[2019] UKUT 0367 (TCC)

Appeal number: UT/2017/0123-0127

Corporation Tax – consortium relief – s 146B CTA 2010

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellant**
- and -	
SOUTH EASTERN POWER NETWORKS PLC **LONDON POWER NETWORKS PLC** **UK POWER NETWORKS (TRANSPORT) LTD** **EASTERN POWER NETWORKS PLC**	**Respondents**

TRIBUNAL: The Hon Mr Justice Snowden
Judge Charles Hellier

Sitting in public in the Rolls Building on 6 and 7 February2019

David Ewart QC and Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Jonathan Peacock QC and Sarah Black instructed by ADE Tax for the Respondents

DECISION

Introduction

1. This is an appeal by HMRC against a decision of the First-tier Tribunal (the "FTT") in connection with claims of the Appellants (the "Power Companies") for consortium tax relief under Part 5 Corporation Tax Act 2010 ("CTA" or "the Act").

2. After the Power Companies had submitted corporation tax returns in which they had made a consortium claim, HMRC opened enquiries into the returns. The enquiries continued for some time, and the Power Companies applied to the FTT under para 33 Sch 18 CTA for directions that HMRC give closure notices.

3. HMRC resisted that application on the basis that they needed further information in order to determine, inter alia, whether s.146B CTA applied to reduce the amount of relief which could be claimed by 50%. The FTT decided that on the facts s.146B did not apply and accordingly directed HMRC to close their enquiries. HMRC appeal against that decision.

4. The facts are not, at least for our purposes, in dispute and the issue before us is narrow. It is limited to determining the proper construction and application of s.146B.

The Statutory Provisions

5. Consortium relief is a form of group tax relief, whereby, among other possibilities, a company (the "claimant company") that is owned by a "consortium" may reduce its taxable profits by setting against them losses surrendered to it by another company (the "surrendering company") with an appropriate relationship to the consortium.

6. A "consortium" for these purposes is defined in s.153 CTA:

> "(1) For the purposes of this Part a company is owned by a consortium if—
>
> (a) the company is not a 75% subsidiary of any company, and
>
> (b) at least 75% of the company's ordinary share capital is beneficially owned by other companies each of which beneficially owns at least 5% of that capital.
>
> (2) The other companies each owning at least 5% of the share capital are the members of the consortium for the purposes of this Part.
>
> (3) If—
>
> (a) a trading company is a 90% subsidiary of a holding company and is not a 75% subsidiary of any company apart from the holding company, and
>
> (b) as a result of subsection (1), the holding company is owned by a consortium,
>
> then for the purposes of this Part the trading company is also owned by the consortium."

7. Section 130 CTA sets out the basic conditions for a claim for consortium relief:

> "(2) A company ("the claimant company") may make a claim for group relief for an accounting period ("the claim period") in relation to those amounts (in whole or in part) if the following requirements are met.
>
> Requirement 1
>
> The surrendering company consents to the claim.
>
> Requirement 2
>
> There is a period ("the overlapping period") that is common to the claim period and the surrender period.
>
> Requirement 3
>
> At a time during the overlapping period—
>
> …
>
> (d) consortium condition 3 is met (see section 133(2) to (4))".

8. The Power Companies rely on "consortium condition 3", the conditions of which are set out in s.133(2) CTA:

> "(2) Consortium condition 3 is met if—
>
> (a) the claimant company is a trading company or a holding company,
>
> (b) the claimant company is owned by a consortium,
>
> (c) the surrendering company is not a member of the consortium,
>
> (d) the surrendering company is a member of the same group of companies as a third company ("the link company"),
>
> (e) the link company is a member of the consortium, and
>
> (f) the surrendering company and the claimant company are both UK related."

Between 12 July 2010 and 10 December 2014 there was an additional condition in s.133(2)(g) CTA, but it is irrelevant to this appeal.

9. In relation to relief under consortium condition 3 there are, therefore, three crucial companies: the claimant company, the surrendering company and the link company. The claimant company must be owned by a consortium of which the link company is a member. The surrendering company must be part of the same group of companies as the link company. It is not disputed that the references in the CTA to a single company (e.g. link company, claimant company or surrendering company) can include the plural.

10. The CTA imposes certain restrictions on the amount of relief that a claimant company can utilise from a surrendering company. For present purposes, the relevant restrictions are set out in ss.144 - 146B CTA.

11. If the claim is based on consortium condition 3, s.145(3) limits the amount of consortium relief to the lowest "ownership proportion" as defined in s.144(2) and (3), which have effect in relation to consortium condition 3 as follows:

> "(2) The group relief to be given on the claim is limited to the ownership proportion of the claimant company's available total profits of the overlapping period (see section 140(2) to determine the available total profits of the overlapping period).
>
> (3) The ownership proportion is the same as the lowest of the following proportions—
>
> > (a) the proportion of the ordinary share capital of the claimant company that is beneficially owned by the [link] company,
> >
> > (b) the proportion of any profits available for distribution to equity holders of the claimant company to which the [link] company is beneficially entitled (see Chapter 6),
> >
> > (c) the proportion of any assets of the claimant company available for distribution to such equity holders on a winding up to which the [link] company would be beneficially entitled (see Chapter 6), and
> >
> > (d) the proportion of the voting power in the claimant company that is directly possessed by the [link] company."

12. Paragraph (d) of s.144(3) was not included in CTA as originally enacted. It was introduced together with s.146B following an announcement in the March 2010 Budget statement of an intention,

> "to strengthen rules designed to ensure that access to consortium relief is only given in proper proportion to the member company's involvement in the consortium".

13. So far as material to this case, s.146B provides:

> "(2) This section … applies if—
>
> > (a) the claimant company makes a claim for group relief based on consortium condition 3, and
> >
> > (b) during any part of the overlapping period, arrangements within subsection (3) are in place which enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, from controlling the claimant company.
>
> (3) Arrangements are within this subsection if—
>
> > (a) the company, either alone or together with one or more other companies that are members of the consortium, would control the claimant company, but for the existence of the arrangements, and

(b) the arrangements form part of a scheme the main purpose, or one of the main purposes, of which is to enable the claimant company to obtain a tax advantage under this Chapter.

(4) The group relief to be given on the claim is to be determined as if the claimant company's total profits for the overlapping period were 50% of what they would be but for this section (see section 140(2) to, determine the total profits for the overlapping period)."

14. The relevant definition of "control" is that set out in s.1124 CTA,

> ""control" means the power of a person ("P") to secure –
>
> (a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or
>
> (b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,
>
> that the affairs of company A are conducted in accordance with P's wishes."

15. Sections 144(3)(d) and 146B were introduced by the Finance (No.3) Act 2010 which came into force on 15 December 2010. It took effect in relation to all accounting periods beginning on or after 12 July 2010, which was the date upon which the Treasury first published the draft clauses which were subsequently included in the Finance (No.3) Bill.

16. The issue in this appeal is whether, at relevant times during the claim period, there were arrangements in place which satisfied s.146B(2)(b) and (3)(a). If there were, then HMRC were entitled to continue to pursue their enquiries into whether those arrangements fell within s.146B(3)(b).

The Facts

Summary

17. There have been long-running enquiries by HMRC into the Power Companies' claims for consortium relief for the three accounting periods commencing on 1 January 2011, 2012 and 2013. The FTT directed that HMRC issue closure notices in relation to those enquiries.

18. Although relevant to the decision of the FTT, it is not necessary for us to consider the detail of the enquiries. The only facts that are relevant for our purposes relate to the structure of the consortium and the changes made to that structure between September 2010 and 31 December 2010. These changes are set out below and are not in dispute.

The consortium

19. Throughout the relevant overlapping periods, the structure of the consortium was as shown on the structure diagram at Appendix A to this decision. The key points are as follows.

20. The Power Companies are all trading subsidiaries of UK Power Networks Holdings Limited ("UKPNHL"). The Power Companies all made significant profits during the relevant overlapping periods. They are the claimant companies for CTA purposes.

21. UKPNHL is owned by five companies: CKI Number 1 Limited ("CKI1"), CKI Number 2 Limited ("CKI2"), CKI Number 3 Limited ("CKI3"), Devin International Limited ("Devin") and Eagle Insight International Limited ("Eagle"). CKI1 is a wholly owned subsidiary of CKI2. CKI2 is a wholly owned subsidiary of CKI3. All five companies had some connection to the Hutchison Whampoa Group, a Hong Kong based group with many business interests around the world. At the relevant times, the consortium, for the purposes of the Act, consisted of CKI1, CKI2 and CKI3 (together the "CKI Companies").

22. The CKI Companies belong to the same group of companies as Hutchison 3G UK Holdings Limited and Hutchison 3G UK Limited (the "Hutchinson Companies"). The Hutchison Companies made significant losses in the relevant overlapping periods. They are the surrendering companies for CTA purposes.

23. As the CKI Companies are both members of the consortium that owns the claimant companies and part of the same group as the surrendering companies, they are the link companies for CTA purposes.

24. It is not in dispute in this appeal that this structure means that the Power Companies can claim consortium relief under the Act. The essential issue is whether s.146B might possibly apply so as to limit the profits against which the relief may be set to 50% of what they would otherwise be.

History of the consortium

25. UKPNHL was formed in June 2010 by three initial shareholders: Devin, Eagle and CKI1. UKPNHL was formed for the purpose of acquiring EDF's UK electricity transmission business (the "Acquisition"), of which the Power Companies formed part. Initially, the three shareholders each owned 1 £1 ordinary share and had equal rights in UKPNHL in every respect.

26. On 11 September 2010, the three shareholders entered into a shareholders' agreement (the "September SA"). The September SA did not alter any of the ownership proportions, but set out how the Acquisition funding would be structured and how the group's governance would be arranged. It specified, inter alia, that, once the Acquisition had taken place, the interests of the parties would be 40% for each of Devin and CKI1 and 20% for Eagle. The agreement also provided that votes at Board level were to be 49.5% to CKI1, 16.8% to Eagle and 33.7% to Devin.

27. On 29 October 2010, the Acquisition completed, the September SA was replaced by a new shareholders' agreement (the "October SA") and new articles of association (the "October Articles") were adopted.

28. The October SA provided for a new share structure of UKPNHL. It introduced, (i) A and B ordinary shares; (ii) A fixed rate preference shares (which do not count as ordinary share capital for the purposes of the CTA); and (iii) B floating rate preference shares (which do count as ordinary share capital for this purpose).

29. The A preference shares were divided between Devin and Eagle in the proportion 2:1. The CKI Companies subscribed for the B preference shares in equal proportions. The numbers of A and B ordinary shares were split such that 97.6% of the ordinary share capital was owned by the CKI companies, 0.8% was owned by Eagle and 1.6% was owned by Devin. This had the consequence that Eagle and Devin ceased to be members of the consortium as they held less than 5% of the ordinary share capital of UKPNHL.

30. The net effect of this new share structure and the rights attaching to the various classes of shares was as follows:

Shareholder	Percentage of ordinary share capital	Percentage of entitlement to residual profits (including indirect entitlement)	Percentage of entitlement to assets available for distribution on winding up (including indirect entitlement)	Percentage of votes held
Eagle	0.8%	20%	12.5%	16.8%
Devin	1.6%	40%	25%	33.6%
CKI1	33.6%	36.7%	37.5%	27.6%
CKI2	32%	38.3% (1.6% direct)	50% (12.5% direct)	11%
CKI3	32%	40% (1.6% direct)[1]	62.5% (12.5% direct)	11%

31. The October Articles included another important change for present purposes: the voting threshold required to pass shareholder resolutions was increased from 50% to 75% (the "75% Voting Threshold"). The relevant new Article read:

[1] The indirect figure includes the holding of each CKI subsidiary (i.e. CKI3's entitlement includes both its own direct entitlement (of 1.6%), CKI2's direct entitlement (of 1.6%) and CKI1's direct entitlement (of 36.7%)

"Save to the extent not permitted by the Act, any resolution of the company or the Members shall require a majority of 75% in order to be validly passed".

32. At that point, the CKI Companies had 49.6% of the voting rights in UKPNHL. Accordingly, neither before nor after the introduction of the 75% Voting Threshold could the CKI Companies be assured of the ability to pass any shareholder resolution of UKPNHL.

33. At this stage, s.144(3) CTA did not include what became s.144(3)(d). The relevant ownership proportion was therefore one of the percentages set out in s.144(3)(a)-(c). However, the proposal to introduce s.144(3)(d) had been announced. If there had been no further change to the voting rights attaching to the shares in UKPNHL, the coming into force of s.144(3)(d) would have resulted in the relevant ownership proportion for the CKI Companies being 49.6%.

34. Against this background, on 30 December 2010 UKPNHL adopted a further new set of articles of association. Through various changes to the voting rights, this caused the combined voting rights of the CKI Companies to increase from 49.6% to 74.6%. The other ownership proportions did not change. Accordingly, the ownership structure after 30 December 2010 was (and remained throughout all relevant overlapping periods):

Consortium Member	Percentage of ordinary share capital	Percentage of entitlement to residual profits (including indirect entitlement)	Percentage of entitlement to assets available for distribution on winding up	Percentage of votes held
Eagle	0.8%	20%	12.5%	8.5%
Devin	1.6%	40%	25%	16.9%
CKI1	33.6%	36.7%	37.5%	25.2%
CKI2	32%	38.3% (1.6% direct)	50% (12.5% direct)	24.7%
CKI3	32%	40% (1.6% direct)	62.5% (12.5% direct)	24.7%

35. Thus, for all the periods of account relevant to HMRC's enquiries, the 75% Voting Threshold applied and the CKI companies held 74.6% of the votes attaching to the shares in UKPNHL.

36. Also on 30 December 2010, CKI3 and Hong Kong Electric Holdings Company ("HEH"), the parent company of Eagle, entered into a voting arrangement whereby

CKI3 agreed not to exercise its voting rights without the prior written consent of HEH. Whilst HMRC relied on this agreement as forming part of the "arrangements" for s.146B purposes before the FTT, it was not relied upon before us. We therefore do not consider it further.

Limits to consortium relief

37. It was common ground, for the purposes of this appeal, that s.144(3)(d) – the percentage of voting rights held by the CKI Companies in UKPNHL - produced the lowest proportion to which the Power Companies' claim for consortium relief should be limited.[2] The claims for consortium relief were made on that basis: the amount of relief claimed was 74.6% of the Power Companies' profits.

38. However, this claim was subject to s.146B which, if it applied, would reduce the profits against which the relief could be set by 50%.

The FTT's decision

39. So far as relevant to this appeal, the broad thrust of HMRC's argument before the FTT was that the disposition of the votes among the shareholders of UKPNHL and the 75% Voting Threshold in its Articles gave rise to an arrangement which satisfied the conditions in s.146B(2)(b) and (3)(a) and as a result that they were entitled to make enquiries as to whether any such arrangement was part of a scheme within s.146B(3)(b).

40. The FTT found that s.146B did not apply and accordingly that HMRC could not reasonably pursue further enquiries about the purposes of the arrangements. It reached this conclusion in paragraphs [235] – [278] of its decision on the following analysis.

41. First, that the 75% Voting Threshold could be an arrangement [256]:

> "The relevant arrangement is accordingly the increase in the voting threshold to 75%."

42. Secondly, that the 75% Voting Threshold was an arrangement which satisfied the "but for" test in s.146B(3)(a). The FTT rejected the argument that s.146B(3)(a) required a loss of pre-existing control as a result of the "arrangements" [267]:

> "I agree with Ms Lemos that the language of section 146B(3)(a) does not require pre-existing control. The purpose of section 146B is to prevent consortia and others implementing arrangements of the prescribed kind which confer a tax advantage. The arrangements may be in place at the outset, before anyone had any control to lose. The enquiry demanded by section 146B(3)(a) is whether

[2] This was on the assumption that the effect of s.167 CTA is that the proportions of entitlement to (i) residual profits and (ii) assets on a winding up (the proportions in ss.144(3)(b) and (c) CTA) both include indirect ownership, which can be aggregated with direct ownership. This produces the result that the CKI Companies are entitled to 115% of the residual profits. It was suggested by Mr Ewart that, in the context of the wider dispute and any potential future tax appeal, HMRC did not accept this to be the case. However, the issue was irrelevant to this appeal.

there are arrangements, and, if so, whether the consortium would control the claimant if the arrangements were not there."

43. Thirdly, that the test in s.146B(2)(b) was not satisfied because the words "enable a person to prevent" required one to look at the world as it is and to ask whether the relevant link company has control and whether there is any other company that had the power to inhibit the exercise of that control, [272]-[273]:

> "272 I agree with Mr Peacock that section 146B(2) does require one to look at the circumstances as they exist, including the arrangements. So the CKI companies have 74% of the votes and the threshold for passing a resolution is 75%. The consortium does not have control of UKPNHL.
>
> 273 If either Eagle or Devin vote with the CKI companies they could pass a resolution. But this does not mean that if both Eagle and Devin vote against the consortium it can be said that the arrangements (the increase in the threshold) have "enabled them to prevent" the CKI companies exercising control because they simply do not have control. That is the position in any company where a shareholder has, or group of shareholders have, a minority interest under the Articles of Association. By definition, they cannot control the company. It is pushing the language of subsection (2) too far to say that the ability of the other shareholders to vote against the minority enables them to prevent the minority from controlling the company."

44. As a result, the FTT held that the 75% Voting Threshold in the December Articles met the requirements of s.146B(3)(a) but not those of s.146B(2)(b). It was therefore not capable of falling within s.146B.

Grounds of appeal

45. HMRC put forward three grounds of appeal, but only the second of those was pursued by Mr Ewart, namely that the FTT erred in its construction of s.146B(2)(b) CTA.

46. The "arrangements" relied upon by HMRC were either: (i) the 75% Voting Threshold; or (ii) the combined effect of the 75% Voting Threshold and the shareholdings of Devlin and Eagle (which together amount to 25.4% of the voting rights of UKPNHL).

47. The Power Companies cross-appealed on the basis that the FTT wrongly concluded that s.146B(3)(a) was satisfied. They argued,

> (1) that although *Pilkington Bros v Inland Revenue* [1982] 1 WLR 136 ("*Pilkington*") is authority for the proposition that a company's articles of association could be "arrangements" for the purposes of s.146B, there was no authority to suggest that *part* of a company's articles of association was capable of being such arrangements. Accordingly, the FTT erred in finding that the 75% Voting Threshold could be "arrangements"; and

(2) that the FTT was wrong in its construction of the "but for" test in s.146B(3)(a) that there was no need for pre-existing control. The FTT was wrong to find that the term 'but for the existence of' is not a test of causation and is instead testing a hypothetical state of affairs 'in the absence' of the arrangements.

If HMRC was successful on Ground 2, and the Power Companies were unsuccessful in their cross appeal then it was accepted that HMRC's enquiry should be allowed to continue and no direction for closure notices should be given. If HMRC were unsuccessful, then it was accepted that their enquiry should not be allowed to continue and the closure direction made by the FTT should stand.

Discussion

48. Three issues arise: (i) what can be included in the "arrangements" to which s.146B may be applied; (ii) how should the requirement in s.146B(2)(b) that the arrangements enable another person to prevent the link company from controlling the claimant company be applied; and (iii) how should the 'but for the existence of' test in s.146B(3)(a) be construed?

49. Before turning to the analysis in the instant case, it is perhaps helpful to give a simple example of a case which, assuming the relevant purpose was present as required by s.146B(3)(b), would plainly be caught by s.146B.

50. Assume two members of a consortium, P1 and P2 hold ordinary shares in company JV: P1 has 60 shares and P2 has 40 shares. The articles of JV are in standard form under which each share carries one vote and a simple majority is required to pass ordinary resolutions of the company. P3, which has a subsidiary with tax losses, is invited to join the consortium with a view to enabling JV to take advantage of the tax losses. P1, P2, P3 and JV enter into an agreement under which P3 agrees to subscribe for 150 shares in JV (giving it 60% of the ordinary share capital and voting power), but P3 agrees that it will only cast the votes attaching to those shares if P1 consents.

51. The mischief sought to be addressed by s.146B in such a case arises because the parties have organised the shareholdings in JV with the purpose of ensuring that P3 has a high ownership proportion (60%) so as to maximise the tax losses capable of being utilised. However, P1 does not in fact wish to surrender control of JV to P3 and so puts a voting agreement in place. In this example, the "arrangements" for s.146B purposes are clearly the voting agreement between the parties; the voting agreement enables P1 to prevent P3 from controlling JV for the purposes of s.146B(2)(b) because P1 can withhold its consent, so preventing P3 from being assured that it can use its voting power to ensure that the affairs of JV are conducted in accordance with its wishes; and "but for the existence of" that agreement, P3 would control JV for the purposes of s.146B(3)(a).

52. With that example in mind, we turn to the issues in the instant case.

(1) "Arrangements"

53. The word "arrangements" is not expressly defined for the purposes of s.146B. Section 146B lies in Chapter 4 of Part 5 CTA. Part 5 contains provisions dealing with losses and group or consortium relief. For the purposes of ss.154 to 155B in Chapter 5 of Part 5 (which deal with the effect on group relief if there are arrangements under which a company might leave a group) "arrangements" are defined by s.156(2)(a) to mean

> "arrangements of any kind (whether or not in writing)"

but excluding a power in a government minister to give directions as to the disposal of the assets of a statutory body. Likewise, for the purposes of ss.170 to 182 (which deal with the calculation of the proportion of profits or assets available to an equity holder for the purpose of determining the proportions in s.155), s.169(2) defines "arrangements" to mean:

> "arrangements of any kind (whether or not in writing)".

54. Elsewhere in CTA, s.775 defines "arrangements" for the purposes of ss.758 to 776 to include an agreement or understanding whether or not legally enforceable; and there are similar provisions in ss.730B and 939.

55. It does not seem to us that any of these other definitions could serve, by implication, to qualify the ordinary and natural meaning of "arrangements" as used in s.146B. We therefore turn to consider the interpretation of "arrangements" in *Pilkington*.

56. *Pilkington* concerned the provision in s.29(1)(b)(ii) Finance Act 1973 (the predecessor of section 154(3) CTA Effect 2) which denied group relief where,

> "arrangements are in existence by virtue of which … any person has or could obtain, or any persons together have or could obtain, control of the [claimant] company but not of the [surrendering] company."

57. Pilkington was the claimant company, and it had an indirect interest in a company, GC, sufficient to meet the other conditions for it to claim group relief for GC's losses. However, the Revenue argued that group relief should be denied because arrangements were in existence by virtue of which the shareholders of Pilkington could control Pilkington, but that neither they nor Pilkington itself controlled GC. The arrangements in question were said by the Revenue to comprise the newly created company structure of GC and its immediate shareholder companies, together with the articles of Pilkington. Pilkington contended that its articles, which had not been amended at any time, could not form part of the "arrangements" for the purposes of s.29(1)(b)(ii).

58. At first instance, Nourse J said that "arrangements" "both in ordinary and in statutory parlance [was] a word of wide import by no means confined to relationships

having contractual form and effect". However, he considered that it would be unnatural to read the plural "arrangements" as "dispensing with the need for some unifying link between each of the combinations or dispositions" said to form the arrangements. He therefore considered the statutory provision,

> "in the expectation that it is intended to refer to things or measures which are combined or disposed for a particular purpose*".*

On that basis, and because there had been no change at any point to the articles of Pilkington, Nourse J held that the provision denying group relief did not apply, and that group relief was available.

59. On a "leapfrog appeal", the majority of the House of Lords rejected any such limitations on the meaning of "arrangements" and held that group relief was not available. Lord Bridge said (at pages 146-147A) that the definition of "arrangements" as arrangements "of any kind" predisposed him against imposing any limitation on the ordinary meaning of the word; he attached no significance to the use of the plural rather than the singular; and he considered that the wording of the statute ("… are in existence by virtue of which …") directed attention to the effect of the arrangements which were in existence, rather than the purpose for which they came into existence. Lord Fraser made the same point at page 141E-F. The majority therefore held that the fact that no change had been made to the articles of Pilkington did not mean that they could not form part of the "arrangements" for the purposes of s.29(1)(b)(ii).

60. There is no indication in the CTA of any intention to limit the ordinary meaning of the word "arrangements" in s.146B, and the words "are in place" in s.146B(2)(b) and "but for the existence of" in s.146B(3)(a) seem to us to have the same connotation as the words "are in existence" in the provision considered in *Pilkington*. We therefore conclude, applying the approach in *Pilkington*, that "arrangements" in s.146B should be given a wide meaning, and that the identification of the "arrangements" should not be limited by the purpose of the matters which may be comprised in them.

61. We also reject Mr Peacock's argument that *Pilkington* is authority for the proposition that a company's articles as a whole may be included within the concept of "arrangements", but that part of the articles may not be. Although the speeches in *Pilkington* all refer rather loosely to "the articles", it is clear from the context that the attention of all the judges was directed at the question of whether those parts of Pilkington's articles that were relevant to the statutory test of control could form part of the "arrangements". There was nothing in that statutory test or in the facts of the case that required the court to have regard to any other parts of Pilkington's articles or draw any distinction between the articles as a whole and some only of the articles.

62. So, for example, when Lord Bridge was summarising the argument of Pilkington which he went on to reject, he commented, at pages 145-146,

> "Mr. Beattie's second submission founds upon the circumstance that the several agreements between Pilkingtons and Manchester Liners and the three subsidiary companies concerned involved alterations in the structure and control of those

> subsidiary companies as part of the scheme devised for the purpose of constituting Golden Cross a 75 per cent. subsidiary of Pilkingtons; the control of Pilkingtons on the other hand, by its shareholders through its articles of association, was unaffected by the scheme. No alteration was made to Pilkingtons' articles of association and the shareholders, as such, were not parties to the scheme. In the light of this it is said that whilst the "arrangements" contemplated by section 29 (1) (b) (ii) clearly embrace the provisions of the scheme establishing the new company structure of HTV, Villamoor and Golden Cross, they cannot include the articles of association of Pilkingtons, which are the only arrangements affecting the control of Pilkingtons."

And when rejecting that argument, Lord Bridge continued, at page 147,

> But, to my mind, the consideration of overriding significance is that the whole sentence [in s.29(1)(b)(ii)] is concerned with those arrangements which determine the control of *both* the companies whose entitlement to be treated as members of the same group is in issue. To construe "arrangements" as excluding, notwithstanding the definition of "control" in section 534 of the Taxes Act [what is now s.1124 CTA], those arrangements which regulate the conduct of the affairs of *either* of the companies in accordance with the wishes of its controlling shareholders seems to me simply to negate the plain meaning of the statutory language.

63. In context, it is clear that Lord Bridge was focussing on the provisions in Pilkington's articles which would enable shareholders to regulate the conduct of the affairs of the companies, and hence were relevant to the question of control as defined in the statute. The fact that Pilkington's articles, like those of any other company, contained numerous provisions which served other purposes than enabling the shareholders to regulate the conduct of the affairs of the company, was simply irrelevant to the decision. The presence of those other provisions in the articles was certainly no part of the reasoning of any of the judges.

64. The point can be tested by considering the analogy of "arrangements" by way of a separate contract such as a shareholders' agreement or voting agreement of the type given in the example in paragraphs 50 and 51 above. There would be no logical or policy reason for concluding that s.146B(2)(b) could apply only to the entire contract, and could not apply if the provisions having the relevant effect formed part only of that contract. If that were the case, it would be very easy for parties to insert into a contract an additional provision dealing with some other inconsequential or unrelated matter to avoid the operation of the statute.

65. Similarly, as already noted, the word "arrangements" is used in other provisions of Part 5 concerned with group and consortium relief. So, for example, s.173 deals with option arrangements, but s.174A(2)(b) excludes from that definition,

> "a provision in a constitutional document of [a] joint venture company which provides for the suspension of a member's voting rights on, or as a result of, one or more … contingencies occurring."

Moreover, s.171(3) and (4) deal with arrangements which are of a kind which would change an equity holder's entitlement to distributions or on a winding up: these are matters which ordinarily concern part only of the articles of a company. These provisions show that Parliament did not intend "arrangements" to be limited so as only to apply to all of the articles of a company.

66. We therefore conclude, as did the FTT, that the 75% Voting Threshold in Article 7.5 is within the meaning of "arrangements" for the purposes of s. 146B.

(2) The "prevent" test in s.146B(2)(b)

67. The FTT held that the test in s.146B(2)(b) was not satisfied. The reason given for that conclusion was because the CKI companies only had 74.6% of the total votes they could not be regarded as having control of UKPNHL, because Article 7.5 meant that the threshold for passing an ordinary resolution was 75%. Accordingly, so the FTT reasoned,

> "If either Eagle or Devin vote with the CKI companies they could pass a resolution. But this does not mean that if both Eagle and Devin vote against the consortium it can be said that the arrangements (the increase in the threshold) have "enabled them to prevent" the CKI companies exercising control because they simply do not have control."

68. It would seem from its analysis that the FTT interpreted s. 146B(2)(b) as only applying where the arrangements in question enable a person to prevent the CKI companies *exercising control*. Having done so, it is hardly surprising that the FTT concluded that because Article 7.5 prevented the CKI companies from having control at all, its effect was not to prevent them exercising control. For the reasons that follow, however, we think this was a misreading of s.146B(2)(b)

69. Section 146B(2)(b) applies where there are arrangements in place,

> "which enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, *from controlling* the claimant company." (our emphasis)

70. "Control" is defined as the power of a person to secure that the affairs of a company are conducted in accordance with his wishes. The definition of control looks either to the holding of shares or the possession of voting power, or to powers conferred by the articles or any other constitutional document. Against that background, the concept used in s.146B(2)(b) of a person "controlling" or being "prevented from controlling" a company seems entirely apposite to include the underlying question of whether a person has such a power or is prevented from having such a power.

71. So, as a matter of ordinary language, we consider that arrangements might be said to prevent a consortium company from "controlling" a company in either of two situations. The first is if the consortium company holds sufficient voting power to pass resolutions under the company's constitution, but the arrangements impose an

external constraint upon the exercise of that voting power so that the consortium company cannot be certain that its wishes will prevail. That situation is the one given in the example in paragraphs 50 and 51 above.

72. The second situation is if the arrangements operate internally under the company's constitution so that the voting power of the consortium company is inadequate to assure it of passing the resolutions necessary to give effect to its wishes. In either case it could be said, without doing violence to the statutory language, that the consortium company is prevented from "controlling" the company by its voting power, and that the arrangements enable another person or other persons to prevent it controlling the claimant company.

73. Specifically, and as applied to the instant case, we consider that it is entirely in accordance with the language and structure of s.146B(2)(b) to say that the existence of the 75% Voting Threshold in Article 7.5 enables Eagle and Devin to prevent the CKI companies from having the power to secure that the affairs of UKPNHL are conducted in accordance with their wishes, because even with 74.6% of the voting power, the CKI companies cannot be sure of being able to pass a resolution of UKPNHL.

74. That interpretation is, we consider, consistent with paragraph 10 of the Explanatory Notes to the Finance (No.3) Bill 2010 which stated that s.146B was designed,

> "[273]… to limit consortium relief where arrangements have been put in place the effect of which is to prevent a member or members of a consortium from controlling the consortium company in situations where they would otherwise hold control, for example by holding the greater part of the voting power."

It can be seen that the legislative explanation gave the example of a person being prevented from controlling the consortium company where they otherwise would hold control by virtue of holding majority voting power. It did not suggest that there was any requirement that the arrangements had to be such that in some way they could affect control that could be found to exist independently.

75. We are also not persuaded by the FTT's further reasoning, in the continuation of the paragraph quoted above, that,

> "That is the position in any company where a shareholder has, or group of shareholders have, a minority interest under the Articles of Association. By definition, they cannot control the company. It is pushing the language of subsection (2) too far to say that the ability of the other shareholders to vote against the minority enables them to prevent the minority from controlling the company."

76. We agree with the FTT that the situation they describe cannot have been intended to fall within s.146B for it is the situation which pertains in all consortia. But

for the reasons which follow that concern is removed by the operation of s.146B(3)(a) and does not require a narrow interpretation of s.146B(2)(b).

77. The FTT suggests that to read s.146B(2)(b) as encompassing this situation is "pushing the language" which we understand to mean adopting an extensive or literal meaning which in the context of the purpose of the provision gives rise to an anomaly. But we do not think that this reasoning is consistent with the structure of the section and, in that context, a proper understanding of s.146B.

78. Section 146B(2)(b), like s.146B(1)(b), identifies a class of arrangements which may be caught, namely the class of arrangements which enable a person to prevent another controlling the claimant company. Both in relation to s.146B(1) and s.146B(2) the potential width of that class is then reduced by s.146B(3) which provides that arrangements are caught only if (a) they are the only reason control is not present, and (b) they are part of a tax scheme. Approaching the structure of the section in that way means that there is no reason to construe s.146B(2)(b) restrictively, because potential anomalies which might arise if regard were only had to s.146B(2)(b), are in fact limited or removed by the operation of s.146B(3).

79. For the reasons in the following section of this decision we consider that the test in s.146B(3)(a) requires a comparison between what is the case and the hypothetical case that the relevant arrangements are not in existence. If the voting rights in the articles of a company constitute an arrangement which enable the majority to prevent the minority from controlling the company then the "but for the existence of" test requires it to be postulated that the article conferring those rights was not in existence.

80. In the case of a company without any special or express provision in its articles, the default position in company law is that an ordinary resolution can be passed by a simple majority of the votes of members cast at a meeting on the basis of one vote for each share: see ss. 282 and 284 Companies Act 2006. Thus where the articles give one vote per share the absence of that voting arrangement from the articles would leave the minority still without control. The test in s.146B(3)(b) would not be satisfied and s.146B would not apply.

81. In addition we find it difficult to see, where a company has standard articles which apply the default rule of ss. 282 and 284 Companies Act 2006, that the application expressly or otherwise of the default rule would be an arrangement when it applies precisely when there are no specific "arrangements" in place. Nor does it seem to us that the mere fact of holding shares in a company should be regarded as arrangements at all.

82. We conclude that the FTT erred in finding that the arrangements constituted by Article 7.5 did not satisfy s.146B(2)(b).

(3) The "but for the existence of" test in s.146B(3)(a).

83. As indicated above, s.146B(3)(a) provides that arrangements are within subsection (3) if,

> "(a) the company, either alone or together with one or more other companies that are members of the consortium, would control the claimant company, but for the existence of the arrangements"

84. We have held that the relevant arrangements are the 75% Voting Threshold provided by Article 7.5. Mr Peacock argued that the test in s. 146B(3)(a) required the comparison of the actual position with either (i) the position which existed prior to the relevant arrangement being put in place (so that it is therefore concerned with a loss of pre-existing control), or (ii) the situation which the evidence indicates is likely to have come into existence had the relevant arrangement not been put in place.

85. On the facts, Mr. Peacock argued that had the 75% Voting Threshold not been adopted, the CKI companies' voting rights would not have been increased to 74.6% in December 2010 but would have remained at 49%. As a result, he submitted, it could not be said that "but for the existence of" Article 7.5 the CKI companies would have controlled UKPNHL, because the adoption of that Article did not cause them to lose pre-existing control, and if it had not been adopted their combined shareholding would have remained below the simple majority required to pass an ordinary resolution.

86. The FTT rejected this argument. It said that s.146B(3)(a) did "not require pre-existing control…The enquiry demanded… is whether there are arrangements and, if so, whether the consortium would control if the arrangements were not there."

87. Mr Peacock submitted that the FTT was wrong, first, because if Parliament had intended merely a notional excising of the arrangement it would have used "in the absence of" rather than "but for the existence of". He contended that "in the absence of" was a phrase commonly used in taxing statutes where a comparison was intended between a purely hypothetical situation where something was to be presumed absent, without there being any causal (or historical) element to the construction of the comparative. We do not accept that submission. It seems to us that in ordinary language, "but for the existence of" may be used in the sense of "in the absence of". For example: "But for the existence of the wall I could see the fields". Further, even if "in the absence of" is used in other situations to denote comparison with a purely hypothetical counterfactual, that does not indicate that "but for the existence of" cannot have the same meaning.

88. Second, Mr Peacock submitted that case-law shows that "but for the existence of" is a test of causation – it seeks to test whether the arrangement is the cause of the lack of control and requires a factual investigation of what would have happened if the arrangement had not been put into place. In support of that argument he cited *Eclairs Group Lts v JKX Oil and Gas plc* [2015] UKSC 17 and *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32.

89. *Eclairs* was a decision in a very different context. The issue was whether directors had exercised their powers for an improper purpose, and if so, what consequences would follow. In discussing how a court approaches the issue of a decision made for a mixture of proper and improper purposes, Lord Sumption suggested (at [21] and [22]) that the decision would only be set aside if the impermissible purpose was causative in the sense that, "but for" its presence, the power would not have been exercised.

90. That approach was a judicial description of the type of test to be applied by a court of equity in deciding what relief to grant in a situation which Lord Sumption indicated was "necessarily in the realm of causation". It does not indicate that when the expression "but for" is used by a statute, it requires the importation of a causative test based upon a factual evaluation of the type to which Lord Sumption referred.

91. *Swynson* was also a case in a different context, namely unjust enrichment. At [89], Lord Mance considered the question of whether the owner and controller (H) of a company (S) who had made a loan to a second company (EMSL) to repay a debt to S, had a claim by way of subrogation to S's claim against negligent accountants. The accountants argued that since S had been repaid (albeit with money borrowed from H), there was no claim to which H could be subrogated. Lord Mance said,

> "… H made a mistake which was causative in the "but for" sense that apart from the mistake he would not have structured the arrangements in the way he did. But mere "but for" causation is not sufficient."

92. Again, we consider that this dictum is simply descriptive of a test for causation which might be used by a court in a particular common law context. It does not indicate that the use of the expression "but for" in a taxing statute was intended by the legislature to require a similar factual investigation as to what would have occurred had the particular factor not been present or the particular thing had not been done.

93. Instead, for similar reasons to those discussed in paragraphs 59 and 60 above, we consider that the statutory wording of s.146B(3)(a) – "but for the existence of" does not invite attention to the process by which the arrangements were put into place, or invite a speculative inquiry into what would have happened if they had not been put in place. The natural reading of the "but for the existence of" test is one that simply requires it to be postulated that the arrangements are not in existence at the relevant time. There is a clear contrast with s.146B(3)(b) which does invite an inquiry into the purposes for which the arrangements were introduced.

94. That conclusion is also consistent with what we understand to be the structure and purpose of the different sub-sections of s.146B. As we have explained, s.146B(2)(b) starts by identifying the type of arrangements which are intended to be caught, and s.146B(3) then limits the scope of that net. In other words, the purpose of the "but for the existence of" test in s.146B(3)(a) is to eliminate from the scope of s.146B a case in which, at the relevant time, there is some reason other than the arrangements in question, which stops the consortium companies from controlling the claimant company.

95. Accordingly, we also agree with the FTT that s.146B(3)(a) does not require any examination of the question of whether the introduction of the arrangements in question caused a loss of pre-existing control. That conclusion is strongly reinforced by the point made by the FTT in [267] of its decision, namely that s.146B must be capable of applying to arrangements which are in place from the outset of the life of a consortium, where there has been no pre-existing control which would be capable of being lost. To read the section otherwise would be to create a large hole in the legislation for no apparent legislative purpose.

96. Likewise, the test suggested by Mr. Peacock would be difficult to apply in the simple example suggested in paragraphs 50 and 51 above. In that example, prior to the introduction of P3, P1 had control of JV by reason of holding 60% of the votes: but because P3 only acquired its additional shares on the terms of the voting agreement, P3 was never able exercise any voting power unless P1 consented, and so P1 never lost the ability to control JV.

97. We consider that our approach is also consistent with the Explanatory Notes to the 2010 Finance Bill to which we have referred above. Those notes assumed that arrangements had been put in place and then focussed on "the effect" of those arrangements and envisaged that s.146B would apply "in situations" where the consortium members "*would otherwise"* hold control. There is no suggestion in that explanation of any requirement to investigate the process by which the arrangements were put in place or to investigate whether there was any loss of pre-existing control.

98. Accordingly we conclude, as Mr Ewart submitted and the FTT held, that the "but for the existence of" test in s.146B(3)(a) does not require there to have been a loss of pre-existing control or a factual investigation of the process by which arrangements were put into place, or as to what might have occurred if the arrangements in question had not been put in place. We agree with the FTT that the arrangements constituted by the 75% Voting Threshold in Article 7.5 satisfied the requirements in s.146B(3)(a) simply because, had that provision not been in the articles of UKPNHL, the CKI companies would, at the relevant time, have controlled that claimant company.

Conclusions

99. We therefore conclude that whilst the FTT correctly found that the 75% Voting Threshold amounted to arrangements which satisfied the requirements of s.146B(3)(a), it erred in law in concluding that it did not satisfy s.146B(2)(b).

100. As a result the question of whether the arrangements fall within s.146B(3)(b) is one into which HMRC may reasonably continue to enquire.

101. We therefore set aside the direction made by the FTT.

MR JUSTICE SNOWDEN

JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

Issued: 24 December 2019

APPENDIX: GROUP STRUCTURE