TC03921

Appeal numbers: TC/2010/07613, TC/2010/07615 & TC/2010/07617

Income Tax – Anti-avoidance – transfer of assets abroad code–s739 ICTA 1988 - appellants were shareholders in UK bookmaker which transferred its telebetting business to Gibraltar – purpose of avoiding betting duty found but not corporation tax or other income tax

Relevance and compatibility of EU freedom of establishment and free movement of capital rights considered – freedoms did not apply as between UK and Gibraltar - freedoms did apply however in respect of first appellant who was national of another Member State (Ireland) – legislation incompatible – interpretation conforming to EU right given - appeals of first appellant allowed

Whether certain assessments defective because conditions for discovery assessment (s29(5) TMA 1970) and time limits (s36 TMA 1970) not met – yes

Appeals of second and third appellants allowed for defective assessments – their appeals for the remaining valid assessments dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANNE FISHER **Appellants**
STEPHEN FISHER
PETER FISHER

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS SHAHWAR SADEQUE

Sitting in public at Bedford Square, London on 29 – 31 January and 1, 4, 5 and 6 February 2013

Stephen Brandon QC, Rory Mullan and Harriet Brown, Counsel, instructed by James Cowper for the Appellants

David Ewart QC, Oliver Connolly and Barbara Belgrano, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

Following the hearing Her Majesty's Government of Gibraltar ("HMGoG") made written submissions on 21 February 2013 pursuant to the Tribunal's directions of 8 February 2013 (Michael Llamas QC, chief legal adviser to HMGoG, and Oliver Marre, Counsel). Pursuant to the directions the appellants and Respondents made their written submissions in relation to HMGoG's submissions on 7 March and 21 March 2013 respectively.

DECISION

Introduction

1. Before internet betting became as widely available as a means of betting as it is now, there was "telebetting", the placing of bets by telephone. The Fisher family, of which the appellants are each members, built up a successful and well-known bookmaking business under the Stan James brand over a number of years. It was one of the first in its sector to recognise and exploit the possibilities of the fast developing market for telebetting in the mid 1990s. Over the course of 1999/2000, a number of bookmakers based in the UK who also offered telebetting, including Stan James, moved their operations to Gibraltar. The move of so many industry players over a relatively short timescale excited ongoing coverage not just in the industry press but the wider media at the time and speculation as to whether and if so when the UK would make changes to its betting duty regime. At the time the betting duty regime was considerably more favourable in Gibraltar than in the UK.

2. This appeal concerns the application of the tax anti-avoidance code on transfer of assets abroad legislation (s739 Income and Corporation and Taxes Act 1988) to the transfer of the telebetting business to Stan James Gibraltar Limited and income which subsequently arose to that company.

3. Stan James (Abingdon) Limited ("SJA"), a UK resident company of which the appellants were each shareholders, sold its telebetting business to Stan James Gibraltar Limited ("SJG"), a Gibraltarian resident company of which the appellants were also shareholders (in different proportions).

4. There are three broad but distinct strands to the case. These are: 1) Various domestic law issues on the interpretation of the anti-avoidance provision and its application to the facts, 2) European law issues, and 3) the validity of the tax assessments for particular years. We outline these further below:

(1) The interpretation of the transfer of assets code anti-avoidance legislation and how it applies to the facts which are to be found. The issues (which we refer to below as "the domestic law issues") include:

(a) whether the anti-avoidance provision requires there to have been actual avoidance of income tax before it is engaged;

(b) whether it is possible, given the relevant case-law for the provision to apply to situations where there are multiple shareholders of the transferor company;

(c) whether it is possible to apply the provision to apply the provision to the context of the income of a trading company whose business evolves into areas distinct from the business which was transferred; and

(d) whether the so-called motive defence to the anti-avoidance provision applies because there was no tax avoidance, or because the appellants' purpose, and purpose for which the transfer was designed, and

the purpose for which the Gibraltar company was set up was not in fact to avoid betting duty, corporation tax, or income tax, but to save their business, given they would otherwise lose business to the competition which was moving to Gibraltar. The appellants also argue they thought the business had to be run through a separate Gibraltar company rather than through a branch to avoid the risk of committing an offence under the betting and gaming duty legislation which applied at the time.

(2) Whether Treaty rights of freedom of establishment and free movement of capital under European law are engaged and if so whether the UK's transfer of assets legislation, must be read in conformity with European law rights or disapplied. We refer to these as "the European law issues". One sub-issue raised in the context of the European law issues is how if at all the freedom to establish and move capital apply to transfers between the United Kingdom and Gibraltar given Gibraltar's particular status under the Treaty as a territory for whose external relations a Member State (the UK) is responsible for rather than as a Member State ("the Gibraltar issue"). The appellants argue this issue, if it becomes necessary to decide it, should be referred to the Court of Justice of the European Communities (CJEU).

(3) The validity of assessments for certain years. For Stephen Fisher and Anne Fisher there are two discovery assessments which, it is argued, are defective. For Peter Fisher there is one year where the applicability of the extended time limits for making assessments on the basis of negligent conduct is in issue.

5. The hearing took place over the course of two weeks and we received evidence from each of the appellants and the HMRC officer investigating the tax affairs of the appellants and SJA. Shortly before the hearing Her Majesty's Government of Gibraltar ("HMGoG") whose concern was solely in relation to the Gibraltar issue applied to be a party to the proceedings. The tribunal judge's reasons for refusing that application are set out in a separate decision. It was however directed by agreement between the parties and HMGoG that HMGoG be allowed to send in written submissions on the Gibraltar issue and that the appellants and HMRC would then have the opportunity to send in their representations on HMGoG's submissions. Putting aside the fact that some of the post-hearing submissions of the parties went beyond the scope of the Tribunal's directions we were grateful for the comprehensive and well-structured skeleton arguments, written representations and oral submissions of both parties and HMGoG.

6. The appellants appeal against assessments to income tax under s739 Income and Corporation Taxes Act 1988 ("ICTA 1988") (for 2000-01 to 2006-07) and s720 Income Taxes Act 2007 ("ITA 2007") for 2007-08.

7. The assessments relate to years 2000-01 to 2007-08 for each of Stephen Fisher and Anne Fisher. The assessments relate to the years 2000-01 to 2004-05 for Peter Fisher.

8. Our decision is structured according to the above issues.

Summary of our conclusions

9. Given the multiple strands, sub-issues to each, the multiple years in issue and the according length of this decision, we hope it will be helpful to the parties to summarise the outcome of the decision at the outset.

10. **In relation to the years 2005-06 and 2006-07 for Stephen Fisher and 2002-03 for Peter Fisher, the appeals are allowed on the basis the tax assessments were defective. The appeals for the remaining years by Stephen Fisher (2000-01, through to 2004-05, and 2007-08) and Peter Fisher for the years 2001-02, 2003-04 and 2004-05 are dismissed in principle.**

11. The above result was reached on the basis that we did not agree that any of the domestic law issues the appellants raised stood in the way of the anti-avoidance charge applying to them. The findings of fact made in relation to the motive for transferring the business to Gibraltar meant the defence to the tax charge did not apply as the purpose of the transfer was the avoidance of UK betting duty. As for the European law issues it was not necessary to construe the UK tax charge differently or disapply it because the EU freedoms did not apply as between the UK and Gibraltar, given the particular treatment of that territory under the relevant European legislation, and the situation was therefore one which was to be regarded as wholly internal to the Member State (the UK). In relation to the Gibraltar issue we declined to make a reference to the CJEU. The fact that the Gibraltar company provided services to other Member States, that it had employees from other Member States, or that Peter Fisher had lived in Spain for a period while setting up the operation in Gibraltar did not provide a sufficient foreign connection for the purposes of EU law to engage the relevant EU freedoms.

12. **The appeals by Anne Fisher for each of the years under appeal are allowed**. This is on the basis that despite the conclusions above on the freedoms not applying as between the UK and Gibraltar, our view was that under the relevant case-law to which we were referred, her Irish nationality meant she did have European law rights of establishment and to move capital. As a non-UK Member State national these rights applied in relation to her ability to establish and move capital to Gibraltar. The UK anti-avoidance legislation which applied at the relevant time operated to restrict those rights, without justification, and was not proportionate. Applying a conforming interpretation to the UK legislation, the scope of the motive defence to the charge was widened, which meant it was able to be applied in relation to assessing the purpose for which the transfer took place in respect of Anne Fisher.

13. If we were wrong in respect of the above conclusion, Anne Fisher's appeal for 2005-06 and 2006-07 would nevertheless succeed because the tax assessments made against her for these years were defective.

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Evidence

14. We heard oral evidence from each of the appellants (in order, Mrs Anne Fisher, her husband Mr Stephen Fisher, and their son Mr Peter Fisher). On behalf of HMRC, we heard from Ms Linnet van Tinteren, the HMRC inspector who handled the latter part of HMRC's investigations into the tax affairs of the appellants and Stan James Abingdon (UK) Ltd. We had statements in advance from each of the witnesses and each of the witnesses was cross-examined. All were credible witnesses.

15. We also had before us 12 lever arch files of documents. There was no formal agreed statement of facts as such. Both parties included background facts in their skeletons and following the evidence phase of the hearing both parties put forward their suggested findings of fact in which there were some common elements. Where relevant, we have incorporated these into our findings. Our findings of fact relating to the particular issues are dealt with as we go through the various issues. Having said that in order to put those issues into context it is necessary first to set out some background facts.

Background facts

The Stan James betting business

16. The Stan James betting business was built up over a number years, initially by Steven Fisher and Anne Fisher who operated in partnership with James Houlder. When James Houlder died in 1988, the business was consolidated under a company. (SJA) which had been incorporated in 1986.

17. By 1988 the shares in SJA, a company resident in the UK, were held by the Fisher family (the appellants, together with Dianne Fisher, the daughter of Anne and Stephen Fisher).

18. The business consisted, over the years, of one or more betting shops in the UK, telebetting, and more recently internet betting.

19. SJA was a family company and was run as such. The four family members were the only directors and shareholders and it did not hold formal board meetings.

20. Stephen, Anne, Peter and Dianne Fisher all lived at Stonehill. Stephen and Anne Fisher lived in the main farmhouse with Dianne Fisher until Dianne moved to Gibraltar. Peter Fisher (and his wife and children) lived in a conversion that was joined to the main house.

21. Stephen Fisher and Peter Fisher were responsible for the day to day running of the business and formulating future planning and provided the majority of input to decisions. Peter Fisher was involved on the telebetting side while Stephen Fisher dealt with the shops and administration and had overall responsibility for the company. Dianne Fisher worked on the account administration side of the telebetting operation.

After 1996 Anne Fisher had virtually nothing to do with the business. Her main concern was care of the family.

22. Anne and Stephen Fisher have at all relevant times been resident and ordinarily resident in the UK. Dianne Fisher ceased to be resident in approximately February 2000 and Peter Fisher cased to be resident in the UK on or around 16 July 2004.

Use of advisers

23. Stephen Fisher's accountants are James Cowper. Through the relevant period with which these appeals are concerned the appellants also obtained advice from solicitors and counsel in the UK and used lawyers in Gibraltar. None of the appellants hold any professional qualifications. SJA did not employ any professional staff until 2002.

The bookmaking business

24. In 1999, SJA's business streams were the retail betting shops, the telebetting business, and supplying odds to independent bookmakers.

Telebetting

25. At the outset each betting shop took its own telebets but in 1992 SJA centralised its telebetting.

26. In 1994 Peter Fisher became solely responsible for the telebetting business which was becoming increasingly important. A number of factors contributed to this. The availability and use of debit cards meant customers were able to open a telephone betting account instantly and deposit using these cards. Advances in computer technology meant telephone operators could enter bets directly onto the computer, and bets could be settled, and betting statements produced automatically. Also with the growth of Sky Sports in the 1990s there was demand to place bets on sports beyond the traditional ones of horse and greyhound racing and football.

27. SJA developed its own call centre software. In 1996 it bought a new building in Milton Park to expand this strand of the business. It outgrew this and bought premises at Grove Technology Park which it was planning to move to in 1999.

28. Prior to SJG, the telebetting strand of SJA's business set the prices for the shops and for the Independent Bookmakers Services ("IBS"). The odds set by the telebetting strand of SJA were also provided to one thousand independent bookmakers through the IBS.

29. By 1999 telebetting accounted for a major part of SJA's business.

Importance of teletext

30. SJA took pages on Sky and Channel 4 teletext. The pages would display a horse race or a football match with odds against the selection and the freephone

number to place the bet. SJA offered the chance to bet right the way through a game. Teletext meant you could watch a race, while switching from picture to text, click to see the text and see the prices and number to phone.

31. Teletext was the industry standard for advertising bookmakers' services. A large proportion of the betting community was aware of teletext. By going to various bookmakers' pages they could compare the odds being offered.

Betting duty regime

32. Under the Betting and Gaming Duties Act 1981 ("BGDA"), bookmakers had to account for betting duty on bets made by customers. In 1999, UK betting duty was charged at a rate of 6.75% on the amount staked. On horse-racing bets a levy of 1% of had to be paid to the Horserace Betting Levy Board.

33. The Betting Office Licensees Association (BOLA), which was a bookmakers' trade association, advised charging 9% on bets. (The extent to which a bookmaker was free to depart from this and make whatever surcharge on the customer he wished to cover betting duty is a matter of dispute between the parties and we consider this further at [321] to [326] below.) The 9% figure took account of the fact there would be a liability on the total amount paid, so there was a 7.75% charge on the money paid to cover the 7.75% charge. Grossing up 7.75% by 7.75% comes to 8.35%. Additionally it was thought convenient to charge a whole number percentage.

34. The charge on the customer worked as follows. If a customer wanted to place a £100 bet he or she would be charged £109 with the additional £9 marked as tax. The total received by the bookmaker was £109. The bookmaker would then pass on £7.36 to Her Majesty's Customs and Excise (HMCE) (6.75% of £109) and £1.09 (1% of £109) to the Horserace Betting Levy Board. The bookmaker would keep the balance of £0.55 if it was a horse racing bet, and £1.64 if it was a non horse racing bet.

35. It was also possible for the customer to have a choice of having the 9% amount deducted from their total returns. A customer taking this option would effectively be making a bet of £91 and accordingly any winnings would be less.

36. On certain bets (forecast and tricast bets) no surcharge was charged by SJA even though they would have to account for 7.75% on the bet.

37. It was legally possible under the regime for a bet to be placed overseas (e.g. for a bookmaker in Gibraltar to accept a bet from the UK and for the bet to be placed in Gibraltar) in which case there would be no UK betting duty liability for betting duty on that bet.

38. The regime prohibited overseas bookmakers from advertising in the UK, or if resources were shared with an entity in the UK in order to take the bet.

Profile of SJA's customers

39. The punters who contributed to the majority of SJA's turnover were frequent betters who would place between 25 to 50 bets per week. These punters would place bets and reinvest the winnings again and again. For them the 9% surcharge was particularly relevant as it had a cumulative effect of reducing the amount they could bet and therefore the number of bets they could make.

40. Beyond wanting to be sure they were betting with a bookmaker who was a recognised brand and who could be trusted to pay up, there was little customer loyalty. If customers could bet more cheaply because they could pay less than 9% then they would switch.

41. In 1999 to 2000 the average stake was around £20. Roughly 3% of SJA's client base was responsible for 55-60% of SJA's turnover.

Setting up SJA branch and discussions with Customs and Excise (HMCE)

42. In 1996 SJA acquired a postal betting service, Wembley Bet, which was taking bets on football games from Germany. SJA decided this business, which was loss making because it had been subsidising these punters' betting duty, might be run profitably from an offshore location where it would not be necessary to charge betting duty.

43. Following research conducted by a business associate, Jim Eliott, with whom Peter Fisher and Stephen Fisher had been discussing internet betting software proposals, Peter Fisher and Stephen Fisher settled on Gibraltar as a jurisdiction. The betting duty there was 1%. Gibraltar was prepared to give them a license and had a regulatory framework which allowed them to trade.

44. On 12 September 1997 James Lewis of James Cowper instructed KPMG to advise on the setting up of a branch in Gibraltar. KPMG produced a paper with various options. This is discussed in more detail at [343] onwards below.

45. SJA decided to set up a branch in Gibraltar and discussed its proposals with HMCE. The detail of this is set out at [358] onwards below.

46. On or around 1 October 1997 Peter Fisher met the Gibraltarian Finance Minister, Tim Bristow, and it was decided that a branch could be used.

47. Peter Fisher was involved in setting up the branch. The branch had computers, software and telephone systems, and took bets from non-UK customers over the telephone. It had six employees including three Germans who answered the calls from Germany. UK workers answered calls from expats in Spain and from Ireland. This business grew slightly but the number of employees did not change.

48. Ladbrokes had obtained a five year exclusive license with Gibraltar. SJA's Gibraltarian betting license became operational from 1 April 1998 which was one day after Ladbrokes' license expired.

Victor Chandler move to Gibraltar / High Court decision on legality of advertising Gibraltar operations on teletext

49. In March 1999, the established bookmaker Victor Chandler, who was a direct competitor to SJA with a similar sized operation, announced it would be moving its entire telebetting business to Gibraltar where it would be taking bets without any charge to UK general betting duty. The move caused shockwaves in the betting industry, was highly publicised and widely reported in both the industry and national UK press.

50. Even though there was an advertising ban, through the publicity in the press, and the fact the move would have been a hot topic of discussion amongst high value punters at race meetings, it would be readily apparent to punters in particular high value / frequent punters that bets could be placed with Victor Chandler who was charging 3% surcharge rather than 9%.

51. Peter Fisher and Stephen Fisher were concerned about this development. The majority of SJA's income at this time was from telebetting. SJA was losing large spending customers (who accounted for a disproportionate amount of profits). Several others threatened to leave and asked why SJA could not offer the same deal as Victor Chandler.

52. On 16/17 July the High Court issued a decision in a case in the Victor Chandler case that Victor Chandler's advertisement of its Gibraltar operations on teletext was lawful.

53. Victor Chandler gained a significant structural advantage by structuring the business in such a way as to take bets from UK residents from Gibraltar. The competition from Victor Chandler was through the fact he did not have to account for UK betting duty on the bets taken from UK customers.

54. In August 1999 each of Ladbrokes, William Hill and Corals announced their intention to move their UK telebetting operations overseas.

55. Within 9 months following the Victor Chandler decision there was no major telebetting operator left in the UK.

Representations to HMCE and Government

56. Stephen Fisher was vice-chairman of the bookmakers' trade association (BOLA). Shortly after Victor Chandler's move he met with HMCE to explain his concerns and to make the point that something would need to be done if the UK telebetting business was not to be severely depleted or lost to the UK. On 20 July 1999, a deputation of bookmakers which included Stephen Fisher met with the financial secretary of the Treasury to suggest an immediate duty rate cut to 3%. The minister promised to review the situation in the next budget.

Taking bets from UK residents

57. On 7 July 1999 Stephen Fisher wrote to HMCE to tell them the branch would begin taking bets from UK residents. The branch began taking bets from UK residents. No betting duty was paid on these bets. SJA customers would have to call a new number and open a new account to bet with the Gibraltar branch.

58. The Gibraltar based telebetting service was advertised on Teletext until that became illegal when the Court of Appeal overturned the High Court's decision in February 2000.

59. When the branch started taking UK bets, there was a significant change. The branch went from having six members of staff to having about 22-24. Most of them were telephone operators. More telephone lines and computers had to be installed. There were no odds compilers in Gibraltar. The odds came from SJA. With the advent of SJG the odds were done in Gibraltar. Peter Fisher had four weeks ahead of 29 February 2000 to get SJG up and running to take the bets. The Gibraltar service had a new freephone number which transferred through to SJG. A customer calling that number had to set up a new account with SJG even if they already had an account with SJA.

60. On 15 July 1999 Peter Fisher resigned as director of SJA

61. SJA had spent a considerable amount of money purchasing a new telephone centre premises at Wantage. Stephen and Peter Fisher were excited about moving in to those premises. The premises were not used because of the move of the telebetting operation to Gibraltar in 1999/2000.

Incorporation of SJG - shareholdings

62. Before 22 July 1999, Peter Fisher gave instructions to Attias & Levy, lawyers in Gibraltar, for the incorporation of SJG in Gibraltar.

63. On 22 July 1999, SJG was incorporated in Gibraltar with two issued shares in the names of Attlev Management Company Limited and Calpe Nominees Limited.

64. On 3 August 1999 following a return of allotments there were 124 issued shares. Stephen Fisher and Anne Fisher held 47 each. Peter and Dianne Fisher held 15 each. The entire share capital of £1000 pounds divided into 1000 shares of one pound each was held by the appellants and Dianne Fisher.

65. Peter Fisher and Dianne Fisher were, as at the date of the hearing, directors of SJG. Peter Fisher was appointed on 2 August 1999 and Dianne Fisher was appointed on 24 February 2000.

August 1999 advice from David Oliver QC

66. On 27 August 1999 David Oliver QC from whom advice had been sought in relation to application of the UK betting duty regime gave an opinion. (This is set out in more detail at [345] onwards below).

January 2000 David Oliver QC and Kevin Prosser QC advice

67. On 20 January 2000 a conference took place with David Oliver QC on the application of BGDA.

68. On the same day a conference with Kevin Prosser QC took place in relation to the direct tax aspects of the proposal to move the telebetting business to Gibraltar.

69. Further detail in relation to the instructions to counsel and the advice are set out at [348] onwards below.

SJG

70. On 24 February 2000 following an EGM of SJG the share capital of the company was increased to 50,000 shares of £1 each. Following the allotment and issue of shares 12,000 A shares (24% of share capital) were held by Peter Fisher, 12,000 B shares (24% of share capital) were held by Dianne Fisher, 13,000 C shares (26% of share capital) were held by Stephen Fisher and 13,000 D shares (26% of share capital) were held by Anne Fisher.

71. The A, B, C and D shares carried equal rights.

72. On 24 February 2000 all the members of SJG (Stephen Fisher, Anne Fisher, Peter Fisher and Dianne Fisher) resolved to note the resignation of Stephen Fisher as Director of SJG on 3 August 1999.

73. On the same day other directors were appointed (these included Chris Edwards, Robert Pender, Richard Heade and Tim Revill.)

Valuation

74. Valuation Consulting were instructed to value the telebetting business and placed a value of £500,000 on it.

Victor Chandler court of appeal decision

75. On 29 February 2000 the Court of Appeal issued its decision which overturned the High Court decision in *Victor Chandler*. The effect was that use of teletext to promote betting by overseas operators was prohibited.

Transfer

76. The English law firm Biddles, and Gibraltarian firm A Hassans and Partners were instructed to effect the transfer. They provided advice on the drafting of the transfer between August 1999 and March 2000.

77. On or around 10 January 2000 it was decided that the remainder of SJA's telebetting operation and its other activities (other than shops) would be transferred to SJG. The sale agreement was amended to reflect this.

78. On 3 February 2000 Dianne Fisher resigned as a director of SJA.

79. It was agreed between SJA and SJG that the business would be formally transferred on 29 February 2000. The draft sale agreement prepared by Biddle was sent to James Cowper on 29 February 2000 for signature by Stephen Fisher and Peter Fisher. The agreement giving effect to this transfer between SJA and SJG was signed in early March 2000 by Stephen Fisher as duly authorised director on behalf of SJA and by Peter Fisher as duly authorised director on behalf of SJG.

80. At the time it sold the telebetting business, SJA had 12 shops.

81. The business sold included a telebetting operation located in the UK at SJA's Abingdon premises and a Gibraltarian branch. It consisted of a Database of 30,000 names (of which 11,867 had placed a bet in the previous three months), a teletext facility, and four freephone numbers.

SJG afterwards

82. For Gibraltarian tax purposes SJG obtained "qualified company" status with effect from 29 February 2000 and was subject to Gibraltar corporation tax at a rate of 4%.

83. SJG's first financial statements state that SJG started to trade on 1 March 2000. After that point in time SJG made profits from its trade.

84. SJG bought a property at Cormorant Wharf in Gibraltar on or around 15 November 2000.

85. Approximately 25-30 staff together with their families were relocated from SJA's operations in the UK to work for SJG.

86. From September 2003 SJG developed internet betting and gaming platforms.

87. By means of two transfers in April and August 2003, SJG became the parent company of SJA (holding 51% of SJA shares).

88. With effect from 1 July 2004 SJG became subject to Gibraltar tax at a fixed annual rate of £450 p.a.

89. In December 2008, Anne Fisher and Stephen Fisher were no longer shareholders in SJG as Dianne Fisher and Peter Fisher bought their shares.

90. Stephen Fisher did not receive any income from SJG from the time it was set up to when he sold his shares in it.

91. On 6 February 2009 SJG was re-registered as Stan James plc a public limited company.

SJA afterwards

92. Following the transfer in early March 2000, SJA continued to take a very small amount of telebetting business in the UK.

93. On 29 February 2000, SJA had 124 issued shares. These were held as to 47 shares (38%) by Stephen Fisher, 47 shares (38%) by Anne Fisher, and 15 shares (12%) Peter Fisher, and 15 shares (12%) Dianne Fisher. Dianne Fisher and Peter Fisher bought Anne Fisher's and Stephen Fisher's shares in December 2008.

94. On 21 June 2000 SJA declared a dividend of £2000 per share.

95. SJA continued with its other business streams until October 2001. The UK's betting duty regime changed so as to make it possible for UK bookmakers to compete with offshore bookmakers in taking telebets. The charge was 15% on net stake receipts (the difference between the monies staked and the monies paid out) instead of 6.75% on takings. SJA re-established its own UK telebetting operation.

Issue (1): The Domestic law issues

The Transfer of Assets Abroad Code

96. These appeals are against assessments made under the transfer of assets abroad (TOAA) code, against the appellants under s739 ICTA 1988.

97. The appellants' skeleton argument sets out a helpful summary of the legislation which HMRC do not dispute and which, with some minor changes, we gratefully adopt here.

98. Section 739 has been the main weapon of the Revenue since 1936 against transfers of assets where liability to tax on income otherwise chargeable on a UK resident is avoided by causing that income to become payable to a foreign entity. (There is an issue between the parties as to whether actual avoidance of income tax is required for the section to bite which we deal with later.)

99. The TOAA charge applies to treat a UK ordinarily resident individual as being in receipt of an amount of income which actually arises to another person who is resident abroad. The charge will only apply (so far as relevant here) if the UK ordinarily resident individual has a power to enjoy the income. Subject to that, however, the charge applies notwithstanding that the individual is not in receipt of the income, does not actually enjoy the income and ultimately might never enjoy or receive the income.

100. The relevant provisions were contained in Chapter III of Part XVII ICTA 1988 until 6 April 2007. From that date the relevant provisions (which were rewritten) are

in Chapter 2 of Part 13 of ITA 2007. Both parties accept that the law on the TOAA code was unchanged insofar as material to these appeals with the introduction of ITA 2007 and that the same principles apply for 2007/08 as for the earlier years of assessment which are under appeal. The references to the ICTA 1988 legislation which applied in most of the years under appeal apply equally where relevant to the corresponding ITA 2007 provisions.

The legislation

101. The provision under which the appellants are charged is section 739 ICTA 1988 which provides that:

> "739 Prevention of avoidance of income tax
>
> (1) Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> (1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) apply only if—
>
> (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected.
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.
>
> (3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled outside the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.
>
> (4) In subsection (3) above "capital sum" means, subject to subsection (5) below—

(a) any sum paid or payable by way of loan or repayment of a loan, and

(b) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth.

(5) For the purposes of subsection (3) above, there shall be treated as a capital sum which an individual receives or is entitled to receive any sum which a third person receives or is entitled to receive at the individual's direction or by virtue of the assignment by him of his right to receive it.

(6) Income shall not by virtue of subsection (3) above be deemed to be that of an individual for any year of assessment by reason only of his having received a sum by way of loan if that sum has been wholly repaid before the beginning of that year."

102. In relation to assets and transfers of assets sub-paragraphs (b) and (e) of ss742(9) ICTA 1988 provide:

"(b) "assets" includes property or rights of any kind and "transfer", in relation to rights, includes the creation of those rights;

…

(e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that income or those accumulations are or have been transferred."

103. An "associated operation" is defined in s742(1) ICTA 1988 in the following terms:

"(1) For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

104. Power to enjoy is defined in ss742(2) and (3) ICTA 1988. Those provisions are not set out as the existence of a power to enjoy is not disputed.

105. A defence to the application of the charge ("the motive defence") is given in s741 ICTA 1988 in the following terms:

"741 Exemption from sections 739 and 740

Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either—

(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or

> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.
>
> The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

106. Section 744(1) ICTA 1988 provides that income is not to be charged more than once under the TOAA code:

> "(1) No amount of income shall be taken into account more than once in charging tax under the provisions of sections 739 and 740; and where there is a choice as to the persons in relation to whom any amount of income can be so taken into account—
>
> (a) it shall be so taken into account in relation to such of them, and if more than one in such proportions respectively, as appears to the Board to be just and reasonable; and
>
> (b) the jurisdiction of the Special Commissioners on any appeal against an assessment charging tax under those provisions shall include jurisdiction to review any relevant decision taken by the Board under this subsection."

107. While in HMRC's submission the issue which lies at the heart of these appeals is whether the motive defence applies on the facts (they say it does not), the appellants' case is that there a number of essentially legal issues (although not exclusively so) on how the charge is to be interpreted and applied. If the appellants are successful on any of these issues which are the subject of this next section of the decision, then it would not then be necessary to consider the further domestic law issues on the applicability of the motive defence to the facts, the European law issues or the defective assessment issues.

Is actual avoidance of income tax required before s739 can apply?

108. The appellants say a purposive construction of s739 requires there to be avoidance of income tax and on the facts here there is no avoidance of income tax. Regardless of the transfer the appellants remained liable to income tax on the distributions of SJA and SJG.

109. They argue the reference in s739(1) ICTA 1988 to the section having effect for the purposes of avoiding liability to income tax is contained in the operative part of the section. The plain meaning of the underlined words is that unless there is avoidance of income tax, the section is *not* to have effect:

> "(1) Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom." [emphasis added]

110. HMRC say it is not necessary to show income tax has been avoided (as distinct from showing that there is an avoidance purpose). Section 739(1) sets out the purpose of the provisions which follow which is to *prevent* avoidance. None of the following provisions impose a requirement that there should be avoidance of income tax. The House of Lords case of *McGuckian* (which we consider in more detail below) is authority that the code can apply even if the effect of the transfer of assets would not have been successful in avoiding UK income tax.

111. The appellants say the context in *McGuckian* was different. The case involved an unmeritorious avoidance scheme, HMRC had been scuppered on timing so it was easy to see why the House of Lords reached the decision it did.

Tribunal's views

112. Before looking at *McGuckian* we make the following preliminary observations on the drafting of s739.

113. We note that the words "shall have effect for the purpose of" does not equate to "shall have effect *only* if". But, the fact that s1A refers to "nothing…shall be taken to imply…only if" indicates that it is *possible* for ss1 to have operative implications.

114. Prior to the enactment of ss1A (and to some extent in relation to the reference to "transfer" post enactment of ss1A) it is necessary to refer to ss1 in order to make sense of the references to "such individual" and "any such transfer". The words "such an individual" refers to "individuals ordinarily resident in the United Kingdom". The words "such a transfer" refers to "a transfer by or virtue of or in consequence of which, either alone or in consequence of which, either alone or in conjunction with…". There is also a function to s739(1) in so far as "Subject to section 747(4)(b)" is an operative provision.

115. That was also the case with the preamble in s478 Income Corporation Taxes Act 1970 ("ICTA 1970"). In this regard the pre-amble was not purely a preamble in the conventional sense (a provision explaining why a provision was enacted) because it could be said to have operative characteristics. The operative text would not make sense without reference being made to the text in the preamble.

116. There would therefore be a rationale, given the operative characteristics already in the preamble, for the text to be incorporated more clearly into the operative part of the text upon a redraft.

117. The question which arises is whether words in ss1, which in principle may create implications in relation to the conditions set out in s739(2) and s739(3) of ICTA 1988, have actual avoidance of income tax as one of those conditions?

118. As HMRC's arguments indicate, the ordinary use of the term "prevention" suggests the avoidance has not yet happened and that the purpose of the provisions is to stop it before it does. We also note that under s739(2) it does not matter that the income the individual has power to enjoy would or would not be chargeable to

income tax. Given the above, our preliminary view, is that there is nothing on the face of the legislation which requires that income tax has actually been avoided before s739 bites.

119. The particular issue was the subject of consideration by the House of Lords which HMRC say is binding on the point.

IRC v McGuckian [1997] 1 WLR 991

120. *McGuckian* concerned a scheme which sought to have dividend income turned into capital by means of an assignment. The scheme did not work because of the operation of a particular legislation (aside from s478) but the Revenue were out of time (due to the taxpayer's stalling) to assess on that basis.

121. The House of Lords considered s478 of ICTA 1970. This provision provided, so far as relevant, as follows:

> "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:-
>
> "(1) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provision of this section, be deemed to be the income of that individual for all the purposes of the Income Tax Acts."

122. The taxpayer argued that s478 ICTA 1970 did not apply because the dividend in question would in any event have been taxable under another provision in ICTA 1970 (s470) and therefore income tax would not have been avoided. Lord Browne-Wilkinson stated at pg 997:

> "he based this submission on the words in the preamble to section 478, "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax …" He submitted that section 478 does not apply unless tax has *in fact* been avoided. In my judgment, there is no warrant for this submission. The words quoted refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section. That parliamentary intention is certainly relevant in construing the section. But the words of subsection (1) make it clear that the actual avoidance of tax is not a precondition to the application of the section. The income is deemed to be the income of the United

> Kingdom resident "whether it would or would not have been chargeable to income tax apart from the provisions of this section." It is therefore clear that section 478 can still apply even though the effect of the transfer of assets abroad would not have been successful in avoiding United Kingdom income tax."

123. Lord Brown Wilkinson reaches that view by noting that the preamble words indicate Parliament's intent, and by noting the words in s478(1) which are now in s739(2).

124. Lord Steyn rejected the argument that the opening words of s478 could only be invoked when there was actual avoidance for two reasons (at pg1002 at H). First, because once *Ramsay* was applied, there was no scope for the application of s470 because the assignment of dividend rights was to be disregarded (in other words it was not the case that tax had not been avoided as the taxpayer in that case argued). Second, he rejected the argument that actual avoidance was a condition precedent:

> "Such a construction treats section 478 as a power of last resort and it substantially emasculates the effectiveness of the power under section 478. Nothing in the language or purpose of section 478 compels such a construction. Properly construed the opening words of section 478 merely provide that there must be an intention to avoid liability for tax. The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax."

125. HMRC depict the facts as one where the scheme was doomed from the start because of s470 ICTA 1970. Lord Browne Wilkinson and Lord Steyn held there was no pre-condition for the application of s478 of actual avoidance. Lords Cooke and Clyde gave speeches that did not expressly deal with the point and Lord Lloyd agreed with the other speeches and all their reasons.

126. The appellants refer to Lord Cooke finding that s470 did not apply, and Lord Clyde referring to the words "whether or not it would have been chargeable to income tax" to support their argument that this case is properly understood as the House of Lords closing off the argument being put by the taxpayer in that case that s478 could not be used where assessment under another section was possible.

127. However, we reject the essentially narrow reading by the appellants of *McGuckian* that it is a case saying that s739 can still apply even if there are alternative bases of taxation. The appellants' characterisation of *McGuckian* does not in our view take away from the fact that a majority of the House of Lords (Lords Brown Wilkinson, Steyn and Lloyd) held actual income tax avoidance was not a pre-requisite to the application of the section.

128. Lord Steyn's statement that the requirement was "that there must be an intention to avoid liability for tax" only serves to emphasise in our view the preventative nature of the section.

129. In any case even if the context in which *McGuckian* is to be understood were to be restricted to cases of alternative bases of taxation, we do not see that this would necessarily assist the appellants. There is no difference in principle between the fact that the income in *McGuckian* fell within s478 ICTA 1970 even though it was charged under another provision, s470 ICTA 1970, and any distributions being chargeable to UK tax on the appellants under other provisions if the appellants were to extract income in that way. In both cases, even if income tax has not been avoided because of the other charge, the words "whether it would or would not have been chargeable to income tax…" and the decision in *McGuckian* suggest the other charge does not stop the TOAA charge applying.

McGuckian not relevant because wording in s478 ICTA differs from s739 ICTA?

130. The appellants say *McGuckian* looked at s478 ICTA 1970 and they highlight the different wording in this section as compared with s739 ICTA 1988. In one the wording is in the preamble and in the other it is in the operative part. HMRC argue the legislation is materially the same to that considered in *McGuckian.*

131. We agree with HMRC's view that there is no material difference between s478 and s739 through moving the words from the preamble elsewhere. The status of the stated purpose remains the same.

132. In s478 ICTA 1970, having stated the purpose the text preceding subsection 1 states "it is hereby enacted as follows:". In s739(1) ICTA 1988 the same purpose is prefaced with the words "the *following* provisions of this section shall have effect…" [emphasis added.]

133. It is also to be noted that ICTA 1988 was expressed to be an Act to "consolidate certain of the enactments relating to income tax…". The starting point would be that substantive changes would not be intended by the consolidating act and that if such changes were intended they would be signposted by clearly different wording.

134. In relation to *McGuckian* it also appears to us that the rejection of the avoidance pre-condition in *McGuckian* was not in any case predicated solely on the opening words being a preamble showing Parliament's intent.

135. In particular Lord Browne Wilkinson's and Lord Steyn's views are not restricted to the fact the words in s478 ICTA 1970 were a preamble. Lord Browne Wilkinson referred to the later words in ss1 which say it does not matter whether income is chargeable to tax or not. Lord Steyn looks at the language and purpose of s478 and in fact draws from the opening words that "there must be an intention to avoid liability for tax."

136. So even if, as the appellants argue, there was some significance to the words appearing in an operative part as opposed to a preamble and that the construction of the words therefore changed, the rejection of the proposition that actual avoidance was required in *McGuckian* still holds good in our view.

Significance of Finance Act 1997 amendment

137. A further reason which, the appellants say, supports their interpretation that actual avoidance is required, is the fact that when ss(1A)(b) Finance Act 1997 ("FA 1997") amended s739 ICTA 1988 to provide that it was no longer a requirement that it must be the case the avoiding of liability to income tax is one of the purposes of the transfer, the draftsman did not take the opportunity to remove the requirement that that income tax must actually be avoided. Following the removal of the avoidance motive the reference to avoidance of tax by individuals makes no sense, the appellants say, unless it was intended to import a requirement of actual avoidance of income tax in line with the purpose of the provision. They say that even if the approach of Lord Browne-Wilkinson in *McGuckian* to the differently worded legislation were relevant, it would in any event be necessary to consider whether that approach was correct after the introduction of ss(1A) FA 1997.

138. The operative element of subsection (1) is confirmed by the opening words of ss(1A) which states:

> "(1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) apply only if—
>
> (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected". (Emphasis added)

139. The underlined words, the appellants say, would not be necessary if subsection (1) was only descriptive of the purpose of the section. Those words plainly were inserted because subsection (1) does limit the operation of the following subsections.

140. The insertion got rid of the requirement for there to be a purpose of avoiding income tax, and a UK resident transferor (to deal with judgment of the House of Lords in *Willoughby* a case which we discuss further below) but it did not get rid of a requirement of income tax having to have been avoided.

141. Essentially the argument amounts to saying that if the wording was preamble as HMRC say the draftsman could have amended the provision differently by simply taking words out of ss1 rather than adding in a complicated ss 1(a).

142. To deal with this argument we need to outline what happened in *Willoughby.*

Commissioners of Inland Revenue v Willoughby 70 TC 57 [1997] 1 WLR 1071

143. This case considered an investment bond bought by a non-resident and the taxpayer's argument that s739 only applies to transfers of assets by individuals who are ordinarily resident in the UK at the time of the transfer. The Special Commissioner, the Court of Appeal (judgment given by Morritt LJ with whom Hobhouse and Glidewell LJJ agreed) and the House of Lords (judgment of Lord Nolan with whom the other Lords agreed) accepted the taxpayer's argument. Applying *Vestey v IRC* [1980] AC 1148 the charging provisions could be applied only

to the individual who has made the relevant transfer. Lord Nolan explained at pg1078 at G:

> "The crucial words, as it seems to me, are those in subsection (1) which state that the section is to "have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets," coupled with the identification, in subsection (2), of "such an individual" as the subject of liability. What can the words "such an individual" refer to save for an individual of the kind described in subsection (1), that is an individual ordinarily resident in the United Kingdom seeking to avoid liability by means of transfers of assets? Although the point was not determined in *Vestey*, the view there taken that the individual to be charged must be the individual who made the transfer seems to me to lead inevitably to the conclusion that the individual concerned must be the only type of transferor with which the section is concerned, and that is a transferor ordinarily resident in the United Kingdom. At the risk of seeming over confident in expressing an opinion about language which has been construed in diametrically opposite senses by your Lordships' House in the past, I would say in the light of *Vestey* that this is the natural and plain meaning of the words used." (Emphasis added).

144. The appellants say the amendments were made following the Court of Appeal's decision. The new ss1A(a) countered the requirement that the transferor must be UK ordinarily resident when he or she made the transfer. The new ss1A(b) also countered the argument the transferor must have the purpose of avoiding income tax. The appellants' argument is that the draftsman kept a requirement for there to be actual avoidance in post *Willoughby*.

145. In our view the difficulty with the appellants' argument as to what the draftsman did *not* do (i.e. remove words so as to make it clear there was no requirement of income tax avoidance) is that it presumes there was a requirement of actual income tax avoidance in the first place. As set out above we are not persuaded there was. There was therefore no need to counter a requirement for actual avoidance, and no inference can be drawn from the absence of drafting which addresses the point.

146. Further, consistent with Lord Browne Wilkinson's view in *McGuckian* that actual avoidance is not required because of the reference to income being caught "whether it would or would not have been chargeable to income tax", nothing changed in the new version such that ss1 as redrafted in ICTA 1988 gave rise to a new requirement that was not there previously.

147. In addition it is to be noted that Lord Nolan refers in the extract above to an individual "seeking to avoid liability". He makes no mention of liability actually having to be avoided.

Relevance of explanatory notes.

148. The appellants ask us to note that the explanatory notes to Clause 97 of Finance Bill 1997 state the intention to secure that s739 bites, after the amendments are applied:

> "...whatever the ordinary residence status of the individual when the transfer is made, and
>
> - where a purpose of the transfer is to avoid any form of direct taxation."

149. At paragraph 10 the notes state:

> "10. Subsection (1A)(b) makes clear that the provisions apply where the purpose of the transfer is to avoid any form of direct taxation. If that were not the case, the legislation would apply to (i) below but not to (ii):
>
> (i) an individual transfers assets with the purpose of avoiding income tax; and
>
> (ii) another individual makes an identical transfer, which has the effect of avoiding income tax, but the purpose is to avoid capital gains tax and/or inheritance tax".

150. The explanatory notes imply the need for an avoidance "effect" and the appellants say it is absolutely clear that actual avoidance is required from 1997 onwards.

151. We do not agree the explanatory notes support the appellants' interpretation. The fact the wording change in ss1A(b) was intended to catch a situation where the purpose was broader than income tax but the effect was income tax was avoided does not mean income tax avoidance is a pre-requisite. On the contrary the reference in the note to i), which is clearly contemplated as being caught by the legislation already, makes no mention of the effect being that income tax is avoided. It appears to us from the notes that an income tax avoidance purpose is sufficient.

152. The explanatory notes do not support there being an actual avoidance requirement. Rather, they are consistent with the idea that situations where the effect of the arrangement is avoidance are included within the target of the legislation but such an effect is not a pre-requisite.

153. The interpretation that no actual avoidance is required is also consistent with the ordinary meaning of "prevent" as discussed above.

154. In relation to the appellants' point that in all the cases referred to where s739 or its predecessors have been successfully applied e.g. *Sassoon* (which we set out later at [328]) there is actual avoidance this does not assist with establishing any proposition that actual avoidance is required. The presence of actual avoidance does not prevent the code applying but it follows from what we say above that it is not essential.

155. The appellants' argument that, purposively interpreted, the code is all about charging income tax where income tax has been avoided is not borne out by the actual wording or how the provisions have been interpreted in *McGuckian*. On the contrary as HMRC point out, there is nothing inherently surprising in a code which is about preventing / dissuading avoidance targeting behaviour or circumstances which are broader than the outcome it seeks to stop from arising.

156. We should record that in any case HMRC say there was actual avoidance through inflated salary paid to Dianne Fisher, the loan to Stephen Fisher, and the fact that Peter Fisher was not paid anything despite working for SJG until he became non-resident in Gibraltar.

157. Our findings of fact on these matters are set out at [497] onwards. However given our conclusion on legal interpretation above it is not necessary for our decision to reach a conclusion on whether any of these facts would amount to actual avoidance.

The quasi transferor issue

158. The transfer in question in this case is by a UK company (SJA) in which the three appellants are each shareholders. The legislation does not refer to either transferors or quasi transferors so it is necessary to set out some background in order to understand what is meant by those terms and in order deal with the appellants' next argument which is that the legislation simply cannot be applied to situations such as this case where there are multiple quasi-transferors.

Transferors

159. In the High Court decision in *Pratt* which we will need to consider in some detail below Walton J considered s412 Income Tax Act 1952 which was the predecessor provisions s478 ICTA 1970. All three provisions charge by reference to "such an individual". Walton J explains what is meant by a transferor at 49D :

> "…the question in relation to an individual sought to be taxed under s412, is, is that person "such an individual" as is mentioned in subss (1) and (2) of s412, that is to say, a person who has sought to avoid liability to income tax by means of a transfer of assets, which being reduced to its simplest element, means that the individual in question must, as the first step, be a transferor of assets."

Quasi transferors

160. A person who is not a transferor may be liable as a transferor if he "procured" the transfer (as explained by Walton J in *Pratt* at [50 A-F]).

161. Walton J adopted the term used by Revenue counsel in the case before him of "quasi-transferor" to describe such a person.

Multiple Quasi transferors possible under the law?

162. The parties dispute the significance of *Pratt*. The judgment of Walton J mentions two issues in relation to the difficulties with multiple quasi transferors. First, difficulties of apportionment, and second difficulties in applying the motive defence (in the situation where you have two transferors what do you do if one had the purpose of avoiding tax and the other had only a simple commercial purpose?). The appellants argue both reasons form part of the ratio, whereas HMRC say it is the former, and that the decision does not stand in the way of application to the appellants because any problems with apportionment have been cured by the subsequent introduction of s744(1)(a) ICTA 1988.

163. If the appellants are correct on the twin ratio point then HMRC's case goes no further because of difficulties with the application of the motive defence. But, even if the appellants' view that there is a twin ratio is incorrect, they disagree that s744(1)(a) removes concerns about apportionment. The provision cannot in any case tell you who the transferor is or solve the problem of whether apportioned income in fact resulted from the transfer. HMRC say difficulties with ascertaining multiple motives do not arise because there is one transfer and one motive here. The appellants are liable for the apportioned part of income deriving from SJG's business. It is not unfair or unreasonable to take this approach because by definition taxpayers are in this situation because they have acted jointly.

164. We will look at the ratio issue first and to do that it is necessary to look at *Pratt* in some detail.

CIR v Pratt (1982) 57 TC 1

165. The case concerned s412 of the Income Tax Act 1952 which was in substantially similar form to s478 ICTA 1970 set out above at [121] above.

166. The taxpayers were three of the eight directors of a UK company and were minority shareholders. The company sold land which it owned to a Bahamian company. Under the scheme increases in the value of the land were to accrue to discretionary settlements for the benefit of, amongst others, the taxpayers and L. Part of the land was sold for £0.9m. By means of loans made by L but reimbursed out of settlement income the taxpayers received £2000. The intention of the scheme was to procure that any increase in the value of the land due to planning permission being granted should be a capital and not an income receipt.

167. The taxpayers won before the Commissioners, and the Revenue appealed to the High Court.

168. At Pg 49 after noting that in *Vestey* the House of Lords decided the provision only applied to those who transfer assets abroad (as opposed to persons who may benefit from such transfer) Walton J (as set out above) identified that the reference to "such an individual" in the legislation meant that as a first step there had to be "a transferor of assets". He went on to discuss various examples. Where A and B held land as joint legal tenants upon trust for themselves beneficially in equal shares there

was in his view no difficulty in regarding A as transferor of its beneficial half share and B as transferor of its beneficial half share. But the difficulties were increased in his view if A and B were beneficial joint tenants as then there were two transferors of one subject matter.

169. At Pg 50 at A, Walton J went on to observe *Vestey* overruled one of the ratios in *Congreve* but not the other. A person who is not a transferor may nevertheless be liable as if he were a transferor if he "procured" the transfer. Walton J adopted Revenue counsel's term for this which was "quasi transferor". Later at 51C he described the matter as follows:

> "…notwithstanding that the transfer was a transfer made by the Company itself, was the reality of the matter that somebody else was the real transferor? To answer that question, nobody has so far produced a better suggestion than that of "procurement".

170. The Revenue submitted it would be absurd if the legislation did not capture a situation where for instance there was a company with two or three director/shareholders who had procured the company to effect the transfer.

171. On the case before him the taxpayers held 12,268 shares out 42,400 issued. The Revenue's submission was that each shareholder and director had concurred with the proposal and decision to sell and that each had "had a hand in" and was "associated with" the transfer.

172. There were then essentially two points before the court: 1) whether multiple transferors were possible under the legislation 2) whether on the facts the transfer by the company had been "procured" by the three taxpayers who had a minority interest. Walton J's view (at 51G) was the case failed on both points.

173. Dealing with the first issue he stated at 51G to 52C:

> "As a matter of law, it appears to me that in the case of a plurality of transferors, if it is impossible to separate out their respective interests so as to be able to say, "The first transferor transferred A per cent. of the interest transferred, the second B per cent." and so on, the series adding up to 100, I do not think s 412 bites at all. I put my qualifications in the manner I have done because I can see an argument open to the Revenue, under many circumstances, that such a dissection is possible. Without in any way deciding that this is indeed the position, I can well see that if A and B own an asset jointly, and transfer it abroad, then one might for this purpose be able to separate out their beneficial interests as being equal, or, if the transfer was in fact a sale, according to the division between them of the purchase money. Something of the sort might even be possible in the case of quasi-transferors, where two or three of them own the company which makes the transfer, but where it is not possible to do just that, s 412 does not bite at all. Of course, Mr. Nichols recognised the difficulties in his way, and I shall note in a moment the way in which he attempted to deal with them. Those difficulties simply are that, in the circumstances put, the section provides no machinery whatsoever for

> attributing anything less than the whole of the income referred to any transferor. Where an identifiable portion of the asset transferred can be attributed to a particular transferor then, of course - at any rate in any normal case - that part actually transferred will produce a similar part of the income, and in no case is there any difficulty in applying the section, since one will apply it separately to each of the individual transfers, or each identifiable portion. But, if there is no such identifiable portion, then what one is dealing with is, in the case of each individual, "the transfer" and all the consequences which it produces, leading to the result that each individual transferor or quasi-transferor is liable to tax on precisely the same income. "Arbitrary, unjust and unconstitutional" are some of the milder adjectives with which such a situation may be properly described."

174. The Revenue's response was that the extent to which income is to be attributed to the transfer of land was a question of fact or mixed fact and law, as was the apportionment of the attributed amount to each taxpayer and that the apportionment was to be done as was just and reasonable in all the circumstances. This received rather short shrift from Walton J who stated at pg 52 at E:

> "*In limine*, I would myself regard this suggestion as completely unworkable, even if it were the law. It is very simple to say that something is a question of fact, or mixed fact and law, and leave it at that, but this does not solve anything at all. Moreover, how one could apportion the amount of the income between not only, of course, the taxpayers, but also all the other persons—all the directors and shareholders of M and J—who 'concurred' in the transfer, is a mind-boggling exercise of the first water.
>
> Fortunately, all this is, in my view, completely bogus. It was really dealt with by Lord Wilberforce in the 1980 *Vestey* case, because precisely the same problem arose as to apportionment—or suggested apportionment—in relation to discretionary beneficiaries, but what was going to be apportioned, if apportionment was going to take place, was the very same income with which I am now dealing."

175. Walton J then quoted the passage from Lord Wilberforces's speech in *Vestey* which highlighted the lack of a legal basis for apportionment between discretionary beneficiaries. (He also explained Lord Wilberforce's statement that "no difficulty arises from cases of multiple tranferors" as meaning that that point was not a live issue.)

176. At 53I he then went on to say:

> "In my judgment also, subs (3) [the motive defence] throws another spanner into the works, so far as the Crown's contention is concerned, when dealing with a case of a single transfer with multiple transferors. There is a single transfer. That transfer was either made with the purpose or not with the purpose of avoiding liability to taxation. How could one apply that to, say, a two-transferor situation where A had the purpose of avoiding tax and B had only a simple commercial purpose? Mr. Nichols' answer was to say that, in such a case, B could show that so far as he was concerned the purpose was a simple commercial

> purpose, and that will enable him to claim the benefit of that subsection. But this is not what the subsection says. It is not "the transferor's purpose in effecting the transfer" but "the purpose for which the transfer was effected". Of course, if, as is in my judgment the case, there can only be a single transferor to consider at a time, this subsection presents no problems whatsoever. "

177. Walton J thought that the only possible results in relation to joint transferors was that each was liable to the whole, or some form of apportionment had to take place. Both of those results were in his view "soundly scotched" by *Vestey*.

178. Walton J then stated:

> "Even if the foregoing were wholly incorrect as a matter of law, and it is possible to have a multiple quasi-transferor situation, it appears to me inevitable that the Crown must here fail on the facts.".

179. There is disagreement between the parties as to the status of Walton J's concerns about applying the motive test. HMRC say this was a subsidiary argument.

180. On balance we prefer HMRC's view. It is clear from what Walton J says that if it was not possible to identify the interests transferred then the section could not apply. The implication was that the section could apply when the interests could be identified. The concerns expressed about the motive defence are in our view relevant to tackling those situations where the interest transferred could be identified as there would have been no need to deal with situations where percentage interests totalling 100% could not apply as those situations would be knocked out by Walton J's first point. There was no suggestion that the taxpayers in the case had transferred an identifiable interest in the way envisaged by Walton J. In that sense we think his views on the difficulties with applying the motive defence situation were in relation to a hypothetical situation and are not binding. If the motive defence effectively dealt the knock out argument to multiple transferors in the way the appellants' argument would suggest, then there would seem to be little point in the decision exploring what situations of multiple transfer the legislation could bite upon.

181. At 54C Walton J canvasses the possibility of there being joint transferors but then explains why the possibility that each transferor is liable for the whole of the income and the possibility of apportionment are cut off. This returns the argument to the first point before Walton J rounds off by saying why multiple quasi transferors are not possible at law. The fact that Walton J saw fit to broach the possibility of a joint transfer after having made the motive defence point is in our view a further indication that the scope of his point on the motive defence need not extend to situations where there was an identifiable interest.

Whether s744(1)which was introduced after Pratt means multiple quasi transferors are now possible

182. The next question is whether it is correct, as HMRC say, that the introduction of certain statutory provisions in ICTA 1988, namely s744(1) (brought in by s46 of Finance Act 1981) deal with Walton J's concerns on apportionment with the effect

that *Pratt* can be put to one side and that it presents no legal bar to there being multiple transferors or even multiple quasi transferors.

183. This provision (set out [106] above), say HMRC, recognises that more than one individual might be charged as a transferor in relation to a particular transfer, and provides a mechanism for apportioning income between those individuals. By providing such a mechanism, HMRC say it is clear Parliament intended there could be multiple "quasi transferors" in relation to any one transfer of assets.

184. The appellants disagree. The provision they say deals with situations where the whole of income could be charged on two or more transferors or beneficiaries. The appellants give the example of settlements and resettlements as situations where the apportionment provision could be applied (and refers to the estate duty case of *Hatton v IRC* [1992] STC 140 and to *Congreve*). For the apportionment to work more than one transferor or beneficiary is taxable on the income. But, crucially, the appellants say, the provision does not help with establishing the prior question of what is the transfer and income payable in respect of each appellant. There is no discretion under the provision to attribute an actual transfer amongst quasi transferors.

185. HMRC say once it is conceded the apportionment works for sequential transfers of the same subject matter to stop it being taxed twice it surely ought to work for joint simultaneous transfers.

Tribunal's views

186. The introduction of s744(1) ICTA 1988 does in our view put an entirely different complexion on the significance of *Pratt* and opens the door that would otherwise be shut on the possibility of the TOAA code applying to situations where there are multiple quasi transferors. The necessity in Walton J's judgment to separate out interests in such a way that the sum is a 100% is in our view predicated on a fear that otherwise there would be double charging with no legal basis for reduction and that is something which cannot have been intended. Where there was no identifiable portion the result which gives rise to the feared outcome is (see 52C) that:

> "one is dealing with…in the case of each individual "the transfer" and all the consequences it produces leading to the result that each individual transferor or quasi-transferor is liable to tax on precisely the same income."

187. It is implicit in any concern about double-charging that some conclusion must have been reached on what was charged in the first place.

188. In our view s744(1) provides precisely such a mechanism for dealing with concerns of apportionment. There is nothing on its face which would limit its application to only sequential transfers or which suggests it could not be used to address joint simultaneous transfers.

189. It is true that s744(1) does not identify who the transferors, or indeed the quasi – transferors are but that will depend on the facts. In relation to the amount transferred

the passage quoted above would tend to endorse a view that in the absence of an identified portion, the quasi transferor is held to account for all of the transfer as a first step (that sum then being reduced in accordance with the apportionment.) The assumption the appellants' case makes that each appellant cannot be a quasi transferor in respect of (and taxable on) all of the income of SJG is unfounded. In any case in order for someone to be found to be a quasi transferor (someone in Walton J's words at 51C/D who answers the description of "the real transferor"), it is not necessary to quantify what their interest is. The question is whether they have procured the transfer such that the transfer is to be imputed to them. It is not necessary to quantify a percentage share to them which when put together adds up to 100 to say someone is such a transferor.

Application to facts

190. Even if it were possible for the legislation to be applied where there were multiple quasi transferors, the appellants argue this did not happen on the facts.

191. The transfer was between two companies, SJA and SJG. It cannot be ascertained what each appellant has transferred and the income arising from what has been transferred. For instance Peter Fisher has a 12% interest in SJA. The most he can have transferred is 12% of the telebetting business. According to *Pratt* the interests of the quasi transferors in SJA are the starting point. Identifying the income payable as a result of the quasi transfer of part of the telebetting business is impossible (this is discussed in the next issue below). The appellants argue HMRC are wrong to calculate the assessments on the basis of holdings in SJG.

Did the appellants procure the transfer?

192. Before we get to the issue of what, if any, interest the appellants can be regarded as having transferred as quasi-transferors we need to consider what it means to "procure" a transfer and whether it is correct that the appellants procured the transfer as HMRC argue.

193. The concept of "procurement" clearly found favour with Walton J in *Pratt* (see [169] above). In *Congreve* (CA), Cohen LJ found it was:

> "a reasonable inference from the facts found that execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs Congreve acting through her agent, Mr Glasgow."

194. That indicates the question is one that may be inferred from the facts. Earlier at pg170 Cohen LJ had noted that it was a fair inference from the fact that throughout the transactions with which the court was concerned Mr Glasgow (Mrs Congreve's father) was "acting with the authority of his daughter who signed such documents as he advised her to sign."

195. The term "procure" is not a term which was set out in the statute and is, as Walton J put it in *Pratt*, a question of who the transferors are in reality. It is implicit in

Walton J's obiter comment (set out at [173] above) that "two or three" owners of a company could (aside from his fundamental legal objections in relation to apportionment as discussed above) be quasi-transferors and therefore given what he says about procurement that in the case of a small jointly owned company that there could be more than one person procuring. Joint procurement is therefore possible in principle.

196. HMRC invite the Tribunal to find as fact that the transfer was decided upon by Peter and Stephen Fisher with Anne Fisher's concurrence. They say the transfer was jointly procured all three.

197. The appellants say it is impossible to see how Anne Fisher procured the transfer and this destroys the argument that s741 can apply as we have to be able to apportion amongst all the quasi transferors.

198. The transfer of the business from SJA to SJG was finalised in early March 2000**.** As at that time, the shareholdings in SJA were held in the following proportions: 24% each by Dianne Fisher and Peter Fisher, and 26% each by Stephen Fisher and Anne Fisher. Shareholdings in SJG were held as follows: Dianne Fisher and Peter Fisher 12% each and Anne Fisher and Stephen Fisher 38% each.

199. All three appellants were directors and shareholders of SJA. Between them they had a controlling shareholding. Anne Fisher entrusted her responsibilities to Stephen Fisher and Peter Fisher and was happy to go along with their decisions. In playing an active role in achieving the transfer Stephen Fisher and Peter Fisher were not simply acting in their own capacities as directors and shareholders but were also acting under the authority of Anne Fisher in relation to her directorship and shareholder functions. We agree with HMRC the transfer was jointly procured by all three appellants. SJA was a family run business, and each of the appellants was in reality a transferor of the telebetting business.

200. It follows from what we say above at [189] that the appellants are not prevented from being quasi transferors by virtue of there not being an identifiable proportion which they are to be regarded as having transferred. We think the whole of the transfer is to be attributed to each. In so far as this finding leads to the same income being taxed multiple times, that may be addressed by the apportionment provision in s744.

Whether possible to work out income arising *as a result* of transfer in context of trading company whose business evolves?

201. The next issue is whether, as the appellants argue, the TOAA code is incapable of applying to facts such as those at issue here, which involve a trading company whose business has evolved into new areas (internet, casino and poker). HMRC point out that these new business ventures were financed from SJG's profit which were generated by the telebetting business.

Background facts

202. From Peter Fisher's evidence we find the following facts. From February 2000 until September 2003 the only business carried on by SJG was fixed odds telephone betting. From September 2003 SJG launched an interactive betting website which enabled customers to bet via the internet. In September 2003 SJG launched an online casino. In February 2005 an online poker website was launched.

203. The internet betting venture was funded out of the profits of SJG. A small number of the original transferred customers might have used the poker product once it was launched. In December 2007 SJG bought a Gibraltar based business Bet Direct.

204. The profits were not ring-fenced and profits from the internet / on-line ventures described above were reinvested in SJG.

205. Peter Fisher had compiled a schedule of how profits attributable to the various businesses varied from 2003 to 2008. Peter Fisher was able to derive these figures because SJG keep a database with the date each customer opened an account. That account date was used to segregate all the customers and identify the customers that had opened their account prior to 1 March 2000. Peter Fisher's evidence, which we accept, was that he did the analysis splitting out profits between business streams occasionally for business purposes (once a year.)

206. According to calculations based on the above cut-off date, by 2008 the profits of SJG were such that only 10% came from customers whom they had acquired in the transfer of business from SJA.

207. We do not proceed to make further findings of fact on what proportion of profits derived from what business stream as the case was not argued on the basis that we should make such findings and it is not necessary for our decision. The parties do not want us to make a determination on the amount of the assessments but to set out the principles by which the amount may be determined.

Parties' submissions

208. The classic situation the TOAA code is intended to capture (which we do not understand to be a matter of dispute between the parties) is where assets are kept abroad, reinvested and the returns rolled up abroad. The appellants say it is simply not possible to apply the TOAA legislation to the kind of facts which arise here, namely where income is payable from a trading company, and the company undertakes new commercial ventures (in this case casino betting, internet betting and poker). Income from the telebetting business which was transferred became payable to SJG but income also became payable because of the new businesses created by SJG and through the hard work of Peter Fisher and others. The appellants argue income from the new trade is too remotely related to fall within the charge. They say the approach HMRC has taken to the definition of "associated operations" is too wide and cannot cover income from such businesses. The associated operations must be "in relation to the transfer" as that requirement is interpreted by case law such that there is a "real relationship" with what is transferred. Further the associated operation must give rise

to a new power to enjoy or result in income becoming payable that was not payable before. The appellants refer to the cases of *Fynn*, *Carvill* and *Herdman* which we consider further below.

209. HMRC say there is no distinction between the growth of trade transferred and the growth of investment business transferred. The trading income derived from the expanded business still arises in consequence of the original transfer either alone or in conjunction with associated operations. The other businesses were developed by SJG using the profits retained from the telebetting business. The income from the internet, casino and poker businesses falls within s739. The words in the legislation "by virtue or in consequence of any such transfer" are wide enough to cover SJG's income and there is no requirement for any closer connection. Business ventures financed by income from the original business transferred would in any case be "associated operations".

210. The words "in relation to" in the definition of "associated operations" simply function as a link to the transfer. Under s739 the starting point is the transferred assets. They produce income, and whatever comes out of that, the further assets, and reinvestments are caught by s739. There is no requirement in s739 which requires remoteness in time to be considered. It does not matter if the profits being produced are because someone is working. The same sort of argument could apply in the case of someone working hard on their investments abroad.

Tribunal's views

211. Some of the points raised may be dealt with briefly.

212. In our view it is clear from the wide wording of s739 that there is no inherent reason why it could not be applied in principle to a person abroad where the person happens to be a company which trades rather than one which holds investments. The issue is whether, and if so where, a line is to be drawn as to income which is to be attributed to such a person.

213. The arguments that a line has to be drawn somewhere because otherwise income could carry on indefinitely makes the assumption that such a consequence cannot have been intended. We do not think it is correct to make such an assumption as there is no indication in the legislation that the amount of the income upon which a person charged will directly reflect the tax that has been avoided. As recognised in *Howard de Walden v CIR* (1943) 25 TC 121, a case the appellants referred us to in the context of their European law argument that the TOAA code offends proportionality, one of the objectives of the code is to penalise those who have transferred assets abroad. In any case it is not clear why if income were allowed to roll up indefinitely abroad, and there was an ongoing power to enjoy why the income ought not to continue to be captured. Someone who was subject to an ongoing charge would not be forced to endure it but could very likely mitigate their position by restructuring their affairs so as to not be caught by the charge indefinitely.

"By virtue of or in consequence of"

214. The first issue is whether the income from the other business ventures is caught by the words "by virtue or in consequence of [the transfer]" in s739(1) ICTA 1988?

215. If we take the broad view of these words implied by HMRC's argument, then they are in the following sense: if it were not for the assets being transferred, the profits in that business would not have been earned, and if it were not for the telebetting profits being earned, the new business profits would not have been earned. Therefore the new business profits would not have been earned if the assets had not been transferred. The question however is whether the fact that profits are earned from a new business venture is an intervening event?

216. Given the breadth of the definition of "associated operation" we do not agree that the words "by virtue of or in consequence of" can be read as widely as HMRC suggest. It is difficult to see what role "associated operations" would perform if HMRC's view were correct.

217. The internet, casino and poker profits must in our view each be viewed as being in consequence of the intervening events of those new ventures being set up rather than "by virtue or in consequence of" of the transfer.

New business ventures were "associated operations" – relevance / real relationship?

218. That then brings us to the question of whether it is correct that the new business ventures are "associated operations".

219. The appellants refer to *Fynn* and *Carvill* in relation to the limits set by the words "in relation to". It also argues there must be power to enjoy where one did not have power to enjoy before or that income becomes payable where income was not payable before.

220. As a matter of statutory interpretation we would agree with the appellants that the words "in relation to" have to be given some meaning and are not just a link as HMRC suggest. In the preceding subsection s739(2) reference is made to "transfer either alone or in conjunction with associated operations". The associated operations are only going to be in issue when they are in conjunction with the transfer so a link between the transfer and the associated operation is already established. Therefore "in relation to" must have been intended to mean something more. We turn now to the cases the appellants referred us to.

Fynn v IRC 37 TC 629

221. For the purpose of avoiding UK tax, the appellant transferred in 1948 certain investments (the transfer) to an Irish company in return for shares in the company which he then settled on an irrevocable trust in favour of his children. The Irish company bought further investments using a loan secured on amongst other things the transferred assets. In 1952 the appellant paid £12,000 to the bank account of the Irish

company by way of an interest-free unsecured loan, reducing the company's overdraft. That loan enabled the company to buy further investments.

222. In the High Court, Upjohn J considered the loan was "an operation of any kind effected by any person" and went on to consider whether the loan was "in relation to any of the transferred assets":

> "Now is it in relation to any of the transferred assets? And it is said that it is because the loan reduced the overdraft. There again I propose not to attempt any definition of the phrase "in relation to any of the assets transferred". Speaking for myself, I cannot see that the making of the unsecured loan can be said in any ordinary use of language to have any relation to the previously created charge. It was an unsecured loan made on the facts of this case not for the purpose of reducing the overdraft because the bank were pressing for payment nor for the purpose of freeing the assets from the charge. It was made to the company as an interest-free unsecured loan and the Company could have used that in any way that it pleased. I cannot see that it bears any relation to any of the transferred assets or to the charge."

223. The appellants submit that the court was looking at whether there was a real relationship between the operation said to be an associated operation and what was transferred.

Carvill v IRC [2000] STC (SCD) 143

224. The issue arose as to whether a number of transactions were associated operations.

225. After setting out the definition at s742(1) the Special Commissioner found they were not for the following reasons:

> "81. In construing this provision I bear in mind that: 'It has been said more than once that [s739] is a broad spectrum anti-avoidance provision which should not be narrowly or technically construed' (see IRC v Brackett [1986] STC 521 at 539 per Hoffmann J) and also that the definition of associated operations is extremely broad. In Fynn v IRC [1958] 1 WLR 585 at 592, 37 TC 629 at 637 Upjohn J applied the ordinary use of language to determine whether there was any relationship between two transactions. The assets transferred are the taxpayer's shares in Holdings (the old majority shares); the assets representing them are the taxpayer's shares in International Holdings (the new majority shares). On the ordinary use of language, and, indeed, however wide a meaning one gives to the expression 'in relation to', it is difficult to see how any of these transactions are operations which relate to either the old or the new majority shares. They either relate to different shares (such as the repurchase of the new minority shares or the purchase of Mr Bassett's shares) or they do not relate to any shares at all (such as the employment arrangements or the brokerage sharing agreement). If I am wrong about this, they are not associated operations which are relevant because no income becomes

payable to International Holdings by virtue or in consequence of any of these transactions; the income, ie the dividends on the old majority shares becomes payable to International Holdings solely by virtue of the transfer of the old majority shares to International Holdings. Nor do any of these transactions give the taxpayer power to enjoy the income of International Holdings; he has that power by virtue of holding the new majority shares which he obtained solely as a result of the transfer.

82. In particular, the purchase by the taxpayer of Mr Bassett's shares in International Holdings (see para 52 above) did not relate in any way to the old or new majority shares. Nor did any income become payable to International Holdings by virtue of the purchase; all International Holdings income continued to be payable to it.

83. The repurchase of the new minority shares in 1986 has no relationship with the old majority shares and the asset representing them, being the new majority shares. The new majority shares owned by the taxpayer remained as they were before and after the repurchase of the new minority shares and therefore the repurchase is not an operation of any kind in relation to either the old or new majority shares. The new majority shares carried with them, rights which varied in extent according to the number of other shares in issue but that was an economic relationship not a legal relationship. Mr Vallance on the other hand, contended that the result of the repurchase of the new minority shares was that the taxpayer became entitled to the whole of the income of International Holdings, thus emphasising the economic relationship. I agree with the taxpayer that the repurchase of the new minority shares is not an operation relating to the taxpayer's new majority shares. The reason why the taxpayer can enjoy all the dividends paid by Holdings to International Holdings is not because of anything which has happened to his shares but because the other shares have been repurchased so that his entitlement relates to a smaller cake. The taxpayer also contends that, even if the repurchase of the new minority shares is an associated operation, it is not a relevant one for the section because first the income which became payable to International Holdings by virtue of the transfer of the old majority shares, being the dividends on the old majority shares, remained unchanged, and secondly, the taxpayer's power to enjoy that income was unchanged by the purchase of the new minority shares. I also agree that even if it were an associated operation it would not be a relevant one for the purpose of the section. The change relates to the taxpayer's power to enjoy the income from the old minority shares but since he was not the transferor of those shares this is not within the section.

84. Nor is there any relationship between the six items listed above and the transfer of the old majority shares and the asset representing them, the new majority shares, because none of them relates to shares at all.

85. Accordingly, I hold that none of the transactions is an associated operation as a matter of law and even if they are they are not relevant transactions because they do not contribute to income becoming payable to International Holdings or to the taxpayer's power to enjoy that income. However, I should add that if, contrary to my findings,

> that the purpose of the transfer was to avoid tax (assuming that these constitute tax avoidance within the meaning of the section) by means of any of the six listed items, then that would inevitably be at least one of the purposes of the transfer and therefore it makes little difference to the result under s 741 whether or not they are associated operations."

226. The appellants refer to the Special Commissioner not finding that transactions were associated operations which were relevant because no income became payable to International Holdings by virtue or in consequence of those transactions (i.e. the income was already payable to International Holdings, and also the fact that the transactions did not give the power to enjoy the income of International Holdings.) The appellants say that what the Special Commissioner was looking for was a "real relationship" between the associated operation and whatever the asset was.

Herdman v CIR 45 TC 394

227. The appellants rely on this case for the proposition that associated operations are limited by whether they give rise to a new power to enjoy. This, the appellants say is consistent with what the Revenue said in Revenue Interpretation 201 (April 1999). But the appellants also accept that associated operations may become relevant if they give rise to income becoming payable.

228. The taxpayer, a controlling shareholder in a Northern Ireland (NI) company transferred shares in that company to a company in the Republic of Ireland (RoI). The RoI company received dividends on the NI company shares which the UK Revenue sought to tax. The relevant legislation before the House of Lords was s412(1) of the 1952 Act (which following the preamble which was identical to that set out in s478 ICTA 1970 (see [121]) went on to say:

> "Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has…power to enjoy".

229. The taxpayer acquired shares in the RoI company and the RoI company assumed a liability to pay the taxpayer on demand. It was not disputed that by means of the transfer the taxpayer had "power to enjoy" the income from the transferred shares.

230. Lord Reid proceeded on the assumption that the Special Commissioners' determination that the accumulation of profits and the management of transferred assets so as to leave funds available for payment to the taxpayer in reduction of the RoI company's debt to him were associated operations as there was no argument on the point. The issue was whether the taxpayer had "by means of" these operations "acquired any rights by virtue of which" the taxpayer had "power to enjoy". The House of Lords dismissed the Revenue's appeal unanimously. Lord Reid explained the taxpayer had not acquired any rights at all by means of the associated operations. The operations did not change what the taxpayer had already acquired by means of the transfer of the shares to the RoI company (the taxpayer continued to be a creditor

of the debt the RoI company owed and continued as a shareholder of shares acquired in the RoI company).

231. Do *Fynn, Carvill* and *Herdman* establish the propositions the appellants put forward about a "real relationship" being required, that income must become payable, or that there must be a power to enjoy where there was not one before?

232. *Carvill* (a case in which considered legislation in materially the same form as that which is before us (pg 164 at [81])) essentially suggests there are two tests to consider. 1) Do the operations relate to the assets transferred? 2) Even if they do relate to the assets transferred do the transactions give the taxpayer power to enjoy the income of the person abroad? Does income become payable to the person abroad as a result of the transaction?

233. The first test is of more significance as it formed part of the ratio for the decision. It must also we think be acknowledged that in accordance with the way the legislation defines "assets" in s742(9)(e) that the question of relationship is to be applied not just to the transferred assets but to all the further items mentioned in the definition of assets in s742(9)(e). The associated relations may therefore also be in relation to 1) "any of the assets" 2) assets representing the assets transferred 3) income arising from any such assets (i.e. assets in 1) and 2)), or to any assets representing the accumulations of income arising from any such assets. So while it is correct the operation must be "effected in relation to" assets it has to be acknowledged in our view that this applies to potentially a very wide class of assets.

234. The second test, is obiter but we note it is a point made in relation to s739(2) and the causative aspects of "by virtue or in consequence of…" rather than an element of the definition of associated operation.

235. As discussed above we agree with the appellants' analysis that "in relation to transfer" must be given some meaning and that it is not just a linking concept. This is consistent with the above cases. The associated operation either has to mean there is a new power to enjoy or that there is new income (income becoming payable where income was not payable before).

236. This is illustrated by facts of *Carvill*. What was under consideration there were the old majority shares in Holdings (transferred assets) and the new majority shares in International Holdings (representing assets). International Holdings was the person abroad. No income became payable to International Holdings by the taxpayer buying someone else's shares in International Holdings or repurchasing new minority shares. The dividends on the old majority shares (and therefore the income of the person abroad, International Holdings) remained unchanged.

237. We are not clear however what if anything putting this in terms of a requirement that there be a "real relationship" as the appellants submit adds.

238. That aside we agree with the appellants' analysis of what is required in relation to show an associated operation (HMRC did not make submissions on this point). The issues therefore are: 1) Is each new venture "in relation to" the transferred assets (and

all the extra matters set out in the legislation such as income arising from such assets) 2) Does the associated operation result in either a new power to enjoy for the taxpayer or new income becoming payable to the person abroad?

239. However where we disagree with the appellants is in the application of these principles to the facts and the appellants' argument that the new business ventures were not "associated operations".

240. The new ventures of the internet and casino businesses only got off the ground with income which arises in relation to the transferred assets and not with other funding. These new ventures do in our view relate to income from the transferred assets.

241. The position may be contrasted with the facts of *Fynn* where the company was not buying assets with income from the original transferred assets. Instead there was new money which came in. If SJG had been lent finance from elsewhere and used that to invest in the new businesses then we would accept the new business venture would not be in consequence (or only partly) in consequence of the transferred assets and to that extent it would fall out of charge.

242. As to whether income becomes payable to SJG, the person abroad, by virtue or in consequence of the new venture the answer is yes it does (in the form of profits from each of the different ventures). It is not the case that the income arises solely from something else. (It is correct however that the alternative route to showing the associated operation is not a relevant one is not fulfilled as the new business venture does not create a new power to enjoy, (the appellants' capacity as shareholders in SJG stayed the same)).

243. In relation to the poker business which was set up from a mixture of tele-betting, and internet/casino profits, the question needs to be asked whether the poker venture is in relation to transferred assets, or more pertinently in relation to "income arising from" the transferred telebetting assets?

244. In our view it follows from the setting up of the internet and casino ventures being associated operations that the internet / casino income is also income arising from the transferred assets. The question which is then posed is whether the poker venture can be said to be "in relation to" the telebetting / internet /casino income. In our view the answer is yes. As to whether the poker venture results in income becoming payable to the person abroad the answer in our view is that it does.

245. The position is no different than if the decision had been taken to apply the profits to investing in shares in an internet betting company or poker gambling company or indeed an investment fund comprising many different shares. Applying the telebetting profits in that way would not create a new power to enjoy in the sense described above. It would give rise to new income becoming payable (income from the internet / casino company shares). Similarly if dividends or other returns from the internet /casino investments were together with returns from telebetting then invested in a poker company, that would create new income.

246. In the both cases the level of profits might in some sense be attributable to any number of factors, the work/ skill of directors, employees and macro-economic and other factors but it is not clear why that should make any difference to the income being taken account of by the charge. If SJG had bought property and rented it out with the telebetting profits, the rental achieved may have depended on market conditions, the type of tenant but the amount would not stop being income received by SJG which was in relation to income arising from the transferred telebetting assets.

247. Nor does it make any difference to the analysis as intimated by the appellants that the online poker and casino betting could not have been carried out in the UK as there was at the relevant time a prohibition on it. In relation to "power to enjoy" s739 does require it to be considered whether the income of the non-resident person would be chargeable to tax if it were income of the individual received by him in the UK. But, the appellants' power to enjoy income of SJG is not in dispute. Under s739 income is chargeable "whether it would or would not be chargeable to income tax…". There is no indication on the legislation that the scope of "associated operation" is limited by whether the operation would be legally possible if it were carried out in the UK. In any case even if the business activities had been carried out in breach of a prohibition the profits would in principle still be chargeable to tax.

The Motive defence in s741

248. The motive defence is set out in s741 ICTA 1988 which provides:

> "741 Exemption from sections 739 and 740
>
> Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either—
>
> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation."

249. Both parties agree the defence has two alternative parts and that none of the motive defences which were introduced with effect from 5 December 2005 are in point.

250. In brief the appellants' case is that the motive defence applies because there was no tax avoidance purpose. The appellants say it is not enough to show that a transaction has been entered into the effect of which is that no tax has been paid. The question which needs to be asked is why the steps which resulted in no tax being paid were taken.

251. The move to Gibraltar was to save the business. The rest of the telebetting industry moved offshore to Gibraltar. Rather than allowing their business to go bust the appellants moved their business as well. The reason why SJG set up as a separate company was not to avoid corporation tax as HMRC argue but because the appellants

did not want to risk potential prosecution under s9 BGDA (which provided a criminal offence which would apply where a bookmaker in the UK was sharing resources with an overseas bookmaker who was taking bets from the UK). In any case there was no avoidance as SJG is a real operation in Gibraltar with premises and employees. Referring to *Willoughby* and dicta in *IRC v Brebner* (1966) 43 TC 705, the real economic consequences of not being subject to betting duty on UK bets placed there have been borne by SJG. Further the reference to avoidance cannot apply to betting duty (because its economic incidence falls on the punter).

252. In relation to Anne Fisher they say there is no evidence she had a motive and it is relevant that she did not sign the transfer.

253. HMRC say that at least one of the purposes was avoidance of betting duty and/or UK corporation tax, or income tax. HMRC characterise the appellants' case as saying "we had to avoid tax, therefore we ought to be let off." This was not a case where there is a wholly commercial reason, a non-tax reason (as there was in *Carvill*).

254. In relation to the argument that SJG had to be set up because of the appellants' fear about the s9 offence HMRC say this worry only arose because of the purpose of avoiding betting duty, and was not a real worry because the real issue was whether there was in fact sharing of resources and that would have been just as much an issue between a separate legal entity and SJA as between a branch of SJA and SJA. A separate legal entity was not necessarily required. HMRC say the appellants also had a purpose of keeping maximum flexibility to minimise the amount of income tax paid by family members in their capacity as shareholders and directors.

255. HMRC say the appellants' situation is distinguishable from *Willoughby* in that the appellants took advice to avoid taxation and the *Brebner* dicta the appellants rely on is also distinguishable as the transaction was not genuine or commercial. Contrary to what the appellants argue it is SJA who bears the economic burden of betting duty not the punter.

Legal issues on motive defence

Test subjective

256. There was no disagreement between the parties that the test to be applied in relation to the motive defence is a subjective one. The question for the Tribunal is what was the object in the mind of the appellant in entering into the transaction in question? (See Lord Upjohn's approval of dicta in *Brebner* pg 718 and also *Carvill* where the Special Commissioner reached this view explaining his reasons at [12]).

257. HMRC agree the motive test is subjective but say that objective factors may be relevant in ascertaining what that subjective motive is.

258. We note that the passage from Lord Nolan's speech in the House of Lords' decision in *Willoughby* which the appellants refer to (in their skeleton) suggests that:

> "…where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation) it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax…"

259. That would, on the face of it, support a non-subjective test.

260. This is dealt with by the Special Commissioner; Dr Avery Jones in *Carvill* who suggests it may be understood as a summary of the Revenue's argument given what is said elsewhere in Lord Nolan's decision. (This point was made in *Beneficiary* (see [143b] of decision). We agree with that analysis.

261. Before we go on to apply the subjective test to the facts there are various matters of legal interpretation which need to be dealt with in order to know what factual findings will be relevant to establishing whether the defence applies.

Tax avoidance purpose and tax avoidance effect / significance of knowing result leads to tax avoidance / relevance of taking tax advice

262. The appellants say it is not enough to point to tax being avoided. You have to look at the purpose and ask *why* the transfer was made. We were referred to the dicta in *Brebner* (referred to below at [280] and (confirmed by the Court of Appeal in *Willoughby*)). This shows you can have a commercial purpose even if the effect is that tax is avoided. Further, the appellants say it is not enough to say that the taxpayer *knew* no betting duty would be charged. You cannot say that because you have done something which you know will mean less tax or no tax will be paid that this means that your motive is necessarily tax avoidance.

263. As to the appellants' proposed question of asking "why was the transfer made?" while its simplicity is attractive, the difficulty we see with this approach is that in answering it there be a temptation to come up with one purpose when it is plainly contemplated from the drafting of the defence in s741 that there may be multiple purposes. The question which has to be asked must we think reflect the legislation more closely and is accordingly: "Was the purpose of avoiding liability to taxation the purpose or one of the purposes…?"

264. On the first point on the relevance of effect, we do not understand HMRC's case to be as straightforward as saying that just because tax was avoided therefore there must have been a tax avoidance purpose. That would not be consistent with the purpose test being subjective.

265. The second point in relation to the relevance of what the taxpayer knows goes, in our view, to the issue of how widely or narrowly a tax avoidance motive is to be construed and in particular the distinction drawn in case-law between tax avoidance and tax mitigation.

266. Under a narrow test the person has to have a specific intention to avoid tax in that they must in their mind think that what they are setting out to do is tax avoidance

as opposed to tax mitigation. Under a wide test it is enough if the person knows that what they are setting out to do will involve the effect that less or no tax is paid, and it does not matter if they think that that amounts to tax mitigation. A motive which is related to tax, as opposed to one that is not would be enough.

267. In relation to the relevance of a person's knowledge this must we think be a pre-requisite in that it is difficult to see how they might have a subjective purpose to do something without knowing what it is they want to do.

268. There is also a point about the relevance or otherwise of tax advice being taken in relation to the transfer which we need to consider.

269. We need to turn to the case-law to see what guidance is offered in approaching the question of applying the subjective test.

270. In *Willoughby* it is relevant to consider the findings which were made on Professor Willoughby's subjective intention.

271. We note that at 1078G, in relation to the first bond the finding that:

> "The avoidance of United Kingdom tax was not in his mind, although he was well aware of the tax aspects of the policy".

272. This suggests that simply being aware of "tax aspects" does not give you a tax avoidance motive.

Beneficiary v IRC [1999] STC (SCD) 134

273. The case concerned a transfer of sums by the grandfather of the appellant from the UK to Jersey to create a discretionary settlement there which the Revenue considered was for the purpose of ensuring that the money did not suffer UK inheritance tax on the grandfather's death. The Special Commissioner first considered whether what was done was tax avoidance or tax mitigation and came to the conclusion the transfer of sums was tax mitigation. It was found that the grandfather did not have the motive of tax avoidance when creating a settlement. UK tax was a consideration of the grandfather's advisers but the tax implications of siting the trust in Jersey "were a matter of indifference" to the grandfather.

274. From this case we note that what was at issue was what the transferor made of the tax advice. The fact that tax advice was received was not determinative.

Philippi v IRC [1971] 1 WLR, 47 TC 75

275. In this case transfers made by the father of the appellant were in issue. The son had to show that the father did not have as one his purposes in making the transfer the object of avoiding UK tax.

276. On the question of what evidence was relevant to ascertaining subjective intention Lord Denning at stated at [112]:

> "What he says is not the only means: it is just one of the means of finding out what his intentions were. You may find it out also by what was said to him and his reactions to it, the circumstances and so forth."

277. The case of *Carvill* is an example, as HMRC point out, of a purpose un-related to tax being found (the need to establish a holding company for a group carrying out reinsurance in territory which would be perceived as neutral as between the UK and US).

278. However, in none of these cases above was it necessary to consider whether, if there had been a tax related motive, whether the motive was specifically to avoid tax or whether it was to mitigate tax by taking advantage of a regime that had been intended by Parliament to allow for that result.

Can Willoughby and Brebner can be distinguished on the basis HMRC suggest?

279. HMRC argue the facts of this case are different from *Willoughby* because the appellants took advice in order to ensure that they would be able by virtue of the transfer of assets and the associated operations to avoid taxation. It argues the dictum in *Brebner* considers the question of carrying out genuine commercial transactions. The transfer and associated operations were not genuine commercial transactions so the dictum does not apply.

280. The *Brebner* dictum the appellants refer to for their argument that tax avoidance cannot be interpreted too widely appears at Lord Upjohn's speech (pgs 718-719):

> "My Lords, I would only conclude my judgment by saying, when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax - it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved".

281. The defence under consideration in *Brebner* was one of:

> "whether the transaction(s) were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained…".

282. In our view the issue of whether the dictum needs to be distinguished may be put to one side because we are not persuaded that it bears the significance that the appellants place on it.

283. We note that the *Brebner* dicta does not go as far as suggesting that if you take the lower tax route this cannot mean you have a tax avoidance purpose. While taking a lower tax route does not mean that by that fact alone it must be inferred that one of

the main objects is tax avoidance, tax avoidance is not precluded. This is reflected in the way the dictum in *Brebner* was relied on in by Morritt LJ in *Willoughby* in the context of s741(a) (pg 108 of the Tax Cases report):

> "The genuine application of the taxpayer's money in the acquisition of a species of property for which Parliament has determined a special tax regime does not amount to tax avoidance **merely on the ground that the taxpayer might have chosen** a different application which would have subjected him to a less favourable treatment. [emphasis added]"

284. We note the extract above also refers to property "for which Parliament had determined a special tax regime". That presents a further limitation on the relevance of the dicta as whether the non-taxability of UK bets taken by overseas bookmakers amounts to a special tax regime remains to be considered.

Relevance of taking tax advice

285. As to the relevance of the person making the transfer taking tax advice it has to be remembered that whether someone has a subjective tax avoidance purpose will come down to a question of fact (see *Nigel Grogan v CIR* [2010] UKUT 416(TC) at [110]). *Beneficiary v IRC* is an example of a case where although tax advice was taken the taxpayer was found to be indifferent to it.

286. However, even if on the facts a person sought tax advice and was aware of the advice, our difficulty with the argument that a person had a tax avoidance purpose because they took advice to avoid taxation is that it begs the question by assuming that the purpose of taking the advice was aimed at tax avoidance. The person would not necessarily have such a purpose if the advice they sought was in relation to mitigating their tax. That takes us back to the question of the dividing line between tax avoidance and tax mitigation and that will entail looking at the scheme of the legislative provisions that are said to be avoided.

287. From the above, we summarise the following propositions in relation to the motive defence:

(1) The test is subjective. (*Carvill*)

(2) Evidence of a person's reactions to what is said to them and circumstances as well what they say their purpose is may be relevant. (*Philippi*)

(3) It is not enough to show a tax avoidance effect.

(4) Knowledge that less tax is paid does not equate to a tax avoidance purpose (but knowledge is a pre-requisite to having a purpose.)

(5) Awareness of tax aspects does not equate to having a tax avoidance motive. (*Willoughby*)

(6) The mere fact of taking tax advice does not mean there is a tax avoidance motive. (*Beneficiary v IRC*)

(7) Picking a lower tax route over a higher tax route does not equate to tax avoidance (but equally does not preclude tax avoidance). (*Brebner / Willoughby*)

288. In terms of where this leaves us with the question of whether the subjective purpose must be the narrow one specifically to avoid tax, as opposed to a wider one of having a tax-related purpose we think the former narrower test is to be preferred. First, because this reflects the drafting of the legislation which specifically uses the term "avoiding". Second, the fact that the case-law shows that being aware of tax aspects, taking tax advice, and picking a lower tax route is not fatal to the application of the motive defence is more consistent with a more nuanced inquiry being made into the specific nature of a person's intentions as far as tax is concerned.

289. Returning then to the question "was tax avoidance the purpose or one of the purposes of the transfer?", if it turns out the person's subjective purpose was in fact to mitigate their tax position then having such a purpose will not mean the motive defence is not available to them.

How do you apply the motive defence when there are multiple quasi-transferors? Walton J's concerns in Pratt

290. At this point we also need to deal with how the motive defence would apply where there is more than one person behind the transfer. Reaching the position, as we do, that the situation of multiple (simultaneous) quasi-transferors are catered for under the legislation, we need to return to the difficulties in applying the motive defence to such a situation which Walton J highlighted in his decision (i.e. what do you do when the motives of multiple transferors or quasi transferors point in different directions?).

291. HMRC say the problem does not arise on the facts of this case because there is one transfer and one purpose. But we agree with the appellants that Walton J was not saying in relation to the motive defence that it depends on facts whether there is a single motive. The concern he raised was one of principle.

292. HMRC say that if the defence fails because of one individual's purpose, the other's commercial purpose could be taken account of in performing a just and reasonable apportionment (under s744(1)(a)). Also by definition where the transfer there are multiple quasi transferors it will have to have been the case that the transfers will have been jointly procured. It is not objectionable for the motive defence to be unavailable in such circumstances because one of the purposes to the jointly procured transfer is tax avoidance.

293. Both parties agree that you have to look at the purpose for which the transfer was effected, and that that test is subjective.

294. Looking at each quasi-transferor's motive and saying the defence is thereby unavailable if any one of them has a tax avoidance motive fails in our view to give

due recognition to the words which require us to look at "the purpose for which the transfer was effected".

295. As Walton J pointed out it is not the transferor's purpose in effecting the transfer which is relevant but "the purpose… for which the transfer was effected."

296. Ultimately we cannot escape the fact that the legislation contemplates there is a purpose or there are purposes for which the transfer is made and that we must therefore conclude whether tax avoidance is that purpose or that is one of those purposes. The fact that there may be all sorts of scenarios where this exercise is not especially straightforward is not a reason not to make a determination on the case before us. It is easier to determine that purpose where there is one individual who has transferred but if two individuals have transferred jointly there is no less of a transfer which has been effected. The task remains to determine what the purpose or purposes of the transfer was. It is not that it is impossible, just that it is not as easy as if there was only one person doing the transfer and one person's subjective motive to consider.

297. Our approach will be to consider each of Stephen Fisher's, Peter Fisher's and Anne Fisher's purposes before reaching a view on what this tells us about the purpose for which the transfer was made.

Appellants' argument that even if their motive was not saving their business, there is no "avoidance" as appellant is bearing the economic consequences Parliament intended of a person not taxable as a bookmaker

298. Because of what we have said above about a distinction needing to be drawn between a tax avoidance purpose and a tax mitigation purpose we think it is necessary to look first at the argument the appellants raise that there can in any case not be an avoidance purpose because the appellants were bearing the economic consequences that Parliament intended.

299. There is also a further argument of the appellants that the notion of avoidance must take into account the special nature of betting duty and that the economic incidence of the tax falls on the punter which we deal with below at [321] onwards. While taking these points now does not reflect the order in which the points were argued before us (they were put to us points which arose if we were not persuaded that the appellants' motives were to save the business and/or because of their fear of prosecution under s9 BGDA) they both go to the meaning of avoidance. In our view we cannot make determinations on whether the appellants had a tax avoidance purpose without being clear how that term is to be understood in relation to betting duty hence we deal with them now.

300. Having looked at the legislation to see what Parliament intended in relation to the application of the betting duty regime, even if the conclusion were reached that what the appellants did amounted to betting duty avoidance that, of course, would not be the end of the matter because then the question which would arise is how did the

appellants understand the regime and did they know that what they were doing was betting duty avoidance?

301. The appellants' argument is that there is no tax avoidance as the appellants have accepted the economic consequences intended of a bookmaker operating outside the UK. They emphasise the fact that SJG is clearly not a money box company and that setting it up in Gibraltar had considerable economic consequences; it cannot advertise in the UK, and it cannot share resources, it cost a lot to set it up, family members had to go out there to run it, and it employs dozens of employees. The appellants rely on *Ensign Tankers v Stokes (1992) 64 TC 617* where Lord Templeman at pgs 240-241 referring to his words in an earlier case stated:

> "…income tax is avoided…when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction"

302. They say this approach was adopted in relation to the TOAA regime in *Willoughby* where Lord Nolan stated:

> "the hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered any taxpayer qualifying for such reduction in his tax liability…"

303. To understand what economic consequences Parliament intended of a person who was not taxable as a bookmaker operating in the UK we need to look in more detail at the scheme of the betting duty legislation.

The Betting and Gaming Duty Act 1981 ("BGDA")

304. Until 2001, general betting duty was charged under s1 of the BGDA, where bets were made with bookmakers in Great Britain:

> "(1) Subject to the provisions of this Part of this Act, on any bet which—
>
> (a) is made with a bookmaker in Great Britain otherwise than by way of pool betting or coupon betting, or
>
> …
>
> there shall be charged a duty of excise to be known as general betting duty."

305. Section 9(1) and (2) of BGDA provided that:

> "(1) Any person who—
>
> (a) conducts in Great Britain any business or agency for the negotiation, receipt or transmission of bets to which this section applies, or

(b) knowingly issues, circulates or distributes in Great Britain, or has in his possession for that purpose, any advertisement or other document inviting or otherwise relating to the making of such bets, or

(c) being a bookmaker in Great Britain, makes or offers to make any such bet with a bookmaker outside Great Britain,

shall be guilty of an offence.

(2) Except as mentioned in subsection (3) below, this section applies to—

(a) all bets made by way of pool betting or coupon betting unless—

(i) in the case of bets made by means of a totalisator, the totalisator is situated in Great Britain,

(ii) in the case of bets made otherwise than by means of a totalisator, the promoter of the betting is in Great Britain; and

(b) all bets made with a bookmaker outside Great Britain (whether or not made by way of pool betting or coupon betting)."

306. Duty was charged on the making of bets with a bookmaker in Great Britain. (Section 12(4) provides that "bookmaker" has the same meaning as in s55(1) of the Betting, Gaming and Lotteries Act 1963 ("any person…who carries on…the business of receiving or negotiating bets")).

307. Under s2 the duty must be paid by the bookmaker. Bets with a bookmaker outside of Great Britain are not chargeable.

308. On the face of it then if a bookmaker changes its operations so it is no longer a bookmaker in Great Britain and outside the scope of the charge that may be said to be in line with the economic consequences Parliament intended.

309. But, that is not the end of the matter because s9 provides for "prohibitions for protection of revenue". It provides a criminal offence which applies to all bets made with a bookmaker in Great Britain where a person conducts in Great Britain a business or agency of the negotiation, receipt or transmission of such bets, or where any person knowingly issues, or circulates in Great Britain advertising in relation to such bets.

310. So while on the face of it placing bets with bookmakers outside Great Britain is fine, what the legislation sought, in our view to dissuade, was persons in Great Britain facilitating through transmission, or advertising, the placing of bets with such bookmakers. We note those bets did not necessarily have to have been placed by anyone in Great Britain. The target of the legislation appears to be to make it difficult for persons in Great Britain to place bets with those outside in that advertising, or other facilities to put the British customer in touch with the bookmaker outside of Great Britain were prohibited. This suggests that Parliament intended, through the territorial grasp it had over persons in Great Britain, or carrying out activities in Great Britain, to dissuade bets being placed with overseas bookmakers by customers in Great Britain.

311. Headings and margin notes may be used as an aid to interpretation and are instructive in this case. The reference to "for protection of revenue" and the focus on activities in Great Britain suggests to us that the target is not non-British punters but British punters who otherwise would bet with bookmakers in Great Britain and pay duty instead of betting with overseas bookmakers and not paying duty.

312. In *Victor Chandler* [2000] 1 All ER Ch D 164, Lightman J described the policy behind the prohibition in this way:

> "Section 9(1) and its predecessors prevent bookmakers who are based off-shore (and are therefore not subject to United Kingdom general betting duty) from soliciting bets in the manner specified from individuals within the United Kingdom. The statutory policy behind imposing this prohibition was to prevent loss of revenue by bookmaker acting in this way and (incidentally) to protect bookmakers based within the United Kingdom (who are liable for United Kingdom general betting duty) from unfair competition within the United Kingdom betting market by overseas bookmakers who are not so liable…"

313. On appeal the Court of Appeal ([2000] 2 All ER 315) described the policy behind the prohibition in similar terms (Sir Richard Scott VC at [7] and Chadwick LJ at [38]). Sir Richard Scott VC's judgment makes it clear that "Nothing in the 1981 Act prevents domestic punters from placing their bets with off-shore bookmakers." But the question here is not the legality of taking bets from such punters (which is not in any doubt) but whether in acting in that way betting duty was avoided.

314. It is not in dispute that the appellants set up a real operation in Gibraltar and this had real economic consequences. But we think it is significant that its operation was not based on attracting new telebetting business from markets outside of Great Britain. It relied on customers resident in Great Britain, teletext information on domestic channels they would watch, and brand recognition carefully nurtured over a number of years in Great Britain.

315. If we pose the question what were the economic consequences that Parliament intended to be suffered by a taxpayer qualifying for having its betting duty reduced or eliminated the answer would be that the economic consequences which were to be suffered would be to forego attracting customers in Great Britain through solicitation and advertising. In relation to taking bets from customers in Great Britain no economic consequences were indicated by the regime because it was, we think, envisaged that the criminal offence would dissuade the situation arising where an overseas bookmaker was accessing customers in Great Britain in the first place. Further it is no answer to say the appellants obviously did not want to fall foul of the criminal sanction. The presence of the criminal sanction is a strong indicator as to what behaviour was sought to be discouraged even though it was narrower in its application than the range of activities which would result in betting duty not being liable.

316. The situation whereby British punters could be enticed to bet with an overseas bookmaker, while legal in the absence of advertising in Great Britain or some kind of

foothold there of the overseas bookmaker (e.g. through the sharing of resources with a British bookmaker) was not one which was in line with the general scheme of the legislation. On the contrary, taking bets abroad from punters in Great Britain so that betting duty was not liable would, we think, amount to avoidance of betting duty.

317. As indicated above that does not in any way dispose of the matter in HMRC's favour because the question that remains is whether the appellants' purpose or one of their purposes when looked at from their *subjective* point of view was to avoid betting duty.

318. Before dealing with that we must deal with the appellants' argument that the move to Gibraltar, trading through the Gibraltarian company and putting that in a situation where no betting duty was paid was not avoidance because if the business had folded (as it would have done they say) then no betting duty would have been paid anyway.

319. HMRC disagree this has any merit and they draw the analogy with arguments used in avoidance schemes which use shares where the taxpayer seeks to argue (unsuccessfully) that no tax has been avoided because no shares would have been sold. HMRC says the argument fails in principle but also on the facts because there was avoidance. SJA was, before the Gibraltar business started, still taking bets from UK customers and accounting for duty on them. After SJG was set up customers still rang in and made bets they would otherwise have done but no duty was paid.

320. We agree with HMRC, on the evidence, although the telebetting business was dwindling it still continued. As a result there were some UK customers who would have bet in the UK, but were enabled by the setting up of SJG to not bet in the UK. Betting duty that would otherwise have been payable in respect of those bets was not paid.

Appellants' argument s741 does not apply to excise duty to which appellant is collection agent / economic incidence falls on punter?

321. We have understood from the submissions made at the hearing that the appellants do not make a point before this Tribunal that betting duty does not fall within the reference to "taxation" in s739. This is on the basis that the appellants consider the wide interpretation of "taxation" Scott LJ in *Sassoon* (a decision we discuss below) binds this Tribunal (a view which we express no view on).

322. The appellants' argument is that s739 does not extend to the avoidance of an excise duty such as betting duty to which the appellants are not themselves chargeable but for which they are merely the collection agent. They say duty was levied on the collection agent with the incidence falling on the punter. If there was tax avoidance it was by the punters. The overseas bookmakers were beneficiaries of punters choosing to engage in such avoidance.

323. HMRC respond with the following points:

(1) The bookmaker not the customer is liable for duty. Section 2 BGDA 1981 makes it clear that SJA and the appellants were jointly and severally liable to pay the betting duty and that SJA bore the economic burden. The bookmaker is free to decide what figure it likes for the surcharge. That is a matter of contract. The surcharge means you are betting more or less, or that the odds are different. The person avoiding the duty must be the person who is liable to account for it.

(2) All customers in all businesses bear the economic burden of taxes in that they are an overhead. If the appellants' point were a good one it would be a general point in relation to all tax.

(3) As well as being jointly and severally liable the bookmaker also bears the economic burden of the duty. It affects their competition with other bookmakers and also with other service providers.

Tribunal's views on whether the bookmaker is liable for betting duty. Construction of BGDA

324. The legislation (which is set out at [304] onwards above) could not be any clearer as to who is to pay the duty. Under s1, betting duty is due on the making of a bet with a bookmaker in Great Britain. Under s2, the duty "shall be paid…by the bookmaker". The class of persons from whom the duty is recoverable include the bookmaker and various other persons who in general terms are involved somehow with the bookmaking business. There is no mention of sums being charged on, paid by, or recoverable from, the customers.

325. The fact that bookmakers have chosen to incorporate the betting duty into the price they charge / the odds they offer is entirely a matter for them. If the economic burden falls on the customer then this is because the bookmaker has decided this. The economic burden of the duty that is imposed by the legislation falls on the bookmaker. The fact that operators appeared to have operated in the same way through imposing a surcharge is a function of particular practices operators were content to adopt in the market SJA was in. Even if correct, it is not relevant that the bookmaker would not be profitable if it did not impose a surcharge. There would be other choices as to what other costs to cut, and there would ultimately also be an option of not operating at all.

326. Any avoidance on the part of the customers is not avoidance which is relevant to s739 because it is avoidance of a contractual surcharge rather than of tax.

327. In any case HMRC argue that the Court of Appeal's decision in *Sassoon v CIR* (1943) 25 TC 121 is authority for the proposition that the avoidance of which the person has a motive need not be avoidance by the same taxpayer.

328. In *Sassoon* the appellant, a UK resident taxpayer and his wife transferred investments to a Swiss company which the appellant had set up. The Special Commissioners accepted the sole purpose of the transfer was the avoidance of estate duty.

329. The issue was whether estate duty fell within the term "taxation" as that term was used in the defence in s 18(1) of the Finance Act 1936 for transfers where it could be shown "were effected mainly for some purpose other than the purpose of avoiding liability to taxation". Section 18 was preceded by a preamble "For the purpose of the preventing the avoiding…of liability to income tax".

330. Scott LJ who gave the majority judgment said:

> "In my view the nature of the proviso, instead of requiring a strict interpretation of the word "taxation" in favour of the taxpayer, calls for a liberal interpretation in favour of the Crown. The draughtsman no doubt had in mind to cover what he would have called all bona fide transfers, that is to say transfers which would be regarded by the Revenue as not made for any fiscal purpose which they would regard as improper. The word "taxation" is a short expression of such an idea and I think a happy one. Death duties, National Defence Contribution, perhaps other taxes or duties, would all be within the Revenue's mind in deliberately choosing the wide word "taxation", in order to make sure that their concession of transfers for other purposes should not be used to deprive the Revenue of other taxes than Income Tax or Sur-tax."

331. We disagree that *Sassoon* is binding in the way HMRC suggest. The decision deals with *what* taxes are covered by "taxation". The appellants' point is about *who* is avoiding. The appellants' argument that it is necessary to identify avoidance by the transferor and that someone else was the avoider was not considered in *Sassoon*. The fact the court was concerned with death duties cannot be read across to a broad proposition that it does not matter who is doing the avoiding and that it is not necessary to identify avoidance by the transferor. The relationship between the beneficiaries / personal representative of a taxpayer is not analogous to a customer of a company.

332. But even though *Sassoon* is not binding on the point, and assuming it were correct that the economic burden fell on someone else there is nothing to suggest from the way s739 and s741 are drafted that avoidance of liability to taxation should exclude situations where someone is liable but has passed the economic burden on to another.

333. Section 739(1A) makes it clear that avoidance purposes which go beyond avoidance of income tax are brought within the scope of the charge. The reference in the motive defence provision, s741, to "avoiding liability to taxation" is clearly also broader than income tax. The benefit of the motive defence is lost if there is a tax avoidance motive which relates to a different tax to income tax. Having drawn the defence narrowly in this respect (from the point of view of those seeking to escape the charge) there is no reason to suppose that an exception should then be read in where it turns out that the person who benefits economically is someone else without clear words to that effect.

Evidence relevant to subjective test

334. Asking whether the purpose or one of the purposes of the transfer of assets was avoiding liability to taxation as a subjective matter requires us to focus on what each of the appellants actually knew, thought and intended at the relevant time.

335. In terms of the types of evidence that will assist in this exercise this consists of what appellants told us about their purpose in their evidence, what they said, and how they acted at the time. It will be relevant to look at what information they were aware of, their understanding of it and their reactions to it (bearing in mind Lord Denning's dicta in *Philippi*).

336. With the above in mind, in addition to the appellants' own evidence (we had witness statements and heard oral evidence from each, and all were credible witnesses) we will look at various pieces of tax advice that were sought and given, correspondence and meetings which took place with HMCE, and awareness gained from other sources such as newspaper articles and participation and representations made on behalf of the industry.

337. Although there is some overlap between Stephen Fisher's and Peter Fisher's intentions, awareness and understanding of the relevant matters, these were not identical between the two and it is necessary to consider their position separately. Anne Fisher played no active part in the decision making and her purpose must be considered separately too. A legal question arises as to whether in the absence of a motive, one may be imputed to her.

338. It is also necessary in our view to consider the application of the motive defence separately in relation to each type of tax for which there is said to be an avoidance purpose. Accordingly in this section of the decision we deal with the question of what each of Stephen Fisher and Peter Fisher were aware of, and understood from the point of view of whether betting duty avoidance was a purpose, or one of the appellant's purposes, and then do the same in respect of corporation tax avoidance and avoidance of other income tax.

339. Before doing that it is necessary to outline in further detail the tax advice sought and received, the correspondence and meetings with HMCE and information the appellants derived from other sources.

Advice in relation to tax / betting duty

340. Here we outline the background and content of the various requests for advice received by Stephen Fisher and Peter Fisher. Our findings on when Stephen Fisher and Peter Fisher were aware of the advice, and their level of awareness appear at respectively [375] onwards and [434] onwards below.

Correspondence in relation to "Bet on the Net" Bahamas

341. The context in which this correspondence arose was that in 1995/1996 Peter Fisher was in contact with Jim Eliott who had the idea of putting a software company

together with a bookmaker. Mr Eliott was a vet who had left his practice to pursue entrepreneurial opportunities. He did not have any legal or financial qualifications or expertise but was involved with a potential project with Time Technology in relation to internet betting software. There was not the appropriate legislation in the UK at the time and there were few jurisdictions which allowed internet betting. The Bahamas was one such jurisdiction.

342. On 12 September 1996, James Cowper sent a fax to Stephen Fisher at SJA asking a series of questions "before Counsel is approached" in relation to an International Business Company being set up in the Bahamas. The answers provided on a fax with the header date of 24 September 1996 included confirmation that "Bahamas is the chosen tax haven", "an IBC is the chosen vehicle with non residential status", and "profits of the company will remain in the Bahamas for the foreseeable future, but obviously loans will be paid back ASAP."

KPMG advice on Gibraltar options (1997).

343. In 1997 James Cowper suggested to Stephen Fisher that advice was obtained from KPMG in relation to the setting up of a branch in Gibraltar. Stephen Fisher agreed to the suggestion and paid for the advice. The report was titled "Notes on the Corporation Tax consequences of operating from a Gibraltarian based business." The "Aim" is stated to be "To advise the shareholders of [SJA] of the Corporation Tax consequences of setting up an off-shore betting business and to determine the preferred vehicle through which to operate". Under the heading of "Business of the company" it was stated:

> "Primarily it is intended that this business will obtain a gaming licence in Gibraltar to enable it to set up a web site for use by non UK residents to place bets over the Internet. The secondary purpose is to provide tele-betting facilities for non UK customers…"

344. The report outlined 3 main options and set out the tax pros and cons of each, 1) a Gibraltarian branch of SJA, 2) a Gibraltarian subsidiary of SJA, 3) a Gibraltarian company owned by a) an off-shore trust, b) a Gibraltarian 1992 company c) the UK shareholders of SJA individually d) nominees on behalf of SJA.

Instructions to David Oliver QC and advice on betting duty (August 1999)

345. The instructions to counsel were prepared by James Cowper on 9 August 1999. David Oliver QC gave his advice in a written opinion dated 27 August 1999. The instructions sought advice on the implications of the Victor Chandler judgment of the High Court and whether it could have direct application to SJA given SJA had a branch whereas Victor Chandler was stated to be a company established in Gibraltar. The instructions state under the heading "The intentions of [SJA]" that "SJA on the strength of this judgment wishes to commission Teletext and Skytext pages as a further means of advertising its Gibraltarian betting operation". The instructions state that if the judgment was not considered to extend to the branch then "consideration will be given to setting up a separate company to run the operation from Gibraltar."

346. The opinion pointed out "the statutory constraints placed upon a bookmaker offering services from outside the United Kingdom…are currently contained in s9 [BGDA]" and attached a copy of the section. After discussing the s9 prohibitions the view was expressed that:

> "…in order to be sure of compliance with these prohibitions, it is in the highest degree desirable to achieve as clean and clear a separation as possible between the United Kingdom aspects of an organisation's relevant betting operations, and those aspects conducted off-shore…For this purpose, by far and away the most efficacious structure to is to conduct off-shore betting operations through a corporate entity entirely separate from the UK company …The most satisfactory structure is …that of a company indirectly controlled by, but not owned by the shareholders of [SJA]… but the option of a Gibraltarian company owned not by the [SJA] but by [SJA's] shareholders, would probably be only marginally less acceptable."

347. The opinion went on to warn that if SJA continued to operate under its present structure and extended its operations to UK residents it would expose SJA and its directors to serious risks of infringements of the s9 provisions which include both fines and imprisonment."

Instructions to David Oliver QC and advice on application of BGDA (20 January 2000).

348. The instructions (undated) were drafted by Biddle. The conference took place on 19 January 2000. The note of conference was drafted by Biddle (Andrew Mashraf) and dated 20 January 2000. The instructions enclosed draft sales and management agreements between SJA and SJG. The instructions reported that SJG was a newly formed company formed as a result of counsel's advice and that the likely shareholders would be Peter Fisher, Stephen Fisher, Anne Fisher and Dianne Fisher. Advice was sought on whether SJA could inform its customers of the sale to SJG, whether SJG could have an administrative office in the UK and provision of pricing from SJG to SJA.

349. Counsel's advice gave a suggestion for how customers could be informed (a letter in the form of a press announcement), it advised on the risks of SJG setting up an office in the UK, and following a point raised at the conference about the effective date of the sale and management agreement, it advised that the date should be the current date. It was agreed the whole of SJA's telephone betting business would be transferred with effect from 29 February 2000.

Instructions to Kevin Prosser QC and advice on direct tax / s739 (20 January 2000).

350. The instructions were dated 17 January 2000 and were prepared by James Cowper. They gave background including the August 1999 advice of David Oliver QC. They referred to SJG and stated that "it is intended the Gibraltar company will not be resident in the UK for the purposes of UK corporation tax, but will be managed

and controlled in Gibraltar. The instructions include the following in relation to motive:

> "There is no tax avoidance motive, save that of having to protect the market position of the business by no paying betting duties, which are payable by similar operations. As demonstrated above, the UK business is seriously contracting, whilst there is an increasing move for customers to deal with Gibraltar providers."

351. In a section marked "areas of concern" the instructions contained bullets which included –

> "Will SGL [*the abbreviation used for SJG*] be treated as non-resident for the purposes of UK corporation tax?" and
>
> - "Should S D Fisher act as a consultant, or will this bring the company within the corporation tax net?" and also
>
> - "Would it be beneficial and appropriate for SGL to be managed and controlled from the UK for the purposes of corporation tax?"

352. From the note of the conference we note the following. In relation to company residence the advice stressed the importance of differentiating between conducting a business from the UK and central management and control of the company's business being conducted so that the company was resident in the UK. Advice was given that Stephen Fisher should not be a shadow director and also that policy decisions should not be made in the UK because then the company would be assessed to profits in the UK, and given a tax credit for any tax paid in Gibraltar. The rate in Gibraltar was considerably less than that in the UK. In relation to a proposed consultancy agreement Stephen Fisher was advised that advice given through the consultancy agreement must be given in Gibraltar. Counsel advised that the valuation of the businesses being disposed of, (the Gibraltar business with overseas customers and the UK business with UK customers) should be carried out by a specialist independent valuer.

353. On "ownership structure" counsel advised that SJG should have a credible share capital i.e. issued share capital between £25,000 and £50,000 rather than be a £100 company. He suggested putting an interest in possession trust on top to keep matters more flexible for capital gains on an exit. This would be more provocative to the Revenue, but a trust would provide more opportunity for planning.

354. On "Residence and Extraction of Profits" it was stated that "the Fishers do not want to be non resident for 5 years, although they are prepared to be available for one year in order to take income free of UK income tax.

355. Stephen Fisher made a suggestion whether his daughter could be non-resident for a year, and then takes either salary or dividend and then give cash to UK members of the family. Counsel advised against this as there could be a deemed settlement in favour of the UK members of the family.

356. Stephen Fisher also asked "If I cannot be a director can I be a consultant?"

357. Counsel suggested separate classes of shares for each family member, so they could take dividends separately. Provided that each class only received their own share of reserves and details were kept of the share of reserves each shareholder received the Revenue could not deem a settlement. The advice was that assuming the shareholder was non-resident, then it could not be attacked by the UK Revenue.

Correspondence and meetings with HMCE

358. On 3 October 1997 a meeting between Neil Owen of James Cowper and Sarah Bell at HMCE's regional head office in Reading took place. Neil Owen prepared the note of meeting. The possibility of having a Gibraltarian branch with procedures in place to ensure no bets were taken from UK residents was raised. Further consultation with HMCE policy was required.

359. On 22 December 1997, Neil Owen met again with Sarah Bell and Mike Birch of HMCE to discuss the proposals regarding setting up a branch in Gibraltar. Stephen Fisher and Peter Fisher attended too. The note prepared by Sarah Bell refers to the following proposal being agreed:

> "it was reiterated that our only stipulation would be that there could be no advertising of the service in the UK and that controls must be in place to ensure UK residents could not participate."

360. On 21 January 1998 James Cowper wrote to Sarah Bell at HMCE stating SJA was committed to ensuring no UK advertising took place, and to putting all reasonable controls in place to ensure that UK residents could not use the service.

361. On 20 February 1998 Sarah Bell replied confirming HMCE's criteria would be met by SJA's proposals to ensure there would be no advertising of the service in the UK and the proposed controls to ensure that bets could not be accepted by UK residents.

362. On 14 September 1998 a meeting took place between Sarah Bell and Sue Gauld of HMCE and Stephen Fisher and Peter Fisher. The notes indicate Sarah Bell expressed the view that further doubt had been cast on whether SJA should have set up as a separate legal entity. Stephen Fisher is reported as saying he was of the view SJA could trade as a branch. In his evidence he disputed the accuracy of some of this note but not the suggestion that HMCE were concerned as to whether a separate legal entity was needed.

363. On 16 September 1998 Sarah Gauld (HMCE) wrote to SJA saying she had consulted with colleagues in Headquarters who had confirmed that the betting operation in Gibraltar had to be set up as a separate legal entity. Stephen Fisher says he contacted Neil Owen at James Cowper who said HMCE were wrong as long as it could be guaranteed the branch were not taking UK bets.

364. James Cowper replied to HMCE's policy unit on 21 October 1998 expressing concern that the 16 September 1998 letter was contrary to what HMCE had said

before. James Cowper's letter set out the view that duty would not be payable where the bet was placed with the Gibraltar branch by a person outside the UK.

365. HMCE's reply to James Cowper on 2 November 1998 included the following explanation:

> "General betting duty is charged on off-course bets made with a bookmaker in the United Kingdom…"Made" must refer to the bookmaker entering into a wagering contract. Where the contract is made is a question of fact. In the case of a corporation with more than one place of business bets may be made at each of those places of business.
>
> In this case your client appears to have two places of business, one in the UK and one in Gibraltar. The latter has effectively been established as a separate trading entity. Having established a separate branch in Gibraltar it will be a question of fact as to whether punters are placing bets with that branch. Any such bets placed with that bookmaker will not incur a liability to generally betting duty.
>
> For the sake of completeness I would point out there are restrictions relating to overseas betting. These are contained in section 9 of the Betting and Gaming Duties Act 1981…you may wish to bring these to your client's attention if he is not already aware of them."

366. On 7 July 1999 Stephen Fisher wrote to Frank Tucker, policy manager at HMCE to inform him:

> "we are unable to continue our voluntary undertaking not to accept business from UK residents at our Gibraltar office…our moving to Gibraltar will not only mean the loss of £3.5million in GBD, but also a decline in horserace levy, corporation tax, income tax contributions and the loss of 45 jobs. We strongly urge you to convey our feelings to your Minister…"

Newspaper articles and Victor Chandler decision / BOLA (Betting Office Licensees Association) representations

367. In 1998, BOLA, an organisation which Stephen Fisher was a vice-chair of, was making representations warning the government of the threat posed by high betting duties in the UK and of off-shore betting.

368. Victor Chandler's move generated a lot of publicity, it was reported on Sky News and was reported extensively in the press including in the Racing Post.

369. There were numerous articles during May to July 1999 on Victor Chandler's Gibraltar operation. Stephen Fisher along with others in the industry made up a deputation from BOLA to meet the financial secretary to the Treasury to discuss their concerns on 20 July 1999.

370. On 14 May 1999 an article in Racing Post entitled "Revolution" reported that "Punters in Britain will be able to bet tax-free by telephone from Monday after a

ground-breaking initiative from independent bookmakers Victor Chandler". The article went on to say that Victor Chandler would be moving its "entire telephone-betting business to the tax haven of Gibraltar" and that as a result Victor Chandler would be able to "offer tax-free betting to their telephone clients, who will now be able to ring a freephone number in Gibraltar and place bets on horse-racing and other sports without paying any betting duty". The article mentioned that Victor Chandler's clients had been informed that Victor Chandler Credit Betting Limited had been sold to "Victor Chandler International, incorporated in Gibraltar".

Was betting duty avoidance the purpose or one of the purposes of the transfer?

Stephen Fisher – findings of fact on sources of knowledge, awareness and understanding

General

371. In the period 1997 to 2001 Stephen Fisher read the Racing Post every day catching up on previous editions if he was abroad and was particularly interested in reporting on the industry. He would also read the Mail on Sunday.

372. As a vice-chair of BOLA he was aware of the representations they were making to government.

373. Another source of knowledge would be information that Peter Fisher had as Stephen Fisher had regular business discussions with Peter Fisher.

374. The evidence Peter Fisher gave as to the general approach he and his father took to dealing with advisers, instructions to counsel, and documents sent on SJA's behalf suggested that they took a slightly more active role than Stephen Fisher's evidence suggested. While Peter Fisher suggested they would have a general discussion with their advisers, that they would review correspondence, approve it, or make amendments, Stephen Fisher's evidence was more equivocal in that he said that in relation to his dealing with James Cowper he would sometimes see letters and sometimes not and that having had a discussion with them he would leave it to them to correspond with HMCE. We think it is likely that professional advisers would a matter of general client care forward correspondence sent on the client's behalf than not and that Stephen Fisher would have seen their letters and advice. We accept however that Stephen Fisher would not necessarily have reviewed and approved or else amended correspondence in draft before it was sent.

Specific

Advice

375. In relation to the various pieces of advice we find the following. Stephen Fisher did have the Bet on the Net advice in relation to setting up in the Bahamas sent to him. We accept, however that he did not recollect it, and that it would not have been in his mind at the time of the transfer.

376. In relation to the KPMG advice on different options for setting up in Gibraltar this advice was sent to Stephen Fisher on 19 July 1999. He read and thought he understood this advice.

377. In relation to the instructions to David Oliver QC and the advice given in August 1999 we think it is more likely than not that the instructions and advice would have been shared with Stephen Fisher. We find accordingly on the balance of probabilities that he did see the instructions and advice.

378. In relation to the later set of instructions to David Oliver QC on the application of BGDA (20 January 2000) Stephen Fisher says Biddles worked with James Lewis or Neil Owen of James Cowper on the points for counsel to consider. He could not remember whether he was asked questions about it as it was a long time ago. As above it seems unlikely to us that Stephen Fisher's professional advisers would not have sent him a copy of the instructions. We find on the balance of probability that he was aware of the instructions. He attended the conference on 19 January 2000 in person and was aware of the advice given in that conference.

379. In relation to the instructions to Kevin Prosser QC and the advice on direct tax / s739 (20 January 2000) we find on the balance of probabilities that Stephen Fisher saw a copy of the instructions before they went out but accept Stephen Fisher's evidence that he did not input into drafting them. His evidence, which we accept was that Neil Owen was responsible for drafting areas of concern. Stephen Fisher attended the conference with counsel in person and asked questions.

Dealings with HMCE

380. James Cowper replied to HMCE's policy unit on 21 October 1998 expressing concern that the 16 September 1998 letter was contrary to what HMCE had said before. James Cowper's letter sets out the view that duty would not be payable where the bet was placed with the Gibraltar branch by a person outside the UK. Stephen Fisher says he was more concerned with HMCE saying they were breaking the law if they operated as a branch at all.

381. We accept this concern was genuine in Stephen Fisher's mind even though it is not consistent with the documents at the time. (There was no mention of a criminal sanction in relation to non-UK bets carried out by the branch and no mention anywhere in the letter of fears of a criminal sanction applying.) The question though is not what someone reading the letter objectively would conclude from it but what Stephen Fisher thought.

382. In relation to HMCE's reply to James Cowper on 2 November 1998 this would have signalled, that betting with the branch would be permissible, but that the bet had to be made with the branch. The reference to the criminal sanction in s9 BGDA would we think, have had the effect of alerting Stephen Fisher to the need to be exercise care with the dealings of the branch. The reference in the letter to both "separate trading entity" and "separate branch" would be apt to cause confusion.

383. The message that would be taken away and which was taken away by Stephen Fisher (albeit with a certain lack of confidence given HMCE's changes in position) was that non-UK sourced bets with a branch of a UK company were permissible. There was no mention however of what the situation would be in relation to UK sourced bets. But by implication the fact there was a voluntary undertaking not to take UK bets would we think have meant it was understood that taking UK bets by SJA's branch would not be something which was sanctioned by HMCE.

384. Stephen Fisher says he thought UK sourced bets would need a separate legal entity as he thought otherwise he would be breaking the law. Again while this is not apparent from correspondence and it would not be reasonable to think that having a separate legal entity would sidestep any difficulties with advertising in the UK we find Stephen Fisher did genuinely believe that UK sourced bets would need to be taken by a separate legal entity. It is consistent with his concerns around s9(1)(a) (conducting in Great Britain any business or agency for the negotiation, receipt or transmission of bets). It is consistent with there being a voluntary undertaking in place not to transact UK sourced bets through SJA's branch.

385. In relation to the 7 July 1999 letter where Stephen Fisher retracted from the voluntary undertaking, it is on the face of this ambiguous whether this is talking about bets being taken by the SJA branch or in anticipation of SJG being set up (SJG was incorporated on 22 July 1999). On balance the reference to corporation tax being lost and to "taking the business overseas" is more consistent with an intention for another corporate entity being set up to take UK bets. It is consistent with Stephen Fisher thinking the branch of a UK company could not take UK bets without there being criminal implications but that a corporate entity could. The appellant would not, we think, be writing to HMCE to tell them he was proposing to do something which he thought ran the risk of a criminal sanction.

386. The upshot of the correspondence is that it would have appeared to Stephen Fisher that it was problematic to take UK bets from SJA's branch and that he thought that if UK bets were to be taken this would require a separate legal entity to SJA.

Newspaper articles and Victor Chandler decision

387. From the article in the Racing Post of 14 May 1999 (see [370] above) it would be apparent to Stephen Fisher that Victor Chandler was running its operation via a Gibraltar corporate entity rather than a branch.

388. On 4 June 1999 from an article in the Racing Post Stephen Fisher was aware of the Victor Chandler court proceedings.

389. On 16 July 1999 when the Victor Chandler decision was given by the High Court, Stephen Fisher understood that Victor Chandler's advertising of its Gibraltarian operation on teletext would not be a breach of s9 BGDA.

390. Stephen Fisher was aware of all the coverage in the Racing Post on Victor Chandler's operation in Gibraltar and the fact that punters could bet without having to

pay the 9% surcharge. He was quoted in an article in the Racing Post dated 14 May 1999 entitled "Reaction varied to effect on gambling industry".

391. On 6 August 1999 Stephen Fisher is quoted as saying "As soon as the teletext judgement for Victor Chandler came through last month, we felt we had no option but to follow suit, just to protect our business."

Stephen Fisher's knowledge of betting duty / s9 BGDA

392. From Stephen Fisher's evidence on what he thought at the relevant time we find the following.

393. By July 1999 it became clear to him that advances in technology meant it was no longer going to be possible for the UK government to prevent overseas bookmakers from taking tax free bets from UK customers.

394. In early July 1999 he discussed with Peter Fisher the reality that they would have to take bets from UK residents via Gibraltar.

395. Stephen Fisher's understanding was that where the bet was not struck in the UK it was not liable to duty. His understanding was that the place where the bet was struck and where the contract was concluded depended on where the bet was entered into the database.

396. He knew that the betting duty chargeable on bets in Gibraltar was far lower than the UK.

397. His evidence that the decision to set up SJG and to transfer business to it was a purely business decision which had nothing to do with saving UK tax goes to the heart of the issue in dispute and we deal with this in the discussion section below.

Discussion – Stephen Fisher's subjective purpose

398. The crux of the issue between the parties is whether Stephen Fisher's purpose was saving the business and not saving betting duty as he argues, or whether avoiding betting duty was one of the purposes of the transfer as HMRC argue. Before dealing with that it is necessary to summarise what we think Stephen Fisher was aware of in relation to betting duty liability and the transfer.

399. His understanding of betting duty was that if a bet was struck in Gibraltar (the contract was concluded there and entered into a database there) then there would not be any liability to UK betting duty.

400. He knew that Victor Chandler could take bets from the UK in Gibraltar more competitively and that the reason for this was not that Victor Chandler was absorbing the cost of UK betting duty but because of the bets taken there being subject to Gibraltar's more favourable betting duty regime.

401. He had this knowledge from press articles which mentioned duty free betting in Gibraltar by Victor Chandler.

402. As well as knowing that betting duty was lower in Gibraltar he knew that the lower betting duty was *the reason for* bets being taken there (as opposed to some other reason.)

403. He knew his punters were sensitive to price, and that betting duty liability was a key determinant of the price that could be offered to punters. His evidence was that he had to "look somewhere where we could legally trade, where customers were going to bet with us because duty was lower than in the UK" (see below at [408]).

404. He knew that moving off-shore and taking UK bets there would not involve accounting for betting duty.

405. He appreciated that the move of SJA's telebetting business to Gibraltar was because existing punters would continue to bet but these bets could be taken without having to account for betting duty (and without therefore having to charge the punter the price they would have paid if the bets had been taken in the UK).

406. However pausing there, as discussed above, simply knowing that a particular tax effect will follow from someone's action does not mean that achieving that tax effect is the person's purpose. It has to be asked what were the reasons for transferring the business to Gibraltar?

407. His evidence was that the decision to set up SJG and to transfer business to it was a purely business decision which had nothing to do with saving UK tax.

408. In the context of questions on betting duty it was put to Stephen Fisher in cross-examination that Stephen Fisher had to structure his business in such a way that the customer did not have to pay tax. Stephen Fisher gave the following answer which HMRC rely on:

> "I had to structure the business in way that the customer would place his bets with me. I could not structure the bet – I could not stand the tax in the UK. I have got two options: close the business or find somewhere else to carry on. Legally carry on. What am I going to do? I am going to look for the opportunity."…
>
> "…I had to look somewhere where we could legally trade, where customers were going to bet with us because the duty was lower than the UK."

409. Here then is the nub of the issue. Stephen Fisher says his purpose was to save the business and not to save tax.

410. We do not agree. We do not see how it is possible on the facts to say on the one hand that the purpose was to save the business but not to save betting duty.

411. To say that he only had the purpose of saving the business and not of saving betting duty would, we think, require his mind to be consumed with wanting to save

the business yet at the same time to be oblivious to the betting duty related threat to business survival and the betting duty related means by which the business was to be saved. That level of mental compartmentalisation simply does not tally with the facts of what Stephen Fisher did know, including his knowledge as shown by the answer he gave in cross-examination and with how he behaved.

412. By way of example Stephen Fisher's letter of 7 July 1999 to HMCE saying the voluntary undertaking was no longer to be honoured and which asked for the representations to be passed on to the minister, when viewed against the backdrop of BOLA representations having been made warning of high betting duties in the UK of which Stephen Fisher was aware (see [367] above) was, we think, written in the forlorn hope that the UK would lower betting duty in order that bookmakers such as SJA could stay. We accept that he would far rather have kept the business in the UK but in his view he could only do this if UK duty rates were cut. Stephen Fisher clearly knew the rate of betting duty was a key factor in the decision to move off-shore. There was no suggestion that SJA would be moving off-shore and would still be paying UK betting duty.

413. Stephen Fisher knew it was fundamental to saving the business that the move was to a jurisdiction which allowed betting to be carried on and where the betting duty was lower than the UK.

414. The findings on what he knew were entirely consistent with the fact he was a seasoned business person who had built up his livelihood from bookmaking. He was well able to, and in our view did, fully understand that the "the threat from offshore" turned on the fact that bets taken offshore in certain jurisdictions such as Gibraltar would result in a lower liability than if they were taken in the UK and subject to UK betting duty.

Ultimate purpose of saving business precludes tax reduction purpose?

415. The fact that saving tax was a means to achieve the stated purpose (business survival) distinguishes this situation from the one in *Carvill* where the tax saving was a consequence to the stated purpose. In *Carvill* the underlying or ultimate purpose to finding a territory which was perceived to be "neutral" to court a certain business sector would presumably have been to have a more successful business than would otherwise be the case. The means by which that outcome was achieved was not dependent on the tax saving. The tax saving was a consequence rather than a means to achieving the intended objective.

416. Saving the business may have been the ultimate purpose, but in our view it does not follow that the means which further that ultimate purpose are precluded from being purposes in their own right. It is unlikely that a person wants to reduce taxes or avoid taxes as an end in itself. An intention to reduce, or avoid taxes could virtually always be reformulated as an intention to maximise profits, to reduce losses, or indeed to stop a business going under. If it were right that the issue was whether someone's ultimate or underlying purpose was avoidance of tax it would be a very narrow scope of transfer which would be captured because it is unlikely to be the case that all

someone was interested in was not paying tax for the sake of not paying tax rather than the beneficial financial consequences of that (or beyond that the purposes they might have in mind for using the financial benefit).

417. Equally where someone has been found to have a purpose which is non tax related (such as the one in *Carvill* of looking for a neutral territory to attract business from reinsurance brokers) that too could no doubt be restated as having an ultimate purpose of increasing profitability. Stating that a business person has made a transfer because they want to increase profit, minimise losses, or save their business is stating what self-evidently any business person would want to do. This is a further reason why it cannot have been intended that the inquiry is as to a person's ultimate purpose because it would not serve to distinguish between cases where that result arises for reasons of tax and those where it does not (such as in *Carvill*).

418. It cannot be the case that just because tax avoidance will likely have an ultimate objective of financial benefit that the tax avoidance by which that objective is achieved is then ignored.

Was reducing betting duty the purpose or one of the purposes?

419. We return to the question above at [289] (which at this stage in order to distinguish tax reasons from non-tax reasons we have reformulated in terms of "reduction" rather than avoidance of tax): "Was the purpose of reducing liability to betting duty the purpose or one of the purposes of the transfer to Gibraltar?" The answer in our view is that reduction of betting duty was patently a purpose of the transfer.

420. Stephen Fisher's denial that there was a tax reduction purpose is we think based on the misconception on his part that because he wanted to save the business as an ultimate goal this precluded the means by which that goal was to be achieved from being a purpose too.

421. We accept Stephen Fisher genuinely believed the move was necessary to save the business, but that did not somehow oust his purpose in moving to reduce betting duty. Rather, we think he fully appreciated that it was fundamental to saving the business that the move was to a jurisdiction where the duty charged would be significantly less.

422. As indicated above at [289] the fact that an appellant had a tax reduction purpose does not mean the motive defence is not available. We have to consider whether *avoidance* of betting duty was the purpose or one of Stephen Fisher's purposes.

Was Stephen Fisher's subjective purpose the avoidance of betting duty (as opposed to the reduction or mitigation of betting duty)?

423. Accepting bets from UK customers was of course legally permissible. However the fact that what Stephen Fisher wanted to do was legally permissible under the legislation can be put to one side as both avoidance and mitigation are legal.

424. Taking account of Stephen Fisher's evidence, what he said and how he behaved our conclusion is that Stephen Fisher's purpose was avoiding rather than mitigating betting duty for the following reasons.

425. The retraction of the voluntary undertaking not to take bets from UK customers must, we think, have signalled to Stephen Fisher that a line was being crossed in relation to accepting bets from the UK, and that they were doing something which HMCE did not want them to do (otherwise why would HMCE have asked for controls on bets being taken from UK residents?)

426. His participation in efforts to seek to persuade the government to cut UK duty and his hope that UK duty would be cut suggests that he must have known that it was not an intended consequence of the legislation that overseas bookmakers should be allowed to take bets from UK residents without liability for UK betting duty. If it was an intended consequence why would he have thought that the government would be concerned about it?

427. His own evidence is that it was clear to him that advances in technology meant the UK government could not prevent overseas bookmakers from taking tax free bets from UK bookmakers. That suggests that it would have been apparent to him that that was not a desired consequence of the betting duty legislation even if it were legal for such bookmakers to take bets in this way.

428. Although at that point in time Stephen Fisher would have been aware that the *Victor Chandler* High Court decision allowed advertising by teletext, we do not think he can have taken this as meaning the legislation intended bets to be taken abroad. It just meant that at that point in time, advertising by teletext was not subject to s9. It did not detract from the general scheme which would have been apparent that taking UK bets from abroad was not something that was being encouraged by the betting duty legislation.

429. At best Stephen Fisher could have thought it was permissible to take UK bets if (despite having no UK presence and despite there being no UK advertising) where those bets were placed with an overseas bookmaker. By contrast the whole purpose of the transfer was to be able to make use of existing customers who would not necessarily need to have been attracted in by advertising. The plan was not about seeing whether new UK customers might happen to find out about SJG and place a bet with them. Advice was sought from David Oliver QC on various possibilities for notifying these existing customers of the move to Gibraltar and the telephone number of SJG without falling foul of the advertising prohibition. The assets which were transferred as part of the business transfer included the database of SJA's telebetting customers and the freephone telephone numbers available for SJA's customers. It was

not that assets which would enable SJG to attract new UK or other customers were being transferred, rather it was those assets which would enable SJG to retain SJA's existing customers which included its UK customers.

430. Taking bets from existing UK customers who would otherwise have bet in the UK was (legal) avoidance of betting duty. We think Stephen Fisher appreciated that by effecting a transfer in order that such bets could be taken without liability to UK betting duty this was not mitigation of betting duty. Albeit reluctantly and thinking there was no alternative way to save the business, he was seeking the outcome that bets from existing UK customers would be taken in Gibraltar without being liable to UK betting duty. Our conclusion is that avoidance of betting duty was from his point of view a purpose for which the transfer to Gibraltar was made.

Relevance of s9 BGDA concerns

431. In the context of the issue of whether betting duty avoidance was one of Stephen Fisher's purpose, we agree with HMRC that the argument that his purpose was to avoid s9 issues does not take the matter any further. The s9 issues only arose in the first place because of the perceived need to write bets with punters in the UK from overseas. If s9 was the concern, the bets would have continued to be written in the UK, or steps would be put in place to not take UK bets. If there had not been the betting duty avoidance there would not have been a s9 issue. On the facts it is plainly the case that Stephen Fisher's mind was not so consumed with an all encompassing fear of s9 that his desire that bets could be taken without UK betting duty being chargeable was overridden. We will however need to return to the s9 argument because the appellants argue it is relevant in the context of whether corporation tax avoidance was the purpose or one of the purposes in setting up in Gibraltar (which we deal with at [462] onwards below).

Conclusion on Stephen Fisher's purpose in relation to first part of the motive defence (s741(a) ICTA 1988)

432. The appellant must show that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer was made. The defence will not apply if even one of the purposes of the transfer was tax avoidance. In relation to our conclusion on whether this part of the motive defence is satisfied with respect to Stephen Fisher's subjective purpose our conclusion is that it is not. In making the transfer Stephen Fisher had a purpose of avoiding betting duty.

Peter Fisher – findings of fact on sources, knowledge and beliefs

433. Peter Fisher worked closely with and had regular discussions with Stephen Fisher. Peter Fisher had similar but not identical awareness of various matters to his father.

434. He browsed the Racing Post almost on a daily basis. He was "absolutely aware" of an article there on 14 May 1999 announcing Victor Chandler's move to Gibraltar entitled "Revolution" (the detail of which is set out at [370] above).

435. His general approach in relation to advisers and in particular his involvement with instructions to counsel, and documents sent on SJA's behalf was that he and Stephen Fisher would have a general discussion with advisers, they would review it, okay it, or make amendments.

436. In relation to the "Bet on the net" Bahamas advice Peter Fisher was involved in the background. He was 25/26 at the time and was giving ideas to his father. While he was well aware of the advice at the time when the advice was first produced we find it was not at the forefront of Peter Fisher's mind in 1999. It served to make him aware that different jurisdictions had different regimes for betting regulation and betting duty.

437. In relation to the KPMG advice on Gibraltar options of (1997) Peter Fisher told us he treated the document with "contempt" as he did not regard it as value for money. He had just needed to know the branch and subsidiary options. He would have read and understood the document at the time and would we think have been aware of the broad differences in corporation tax treatment as between branches and subsidiaries.

438. When the advice was re-sent to his father in 1999 there is no evidence to suggest Stephen Fisher discussed its contents with Peter Fisher. It was not new advice. Peter had already seen it before. There was no evidence to suggest Peter Fisher still had his copy of the advice or that if he did that he dug out the copy to refresh his knowledge of the contents. The contents of that advice were accordingly not at the forefront of Peter Fisher's mind in 1999.

Correspondence and meetings with HMCE

439. Peter Fisher attended the meeting with Sarah Bell (HMCE) on 14 September 1998. He recalled attending one or two meetings with HMCE and would certainly have read the correspondence with HMCE even if he was not directly involved in writing it and left that to James Cowper. We find that he did not discuss with HMCE what the position would be with regard to the SJA branch taking UK bets.

440. Peter Fisher's evidence in relation to the exchanges with HMCE was that the only means by which an overseas bookmaker could legally accept bets from UK residents was if it was as a separate legal entity from any UK based business.

441. While he concedes now that whatever the structure was, there was a factual issue of whether there was aiding of the betting going on in the UK we think that from being at the meeting and reading the correspondence he genuinely came to the view at the time that a separate entity would be required. Otherwise there would be a problem taking UK bets.

442. The HMCE correspondence did not specifically address the situation of UK bets being taken. But we think that Peter Fisher's understanding is consistent with what one might reasonably infer from what HMCE had said. The 22 December 1997 meeting and James Cowper's reply of 21 January 1998 (see [360] above) made it

clear HMCE's approval of the proposal was dependent on not just no advertising taking place but also there being controls in place to ensure UK residents could not use the service. Even when HMCE had by 2 November 1998 clarified that bets were made where they were placed and that if as a matter of fact bets were made outside the UK then no duty would be chargeable, there is no suggestion that the controls on not taking bets from the UK could be relaxed. Also, James Cowper had told Stephen Fisher (and we find Peter Fisher too) that HMCE's earlier letter was wrong as long as it could be guaranteed the branch were not taking UK bets.

443. We can see therefore how one might reasonably be left with the impression from the controls on bets with UK customers not being relaxed and James Cowper's advice, that although non-UK bets taken by a Gibraltar branch did not give rise to duty, bets were not to be undertaken from the UK by such a branch.

Peter Fisher's knowledge of how betting duty works

444. Peter Fisher did not differentiate between liability for betting duty and potential infringements of Section 9.

445. He told us:

> "in my mind at the time…[if] duty applied on those bets in the branch in Gibraltar and…you have conducted business from the UK you have breached Section 9 and therefore you are either going to jail or you pay duty on the bets that you have undertaken."

446. Although this is not the legal position, Peter Fisher is not a lawyer and we accept his evidence that this was his belief. HMCE's shifts in position would have done nothing to disabuse him of that misapprehension.

447. HMRC also refer to an answer Peter Fisher gave in cross-examination that he would not have considered paying the duty as it would have been "commercial, potentially, suicide". HMRC say this shows he had concerns about both betting duty liability and s9; that he thought he could go to HMCE and pay duty but did not want to do this because paying duty would be a huge amount of money. It seems to us that this answer is more of a reflection of what Peter Fisher thinks now. His answer actually suggests to us he did not even consider paying duty; it therefore did not enter his mind.

448. We also note that Peter Fisher's answer above is couched in the alternative. It seems to suggest that he thought payment of duty would be a penalty (an alternative to jail) if s9 was breached.

449. Peter Fisher told us he did not take advice before taking bets in July 1999. He said that when he decided he had to take bets from UK customers this was a "knee-jerk" reaction and that he supposed there was a reluctance to take advice in case the advice was that he was not to take UK bets.

450. He says he did not agree to sell the branch and business to avoid tax and that when he referred in his witness statement to not avoiding tax this included not avoiding betting duty.

Discussion –Peter Fisher – purpose of avoiding betting duty?

451. In relation to the relevance of the advice which was received to Peter Fisher's purpose we have found the Bahamas advice was not relevant; neither was the KPMG advice. From correspondence and meetings with HMCE we accept Peter Fisher could not really know what the position was with taking UK bets in Gibraltar as that question had not been raised. In the same way as his father, Peter Fisher would have been left with the impression that if the SJA branch were to take UK bets that would be problematic.

452. In our view it does not necessarily follow from the fact that Peter Fisher intermingled liability under s9 with payment of duty that a fear of s9 must mean there was duty avoidance because Peter Fisher could, we think, be seen as thinking that duty payment was a penalty.

453. However while he was concerned about the risk of criminal liability and wanted to minimise that risk, he knew, we think, that if that risk were avoided UK betting duty would not be payable on bets taken in Gibraltar from customers in the UK.

454. The issue was how to take such bets in a way which did not result in a risk of prosecution.

455. The s9 concerns were a consequence of an underlying objective of writing UK business out of a jurisdiction with lower betting duty. Were it not for that underlying objective the business would continue to be written in the UK and there would be no s9 concern.

456. Crucially, like Stephen Fisher, going to a jurisdiction where duty was less was a priority. It was, we think, inextricably linked in his mind with saving the business.

457. There was no point to going to Gibraltar unless the duty rate was lower. Peter Fisher did not consider absorbing the cost of the bet back in the UK because this was not commercially viable in his view given the gross margins (6%). Absorbing 6% would mean no money would be made on the bet.

458. The ultimate purpose was to do the same as what a competitor was doing to reduce betting duty liability that would otherwise be payable if the bets were struck in the UK in order to be able to not lose business to them and to make sure the business survived. The same analysis which applies to Stephen Fisher as to why an ultimate purpose of saving the business did not preclude a betting duty reduction purpose applies equally to Peter Fisher. Peter Fisher's own evidence that he did not have a tax avoidance purpose is vulnerable on the basis of the same assumptions that are highlighted for Stephen Fisher.

459. Further, for similar reasons as for Stephen Fisher we think Peter Fisher was aware that taking UK bets in Gibraltar was not an option being offered by the betting duty legislation that Parliament had enacted. (He was aware of the efforts to get the government to reduce duty but thought that they were moving too slowly. Why would he think the government would even be concerned to change the duty rate if off-shore betting with UK residents was an intended consequence of the legislation?).

460. The fact he did not think it exposed him to s9 liability and therefore in his mind to betting duty is not inconsistent with him knowing that (although legal) betting duty that was otherwise payable if the bets were struck in the UK was being avoided by taking the bets in Gibraltar. In any case Peter Fisher's reluctance to take advice indicates he had reservations over whether the way he was writing UK business through SJG (given in July he thought the transfer had gone through) was even legal. It is not consistent with him thinking that what he was doing was mitigating as opposed to avoiding betting duty.

Conclusion on Peter Fisher's purpose in relation to betting duty

461. The avoidance of betting duty was one of the purposes in making the transfer.

Was corporation tax avoidance the purpose or one of purposes of transfer?

462. The background findings of fact as to the appellants' knowledge are set out above at [371] to [397] (Stephen Fisher) and [433] to [493] (Peter Fisher).

463. The issue is whether setting up SJG and the transfer to it were motivated by corporation tax avoidance concerns as HMRC argue, or as the appellant argues because of a concern about breaching s9 BGDA.

464. The corporation tax avoidance is said to have taken place through the setting up of a non-resident company rather than a corporate entity that would be regarded as resident in the UK or a branch of the UK company.

Relevant time?

465. Before we consider what findings we can make as to what was in the appellants' minds at the relevant time there is an issue over what that relevant time is. The time impacts on which pieces of advice are relevant to look at. The appellants argue that given Stephen and Peter Fisher thought the transfer had happened in July 1999, the advice received after that date (in particular the Kevin Prosser QC advice) is not relevant.

466. This raises the question whether a subjective intention as to purpose is limited to looking at the actual time the transfer took place, or the time the appellant believed the transfer took place.

467. We note in any case that on the facts it appears to us that even if Peter Fisher and Stephen Fisher held a belief that the transfer had already happened in July 1999 this belief did not last.

468. We accept that Peter Fisher and Stephen Fisher believed that a transfer had happened in July 1999. In Peter Fisher's mind it was tied to getting betting license approval, and we accept as plausible that at the time he would have thought that an oral confirmation from Joe Mecano (who worked to the minister and was responsible for licensing) was sufficient to go ahead. It was a small jurisdiction; Stan James was a relatively big player and had prior dealings when getting the license originally. (Peter Fisher told us he had dealings with the Gibraltar finance minister in relation to the branch betting license for SJA).

469. Stephen Fisher's letter of 17 November 1999 to James Levy at J A Hassan & Partners discussing how the transfer should be described in the sale agreement suggest to us that he and Peter, through the regular discussions they had, must be taken to know that the transfer had not happened in July 1999.

470. We find therefore that Stephen Fisher and Peter Fisher knew the transfer had not happened by 17 November 1999 at the latest. Although it had not happened we accept they then thought a subsequent transfer could be backdated to July 1999. This view persisted until the conference with David Oliver QC on 20 January after which point Stephen Fisher and Peter Fisher were aware that the transfer was still to take place and that its effect would operate prospectively.

471. Therefore consideration of the Kevin Prosser QC advice is not knocked out just because Stephen and Peter Fisher believed the transfer had already happened because they later realised it had in their eyes not happened properly. The Kevin Prosser QC and David Oliver QC instructions and advice of January 2000 are therefore relevant to be considered.

Stephen Fisher's and Peter Fisher's awareness of corporation tax

472. From the letter Stephen Fisher wrote to HMCE in July 1999 setting out the implications of moving to Gibraltar (see [366] above) we find that Stephen Fisher and Peter Fisher (through his awareness of that letter) were aware of the corporation tax implications of moving the business to SJG. Stephen Fisher would have known, we think, at a high level the relevance of the concepts of central management and control from the 1997 KPMG advice he re-requested.

473. However we do not think Stephen Fisher would have placed any significant reliance on it. It was from 1997 and premised on non-UK business being transacted. Peter Fisher would have had basic awareness of those concepts having seen the advice the first time around. Both Stephen and Peter Fisher understood that corporation tax would be paid to Gibraltar and not the UK if the business was transferred to SJG.

474. Through seeing the instructions and attending the conference with Kevin Prosser QC the appellants would have had a more detailed knowledge of the corporation tax implications of what was proposed.

Fear of s9?

475. The relevant detail of the correspondence the appellants had with HMRCE is set out above at [358] onwards.

476. We accept the evidence of Stephen and Peter Fisher that they were concerned about breaching s9 BGDA. Even if it was legally not a problem it was a problem in their minds. We find it is credible that the appellants thought SJG needed to be set up to carry out the overseas bets with UK residents and that transfer of the business to the branch of SJA would not work as far as HMCE were concerned.

477. If the interactions with HMCE had suggested possible issues even when non-UK bets were being taken abroad, it is not surprising in the appellants' minds that there would be even more cause for concern with whether the activities undertaken overseas were sufficiently separate from the UK operation when taking UK bets. (See our conclusion at [443] above).

478. The appellants had a fear of breaching s9 in July 1999 when they started to take bets from UK residents. This was even more the case after the August 1999 advice from David Oliver QC. That advice (which suggested the most efficacious structure for off-shore betting would be "a corporate entity entirely separate from the UK company") would not have suggested to Stephen Fisher and Peter Fisher that they were being over-cautious by proposing to use SJG to transact such bets. There was no reason for Stephen Fisher and Peter Fisher to think there was another suitable way of being able to take bets from UK residents overseas which would not run into concerns about whether s9 had been complied with.

479. It is also consistent with them being aware through newspaper reports that Victor Chandler had structured its affairs in this way (see [370] above).

480. Victor Chandler had established a new company. There did not appear to be any indication that what Victor Chandler had done would render him liable to prosecution aside from the issue of whether teletext fell foul of the advertising prohibition. We can see why the appellants would have thought, that it was safer to conduct overseas betting through a separate entity overseas, than through a branch of a UK company (even if the legal position was more nuanced in looking to the fact of separation of activities whether this was through a branch or through a separate legal entity).

Relevance of taking advice

481. While Stephen and Peter Fisher were aware that transferring the telebetting business to SJG would result in no UK corporation tax liability on profits relating to such business we do not think this means they had a purpose of avoiding corporation tax in either setting up SJG or making the transfer to it.

482. From their point of view finding a way of keeping UK customers through being able to offer bets on which reduced duty was liable would we think be a far more pressing concern in July 1999 than avoiding corporation tax. We accept their evidence that customers were not loyal and that if only a small number of high rollers moved to Victor Chandler this would be disastrous for their telebetting business.

483. The driver for setting up SJG and the transfer of business to it was to take bets from UK residents in such a way that there would be no liability to UK betting duty but also in such a way that they did not fall foul of s9 BGDA.

484. The advice sought and received in relation to corporation tax did not alter the above. It sought to address the implications of a course of action which had already been selected. Whether the advice sought from Kevin Prosser QC was about how the company's affairs could be structured so as to avoid corporation tax or to do it in the most tax efficient way the purposes behind the setting up of SJG and the intention to transfer the telebetting business had already been fixed from the appellants' point of view.

485. The corporation tax considerations only came into play in our view once it was decided that the business would be transferred to a separate corporate entity based in Gibraltar and that decision had already been made when moves were put in place to set up SJG in the expectation that it would be used to transact bets with customers resident in the UK. SJG was incorporated on 22 July 1999, but Stephen and Peter Fisher were we think proceeding on the basis that it would be set up in order to take bets from UK residents by early July 1999 (see [385]).

486. In relation to the transfer in February 2000, given the advice that had been received from David Oliver QC in August 1999 in relation to betting duty the option of conducting the UK telebetting business through a branch of SJA would not have been on the table. We think that advice weighed heavily in the minds of Stephen and Peter Fisher. There was no question that the transfer was going to have to be to a separate Gibraltar company.

487. In relation to the Kevin Prosser QC instructions and advice it is understandable that having taken the decision to set up a Gibraltar company rather than use the branch Stephen and Peter Fisher and their advisors would recommend looking at what the implications were of that.

488. It does not indicate however that the purpose of moving offshore and in setting up SJG was to avoid corporation tax. UK corporation tax not being paid was consequence of transferring the business to a company which had been set up for other reasons. There was nothing on the evidence before us which indicated that Gibraltar had been selected as a jurisdiction to which to transfer the business to because of its more favourable corporation tax regime.

489. We accept Stephen Fisher's evidence that James Cowper said the appellants "should take tax advice before we go overseas so we did not do anything wrong" and

that Stephen Fisher agreed to this "because we wanted to ensure we did not do anything wrong".

490. Having come to the view that a separate entity in Gibraltar was required for betting duty legislation purposes (and knowing that UK corporation tax would not be payable on its profits) there was no obligation on the appellants' part to explore a scenario which would satisfy their betting duty concerns but which meant UK corporation tax would still be payable.

491. By the time Stephen and Peter Fisher knew more needed to be done to formalise the transfer (November 1999), the outstanding issue was one of backdating. There was no indication that it was being canvassed they go back to scratch and to thinking a transfer to the business branch was possible. They realised the transfer had not been effected, their intention was still to transfer the business to SJG. It was not as if they went back to the drawing board to think about who else the business was going to be transferred to.

492. The instructions to David Oliver QC (January 2000) with their query about the effective date of the transfer seem to us to assume that the transfer to SJG was going to be carried out and that there were no plans to transfer to another entity or to retain the business with SJA.

493. While other changes were made to the agreement in advance of it being finalised (see [77] above) there was nothing which suggested an intention to backtrack on the proposal to transfer to SJG.

Conclusion on corporation tax avoidance purpose

494. From Stephen Fisher's and Peter Fisher's points of view avoidance of corporation tax was not one of the purposes of the transfer or in setting up SJG. While it was a consequence of the transfer to SJG that lower rates of Gibraltar corporation tax would be payable rather than UK corporation tax this was not what motivated them to establish SJG or to effect the transfer to it. Rather their motivation was to not be liable to betting duty on bets taken from UK residents. In their mind this required the use of a separate Gibraltar company in order not to fall foul of the provisions of s9 BGDA.

Was the purpose or one of the purposes other income tax avoidance?

495. HMRC made submissions on the instructions to counsel and Kevin Prosser QC advice on direct tax / s739 (20 January 2000). HMRC submit, looking at the instructions to Mr Prosser, that it was in Stephen Fisher's mind that his daughter could be non-resident for a year and take either salary or dividend and give cash to UK members of the family. HMRC say this is in fact what happened except Dianne stayed non-resident for longer. She became non-resident, received over-excessive remuneration and made a loan to Stephen Fisher of £1million. The note of conference shows Stephen Fisher was putting forward his own ideas for tax avoidance.

496. The findings of fact are relevant to this argument are set out at below.

Dianne Fisher's role in business / salary / Peter Fisher's role

497. Dianne Fisher filled in the parts where Peter Fisher was weak: finance, customer service, Human Resources, and maintenance on the office itself. She would be someone who members of staff could go to if they had any issues or troubles. On the finance side she would enter figures from the day's trading. Peter Fisher worked with the betting side of business. He used to work full-time and was doing so in 2002-2003. Dianne Fisher was the only family member looking after business when business first started out. She was keen to go at the beginning unlike Peter Fisher. Peter Fisher did not go earlier because his children were at school in the UK and there was a reluctance to move. Peter Fisher says the fact Dianne Fisher was a shareholder was relevant to paying her a bonus.

498. Dianne Fisher received £1million salary in each of the two years 31 December 2001 and 31 December 2002. In 31 December 2001 she also received a bonus of £1million. The non-family directors received approximately £40,000 and £45,000 respectively. They were non-executive directors. One specialised in trading, one in operations, one in IT, one in finance and one was non-executive. Peter Fisher thought someone doing Dianne's job would maybe earn £100,000 p.a. He concedes the reason he did not receive salary was because he would have had to pay higher rates of tax.

499. After becoming non-resident, Peter Fisher took a salary that enabled him to buy a house for his family. The house which was bought by SJG across the border in Spain was for the purpose of relocating employees. When he lived there it was shared with up to four other people.

500. Peter Fisher and Dianne Fisher fall into the category of taxpayer for Gibraltarian tax purposes whereby they pay a fixed amount of income tax on the income declared to Gibraltar. Peter Fisher thought the amount was between £25,000 - £30,000 per year.

501. Stephen Fisher did not know about Dianne Fisher's salary, or Peter Fisher's salary apart from what he saw in the accounts. In April 2003 Stephen Fisher received a £1 million pound loan from Dianne Fisher to help buy a farm. He repaid the money to her when he sold the farm in December 2008.

Conclusion on whether Stephen Fisher and Peter Fisher had purpose of avoiding other income tax

502. While we have set out findings of fact on what happened after the transfer we think they are of limited relevance to the issue of the appellants' purposes at the time of the transfer. We do not think the setting up of SJG or the transfer to it were for income tax avoidance purposes. For the same reasons as in relation to corporation tax, we find the purpose of the transfer was to avoid betting duty and the reason for setting up SJG was to allay concerns about s9 BGDA concerns.

503. It was not one of the purposes of the transfer to avoid income tax. The income tax avoidance relied on SJG being a non-UK company. The reason SJG was set up as a non-UK company was, irrespective of whether the concerns were legally robust, because of Stephen Fisher's and Peter Fisher's perceived BGDA concerns.

504. The relevance of Stephen and Peter Fisher having taken tax advice which encompassed the implications for other income tax beforehand is we think simply a function of the tax situation being complex and reflects the fact that there are means by which different tax results can be achieved through planning.

505. We think it unlikely that Stephen Fisher's suggestion at the conference was a "throw away" comment as he suggested (it seems unlikely it would be recorded in a note of the conference if it was). Rather, it seemed to us that he was embarrassed about having made the suggestion and is now seeking to downplay it. However we see the suggestion in the context of Stephen Fisher investigating a possible option of something that might be done later. We think this option would at best have been seen by Stephen Fisher as a fringe benefit of a transfer to SJG that was going to happen rather than as a motivating factor for making the transfer to SJG. In fact it would have been clear to both Stephen and Peter Fisher that following through Stephen Fisher's suggestion was something which Counsel thought was inadvisable. It does not seem likely to us that they would, even if they had a purpose along the lines of the suggestion, have continued to hold on to that purpose in the face of such tax advice from counsel.

506. Any consideration of becoming non-resident was predicated on the fact that the transfer was going to happen. It was not a reason for the transfer. It was not in either Stephen Fisher's or Peter Fisher's view a purpose of the transfer.

Anne Fisher's purpose?

Imputation of motive to Anne Fisher from Stephen and Peter Fisher

507. HMRC argue that the fact that Anne Fisher procured the transfer jointly with the others is enough to enable it to be found that she had a tax avoidance motive. They argue that the Special Commissioner case of *Sally Ann Burns* supports looking to the motives of Stephen and Peter Fisher. Anne Fisher did not have any specific motive, she would go along with what Stephen and Peter decided.

508. The appellants note that in that case Ms Burns signed the transfer. She was not a quasi transferor. Under *Pratt* they say the motive defence cannot be sensibly applied where there are multiple shareholders. The appellants say for s741 to apply it is necessary to identify avoidance by the transferor.

509. We have of course disagreed with that argument above at [186] onwards above.

Tribunal's view on imputing motive to Anne on basis of Burns.

510. *Mrs Sally Ann Burns, Mrs Lisa Neil v CIR* [2009] STC (SCD) 165 is a Special Commissioner decision so is of persuasive value. We agree with the appellants it is distinguishable in that the two individuals to whom motives were imputed signed the transfer whereas Anne Fisher did not.

511. But in any case we would be cautious in adopting the proposition HMRC argue for given the reasoning for imputing the motive appeared to turn on the particular facts of that case and did not we think give rise to a wider point of principle.

512. At [39] the decision states:

> "The purpose for which the two girls [the appellants] effected the transactions was simply to do what their parents suggested and it seems appropriate to me to proceed on basis that the two girls effectively sought to achieve those purposes that influenced their parents".

513. It is not clear upon what basis it was thought appropriate to impute a motive. The fact that the provisions might be easy to avoid if the imputation is not made as HMRC argue is not a reason to make an inroad into the subjective test which is acknowledged to apply. If a subjective motive is required, we do not think we can deem a person to have such a motive just because otherwise the section would be easy to avoid. The fact that it is possible to take account of the actual motives in a just and reasonable apportionment (s744(1) ICTA 1988) might also suggest we should not be quick to impute a motive where there is not one in fact.

514. Returning to the question of what was the purpose for which the transfer was made that is a question which in our view needs to be looked at by taking into account the subjective intentions of each of the quasi transferors.

515. The fact that Anne Fisher did not have a motive means there is one less individual to consider. It does not mean there cannot be an avoidance motive, if that ultimately is found to be the motive for the transfer then it may be something which is taken account of in the apportionment of income.

Taking account of Stephen Fisher's / Peter Fisher's and Anne Fisher's purposes was the purpose or one of the purposes of the transfer avoidance of betting duty, avoidance of corporation tax or avoidance of other income tax?

516. Stephen Fisher's and Peter Fisher's motives point in the same direction. Anne Fisher did not have a motive. When we ask the question what was the purpose for which the transfer (or the associated operation of incorporating SJG) was made we find the following.

517. In relation to the first part of the defence we find that avoidance of betting duty was one of the purposes for which the transfer was made and for which the associated operation of incorporating SJG was performed. We are not satisfied however that

avoidance of corporation tax or other income tax was a purpose of the transfer (or the associated operation of incorporating SJG).

518. As for the associated operation of changing the share classes of SJG the appellants' case is that the above associated operations do not need to be considered on the basis of the case of *Herdman, Carvill,* and *Flynn* because they are not relevant associated operations.

519. It did not produce income. Income was already payable as a result of the transfer of the telebetting business. The issue of shares in four classes did not give anyone a new power to enjoy as the shareholders of SJG already had power to enjoy. (The appellants agree with RI 201 that the only relevant associated operations are those relating to production of income or the power to enjoy.)

520. We agree with the appellants. We do not therefore need to consider whether the motive defence applies to it.

Is the second part of Motive defence fulfilled?

Designed for avoidance purpose?

521. Subsection b) of the motive defence in s741 provides an alternative basis for the motive defence applying. It refers to two aspects which both need to be fulfilled in order for the motive defence under this subsection to apply :

> "…that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation."

522. Accordingly the issues which arise are whether the transaction was a bona fide commercial transaction and second whether the transfer and any associated operations were designed for the purpose of avoiding liability to taxation?

Facts

523. The agreement to transfer the telebetting business was drawn up by Biddle (see [76] above). At the conference with Kevin Prosser QC on 19 January 2000 which Stephen and Peter Fisher attended, advice was given that valuation of the businesses being disposed of should be carried out by a specialist independent valuer.

524. Biddle agreed to arrange this and they appointed Valuation Consulting. In a letter dated 29 February 2000, Tony Hindley of Valuation Consulting set out his opinion to Stephen Fisher at SJA of the likely value of the telebetting service carried on by SJA in the UK (the client database, the teletext advertising rights, and the freephone telephone number). The valuation was expressed to be in respect of UK CGT purposes and suggested a valuation of the assets in the order of £500,000. This was ascribed as follows to the assets (£395,000 (database), £100,000 (freephone numbers) and £5,000 (teletext rights)). These were the values which appeared in respect of these assets in the transfer agreement.

Parties' submissions

525. While HMRC say the transfer and associated operations were not bona fide commercial transactions for a number of reasons they do not say the transactions are not bona fide in the sense of being a sham. SJA and SJG were controlled by the same shareholders all of whom were close family members. The transaction was not an arms length transaction between unconnected parties and was not made on commercial terms. The sale could only be carried out in the manner in which it was because of the close connection between SJA and SJG.

526. The appellants argue HMRC's view of the test is too narrow and is not supported by the legislation. The appellants refer to *Carvill* at pg 166 where the Special Commissioner, after noting there was not much difference between the two parties about what constituted a bona fide commercial transaction decided the following the two meanings which were respectively whether the transaction was "any genuine transaction which implements or facilitates a business end" and a transaction which had to be "in furtherance of commerce, i.e. a trade or business".

Legal interpretation

527. In relation to the "designed for the purpose of avoiding liability to taxation" limb, according to *Carvill* this is to be ascertained by having regard to the main purpose and we see no reason not to adopt that position. Save for the gloss of the purpose of being a "main purpose" from *Carvill* we did not understand the parties to be putting forward arguments which distinguished between the purpose of the transfer being avoidance and the transfer being designed for the purpose of avoidance.

528. We agree with the appellants that the requirements HMRC seek to place on the bona fide commercial transaction test make it too narrow. The legislation for the time period we are concerned with does not make any reference to arms-length dealings. We see no reason not to follow the same approach as the Special Commissioner in *Carvill*.

529. We would note that while the "design for the purpose of avoidance" obviously looks to the purpose, the "commercial transaction" does not require that the main purpose of the transaction is commercial. The fact that there are two discrete aspects in b) to fulfil suggests that a transaction which had been designed with an avoidance purpose might nevertheless be a bona fide commercial transaction, and that conversely a transaction that was not designed for the avoidance of tax could not benefit from the defence if despite that it was not a bona fide commercial transaction (e.g. if it was a gift).

Application to the facts

530. HMRC say the purpose was to avoid the payment of betting duty and that cannot be a commercial purpose in the context of s739. The appellants say the purpose was to save the business and that is as commercial a purpose as you can get.

531. Also HMRC say the terms of the transaction did not take commercial form. It was a purely family transaction in the sense it was between two companies both wholly owned by the Fisher family. No-one was particularly concerned about the price being paid. There was no need for bargaining as there would be in an arms length transaction.

532. The appellants argue the valuation was commercial. The appellants wanted to do things the right way and took an independent valuation of the business.

Tribunal's views

533. We have specifically considered whether it the case that although betting duty avoidance was one purpose of the transfer (as we have found above) it was not the main purpose. Our conclusion however is that it was the main purpose.

534. There was simply no other reason (that was not a consequence of the betting duty avoidance purpose) for the transfer. It is inconceivable the transfer would have gone ahead were it not for the betting duty being lower in Gibraltar.

535. The purpose the appellants rely on as the main reason for the transfer was survival of the business. But this is in the context of betting duty avoidance being the means for survival. We doubt whether in examining whether an avoidance purpose was the main purpose one can go as far as relying on the consequence of a tax avoidance reason. It cannot be the intention of the legislation that someone who looks beyond the tax avoidance to the consequences of that can be allowed to supplant those consequences as their main purpose. If it were, such consequences would virtually always operate to stop a tax avoidance purpose being the main purpose. Except in the theoretical case where the goal for which the transfer was designed was to avoid tax for the sake of it without any concern for the benefits that would bring, this part of the motive defence would for practical purposes always be available.

536. The appellants do not therefore succeed on the motive defence.

537. The views which follow on whether the transaction was commercial are therefore not necessary for our decision and are made by way of observation.

538. We do not agree with the appellants that the transfer was as commercial a reason as there could be because it was about saving the business. It follows from the avoidance of tax, that profits that would otherwise be lower would be increased, that losses that would otherwise be lower would be reduced, and in extreme circumstances that a business that might otherwise fail because of losses due to tax might be saved. A commercial purpose must speak to something more than those things which follow from the avoidance of tax. It ought to relate to the non-tax means by which profits are maximised, losses reduced, or by which the business survives.

539. As a matter of fact it is true that there was not the negotiation between SJA and SJG that one might expect to see between two commercial entities operating at arms length. This reflected the common ownership by family members of the companies. It

was not that the Fishers did not care about the value but rather that they agreed to adopt the valuation given by an independent valuer.

540. Taking account of the law to be applied, these findings do not in our view mean that the transfer was not a commercial transaction (HMRC accept they were bona fide transactions.) As discussed above there is no requirement in the legislation or the case law we were referred to for the transaction to be at arms length and not between connected parties.

541. It is clear to us that the transaction was a "genuine transaction which implements or facilitates a business end" and a transaction which was "in furtherance of commerce, i.e. a trade or business".

542. We should be clear that there is in our view no difficulty or conflict between on the one hand saying the transaction was designed for the avoidance of tax, but on the other saying it was a bona fide commercial transaction. The fact that the transaction implemented or facilitated a business end (realising value for a business whose sustainability would otherwise be in serious doubt) does not mean that that was the main purpose for which the transaction was designed.

543. Therefore if we were wrong in our conclusion that the transfer was designed with the main purpose of betting duty avoidance in mind, then the motive defence would have succeeded as the transaction was a bona fide commercial one.

Relevance of other bookmakers also moving to Gibraltar

544. We appreciate that the Fishers were left in what must have been for them a desperate position when Victor Chandler moved to Gibraltar and that they could not see any viable alternative, if they wanted to save their business, to moving the telebetting business to Gibraltar too. In his witness statement Stephen Fisher says that he finds it very unfair that he is being taxed for doing what any sensible bookmaker would have done at the time.

545. Unfortunately for the appellants, in transferring assets abroad the TOAA charge applied and none of the available defences under the relevant legislation can be seen to apply on the facts. Subject to the outcome of the analysis on the European law issues which we shall come on to, there is no defence provided in the legislation that can be seen to apply the kind of situation the Fishers were in where they were operating in an industry of tight margins and high price sensitivity such that differences in betting duty would jeopardise the running of their business in the UK when competitors moved abroad to take advantage of lower betting duty. The fact other sensible bookmakers would have done the same thing is no defence under the relevant legislation.

546. Stephen Fisher also mentions that he finds it unfair that his competitors have not been taxed in the same way even though they all did the same thing. The issue of whether his competitors were in a similar situation and what if any tax assessments have been raised against them is not however something we can deal with in these

proceedings which concern the facts relating to the assessment against the appellants, and how the legislation applies to them.

Issue (2): The European Law arguments

547. By way of brief reminder this issue ultimately concerns whether, even if the appellants do not succeed on the domestic law arguments, the transfer of assets abroad (TOAA) legislation charge infringes the appellants' European law rights of freedom of establishment and freedom to provide services. So as to avoid infringing those rights the TOAA legislation must, the appellants argue, be disapplied or interpreted in conformity with those European law rights with the effect that the appellants succeed. This breaks down into a number of issues which we deal with in turn.

548. First, is it correct that European law rights are even relevant? Putting to one side the issue of how European law rights apply as between Gibraltar and the UK which we shall come onto, HMRC say the appellants' situation is one which is wholly internal to one Member State, the UK, and European law is not concerned with wholly internal matters. The appellants disagree and point to various cross border elements which they say mean European law is engaged. (These are that Anne Fisher is a national of a one Member State (Ireland) who has exercised her right of establishment in another, Peter Fisher exercised free movement rights to Spain and from there worked in Gibraltar, and SJG provides services to other Member States and has employees who are nationals of other Member States.) HMRC say that each of these purported connecting factors to EU law are irrelevant; what is relevant is whether the appellants can show that their freedom of establishment and free movement of capital rights have been restricted by the transfer of assets abroad code. (We refer to this as the "EU connections issue".)

549. In any case, the appellants argue that the specific EU Treaty provision on the applicability of the Treaty to Gibraltar are applied in such a way that the EU freedoms are engaged when a person establishes in Gibraltar from the UK, and in relation to movements of capital between the UK and Gibraltar. (We refer to this as the "Gibraltar issue".)

550. We received written representations from HMGoG on the Gibraltar issue, which supported the appellants' position. HMGoG's submissions also made further arguments as to why under public international law, English law, and European law, Gibraltar and the UK were to be treated as separate territories such that there were freedom of establishment and free movement of capital rights between the two. HMRC disagree and say that on the basis that Gibraltar is not itself a Member State or a third country, the freedoms cannot be applied as between the UK and Gibraltar. The fact that those rights *do* apply between Gibraltar and Member States other than the UK is consistent with Gibraltar being treated as part of the Member State of the UK for the purposes of the fundamental freedom provisions.

551. Whether European law is engaged through the EU connections issue or through the Gibraltar issue, the appellants say their rights are breached, without justification

and the TOAA legislation is in any case not proportionate. The legislation must accordingly either be interpreted in a way which conforms to EU rights or disapplied.

552. The appellants also argue that even if they were unsuccessful on the EU connections issue or Gibraltar issue, and we considered the issue was wholly internal to the UK, the legislation should be read to conform to EU law and that this conforming interpretation would be just as accessible for the appellants to benefit from.

553. HMRC disagree with all the above points.

554. The appellants also suggest in their subsequent written submissions on the Gibraltar issue that there should be a reference to the CJEU on the Gibraltar issue in the event the Tribunal is not able to find in their favour on the EU connections issue. In this situation the appellants also suggest that both the Gibraltar issue and the EU connections issue should be referred to the CJEU. HMRC oppose the making of a reference.

555. We will consider the EU connections issue first on the basis that if we agree with the appellants it will not then become necessary to deal with the Gibraltar issue and whether a reference needs to be made on that issue, as argued for by the appellants.

556. Before working through these points it is helpful to record what the parties agree on. Neither party, nor for that matter HMGoG, argue that Gibraltar is a Member State or that it is a "third country" for the purposes of the Treaty provisions.

557. The freedoms which are in issue in this case are those of freedom of establishment and free movement of capital. While the parties have put their case in mainly in relation to the issues around freedom of establishment their arguments apply in the same way to free movement of capital.

558. We do not address the appellants' argument that SJG's freedom to provide services had been breached given the very late stage at which the argument was made (some way through the course of the hearing). This is not to be confused with the appellants' argument that the appellants' freedoms of establishment and free movement of capital rights are *engaged* by virtue of SJG exercising its freedom to provide services, which is a point which we consider below. To the extent the appellants' written submissions raised matters relating to the EU connections issue (termed the "factual question" by them) these were not a response to HMGoG's submissions and were outside the scope of the Tribunal's directions. We have therefore disregarded the appellants' submissions, the Respondents' response, and the appellant's reply on 3 April 2013 in so far as they addressed the factual question rather than subject of HMGoG's submissions which was the Gibraltar issue.

Issue 2: (a) – EU connections

Law

559. We set out the relevant articles from the Treaty on freedom of establishment and free movement of capital below.

560. The right of establishment was set out in Article 43 EC (now Article 49 TFEU) which provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital".

561. Article 48 EC (now Article 54 TFEU) confirmed that the right applies to companies.

562. In relation to free movement of capital, this is set out in Article 56 EC (now Article 63 TFEU) :

> "1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
>
> 2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

563. The appellants' arguments at the hearing also referred to Article 18 EC (now Article 21 TFEU):

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect….".

Application of Treaty rights to "wholly internal" matters

564. We do not understand it to be in dispute as a matter of principle that there is a category of matters or scenarios in relation to which European Treaty rights are not relevant, because they take place within one Member State and do not involve what might be called any cross border element.

565. The parties disagree however as to the scope of this principle with the appellants taking a narrower view than HMRC as to what is "wholly internal" and therefore out of scope of the European Treaty rights.

566. The following extract from the CJEU's decision in *Walloon* (a case we discuss further below) sets out the principle and supporting case-law:

> "in this respect, it must be borne in mind that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (see, inter alia, with regard to freedom of establishment and freedom of movement for workers, respectively, Case 20/87 *Gauchard* [1987] ECR 4879, paragraphs 12 and 13, and Case C- 18/95 *Terhoeve* [1999] ECR I- 345, paragraph 26, and the decisions there cited)."

567. It should be noted that for the purposes of this section of the decision we are putting to one side the issue of Gibraltar's status and proceed on the basis that the UK and Gibraltar are, for the purposes of the freedoms of establishment and free movement of capital to be treated as different parts of the same Member State. (Whether that is the case is precisely in point in the next section of the decision on the Gibraltar issue).

568. We consider the law in this area first before applying the law to the facts.

569. The point in issue, which in our view is a legal one, comes down to whether the person complaining of the restriction on a treaty freedom needs to be able to identify the treaty freedom they are exercising and to say how it is restricted by the legislation in question, as HMRC argue, or whether, as the appellants argue, it is sufficient to show a connection to an EU law situation.

570. Although it can be seen from the drafting of the Treaty provisions set out above that what is contemplated is movements between Member States, the appellants say there is much authority in the case law of the European court supporting the proposition that Article 43 does not have to be read literally and that the movement does not have to be between Member States. They rely on the cases of *Terhoeve, Walloon, Hartman, Ritter-Coulais,* and *Carpenter* which we discuss further below. In turn HMRC say these cases actually serve to illustrate their argument which is that the taxpayer must have exercised the freedom which it is alleged the measure in question unlawfully restricts. They refer to the case of *Werner* (which the appellants say is no longer good law) in support.

The Case law

Terhoeve (FC) v Inspecteur van de Belastingdiest Particuleren Ondernemingen Buitenland (Case C-18/95)

571. The case concerned free movement of persons and a Dutch social security measure under which contributions were not capped where a worker was non-resident, but were capped when the work was resident in the Netherlands. The worker, a Dutch national, lived and worked in the UK and returned to the Netherlands. The ECJ held the free movement treaty right could be relied on by a worker who was a national of the Member State, in this case the Netherlands, imposing the restriction.

572. The appellants appear to us to be suggesting that this case shows that where a national of one Member State moves to another and then moves back again this supports the idea that a movement *within* the Member State engages EU law as long as there has been a movement from the first Member State to the second. (The appellants also referred to the Advocate Generals' opinion in this case which in turn referred to *Asscher* (Case C-107/94) and *Sholz* (Case C-419/92) and invited us to treat a movement from one Member State to another and then back again as a movement within the Member State.) This is to be contrasted with HMRC who explain the basis for this case as being that the crucial movement is between the second Member State back to the first and that what the case is saying is that it does not matter that the person moving is a national of the first Member State.

573. In our view, HMRC are correct in so far as the case establishes that nationals of one Member State are not precluded from relying on free movement rights just because the state imposing the restriction is their state of nationality and not *another* Member State. The need to take account of the national's movement back to their own state of nationality can, we think, be rationalised in terms of protecting the national's free movement right to another Member State (the worker would be dissuaded from exercising their free movement rights to the second Member State in the first place if they were disadvantaged on returning) so in that respect the focus is not just on the movement from the second Member State back to the first.

574. The case does not however establish any principle that movements within Member States may be treated as movements which engage the fundamental freedoms absent such a movement out and a movement back in.

Walloon (Government of the French Community and Walloon Government v Flemish Government) C-212/06

575. This case concerned free movement of persons, but freedom of establishment was also relevant (self-employed workers).

576. The case concerned a care insurance scheme with eligibility restricted to those resident in the Dutch speaking / Brussels bilingual areas of Belgium. (Member State nationals working in those regions but resident in another Member State were also eligible.)

577. We have found it helpful to set out the different categories of persons that were under consideration:

(1) Belgian and other nationals resident in the regions (eligible under scheme)

(2) Belgian nationals not resident in the regions but working in the regions who had not previously exercised free movement rights to another Member State (not eligible under scheme)

(3) Belgian nationals not resident but working in the regions who had exercised free movement rights to another Member State (not eligible under scheme)

(4) other (non Belgian) Member State nationals, resident in another Member State, working in the regions but not resident there (eligible under scheme)

(5) other (non Belgian) Member State nationals resident in Belgium and working in the regions, but not resident in the regions (not eligible under scheme)

578. Thus the care insurance scheme covered those in (1) and (4) but not the others.

579. The court held that legislation which excluded from a care insurance scheme Belgian nationals who worked in the Dutch speaking region/ or Brussels bilingual capital region, but who lived in the French /German speaking region of Belgium was a wholly internal situation. But at [60] it found the legislation infringed free movement rights in so far as it:

> "affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community."

580. Therefore those in (2) were classed as being in a wholly internal situation. Those in (3) and (5) were not in a wholly internal situation.

581. We read the reference to "nationals…who have made use of their right to freedom of movement" in the extract above as referring to nationals of the Member State concerned (Belgium) and not other Member State nationals because other Member State nationals residing abroad and working in the relevant territory were specifically covered by the care insurance scheme.

582. We note that as with *Terhoeve* this is an example of the court saying you cannot have a measure which dissuades another Member State national or a returning Member State national of the same state from moving to the Member State (or even in this case a particular part of the Member State).

583. Even though the legislation complained of in the case did make provision for nationals of other Member States who were not living in Belgium to take advantage of the scheme it was still found to restrict the rights of other Member State nationals.

584. We note that there is no discussion in the decision which suggests that this is because they have exercised free movement or freedom of establishment rights. The

court's finding suggests to us that the rights of one Member State national as against another Member State are not extinguished because they have been resident in the Member State in which they are asserting their Treaty freedom.

Carpenter v Secretary of State for the Home Department (Case C-60/00)

585. The case concerned the deportation of Mrs Carpenter, a non Member State national from the UK. Her husband Mr Carpenter, a UK national, had a business which provided services to other Member States. The court found his freedom to provide services would not be fully effective if his spouse was deported given her role in his family life (taking account of the right to family life under the Human Rights Convention).

586. The appellants say it was significant that the court did not just say the matter was wholly internal but went on to consider the deportation even though the only link to EU law was the provision of services by the husband's business.

587. HMRC highlight the fact that even though there was a restriction on the husband's freedom to provide services this did not in itself mean that Mrs Carpenter could take advantage of that. In order to establish why she could take advantage of that it was necessary to refer to human rights convention rights to family life.

588. Notably this was not a case where Mrs Carpenter's rights were infringed but one where she benefited indirectly from the infringement of Mr Carpenter's rights.

589. We do not agree that this case establishes any broader proposition that one person can rely on the freedom to provide services of a second person absent an explanation for why the second person's rights would be infringed by the treatment complained of in relation to the first person. It is open of course for the second person to claim that their freedom to provide service is restricted, but this does not of itself establish that the first person has rights they would not otherwise have.

Werner (Case C-112/91)

590. Mr Werner, a German national, was a dentist who had his practice in Germany but lived in the Netherlands. The question was whether German tax legislation which imposed a heavier tax burden on those who were not resident in Germany infringed the freedom of establishment. At [16] the court described his position as follows:

> "Mr Werner is a German national who obtained his degrees and professional qualifications in Germany; he has always practised his profession in Germany and is subject to German tax legislation. The only factor which takes his case out of a purely national context is the fact that he lives in a Member State other than that in which he practises his profession."

591. HMRC rely on this case for their argument that the matters which the appellants rely on to bring EU law into play are "random elements". The appellants say the case can no longer be regarded as good law as in the later cases of *Ritter Coulais* and

Hartmann (discussed below) the Advocate General suggested following *Werner* but despite this the CJEU declined to do so.

592. Mr Werner did not move away from Germany and then move back. We think this case is to be understood as the ECJ saying that there was no establishment right in issue here as Mr Werner had always been practising in Germany. The fact he was resident in the Netherlands was irrelevant and did not mean he had an establishment right in relation to Germany.

593. But beyond serving as an example that there may be situations where on the facts a cross border element will not automatically mean there is an establishment right, we do not see that the case stands for any wider proposition advanced by HMRC that the EU connections put forward by the appellants are irrelevant. It does not assist us on distinguishing what sorts of connections are irrelevant. That will depend on the particular facts.

594. Contrary to what the appellants argue it is not clear to us that *Werner* is bad law and can be disregarded for that reason because of *Ritter-Coulais* and *Hartmann*. *Werner* was not rejected, or specifically considered by the court in those cases. The facts in *Ritter-Coulais* which we discuss below are materially different as it is not clear the employees in that case had always worked in the German school but subsequent to that had then decided to move to France.

Ritter-Coulais (Case C-152/03)

595. The court considered whether a German tax measure which did not allow for taking account of losses in respect of non-German property infringed Treaty rights on free movement of persons. Mr Ritter-Coulais was a German national; Mrs Ritter-Coulais was a German / French dual national. They worked in Germany but lived in their house in France. At [35] the court highlighted that:

> "individuals such as the appellants in the main proceedings, who worked in Germany whilst residing in their own home in another Member State, were not entitled, in the absence of positive income, to have income losses relating to the use of their home taken into account for the purposes of determining their income tax rate, in contrast with individuals working and residing in their own homes in Germany."

596. The appellants draw attention to the Advocate General's opinion and the distinction drawn between ratione materiae and ratione personae – the latter being "situations which involve a sufficient foreign element to trigger its application".

597. They point out that the court did not follow the Advocate General's opinion which pointed out *Werner* and argued that residence was not relevant. It was enough that the appellants lived in France. The implication was that this was a sufficient foreign element to trigger the application of European law.

598. We do not see the case in this way i.e. that it establishes that it is sufficient simply that there is a cross-border issue. We therefore agree with HMRC's argument

in reply that this is an example of the court looking to see if there had been an exercise of the right of freedom of movement between Member States. The appellants were exercising free movement rights by working in Germany but living in France. As persons residing in one member state but working in Germany they were in a worse position than workers living in Germany in their own homes there under the tax legislation which was the subject of the complaint.

599. The court was not saying that in situations where there had not been any exercise of free movement right that Community law could be relied upon simply because the appellant resided in another Member State.

600. In relation to the extract from Advocate General's opinion which the appellants refer to, our view is that the reference to "situations covered by European law" must be understood as a shorthand for the question of whether the person has a right under the relevant European law provisions set out in legislation and in established principles rather than some kind of amorphous concept of whether the situation is covered by "European law". The extract also highlights in any case that there are matters of degree to the "foreign element" with the implication that it is not the case that any foreign element will be sufficient.

Hartmann (Case C-212/05)

601. This case concerned a German national working in Germany who moved to Austria with his wife but continued to work in Germany. The issue was whether his wife could claim German child benefit.

> "…any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of that provision [Article 48 – free movement article]"

602. Thus in answer to the issue of whether what the German national did counted as free movement of workers, the court answered yes. When Mr Hartmann moved to Austria but continued to work in Germany this was a free movement exercise. The decision then went onto consider the applicability of the relevant Regulation on social security provision given that there was a free movement exercise.

603. The case confirms that free movement rights are available to a national of one Member State who works in his or her state of nationality but resides in another Member State. In our view the case is not however supportive of a principle that Treaty rights more generally are engaged by pointing to an EU element. It was not that Mr Hartmann was somehow all the while exercising embryonic or uncrystallised "free movement rights" albeit ones that did not count as EU free movement rights until he changed residence.

Summary of legal propositions

604. Taking account of the above cases we would summarise the relevant legal propositions as follows:

(1) EU law (meaning the application of the fundamental freedoms) is not engaged with "wholly internal" situations (case-law referred to in *Walloon* cited above).

(2) Free movement rights may be taken advantage of by nationals of the member state which is alleged to be restricting the freedom, but this is in circumstances where the national has first exercised a freedom to move outside the Member State (*Terhoeve, Walloon).*

(3) A restriction may be challenged by one person even though it does not infringe their rights but it infringes the freedom to provide services of another (their spouse) on the basis of human rights conventions (*Carpenter*).

(4) A national who is already established in the Member State of nationality does not exercise establishment rights into that Member State by virtue of subsequently being resident outside the Member State (*Werner*).

(5) A national of one Member State still has establishment rights which may be infringed even if they are resident in the Member State which is alleged to restrict the right (*Walloon*).

(6) Free movement rights are available to a national of one Member State who works in his or her state of nationality but resides in another Member State (*Ritter-Coulais, Hartman*).

605. The issue in contention between the parties is whether, as the appellants argue, we should ask as a first step whether European law is engaged, or whether the starting point is, as HMRC argue, that of identifying a restriction on the right said to be infringed.

Conclusion on legal issues

606. Our view is that HMRC's position is the better one. The cases we were referred to do not support the argument that there is an initial exercise of seeing whether European law is engaged.

607. *Terhoeve* concerned freedom of movement rights of a national from one Member State to another. *Carpenter* concerned the freedom to provide services rights which Mr Carpenter's spouse was able to benefit from. *Ritter-Coulais* and *Hartmann* concerned free movement rights when a person worked in their state of nationality but resided in another Member State. In *Werner* the analysis is that there was no cross border element because Mr Werner had always been established in Germany.

608. But we put the point in the following terms. A person has to assert what fundamental freedom is in issue in the first place. That may be their own freedom or someone else's freedom as in *Carpenter*. In explaining why a person has a right there will be a cross border element which is intrinsic to that right. The "wholly internal"

issue is inextricably bound up, or can be viewed as the flipside to, the question of whether someone has a fundamental freedom right that counts under European law in the first place. So the question in each case can be seen as whether they have a relevant right under European law.

609. In each of the cases discussed we note the cross border element is what gives rise to the right said to be infringed. It is not a trigger for the consideration of some other right.

610. Taking account of the above propositions we now turn to the facts of this case.

Application to facts

611. The facts relevant to the EU law argument may be stated briefly as follows:

(1) *SJG's provision of services* – SJG took bets from punters in Spain, Portugal, Germany, Greece, Belgium and Ireland as well as the UK.

(2) *SJG's employees* – SJG employed individuals from Germany (5), Gibraltar (17), Spain (25), Greece (11), Italy (4), Belgium (5), Czech Republic (6), Finland (2), Hungary (1), Sweden (8) and the UK. Many of SJG's employees (approximately 60%) live in Spain.

(3) *Peter Fisher's move to Spain* – Peter Fisher lived in Spain when he first started working in Gibraltar. He lived in a house in Guadacorte in Spain which had been purchased by SJG to house its employees. Peter Fisher shared this accommodation with up to four other employees before he moved to Gibraltar permanently.

(4) *Anne Fisher's nationality* – Anne Fisher is originally from Ireland but has spent many years in living in England. She has Irish nationality.

Provision of services by SJG to other Member States

612. SJG undoubtedly has freedom to provide its services to other Member States.

613. The argument HMRC made that it would be ludicrous, if say SJG had been established in a third country, that there was a freedom of establishment right in setting up the company just because the company traded with the EU does not take the matter further because in that example the third country company would not have a freedom to provide services right in the first place.

614. Nevertheless, the fact that the company into which the appellants moved their business provides services to persons in other Member States does not in our view mean, as the appellants argue, that the appellants had establishment rights under EU law when they established in another part of the Member State.

615. The appellants refer to *Carpenter* where Mr Carpenter's freedom to provide services was relevant as showing their case involves a situation covered by EU law. They argue that the restriction on their right of establishment operates to hinder the

exercise of the right of SJG's freedom to provide services and this is a sufficient basis to make this an EU law situation.

616. However although Mrs Carpenter got her rights indirectly because of the impact on Mr Carpenter's rights it was not a case about her rights being infringed. Similarly the facts in this case are not about SJG's freedom to provide services being infringed such that the appellants have rights. It would need to be argued the other way around i.e. that SJG's freedom to provide services was restricted, and if the measure could be challenged on that basis then it would need to be further argued why the appellants could benefit from that.

617. SJG's freedom to provide services may or may not be infringed. We are not in a position to draw any conclusion on that issue as the case was not argued on this basis.

618. None of the authorities we were referred to support the proposition that the appellants have a fundamental freedom of establishment in the UK by virtue of SJG providing services to other Member States.

SJG has other Member State employees / employees who reside in another Member State

619. The analysis is no different in respect of the fact that SJG has employees from other Member States and employees who reside in another Member State (Spain). Those employees have no doubt exercised freedom of movement either in moving from one Member State to another (the UK for present purposes) or in living in one Member State but working in another. But these free movement rights are those of the workers. The fact the appellants have established a business within an entity which has workers who have exercised free movement rights does not bring the establishment of the business within the scope of EU law when the establishment is from one part of the Member State to another.

620. Again there was no authority before us that accorded the right of establishment by reason of this kind of link and *Carpenter* is not on point. The case would have to be put in terms of the employees and customers arguing that their respective free movement rights and rights to receive services were infringed but the case has not been argued on that basis. In any case even if the workers' or customers' respective rights were in issue the links between employees and customers of SJG and SJG could not be said to be analogous to the spousal link between Mr and Mrs Carpenter. The particular context of respecting human rights to a family life that existed between the service provider and the person challenging the restriction in *Carpenter* does not arise here.

621. We feel reassured in this conclusion given that as a matter of principle it is difficult to see how the concept of a "wholly internal" situation could ever be applicable if it were enough to show that the establishment was providing services to other Member States and/or was engaging workers who were exercising free movement rights. There would be no reason to restrict such a principle to the actual provision of services and it would have to extend to potential provision of services (or

to free movement of the establishment's workers). In principle any business could provide services across the EU or employ workers who had exercised free movement rights. The establishment of any business within a Member State would therefore engage European law rights just because the establishment had the potential to provide services or to engage workers who had exercised free movement rights and the concept of a wholly internal situation in relation to freedom of establishment would be rendered meaningless.

Peter Fisher moved to Spain and moved from there to Gibraltar

622. What difference does it make that Peter Fisher lived in Spain before moving to Gibraltar?

623. The appellants rely on Peter Fisher having used his Article 18 citizenship rights to move to Spain.

624. None of the cases we were referred to show that by virtue of a person exercising free movement rights under Article 18 the person would then have freedom of establishment rights in his or her Member State of origin. Crucially Peter Fisher has not established in one part of the UK from Spain. Although he resided in Spain his establishment is not from Spain but through the setting up of a company in part of his Member State of origin and the transfer of business from another company in that Member State.

625. Putting aside the question of whether there is a difference between Article 18 exercises and free movement of workers, the question might be asked whether Peter Fisher is not analogous to the Belgian returners referred to in the *Walloon* case? (See [577(3)] above). There the court's decision carved out from the "wholly internal" situation those Belgian nationals who had exercised their right of free movement within the European Community.

626. We note that at [46] of *Walloon* the court noted that:

> "…measures which have the effect of causing workers to lose, *as a consequence* of the exercise of their right to freedom of movement, social security advantages guaranteed them by the legislation of a Member State have in particular been classed as obstacles…" [emphasis added].

627. It is in that context that it can be understood why Belgian nationals who had exercised free movement rights also needed to be taken account of.

628. We also find the Advocate General's opinion in *Carpenter,* (referring to [32] of *Assher* instructive in explaining the rationale for catering for nationals of the Member State who return:

> "…although the provisions of the Treaty relating to freedom of establishment could not be applied to situations which were purely internal to a Member State, the scope of Article 52 of the Treaty, nevertheless, could not be interpreted in such a way as to exclude a

> given Member State's own nationals from the benefit of Community law where, by reasons of their conduct, they were, with regard to their Member State of origin, in a situation which could be regarded as equivalent to that of other persons enjoying the rights and liberties guaranteed by the Treaty."

629. Although on the face of it Peter Fisher is indeed someone who has exercised a free movement right (under Article 18) the rationale for the extension of rights to nationals of the member state imposing the restriction to those who have exercised their free movement right is not to hinder the exercise of that right. In *Walloon* a Belgian national exercising a free movement right might be discouraged from doing that if they would lose social security benefits upon return to a particular region of the country. That rationale does not apply in the same way to Peter Fisher. Having lived in Spain for a time while working for SJG he is not hindered from establishing in the "UK" from Spain as a consequence of that or from moving capital in Spain to a particular part of the "UK".

630. There is therefore not the same relationship between the hindrance resulting from the alleged restriction and the exercise of the freedom of movement as there is in *Walloon*. Peter Fisher is not in any ostensibly worse position as a result of choosing to live temporarily in Spain vis-à-vis setting up in the Member State of his nationality.

631. To the extent Peter Fisher has used his Article 18 citizenship rights to move to Spain there is no indication that these rights have been restricted by the TOAA code. Exercising such rights does not give Peter Fisher an EU right of establishment into the one part of the "UK" to another that he would not otherwise have (because the establishment would be "wholly internal").

Anne Fisher's Irish nationality

632. The appellants say that Anne Fisher's Irish nationality is sufficient for European law to be engaged. HMRC say her nationality is irrelevant.

633. Referring to *Werner*, HMRC argue that just as with Mr Werner, Anne Fisher did not move away and then move back. They say she was established in the Member State (UK). While she established in another part of the Member State (UK) she did not establish in that part of the Member State from *another* Member State (Ireland).

634. HMRC's argument is that the establishment must be *from* one Member State *to* another Member State (they refer to *Cadbury Schweppes* in this regard (the extract is set out at [645]). Underlying this argument is the proposition that if you have lived in the different state for long enough then when you set up a business you are not establishing from another Member State even if you have kept the nationality of another Member State. HMRC say the Member State of origin is the UK not Ireland in respect of Anne Fisher.

635. While *Werner* stands for the proposition, as discussed above, that residence abroad having established in one Member State does not turn an establishment already set up there into one which has involved a freedom of establishment right, we do not

think it is correct in the light of *Walloon* to say that this may be extended to the proposition that nationality is irrelevant too.

636. If Mr Werner had not been a German national but a national of another Member State, it is difficult to see how he could have established in Germany without exercising a freedom of establishment right. (In any case the factual scenario here is different from Werner in that the right in question here is not in relation to an establishment that had always been in one place but a new establishment in a different part of the Member State.) If Mr Werner had been a Dutch national established and trained in Germany but then living in the Netherlands the answer could well have been different.

637. On the face of it the TOAA legislation would (given its treatment of Gibraltar as a place which was abroad) dissuade another Member State national (albeit one who was resident in one part of the Member State for tax purposes) from establishing in a particular part of that Member State. In *Walloon*, (a case which applied to freedom of establishment as well as free movement of workers) it did not matter that the non-Belgian Member State nationals were resident in another part of Belgium.

638. Anne Fisher's situation as an Irish national establishing in another part of the "UK" is, in our view, analogous to the non-Belgian Member State nationals, resident in Belgium, whose rights to establish in another part of Belgium were held to be infringed.

639. The relevance of Anne Fisher's nationality may be masked by the many years during which she has lived in the UK but it is not clear to us at all why it should make a difference in principle how long she has been in the UK. There was no legal authority from the cases we were referred to for the suggestion that she should lose her freedom to establish into a Member State different to the Member State of which she was a national just because she has exercised other rights and has become resident / established in the UK.

640. The relevance of Anne Fisher's nationality is not so much that by virtue of it she has exercised free movement or freedom of establishment rights into the UK, but that her rights as a national of one Member State to establish in a Member State other than that of her origin (and in this case a particular part of the "UK") are preserved not extinguished.

641. The conclusion at this point therefore is that the European law arguments are relevant to Anne Fisher but not to Stephen Fisher and Peter Fisher.

Compatibility of TOAA provisions with EU law

Breach of freedom of establishment?

642. The question arises as to whether the TOAA provisions restrict Anne Fisher's freedom of establishment. Referring to *État Belge* (Case C-311/08) the appellants

point out it is not necessary to show in fact the restriction of the right but merely that the measure is capable of restricting the right.

643. The tax charge is levied against a person in the UK on profits of an entity that would not be levied if that entity were established in the UK.

644. The appellants say there is an obvious restriction on the right to freedom of establishment as result of 1) SJG's profits being charged on the appellants and 2) those profits being charged at their higher personal tax rates. Neither of these disadvantages would have occurred if SJG had been resident in the UK or if it had been possible to maintain a Gibraltarian branch to carry out the overseas telebetting operation.

645. The appellants also say that ownership of shares in SJG involves a movement of capital and the Treaty article related to that is breached too. The appellants refer to *Cadbury Schweppes* at [44] to [46] which concerned freedom of establishment and the UK's Controlled Foreign Corporation (CFC) legislation.

Cadbury Schweppes plc v IRC [2006] STC 1908

> 44 Where the resident company has incorporated a CFC in a Member State in which it is subject to a lower level of taxation within the meaning of the legislation on CFCs, the profits made by such a controlled company are, pursuant to that legislation, attributed to the resident company, which is taxed on those profits. Where, on the other hand, the controlled company has been incorporated and taxed in the United Kingdom or in a State in which it is not subject to a lower level of taxation within the meaning of that legislation, the latter is not applicable and, under the United Kingdom legislation on corporation tax, the resident company is not, in such circumstances, taxed on the profits of the controlled company.
>
> 45 That difference in treatment creates a tax disadvantage for the resident company to which the legislation on CFCs is applicable. Even taking into account, as suggested by the United Kingdom, Danish, German, French, Portuguese, Finnish, and Swedish Governments, the fact referred to by the national court that such a resident company does not pay, on the profits of a CFC within the scope of application of that legislation, more tax than that which would have been payable on those profits if they had been made by a subsidiary established in the United Kingdom, the fact remains that under such legislation the resident company is taxed on profits of another legal person. That is not the case for a resident company with a subsidiary taxed in the United Kingdom or a subsidiary established outside that Member State which is not subject to a lower level of taxation.
>
> 46 As submitted by the applicants in the main proceedings and by Ireland and the Commission of the European Communities, the separate tax treatment under the legislation on CFCs and the resulting disadvantage for resident companies which have a subsidiary subject, in another Member State, to a lower level of taxation are such as to hinder the exercise of freedom of establishment by such companies,

> dissuading them from establishing, acquiring or maintaining a subsidiary in a Member State in which the latter is subject to such a level of taxation. They therefore constitute a restriction on freedom of establishment within the meaning of Articles 43 EC and 48 EC."

646. In the case of Anne Fisher, HMRC say she is not establishing from Ireland to Gibraltar. Her Irish nationality is irrelevant to the application of the TOAA provisions which apply to her as a UK resident.

647. As discussed above the *Walloon* case suggests to us that legislation may be capable of restricting the establishment right of a Member State national from another member state even if they reside in the Member State imposing the restriction.

648. While it is correct that Anne Fisher as an Irish national, resident in the UK who establishes in Gibraltar, is treated no differently as a result of her nationality to a UK national resident in the UK establishing in Gibraltar it does not follow from that that there cannot be a restriction on her establishment right. Article 49 TFEU (formerly Article 43 EC) prohibits "restrictions on the freedom of establishment of nationals of a Member State in a territory of another Member State". In addition to prohibiting discriminatory restrictions it is clear that even if the provisions are non-discriminatory and apply equally as between nationals of a Member State provisions could still be breach the freedom if they amount to restrictions on the freedom because they are liable to inhibit or dissuade the exercise of the freedom. (The CJEU's decision in *Walloon* at [45] refers to case-law supporting the proposition that the free movement of workers and freedom of establishment articles "militate against any national measure which even though applicable without discrimination on ground of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty".)

649. Anne Fisher's freedom to establish in the UK (albeit a part of the UK given we are in this section of the decision assuming the freedoms do not apply as between the UK and Gibraltar) is so restricted in our view. She is a national of one Member State (Ireland) who is dissuaded from establishing in part of another Member State (the UK for the purposes of this argument) by being charged to UK tax on the profits of SJG and being charged at a higher personal tax rate.

650. It does not matter that the restriction is in respect of establishing in one part of the territory of the Member State. In *Walloon* the facts concerned a scheme which covered only part of the national territory but was nevertheless found to be a restriction on free movement and freedom of establishment. Further it was a restriction on the establishment rights of other Member State nationals who resided in the part of the territory not covered by the scheme.

651. We are satisfied that the TOAA code restricts Anne Fisher's right of establishment. That does not of course mean the legislation is incompatible. The approach confirmed by the relevant case-law, which we do not understand to be in dispute between the parties, is then to consider if the restriction is justified, and if it is,

to consider further if the restriction is a proportionate means of achieving the legitimate objective pursued by the legislation. We turn now to those questions.

Justification and proportionality

652. HMRC argue that in the context of an establishment in Gibraltar, it is justifiable and proportionate, for the UK to prevent tax avoidance by the movement of profits generated in the UK to Gibraltar.

653. Their Statement of Case makes reference to the justifications of balanced allocation of taxation, fiscal cohesion and/or the fight against tax avoidance.

654. The appellants say that none of these justifications stand up to scrutiny.

655. The allocation / avoidance justifications can only apply to measures intended to enable a Member State to exercise its taxing jurisdiction on activities within its territory. The purpose of s739 is to tax activities carried on outside its territory. In relation to fiscal cohesion there is no advantage to be offset.

656. Except for the "fight against tax avoidance" justification which we shall come on to, HMRC did not put forward any further detail on the other categories of possible justification. We agree with the appellants for the reasons they suggest that those categories do not provide justification for the restriction.

657. In relation to the justification of fighting tax avoidance the appellants point out the tax avoidance justification is narrower than the UK concept of tax avoidance and covers artificial arrangements. They refer to the following extract from *Cadbury Schweppes.*

> "61 The legislation on CFCs contains a number of exceptions where taxation of the resident company on the profits of CFCs does not apply. Some of those exceptions exempt the resident company in situations in which the existence of a wholly artificial arrangement solely for tax purposes appears to be excluded. Thus, the distribution by a CFC of almost the whole of its profits to a resident company reflects the absence of an intention by the latter to escape United Kingdom income tax. The performance by the CFC of trading activities excludes, for its part, the existence of an artificial arrangement which has no real economic link with the host Member State.
>
> 62 If none of those exceptions applies, the taxation provided for by the CFC legislation may not apply if the establishment and the activities of the CFC satisfy the motive test. That requires, essentially, that the resident company show, first, that the considerable reduction in United Kingdom tax resulting from the transactions routed between that company and the CFC was not the main purpose or one of the main purposes of those transactions and, secondly, that the achievement of a reduction in that tax by a diversion of profits within the meaning of that legislation was not the main reason, or one of the main reasons, for incorporating the CFC.

63 As stated by the applicants in the main proceedings and by the Belgian Government and the Commission, the fact that none of the exceptions provided for by the legislation on CFCs applies and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax.

64 In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment, as set out in paragraphs 54 and 55 of this judgment, has not been achieved (see, to that effect, Case C-110/99 Emsland-Stärke [2000] ECR I-11569, paragraphs 52 and 53, and Case C-255/02 Halifax and Others [2006] ECR I-0000, paragraphs 74 and 75).

65 In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality.

66 That incorporation must correspond with an actual establishment intended to carry on genuine economic activities in the host Member State, as is apparent from the case-law recalled in paragraphs 52 to 54 of this judgment.

67 As suggested by the United Kingdom Government and the Commission at the hearing, that finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment.

68 If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a ‘letterbox' or ‘front' subsidiary (see Case C-341/04 Eurofood IFSC [2006] ECR I-0000, paragraphs 34 and 35).

69 On the other hand, as pointed out by the Advocate General in point 103 of his Opinion, the fact that the activities which correspond to the profits of the CFC could just as well have been carried out by a company established in the territory of the Member State in which the resident company is established does not warrant the conclusion that there is a wholly artificial arrangement.”

658. Further, the appellants say that even if the appellants decided to establish SJG in Gibraltar to benefit from a different tax regime that is not relevant (*Cadbury Schweppes* [36]).

> “However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of

> the right to rely on the provisions of the Treaty (see, to that effect, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 71)."

659. To this HMRC say the reasoning on justification assumes that the establishment is in another Member State. Gibraltar is not another Member State so the rationale that tax paid in one Member State is equivalent to tax paid in any of the other member states is not applicable. The court clearly set out the objective of Article 43 at [53] – that is:

> "…to allow a national of a member state to set up a secondary establishment in another member state to carry on his activities there …freedom of establishment is intended to allow a Community national to participate, on a stable and continuing basis, in the economic life of a member state other than his state of origin and to profit therefrom…".

660. HMRC highlight that the purpose of the freedom is not about encouraging establishments in non-Member States.

661. It is clear from the findings of fact that SJG was a real operation with premises, staff and equipment. It was not a letter box company and there can be no question in our minds that it falls within the artificial arrangements envisaged by "avoidance" as understood in European law terms.

662. In relation to HMRC's argument that the TOAA code is justifiable because it deals with movements to a territory rather than a Member State, and the principles that the appellants rely on from *Cadbury Schweppes* are to be viewed as not therefore applying, we do not think this argument, even it is correct, can help by way of justification for a restriction on the freedom of establishment of a national of one Member State (Ireland), Anne Fisher, in another Member State (for these purpose the UK).

663. Given HMRC's position is that Gibraltar is to be regarded as part of the UK for the purpose of the freedom of establishment we cannot see how it can then be argued that establishing in Gibraltar from Ireland is different from establishing in a Member State.

664. In any case even if we were to put to one side HMRC's argument that Gibraltar is to be treated as part of the UK, and to treat it as a separate territory, there would in our view be no reason why the rationale that tax paid in one Member State is equivalent to tax paid in another would not be just as applicable to a territory to which the Treaty provisions are required to be applied under Article 299(4) EC (now Article 355(3) TFEU (set out below at [714]) and which had its own tax regime such as Gibraltar does.

665. The justification put forward by HMRC of preventing tax avoidance by the movement of profits generated in the UK to Gibraltar does not amount to a valid justification in our view. As the appellants point out they are being taxed on profits generated in Gibraltar. This illustrates in our view that the provisions are not targeted at deterring the movement of profits made in the UK but that they operate to dissuade establishing in Gibraltar to take advantage of tax advantages there. It follows from

Cadbury-Schweppes that this behaviour does not amount to avoidance in European law terms and that the justification of fighting against tax avoidance understood in those terms does not serve to justify the TOAA legislation which is cast in far wider terms.

Proportionality

666. In any event the appellants say that the TOAA charge goes far beyond what is necessary to attain a legitimate objective. One of its objectives is to penalise those who have transferred assets abroad (recognised in *Howard de Walden v CIR* (1943) 25 TC 121). This penal nature is incompatible with any justification for the restrictions on the freedoms which result from the application.

667. The appellants draw attention to the fact the whole of the profits of the Gibraltarian company are taxable in the UK year after year on individuals in the UK when the business bears no resemblance to what it was when it was first transferred. There is no question of the activities carried out in the UK resulting in taxation abroad.

668. HMRC argue the legislation is proportionate because it is closely targeted on situations in which the transferor has a tax avoidance motive. It does not apply to transactions undertaken purely for commercial reasons.

669. We disagree with HMRC. Even if the objective of the legislation were articulated as the prevention of the avoidance in the European sense of the term, as can be seen from our earlier findings, it operates to catch persons who establish in Gibraltar in order to take advantage of the more favourable tax regime but who have not done so using artificial means. It is not therefore closely targeted at those situations (artificiality as described in *Cadbury-Schweppes*) which count as avoidance in European law but captures persons such as Anne Fisher who exercise freedom of establishment rights into Gibraltar and UK nationals who exercise their freedom of establishment into other Member States.

670. Further, even if the fight against avoidance of UK betting duty were to be a valid justification for the provisions, the provisions are not suitable for that objective and go far beyond it as the way in which the tax charged on the appellants is calculated goes far beyond the amount of betting duty avoided.

Relevance of Infringement proceedings

671. The appellants point to the UK changing the TOAA in relation to infringement proceedings and say this acknowledges the provisions are in breach of EU law. HMRC say the proceedings are in respect of establishments in other Member States and are therefore irrelevant to the present case.

672. We think these proceedings are irrelevant simply by virtue of the fact that we cannot know the reasons for why the case did not go ahead to the CJEU (whose views would be of far more relevance.) The views of the parties to the infringement

proceedings as to what they thought the respective merits or otherwise of their case were do not help us with establishing what the position is under the law.

Conclusion on incompatibility

673. Our conclusion is that the TOAA charge does restrict Anne Fisher's freedom of establishment (and by extension her free movement of capital) and that it breaches those freedoms in a way which lacks justification. Even if the breach of those freedoms were justified it is not proportionate to any legitimate justification of fighting tax avoidance as that concept is understood in European law.

Effect of legislation breaching right? Conforming interpretation / Disapplication

674. Section 2(1) of the European Communities Act 1972 ("EC Act 1972") provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

675. It is uncontroversial that once it is found an appellant's rights under the Treaty are infringed by legislation, here the TOAA charge, then we must first see if we can interpret the legislation in such a manner which is consistent with the appellant's rights (i.e. find a conforming interpretation). If that is not possible then the legislation must be disapplied.

676. The appellants referred us in this regard to Lord Walker's speech in the House of Lords decision in *Fleming t/a Bodycraft v CCE* [2008] UKHL 2 [2008] STC 324:

> "[24] My Lords, it is a fundamental principle of the law of the European Union (EU), recognised in s 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in Factortame Ltd v Secretary of State for Transport [1990] 2 AC 85 at 140):
>
> '… without prejudice to the directly enforceable Community rights of nationals of any member state of the E.E.C.'
>
> The principle has often been recognised your Lordships' House, including (in the context of taxes) Imperial Chemical Industries plc v Colmer (Inspector of Taxes) [1999] STC 1089 at 1095, [1999] 1 WLR 2035 at 2041 per Lord Nolan, and recently Re Claimants under Loss Relief Group Litigation Order (sub nom Autologic Holdings plc v

> IRC) [2005] UKHL 54 at [16]-[17], [2005] STC 1357 at [16]-[17] per Lord Nicholls of Birkenhead.
>
> [25] Disapplication is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national court will, if at all possible, interpret the national legislation so as to make it conform to the superior order of EU law: Pickstone v Freemans plc [1989] AC 66; Litster v Forth Dry Dock & Engineering Co Ltd (in receivership) [1990] 1 AC 546. Sometimes, however, a conforming construction is not possible, and disapplication cannot be avoided. Disapplication of national legislation is an essentially different process from its interpretation so as to conform with EU law. Only in the most formal sense (because of the terms of s 2(4) of the European Communities Act 1972) can disapplication be described as a process of construction".

677. There is disagreement between the parties as to the effect of finding a conforming interpretation. (The appellants argue once a conforming interpretation is performed, in contrast to disapplication, that the conforming interpretation applies for all UK law purposes. HMRC argue it is only those in respect of whom EU rights have been exercised for whom the conforming interpretation is relevant (and the same is true of disapplication). But before that issue becomes relevant we must first see whether a conforming interpretation is possible.

Conforming interpretation?

678. The principles derived from case law on the approach are summarised by Morritt C at [37] (which sets out the case-references) and [38] of *Vodafone 2* [2009] EWCA Civ 664.

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (Per Lord Oliver in Pickstone at 126B);
>
> (b) It does not require ambiguity in the legislative language (Per Lord Oliver in Pickstone at 126B; Lord Nicholls in Ghaidan at 32);
>
> (c) It is not an exercise in semantics or linguistics (See Ghaidan per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110 – 115);
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in Litster at 577A; Lord Nicholls in Ghaidan at 31);
>
> (e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in Pickstone at 120H-121A; Lord Oliver in Litster at 577A); and

(f) The precise form of the words to be implied does not matter (Per Lord Keith in Pickstone at 112D; Lord Rodger in Ghaidan at para 122; Arden LJ in IDT Card Services at 114)."

[38] Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

"The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

(a) The meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed.' (Per Lord Nicholls in Ghaidan at 33; Dyson LJ in EB Central Services at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See Ghaidan per Lord Nicholls at 33; Lord Rodger at 110 – 113; Arden LJ in IDT Card Services at 82 and 113) and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See Ghaidan per Lord Nicholls at 33; Lord Rodger at 115; Arden L in IDT Card Services at 113.)"

679. The appellants' primary position is that the legislation should be disapplied but if it is not disapplied then the conforming interpretation would recast the motive defence so as to construe tax avoidance in the more restricted European law sense of artificiality so that the provision did not operate so as to catch exercises of freedom of establishment and movement of capital protected by the Treaty.

680. The motive defence must, they argue, be interpreted in a manner which complies with EU law, which would be as set out in *Cadbury Schweppes* i.e. that disregards only activities which are wholly artificial.

681. We think a conforming interpretation along the lines the appellants suggest is possible with the following caveat. In seeking a conforming interpretation which ensures the relevant freedom is not infringed, we are mindful of the need to not go further than necessary. In our view the appellants' suggested conforming interpretation therefore needs a further gloss. This is that their reinterpreted more restrictive definition of "avoidance" in the motive defence need only be applied to those situations where the individual subject to the charge is exercising Treaty freedoms. A conforming interpretation, (using a narrow conception of avoidance) which applied irrespective of whether a person's treaty freedoms had been infringed would be going further than what was necessary to ensure compliance with s2 of EC Act 1972. It would, for instance, apply the benefit of the more limited definition to movements to third countries. The rationale in *Cadbury Scheppes* of tax being paid in one Member State being equivalent to tax being paid in another would not extend to saying that tax paid in a third country is equivalent to tax being paid in a Member State.

682. In terms of the constraints to adopting a conforming interpretation flagged in the extract from *Vodafone* above at [678], by reading in a narrower conception of "avoidance" in those situations where the person charged with tax under the code is exercising their freedom of establishment and freedom to move capital this would not, we think, go against the grain of the legislation. It would not, we think, involve the court making important practical decisions which it was not placed to make (given that an adaptation to the legislation to take account of EU freedoms has been enacted by Parliament in respect of later years (s742A ITA 2007 for tax years 2012-13 onwards)).

683. Interpreted accordingly, in respect of Anne Fisher, the person charged to tax, who was exercising a freedom to establish in part of the UK, "avoidance" in the motive defence would be construed in the narrower sense. When it is asked what was the purpose for which the transfer was made, the fact the purpose was to take advantage of lower betting duty in a part of a Member State would not mean the purpose was an avoidance purpose. On the facts, there would be no purpose of avoiding such duty through artificial means. The motive defence in s741 as reinterpreted succeeds in respect of Anne Fisher.

684. If we were wrong in our view that a conforming interpretation in the way suggested above could be applied, then the outcome would be the same for Anne Fisher as the legislation would have to be disapplied in respect of persons exercising their Treaty freedoms.

685. It is convenient at this point to deal with the appellants' argument that in contrast to disapplication, a conforming interpretation applies for all UK law purposes.

686. If their argument were correct it would mean a person could take advantage of the narrower definition of avoidance irrespective of whether they were exercising the Treaty freedoms found to be infringed by the legislation. In the case of Stephen Fisher and Peter Fisher it would not then matter if they had not been exercising Treaty freedoms and it would not be necessary to consider the Gibraltar question.

687. HMRC disagree a conforming interpretation has this wider effect. They refer to the decision of the ECJ in *ICI v Colmer* (Case C-264/96). The background was that the UK's consortium relief legislation was incompatible with Community law in relation to its application to holding companies owned by consortiums which controlled mainly subsidiaries having their seat in the Community. The question was whether the incompatible consortium relief legislation also had to be disapplied, or the legislation construed in conformity with Community law, where the subsidiaries mainly controlled by the holding company had their seat in *non-member* countries. The answer by the court was as follows:

> "It must be emphasised that the difference of treatment applied according to whether or not the business of the holding company belonging to the consortium consists wholly or mainly in holding shares in subsidiaries having their seat in non-member countries lies outside the scope of Community law.

> 33. Consequently, arts 52 and 58 of the Treaty do not preclude domestic legislation under which tax relief is not granted to a resident consortium member where the business of the holding company owned by that consortium consists wholly or mainly in holding shares in subsidiaries which have their seat in non-member countries. Nor does art 5 of the Treaty apply.
>
> 34. Accordingly, when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the state concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.
>
> 35. Consequently, in circumstances such as those in point in the main proceedings, art 5 of the Treaty does not require the national court to interpret its legislation in conformity with Community law or to disapply the legislation in a situation falling outside the scope of Community law."

688. We think this passage confirms that we must be careful that the conforming interpretation does not go beyond what is necessary to give effect to the relevant European rights. If we were to accept the uncaveated conforming interpretation which the appellants suggest this would effectively go against the view in *Colmer* that a court is not required to apply a conforming interpretation to situations outside the scope of Community law. (To the extent *Colmer* leaves open the possibility that even if a court was not *required* to apply a conforming interpretation but nevertheless could apply it this may be an illusory discretion in view of s2 EC Act 1972 and the absence of any other basis for applying the normal approach to construction of legislation that would otherwise apply). It also confirms that if we are in the realm of disapplication, the disapplication would only apply to those within the scope of EU law.

689. At a basic level the appellants' proposition is correct. The conforming interpretation that is found will apply for all UK law purposes (if it did not then it would be difficult to see how it could be a law). The crucial point we think is that the conforming interpretation, if it is commensurate with the infringement which give rises to the need for the conforming interpretation in the first place, will not apply to persons whose situation does not fall within the scope of EU law. If it does then by definition the conforming interpretation has gone further than what was necessary.

690. This means that while Anne Fisher benefits from the conforming interpretation, unless Stephen Fisher and Peter Fisher can show that their situation is within the scope of freedom of establishment and free movement of capital they cannot also benefit from that conforming interpretation.

691. Therefore it does become relevant to consider the Gibraltar question (whether the appellants had freedom to establish in Gibraltar / freedom to move capital to Gibraltar by virtue of the application of the Treaty provisions to Gibraltar.)

Issue 2: (b) The Gibraltar question. Is EU law engaged because the Treaty applies by reason of Article 299(4) EC?

692. At the heart of this issue is whether the fundamental Treaty freedoms of freedom of establishment and free movement of capital apply to movements between the UK and Gibraltar.

693. The position of the appellants and of HMGoG, with which HMRC disagree, is that such freedoms do apply by virtue of Article 299(4) EC. This provides:

> "The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible."

694. There is no issue that Gibraltar is a European territory for whose external relations the UK is responsible for and that Gibraltar falls within this article. Nor is there any issue as to whether Gibraltar is itself a Member State. It is clear that it is not.

695. It is also clear from the case-law that the fundamental freedoms (except free movement of goods) apply as between Gibraltar and Member States other than the UK, and between such Member States and Gibraltar. There is no direct authority however on the position as between the UK and Gibraltar.

Should a reference be made to CJEU?

696. In the circumstances (where we have found against the appellants on the domestic law issues and two of them, Stephen Fisher and Peter Fisher, on the EU connections issue), the appellants' position is that it is plainly appropriate for a reference to the CJEU to be made on the Gibraltar question. They say that if a reference is to be made on this question then it ought also to be made on the EU connections issue.

697. The making of a reference is supported by HMGoG's submissions but opposed by HMRC. We set out the relevant law on the question of when a reference may or ought to be made upon which there was no significant dispute between the parties. The differences between the parties stemmed from the application of the criteria to the circumstances of this case.

Law and Criteria on whether to make a reference to CJEU

698. The making of references by a court or tribunal to the CJEU is covered by Article 267 of the TFEU which provides so far as is relevant to this case:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court…"

Necessary in order to give judgment and exercise of discretion?

699. The first issue to consider is whether the Tribunal considers a decision on the question is "necessary" in order to give judgment.

700. Guidelines in considering whether a reference is necessary were set out by Lord Denning MR in *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226 and were applied by Bingham J in *CCE v ApS Samex* [1983] 1 All ER 1042.

701. Lord Denning's judgment as explained by Bingham J refers to four relevant points:

(1) Will the point be substantially determinative of the litigation?

(2) Has the same point or substantially the same point been decided by the European court in a previous case?

(3) *acte claire* – does the court consider the point reasonably clear and free from doubt?

(4) Decide the facts first.

702. Even if the position is not *acte claire*, given the decisions of this Tribunal may be appealed against (i.e. the decisions of the tribunal are those in the words of Article 267 for which there is a "judicial remedy under national law") the question arises as to how the Tribunal should exercise its discretion?

703. In relation to this, HMRC's submissions referred us to the decision of Roth J in *Dr Reddy's Laboratories (UK) Ltd v Warner-Lambert Co LLC* [2012] EWHC 1791 (Pat).

704. This set out 7 points of which (4) to (7) are relevant here. These are:

(4) A reference may be made at any stage of proceedings. Although it is often desirable for the court to first find the facts if they are not agreed;

(5) the national court can take into account considerations of procedural organisation and efficiency, including whether significant trial costs would be avoided;

(6) A reference should include all questions on which a ruling of the ECJ is required. It causes substantial delay and expense if the national court should have to make a further reference in the same case;

(7) accordingly, if a reference its to be made at a preliminary stage, the court must have confidence that the factual situation can be sufficiently defined and that all the relevant legal issues have crystallised such that the questions on which a ruling of the ECJ is necessary can be framed with precision.

705. The Tribunal should also consider when exercising its discretion (following from what Lord Denning said in *Bulmer*) the time to get a ruling, the undesirability of overloading the CJEU, the need to formulate the question clearly, the difficult and importance of the point; expense; and the wishes of the parties.

706. Amongst other matters, relevant to the reference the parties disagree on the issue of whether the Gibraltar question is *acte claire* and whether a substantially similar point has been raised before. In order to reach a view on whether the point, or substantially the same point has been considered by the European court before, and whether the points is reasonably clear and free from doubt it is necessary to set out the relevant legislation and case-law.

707. In this section we will first look at the legislation, then the cases the appellants and HMGoG rely on in support of their position (state aid cases involving Gibraltar, *Portuguese Liga*, and *Matthews).*

708. We will then look at cases HMRC refer to (*Roque, Montrose, Jersey Potatoes,* and *Provident Insurance Plc*).

709. HMRC say there is no case law support for saying the relationship between UK and Gibraltar is to treated the same as between Member States in fact *Pereira* and *Jersey Potatoes* which relate to Jersey (also semi-autonomous) point to the relationship between UK and Gibraltar not being the same as that between Member States.

710. HMRC note the following from article 299(4): (1) Gibraltar is a territory not a state, 2) a Member State is responsible for its external relations 3) the Member State is the UK.

711. The appellants and HMGoG note that European law directives relating to the fundamental freedoms are required to be implemented in respect of Gibraltar and refer to *Commission v UK* (Case C-556/08) where Gibraltar was required to implement Directive 2005/26 on the recognition of professional qualifications. But HMRC say the obligation to implement is on the UK hence the Commission had to take action against the UK.

Law

712. Article 299(4) EC (now Article 355(3) TFEU) provides:

"The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible."

713. It is necessary to set out the text of Article 355 (there is no material difference between this article and the former one) to provide the wider context for the above provision and also to explain the background to the case-law which we come onto which deals with Jersey (*Pereira*) and the Isle of Man (*Montrose*).

714. Article 355 TFEU

"(ex Article 299(2), first subparagraph, and Article 299(3) to (6) TEC)

In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion,

Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic

Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission."

715. Article 52 TEU applies the Treaty to "the United Kingdom of Great Britain and Northern Ireland".

"Article 52

1. This Treaty shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union."

716. It can be seen from the structure of the provisions in Article 355 and the way they provide an "exception to an exception" in relation to the Channel Islands and Isle of Man that were it not for Article 355(3) the starting point would be that the Treaty would not apply to the territory. This suggests that Article 355(3) is not simply a clarificatory provision.

717. A summary of the constitutional position of Gibraltar and its status within the EU, in relation to the time period with which we are concerned (1999/2000) was provided by the CJEU in *Spain v UK* (C-145/04). (While HMGoG refer to HMGoG's Constitution which came into force on 1 January 2007 we agree with HMRC that these are irrelevant as they post-date the transfer of business which the appellants say amounts to the exercise of their establishment right and free movement of capital.)

"The status of Gibraltar

14 Gibraltar was ceded by the King of Spain to the British Crown by the Treaty of Utrecht concluded between the former and the Queen of Great Britain on 13 July 1713, which was one of the treaties which put an end to the War of the Spanish Succession. The final sentence of Article X of that treaty stated that if it ever seemed meet to the British Crown to grant, sell or by any means to alienate the property of the town of Gibraltar, a right of pre-emption would be given to the Crown of Spain.

> 15 Gibraltar is currently a British Crown Colony. It does not form part of the United Kingdom.
>
> 16 Executive authority is vested in a Governor, who is appointed by the Queen, and, for certain domestic matters, in a Chief Minister and Ministers who are elected locally. They are responsible to the House of Assembly, elections for which are held every five years.
>
> 17 The House of Assembly has the right to make laws in defined domestic matters. The Governor, however, has power to refuse to assent to legislation. The United Kingdom Parliament and the Queen in Council also retain power to legislate for Gibraltar.
>
> 18 Gibraltar has its own courts. It is, however, possible to appeal against judgments of Gibraltar's highest court to the Judicial Committee of the Privy Council.
>
> 19 In Community law, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 299(4) EC and to which the provisions of the EC Treaty apply. The Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14) provides, however, that certain parts of the Treaty are not to apply to Gibraltar".

718. As HMGoG's observations point out Gibraltar, unlike the UK is outside the following:

(1) the EU common customs territory (free movement of goods rights together with directives which have as their objective removal of barriers to the free movement of goods do not apply – see Case C-30/01 *Commission v UK* below at [728])

(2) the EU's Common Commercial Policy and Common Agricultural Policy

(3) all EU rules relating to value added tax and other turnover taxes

(4) all regimes whose proceeds contribute to EU finances including the Common Agricultural Policy, the Common Customs Tariff, valued added tax and the "fourth resource", a contribution to the EU budget based on Gross National Product.

Interpretation of Article 43 and Article 56

719. The text of Article 43 and 56 is set out above at [560] and [562] above.

720. Article 52 TEU applies the Treaty to the United Kingdom of Great Britain and Northern Ireland. It goes on to refer to Article 355 as setting out the "territorial scope" of the treaties.

721. The appellants argue "Member State" in Article 43 and 56 is not to be interpreted so literally so as to exclude territories such as Gibraltar.

Liga Portuguesa de Futebol (C-42/07)

722. The appellants point to this case as being one where a bookmaker established in Gibraltar could rely on the freedom to provide services notwithstanding that Gibraltar was not a Member State.

723. The reference to the CJEU arose out of fines imposed on Bwin by authorities in Portugal. The issue was whether a Portuguese regulation prohibiting providers of gaming service from offering services in Portugal, was contrary to the freedom to provide services. The CJEU accepted at [52] that Bwin was "established in another Member State".

724. On the other hand HMRC say this case supports the interpretation that the freedoms apply in such a way that territories to which the Treaty applies but which are only included in the Treaty by reason of their dependence on a Member State under Article 299(4) should be seen as part of the Member State for the purposes of those freedoms. Given Gibraltar is not a Member State, HMRC argue the CJEU must have been referring to the UK.

Matthews v UK (24833/04 [1999] ECHR 12)

725. HMGoG refer to this case by way of support for the argument that the UK and Gibraltar are separate and that Gibraltar is not to be treated as part of the UK.

726. This was an ECHR decision concerning Gibraltar's exclusion from the franchise for elections to the European Parliament. HMGoG refers to the UK's arguments that Community law does not consider Gibraltar to be part of the United Kingdom of Great Britain. The issue was whether the fact that the UK had not made arrangements to allow residents of Gibraltar to vote in European Parliament elections amounted to a violation of their right to hold free elections under Article 3 of Protocol 1 ECHR or amounted to discrimination under Article 14 ECHR. The court had before it the Act Concerning the Election of Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 which was attached to Council Decision 76/787. Annex II to the Act provided that:

> "The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom".

727. HMRC say it does not follow that because Gibraltar is held to be distinct from the UK for one legislative purpose this carries through to all legislative purposes and say this case does not assist on the issue of the application of Articles 43 and 56 EC to transfers between UK and Gibraltar.

Commission v UK (Case C-30/01)

728. This case considered whether the Treaty articles on free movement of goods applied to Gibraltar given the exclusions in Articles 28 to 30 of the UK Act of Accession to the EC treaty in respect of Gibraltar and Gibraltar's exclusion from the customs territory. (While the territory of "the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man" was listed in the

Regulation defining the customs territory (Council Regulation (EEC) No 2913/92) Gibraltar was not mentioned).

729. The court found that the exclusion of Gibraltar from the customs territory of the Community implied that the Treaty provisions on free movement of goods did not apply to Gibraltar.

Commission v UK (Case C-556/08)

730. The appellants refer to this case to show that Gibraltar was obliged to implement a European Directive, in this case Directive 2005/26 on the recognition of professional qualifications. HMRC refer to the fact the Commission brought its action against the UK and not Gibraltar. They accept the case illustrates the proposition that freedom of establishment does apply to Gibraltar in relation to establishment from Member States other than the UK.

State aid cases Gibraltar and the UK v European Commission (T-211/04 and T-215/04 on appeal Cases C-106/09 and C-107/09)

731. The cases concerned a Commission decision that Gibraltar's proposed system of corporate taxation was selective because companies in Gibraltar would be taxed in general at a lower rate than companies in the United Kingdom.

732. The point was not considered at first instance or appeal.

733. In order to determine whether the tax reform was regionally selective it needed to be determined what the "reference framework" was. Was it the UK as the Commission argued or was it Gibraltar? The Court of First Instance (CFI) did not need to consider the Commission's first factor which was that the general scheme of the Treaty and State aid rules meant that the reference framework could only be the Member State because that issue was already resolved by the *Azores* decision which held that that it was possible for an area for which an autonomous infra state body was responsible to be to be the reference area. The CFI considered the Commission's second factor which was the role played by the UK in defining the political and economic environment in which the undertakings operated in Gibraltar. The CFI found that the 3 criteria set out in the *Azores* judgment were met and that the "reference framework" was Gibraltar.

734. The CFI found the Commission had not established selective advantages stemming from the tax reform and had made an error of law in classifying those aspects of the tax reform as state aid.

735. The Commission appealed to the CJEU which overturned the CFI's decision. The Court did not consider the Spanish government's grounds of appeal on the status of Gibraltar.

736. The appellants refer to [55] of the Advocate General's opinion where in relation to Article 299(4) territories and state aid rules he thought the legal questions

on which the Court of Justice were called upon to adjudicate were of an exclusively Community nature. The appellants argue that whatever else his view he considered that the relationship between the UK and Gibraltar for the purposes of the application of the Treaty was a situation governed by EU law and that, as such, economic movements between them plainly could not involve wholly internal matters.

737. The appellants point out that the CFI did not state the UK and Gibraltar are a single Member State and that the UK argued Gibraltar could not be equated to a territorial entity that forms part of a Member State. HMGoG's representations also highlight the fact that the arguments the UK made were contrary to the arguments HMRC are making in this case. HMRC say these cases on which are on state aid rules are irrelevant.

738. Turning to the cases HMRC rely on:

Roque Pereira v Lieutenant Governor of Jersey (Case C-171/99)

739. Here the issue was whether Jersey legislation under which Jersey tried to deport a Portuguese national complied with equal treatment provision in Article 4 of Protocol No 3 on the Channel Islands and the Isle of Man (annexed to the 1972 Act of Accession) ("the Accession protocol") that:

> "The authorities of these territories [Channel Island and Isle of Man] shall apply the same treatment to all natural and legal persons of the Community."

740. HMRC point to the following at [41] and [42]:

> "However, since Channel Islanders are British nationals, the distinction between them and other citizens of the United Kingdom cannot be likened to the difference in nationality between the nationals of two Member States.
>
> Nor can relations between the Channel Islands and the United Kingdom be regarded as similar to those between two Member States because of other aspects of the status of those Islands."

741. HMRC refer to the court noting that Jersey was a "semi-autonomous dependency of the British Crown" (at [11]) and that under British Nationality Act 1981 a person born in Jersey obtains British citizenship "in the same circumstances as a person born in Great Britain…".

742. HMRC also refer to the fact that like Gibraltar the UK is responsible for defence and international relations in relation to Jersey.

743. The court found that the rule on equal treatment did not prohibit non-UK Member State nationals being deported even though UK nationals who were not Channel Islanders were not liable to be deported.

744. HMRC point to the aspects highlighted above as persuading the court that Jersey and UK should not be treated as separate Member States.

745. The appellants highlight the difference in treatment between Jersey (and the Isle of Man) under the Treaty. The Treaty applies to those territories only to the limited extent necessary to ensure implementation of arrangements set out in the Treaty concerning accession. This is to be contrasted with the Treaty simply being stated to apply to Gibraltar by virtue of Article 299(4) EC.

DHSS v Barr and Montrose Holdings Ltd. (Case C-355/89)

746. The treatment under the Treaty provisions for the Isle of Man is similar to that which applied for Jersey. The issue in this case was a challenge to Isle of Man legislation which controlled a UK national working on the Isle of Man. There were no free movement of person rights but again the issue was whether the equal treatment provision in the Accession protocol (set out above at [739]) was breached. The court found that the right to take up employment was nevertheless a matter which was governed by Community law. It was argued that because some of the derogations in the legislation were favourable to certain Member State nationals (UK and Ireland) that the entire system of the legislation was incompatible. The court rejected this. The key was whether the certain types of employment which required a work permit were applied without discrimination. The court also rejected an argument that the legislation should treat Community nationals in the same way that Manxmen were treated in the UK.

747. The appellants point to the Advocate General's discussion of an argument that in a similar way to free movement rights not being concerned with wholly internal situations, the right to take up employment under Community law was also not concerned with wholly internal situations. However the Advocate General thought the circumstances were not wholly internal because "the Isle of Man is not part of the United Kingdom". The protocol applied to nationals of all Member States including the United Kingdom.

748. The appellants argue that through its decision the court must be taken to have approved this analysis. Why, the appellants argue, would the court have gone on to consider compatibility with Community law if it did not accept the Isle of Man and the UK were not the same Member State?

749. HMRC say the case turned on Article 4 of the Accession protocol (and that it did not affect the principle in *Jersey Potatoes* discussed below that, at least for the purposes of some of the freedoms, it is legitimate to regard a European territory under Article 299(4) EC as forming part of the UK).

Jersey Produce Marketing Organisation Ltd v States of Jersey ("Jersey Potatoes") (C-293/02)

750. This case concerned legislation which imposed restrictions and charges on the export of potatoes from Jersey to the UK. The decision is of interest because of what the court had to say about Jersey and the UK being the same Member State.

751. The Treaty provisions in issue were Article 23, 25, 28 and 29 of the EC Treaty.

752. Under Article 1(1) of the Accession protocol the Community rules on customs matters and quantitative restrictions (which included the above provisions) applied to the Channel Islands and the Isle of Man "under the same conditions as they apply to the United Kingdom". The issue was whether for the purposes of the application of those provisions trade in potatoes between Jersey and the UK was to be treated as trade between Member States or whether the UK and Jersey were to be treated as if they formed a single Member State.

753. The court started by recalling its previous statement in *Pereira* (see [740] above) that relations between the Channel Islands and the UK cannot be regarded as similar to those between two Member States. It then noted the reference in the provisions of Article 1(1) that the Community rules were to apply to the Channel Islands "under the same conditions as they apply to the United Kingdom" and stated:

> "such wording suggests, that for the purposes of the application of those Community rules, the United Kingdom and the Islands are, as a rule, to be regarded as a single Member State."

754. Similarly the reference in Article 1(2) of the Accession protocol to measures "applicable by the United Kingdom" suggested the islands and the UK were to be regarded as the same Member State.

755. The Court went on to refer to various regulations. Article 3(1) of Regulation No 2913/92 stated "the customs territory of the Community shall comprise: …- the territory of the United Kingdom of Great Britain and Northern Island and of the Channel Islands and the Isle of Man" and Article 1(1) and (2) of Regulation No 706/73 concerning Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products (and made under the authority of the Protocol) refer to Community rules applying to the islands and state that for the purpose of applying the rules "the United Kingdom and the island shall be treated as a single Member State". The single Member State construction was noted by the court as thus having been applied by the Community legislature (at [49] of the decision).

756. The court rejected an argument that distinction drawn in the protocol between "the Community as originally constituted" and "the new Member States", of which the UK was one did not go against a single member state construction. The court went on to say at [54] that:

> "It is clear from all the preceding points, that for the purposes of the application of Articles 23 EC, 25 EC, 28 EC and 29 EC, the Channel Islands, the Isle of Man and the United Kingdom must be treated as one Member State."

Provident Insurance Plc and others v FSA [2012] EWHC 1860 (Ch)

757. The issue was whether the court had jurisdiction to sanction a transfer of general insurance business of an insurance firm authorised in Gibraltar by the Gibraltar regulator under the provisions of Part VII of the Financial Services and Markets Act 2000 ("FSMA"). This turned on the definition of "EEA State" in FSMA and whether

it was the case that Gibraltar was an EEA State other than the UK. At [12] Henderson J answered the question as follows:

> "The answer to this question is that, in the absence of special provision, Gibraltar is not an EEA State; it is a British Overseas Territory, in accordance with the British Overseas Territories Act 2002 and Schedule 6 to the British Nationality Act 1981, for whose external relations the United Kingdom is responsible. It is by virtue of that responsibility for the external relations of Gibraltar that Gibraltar is made subject to the Treaty on the Functioning of the EU (see Article 355(3) of the TFEU); and it is because the TFEU applies to Gibraltar that the EEA agreement also applies to it (see Article 126 of the EEA agreement). The correct position therefore, I am satisfied, is that Gibraltar is not in its own right a party to the EEA agreement, but is rather treated for the purposes of the EU and the EEA as part of the United Kingdom."

758. HMRC say the reasoning for the conclusion was in part based on Article 355(3) of the TFEU (the old Article 299(4) TEC) and that it therefore undermines the appellants' contention and lends support to the interpretation of Article 299(4) that HMRC argue for. They say this case is High Court authority which binds the First-tier Tribunal ("FTT") on the proposition that Article 43 or 56 do not cover a transfer from a Member State to a dependent territory under Article 299(4), and that relations between Member States and dependent "semi-autonomous" territories are not analogous to relations between Member States.

759. The appellants say the case does not offer any clear guidance on the issue of whether the establishment of SJG in Gibraltar falls within the ratione personae of EU law. They say the case concerned the particular interpretation of UK legislation and it concluded Gibraltar was not an EEA State and that it was not within the definition of the Interpretation Act 1978. It does not assist on whether EU law is engaged on the establishment of a business in Gibraltar by a UK national and that point was not argued before the court.

Should a reference to the CJEU be made?

760. The case-law criteria / framework for making this decision are set out above at [699] onwards above.

761. The appellants submit that all the points are satisfied in the present case.

762. HMRC say the Gibraltar question is *acte claire* (and contrary to what the appellants say the EU connection issue is too.) HMRC say it is significant that neither the appellants nor HMGoG purport to provide a purposive construction of Article 43 or 56 which accommodate their view. Further HMRC say the case law of the CJEU on dependent semi autonomous territories and the High Court in *Provident Insurance* put the matter beyond doubt.

Is the issue act claire?

763. For the reasons below we are not persuaded that the issue is clear and reasonably free from doubt (*acte claire*) as HMRC suggest.

764. HMRC focus on the construction of Articles 43 and 56 EC and the fact it is not possible to find a purposive interpretation of these articles in order to take account of Gibraltar (given Gibraltar is not a Member State).

765. Pausing there it seems to us that the issue is not purely one of the interpretation of those Articles but of how those articles are to be interpreted in conjunction with Article 299(4) which applied the Treaty provisions to Gibraltar. The fact that HMGoG or the appellants have not articulated how Article 43 and 56 EC are to be construed does not in our view mean they are unable to say the matter is not acte clair. We understand the position of the appellants and HMGoG to be that the effect of Article 299(4) is that Articles 43 and 56 EC do apply the freedoms as between the UK and Gibraltar even though Gibraltar is not a Member State. The terms of the legislation do not deal explicitly with the issue of how the freedoms apply as between the external territory and the "associated" Member State (for want of better term to describe the Member State who is responsible for the territory's external relations).

766. HMRC say the case-law supports the interpretation which they favour which is that Gibraltar, by reason of its dependence on the UK under Article 299(4), should be seen as part of that Member State for the purposes of those freedoms and that is supported by the case law (*Roque Pereira, Jersey Potatoes, Liga Portuguesa*, and *Provident Insurance Plc*).

767. For the reasons set out below, we do not agree the case law points to the situation being *acte claire*.

768. In relation to *Roque Perieira* we are not persuaded we can place as much store by this case as HMRC invite us to.

769. This was in our view a case about whether the external territory could treat its associated Member State nationals better than other Member State nationals. The court held it could because their situations were different. While it is true the case is consistent with the proposition that relations between an external territory and its associated Member State are not the same as relations as between Member States in relation to free movement of persons it does not tell us what the nature of the relationship between the territory and the Member State is. Also the court's conclusion must we think be understood in the particular context of deportation and it being established that Member States were not able to deport their own nationals (and that persons born in Jersey were entitled to UK citizenship in the same way as UK nationals). Further the case (like *Montrose*) is about the interpretation of the particular provisions of the Accession Protocol and it is not safe, we think, to extrapolate a wider principle from the court's conclusions given that.

770. In relation to *Jersey Potatoes* we agree with the appellants that this case is of limited relevance to the Gibraltar question. The reference to *Pereira* was but one of

several points that led to the court's conclusion. Of particular importance was the reference to the legislation being stated to apply "under the same conditions as they apply to the United Kingdom" and the specific wording in the various Regulations under consideration. The free movement of good articles were not considered in their own right but by virtue of the application provisions which specifically mentioned the UK. It is not clear at all how the court would have ruled if it was stated the arrangements were simply to apply to the external territory, or if there were no specific regulations on the point.

771. The decision in *Jersey Potatoes* therefore reflects the particular legislative framework which was applicable. It does not tend to suggest that Gibraltar and the UK would be treated similarly where the relevant legislative wording which applies to them is different.

772. In relation to *Liga Portuguesa* we do not think this case assists in throwing light on how the freedoms operate as between Gibraltar and the UK. It is clear the freedom to provide services is available to an establishment providing services into a non-UK Member State. But it is not clear whether this is because Gibraltar is to be regarded as part of the UK or whether independently of that, the freedom is available because Article 299(4) says the Treaty shall apply to such a territory.

773. In relation to *Provident Insurance Plc* we are not persuaded the decision takes the Gibraltar question further or is binding in the way HMRC suggest. Article 355(3) TFEU was the provision by virtue of which the EEA agreement applied to Gibraltar (Article 126 of the EEA agreement which the High Court referred to provides that the EEA Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied). But the question before the High Court was whether Gibraltar was an EEA state other than the UK. Article 355(3) explained how it was that the EEA agreement applied to Gibraltar but it was not because of that provision that the conclusion was reached that Gibraltar was not an EEA state other than the UK but rather because Gibraltar was not a party to the EEA agreement. By analogy the reasoning is consistent with the position that Gibraltar is not a Member State by reason of the application of Article 299(4) but that position is not in contention between the parties.

774. The issue remains as to what does it mean to say that the Treaty applies to Gibraltar under Article 299(4)? Taking account of the limitations of the case-law referred to it cannot be said that the Gibraltar question is reasonably clear and free from doubt in the way HMRC suggest.

775. For the sake of completeness, although the appellants do not argue that the position is so clearly in their favour that the matter is not *acte claire* for that reason we have considered whether that was the case but were not persuaded that it was. For the reasons explained at [798] below, those cases are not we think relevant to the issue (with the result the position is not *act claire* in relation to the position the appellants argue for).

776. By contrast the position on the EU connections issue, which the appellants also seek a reference on is we think *acte claire*. We have set out the relevant cases and the reasoning on this point above at [571] onwards above.

Even if not acte clair how should the Tribunal exercise its discretion?

777. Both parties also refer to the other factors in *Bulmer* (see [705] above).

778. The appellants refer to the breadth of the discretion as considered by the UT in *Grattan plc v HMRC* [2011] STC 2342.

779. HMRC say that even where the question is not *acte claire* if the Tribunal considers that the same point "or substantially the same point" has been decided by the CJEU in a previous case this could count against making a reference. They say there is CJEU authority (*Roque Pereira*) on a similar issue on the relation between the UK and Jersey.

780. As explained above we do not agree this aspect is fulfilled because of the particular context in which that case arose.

781. In relation to whether the question may be formulated clearly, HMRC say that neither EU connections issue nor the Gibraltar question may be formulated clearly.

782. Given our view that the EU connections issue is *acte claire* the issue of the further factors relevant to exercise of the discretion are not significant. In relation to the Gibraltar question we do not think the lack of a wording suggestion for how the Treaty articles may be construed by the appellants means a question cannot be formulated. It would, we think, be relatively straightforward to formulate the question on whether fundamental freedoms apply as between a Member State and the territory whose external relations the Member State is responsible for. Although the question as stated is not agreed between the parties we think it would be possible to state the issue.

783. In relation to the wishes of the parties, these obviously point equally in the opposite direction and do not take the matter further.

784. HMRC say that even if the Tribunal dismisses the appeals in terms of the UK law arguments alone and if it considers there is a reasonable prospect of its decision in this respect being successfully appealed this would be a factor counting against a reference at this stage

785. This point is of more significance in our view. We think it is relevant to the exercise of our discretion that there are number of issues, before getting to the Gibraltar issue which, if resolved in the appellants' favour, would mean there would be no need to seek a reference on the issue. (These are all of the domestic law issues set out under Issue 1 and the EU connections issue). If the appellants were to be successful on any of these points no reference on the Gibraltar question would be required.

786. The options appear to us be the following 1) make a reference now 2) do not make a reference, and go ahead and make a decision in respect of Stephen Fisher and Peter Fisher 3) defer making a decision on whether to make a reference until it is clear whether an appeal will be made and the basis upon which it is made.

787. Because Anne Fisher's appeal has been determined in her favour, we bear in mind that the domestic UK law issues could arise not just in relation to an appeal by Stephen Fisher and Peter Fisher (if they were unsuccessful on the Gibraltar issue) but also potentially on a cross appeal if HMRC were to appeal against the decision in relation to Anne Fisher.

788. If we make a reference now (but make a decision in relation to Anne Fisher), and meanwhile if HMRC obtain permission to appeal against the decision for Anne Fisher in relation to the European law points, then the appellants may, subject to obtaining the relevant permissions, cross appeal on points which may include the domestic law points. If the appellants won on the domestic UK law points a reference would be unnecessary.

789. If we did not make a reference, and were to decide the Gibraltar question in favour of the appellants then even if the decision were appealed by HMRC and a cross appeal was made by the appellants on the domestic law points then it is still possible the case could be decided on the domestic UK law points alone and a reference would be unnecessary. If the Gibraltar question were not decided in the appellants' favour then the appellants could again appeal on the domestic law points and win in which case a reference would also not be necessary.

790. In our view deferring the decision on whether to make a reference in order to see what the grounds of appeal were is unlikely to change the position that the matter might well be resolved on any appeal without the need for a reference. The only real advantage of doing this would be to cover off the possibility that the appellants did not choose to appeal or cross-appeal, or were unable to identify arguable errors of law.

791. We are in favour of not deciding to make a reference to CJEU now and in favour of making a decision in respect of Stephen Fisher and Peter Fisher now. If the decision is favourable then there is no need for a reference (HMRC do not seek one). If it is not favourable, then it would on appeal (assuming permission to appeal were granted) be open to the Upper Tribunal to make a reference (if it agreed the issue was not acte claire) and that Tribunal would on seeing the grounds of appeal be in a better position to assess the likelihood of the appellants winning on the domestic law arguments and therefore how worthwhile it was referring the question to the CJEU.

792. We also take into account that although we think the issue falls short of being acte claire we have had the benefit of extensive submissions from the parties and from HMGoG exploring the matters which they suggest are relevant.

793. Although HMRC have put this issue in terms of whether we think there is a reasonable prospect of an appeal on the domestic law points succeeding we do not go

so far as saying that that is the case. That will depend on the strength of the particular grounds of appeal.

794. HMGoG's concerns are with a decision on the Gibraltar issue going against their view. While we understand the point that an adverse decision will be taken account of it will at best only be persuasive and it will be open for other courts or tribunals when faced with similar issues to reach a different view. (The precedential status would of course be the same if a decision were made which was favourable from their point of view.)

795. HMGoG's representations make it very clear that the issue is one of great importance to them. By not referring the decision at this stage we ought to make it clear that we do not mean in any way to seem dismissive of HMGoG's concerns about the importance of the wider implications that flow from the Gibraltar question. We come back however to the importance of the question as far as these proceedings and any subsequent appeals are concerned. The likelihood that one or other of the parties will appeal and therefore of a reference being possible at a later stage and of the possibility that a decision in the proceedings may be reached without the need for a reference in our view outweigh HMGoG's interest in getting clarity from the CJEU at this stage.

Discussion on Gibraltar issue

796. We therefore now move on to consider our decision on the Gibraltar issue.

797. As discussed above on the section on *acte claire* the legislation does not deal expressly with how the freedoms are to apply as between the Member State and the European territory whose external relations the Member State is responsible for. Having considered the cases referred to by the parties and HMGoG it does not appear to us that the cases point towards a particular conclusion on the issue.

Appellants' and HMGoG's cases

798. *Liga Portuguese* – In relation to HMRC's reliance on this case we explain above at [772] why we think the significance of the case is overstated. But, equally it does not provide support for the position that the fundamental freedoms apply as between the UK and Gibraltar.

799. Similarly *Commission v UK* (Case C-556/08) shows that freedom of establishment rights apply into Gibraltar from other Member States but it does not shed light on whether those rights exist as between the UK and Gibraltar.

800. In relation to *Matthews v UK* we agree with HMRC that this case which is on a particular legislative provision on enfranchisement and does not assist on whether there are free movement rights as between the UK and Gibraltar.

801. *Commission v UK (Case C-30/01)* concerns the carve out in Article 28 to 30 of the Act of Accession to the Treaty applying to Gibraltar in respect of free movement

of goods but it does not tell us how freedom of establishment and free movement of capital rights are to apply let alone how these will apply as between the UK and Gibraltar.

State Aid Cases

802. In relation to the appellants' argument at [736] above that the Advocate General must be taken to have thought that movements between the UK and Gibraltar could not involve wholly internal matters we would note that the Advocate General's view that what was important was EU law (as opposed to domestic or international law) merely reminds us that what was in issue was the Treaty provision on state aid. But, it does not follow, we think, from this that because the relationship between the UK and Gibraltar (for the purposes of the state aid rules and Treaty interpretation) was a matter of EU law that economic movements between them could not involve wholly internal matters.

803. Article 87(1) EC provides:

> "…any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

804. We agree with HMRC it is difficult to see how these cases help on the issue of whether the freedom of establishment / movement of capital apply as between the UK and Gibraltar. If anything the fact the analysis seems to look to whether the Gibraltar legislation could be said to derive from an autonomous "*infra*-state" body for the purpose of defining the "reference framework" would be more consistent with Gibraltar being seen as part of the Member State for state aid purposes. However, whether it could be seen as part of the Member State for state aid purposes would not we think, point one way or the other on the issue of whether Gibraltar would be seen as being part of the Member State for other purposes.

805. In relation to *Montrose* we agree with HMRC this does not support the appellants' case. It cannot be inferred from the court's non-rejection of the Advocate General's view that the circumstances were not wholly internal and that the Isle of Man and the UK were not to be regarded as the same Member State. Article 4 of the Accession protocol specifically refers to the authorities of the particular territory and does not carve the UK out from the reference to "natural and legal persons of the Community". The Advocate General's view and the Court's approach are entirely consistent with the drafting of the particular provision they were considering. (But as noted above *Pereira* which HMRC rely on is similarly restricted to the interpretation of Article 4 of the Accession Protocol.)

HMGoG's other points

806. HMGoG raise a number of matters which in our view do not take the matter further. The overarching reason is that they do not speak to the particular question

which is before us which is how the the particular freedoms in the Treaty are to be applied taking account of Article 299(4) (now Article 355(3)).

807. HMGoG place much emphasis on the fact that HMRC's representations in these proceedings are in complete contradiction to what the UK government has argued in other proceedings before the European Courts where the UK argued that Gibraltar was not part of the UK for European law purposes (a position which the HMGoG agrees was correct). For instance in relation to *Matthews v UK* the UK government's submissions before the ECtHR accepted that although Gibraltar was not separately named in Community Directives and other measures which were nonetheless considered to apply to it:

> "It cannot be inferred form this fact that Gibraltar, is as a matter of Community law, part of the United Kingdom"

808. The UK's submission went on to acknowledge the UK was responsible for the implementation of Community law in Gibraltar but in relation to this stated:

> "To accept that the United Kingdom is responsible for the implementation of Community law in Gibraltar does not in any way imply acceptance of the false proposition that Community law considers Gibraltar to be part of the United Kingdom of Great Britain and Northern Ireland."

809. Similarly, as recorded by the ECJ at [51] of it decision in the state aid cases (Joined Cases T-211/04 and T-215/04) (discussed above) the UK argued the criterion of regional selectivity could not be applied:

> "because Gibraltar is not part of the United Kingdom under national law, international law or Community law."

810. While it may be galling to see apparently contradictory positions being taken, the consistency or otherwise of the arguments one party makes in one or more sets of proceedings does not throw any light on what the correct legal position is in other proceedings however closely related the issues are. The legal position will be informed by what the court made of such arguments but HMGoG's objection is put purely in terms of HMRC running different arguments to the UK. Whether HMRC's stance is different to contentions advanced in other proceedings by the UK is irrelevant to the issue of construction before us. (Accordingly while we ought to record that HMRC disagree the positions are contradictory it is not necessary to go into the detail of this.)

811. HMGoG also argue that under domestic law Gibraltar does not legally, economically, politically, administratively, or jurisdictionally form part of the UK. It is not part of the UK for public international law either and there is no reason why the position should be otherwise under EU law. As regards domestic law HMGoG refer by way of example to the fact the definition of "United Kingdom" in Schedule 1 of the Interpretation Act 1978 does not include Gibraltar. The fact Gibraltar does not form part of the UK is consistent with and required by public international law. HMGoG refer to Resolution 2625 (XXV) of 24 October 1970 of the UN General Assembly "Declaration on Principles of International Law concerning Friendly

Relations and Cooperation among States". They emphasise its reference to the status which the territory of a colony or other non-self-governing territory, has under the [United Nations Charter of 1946] pending the exercise of self-determination in accordance with the Charter. Such territory has:

> "…a status separate and distinct from the territory of the State administering it…"

812. The status of Gibraltar in relation to UK law and international law is also irrelevant. Gibraltar is not specifically mentioned in Article 299(4). The issue of construction of that article must be taken to be a more generic one which would apply to any Member State which had an Article 299(4) territory. We understand it to be the case that Gibraltar is the only such territory. There is no indication however in Article 299(4) that the particular interpretation of the freedoms vis-à-vis Article 299(4) territories would vary according to the particular nature of the territory under the domestic law of the territory or that of the Member State. The only factor qualifying a territory to come within the scope is that the Member State in question should be responsible for the territory's external relations. The position under Article 299(4) is in contrast to the fact that elsewhere the Treaties do make provision for specific application in relation to specific territories e.g. the Channel Islands and the Isle of Man.

813. As regards public international law the UN Charter provisions HMGoG have referred us to on the territories having a separate and distinct status are not inconsistent with a position under European law whereby the Treaty freedoms do not apply as between the UK and Gibraltar. Whatever obligations the UN Charter provisions may create it is not clear why those must be translated into rights and responsibilities to be set out in another multilateral international legal instrument (at an EU level) as opposed to being delivered through a bilateral arrangement between the state and the relevant territory.

814. HMGoG refer to the fact that EU directives are implemented in Gibraltar under its own legislation passed by the Gibraltar Parliament (the Gibraltar European Communities Act 1972) which serves to emphasise Gibraltar and the UK as two separate jurisdictions. They draw attention to the fact that many EU directives have been implemented by Gibraltar into Gibraltar law on the basis that the freedoms apply as between Gibraltar and the UK (including for example the directive on exchange of information on tax matters (Council Directive 2011/16/EU)). If HMRC's position is correct then they need not have done that. HMRC's response is that their position is not that Gibraltar is part of the UK for all purposes.

815. While the fact that laws are separately transposed in Gibraltar and the UK is a further illustration that Gibraltar and the UK are different jurisdictions (which does not appear to us be in dispute), this does not reflect any obligation to that effect in EU law and it does not point one way or the other as to what the content of the rights are that must be transposed and in particular what the content of the free movement rights are as between the UK and Gibraltar. It is quite consistent with the fact that it need only be the case that the Member State is responsible for the European territory's

external relations (with the implication that the territory might be responsible for a whole range of other matters).

816. The issue of whether it is correct that Directives such as the one HMGoG refer to on information exchange create an obligation of information exchange between the UK and Gibraltar is not before the Tribunal. However without expressing any view on that directive it does seem to us that HMRC's efforts to ring-fence the application of this issue and preserve a contrary position in relation to directive obligations as between the UK and Gibraltar can only go so far. To the extent a particular directive draws its basis from the relevant Treaty fundamental freedoms in issue it is difficult to see how on the one hand the Treaty rights could not apply as between the UK and Gibraltar but how on the other directive obligations based on the very same Treaty rights could arise which required implementation with respect to relations between the UK and Gibraltar.

817. Returning to HMGoG's argument in relation to directive transposition this is along the lines that it would be absurd if rights between the UK and Gibraltar as have been transposed in fact did not apply, therefore HMRC's position cannot be correct. But the prior question is whether the rights apply between the UK and Gibraltar or not. The fact that laws have been drafted on a certain premise (that the rights apply as between the UK and Gibraltar) does not make it any more or less tenable that the premise is correct.

818. A related point can be made in relation to HMGoG's arguments as to the consequences for the relationship between the UK and Gibraltar of the effects of the interpretation. These are variously that there is discrimination in that Gibraltarian persons and companies would not have EU rights but at the same time would not enjoy the same UK rights of UK-based companies and individuals. (The fact that some UK legislation treats Gibraltar as if it were a separate EEA state to the UK, being a matter of discretion on the part of the UK government does not cure the discrimination.) There would be harm to the economy in that the UK is Gibraltar's most important market. UK taxpayers would be dissuaded from investing in Gibraltar and would prefer countries in which the freedoms did apply.

819. We agree with the point HMRC make in response which is that the consequences of a particular interpretation cannot affect the issue of what is the correct interpretation in the first place. We have nevertheless considered whether any of the matters fall into the category of outcomes which are so far-fetched that they suggest that it cannot possibly have been intended that the freedoms would not apply as between the UK and Gibraltar but none of them do fall into this category.

820. HMGoG refer us to the fact that their concerns have already provoked political representations at a high level between HMGoG and the UK Government. While this re-inforces how strongly HMGoG feel about the issue and the concerns they perceive around the effects this obviously cannot have any sway on what the correct position is as a matter of law.

Is it necessary to say that Gibraltar is part of the UK for the purposes of applying the fundamental freedoms?

821. In relation to HMGoG's arguments as to why Gibraltar does not form part of the UK for EU law purposes; they assume that there is one consistent view of how Gibraltar should be treated. In some ways that is a "back to front" way of looking at things. There is no question before us of "is Gibraltar part of the UK for EU purposes?" That is far too generic and does not reflect the precise way in which some rights have been applied and others not (e.g. there is free movement of goods and Gibraltar is not part of the customs territory). The question must be asked within the context of the specific provisions in issue (e.g. voting provisions, state aid.). We should point out that although Henderson J's statement in *Providential Insurance* at [757] above is cast in such terms it must we think be understood in the context of the specific question that was before him. It cannot be understood as saying that Gibraltar was part of the UK for all European Law purposes.

822. On the other hand we do not necessarily go as far as accepting HMRC's argument that the only possible interpretation is to regard Gibraltar as part of the UK. The combination of Article 299(4) and Article 43 must lead to the view that the freedoms are to apply not only to the Member State but (unless provided otherwise) the external European territory for whose external relations the Member State is responsible. To say, as HMRC do, that only inter Member State transfers engage the freedoms is to prejudge the very question in issue – i.e. is it only inter Member State transfers which engage freedoms or can it include transfers from one Member State to the territory for which another Member State is responsible.

HMRC's cases

823. We have discussed the reasons why these cases do not go as far as HMRC suggest above at [768] onwards.

824. We do not agree with HMRC's suggestion that *Pereira* supports an interpretation that external territories should be seen as being part of the Member State for the purposes of the freedoms.

Back to the legislation

825. In the absence of cases which assist (beyond *Pereira* which we accept suggests that the relationship between the Member State and its external territory is not the same as between two Member States) we must return to looking at the legislation and the wider framework in which they reside.

826. Having considered that we think on balance the better view is that freedom of establishment and free movement of capital provisions do not apply as between the UK and Gibraltar for the following reasons.

827. In terms of the drafting of Article 299(4) we think it is significant that the reference to Member State is singular. This suggests to us that the particular Member State which is responsible for the territory's external relations has a special status. It is

not like other Member States. If it did not matter *which* Member State was responsible for the territory's external relations the drafting would have been more generic and would refer to any Member State.

828. There is a special relationship between the territory and the associated Member State. The territory does not feature in the Treaty because it is independently named (as others are) but because of its special status as territory whose external relations (which by definition would include a power to enter into international agreements such as the EU treaty) a particular Member State is responsible for. The provisions in Article 355 are stated to be "in addition to" Article 53. This drafting and the reference to "territorial scope of the Treaties" suggest to us that there is a distinction between provisions which determine *who / what* entity has rights and obligations as distinct to the question of *where* geographically those rights and duties are applicable. Article 355 may in our view be better understood as a provision which is about enlarging or restricting the scope of the territory where rights or duties accorded elsewhere in the Treaty arise; it is not about giving new rights or imposing new duties.

829. It is clear Member States and their nationals have rights. The fact the enforcement machinery of the Commission centres on it being able to infract Member States, is part of the coherent framework which supports such rights and obligations. Article 355 serves to tell us what comprises the territory of the Member State.

830. Gibraltar is not a party to the instrument (which accords with another entity the UK, being responsible for its international relations). It is relevant in our view that there is no mechanism to infract external territories such as Gibraltar; rather proceedings are taken against the Member State which is responsible for the territory's external relations, the UK. (*Commission v UK* demonstrates that the UK is ultimately responsible for the implementation of EU Directives in Gibraltar).

831. Article 226 EC (now Article 258 TFEU) provides:

> "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

832. The above provision is supportive of the Treaty not envisaging that legislation of the external territory which infringes European law being challenged by way of actions against the external territory. If Gibraltar had obligations imposed upon it and had legislation which infringed such obligations it would be expected that the means of enforcement of the obligation would operate against Gibraltar.

833. Further the CJEU's legal basis for imposing sanctions refers only to Member States (see Article 260 TFEU). Again, if rights were intended between the external territory and its associated Member State, if it was the external territory which

breached rights then it would be expected that the sanction would be against the external territory.

834. The only pre-requisite for the territory to qualify under Article 299(4) is that the Member State is responsible for the territory's external relations. It is inherent in the fact of one entity being responsible for another's external relations that when it comes to the relationship between the two entities the nature of that relationship will be something other than one of external relations.

835. So while it might be understood why a Member State might be held responsible for breaches in the relevant territory involving another Member State (the former is responsible for the territory's external relations, and by extension its compliance with international obligations such as Treaty rights) the same rationale does not extend to relations between the Member State and the territory which by definition are not external relations.

836. Another argument the appellants raise is to say it would be odd that someone would be in a worse position if they went to Gibraltar in terms of their rights than if they went to Jersey which is treated as a third country. But, if that is the result then that flows from the different settlement under the Treaty in relation to Gibraltar. It was not argued before us that Gibraltar was a third country. Here "worse" is used in the sense of there being fewer rights under the Treaty but if the upshot is that movements between the UK and Gibraltar are internal then there is nothing to stop those movements being regulated as between the UK and Gibraltar. The flipside to the "worse" position is that Member States have preserved more autonomy in relation to the regulations between themselves and the territory whose external relation that Member State is responsible for (at the price of being responsible for the territory's compliance with the Treaty).

837. There is nothing to suggest from the wording of the freedom of establishment and freedom to move capital articles that when read purposively in conjunction with Article 299(4) that they would create rights as between the Member State and the external territory for whose relations the Member State is responsible for. The above factors suggest such rights are not intended to be present but are left to the Member State and the territory to determine. We do not agree that the case-law points to this conclusion in so clear a way as HMRC argue so as to make the position *acte claire* but nevertheless the way in which the articles are drafted and the wider framework in which they reside suggests that such rights do not arise. Article 299(4) is certainly not otiose because it serves a clear a role in relation to rights between the external territory and Member States other than the UK and vice versa. (In order to reconcile the freedoms with Article 299(4) the freedoms (unless excluded) must apply (as is accepted) between a Member State (other than the associated Member State) and the external territory).

838. Our conclusion on the Gibraltar issue therefore is that the fundamental freedoms of establishment and free movement of capital are not engaged in relation to movements between the UK and Gibraltar.

Conclusion

839. In relation to Stephen Fisher and Peter Fisher the EU law arguments do not assist. Subject to the issues below in relation to whether assessments for particular years are defective, the assessments made against them are upheld in principle.

Issue 3: Defective assessment issues

840. There are two sets of issues in relation to assessments for particular years which are under appeal. For Stephen and Anne Fisher and the years 2005-06 and 2006-07 the challenge is on the basis there was no power under the discovery assessment provisions of s29 Taxes Management Act 1970 ("TMA 1970") to make such assessments because there was no "discovery" and in any case because the limitation on HMRC's power to make discovery assessments in s29(5) TMA applies (HMRC had enough information to know that there was an insufficiency of tax before the relevant enquiry windows shut).

841. For Peter Fisher and the year 2002-03 the issue is whether the extended time limit for making assessments under s36(1) TMA 1970 for instances of negligent conduct applies. In this regard, there is a disputed issue of fact between the parties as to whether Peter Fisher's return was submitted to HMRC.

Stephen Fisher and Anne Fisher 2005-6 and 2006-7

842. The appellants (Stephen Fisher and Anne Fisher) challenge the assessments made against each of them for 2005-6 and 2006-7 on the basis there was no power under the discovery assessment provisions of s29 TMA 1970 to make such assessments.

Issues

843. As is well known in the field of direct tax s29 TMA 1970 provides a means of assessing tax where a loss of tax is discovered. The power to assess is subject to two alternative conditions being fulfilled. The whole of the section as it applied at the relevant time is set out below at [845] below. The condition relevant to this appeal is set out in s29(5) which relates to the information available to an officer (which the parties agree is a hypothetical officer rather than the actual one) by the time the enquiry window closes. Section 29(6) prescribes a list of the types of information (returns, accompanying documents, responses to enquiries etc. which may be taken into account (which include inferences which may be drawn under s29(6)(d)(i)). The period over which the relevant categories of information in s29(6) may be taken account of, includes not just the year of assessment but also the two tax years preceding the year of assessment.

844. The specific issues which arise may be summarised as follows:

(1) **Discovery**: Was there a discovery for the purposes of s29(1) TMA 1970? The appellants challenge HMRC's view as to when the requisite discovery was made and argue that the length of time between any purported discovery and the

actual assessment means that the discovery was insufficiently new to count as a discovery for the purposes of the legislation.

(2) **Applicability of condition in s29(5)**: The appellants argue the provision is not satisfied as an officer could reasonably be expected to be aware of an insufficiency in tax. This involves considering:

(a) Whether it is necessary for the officer be aware of the *amount* of tax loss before he or she can be taken to be aware of such insufficiency (as HMRC argue) or whether awareness simply that the amount of tax loss is more than zero is sufficient (as the appellants argue).

(b) The application of the condition to the particular facts of the case. This involves considering what, if any, inferences may be drawn under s29(6)(d)(i) from the information which was provided.

Law

845. Law on discovery assessments

"29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) …

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

…

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this

Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii)…; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) …The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 804ZA of the principal Act.

(8) …An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant [year of assessment]2 is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b)…."

Facts

846. With the above statutory pre-conditions in mind it is necessary to set out some basic facts.

Returns / assessments, enquiries and appeals

847. Stephen Fisher submitted a tax return for the year 2005-06 on 30 January 2007 and a tax return for the year 2006-07 on 28 January 2008.

848. Anne Fisher submitted a tax return for the years 2005-06 on 1 February 2007 and a tax return for the year 2006-07 on 29 January 2008.

849. For the purposes of s29(7) TMA 1970 the returns in the two preceding years are also relevant. Returns for Stephen Fisher and Anne Fisher were submitted for 2003-4 and 2004-5.

850. Enquires were opened into the tax returns of Stephen and Anne Fisher:

(1) for 2002-03 on 10 January 2005;

(2) for 2003-04 on 6 December 2005; and

(3) for 2004-05 on 10 January 2007.

851. No notice of enquiry was given for either Stephen or Anne Fisher for either 2005-06 or 2006-07.

852. On 17 January 2008 HMRC issued discovery assessments for 2001-02 against the appellants on the basis that they were chargeable to income tax on the profits of SJG. The appellants appealed those assessments on 18 January 2008.

853. The enquiry window for 2005-06 closed on 31 January 2008 and for 2006-07 it closed on 31 January 2009.

854. On 11 February 2009 HMRC made discovery assessments on Stephen Fisher and Anne Fisher for the years 2005-06 and 2006-07. On the same day Stephen Fisher and Anne Fisher were each given notices of assessment in respect of the years 2005-06 and 2006-07. Those notices of enquiry stated that the enquiry into that year's tax return would form part of the on-going enquiries.

Background to discovery assessment

855. We make our findings from the evidence of Ms van Tinteren, the HMRC inspector who handled the latter part of HMRC's investigations into the tax affairs of the appellants and SJA and whose evidence was subject to cross-examination. We found Ms van Tinteren to be a credible witness. She was helpful and keen to assist the Tribunal with ensuring the answers she gave were as accurate as possible. She was upfront in admitting where mistakes had been made but equally clear about not accepting matters put to her in cross examination with which she did not agree.

856. In cross-examination it was put to Ms van Tinteren that she did not fully investigate matters, that she was suspicious of the Fishers and their advisers, and that her evidence as to the appellants' responses to requests for documents was selective and misleading. Acknowledging that her evidence did not purport to describe every piece of correspondence and was therefore selective from that point of view we did not find these allegations to be made out.

857. We do not agree that Ms van Tinteren was suspicious of the Fishers rather that she may have been over-zealous in her quest for proof that Peter Fisher's return (discussed in the section of the decision following this one) had been submitted. We accept Ms van Tinteren's evidence that she set out in a "spirit of genuine inquiry", as she put it, to find out what happened. (Where the explanation was that it was the taxpayer as opposed to the agent who was sending the return in, it would not be altogether surprising that James Cowper would not have a copy of the signed return or that the taxpayer might not have thought to keep a copy of the signed return. Her expectations as to what might be uncovered by her continued enquiries in these circumstances were therefore unrealistic.)

858. Her evidence is not therefore called into question on the basis that she had and continued to be pre-disposed against the Fishers. However, there were some matters where her evidence was not relevant or could not be given much weight, in our view, because it was not within her knowledge. We have only set out the findings from her evidence which we find to be relevant to the issues under appeal.

859. We ought also to mention that in the bundle of documents before us we had a copy of a witness statement of the appellants' adviser, Sharon Bedford, of James Cowper which had been put forward in relation to a previous disclosure application. Ms Bedford was not called as a witness in these proceedings and was therefore not cross-examined on the statement. In the event we have not found it necessary to refer to the matters covered by this statement in order to make the findings which are relevant to the issue before us and the issue of the appropriate weight to be given to the statement does not arise.

860. Ms van Tinteren has worked for HMRC since 1990. She became a fully trained inspector in 1994, served in local offices until 1998, and HMRC's Large Business Office until 2002 when she took up post as an investigator in what was then the Special Compliance Office (SCO) and is now known as Specialist Investigations in Bristol.

861. On 14 December 2001 a corporation tax (CT) enquiry was opened into SJA for the year ended 31 December 2000. This included questions as to valuation of the good will of SJA's UK tele-betting business in connection with a claim that had been made for rollover relief. Shortly after 24 January 2003, the CT enquiry into SJA was passed to Julian Sharp at SCO. He registered the case for full investigation on 14 February 2003 and notified Stephen Fisher and Anne Fisher that he was opening enquiries into 2001-02 personal self-assessments on 19 February 2003. The investigation was transferred to another HMRC officer, Len Jacobs on 8 November 2005. Ms van Tinteren took over this investigation on 9 June 2006.

862. On 12 December 2006, Ms van Tinteren issued discovery assessments in respect of liability under the TOAA charge (s739 ICTA 1988) against all three appellants for 2000-01.

Ms van Tinteren's decision to issue discovery assessments for 2005-06 and 2006-07

863. On 27 January 2009 an HMRC colleague forwarded Ms van Tinteren an article published in the Oxford Mail announcing that SJA's UK telebetting business (set up after the change in UK gambling duty regime in 2001) had been sold to Gibraltar. Ms van Tinteren says this raised two issues.

864. The first was around recovery of tax being put at risk by transfers offshore.

865. The second was that the article suggested to her that the move to Gibraltar was to save money. The article mentioned that VAT was not charged in Gibraltar and in her mind moving for this reason accorded with the purpose of designing transactions for the avoidance of taxation.

866. She regarded the following HMRC Self Assessment manual instruction (SAM 1010) as relevant:

> "A jeopardy amendment is made to a taxpayer's self assessment during a s9A enquiry if there is reason to believe that the subsequent settlement of the additional liability may be in jeopardy. For example, you may become aware that the taxpayer has plans to leave the country, or is disposing of assets."

867. Ms van Tinteren explained:

> "Since I believed that tax was at risk I raised jeopardy amendments for the years in which the returns were under enquiry and discovery assessments for the years when they were not."

868. She considered s29(1)(a) TMA 1970 applied:

> "because income of SJG which should have been self assessed to IT by the Fishers under s739 ICTA 1988 for the returns periods ended 5 April 2006 and 2007 had not been assessed".

869. In cross-examination Ms van Tinteren explained that she did not take legal advice before issuing the assessments but she did talk to a technical specialist at SCO

who specialised in giving advice on whether or not to issue assessments and how the assessing procedure worked under TMA 1970.

Was there a discovery?

Law on "discovery"

870. The issue of the validity of discovery assessments and the interpretation of s29 TMA 1970 was considered by the Upper Tribunal (UT) in *HMRC v Charlton* [2012] UKFTT 770 (TCC). The decision considered a number of issues of interpretation relevant to this appeal.

871. The facts concerned a tax scheme involving second hand insurance policies. The appellants had made disclosures which included a SRN (a scheme reference number under the Disclosure of Tax Avoidance Scheme Regulations). HMRC opened enquiries in relation to others who had entered into the scheme but not the taxpayers. The appeal was allowed by the FTT. The UT, heard HMRC's appeal and the taxpayer's cross appeal. The UT's decision covered issues of interpretation on the meaning of "discovers" in s29(1) TMA 1970 and whether it implied a requirement for something new to have arisen or whether a discovery could happen when HMRC realised that insufficient tax had been assessed.

872. According to the UT at [37]:

> "…no new information, of fact of law is required for there to be discovery. All that is required is that it has newly appeared to an officer acting honestly and reasonably that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

873. At [24] of *Charlton* the UT, in discussing the threshold to be crossed, stated:

> "…an officer's discovery must be a reasonable conclusion from the evidence available to him. To that extent, although the test in s29(1) is a subjective test, an element of objectivity is introduced in examining the reasonableness of the officer's conclusion…"

874. The appellants say it needs to be taken into account that a conclusion was reached long before the relevant dates and so there was no discovery. The appellants refer to [37] of the UT's decision in *Charlton* for the proposition that:

> "If the assessment is not made within a reasonable period after that conclusion is reached, it might depending on the circumstances be the case that the conclusion would lose its essential newness by the time of the actual assessment."

875. From the UT's decision in *Charlton* we note the following points. The fact that the UT gives the example of a change of view suggests that it is what is going through the actual officer's mind which is relevant. However the test is not wholly subjective

because it must appear to the officer "acting honestly and reasonably" so it is relevant to measure the officer's state of mind against what an officer acting honestly and reasonably in that circumstance could have thought.

876. It is also the case that whether there is a discovery is a prior issue (see [16] of the UT's decision "…the meaning of "discovers" in s29(1) is essentially a threshold question…). It seems to us that for the purposes of considering whether or not this prior issue of discovery is met, the fact that a hypothetical officer could have come to the view earlier would however be irrelevant to the question of what an actual officer thought at a particular point in time and to the issue of whether the view was one that an officer acting honestly and reasonably at that particular point in time could have come to.

877. In testing out whether there has been a discovery it seems that the first step is to look for the first point in time at which an HMRC officer has reached a subjective conclusion as to insufficiency. That is then tested for honesty and reasonableness and for proximity to the assessment date. (It is implicit in the observation in *Charlton* (at [42] of the UT's decision) to the effect that of an out of time officer who passed the file to another would not be successful in refreshing its newness that a conclusion would already have been reached by the first officer.) The question of when *ought* the officer to have come to the view there was a loss of tax does not arise however at this stage.

878. We also note that in contrast to s29(5) TMA 1970 where there is a prescribed set of information to consider, there is no such prescription for s29(1) TMA 1970. The information that needs to be considered when looking at an officer who is acting honestly and reasonably is, it seems to us, all of the information which was available to the particular officer who made the purported discovery.

Application to facts: Was there a "discovery"?

879. The appellants suggest that it is difficult for HMRC to say that anything newly appeared to an officer because HMRC had for some time held the firm and fixed view that tax was due under s739 ICTA 1988 and had already gone ahead and issued assessments relating to such liability at the end of January 2008.

880. The answer lies however in what we make of Ms van Tinteren's evidence. She was the officer who made the discovery assessments.

881. Ms van Tinteren says she did not know whether SJG had made any profits after 31 December 2005 which might be assessable under s739, and if there were profits, what figures would be assessable. (She did not know whether and if so in what proportion the appellants held shareholdings in SJG.)

882. In terms of what amounts to a discovery for the purposes of the legislation the UT in *Charlton* described the issue as follows at [28]:

> "at one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed."

883. Our view is that Ms van Tinteren did cross such a threshold on finding out from the newspaper article about the business move in January 2009 and that the appellants' argument that a conclusion that there was an insufficiency was reached earlier by HMRC is not made out.

884. The appellants suggest there cannot have been any concern following the newspaper article about, "UK situs assets being depleted", (as Ms van Tinteren put it) because if there was a sale, the Fishers would still hold their shares in the company and the company would have the proceeds of the sale. However the non-technical way in which the HMRC instructions are written does not suggest to us that the reference to disposal of assets was meant to be read in such an overly strict sense and we accept that Ms van Tinteren might reasonably have thought and did in fact think that the business move mentioned in the article could fall under the scope of the instructions and that further consideration on whether to make an assessment was warranted.

885. Ms van Tinteren's reasons for her change of view do however, it has to be said, strike us as a little surprising to the extent they imply that she ought to have come to the view there was an insufficiency sooner. To suddenly be concerned about the risk of recovery of tax presupposed that there was a loss of tax to recover. It is at odds with her evidence that she was essentially holding out for information on the share ownership of SJG and SJG's profits before being able to know that there was an insufficiency of tax.

886. It did not strike us however that the need to get the profit figures for SJG in order to pin down the s739 liability was something Ms van Tinteren necessarily had at the forefront of her mind. She was unable to recollect when she had located the SJG profit figures which were in the SJA accounts whereas if it was such a key piece of information that she had been holding out for we would have thought that when it became apparent that it contained information about SJG's profits that would be something which would have stuck out in her mind.

887. We think Ms van Tinteren's evidence as to her actual thought processes has become somewhat confused because she seeks to address points which are more relevant to the issue, which we shall come onto, of how a hypothetical officer would have approached the matter and in doing so she has unwittingly focussed on those elements which provide a more rational basis, with the benefit of hindsight, for why an enquiry was not opened earlier.

888. In our view, Ms van Tinteren did not have a firm view on the insufficiency of tax in the years 2004-05 and 2005-06 before January 2009 because she had not specifically turned her mind to reaching a view on that issue. We accept her evidence that the newspaper article created in her mind a fear of assets moving off-shore and this is what prompted her to think more specifically about the matter and to come to the view that there was an insufficiency of tax.

889. The fact that the basis for coming to this view may be difficult to reconcile with the explanations Ms van Tinteren has given (because the article did not make it any clearer that Stephen Fisher and Anne Fisher still had shares in SJG or what SJG's profits were in that year) does not make the conclusion that Ms van Tinteren reached this view in actual fact at this point in time any less tenable.

890. In terms of whether the view is one that an officer acting honestly and reasonably would have come to, while we are not persuaded for the reasons set out above that the newspaper article by itself would prompt an officer acting reasonably to think there was an insufficiency of tax, the matter has to be looked at with the benefit of the totality of the information that was available.

891. The information that Ms van Tinteren had in January 2009, included the SJA accounts with SJG's profit figures (Ms van Tinteren's evidence is that she referred to these figures when making the discovery assessments), the SJG consolidated accounts with additional pages on SJG's individual figures and details of the appellants' control of it, the returns, and previous correspondence with the appellants (see [949(2) and (3)] below). An officer with this information and one who would have had regard to departmental instructions that applied would, we think, when acting honestly and reasonably, have reached the view that there was an insufficiency of tax.

892. Having identified a conclusion on insufficiency which on the face of it amounts to a "discovery", the decision in *Charlton* suggests at [42] that it would be appropriate to see whether the conclusion had been reached earlier and if so whether it was, in view of the time by which the assessment was made, still a new conclusion.

893. There is nothing, however, on the evidence which suggests, prior to Ms van Tinteren's discovery that any HMRC officer had reached an earlier conclusion that tax was underpaid in 2005-06 and 2006-07. On the contrary the evidence points to HMRC officers not having a view or to the fact that they were seeking particular information to assist them in reaching a view on insufficiency.

894. It might be said that the combination of the above information available to Ms van Tinteren would suggest that an officer ought to have come to that discovery sooner but as mentioned above the test of whether a discovery has been made is a subjective one and involves indentifying the insufficiency has in fact become apparent to a particular officer acting honestly and reasonably.

895. While a discovery assessment was made on 17 January 2008 for 2001-02 (and indeed on 12 December 2006 for 2000-01) these earlier assessments do not indicate that any particular officer did in fact reach a conclusion that there was a tax insufficiency for 2005-06 and 2006-07.

Discovery sufficiently new?

896. We accept Ms van Tinteren came to the view there was an insufficiency for 2005-06 and 2006-07 on finding out about the business move at the end of January 2009. It is not the case that her conclusion was reached earlier and that she failed to

act on it. Given the date of the assessment was within a calendar month of finding out about the business move this is certainly not a situation in our view where the purported change in view is not a valid discovery for the purposes of the legislation because it is insufficiently new.

Was the condition in s29(5) TMA 1970 fulfilled?

897. In relation to this condition we were referred by the appellants to *Charlton*, and by HMRC to the Court of Appeal decisions in *HMRC v Lansdowne Partners Limited Partnership* [2012] STC 544 and *Langham v Veltema* [2004] STC 544.

898. It is uncontroversial that for the purposes of s29(5) that the relevant officer to be considered is a hypothetical one. As explained by the UT in *Charlton* at [65], the officer:

> "..must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer. Whilst leaving open the exceptional case where the complexity of the law itself might lead to a conclusion that an officer could not reasonably be expected to be aware of an insufficiency, the test should not be constrained by reference to any perceived lack of specialist knowledge in any section of HMRC officers. What is reasonable for an officer to be aware of will depend on a range of factors affecting the adequacy of the information made available, including complexity. But reasonableness falls to be tested, not by reference to a living embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case."

899. In their skeleton argument and reply it appeared to us however that the appellants were pursuing an argument tantamount to saying that it was necessary to look beyond the list of documents in s29(6) (and arguing only in the alternative that the documents they were seeking to rely on to make out the case on s29(5) fell within that subsection). The appellants' submissions at the hearing focussed however on the effect of certain documents in relation to which there appeared to be no dispute as to whether they fell with s29(6).

900. We do not think there can be any doubt that for the purposes of s29(5) we are restricted to only putting the s29(6) information before our hypothetical officer. It is clear that the list in s29(6) of the information made available to the officer is exhaustive (see [36] of Auld LJ's judgment in *Langham* and [66] of the UT's decision in *Charlton*). To the extent that not looking at documents HMRC has obtained through its own efforts can be described as resulting, as the appellants put it, as "wilful blindness", then that is a function of the particular way in which the statutory scheme works and the emphasis that it puts on disclosures being made by the taxpayer.

901. Returning to our hypothetical officer it is also not in dispute that it is not enough that the hypothetical officer has enough information to cause him or her suspicion which might lead him or her to go to further inquiries.

902. Before considering the facts and the application of the law to them there are some preliminary issues of legal interpretation that we need to deal with.

Does coming to the view that there is an insufficiency mean that the quantum of tax insufficiency has to be indentified too?

903. The appellants argue that all that is required is for an insufficiency to be identified. The quantum of the insufficiency does not need to be identified. The appellants suggest that Statement of Practice SP1/06 represents the proper interpretation of subsection 1 and that it supports this argument.

904. SP1/06 provides:

> "Taking a Different View
>
> 18. It is open to a taxpayer properly informed or advised to adopt a different view of the law from that published as HMRC's view. To protect against a discovery assessment after the enquiry period, the return or accompanying documents would have to indicate that a different view had been adopted. This might be done by comments to the effect that the taxpayer has not followed HMRC guidance on the issue or that no adjustment has been made to take account of it. This would offer an opportunity to HMRC to take up the return for enquiry. It is not necessary to provide all the documentation that HMRC might need to quantify that insufficiency if an enquiry into the Return is made."

905. In relation to the Statement of Practice, HMRC say this refers to accompanying documents (sent in with the return) and also that it must be seen to apply in the context of circumstances where the taxpayer has alerted HMRC to a difference between its view and HMRC's published view. HMRC clarify that an estimate of offshore income would suffice. The appellants say this is too narrow a reading of "published". There is no reason, they say, to distinguish between published views and unpublished as in both cases appellant is disagreeing with HMRC's view. All that was needed was for the appellant to have said they were taking a different view of the law.

906. Although it is apparent the parties have different views on the matter of how HMRC's Statement of Practice should be interpreted the issue before us is whether the legislation requires the insufficiency to have been quantified. Taking on board that the appellants say the Statement of Practice reflects their argument that quantification is not necessary, our focus must nevertheless be on interpreting the legislation.

Tribunal's views on whether quantification necessary

907. Section 29(1)(a) TMA 1970 appears to us to cover the situation where perhaps there has been no assessment but also where there has been an assessment but a

particular type or category of income or gain has not been included. Section 29(1)(b) assumes there has been an assessment or in addition an identification of a type of income but that the quantity is insufficient. (As an aside we would note that while for the purposes of this appeal we have been directed towards s29(1)(b) as the basis for the assessment if it were possible that s739 income could be viewed as a distinct type of income the situation would therefore fall under s29(1)(a) in which case there would be no need to discover the quantity of income just that there is some such income.)

908. Assuming however that it is correct that this is a s29(1)(b) case we would agree with the appellants that the normal meaning of "insufficiency" is that it simply means something greater than zero (i.e. the amount of shortfall of tax is greater than zero). It does not necessarily mean the discovery has to quantify what the level of insufficiency is.

909. There is some support for the appellants' argument in the way s29(1) is drafted. The amount or further amount which is charged in order to make good the loss of tax is not simply by reference to what has not been assessed, tax which is insufficient, or the amount by which the relief is excessive. Rather, the amount is that which *in the opinion of* the officer or the Board's *opinion* ought to be charged. This seems to us to suggest that quantification is a separate step.

910. This conclusion does not mean HMRC's case falls away however. As set out in the section of this decision dealing with Issue 1 (domestic law arguments), s739 contains a number of ingredients that must be dealt with before the income can be attributed to Stephen Fisher and Anne Fisher. One of these ingredients is that it must be shown that Stephen Fisher and Anne Fisher had a power to enjoy. HMRC's primary submission is that s739 is an annual tax and that for a given year the officer must have been found to be aware that Stephen Fisher and Anne Fisher had a power to enjoy. Further even if, contrary to HMRC's views, quantification of income was not necessary, it still had to be shown that the person abroad, SJG, had made profits in the relevant tax years.

911. There cannot be any doubt that we ought to look at those points separately for each tax year. The fact that in respect of Stephen Fisher and Anne Fisher there may be a s739 tax insufficiency in one year does not mean there will be in the following year if SJG did not have any income and if Stephen Fisher and Anne Fisher did not have power to enjoy. It is therefore relevant to consider those questions in relation to each year and it is necessary to show the hypothetical officer would reasonably be aware of SJG making profits in 2005-06 and 2006-07 and that Stephen Fisher and Anne Fisher had shares in SJG in those years.

Relevant information as set out in s29(6) TMA 1970

912. Section 29(6) contains a list of information which we must put on the hypothetical officer's desk. This does not include documents the officer has found off his or her own bat or which they have received other than through the taxpayer or their agent (so it would not include the SJG accounts Ms van Tinteren obtained from

Gibraltar Companies House or the SJA accounts received along with SJA's corporation tax returns.)

913. The hypothetical officer is deemed to be aware not only of the tax returns of Stephen Fisher and Anne Fisher for 2005-06 and 2006-7 but also of "documents, accounts or particulars" provided to HMRC in connection with enquiries into the 2003-04 and 2004-05 tax returns in relation to 2005-06 and 2006-07. The appellants clarified that while 2003-04 was relevant in principle there was not any additional information from looking at that period which they needed to rely on.

914. In addition to the returns and SJG consolidated accounts which were sent in by the appellants, the information the appellants rely on is as follows:

(1) A 16 page letter of 25 June 2007 from Chris Oates of Ernst & Young marked for the attention of Ms van Tinteren.

(2) E-mail exchanges of 18 and 23 October 2007 between Ms van Tinteren and James Cowper.

(3) A 9 page letter of 4 September 2008 from James Cowper to Ms van Tinteren.

915. The appellants say these documents were provided in relation to the ongoing enquiry into the 2004-05 returns of Stephen Fisher and Anne Fisher and would also satisfy s29(6)(d)(ii) independently by reference to both earlier years of assessment.

916. HMRC does not take issue with the notion that these documents arise out of that inquiry but does take issue with the submission that the hypothetical officer with those letters on their desk would have become aware of the tax loss by the end of the relevant enquiry windows. In particular the officer, they say, would not be aware of whether Stephen Fisher and Anne Fisher had power to enjoy and would not be aware of whether SJG had profits for the relevant time period.

917. The appellants' argument, with which we agree, is that we are able to look at the documents in conjunction with each other for the purposes of assessing what the hypothetical officer would reasonably be aware of and also that there is no hierarchy of importance between the categories of information. In principle it is possible that the whole of the matter the officer is taken to be aware of amounts to something bigger than the sum of the individual parts. Whether this is the case will depend on the particular circumstances.

918. HMRC say it is significant there is no threshold to open an enquiry. The only protection the taxpayer has is to make a very full disclosure, so it is a heavy burden on the taxpayer.

919. Given the main plank of the appellants' case is the application of the motive defence in s741 that box ought to have been ticked and full particulars of the s741 defence ought to have been given. Also in order to be "aware" of a tax loss under s739 the notional officer would have to be made aware in a s29(6) document of the level of income arising offshore.

920. In relation to s29(6)(d)(ii) HMRC say that in order to rely on this provision, the taxpayer must notify in writing both the existence of the information and its relevance as regards the "situation…" and that such information must lead the notional officer to reasonable awareness of the tax loss. Section 29(6)(d) refers to information which would enable an officer to make an assessment for the year in issue.

921. At the hearing the appellants made arguments in relation to s29(6)(d)(i). They say that even if it were relevant to show that SJG was making profits that could easily be inferred. The accounts up to 31 January 2005 had been provided by 5 December 2007, and the accounts up to 31 December 2005 include the first 9 months of the tax year 2005-06. SJG's net profits were disclosed at note 15 of the accounts.

922. Further the appellants refer to *Charlton* to make the point that it is not necessary to infer the actual information, merely the existence and relevance of the information.

923. Our focus therefore will be on whether the particular "s29(6) information" would make our hypothetical officer aware of Stephen Fisher's and Anne Fisher's power to enjoy, and of SJG's profits for the relevant years. We will go through the documents noting our comments on what they make the officer aware of. But we will, having done that, and following from what we say above at [917] also consider their cumulative effect.

The returns

924. Stephen Fisher filled his returns in as follows.

(1) He did not place a tick against the box in his 2005-06 return to the question:

> "Have you or could you have received, or enjoyed directly or indirectly or benefitted in any way from, income of a foreign entity as a result of a transfer of assets made in this or earlier years?"

(2) His 2006-07 return does contain a tick and an instruction to "see box 6.39" of the "Foreign Pages" which contains a reference to "S D Fisher Life Interest Trust".

(3) In the "white space" in Box 6.39 the following information was entered:

(4) "Mr Fisher is the settlor and life tenant of the S D Fisher Life Interest Turst, which is resident in the UK. It is dealt with at Nottingham Trust district at reference [*reference number given*]. All income and gains are included on Mr Fisher's Tax Return. Please note that the foreign pages show no income as although Mr Fisher is entitled to receive foreign dividends none were paid during the year ended 5 April 2007."

(5) The word "Gibraltar" is typed on the first page of the foreign pages in the dividends section.

925. In relation to Anne Fisher the "yes" box to the question (at [924]) above was not ticked for her 2005-6 or 2006-7 returns.

926. For both Anne Fisher and Stephen Fisher for 2004-05, 2005-06 and 2006-07 there are no ticks in relation to the question 8 on Capital Gains "Did you dispose of other chargeable assets (the prior bullet refers to only or main residence) worth more than [£32,800 for 2004-05 / £34,000 for 2005-06 and £35,200 for 2006-07] in total?

The letter of 4 September 2008

927. This letter from James Cowper replies to a letter from Ms van Tinteren dated 26 February 2008 (which is redacted in its entirety). The heading of the 4 September 2008 letter includes a reference to "Stanjames (Abingdon) Limited, Stanjames (Gibraltar) Limited" as well as the appellants but does not mention any years of assessment. The letter is stated to be in accordance with advice obtained from Stephen Brandon QC. It sets out factual background, deals with relevant transfers and associated operations, the operation of s739 to transfers, various arguments on s741, EU law and ends with the conclusion that it is not accepted that s739 applies (maintaining that s741 disapplies it) if that was necessary given the arguments on Article 43 EC.

928. The appellants referred us to a passage which they say is supportive of the fact that Stephen Fisher and Anne Fisher had ownership of SJG shares.

929. After setting out background facts in the period 1997 to 2001 the letter states at 3.14:

> "Subsequently HMRC has issued assessments to income tax for the years ended 5 April 2001 and 5 April 2002 in the proportions: Stephen Fisher 26%, Mrs A P Fisher 26%, Mr Peter Fisher 24%. These assessments reflect the shareholding in SJG."

930. Although the statement as to shareholding is in the present tense it seems clear to us from the context that the percentages are relevant to the years of assessment (2000-01 and 2001-02). Section 5 of the letter contains some argument in relation to the percentage of income in relation to which Stephen Fisher is to be assessed and ends with the statement at 5.2.10.

> "We cannot therefore accept that, even if section 739 is in point because section 741 does not disapply it, the figures on which you have assessed bear any resemblance to the actual liabilities under this section."

931. This makes it all the more clearer that the discussion is in the context of figures which have been assessed. There is no indication here we think as to the appellants' shareholdings in SJG in 2005-06 and 2006-07.

932. Further the appellants also refer to a statement in the letter at paragraph 7.2: "We note that you refer to SJG retaining its profits as tax avoidance…" made in the context of an argument about whether there was any new power to enjoy. The appellants say the implication of this is that at this time there were profits for it to retain.

933. Again it is not clear at all what year of profits is being referred to. There is nothing to suggest from this statement that SJG had profits in the particular years 2005-06 and 2006-07.

934. The letter maintains that s739 does not apply. The appellants say the natural inference from this is that s739 continues to be on point.

E-mails of 2007

935. In relation to the emails of 18/23 October 2007, on 19 October 2007 Ms van Tinteren wrote to Chris Wood at James Cowper to ask for the SJG accounts in order that a referral for specialist advice within HMRC could be made. Penelope Lang of James Cowper replied on 23 October 2007 saying Chris Wood was away and that she would discuss the request with him on his return. The appellants argue that Ms Lang was accepting the premise that all of the accounting periods after 2002 up until 2007 continued to be relevant and that the inference was that the Fishers continued to have a power to enjoy in SJG and that it continued to make profits. If the position were otherwise the answer would have been that the shares were sold and that the provision of accounts beyond 2003 would not have been necessary.

936. We do not read these exchanges of e-mails in this way. Ms Lang was simply sending a holding response. While the exchanges are not inconsistent with a continuing power to enjoy we do not think they would indicate anything one way or the other to HMRC on the question of whether power to enjoy continued. It is not even as if there was an indication that the issue of whether it was correct to provide the accounts given their relevance to particular years was going to be specifically considered.

E&Y letter of 25 June 2007

937. This letter from Chris Oates of Ernst & Young to Ms van Tinteren is headed with the names of SJA and SJG as well as the appellants. It is prefaced with the following:

> "As you are aware we have been asked by the above to carry out an independent review of the facts in respect of the transactions undertaken, which are currently subject to a long running enquiry by HM Revenue and Customs under ICTA 1988 s.739, and to set out our findings thereon."

938. In large part the letter which extends to 16 pages does what it sets out to do. It sets out the background to the formation of the Gibraltar branch the declining turnover of SJA, the establishment of SJG, the seeking of counsel's opinion, the transfer of the Gibraltar branch to SJG, the disposal of SJA's tele-betting business, the valuation challenge and the regeneration of UK telebetting. The letter referred to Stephen Fisher's and Anne Fisher's initial subscriptions for shares in SJG and enclosed diagrams showing their percentage shareholdings. The letter goes on to recount various HMRC arguments and to make various arguments on applicability of the s741 defence.

939. We agree with HMRC however that there is nothing in this letter which would throw light on what the position was in relation to who the shareholders of SJG were in 2005-06 and 2006-07 and whether SJG was making profits in 2005-06 and 2006-07.

Accounts

940. On 28 August 2003 following a share transfer SJG became the majority shareholder of SJA. Consolidated accounts for SJG were prepared.

941. On 5 December 2007 Mr Wood of James Cowper faxed consolidated accounts of SJG for the periods ending 31 December 2003 to 2005 to Ms van Tinteren. The two pages at end of these accounts provided SJG's profit figures. SJG's individual profit figures for years ending 31 December 2006 and 2007 were not provided to HMRC until after the enquiry windows had been shut.

942. The SJG accounts for the year ending 31 December 2004 show profits at 31 December 2003 of £1.979 million, £2.734 million at 31 December 2004 and £3,074,198 at 31 December 2005.

943. In relation to the accounts for year ended 31 December 2004 dated 5 June 2006 the appellants point to the directors' report showing the company was in "rude health" as they put it (the report refers to increase in turnover, an office move, a move into new operations). The appellants say that when taken together with the profits up to year end 31 December 2005, the only natural inference is that the company is going to continue to be profitable. While the appellants refer to the fact that the accounts were prepared on a "going concern basis" this explains the valuation basis on which the figures were prepared but it does not we think cast any light as to what the financial situation of the company in the next year was going to be.

944. The SJG accounts for year ended 31 December 2005 overlap by 9 months with the tax year 2005-6. The director's report is dated 30 April 2007. This again contains a report which indicates good financial health according to the appellants with a reference to movement of offices and expansion into new regions. The accounts show SJG's profits. The appellants say it can be inferred from this report and the returns and letters that there was profit in 2006-7 and as such an insufficiency of tax. They say it also shows that Stephen Fisher and Anne Fisher were controlling shareholders.

945. Note 19 of the SJG consolidated financial statements states:

> "Ultimate Controlling Party
>
> In the opinion of the directors, the ultimate controlling parties of the group are S.D. Fisher and A.P. Fisher jointly, by virtue of their 52% shareholding in the company."

946. HMRC's argument that the 2005 SJG accounts cannot be taken account of because they were not sent in by the taxpayer is not sustainable on the facts (they were sent by the appellant's agent James Cowper on 5 December 2007). However, even if the 2005 accounts were to have been provided, HMRC highlight that they

were for only for part of the tax year and also that they would not deal with power to enjoy which is a prior question. It is analogous, HMRC say to as if in *Lansdowne* the partnership had said that it had had a policy of paying rebates but not saying whether or not a rebate had been paid in the particular year.

947. The appellants pointed out that in the normal course of events, where accounts are only finalised some time after the financial year end it would have been impossible for a person to have quantified the s739 figure where the April to April period spanned two accounting years by the due date for the return. The accounts for the second year within that period would not have been finalised by the due date of the return in 31 January.

948. We are not sure however that this observation takes the matter any further (beyond pointing out the information would be unlikely to be ready by the time the return needed to be filed). The relevant point in time is the close of enquiry window which is the following January by which time the accounts would be available. If we have understood HMRC's position correctly they are not saying that the quantification has to be in the return in that the return could give an estimate and then the actual amounts could be disclosed later.

949. For the sake of completeness (and because some of these accounts are relevant to the issue of the earlier issue of whether there was a "discovery" in the first place by Ms van Tinteren) we will mention that Ms van Tinteren had access to a number of other accounts. These are not relevant for the analysis under s29(5) (putting to one side the question of inferences under s29(6)(d)(i)) because:

(1) In relation to the SJG consolidated accounts containing individual SJG profit figures for 2006 and 2007 (in notes 15 and 17 respectively) these were received after the respective enquiry windows for 2005-06 and 2006-07 were shut.

(2) In relation to the SJG consolidated accounts that Ms van Tinteren obtained for y/e 31 December 2004 and December 2005 these were obtained by Ms van Tinteren from Companies House Gibraltar and not disclosed by the taxpayer.

(3) The SJA accounts for the period ending 31 December 2005, 2006 and 2007 (which at note 8 contained profit details of the "parent company" (i.e. SJG, but which Ms van Tinteren mistakenly thought was SJA in relation to its UK subsidiaries). These were received by Berkshire Area Tax Office and forwarded to SCO Bristol. These were not however sent by the taxpayer (Stephen Fisher and Anne Fisher or their advisers (acting in their capacity as advisers to the appellants as opposed to SJA).

Inferences for the purposes of section 29(6)(d)(i) TMA 1970

Law

950. The text of the provision is set out at [845] above.

951. The construction of this provision was considered by the UT in *Charlton.* After setting out the provision the UT at [70] stated:

> "From this we can immediately conclude that the test is again an objective test, looking at what the hypothetical officer could reasonably infer from the taxpayer's return or any claim, and accompanying documents, or documents, accounts or particulars produced or furnished by the taxpayer or his agent for the purpose of HMRC enquiries. The information is only treated as made available for s 29(5) purposes if both its existence and relevance could reasonably be inferred."

952. The appellants highlight the following at [78]:

> "The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary."

953. The UT went on to observe:

> "However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.
>
> [79] As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s29 when applying the test of reasonableness."

954. Earlier at [74] the UT stated:

> "It is clear that s 29(6) should be construed in a manner consistent with the purpose of the overall scheme of s 29(5). That purpose was described by Auld LJ in Langham v Veltema in the following terms ([2004] STC 544 at [36], 76 TC 259 at [36]):
>
> '… It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a s 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a s 9A enquiry before the discovery provisions of s 29(5) come into play. That scheme is clearly supported by the express identification in s 29(6) only of categories of information emanating from the taxpayer.' "

955. The UT had [75] had rejected the taxpayers' wide construction which it thought would result in the consequence that "any document that could reasonably be assumed to exist effectively to be treated as if it were before the hypothetical officer".

956. At [77] in discussing examples put forward by HMRC's counsel, it said:

> "The information referred to in s29(6)(d)(i) must relate to something more than the thought processes by which the officer would reasonably conclude that an assessment was justified."

957. From the above we consider that s29(6)(d)(i) envisages information whose content is something which is distinct from the way in which its existence and relevance may be described. It is also not aimed at deeming conclusions the officer reaches by applying his or her mind to information falling within ss a) to c) to be before the officer. The question is not therefore whether it could reasonably be inferred from information falling within ss a) to c) that SJG was profitable. If the information content were stated in this way (i.e. "SJG was profitable") it is difficult to see how one might point to something else which was apt to describe the existence or relevance of that information. Rather what needs to be identified is a particular piece of information (whose content discloses something distinct from its existence and relevance). We then need consider whether what the appellants have disclosed under the categories of information in ss a) to c) which would allow the officer to reasonably infer the existence and relevance of the information.

Applying law to facts of this case

958. The particular piece of information relevant here is the account information showing SJG's income in 2005-06 and 2006-07.

959. The issue therefore is whether there is anything in the information falling under s29(6)(a) to (c) which would allow the officer to reasonably infer the existence and relevance of such information.

960. It would then still need to be considered as a further matter whether, given the information in (a) to (c) and (d) if applicable, the hypothetical officer ought reasonably to be taken to be aware of SJG having an income in 2005-06 and 2006-07. We discuss this issue below at [975].

961. In actual fact there was ongoing correspondence in which HMRC were seeking the accounts which stated SJG's individual profit figures. Although the emphasis must be on looking at what the taxpayer has disclosed, we also bear in mind the passage in *Lansdowne* ([49] of that decision) that we were referred to by way of reminder that disclosures could incorporate other information by reference and that we should not read such disclosures in a vacuum but in their context.

962. The awareness of the officer is to be judged taking into account the particular circumstances of the case (see *Charlton* at [58]). We take into account that there was a long running s739 dispute. In principle there could be an issue of continuing income being attributed to Anne Fisher and Stephen Fisher but as HMRC point out there was

an issue as to whether power to enjoy would continue and whether SJG had an income.

963. The hypothetical officer by the time the closure of the enquiry windows (31 January 2008 for 2005-06 and 31 January 2009 for 2006-07) would have been aware of s739 being in contention.

Would the officer have been aware through replies to enquiries about accounts that the accounts for 2006 and 2007 existed and that they were relevant?

964. Ms van Tinteren's e-mail to Mr Wood at James Cooper (19 October 2007) refers to the Gibraltar accounts having been discussed but it is not clear what if anything the appellants disclosed in relation to them. Ms Lang's reply of 23 October 2007 says the issue will be discussed but we cannot read it as allowing an officer to infer that accounts showing SJG profits for the year ended 2006 existed. (The year end 2007 accounts would of course not be capable of existing at that point.)

965. Ms van Tinteren's evidence is that in a letter dated 20 March 2008, James Cowper's response to Ms van Tinteren's request of 26 February 2008 asking for SJG's non-consolidated accounts for all years after 2002, was:

> "the group accounts in your possession contain the amount of the Gibraltar company alone on the last 2 pages of the accounts. These pages are entitled "Detailed Profit & Loss – Company only."

966. Although Ms van Tinteren had only had consolidated accounts for the year ended 2005 the versions sent to her by the taxpayer's agent also included SJG's solo profit figures. It seems to us that an officer would reasonably infer from the accounts disclosed which showed SJG's profit figures coupled with the above response when viewed in the context of the request it was answering that accounts showing SJG's individual profit figures existed for the year ended 2006 and year ended 2007.

967. Bearing in mind the need to look at the disclosures in their context we think that when the appellants' reply mentioned the accounts and taking account of the accounts which had been provided for y/e 2005 in the context of an enquiry relating to s739 liability (in which according to Ms van Tinteren she has explained the basis for seeking these accounts) we think a hypothetical officer would reasonably be taken to have inferred the relevance of these accounts to an insufficiency in tax.

968. In particular from the year end 2005 accounts disclosed, which as well as containing SJG's individual profit figures also contained details of the appellants' percentage shareholdings in SJG an officer would, we think, have reasonably inferred that there was information relevant to power to enjoy and information relevant to SJG's income in the accounts of SJG. This would all we think together with the 20 March 2008 response, amount to information which would allow the hypothetical officer to reasonably infer that the 2006 and 2007 accounts of SJG were *relevant* to insufficiency of tax. (It is not necessary for it to be inferred that they demonstrated an insufficiency of tax).

969. Given the 2006 and 2007 accounts were not actually produced to HMRC until after the enquiry windows were shut, we ought to address, if those accounts are to be attributed to the officer, how that may be reconciled with the statement of Arden LJ in *Langham v Veltema* which might on the face of it suggest the further information was not to be attributed to the officer until it was produced. In a statement referred to in *Charlton* at [71] and by Henderson J in *Household Estate Agents,* Arden LJ stated at [51]:

> "…in circumstances such as this the valuation might not in fact support the figure in the taxpayer's tax return. In that event, in my judgment on the true construction of s29(6)(d)(i) the inspector is not to have attributed to him the further information that he would actually have obtained if he had asked for that valuation, unless and until it is produced to him."

970. This can we think be understood on the basis that if the taxpayer had said the value was a particular amount the officer could not be expected to infer that the valuation report might not support that amount until seeing it. As explained by the UT in *Charlton* at [80] its relevance to an insufficiency of tax could not be inferred unless there was some other information in the return which suggested that there was an insufficiency. (There is no reason to restrict this analysis to disclosures in the return. The principle would apply to all information disclosed in a) to c)).

971. We do not therefore understand the statement to be setting out any wider proposition that information in documents cannot be inferred unless and until the information is produced. Indeed if such a proposition were correct it would sit oddly with the idea that information can be attributed when only its existence and relevance are inferred and not the content of the information itself.

972. We reject however the appellants' arguments to the effect that the hypothetical officer ought to draw inferences from what has not been said. The emphasis in the statutory scheme as interpreted in the case-law on looking at what the taxpayer has disclosed militates against such an approach. Putting aside situations where it is clear from the context that the taxpayer has upon consideration given a nil response to a specific question, the officer is not, we think, required to speculate on what the taxpayer's position may or may not be from what has not been said.

Section 29 (6)(d)(ii) information?

973. While in their skeleton the appellants argued that the information was provided under s29(6)(d)(ii), they chose not to focus on this point, in their submissions at hearing.

974. That was for good reason as we think the point is a non-starter in terms of explaining where the appellants can be said to have notified the existence and relevance of the profits of SJG in 2005-06 and 2006-07 and holdings in SJG shares in that period. As with s29(6)(d)(i) there is a distinction between the content of the information and its existence and relevance. In contrast to s29(6)(d)(i) those latter attributes are not a question of reasonable inference but must be things which are

specifically notified by the taxpayer to HMRC. No-where can we see that the taxpayers provided such specific disclosures before the closure of the relevant enquiry windows on the existence or relevance of the 2006 and 2007 account information. Even if James Cowper's letter of 20 March 2008 were to be regarded as disclosing the existence of year end 2006 and 2007 account information which showed SJG's income figures, it would certainly not be a disclosure which notified HMRC of the relevance of such information to an insufficiency of tax.

Discussion

975. We have considered what the hypothetical officer would be taken to be aware of taking into account the returns, accounts, and documents that would be put before him or her and the information which is taken to be attributed to the officer through the officer being reasonably able to infer the existence and relevance of such information.

976. We need to look at the two years (2005-06 and 2006-07) separately as it follows from our findings above as to the particular the time at which reasonable inferences were possible that the information which the hypothetical officer would have had regard to as at 31 January 2008 is not the same as the information they would have at 31 January 2009. The existence of the SJG accounts containing information specific to SJG for 2006 and 2007 could not have reasonably been inferred until the appellants' letter of March 2008 which means the 2006 and 2007 accounts were not attributable as at 31 January 2008.

977. We start with the appellants' argument that it is significant that there had been no suggestion on their part that it was the case that there was no income arising to SJG or that there was no power to enjoy, or that power to enjoy had ceased. The appellants say that a reasonable inference to be taken from the absence of such information and that the appellants' advisers had been instructed to write 16 page letters (the E&Y letter) is that the situation as to s739 liability was a live one and an ongoing one.

978. We disagree. The advisers' correspondence does not refer to any particular assessments and must we think to be taken to refer to the assessments which were in issue. While there was clearly a dispute about the applicability of s739 a hypothetical officer would not, we think, be aware that there was an insufficiency for the particular years in question by these letters alone. The length of the letters does not indicate anything about the particular years 2005-06 or 2006-07 as the detailed factual background of what happened in 1999/2000 and the legal arguments on liability which were put forward and which gave rise to the length of the letter would be equally as justified in relation to putting the appellants' position in relation to the earlier years for which assessments had been raised.

979. Turning then to the specific years in question the year 2006-7 is more straightforward and we deal with it first.

980. Following from our analysis above at [964] onwards the accounts containing the SJG income, and notes as to controlling shareholding for year end 2006 and year end

2007 would be attributed to the information to be put before the hypothetical officer. The officer would, from the correspondence with the appellants' advisers, be aware that s739 income was potentially in issue (even though no disclosure was made in the return). It does not make any difference, we think, that Stephen Fisher's response was different (his question 6 yes box was ticked) for 2006-07 but referred to a life interest trust whereas Anne Fisher's return did not check the box. The officer would be aware from the information in the year end 2006 and year end 2007 accounts that Anne Fisher and Stephen Fisher were still shareholders in SJG (a similar note to note 19 set out at [945] onwards below appears in the y/e 2006 accounts) during a time when SJG was generating profit, and that they therefore still had a power to enjoy for part of the year 2006-07. The officer would be aware that SJG had income greater than zero (as the accounts for year end 2006 and year end 2007 disclosed profits).

981. For 2005-06 the year end 2006 accounts and year end 2007 accounts (which may be attributed by inference only from 20 March 2008 and therefore after the closure of the enquiry window on 31 January 2008) the position is more complicated. The question arises as to the significance of only having accounts for part of the year (the year end 2005 accounts would cover the early part, April to December of the tax year 2005-06).

Did y/e 31 December 2005 accounts confirm that Anne Fisher and Stephen Fisher still owned SJG shares for 2005-6?

982. Note 19 of the SJG consolidated financial statements for y/e 2005 states:

> "Ultimate Controlling Party
>
> In the opinion of the directors, the ultimate controlling parties of the group are S.D. Fisher and A.P. Fisher jointly, by virtue of their 52% shareholding in the company."

983. In our view this information would have been sufficient to mean that the hypothetical officer could reasonably be taken to be aware that Stephen Fisher and Anne Fisher had shareholdings in SJG for at least some part of 2005-06.

Would the officer have been reasonably been expected to be aware of insufficiency of tax from 9 months of profit figures and preceding accounts that there was a profit for SJG for 2005-06

984. The profit figure for SJG for 2005 (up to 31 December 2005 was £3,074,198).

985. There is a possible issue over whether it is necessary to know the profit for the whole period 2005-06 to know whether there is a s739 "income" i.e. the deemed income of the transferor in the UK from the fact that as at 31 December 2005, the income of SJG was a given amount.

986. As HMRC argue, the officer cannot reasonably be expected to be aware that there were profits for the remainder of the year. Further, if there were losses in the remaining period of such an extent that they wiped out the previous 9 months' profits when the annual profit was considered, the officer would not know this. Indeed the

officer would not necessarily know that SJG had continued in operation the following year (were it not for a section on events after the balance sheet date).

987. In our view it is necessary to test the outcome HMRC point to (that a discovery assessment is possible because the officer is not taken to be aware of an insufficiency on the basis of 9 months of profits but not the whole year) by considering the converse position.

988. If we were to imagine the position were the reverse so that there were nine months worth of losses, (but it later transpired there was an annual profit giving rise to a tax insufficiency) the corollary of the above approach would be that it would not be clear that there was a loss for the tax year until the possibility that there could thereafter be three months of huge profit reversing the previous losses had been ruled out. HMRC's approach would mean the officer would be taken to be aware of a tax insufficiency and a subsequent discovery assessment to recover loss of tax in respect of the annual profit would be invalid because, despite information that there were nine months of losses, it could not be ruled out that an annual profit could have been made as a result of large profits in the remaining three months. That cannot be a result which is intended by the legislation.

989. In our view knowing that there was nine months of profits (but not knowing either way what had happened in the next three months) would mean the hypothetical officer must be taken to be aware that there was an insufficiency of tax for the tax year in the same way that knowing there were nine months of losses (but not knowing either way what happened in the next three months) would not deprive the officer of the protection of s29(5) to raise a discovery assessment where there had despite the earlier losses been an annual profit and therefore an insufficiency of tax).

Would an officer have been aware from absence of information / answers on CGT on return that in 2006-07, Anne Fisher and Stephen Fisher still owned SJG shares?

990. The appellants argue that it would be apparent to the hypothetical officer from the fact no CGT disposals of SJG shares were mentioned in the appellants' returns that they still held their SJG shares.

991. If Anne Fisher and Stephen Fisher no longer had shareholdings in the latter three months of the tax year this would not alter the fact they had shareholdings for a preceding part of the year when profits were made. However if it was necessary to decide the matter we do not think an officer could be taken to be aware of Anne Fisher and Stephen Fisher holding their shares in this period because the absence of a reference to disposals in their returns given what is required is disclosure by the taxpayer, whether in the return, or other documents of the information.

Can the profit history / part year profits for 2005-06 mean that officer ought reasonably to be aware that there were profits for 2006-07?

992. In the event we are wrong on our conclusion that the existence and relevance of the year end 2006 and year end 2007 accounts are matters which may reasonably have

been inferred we note as pointed out by the UT in *Charlton* at [92] that "the test is one of awareness and not one of certainty or even probability". In relation to the question of whether profits for part of the year in 2005-06 would mean there were profits for 2006-07 at best the officer would be aware that it was more likely than not that SJG was profit making but that approach was specifically disapproved of in the Court of Appeal in *Lansdowne* (see decision of Moses LJ at [70]).

993. While on the balance of probabilities and given the history an officer might have guessed that SJG had income in 2006-07 we are not persuaded an officer would have been aware of such income. The absence of a mention of losses in correspondence or any mention of the issue while continuing to talk about s739 would not mean the officer must be taken to be aware of SJG having an income. It is for the appellant to disclose the matter if the protection of s29(5) is sought and not rely on the officer making inferences from what is not disclosed.

994. While the appellants refer in general terms to other documents falling into the scope of s29(6) by incorporation the particular documents were not identified to us and we were not taken through them. In particular in relation to the E&Y letter of 25 June 2007 and the other letter considered above of 4 September 2008 the appellants say that if this is insufficient then the Tribunal were invited to consider whether correspondence previous to those letters has been incorporated and, if it had been, to further consider whether the information taking account of those other letters was sufficient to show an insufficiency. We declined the invitation. It was an unsatisfactory way of proceeding as in our view as the documents were not new ones that had come in unexpectedly at a late stage in the proceedings and given that it deprived the other party of the opportunity to make its representations on the documents and the Tribunal of the opportunity to ask questions in relation to the documents and to consider them with the benefit of both parties' representations.

995. We would note, in any case that the letter from E&Y would seem to be an unlikely vehicle for incorporating additional relevant information that would make an officer aware that SJG had income in 2006-07.

996. The letter from E&Y dated 25 June 2007 states:

> "We have reviewed the enquiry correspondence that has taken place to date and feel that, for whatever reason, the facts of this case have never been completely put forward in a clear and systematic format. We therefore think that a sensible place to start is with the full fact pattern of events."

997. This rather suggests that any relevant facts in the previous correspondence would in the writer's view have been pulled out into the text of this letter.

Summary of the matters hypothetical officer would have been aware of:

998. We summarise below the matters which we therefore think the hypothetical officer would have been aware of.

999. For 2005-06, that:

(1) The appellants were arguing that the s741 motive defence was applicable to any s739 income.

(2) Stephen Fisher and Anne Fisher were owners of SJG shares and had power to enjoy.

(3) SJG had income.

1000. For 2006-07, that:

(1) The appellants were arguing that the s741 motive defence was applicable to any s739 income.

(2) Stephen Fisher and Anne Fisher continued to be owners of SJG shares (because this is mentioned in year end 2006 accounts and the year end 2007 accounts were attributed to the hypothetical officer on the basis their existence and relevance could reasonably be inferred).

(3) SJG had income in 2006-07(similarly by attribution of the 2006 and 2007 accounts).

Conclusion on discovery assessment issue (Stephen Fisher and Anne Fisher)

1001. Given the hypothetical officer's awareness above the condition in s29(5) is not satisfied in relation to the assessments on Stephen Fisher and Anne Fisher for 2005-6 and 2006-7. The appeals against that assessment are allowed for Stephen Fisher (and in the event we are wrong on our conclusion that Anne Fisher succeeds on the basis of the EU law arguments) would be allowed for her too.

Whether assessment on Peter Fisher for 2002-3 defective as out of time

1002. Assessments were made on Peter Fisher for 2000-01 to 2004-05. The appellant argues the discovery assessment on him for 2002-03 was issued out of time.

1003. The discovery assessment for Peter Fisher for 2002-03 was issued on 3 August 2009. The appellant says this is outside the 6 year time limit (from the date of the end of the relevant year of assessment) permitted by s34 TMA 1970 i.e. 5 April 2009. HMRC rely on s36 TMA 1970 which extends the time limit to 20 years after 31 January 2004 where a loss of tax is attributable to negligent conduct.

1004. At the relevant time s36 TMA provided as follows:

> "An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates"

1005. It is not in issue between the parties, and in our view it is clear from the relevant statutory provisions, that an assessment under this provision can only be opened when an enquiry has been opened into a tax return and that an enquiry can only be opened where a tax return has in fact been delivered (ss9A(1); 9C(1) TMA 1970).

Issues

1006. HMRC say s36 TMA 1970 applies as there was a loss of tax attributable to the negligent conduct of Peter Fisher in failing to make a return. Further they say there was a failure to realise or ascertain that there had been a failure to send the return when James Cowper replied in February 2005 stating that the return had been submitted. Either or both points constitute negligent conduct for the purposes of s36(1) TMA 1970 which extends the time limit for assessment to 20 years.

1007. The appellant highlights that the burden of proof in showing negligence is on HMRC. The appellant argues:

(1) That HMRC have not met the burden of showing that the return was not submitted. Peter Fisher was not therefore negligent.

(2) Even if it could be shown that the return had not been filed the appellant says this does not explain how the loss of tax can be attributable to the non-filing of the tax return in that HMRC were well aware the return would not have assessed Peter Fisher to tax under the TOAA provisions and indeed the unsigned return provided to them by James Cowper showed this.

Was the return submitted?

1008. The critical issue is one of fact which is whether or not HMRC have demonstrated that the tax return for 2002-03 was not submitted by Peter Fisher to HMRC. Before we go into that it is necessary to set out a chronology of what happened. We heard evidence from Peter Fisher and from Ms van Tinteren. Ms van Tinteren's evidence also referred to various pieces of correspondence between herself and James Cowper in relation to her investigation into whether a return had been submitted.

Facts

1009. A self-assessment return form for 2002-03 was issued to Peter Fisher on 6 April 2003.

1010. On 10 January 2005 on the understanding Peter Fisher had submitted a 2002-03 return HMRC purported to open an enquiry into that return.

1011. On 26 January 2005 Mr Sharp of HMRC wrote to James Cowper requesting confirmation that Peter Fisher had in fact submitted a return for that period.

1012. On 9 February 2005 Amanda Rodger at James Cowper replied:

> "I can confirm that Mr Fisher submitted a 2002/3 tax return which we understand he submitted to Cardiff 3 direct. We therefore do no have a signed photocopy, but we enclose an unsigned copy which we trust in the circumstances is sufficient."

1013. On 11 February 2009 Ms van Tinteren issued a jeopardy assessment on Peter Fisher for 2002-03.

1014. There was then a series of correspondence between Ms van Tinteren and James Cowper in which Ms van Tinteren sought evidence as to the return being submitted. The copies of unsigned returns which had been enclosed in James Cowper's letter to Mr Sharp could not be found within HMRC.

1015. James Cowper were asked for and provided further copies of the returns for 2002-3. As these were not signed or dated Ms van Tinteren continued to press for evidence that returns had been submitted for 2002-03.

1016. In a letter dated 14 May 2009, Sharon Bedford of James Cowper told Ms van Tinterent in respect of 2002-03 that:

> "Mr P A Fisher has been unable to locate any documentary evidence to prove conclusively that the return was received by HM Revenue & Customs".

1017. She went on to enclose a printout of James Cowper's letter to Peter Fisher enclosing his tax return and a copy of the document properties details on their computer system showing it was created on 31 January 2004. The letter also enclosed copies of returns which were stated to be photocopies of returns sent to Peter Fisher on 31 January 2004.

1018. Ms van Tinteren compared the copies of returns sent in on 14 May 2009 with those sent in on 26 March 2009 and found there to be differences between the information on the copies.

1019. The copies of the returns did not disclose there to be any tax liability.

1020. On 3 August 2009 Ms van Tinteren issued a discovery assessment on Peter Fisher.

1021. No penalty demands from the Revenue or HMRC were triggered in respect of late filing of the 2002-03 return.

1022. At the time Ms van Tinteren was seeking clarification HMRC's self-assessment computer system did contain an on-screen entry showing 14/03/03 as a date of receipt for Peter Fisher's 2003 return. This date was incorrect as it fell before the end of the return period.

1023. Peter Fisher did not have any specific recollection of exactly what he did each year with his tax returns. Apart from perhaps one year where the return was electronic, the return was a paper return. We accept his evidence that he would check

the return and sign it and then return it. On some occasions he would return it to James Cowper and other occasions he would send it to the Revenue. In his words it was "just a process that I did and forgot about afterwards."

1024. We find that Peter Fisher was sent a letter enclosing a letter which explained what to do with the return from James Cowper. This was sent on 30 January 2004 at the earliest (given this was the date the cover letter was created). It is unclear whether it was posted or e-mailed to him. Peter Fisher said it was possible he would have kept a copy of the return he sent but said he was disorganised at keeping personal paperwork. He relied on his accountants to keep his paperwork.

Discussion

1025. The appellant says the burden of proof is on HMRC. Had the return not been received it would be expected that reminders and possible penalty demands would have been issued.

1026. HMRC say the return was not received by HMRC and as between the possibilities of the return not being sent by Peter Fisher or his agent and the return being lost the former is more likely on the balance of probabilities.

1027. For the reasons set out below we are not satisfied that Peter Fisher was negligent in not submitting a return as HMRC argue.

1028. Weighing up the evidence it has not been demonstrated to us that Peter Fisher did not submit the return.

1029. Peter Fisher was sent a return for him to sign by James Cowper. James Cowper's letter of 9 February 2005 suggests that it was envisaged that Peter Fisher would send the return in directly rather than back to James Cowper. That is consistent with Peter Fisher's evidence that he would on occasions send the return directly and seems entirely plausible particularly given the date the return was sent was so close to the deadline for filing.

1030. As between the possibilities that 1) Peter Fisher upon receiving the letter did not act upon it, and 2) the possibility that either the return was lost en route to HMRC, or was lost within HMRC we think the possibilities under 2) are more likely.

1031. There was insufficient evidence before us to allow us to make findings on the robustness of HMRC's systems at the time for logging receipt of return, retention, and filing procedures for returns within HMRC. (These areas are outside of Ms van Tinteren's day to day duties as an investigator and her evidence on these matters carries little weight in our view.)

1032. In relation to the entry on HMRC's system, the date is clearly wrong. To the extent the insertion of a date showing receipt of a return in HMRC's system, albeit a wrong date, is more likely to have occurred when a return was received than if it was not, the entry is consistent with our finding (although we do not rely on it). Ms van Tinteren's evidence suggests that the entry could be explained by a member of

clerical staff wanting to suppress automatic issue of reminders or penalties and that a possible explanation therefore for making such an entry would be that Peter Fisher was known to have gone to live in Gibraltar. This is speculation and insufficient evidence was put forward to enable us to make a finding on whether this was indeed an explanation for the entry.

1033. It is not inconceivable, as indicated by the unsigned returns enclosed in the letter to Mr Sharp going missing that documents, even if they have been received by HMRC, may subsequently go missing. We are unable to infer from the fact the return was not subsequently located within HMRC that Peter Fisher did not send it.

1034. In relation to Peter Fishers' admission to being disorganised with paperwork we note this is in relation to keeping copies. It does not assist us in our finding as to whether it has been shown that he did not submit the return.

1035. The fact that no penalties were issued for failure to file returns despite a return having been issued automatically is more consistent with a return having been received than with it not having been received.

1036. HMRC have not therefore shown any negligent conduct on the part of Peter Fisher.

James Cowper negligent?

1037. While under s36 TMA 1970 negligent conduct on the part of Peter Fisher's advisers could also be relevant in our view HMRC's arguments in relation to James Cowper are misconceived. In relation to any argument that James Cowper acted negligently in not establishing that the return was not filed, this falls away given the conclusion that it has not been established that the return was not filed. In relation to HMRC's argument that James Cowper's response in 2005 stating that the return had been submitted was negligent (in that there was a failure to realise that there had been a failure to send the return) there was no ongoing duty of care on James Cowper to establish whether or not the return had been filed. When James Cowper replied in February 2005 they proceeded on the assumption that Peter Fisher had submitted it. Given the letter on their systems and the date it was sent that position does not seem to us to be an unreasonable response on their part. Even if there was an ongoing duty on James Cowper, it was certainly not negligent of them to have responded in the way they did. The fact that the returns subsequently supplied were not signed copies is consistent with the unsigned return being sent to Peter Fisher for him to sign and then to submit to HMRC. The consistency or otherwise of the unsigned copies was irrelevant to establishing whether a return had been filed.

1038. Given our conclusions it is not necessary to deal with the further arguments on whether or not any negligence can be said to be attributable to loss of tax.

1039. The grounds for the extended time limit to assess are not made out. Neither Peter Fisher nor James Cowper has been negligent.

1040. Peter Fisher's appeal in relation to 2002-03 therefore succeeds.

Conclusion

1041. Anne Fisher's appeals for each of the years under appeal are allowed.

1042. Stephen Fisher's appeals for 2000-01 through to 2004-05 and 2007-08 are dismissed. His appeals for 2005-06 and 2006-07 are allowed.

1043. Peter Fisher's appeals for 2000-01, 2002-03, and 2003-04 are dismissed. His appeal for 2002-03 is allowed.

1044. The decision is made in principle, and should the parties be unable to agree on the amounts of the assessments they are at liberty to revert to the Tribunal to determine the amounts.

1045. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 14 August 2014