[2019] UKUT 169 (TCC)

Appeal number: UT/2017/0170

CORPORATION TAX – whether certain companies were resident outside the United Kingdom – residence outside the United Kingdom essential for tax planning – the test for "residence"

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) DEVELOPMENT SECURITIES plc
(2) DEVELOPMENT SECURITIES (No 9) LIMITED
(3) DEVELOPMENT SECURITIES (No 18) LIMITED
(4) DEVELOPMENT SECURITIES (No 25) LIMITED
(5) DS JERSEY (No 1) LIMITED
(6) DS JERSEY (No 2) LIMITED
(7) DS JERSEY (No 3) LIMITED

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Honourable Mr Justice Marcus Smith
Judge Guy Brannan

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 4, 5, 8 and 9 April 2019

Sam Grodzinski, QC and Julian Hickey, instructed by Levy & Levy, for the Appellants

Akash Nawbatt, QC and Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

A. INTRODUCTION

1. In October 2014, the Respondents to this appeal, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), denied the Appellants the benefit of various capital loss relief provisions in the Taxation of Chargeable Gains Act 1992 ("TCGA") on the disposal by the Appellants in 2004 of certain assets, which we refer to as the "relevant assets".

2. The relevant assets were disposed of pursuant to a plan, designed by PricewaterhouseCoopers ("PwC"), intended to enable the Appellants to crystallise latent capital losses on the relevant assets on the basis that indexation would be comprised in the loss. We shall refer to this plan as the "Scheme" and describe it in greater detail below.[1]

3. The Fifth, Sixth and Seventh Appellants – respectively, "DS1", "DS2" and "DS3", together the "Jersey Companies" – were incorporated in Jersey for the purposes of the Scheme. The Jersey Companies were incorporated as subsidiaries of the First Appellant, Development Securities plc. Development Securities plc is part of a property development and investment group of companies (the "Development Securities Group" or "DSG"). The relevant assets were assets held by DSG companies incorporated and resident in the United Kingdom. The intention was that the relevant assets would be acquired by the Jersey Companies pursuant to the Scheme.

4. It was essential to the operation of the Scheme that the Jersey Companies not only be incorporated in Jersey, but resident there (and not resident in the United Kingdom) for corporation tax purposes from the date of their incorporation until 20 July 2004.

5. HMRC determined that the Appellants could not benefit from the capital loss relief provisions in the TCGA because the Jersey Companies were in fact resident in the United Kingdom for tax purposes in June and July 2004. For that reason, the intended tax advantages of the Scheme failed.

6. The Appellants appealed HMRC's decision to the First-tier Tribunal (Tax Chamber) (the "FTT"). In a decision dated 14 July 2017 (the "Decision"), the FTT decided that the Jersey Companies were tax resident in the United Kingdom at the material times. The Appellants' appeal was, therefore, dismissed. With the permission of the FTT, given on 16 November 2017, the Appellants appeal to this tribunal.

7. Appeals to this tribunal are on points of law only. Both the Appellants and HMRC accepted that the question of a corporation's residence is essentially a

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[1] See paragraphs 24 to 27 below.

question of fact. The Appellants made clear that they were not challenging any of the FTT's findings of primary fact: they accepted that they had no right to do so. Rather, the Appellants contended that the FTT had either applied the wrong test to the facts as found by it or – if the FTT had applied the right test – it had come to a conclusion which could not properly be reached on a proper application of that test and so the FTT's decision was wrong in law on the principles laid down in *Edwards v. Bairstow*.[2]

8. The only issue before the FTT and now before this tribunal is whether the Jersey Companies were resident in the United Kingdom, in particular during the period from their incorporation in Jersey on 10 June 2004 until the companies moved their residence to the United Kingdom on 20 July 2004 and thus from that date onwards (as is common ground) were resident in the United Kingdom.

9. The Scheme was, as the Appellants candidly admitted, a tax planning or tax avoidance scheme. HMRC originally suggested that the transactions in question were ineffective for tax purposes according to the principles in *Ramsay v. IRC*[3] and *Furniss v. Dawson*.[4] That argument was abandoned by HMRC in September 2014. Accordingly, the fact that the Jersey Companies were incorporated in Jersey and required Jersey residence for the purposes of a tax avoidance scheme is irrelevant to our consideration of the question of the residence of the Jersey Companies and we leave it out of account. As Lord Neuberger stated in *Secret Hotels 2 Ltd v. HMRC*:[5]

> "…one must be careful before stigmatising the contractual documentation as being "artificial", bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation…"

10. The test of a corporation's residence involves a classic "multi-factorial" approach, where we should be slow to interfere unless the FTT has erred in principle. In *HMRC v. Arkley*, the Upper Tribunal stated the approach in this way:[6]

> "Where a decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, that will fall within the class of case in

[2] [1956] AC 14.

[3] [1982] AC 200.

[4] [1984] AC 474.

[5] [2014] STC 937 at [57].

[6] [2013] UKUT 393 (TCC) at [28]. The Upper Tribunal relied on *Designers Guild Ltd v. Russell Williams (Textiles) Ltd*, [2000] 1 WLR 2416 at 2423 and *Procter & Gamble UK v. Revenue and Customs Commissioners*, [2009] STC 1990 at [9]-[10]. This paragraph was cited with approval in *Mackay v. HMRC*, [2018] UKUT 378 (TCC) at [120].

which an appellate court should not reverse the lower tribunal's decision unless it has erred in principle…"

That is the approach we follow in this case.

11. This decision considers the following matters in the following order:

5 (1) *The test for determining where a corporation is resident.* The test for the residence of a corporation is one that has evolved at common law, beginning with the decision of the House of Lords in *De Beers Consolidated Mines v. Howe (Surveyor of Taxes)*.[7] The test is considered in Section B below. Section B considers, in particular, the decisions of Park J and the Court of
10 Appeal in *Wood v. Holden*.[8] *Wood v. Holden* is a decision of particular significance to this case, because it concerns the residence of "special purpose vehicles" owned entirely by a parent company, which, of course, was the nature and position of the Jersey Companies. Section B also considers the law in relation to "dual" residence of companies. It was
15 HMRC's primary position that the FTT had correctly concluded that the Jersey Companies were resident in the United Kingdom. In HMRC's Respondents' Notice, however, HMRC contended that the Decision could also be upheld on the basis that the Jersey Companies were resident in Jersey and in the United Kingdom.

20 (2) *The significance of the fact that the Decision was amended by the FTT.* When, on 16 November 2016, the FTT gave permission to appeal, it also released an amended Decision, which (it said) was issued pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. Rule 37 provides for the correction of "any clerical mistake or other
25 accidental slip or omission in a decision…". The Appellants contended that the revisions made to the Decision were not properly made pursuant to rule 37. This point, and its implications, are considered in Section C.

(3) *The Decision of the FTT.* Section D considers the FTT's Decision and specifically whether the FTT correctly concluded that the Jersey Companies
30 were resident in the United Kingdom rather than in Jersey. More specifically:

(a) The Decision is long and detailed, running to some 437 paragraphs. Much of the Decision is concerned with the facts, although the Decision carefully considers the law and the application of the law to the facts.

35 (b) We have not found it necessary to set out in detail the factual findings of the FTT as recorded in the Decision. The approach that we take is to describe – in somewhat broad brush terms – the essential facts (Section D(1)) and then (in Section D(2)) to identify the basis upon which the FTT

[7] [1906] AC 455.

[8] [2005] EWHC 547 (Ch) and [2006] EWCA Civ 26.

reached its conclusion on the question of residence. Despite the length of the Decision, the basis for the Decision can be stated relatively briefly.

(c) We then consider (in Section D(3)) whether the basis upon which the FTT reached its conclusion on residence is soundly based in law or whether this conclusion must be overturned because it is wrong in law.

(4) *HMRC's Respondents' Notice.* HMRC sought to defend the Decision on other grounds. HMRC's Respondents' Notice contended that the Decision could be affirmed on four additional grounds. These are considered in Section E.

12. Finally, Section F states how we dispose of the appeal.

B. THE TEST FOR RESIDENCE

13. Rule 173 of *Dicey, Morris & Collins on the Conflict of Laws* provides:[9]

"(1) The domicile of a corporation is in the country under whose law it is incorporated.

(2) A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries then the corporation is resident in each of these countries."

14. The "central management and control" or "CMC" test derives from the speech of Lord Loreburn LC in *De Beers Consolidated Mines v. Howe (Surveyor of Taxes)*:[10]

"In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise, it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly CB and Huddleston B in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Co v. Nicholson*, now thirty years ago, involved the principle that a company resides for the purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

It remains to be considered whether the present case falls within that rule. This is a pure question of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading."

15. That test has been the subject of consideration and elucidation since it was propounded. It remains the starting point for the determination of where a corporation is resident. That is so even as regards the residence of subsidiaries,

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[9] Collins (ed), 15th edn (2012).

[10] [1906] AC 455 at 458.

including "special purpose vehicles", despite the fact that neither *De Beers* itself, nor the cases cited by Lord Loreburn in *De Beers*, involved subsidiaries, still less special purpose vehicles.

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16. *De Beers* was concerned with the residence of a corporation which did the vast majority of its business abroad (the company operated diamond mines in South Africa), from which it derived its profits. However, the House of Lords held that what was determinative was where "real control" was exercised, and that this was London, not South Africa. At 458-459, Lord Loreburn applied the test he had propounded:

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> "The case stated by the Commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has also always controlled matters that require to be determined by the majority of all the directors, which includes all questions of expenditure except wages, materials, and such-lie at the mines, and a limited sum which may be spent by the directors at Kimberley.
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> The Commissioners, after sifting the evidence, arrived at the two following conclusions, viz: (1.) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2.) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were, in fact controlled, managed and directed.
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> These conclusions of fact cannot be impugned, and it follows that this company was resident within the United Kingdom for purposes of income tax, and must be assessed on that footing."

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17. It might be thought that the central management and control test was unsuited to determining the residence of special purpose vehicles or other 100% owned subsidiaries of corporations. In *Wood v. Holden*,[11] Park J referred to special purpose vehicles in the following terms:

> "…it is possible (and is common in modern international finance and commerce) for a company to be established which may have limited functions to perform, sometimes being functions which do not require the company to remain in existence for long. Such

[11] [2006] STC 443 at [25].

companies are sometimes referred to as vehicle companies or SPVs (special purpose vehicles). 'Vehicle' has a belittling sound to it, but such companies exist. They can and do fulfil important functions within international groups, and they are principals, not merely nominees or agents, in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why is that in many cases the things which such companies do, though important, tend not to involve much positive outward activity. Such companies do not need frequent and lengthy board meetings."

Where a 100% owned subsidiary is set up, by its parent, for a particular purpose, and it carries out that purpose in accordance with the parent's intentions, one can easily see how it might be said that the central management and control of the subsidiary lay with the parent. That would, however, be an incorrect conclusion, as the decision of Park J in *Wood v. Holden*, which was affirmed on appeal, demonstrates. The mere fact that a 100% owned subsidiary carries out the purpose for which it was set up, in accordance with the intentions, desires and even instructions of its parent does not mean that central management and control vests in the parent.

18. This means that in the case of special purpose vehicles, the CMC test must be approached with particular care, so as to distinguish between influence over the subsidiary and control of the subsidiary. Where a parent company merely "influences" the subsidiary, CMC remains with the board of the subsidiary. It is only where the parent company "controls" the subsidiary, i.e. by taking the decisions which should properly be taken by the subsidiary's board of directors, that CMC vests in the parent.

19. We consider that the central management and control test can be stated by way of the following propositions:

(1) The place of central management and control is the place where CMC is actually to be found, not the place where CMC ought to be exercised. It is the substance, and not the form, that is determinative.[12] If CMC is, as a matter of fact, exercised in Country A, even though it should be exercised in Country B, then the corporation is resident in Country A, not Country B. That is so, even if the exercise of CMC from Country A is unlawful or improper in that it is usurping the proper powers of the corporation's *de jure* management.[13]

[12] *De Beers*, *ibid*, at 458 ("where the central management and control actually abides" (*per* Lord Loreburn LC)); *Bullock (HM Inspector of Taxes) v. The Unit Construction Co Ltd*, (1959) 38 TC 712 at 736 ("it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company" (*per* Lord Simonds), 737 ("This is a straightforward case of *de facto* control being actively exercised in the United Kingdom, while the local directors "stood aside" from their directorial duties…" (*per* Lord Radcliffe)) and 741 ("…the question where control and management abide must be treated as one of fact or "actuality" (*per* Lord Radcliffe)).

[13] *Bullock*, *ibid*, was itself a case of "usurpation".

(2) In consequence, a court must be astute to detect "shams", where a corporate entity appears to have CMC, such that the corporation is resident in Country B, whereas in reality CMC is exercised by a different body in Country A.[14]

5 (3) The place of central management and control is the place of "paramount authority".[15] If paramount authority is exercised in Country A, then the fact that certain corporate functions or lesser corporate decisions are taken in Country B does not affect the fact that the corporation is resident in Country A. In *Wood*, Park J noted:[16]

10 "In all normal cases, the central control and management is identified with the control which a company's board of directors has over its business and affairs, so that the principle almost always followed is that a company is resident in the jurisdiction where its board of directors meets."

That, of course, is the normal or ordinary case: that case will not hold where
15 there has been a usurpation of the board; a sham; or – as will be considered below – where the board acts as a "rubber stamp".

(4) Influencing those who exercise management and control is not the same as exercising management and control.[17] Provided the body who should exercise CMC exercises proper judgment, the fact that instructions are
20 issued to that body does not divest CMC from that body.[18] Self-evidently, the usurpation of CMC or shams intended to disguise how CMC is exercised both go well beyond merely seeking to influence CMC. However, usurpation and shams are not the only way in which CMC may vest in persons other than those who ought to be exercising CMC. There may be
25 cases, not involving usurpation of CMC or shams, where those having central management and control of the corporation abdicate responsibility for management and control, such that they do not bring their mind to bear on the questions that they ought to consider if properly exercising

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[14] See, for example, *Bywater Investments Ltd v. Commissioner of Taxation*, [2016] HCA 45, in particular at [12], [27] and [28] ("*Bywater Investments*").

[15] *American Thread Co. v. Joyce*, (1913) 6 TC 163 at 164 (*per* Viscount Haldane LC).

[16] *Ibid*, at [21].

[17] *Esquire Nominees Ltd v. The Commissioner of Taxation of the Commonwealth of Australia* (1971-1973) 129 CLR 177 at 190-191; *NZ Forest Products Finance NV v. Commissioner of Inland Revenue*, [1995] 2 NZLR 357 at 367-368; *Untelrab Ltd v. McGregor (Inspector of Taxes)*, [1996] STC 1 at [29] and [75]; *Wood*, *ibid*, at [24]-[27].

[18] *Re Little Olympian Each Ways Ltd*, [1995] 1 WLR 560 at 572-573.

management and control.[19] This has been called behaving "as a rubber stamp".[20] In *Untelrab*, the Special Commissioners put the matter thus:[21]

> "*Bullock* highlighted the very fine dividing line between, on the one hand, subsidiaries being complaisant to do the will of the parent but actually functioning in giving effect to the parent's wishes (which would point to the subsidiaries being resident where their directors meet) and, on the other hand, the case where the boards of the subsidiaries do not function at all even as a rubber stamp (which would point to the subsidiaries being resident where the parent is). *Esquire Nominees* highlighted another very fine dividing line between a board doing what it is told (which does not affect its residence) and the parent controlling the board in the conduct of its business (which will affect its residence). In both cases a significant factor is whether the directors would have declined to do something improper or inadvisable; if they would, then this would point towards the conclusion that there was no control by the parent."

(5) The distinction between influence and the abdication of responsibility is *par excellence* a question of fact and degree.[22] It is, therefore, not possible to do more than identify what may be indicators of an abdication of responsibility:

(a) One indicator of an abdication of responsibility or of acting as a "rubber stamp" is where the person who ought to have CMC disregards or breaches the duties imposed on that person to ensure the proper governance of the corporation. Where, for example, the board of a corporation is obliged to act in the best interests of the corporation and – on the instruction of the parent – does an act that is contrary to the corporation's best interests, then this is cogent evidence that CMC resides not with the board, but with the parent. Of course, where the corporation is a foreign corporation, it will be necessary to understand very clearly the nature of the duties imposed on the board of that corporation.[23] The inference that CMC is not vested in the board can, in such a case, only be drawn where it can be said that the board is acting in breach of its duties.

(b) Another indicator of an abdication of responsibility is where the board knowingly takes decisions without having sufficient information properly to make that decision. It is important to appreciate, in this context,

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[19] See also *Bywater Investments*, *ibid*, at [73], where the High Court of Australia said: "At its base, that distinction appears to rest on whether the local board actually considers and makes the decision to adopt the parent company's recommendations as bona fide in the best interests of the subsidiary, or whether the local board just mechanically implements directions from the parent company because it is so directed."

[20] *Re Little Olympian*, *ibid*, at 573 ("When a board fails to act *at all*, not even as a rubber stamp, I can see that it may be right to look through its by then wholly theoretical power of veto…" (*per* Lindsay J).

[21] *Ibid*, at [75].

[22] In *Laerstate BV v. Revenue and Customs Commissioners*, [2009] UKFTT 209 (TC), a differently constituted FTT described cases of abdication as being on a spectrum (at [34]).

[23] This will be a question of the place of the law of incorporation.

that the mere fact that the board makes ill-informed or ill-advised decision is not inconsistent with CMC vesting in the board.[24]

(6) It is possible for a corporation to have more than one residence.[25] In *Swedish Central Railway Co Ltd*, Lord Cave said that "[t]he central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one residence".[26] When considering the question of multiple residence, it is important to bear in mind the following:

(a) The test remains the CMC test. What one must look for is a divided CMC, not divided operations. In short, one must not be seduced into finding a divided CMC simply because significant operations or management of a subsidiary nature are carried out in another place. The following statement of Dixon J in the High Court of Australia has been cited with approval:[27]

> "The better opinion, however, appears to be that a finding that a company is resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled."

(b) It follows that the question of dual or multiple CMC is – like the CMC test generally – essentially one of fact, which is dangerous to expand upon further. We would only say that, simply as a matter of practicality, it is difficult for the superior or directing authority to be other than unitary.[28] It seems to us that the norm will be for CMC to be located in one place, and that it will be necessary to identify specific exceptional factors to cause what is normally a unitary thing to fracture e.g. regular board meetings in one or more countries.

C. THE ERRONEOUS QUOTATION OF *DE BEERS*

20. In the original Decision, released in July 2017, at [294], [386] and [404], the FTT attributed certain words to Lord Loreburn in *De Beers* that were not part of the Lord Chancellor's opinion. We have quoted the relevant passage of Lord

[24] *Laerstate*, *ibid*, at [36].

[25] *The Swedish Central Railway Co Ltd v. Thompson (HM Inspector of Taxes)*, (1925) 9 TC 342 at 352 (*per* Rowlatt J) and 372-373, 375 (*per* Lord Cave LC); *Union Corporation Ltd v. Commissioners of Inland Revenue*, (1951) 34 TC 207 at 271, 274 and 275 (*per* Evershed MR).

[26] *The Swedish Central Railway Co Ltd*, *ibid*, at 372.

[27] See, for example, *Union Corporation*, *ibid*, at 271 (emphasis supplied).

[28] In *Bullock*, *ibid,* at 735, Lord Simonds noted the difficulties inherent in a divided CMC. See also Lord Radcliffe at 739-740.

Loreburn in paragraph 14 above. The FTT added within the passage the following additional sentence:

> "You reach that conclusion based on a scrutiny of the course of business over the relevant period, informed by what has taken place immediately prior to incorporation."

21. In the amended Decision, this sentence was removed. The FTT relied upon rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to effect this change. However, rule 37 provides for the correction of clerical mistakes or other accidental slips or omissions in a decision. We consider the FTT's reliance on this provision to have been inappropriate. The mis-quotation of Lord Loreburn did not involve the introduction of a typographical error or some other immaterial clerical mistake into the Decision. The misquotation involved a substantive addition to the test propounded by Lord Loreburn, which the FTT was purporting to apply.

22. Accordingly, we approach this appeal considering the unamended, original, Decision. The question we must ask is whether the misquotation of the test for CMC itself introduced an error of law into the Decision. Certainly, the effect of the additional sentence is to suggest that in all cases where CMC is being considered, it is necessary for the court or tribunal to consider what took place immediately prior to incorporation. We are not persuaded that this is correct in all cases. The FTT accordingly misdirected itself as to the law.

23. However, we conclude that on the facts of this case, this misdirection did not result in any error. The Scheme was planned by PwC before the Jersey Companies were incorporated. It would not be possible, in this case, to understand the question of CMC and where it was exercised without understanding the genesis of the Scheme. In this case, therefore, it was entirely appropriate for the FTT to consider and make findings of fact in relation to the pre-incorporation period. The Appellants did not seriously seek to contend otherwise.

D. THE CONCLUSION OF THE FTT ON CMC

(1) The essential facts

24. The Appellants entered into the Scheme in 2004. The object of the Scheme was to obtain loss relief for the purposes of corporation tax on chargeable gains (which, for simplicity, we will refer to as capital gains tax) on the disposal of the relevant assets. The Scheme caused the relevant assets to be disposed of in such a way as to enable DSG to crystallise latent capital losses on the relevant assets on the basis that indexation would in effect be comprised in the loss.

25. In each case, the relevant asset (to be acquired by each of the Jersey Companies on the exercise of options which would themselves be created pursuant to the Scheme) was standing at a loss for capital gains tax purposes as the market value of the asset had fallen since it was acquired by DSG. Under the capital gains tax rules, indexation (an allowance for inflation) does not increase the amount of a capital loss which can be off-set against chargeable gains for UK

tax purposes. The idea of the Scheme was to enable DSG to achieve an increased capital loss by including the indexation element in the price paid for the relevant assets.

26. The Scheme required that the Jersey companies should be granted a call option which would enable them to purchase shares in property-owning companies and certain properties (i.e. the relevant assets) at an over-value. The Jersey Companies would be funded to make the acquisition by a combination of the issue of new ordinary share capital to and by a capital contribution (i.e. a gift) from Development Securities plc. Then, the Jersey Companies would exercise the call options and acquire the shares and properties. Once that had been accomplished, the residence of the Jersey Companies would be moved from Jersey to the United Kingdom. The Jersey directors would resign and new, United Kingdom resident, directors would be appointed.

27. It was essential to the success of the Scheme that the Jersey Companies, which were newly incorporated, were resident in Jersey and not the United Kingdom in the period from their incorporation on 10 June 2004 until 20 July 2004.

28. The Jersey Companies were incorporated in Jersey on 10 June 2004 as subsidiaries of Development Securities plc. The Jersey Companies were set up by Volaw Trust and Corporate Services Limited ("Volaw"), a Jersey company associated with the Jersey law firm, Voisin & Co. The initial shareholders in the Jersey Companies were nominees provided by Volaw, the nominees holding the shares for Development Securities plc as the beneficial owner.

29. The board of directors of each of the Jersey Companies comprised three Jersey-based and tax resident directors provided by Volaw. They were Mr Simon Perchard, Mr Trevor Norman and Mr Robert Christensen. All three were what might be called "professional" directors, acting as directors for multiple companies set up by Volaw.

30. The fourth director, Mr Stephen Lanes, was based and tax resident in the United Kingdom. Mr Lanes was the company secretary of Development Securities plc.

31. The Jersey Companies each held five board meetings in Jersey. These took place on 11 June, 25 June, 28 June, 12 July and 20 July 2004.[29] In respect of each of the Jersey Companies, those board meetings were as follows:

(1) At the meetings on 11 June 2004, the proposal was put to the board, as outlined by Mr Lanes, that DSG member companies incorporated in the United Kingdom would grant the Jersey Companies call options which, if certain

[29] It would be unrealistic to expect three separate meetings for each of the Jersey Companies to have taken place on these five occasions, and that did not happen. The documentation, however, suggested that separate meetings were held.

conditions were satisfied, would entitle one of the Jersey Companies to purchase shares in certain property owning companies and the other two Jersey Companies to purchase properties. It was envisaged that, if the directors decided to exercise the option, Development Securities plc might be willing to make a capital contribution and to subscribe for newly issued shares to assist in the purchase of the relevant asset.

(2) On 25 June 2004, the board agreed to execute the call options, having received a resolution from the nominee shareholders (issued on the authorisation of Development Securities plc as beneficial owner) approving the transaction and notifying the board it was for the benefit of the companies and a letter of intent from Development Securities plc that it would consider making a capital contribution towards the purchase of the relevant assets (although there was no contractual commitment to do so). The conditions for the exercise of the options included that the FTSE Real Estate Total Return Index closed at 2082 or above for at least five consecutive days in a specified period (the "FTSE condition") and approval by Development Securities plc.

(3) On 28 June 2004, a further meeting of the board was held at which it was resolved to approve the transfer of shares in the companies from the initial holders (two Volaw nominee companies) to the beneficial owner, Development Securities plc.

(4) On 12 July 2004, the board resolved to exercise the options, noting that the relevant conditions had been met, and requested Development Securities plc to provide the funding through capital contributions and share subscriptions. This duly took place. The board also resolved to make certain VAT and tax applications in respect of the properties. The formalities to effect the acquisition were completed on that day or shortly thereafter.

(5) On 20 July 2004, the Jersey directors resigned and United Kingdom resident directors were appointed with a view to the Jersey Companies becoming tax resident in the United Kingdom from that time. Shortly afterwards, once it was considered that the Jersey Companies were tax resident in the United Kingdom, steps were taken for the Jersey companies to sell or dispose of the relevant assets, thereby triggering a capital loss.

32. In order to achieve the tax planning objectives of the Scheme, the price payable by the Jersey Companies for the relevant assets on exercise of the options was an amount equal to the relevant DSG company's historic base cost in the relevant asset for capital gains tax purposes (broadly, being the amount originally paid for the asset) plus indexation accrued to that time. This meant that the price was considerably in excess of the then market value of the asset. On the assumption that the Jersey companies were not resident in the United Kingdom at the relevant time, the United Kingdom resident members of DSG did not realise any tax charge on the sale of the assets to the Jersey Companies and the Jersey Companies acquired the assets for capital gains purposes for the actual amount paid rather than by reference to market value. Therefore, when the Jersey Companies later sold the assets, they were standing at a larger loss, as increased by the indexation element.

33. The amount of money DSG stood to save from the Scheme was around £8 million (although we understand that significantly less than that was saved in the end). The total price paid for the acquisition of the relevant assets (as funded by Development Securities plc) was £24,495,000.

34. Various people at DSG were involved in the implementation of the tax plan. The driving force behind the tax planning was Mr Michael Marx. He was a member of the board of directors of Development Securities plc and other DSG companies. He was qualified as an accountant. Also heavily involved were:

(1) Mr Chris Christofi, the financial controller of DSG; and

(2) Mr Lanes who, as already mentioned, was Development Securities plc's company secretary.

Both reported to Mr Marx.

35. Of the three directors of the Jersey Companies provided by Volaw, Mr Christensen was the managing director of Volaw and much of his work involved special purpose real estate vehicles. He was a director of a large number of other special purpose vehicles, collective investment funds as well as investment and finance companies. Similarly, Mr Perchard and Mr Norman had considerable experience in real estate transactions and were professional company directors. Mr Perchard was a director of approximately 40-50 client companies and Mr Norman was a director of approximately 300-400 companies.

36. Ms Anne Hembry was an administrator working for Volaw. She provided much of the administrative backup for the directors of the Jersey companies and reported to Mr Perchard. She typed up board minutes and kept manuscript notes of the board meetings.

37. In addition, PwC had a team of tax accountants working on the Scheme and DSG were also advised by PwC's associated law firm, Landwell.

(2) The reasoning of the FTT

38. The FTT concluded that CMC did not reside in Jersey, where the board meetings were held and where three of the four directors were resident, but in the United Kingdom. The FTT did not consider this to be a case of usurpation or sham. Rather, it concluded that this was a case of abdication of CMC on the part of the Jersey directors, albeit abdication of a very particular sort. The FTT concluded that:

> "410 …we consider the rather unusual circumstances in this case evidence that from the outset, in the very act of agreeing to take on the engagement, the Jersey directors were in reality agreeing to implement what the parent had already at that point in effect decided to do, subject only to checking it was lawful for them to do so. The Jersey directors were presented with a very specific plan, to implement a set of steps for the acquisition of an asset at an overvalue (albeit with inbuilt conditionality), a transaction which made no commercial sense for the companies

themselves, and, having done that, to resign within a matter of days, all within the space of a few weeks. We do not have any evidence as to precisely what the directors knew of the project at the time when work started as regards setting up on the companies on 9 June 2004, although it is reasonable to suppose they had some knowledge of what was involved…In any event, on 10 June 2004, the day before the first board meeting, Mr Norman and Mr Christiansen had received the package of papers from PwC, from which the nature of the project was very clear…

411 We find it difficult to see that, in reality, in those circumstances, in agreeing to act as directors as regards a very specific sole project which was inherently uncommercial for the Jersey companies themselves, the Jersey directors were doing anything other than thereby agreeing from the outset to implement the specific steps required to acquire the assets for their client, DS plc, barring it being found there was any legal impediment for them to do so (although in that case, no doubt the parent would not have wanted to proceed). The question arises as to why directors of a company would agree to undertake a project which is not for the benefit of that company; in this case, the answer can only be that it was because the parent wanted them to do so. If they were not prepared from the outset to undertake the sole, inherently uncommercial act required of them, subject to it being lawful for them to do so, it would be very odd to accept the appointment given the specificity of what was required.

412 The lines of distinction as regards who is controlling a subsidiary formed for a limited and/or specific purpose may be rather fine ones. But in our view, there is a difference between, for example, engaging a board of directors to operate a company with a limited or group function, such as a finance function for the group, which responds to proposals put by the parent in the expectation they will be approved (because they make commercial sense) and engaging a board to perform a single act, which is wholly uncommercial from the companies' own perspective, on the basis control is then almost immediately handed back to the parent. It is inherent in the uncommercial nature of what was proposed or, in other words, that lack of any commercial benefit evidence that the board were undertaking to implement the necessary steps from the outset on the "say so" of the parent (subject to the legality issue). We cannot see on what other basis the directors of a company would sign up to take on board such a project.

413 This evidences that it was [Development Securities plc] who, as the parent which decided to undertake the planning and engaged the board to perform these specific actions, was in effect exercising CMC of the Jersey Companies. It is not a case of the Jersey board considering and exercising their discretion as directors at the board meetings of the company as and when the proposals for the option and exercise of the options were put to them. From the outset there was no prospect that the actions would not be taken, barring any legal impediment, because in reality that was what the Jersey board were engaged by [Development Securities plc] to do, namely, to enter into the formal approvals required subject to checking the legality. Checking the legality does not in these circumstances, for the reasons set out below, amount to exercising CMC."

39. Thus, the FTT determined that CMC was exercised by the parent, Development Securities plc, in London for two reasons, one in our view primary and one in our view subsidiary:

(1) The subsidiary reason was that the directors had a specific task entrusted to them by their parent, after which they were to resign – as they did.

(2) The primary reason for the FTT's conclusion was their finding that the directors knew from the outset that they were – as an integral part of the specific task entrusted to them – to cause the Jersey Companies to act in a manner contrary to their commercial interests, and that the only possible inference that could be drawn from their agreement to serve on this basis was that (provided the transaction was legal) they would go through with it without question and without exercising their judgment as directors. In short, the inference that CMC vested elsewhere is based upon the Jersey directors' willingness to accept appointment knowing that this appointment involved causing the Jersey companies to enter into transactions that (in the FTT's judgment) could only be explained by an abdication of responsibility of the directors to exercise CMC. This theme runs throughout the paragraphs we have quoted above, and indeed, throughout the judgment (notably at [75], [100], [144(5)], [150], [153], [205], [206], [212], [215(7) and (8)], [288], [402(1) and (2)] and [417]-[424]). Although the FTT found that the directors considered the Scheme, that was from the narrow perspective of wanting to assure themselves that the Jersey Companies would not be breaking the law, rather than from the wider perspective of seeking to reach a view as to whether the Jersey Companies should enter into the transactions that the Scheme envisaged them entering into.

(3) Analysis

(i) The subsidiary reason

40. We do not consider that the mere fact that the directors had a specific task entrusted to them by their parent, after which they were to resign, says anything about where CMC vested. Indeed, somewhat inconsistently with [410] to [413] of the Decision, the FTT appears to have accepted this at [401] and [409].

41. As Park J noted in *Wood v. Holden*, special purpose vehicles are often brought into being for specific and short-term purposes, on the achievement of which they are wound down. In this case, the Jersey Companies were not wound down, but (pursuant to the Scheme) had or tried to have their place of residence changed from Jersey to the United Kingdom. For that reason, United Kingdom resident directors replaced Jersey resident directors. We do not see how this factor sheds any light on the question of who was exercising central management and control.

42. Had the FTT concluded that CMC vested in London simply on the basis that the Scheme was a short-term scheme which, once achieved, would involve the resignation of the Jersey directors, we would have found this to be an error of law in the understanding of the CMC test.

43. We turn to the primary reason as to why the FTT concluded that CMC vested in the parent company, which was that the Jersey directors, who should

have exercised CMC, did not do so because they had abdicated responsibility for management and control.

(ii) The primary reason

44. We consider the FTT's primary basis for concluding that CMC was exercised in London and not in Jersey to be untenable and wrong given the facts found by the FTT in the Decision.

45. The basis for the conclusion that the Jersey directors had abdicated responsibility for CMC was that the directors had failed to decline to do something that was improper or inadvisable, in that they had entered into so-called uncommercial transactions by exercising the options. The FTT was making the sort of inference described in *Untelrab*:[30]

> "…a significant factor is whether the directors would have declined to do something improper or inadvisable; if they would, then this would point towards the conclusion that there was no control by the parent."

46. The FTT's conclusion rests on a fundamental misunderstanding of *(i)* the nature of the transactions entered into by the Jersey Companies and *(ii)* of the duties of the Jersey directors in relation to those transactions. We consider these two points in turn below.

47. As regards the nature of the transactions entered into by the Jersey Companies, it is wrong to say – as the FTT repeatedly does[31] – that the relevant assets were acquired <u>by the Jersey Companies</u> on uncommercial terms, in the sense that they (the Jersey Companies) were economically disadvantaged. As we have pointed out, it was envisaged that the acquisition of the relevant assets would be funded by Development Securities plc and that is what in fact occurred.[32] Thus, whilst the relevant assets were acquired at an overvalue, the overpayment by the Jersey Companies was <u>not</u> funded by them. We therefore have grave doubts regarding the FTT's description of the Jersey Companies' participation in the Scheme and their acquisition of the relevant assets as being "uncommercial" when considering only the position of the Jersey Companies.

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[30] See the last sentence of the passage quoted in paragraph 18(4) above, which for convenience we set out again.

[31] See, for example, at [402(1)] in a passage which immediately precedes the FTT's reasons for its decision: "The Jersey companies were set up on the basis that the only transaction to be undertaken whilst the Jersey board was intended to be exercising CMC over them was an inherently uncommercial one from their perspective, namely, that they would acquire assets standing at a loss for a substantial amount in excess of their market value." It is clear that this is what the FTT had in mind when it refers to the acquisition by the Jersey Companies of the relevant assets as being "inherently uncommercial".

[32] See paragraphs 30(1) and 30(4) above. In fact, it seems clear from a paper prepared by PwC dated 6 April 2004 that the capital contributions made by Development Securities plc were intended to provide the Jersey Companies with sufficient distributable reserves in order to prevent there being an unlawful reduction of capital.

48. The term "artificial" might be more appropriate to describe the Scheme, for the Scheme had no commercial purpose other than producing the tax benefits that we have described. We have not, of course, seen the legal advice received by DSG and the Jersey Companies (privilege was not waived) but we would strongly anticipate that the advice would have focussed on the legality of a Scheme that might be said to be commercially pointless and which undoubtedly had artificial elements (such as over-paying for the relevant assets) which could only be understood in light of the tax advantages of the Scheme.

49. We noted in paragraph 9 above that HMRC does not now seek to challenge the Scheme on *Ramsey* and *Dawson* grounds. The FTT did not find that the Jersey directors entered into the transactions having any concerns about the legality of the Scheme. To the contrary, the FTT has found that the Jersey directors would not have entered into the options had that been their view.[33]

50. We turn to the misunderstanding in relation to the duties imposed on the directors. Assuming, contrary to the conclusion that we have expressed in paragraph 47 above, that the FTT was right in holding that the relevant assets were acquired <u>by the Jersey Companies</u> on uncommercial terms, we nevertheless consider that the conclusion of the FTT regarding CMC was plainly wrong as a matter of law. Our grounds for reaching this conclusion are as follows:

(1) Article 74 of the Companies (Jersey) Law 1991, as in force at the relevant time, provided:

"**Duties of directors**

(1) A director, in exercising the director's powers and discharging the director's duties, shall –

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercising comparable circumstances.

(2) Without prejudice to the operation of any rule of law empowering the members, or any of them, to authorize or ratify a breach of this Article, no act or omission of the director shall be treated as a breach of paragraph (1) if –

all the members of the company authorize or ratify the act or omission; and

after the act or omission the company is able to discharge its liabilities as they fall due and the realisable value of the company's assets is not less than its liabilities."

(2) This provision is similar but not identical to the equivalent English law provisions. The duty to act in the best interests of the company does not appear to be fully articulated in Article 74, but (like English law) requires consideration of the interests of members (or shareholders), employees and

[33] See Decision at [75], [150], [152], [215(6)], [285], [288], [375(5)], [412], [413], [415], [416], [418], [420(1)], [423], [426], [427] and [434].

creditors. In this case, given that the Jersey Companies had no employees and the transactions that the Jersey Companies were to enter into, pursuant to the Scheme, did not prejudice creditors, the primary consideration can only have been the interest of the shareholders. Beyond the interests of shareholders, creditors and employees it is extremely difficult to identify what other interests a board of directors might take into account. Significantly, the Decision identifies no interest beyond these three.

(3) The Jersey Companies were 100% subsidiaries of Development Securities plc. The primary regard of the Jersey directors ought to have been – and, as it seems to us, on the basis of the facts found in the Decision was – directed to what was in the best interests of Development Securities plc *qua* shareholder. The Decision considers the approach of the Jersey directors at various points, most significantly in [94]-[100] and [144]. It is clear that the Jersey directors had well in mind the duties they were subject to, and were seeking to act in accordance with those duties. They gave detailed consideration to the appropriateness of the Scheme – including the apparently uncommercial nature of the options and the acquisition by the Jersey Companies of the relevant assets – and concluded that the transactions were in the best interests of the shareholders and therefore in the best interests of the Jersey Companies, there being no prejudice to either employees or creditors of the Jersey Companies. The FTT, erroneously, took the view (which it expressed on multiple occasions throughout the Decision) that because the transactions were uncommercial, they had to be contrary to the interests of the Jersey Companies. That, with great respect to the FTT, is a *non sequitur* and it undermines the entire Decision.

(4) In these circumstances, given that the Scheme was actively being propounded by Development Securities plc, it would take a factor of some significance (for instance, a material risk that the Scheme was unlawful) for the Jersey directors properly to be in a position to refuse to enter into the transactions required by the Scheme.

(5) We stress that we reach this conclusion without the need to rely upon Article 74(2). Article 74(2) permits the shareholders to authorise or ratify what would otherwise have been a breach of Article 74(1). In this case, the directors had the benefit of an authorisation under Article 74(2) – no doubt for the avoidance of doubt – but we do not consider that such an authorisation was in fact necessary in this case.

(6) The essential error committed by the FTT was to focus on the uncommerciality of the transactions to the individual Jersey Companies without having regard to the actual duties the directors owed to those companies. These duties, as we have noted, in this case principally involved consideration of the shareholders' interests and the FTT made no finding that the Scheme was not in the interests of the shareholders. Indeed, such a finding would have been fundamentally inconsistent with the FTT's view that the beneficial shareholder – Development Securities plc – wanted the Scheme to go ahead.

(7) The problem with the FTT's approach is that it confused an instruction from a parent company (which would be a matter the Jersey directors should take into account, but not be ruled by) with the authorisation or ratification of a course of conduct by the shareholders in the company, which conduct might be in breach of the duty of the directors. This is the very reverse of an instruction from an entity different from the company, telling it what to do. It is an authorisation or ratification from the appropriate organ within the company. In short, the FTT's references to the Jersey directors being "instructed" by the parent entirely misunderstand the nature of the Article 74(2) authorisation or ratification.

(8) We are satisfied that, whatever the position as regards Mr Lanes (who may have been prepared to carry out the transactions no matter what), the Jersey directors *(i)* knew exactly what they were being asked to decide; *(ii)* did so understanding their duties; and *(iii)* complied with those duties. The FTT found that Mr Lanes did not influence the Jersey directors. More specifically:

(a) In [286] of the Decision, the FTT conclude that "[a]s regards Mr Lanes' own position as a director of the Jersey Companies, it is difficult to see him as anything other than a puppet of [Development Securities plc]/Mr Marx". That amounts to a finding – as against Mr Lanes – that he abdicated responsibility and acted as a rubber stamp, and we accept that finding and proceed on that basis.

(b) If the FTT had found that the Jersey directors had similarly acted as puppets – either of Mr Marx or of Mr Lanes – then the outcome of this appeal might have been different. But they did not. At [287] of the Decision, the FTT found:

> "However, as regards his [Mr Lanes'] interaction with the Jersey directors, who were of course in the majority, whilst Mr Lanes was clearly placed on the board with a view to doing what he could to ensure that what was supposed to happen did happen, we cannot see he was somehow issuing "orders" to the Jersey directors on behalf of [Development Securities plc] or indeed that he would have been in a position to do so (and as noted we consider any such orders would not have been necessary[34]). Rather, he was facilitating communication and information and co-ordinating the required paperwork."

51. It is fair to say that in its conclusions – at for example [423] to [426] of the Decision – the FTT suggests that the Scheme and the Jersey Companies' participation in the transactions forming part of the Scheme did not receive proper consideration. These paragraphs, we find, are coloured by the erroneous conclusion the FTT drew from the "uncommercial" nature of the transactions entered into[35] and cannot be sustained in light of the findings of fact made earlier

[34] This appears to be a reference to the FTT's conclude that, for different reasons, the Jersey directors had abdicated their responsibilities. For the reasons we have given, we reject that analysis as wrong in law: but we accept, as we are bound to, the finding of fact in this paragraph.

[35] See paragraphs 44*ff* above.

on in the Decision and referenced in paragraphs 52 and 74(3) below. Furthermore, we consider that the repeated findings of the FTT that the Jersey directors would not act illegally amounts in truth to a finding that that the Jersey directors would not – as experienced directors – act in breach of their fiduciary duties.[36]

52. Moreover, the FTT's conclusion that the Jersey directors did not give any or sufficient consideration to the merits of the transactions does not sit well with the facts it found. In addition to the points made above, we observe, for example, the following findings of fact by the FTT:

(1) The first board meeting on 11 June 2004, at which the proposed transactions were considered, lasted from approximately 11a.m. until 4p.m., with a break for lunch (Decision [133]). This seems inconsistent with the notion that the Jersey directors were either acting "mindlessly" or were simply going through the motions at the behest of Development Securities plc.

(2) At the same board meeting, the Jersey directors queried the stamp duty position and took advice from PwC by telephone (Decision [135] and [136]). This is important because it shows that the Jersey directors were applying their minds to relevant issues arising from the proposed transactions – stamp duty is typically a liability which would potentially fall upon a transferee[37] i.e. the Jersey Companies. They were not simply following instructions to implement the transactions "come what may". It is also inconsistent with the FTT's frequently stated view that the Jersey directors were agreeing to approve the proposed transactions, subject only to checking the legalities.

(3) At the board meeting on 25 June 2004, the Jersey directors considered the terms of the call option. The directors noticed an inconsistency between the terms of the option and the drafting of the option notice. They sought clarification from Landwell by telephone. This shows, again, that the directors were applying their minds to the transactions before them and were not simply abdicating their responsibilities.

53. Finally, at certain points (Decision [148] and [422]) the FTT appears to suggest that the Jersey directors should have considered the taxation merits of the Scheme. We consider that it was wrong for it to do so. There was no need for the Jersey directors to take an independent view on the strengths or weaknesses of the United Kingdom tax planning being undertaken by DSG. They were entitled to rely on the PwC paper dated 7 June 2004 presented to the Jersey directors prior to the first board meeting of 11 June 2004. This paper summarised the intended

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[36] See paragraph 51 above. This is further borne out by two other matters. First, the fact that DSG accepted that Development Securities plc had no authority to commit the Jersey directors to anything: see the Decision at [48]. The Jersey directors were thus free to act in accordance with their fiduciary duties. Secondly, the Jersey directors had a very clear understanding of their fiduciary duties: see the Decision at [94]-[102]. The Decision is unclear in recording what the FTT made of this evidence: but it certainly cannot be said that there was a finding rejecting it.

[37] Absent a claim for relief in respect of intra-group transactions under section 42 Finance Act 1930.

tax benefits intended to accrue to DSG. We note that, in any event, HMRC did not seek to support the FTT's apparent view that this was a relevant factor.

54. In these circumstances, we find the conclusion of the FTT that the Jersey directors had abdicated their responsibilities such that CMC vested not in the Jersey boards but in Development Securities plc an impossible one. The fact that the Scheme envisaged the Jersey Companies entering into what the FTT regarded as uncommercial transactions says quite literally nothing about the Jersey directors' abdication or otherwise of their duties. Indeed, the approach of the FTT begs a very serious question. If, as we infer, the conclusion of the FTT was that the transactions were entered into by the Jersey directors in breach of their duties as directors, then this would have been an illegal act, which the Jersey directors would not have countenanced. The FTT never actually articulated what it meant by "illegality", but such illegality is capable of embracing a breach of fiduciary duty. The FTT clearly regarded the entry into transactions at an over-value as somehow inconsistent with the Jersey directors' duties. We do not accept that. But the logical corollary of the FTT's position is that the Jersey directors – given their concern about legality – would never have entered into these transactions. Ergo, the directors must have been satisfied that they were legal. There is an essential incoherence in the FTT's reasoning.

55. In these circumstances, unless the Decision can be defended on other grounds, the appeal must be allowed. We turn to HMRC's cross-appeal.

E. THE CROSS-APPEAL

(1) Introduction

56. HMRC sought to defend the Decision on other grounds. Paragraph 4 of HMRC's Respondents' Notice contended that the Decision could be affirmed on the following additional grounds:

> (1) Contrary to its approach, the FTT ought to have considered the CMC test in light of the whole course of the Jersey companies' business and trading between 10 June 2004 and 20 July 2004.
>
> (2) In addition to the facts that persuaded the FTT that CMC did not reside in Jersey – namely, agreeing to take on the directorships of the Jersey companies knowing that the plan was for them to acquire the assets at an overvalue and moving the residence of the companies to the UK after the relevant parts of the plan had been performed – the FTT ought to have concluded that there were further acts of CMC carried out during the relevant period and those acts were carried out wholly or partly in the UK.
>
> (3) Contrary to the FTT's conclusion that the decision in *Smallwood* was inapplicable when considering the CMC test, it was relevant to consider whether there was a "scheme of management" in the UK.
>
> (4) If CMC was exercised in Jersey then, on the FTT's findings of fact, the Jersey companies were dual resident in Jersey and the UK.

57. We consider these four points in turn below. None, in our judgment, is sufficient to enable us to affirm the Decision on other grounds.

(2) The need to consider the whole course of the Jersey companies' business

5 58. We understand that – in the proceedings before the FTT – the focus was on what was said and decided at the various board meetings of the Jersey Companies. That would appear to be a sensible starting point when considering CMC, since it is at board meetings that (typically) decisions are made.

59. However, context is everything, and factors that influence decisions taken 10 at a board meeting may emerge out of events occurring outside the board room. We consider that such factors may well be relevant to questions of CMC. However, there is no holding in the Decision to suggest that the FTT excluded from consideration a material factor going to the question of CMC simply because it occurred outside a board meeting.

15 60. To the contrary, whilst the Decision does, indeed, focus on the board meetings, it clearly takes account of matters occurring outside these meetings: for example, actions by DSG more generally and events pre-dating the incorporation of the Jersey Companies.

61. In short, we reject the implied criticism of the FTT made by HMRC: the 20 FTT did not fail to take account of relevant facts by (wrongly) confining itself to events occurring at board meetings.

(3) Further acts of CMC

62. In this case, whilst there was doubtless consideration of the Scheme outside board meetings of the Jersey Companies and certainly acts were done in relation 25 to the Scheme other than at board meetings, including elsewhere than in Jersey (for example, the setting up of bank accounts), we have no doubt, given the facts found by the FTT, that there were no acts <u>of CMC</u> outside the board meetings and/or outside Jersey.

63. In paragraph 19(3) above, we noted that there is a distinction between cases 30 where CMC is exercised and cases where other, lesser, corporate decisions are taken. We are concerned with identifying the *locus* of <u>central</u> management and control. The fact that other operations took place or other decisions were made away from this *locus* does not affect the *locus* of CMC <u>unless</u> in themselves they amount to CMC.[38] If that is the case, one must consider whether CMC is, in fact,

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[38] Thus, for example, the fact that executive directors frequently have authority (often limited by financial limits) delegated to them by the board does not of itself mean that those executive directors exercise CMC. Similarly, where the board of directors delegates specific functions (e.g. audit, nominations and remuneration) to committees of the board the exercise of those delegated functions would not usually result in CMC being exercised by the board committee.

exercised elsewhere (because this is a case of usurpation, sham or abdication) or whether the CMC is split, giving rise to dual or multiple residence.

64. For the reasons we have given, we consider the conclusion of the FTT that the Jersey board abdicated its responsibilities to be wrong in law. However, we have reached that conclusion not because the FTT failed to identify what were the relevant acts of CMC. We consider that the FTT correctly identified the relevant acts of CMC as being the decisions of the Jersey boards (including the surrounding matrix of fact), but that the FTT erred in concluding that, when making these decisions, the Jersey boards abdicated their responsibilities as directors to act in accordance with the directors' duties. The FTT identified no other material acts of CMC, and we consider the FTT was correct in reaching this conclusion. We reject the submission that there are other acts of CMC – other than those considered by the FTT – capable of supporting the conclusion reached by the FTT.

65. Furthermore, the FTT made no finding of usurpation or sham. On the face of the Decision, there are no facts that could justify such a conclusion.

(4) The decision in *Smallwood*

66. HMRC submitted to the FTT that the decision of the Court of Appeal in *HMRC v. Smallwood*[39] could and did elucidate the test for CMC that we have described in Section B above. The FTT considered the *Smallwood* decision at [342]*ff* of the Decision, and concluded (at [389]) that there was no basis for using the *Smallwood* decision to elucidate the CMC test because *Smallwood* was concerned, not with CMC, but with the residence of a trust under different rules to the rules relating to the residence of corporations.

67. We, of course, accept that it is quite possible for one area of law to inform another: but this is not such a case, and we consider that the FTT was correct to hold that *Smallwood* was "inapplicable in these circumstances". We have not considered it necessary to incorporate the analysis in *Smallwood* into Section B above for that very reason: the principles in *Smallwood* – were we to incorporate them – distort rather than elucidate the CMC test for corporate residence.

(5) Dual residence

68. In paragraph 19(6) above, we noted that it was possible for a corporation to have more than one residence, but that the test for this remained the CMC test. It is necessary to show that central management and control is divided between two jurisdictions.

69. The Decision provides no factual basis for such a conclusion. But for its conclusion that the Jersey directors had abdicated their CMC responsibility to Development Securities plc, the FTT accepted that CMC vested in Jersey. That

[39] [2010] EWCA Civ 778.

was where, so the FTT found, the critical decisions were made, save that they were made in so unthinking a way that CMC vested not in the board in Jersey, but in London.

70. As we have described, we do not accept that the Jersey directors did act in such a way as to cause CMC to move away from the boards of the Jersey Companies. But we have no reason to disagree with the anterior conclusion of the FTT that, but for this abdication, the board would have been exercising CMC.

71. We can see no factual basis for finding that CMC was divided. To the extent that other decisions or steps were taken in relation to the Scheme, these were not matters of central management and control but lesser corporate decisions and actions.

G. DISPOSITION AND COSTS

72. We conclude that the Decision that the Jersey Companies were resident in the United Kingdom in June/July 2004 was incorrect as a matter of law. The Appellants' appeal is, therefore, allowed.

73. The question remains whether the question of residence must be remitted to the FTT, for the decision – which, as we have noted, is essentially one of fact – to be remade or whether this is a decision which we can make, on the basis of the facts found by the FTT.

74. We conclude that we can undertake the determination of this question of fact and that there would be no point in remitting this question back to the FTT. As to this:

(1) The FTT, in its Decision, has made multiple findings of fact. We consider that these findings – which we identify further below – enable us to determine the question of the residence of the Jersey Companies. Moreover, we do not consider, given the length of the hearing before the FTT, the evidence heard and the detail of the Decision that there is any real prospect of <u>further</u> findings of fact reliably being made.

(2) The essence of the FTT's decision was that CMC would have been exercised in Jersey but for the FTT's (we find, erroneous) conclusion that the directors of the Jersey boards abdicated their decision-making responsibility. Having concluded that the Jersey directors did <u>not</u> abdicate their responsibilities in this way, the conclusion that CMC was exercised in Jersey is inevitable on the logic of the Decision itself.

(3) Furthermore, the Decision finds as fact that:

(a) The Jersey directors knew and understood the Scheme, its operation and purpose.[40]

[40] See Decision at [56], [73]-[75], [94]-[102], [129], [147]-[154], [195]-[196], [215] and [252].

(b) The Jersey directors applied their minds to the Scheme, and positively concluded that they could lawfully cause the Jersey Companies to enter into the options to acquire the relevant assets and then acquire those assets pursuant to those options.[41]

75. We conclude that the Jersey directors did properly consider the decisions they made on behalf of the Jersey Companies and that, in consequence, CMC was exercised in Jersey and that therefore the Jersey Companies are resident in Jersey and not in the United Kingdom.

76. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Marcus Smith

Judge Guy Brannan

Release date: 5 June 2019

[41] See Decision at [75], [150], [152], [215(6)], [285], [288], [375(5)], [412], [413], [415], [416], [418], [420(1)], [423], [426], [427] and [434].