

**FIRST-TIER TRIBUNAL (TAX)**

**LAERSTATE BV**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS [CORPORATION TAX]**

**Respondents**

**TRIBUNAL: JOHN F AVERY JONES CBE  
ROGER BERNER (TRIBUNAL JUDGES)**

**Sitting in public in London on 13 to 16, 20 July 2009**

**Philip Baker QC and Aparna Nathan, counsel, instructed by Stevens & Bolton  
LLP, for the Appellant**

**Timothy Brennan QC and Mr Akash Nawbatt, counsel, instructed by the General  
Counsel and Solicitor to HM Revenue and Customs for the Respondents**

## DECISION

1. This is an appeal by Laerstate BV against the assessment described in paragraph 2(38) below for the year from 1 January to 31 December 1996, and the assessments described in paragraph 2(39) below for the periods from 1 October 1993 to 31 December 1996, and against refusal of the claims referred to in paragraph 2(40) below. The issue is whether the Appellant was at the material times resident in the United Kingdom. The Appellant was represented by Mr Philip Baker QC and Miss Aparna Nathan, and the Respondent (“HMRC”) by Mr Timothy Brennan QC and Mr Akash Nawbatt.
2. There was an agreed statement of facts as follows:

### *Introduction*

(1) The Appellant was incorporated in the Netherlands on 1 August 1988. Its sole director on incorporation was Mr Johannes Eduard Trapman (“Mr Trapman”). The Appellant’s registered office was originally at Nieuweweg 109, Soest, Netherlands. At the time of incorporation the Appellant’s share capital was 200,000 guilders, divided into 200 shares of 1000 guilders. Of these, 40 shares were issued.

(2) The Appellant was incorporated as a wholly owned subsidiary of another Dutch incorporated company, Gouden Akker NV (“GA Properties”), with a paid up share capital of NGL 40,000.

(3) Mr Dieter Bock (“Mr Bock”) acquired the entire shareholding in the Appellant from GA Properties for a consideration of NGL 50,000 on 9 December 1992. Mr Bock was appointed a director of the Appellant on 9 December 1992 and resigned as a director on 30 August 1996.

(4) At all relevant times the Appellant was resident in the Netherlands under Netherlands domestic law, by virtue of the fact that it was incorporated there.

### *The Appellant’s acquisition of Lonrho shares*

(5) In November 1992, Mr Bock was in negotiations with the Frankfurt head office of a German bank, BfG Bank AG (“BfG Bank”) in order to secure a loan to finance the purchase of Lonrho plc (“Lonrho”) shares.

(6) On 27 November 1992, the Frankfurt head office of BfG Bank made an offer in writing of a loan of £100m to Mr Bock. The Loan Agreement was made on 7 December 1992.

(7) A board resolution of the Appellant dated 7 December 1992 has been translated by HMRC as: “The purchase of 100,000 shares by means of issuing new shares in Lonrho has been discussed and approved. The purchase of 43,478,260 Lonrho shares, in the possession of Tiny Rowland (“Mr Rowland”), by means of a call option has been discussed and approved.”

(8) On 9 December 1992, the Appellant entered into an Underwriting and Subscription Agreement with Lonrho and Morgan Grenfell under which it

agreed to subscribe for up to 100m new 25p ordinary shares in Lonrho subject to the terms and conditions set out in that agreement.

(9) Also on 9 December 1992, the Appellant entered into a Sale and Option Agreement with Yeoman Investments Limited (“Yeoman”) and Mr Bock to purchase from Yeoman 43,478,260 Lonrho shares of 25p for a total price of £50,000,000, payable as to £10,000,000 on exchange, £15,000,000 by 18 March 1993, and £25,000,000 by 17 June 1993. The agreement also provided for associated put and call options between Yeoman and the Appellant over a further 45,529,447 shares in Lonrho and assignments of the right to subscribe.

(10) The Loan Agreement dated 7th December 1992 records a loan facility that Mr Bock had negotiated with BfG Bank prior to the Appellant’s purchase of the Lonrho shares. £85m of this loan facility was to finance the acquisition of 100,000,000 shares with a nominal value of 25p in Lonrho by subscription. A further £15m of this loan facility was to finance part of the purchase of further shares in Lonrho from Yeoman.

(11) In relation to the payments made under the Sale and Option Agreement, the first instalment plus a deposit for the underwriting was paid on behalf of the Appellant by BfG Bank to Morgan Grenfell who then delivered a banker’s cheque to Credit Suisse for the vendor. The second instalment of £15,000,000 was transferred by BfG Bank on behalf of the Appellant on 18 March 1993, following instructions from Mr Bock to BfG Bank Frankfurt head office into an escrow account at Credit Suisse, Bishopsgate, London. The third instalment of £25,000,000 was transferred by BfG Bank on behalf of the Appellant on 17 June 1993, following instructions from Mr Bock to BfG Bank Frankfurt head office to Credit Suisse, Bishopsgate, London.

(12) Another part of the loan facility agreed by Mr Bock with BfG Bank prior to the Appellant’s purchase of Lonrho shares was recorded on 11 June 1993 by the Frankfurt head office of BfG Bank. On 17 June 1993, the loan of £25m was made available to Mr Bock to help the Appellant to fund the final instalment of the consideration for the purchase of Lonrho shares from Yeoman.

(13) On 11 June 1993, Mr Trapman signed a Pledging Agreement together with Mr Bock in Frankfurt with effect that the Appellant’s shares in Lonrho were deposited as security for the BfG Bank loan.

(14) On 19 October 1993 the Appellant resolved to move its registered offices from Nieuweweg 109, Soest, Netherlands to van Lijndenlaan 16, Soestduinen, Netherlands. At the same board meeting, the Appellant resolved to appoint Pannell Kerr Forster in the Netherlands as auditors of the Appellant. Pannell Kerr Forster subsequently prepared the accounts of the Appellant.

(15) On 6 October 1993 a Charge was entered into by the Appellant (as “Chargor”), BfG Bank (as “Lender”) and Mr Bock (as “Borrower”).

*Mr Bock's move to the UK*

(16) Mr Bock commenced his employment in London as Joint Managing Director and CEO of Lonrho on 10 February 1993.

(17) In June 1993, a Dutch company owned by Mr Bock's family purchased a flat in London (Flat 4 St James's Place, London SW1). The title was registered on 6 July 1993.

*Matters Affecting the Appellant in 1994/1995*

(18) On 21 March 1994 the Appellant resolved to approve the 1992 accounts. The board minutes were signed by Mr Trapman.

(19) The Appellant entered into a Deed of Charge with Landessbank Hessen-Thüringen Girozentrale in Germany under which the Appellant's shareholding in Lonrho was security for a loan made to Mr Bock in relation to a loan obligation of a German-incorporated company, Advanta Management AG. The Deed was signed by Mr Bock as director of the Appellant.

(20) On 14 June 1994 an Agreement was made between Mr Bock, the Appellant and BfG Bank in which BfG Bank agreed that the loans amounting to £125 million made available to Mr Bock would be extended to 31 December 1995. It was signed by Mr Bock on behalf of the Appellant.

(21) A Deed of Priorities over the Lonrho shareholding was entered into by Mr Bock, the Appellant, BfG Bank and Berliner Handels und Frankfurter Bank on 30 December 1994. Mr Bock signed on behalf of himself and on behalf of the Appellant.

(22) At a meeting of the board of the Appellant held in Frankfurt on 26 September 1994, it was resolved that the Appellant would renounce its option under the Sale and Option Agreement of 9 December 1992 if Mr Rowland left the Board of Lonrho prematurely.

(23) Mr Bock signed a Cancellation Agreement dated 3 November 1994 under which he agreed to procure that the Appellant would renounce its option rights under the Sale and Option Agreement. The Appellant formally acknowledged the Cancellation Agreement on 8 November 1994. This minute was signed by Mr Trapman.

(24) On 31 March 1995, the Appellant and Mr Bock entered into a Current Account Agreement. This was to formalise its loan arrangements for the purchase of the Lonrho shares.

*The Appellant's Disposal of Lonrho shares to Anglo American Corporation of South Africa Limited ("Anglo")*

(25) By 1995, there was a dispute between Mr Bock and the Appellant on the one hand and Mr Rowland on the other hand over the validity or otherwise of the put/call options entered into as part of the Sale and Option Agreement.

(26) On 4 March 1996, Mr Rowland's investment company, Yeoman gave formal notice of the exercise of the put option in the Sale and Option Agreement. This notice was sent to Michael Sears, a solicitor in London, who was recorded in the Sale and Option Agreement as the person to whom notices should be sent.

(27) A valuation of the option price was commissioned by Messrs. Macfarlanes from James Capel & Co. Mr Trapman signed and issued a counter-notice on 12 March 1996.

(28) In early March 1996, Anglo made an offer to the Appellant and Mr Bock to acquire the shares which were the subject of Yeoman's put option ("the Option Shares", being approximately 5% of the issued share capital of Lonrho) from the Appellant and the Appellant offered to grant Anglo a right of first refusal over the Appellant's remaining holding in Lonrho (approximately 18%).

(29) At a board meeting held in Zurich on 13 March 1996 the Appellant resolved to acquire and immediately dispose of the Option Shares. This meeting was attended by both Mr Bock and Mr Trapman (as well as representatives of Macfarlanes, SBC Warburg and Clifford Chance). The minutes of the meeting were signed by Mr Trapman. The agreements referred to in the minutes dated 13 March 1996 at paragraphs 3.2.1 to 3.2.4 inclusive were signed by both Mr Trapman and Mr Bock. In this agreement the Appellant gave Anglo a right of first refusal over 143,478,260 Lonrho shares provided Anglo purchased the 45,529,447 Option Shares that Yeoman had required the Appellant to acquire. The attendant UK Companies Acts formalities were signed by Mr Trapman on behalf of the Appellant on 14 March 1996 and the s 324 Notice to the directors of Lonrho was signed by Mr Bock.

(30) On 4 April 1996 a revised draft Option Agreement was proposed by Clifford Chance whereby the Appellant was to grant a call option to Anglo at £2.20 per share and to be granted a put option on Anglo at £1.80 per share in respect of the Appellant's entire holding of 143,478,260 Lonrho shares.

(31) On 8 April 1996 the Appellant resolved to accept the proposal for the Option Agreement for the 143,478,260 shares in Lonrho from Anglo.

(32) On 12 April 1996 the Appellant, Mr Bock and Anglo entered into an Option Agreement and supplemental agreement. Mr Trapman signed the agreements on behalf of the Appellant.

(33) On 12 April 1996, the Option Agreement was announced to the London Stock Exchange.

(34) Anglo became concerned that exercising their option under the April Option agreement might mean they fell foul of EC merger regulations, if Anglo's holding meant they had a "decisive influence" in the market regarding platinum mining interests. On 24 September 1996, the Appellant

gave notice to Anglo of its intention to exercise the put option pursuant to the 12 April 1996 option agreement with Anglo.

(35) On 29 October 1996, the Appellant gave notice to Anglo of its exercise of the put option pursuant to the 12 April 1996 Option Agreement with Anglo.

(36) On 5 November 1996 Mr Trapman wrote directly to Anglo requiring them to deliver 4 bankers' drafts on completion of the exercise of the put option.

(37) On 7 November 1996, Mr Bock and Mr Trapman went to Zurich to attend the completion meeting at which the documents, prepared by Macfarlanes, were signed. Mr Trapman signed on behalf of the Appellant.

#### *Assessment and Appeals*

(38) On 13 November 1997, the Inland Revenue assessed the Appellant to corporation tax in respect of the gain arising on the disposal by it of its shareholding in Lonrho on the basis that the Appellant was resident in the UK for tax purposes at the time that the gain arose. On 27 November 1997, the Appellant appealed against this assessment on the basis that it was not resident in the United Kingdom for tax purposes either at the time that it purchased its shareholding in Lonrho or at the time when it sold its shareholding in Lonrho or at any time between those events.

(39) On 20 November 1997, the Inland Revenue assessed the Appellant to Advance Corporation Tax in respect of franked payments (para 3(3) Sch 13 ICTA 1988) and on 20 November and 17 April 1998 in respect of relevant payments (para 4(2) Sch 16 ICTA 1988). The Appellant appealed these assessments on 1 December 1997, 11 December 1997 and on 20 April 1998.

(40) In or around March 1995 the Appellant wrote to the Inland Revenue applying for double taxation relief under the UK /Netherlands Double Tax Agreement for repayment of tax credits on its Lonrho dividend income. The claim was in the sum of £2,017,659.95 and was made in respect of dividends paid in the period between 1 October 1993 and 1 October 1996. The repayment of tax credits, therefore, forms part of the Appellant's appeal.

3. As will be seen from the above statement of facts, the appeal concerns events between 1992 and 1996. We wish to place on record our concern that appeals should take this long to come on for hearing and we urge parties not to allow this to occur by putting down the appeal for hearing. In this case the appeal was transferred to the Special Commissioners in January 2007 and would have been heard during 2008 but for the indisposition of Mr Bock. The long delay before the appeal being heard meant that a date for the hearing last year had to be postponed through Mr Bock being indisposed. We heard evidence via video conference from Mr Bock. It was expected that Mr Trapman might be able to give evidence by video conference although he had come out of hospital about three weeks earlier. We received medical evidence that he had difficulty in

speaking on account of a condition unconnected with the one for which he had been in hospital, and we failed to obtain any medical evidence about whether the problem of speaking was temporary or likely to be permanent. Mr Baker asked to admit his witness statement to which Mr Brennan objected. We decided to admit the witness statement, and to decide what weight to give it, on the basis that the overriding objective of dealing with the case fairly and justly (rule 2 of the the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) required it as balance of prejudice was with the Appellant if we received no evidence from Mr Trapman who was the sole director of the Appellant for part of the time concerned and one of two directors for most of the time. If the appeal had been heard earlier we would have been able to have Mr Trapman's evidence in person which would have been much more satisfactory for both parties and ourselves. We also heard evidence in person from Mrs Rita Mackintosh, Mr Bock's personal assistant. A witness statement by Meester J Kemper, notary and partner in Schaap & Partners, Rotterdam, on Dutch company law was admitted unopposed.

### **The constitution of the Appellant**

4. We find the following further facts:

(1) The Articles of Association of the Appellant provide (in translation):

(a) Art 11(1): The company shall be managed by a board of management (*directie* in Dutch), which shall consist of one or more members;...(2) Management board members (*directeuren*) shall be appointed by the general meeting, which may suspend or dismiss them at any time.

(b) Art 12(1): The board of management (*directie*) shall be responsible for the management of the company....(3) the board of management shall meet as often as any member so requires. It shall pass resolutions by an absolute majority of votes. In the event of an equality of votes, no resolution shall be passed.

(c) Art.14: Subject to the provisions of article 12, para 4 [which relates to the directors having the approval of the general meeting of shareholders to do various acts] the board of management (*directie*) may grant signing rights to one or more persons in the company's employment, and may grant one or more authorised signatories such title as they see fit.

(d) Art.15: Each manager (*directeur*) shall be independently authorised to represent the company at law and otherwise.

(e) Concluding provisions: ... that Mr Johannes Eduard Trapman residing at Soest, Clarenstekepad 11, born at Zuilen on 26.3.1932, is appointed as managing director (*directeur*) of the company for the first time and for an unspecified period.

(2) Mr Kemper's uncontested evidence about a Dutch BV was that:

- (a) The company is represented by the Board of Directors
- (b) The Directors are in charge of governing the company (section 2:239 Dutch Civil Code)
- (c) Under Dutch law a company may have one or more Directors. It is, in practice, not uncommon for only one Director to be appointed.
- (d) If the company has more than one Director, each Director can individually bind the company unless the Articles of Association provide otherwise. The ability of the Directors to represent and bind the company is unrestricted and unconditional provided that the law or the Articles of Association do not provide otherwise.
- (e) If only one Director is appointed, he is free to act in any manner consistent with the Dutch Civil Code provided that no limitations are placed on his decision making and other powers by the company's own Articles of Association.
- (f) Under Dutch law, a shareholder who is not a Director of the company cannot bind the company.
- (g) Under Dutch law, subject to one exception [applicable where the sole director is the only shareholder] there is no requirement for a formal written record to be kept of the matters discussed and decided at meetings of the board of Directors.

(3) We understand (and so find) that art 12(3) of the Articles does not affect the point made by Mr Kemper at 4(2)(d) above that any director can bind the company, or that at 4(2)(e) above that a sole director can do so. We also find that since the same Dutch word (*directeur*) is used in the concluding provisions relating to Mr Trapman that there is no significance in the different translation of his being "managing" director, or in art 15 that each "manager" is authorised to represent the company. We infer that the relationship between art 12(3), requiring the agreement of both directors for a resolution to be passed, and art 15, that each director can represent the company, to be that the former is an internal provision and that the latter is an external provision. Thus we find that the Appellant would be bound to a third party by an act of one of two directors that was not authorised by both directors.

#### **Background to the investment by the Appellant in Lonrho**

5. Mr Bock is a German national who qualified as a lawyer and Steuerberater (tax adviser). He founded a tax consulting firm with Juergen Stauth. In 1974 he started investment in real estate in Germany which later expanded to the US and South Africa, often in partnership with other investors. He formed a German

company Advanta Management AG in 1985 of which he owned the entire share capital and was chairman of the supervisory board, later together with Mr Trapman and board members of two German banks, but he was not a member of the executive board. Advanta engaged in property development and invested in property. It also took strategic stakes in listed real estate companies. By 1990 it had become successful and employed about 35 people. One of the German banks represented on the supervisory board acquired a 20% stake. In 1992 Advanta purchased a majority holding in the German hotel group, Kempinski AG for over DM 170m.

6. In about 1986 Mr Bock decided to investigate the Dutch property market. He was introduced to Mr Trapman by his partner Mr Stauth. Mr Trapman had been managing director of Zanussi Germany and was then CEO of Molenaars, a Dutch company operating department stores. They formed a Dutch company, GA Properties, of which they each owned 50% of the capital. Mr Trapman identified property opportunities and dealt with the transactions, while Mr Bock dealt with the financing. GA Properties became a large and profitable company. It had about 15 Dutch subsidiaries of which Mr Trapman was sole director. A subsidiary of GA Properties was sold to one of the two largest German construction companies, Philipp Holzmann AG, in 1987 and the proceeds were invested by GA Properties in the purchasing company which was built up to a 10% stake. That shareholding was sold to Advanta in exchange for shares. GA Properties became Advanta's majority shareholder in 1992-93.
7. Mr Bock and Mr Trapman jointly investigated the UK property market and UK property companies in the early 1990s but failed to find a suitable investment. They discussed a possible investment in Lonrho. Mr Trapman decided after discussion not to be a joint investor with Mr Bock. Mr Bock decided to invest through a Dutch company and decided to use the Appellant which was at the time a dormant subsidiary of GA Properties that had been formed in 1988. As explained below Mr Bock bought the Appellant from GA Properties. Mr Trapman was the sole director of the Appellant and continued as such without any remuneration.
8. Mr Bock personally borrowed £125m from BfG Bank in Frankfurt for which the Bank required a charge over his interest in Advanta and the Lonrho shares to be owned by the Appellant. Mr Vetter of the Bank was a member of the supervisory board of Advanta. Mr Bock's dealings were with the Bank in Frankfurt, although for banking reasons the loan was booked to the London branch. Mr Trapman was not involved in the financing.
9. Following the investment in Lonrho being made Mr Bock became a director and joint chief executive of Lonrho on 10 February 1993. He continued to be resident in Germany, staying in a hotel in London when required. A family company acquired a flat in London which he moved into after renovation in April 1994. He retained an office in Frankfurt with a private secretary from which he mainly dealt with non-Lonrho business, including Advanta and GA Properties. He had a personal London office only from January 1997. He

travelled extensively spending 232 days outside the UK in 1993, 207 days in 1994, 210 days in 1995 and 163 days in 1996.

10. Mr Bock had made it clear to the Lonrho board at the outset of his employment with Lonrho that he had a number of personal interests which would require a certain time commitment from him. The terms and conditions of his employment were confirmed in a letter dated 11 July 1994, expressed to apply from the date of commencement of the employment. Under paragraph 10 of that letter Mr Bock is required to devote such of his time, attention and ability during his working day to the performance of his duties for Lonrho, but by way of exception also provides:

“Notwithstanding the foregoing and your position as a full time employee of the Company, you shall be entitled to devote to your private business interests such of your time, attention and ability:-

- i) Outside the Company’s normal business hours as you shall deem appropriate; and
- ii) Within the Company’s normal business hours as does not undermine your ability to perform the powers and functions which from time to time are reasonably assigned to you by the Board (or by any Committee of the Board with delegated powers).”

Attached to the 11 July 1994 letter is a list of Mr B’s outside interests which had evidently originally been prepared for regulatory purposes but was used here to avoid misunderstanding as to the scope of the paragraph 10 exception. Among those outside interests was Mr Bock’s position as a director of the Appellant.

11. Both Mr Bock and Mrs Mackintosh were concerned that their phones were bugged and he said that he tried not to conduct non-Lonrho business from his Lonrho office or his home in London. We accept that this is what they thought but we do not accept that we should conclude from this that Mr Bock did not conduct any business of the Appellant in the UK. The facts do not, in our judgment, support any such conclusion. In evidence of Mrs Mackintosh it was clear that she had requested certain documents pertaining to the Appellant’s business to be sent to her by Mr Bock’s solicitor, and it is apparent that his concerns about confidentiality and security did not prevent Mr Bock from communicating with the Appellant’s advisers on numerous occasions whilst he was in the UK.

### **The acquisition of shares in Lonrho by the Appellant**

12. We find the following facts:

- (1) Mr Bock discussed with Mr Trapman the possibility of making an investment in Lonrho jointly but in the end Mr Trapman decided against it.
- (2) Mr Bock met with Macfarlanes on 26 November 1992 and a hand-written note says: “fax DB [Mr Bock] S&P at home today....Vehicle is Dutch shell co.” We infer that he was instructing them to prepare a sale and purchase agreement and that the identity of the Dutch company was not then ascertained.

(3) A letter from BfG Bank to Mr Bock of 27 November 1992 confirmed that they were prepared to lend £100m on terms discussed. A manuscript note of a meeting on 27 November 1992 between representatives of Morgan Grenfell and Macfarlanes said “letter from bank to DB-£100m avail.” Mr Bock gave written instruction to the BfG Bank on 7 December 1992 to transfer £10m to him, and on the same day to transfer £85m to Morgan Grenfell.

(4) Mr Bock dealt with BfG Bank only in Frankfurt, although the loan to him was booked in London as was the case for all euro credit loans by BfG Bank.

(5) As stated above, Mr Trapman passed a board resolution of the Appellant on 7 December 1992 saying (in translation) “The purchase of 100,000,000 shares by means of issuing new shares in Lonrho (sic) Plc has been discussed and approved. The purchase of 43,478,260 Lonrho (sic) Plc shares, in the possession of Tiny Rowland (sic), by means of a call option (sic) has been discussed and approved.”

(6) From an address in Germany on 8 December 1992 Mr Bock instructed BfG Bank to transfer on 9 December 1992 £85m to the account “Laerstate BV/Lonrho Plc subscription moneys escrow account” at Morgan Grenfell; and £10m to his own account to Morgan Grenfell. On the same day Morgan Grenfell wrote to BfG Bank saying that they will hold the funds in the escrow account to pay for the subscription by the Appellant of 100m new shares in Lonrho.

(7) On 9 December 1992 the Appellant, Yeoman (a Bahamas company owned by Mr Rowland) and Mr Bock entered into an agreement in London:

(a) For the sale of 43,478,260 Lonrho shares from Yeoman to the Appellant for £50m payable £10m on exchange, £15m on 18 March 1993 and £25m on 17 June 1993.

(b) For a put and call option over 45,529,447 Lonrho shares under which Yeoman can put and the Appellant can call for the shares at a price determined by the average quoted price for the 40 preceding business days during the 12 month period starting 3 years after the date of the agreement or (if later) Mr Rowland ceasing to be a director of Lonrho.

(c) Mr Bock guaranteed the Appellant’s obligations under the agreement.

(d) The agreement was signed by Mr Trapman on behalf of the Appellant and his signature was notarised in Soest in the Netherlands on 11 February 1993.

(8) On 9 December 1992 a subscription agreement was entered into between Lonrho, the Appellant and Morgan Grenfell for the subscription by the Appellant for up to 100m shares in Lonrho. Mr Trapman signed the agreement in London.

(9) On 9 December 1992 Yeoman, the Appellant and Credit Suisse entered into an escrow agreement relating to 87,447,946 shares in Lonrho held by Credit Suisse. A typed version shows that it was signed by the Appellant but not by whom. We infer that Mr Trapman also signed this agreement in London.

(10) Following the completion meetings of the above agreements Mr Bock and Mr Trapman went to the Netherlands.

(11) On 9 December 1992 by a written agreement stated to be signed in Soest, GA Properties sold 40 shares (the whole of the share capital) in the Appellant to Mr Bock for 50,000 Dutch guilders. Mr Trapman signed the agreement on behalf of GA Properties and he also declared that he had noted the transfer of shares on behalf of the Appellant.

(12) On 9 December 1992 at a shareholders' meeting of the Appellant held at Soest, Mr Bock as sole shareholder appointed himself as a director of the Appellant.

13. We find that Mr Bock arranged all the transactions relating to Lonrho shares, agreeing on 7 December 1992 to the security being given by the Appellant over its Lonrho shares to secure his personal borrowing before he was appointed a director of the Appellant. The board resolution that Mr Trapman signed on 7 December 1992 misstated that the purchase was from Mr Rowland when it was from Yeoman (which was a company owned by Mr Rowland), and more importantly that the purchase of 43,478,260 shares in Lonrho was by means of a call option when it was an outright sale and the put and call (not put) options over 45,529,447 shares were a separate transaction that was not mentioned in the resolution. We infer that Mr Trapman was aware of the transactions in general terms particularly as it was originally proposed that he should also invest, but that he was not aware of the details of the transactions. There was no evidence that Mr Trapman saw drafts of the agreements. The decision to enter into them was made by Mr Bock. Mr Trapman signed the agreements in London at a time when the shares in the Appellant were still owned by GA Properties of which Mr Trapman was sole director. Mr Bock was not resident in the UK for tax purposes at the time. We find that all the transactions were decided by Mr Bock and Mr Trapman signed in accordance with his wishes while in the UK.

#### **Actions of the Appellant while Mr Bock was a director**

14. We find the following facts:

##### *The Appellant's agreement relating to Lonrho shares*

(1) On 20 January 1993 an agreement was entered into amending the agreement of 9 December 1992 relating to the acquisition of the Lonrho shares and the put and call options. This Amendment Agreement was signed by Mr Bock in his personal capacity, by Yeoman, and by an unknown agent (not Mr Trapman) for the Appellant. The Amendment Agreement itself states that it was entered into in Zurich, Switzerland. It appears to have been signed on behalf of Yeoman in Zurich; the Yeoman

signature was witnessed by a secretary whose address was in Zurich. On the other hand the schedule produced by Mrs Mackintosh, Mr Bock's secretary, of Mr Bock's travel arrangements in the relevant period shows that on 20 January 1993 Mr Bock was in fact in the Caribbean, having flown from London to Frankfurt on 18 January 1993 and thence to Antigua on 19 January 1993. It also shows that he was in Switzerland on 15 January 1993, but we conclude that in the circumstances Mr Bock signed this agreement in London and not in Zurich, and that the same is the case for the Appellant's signatory. Mr Bock's signature was witnessed by Michael Sears, Mr Bock's personal solicitor. The signature of the agent of the Appellant was witnessed by a secretary at the offices of Mr Sears at 50 Upper Brook Street, W1. We infer from this that the agreement was signed by Mr Bock and on behalf of the Appellant in London. There is no evidence of any involvement by Mr Trapman.

(2) On 24 May 1993 Mr Charles Martin of Macfarlanes wrote to Mr Bock at Lonrho in London enclosing a fee note addressed to the Appellant. The letter was also copied to Mr Trapman. Mr Trapman replied by writing in manuscript on the letter and returning it to Macfarlanes. There is no evidence of any reply from Mr Bock.

(3) Mr Bock was in Germany on 11 June 1997, and we find that he signed the Pledging Agreement in Germany.

(4) From Frankfurt, on behalf of the Appellant, on 14 June 1993 Mr Bock faxed Mr Martin with instructions to deliver the Lonrho shares to Midland Bank in favour of BfG Bank.

(5) On 15 June 1993 Mr Bock and Mr Trapman signed an instruction to Credit Suisse to deliver the Lonrho shares out of escrow to Macfarlanes on behalf of the Appellant. This document is expressed to have been signed in Brussels, but the travel schedule shows Mr Bock to have been in the UK on that date. We find therefore that Mr Bock signed this document in London.

(6) On 1 July 1993 Macfarlanes sent a fax to Lonrho referring to their having written to Mr Bock suggesting production of a second stock transfer form in relation to the Lonrho shares. On 20 July 1993, according to a file note of Macfarlanes, they were at that stage seeking to establish with Mr Bock the position regarding a possible option agreement over Lonrho shares. There is no evidence that Mr Trapman was involved in this correspondence.

(7) On 29 July 1993 BfG Bank wrote to Mr Bock at the Appellant's Dutch address confirming for him the acquisitions by the Appellant of the Lonrho shares and that those shares were deposited with Midland Security Services, London. We infer that this information had been requested by Mr Bock, and not by Mr Trapman.

(8) On 5 August 1993 Mr Bock, on behalf of the Appellant, wrote to BfG Bank asking them to instruct Midland Bank (Overseas) Limited to execute

a stock transfer form in respect of Lonrho shares in favour of the Appellant and to “deliver it by hand to my solicitor in London, Macfarlanes”. This letter is headed with the Netherlands address of the Appellant but was signed by Mr Bock at a time when, according to the travel schedule, he was in the UK, and we find that it was signed in the UK.

(9) According to a file note of Macfarlanes dated 5 August 1993 in relation to events of that day, Macfarlanes had been having discussions with Mr Bock regarding BfG Bank holding Lonrho shares on behalf of the Appellant. The note records Mr Bock as saying that “he had arranged a meeting with BfG tomorrow (6<sup>th</sup> August) at 10.30 am to discuss the points”. Mr Bock was in the UK from 2 to 5 August 1993, and we conclude therefore that his discussions with Macfarlanes took place in the UK. He flew from London to Frankfurt on the morning of 6 August, and the meeting with BfG Bank took place in Frankfurt.

(10) Mr Bock remained in Germany for approximately 10 days and was there when, on 9 August 1993, his secretary in Germany faxed Mr Martin at Macfarlanes to say that matters were agreed.

(11) The Deed of Charge entered into on 6 October 1993 between the Appellant, BfG Bank and Mr Bock created a charge over the Appellant’s Lonrho shares to secure the loans to Mr Bock. Mr Bock signed this deed in his own capacity and as a director of the Appellant. The deed was signed by him in Frankfurt, Mr Bock having travelled to Frankfurt from London that morning. There is no evidence of Mr Trapman participating in this meeting. However, this deed merely perfected the security arrangements previously agreed with BfG Bank and did not require any further corporate decision to be taken by the Appellant.

(12) On 27 October 1993 Mr Trapman wrote by fax to Macfarlanes attaching a notice pursuant to s 212 of the Companies Act 1985 and asked for instructions how to act.

(13) In a faxed letter dated 10 February 1994 BfG Bank wrote to Macfarlanes referring to discussions with Mr Bock regarding the need for an English legal opinion in respect of the Appellant’s charge over the Lonrho shares. There is no evidence as to where these discussions took place. Mr Bock was in Germany on 9 February 1994, returning to the UK that evening, but he was in Munich and not Frankfurt, and so we infer that he had not met BfG Bank in Germany on that day to discuss this matter. He was in the UK on 7 and 8 February 1994 before flying to Munich late that evening. We do not, however, draw any inference from this as to where Mr Bock was when these discussions took place.

(14) On 15 February 1994 BfG Bank, London branch, from its address at 33 Lombard Street, London wrote to Mr Bock at his German address to confirm that, with reference to various discussions, the facilities of £125 million had been extended as to £100 million until 30 September 1994 and as to £25 million until 31 March 1994. These were the personal borrowings of Mr Bock to provide his loan to the Appellant, and indirectly

to finance the acquisitions of the Lonrho shares. This letter was therefore written to Mr Bock in his personal capacity and not as director of the Appellant. The evidence of Mr Bock is that, although for internal banking reasons and to access funds more cheaply the loans were written out of BfG Bank's London branch, all the discussions relating to the loans took place with BfG Bank's head office in Frankfurt. Mr Bock travelled to Frankfurt in the afternoon of 11 February 1994, and we infer that he had there the discussions referred to in the fax from the London branch.

(15) Mr Bock flew to Amsterdam from London on the evening of 21 March 1994. We infer from this that he was present at the board meeting of the Appellant with Mr Trapman that took place on that date although he is not recorded as being present in the resolution signed by Mr Trapman.

(16) On 24 May 1994 there was a further resolution signed by Mr Trapman of a board meeting in the Netherlands. The travel schedule indicates that Mr Bock was in Germany on that day, and so we infer that he was not present at the board meeting. The minutes record that at the request of BfG Bank in Frankfurt the Lonrho dividends would be paid directly into Mr Bock's account at BfG Bank to enable interest on Mr Bock's loans to be paid. It is also recorded that Pannell Kerr Forster had confirmed that they would audit the company's accounts from 1993. No reference is made in these minutes of the Deed of Charge that was entered into the following day.

(17) As the agreed facts state, the Deed of Charge dated 25 May 1994 between the Appellant and Landesbank was signed by Mr Bock as director of the Appellant. Mr Bock had flown from London to Frankfurt in the evening of 23 May 1994 and returned to the UK in the afternoon of 25 May 1994. In his witness statement Mr Bock says that he had a meeting at 8 am on 25 May 1994 with Dr Kauermann, the CEO of Hessischer Landesbank. But although the Deed of Charge was dated 25 May 1994 it is not clear that it was signed on that date. In his witness statement Mr Bock says that the relevant documents in respect of this transaction were signed in June and early July and that some, including this Deed of Charge, had retrospect effect or were signed with a blank date. We find that it is likely that this Deed of Charge was executed on a date later than 25 May 1994 and that Mr Bock's presence in Germany on that date does not confirm otherwise. In his witness statement Mr Bock stated, and was not challenged on this point in cross-examination, that Mr Rupf, a member of the board of BHF Bank, which was another bank that had financed Mr Bock's commercial interests, had discussed the issues with Mr Trapman, and that he himself had discussed the matter with Mr Trapman. This is borne out by Mr Bock's evidence, which recalled that he had paid a personal visit to Mr Trapman on 21 May 1994, a visit that is supported by Mr Bock's travel records.

(18) On 14 June 1994, Mr Bock was in Germany. On that date, in Frankfurt, Mr Bock signed, in his capacity as shareholder of the Appellant and on behalf of the Appellant itself, the document extending the term of

BfG Bank loans to Mr Bock to 31 December 1995. The Appellant agreed in this document to pledge to BfG Bank all dividend claims from the Lonrho shares. Mr Trapman does not refer to this meeting in his witness statement and we conclude that he was not present.

(19) The 26 September 1994 a board meeting of the Appellant was held at the offices of Advanta Management AG in Frankfurt. There was a single resolution:

“The board of directors decides to renounce the rights from the option agreement with T.R. [Mr Rowland] in the event of T.R. leaving the board of Lonrho prematurely.”

The minute is signed by Mr Trapman, but we conclude that Mr Bock was also present, as his travel records indicate that he was in Germany on that date, and that he met Mr Trapman at Advanta’s offices. Mr Bock’s written statement states that he discussed with Mr Trapman the potential consequences of Mr Rowland’s resignation on the Option. The timing of this resolution is rather curious, as the evidence of Mr Bock is that he became involved in negotiations regarding Mr Rowland’s resignation only in November 1994 when it was then put to him by the Lonrho non-executive directors that if the Appellant cancelled its Option, Mr Rowland would resign. Mr Bock’s witness statement states that:

“Sometime in September 1994 there was press speculation that Mr Rowland was about to resign from Lonrho’s board. This stemmed from Mr Rowland’s unhelpful public behaviour. The non-executive board of Lonrho had indeed begun to consider Mr Rowland’s position. Ed Trapman and I discussed the potential consequences of such an event as it would provide Laerstate with a right to acquire Mr Rowland’s remaining shares 12 months after such resignation.”

This apparent discrepancy was not explained. One possible explanation is that, contrary to his evidence, Mr Bock was in fact aware of the possible benefit of securing Mr Rowland’s resignation by cancelling the Appellant’s option some time earlier than November 1994, and that the minute of the board meeting recorded the decision at that time to cancel the option to facilitate Mr Rowland’s departure. Another is that the minute was prepared at a later stage, once it had been made clear to Mr Bock by the Lonrho non-executive directors that such a cancellation would have this effect. In view of the discrepancy, although we accept that a meeting took place in Frankfurt on 26 November 1994, we cannot conclude that it was at this meeting that the potential cancellation of the Call Option was decided or resolved upon.

(20) The agreement dated 3 November 1994 between Mr Bock and Mr Rowland under which Mr Bock and Mr Rowland agreed to procure that their respective companies (the Appellant and Yeoman) cancel the option agreement of 9 December 1992, and replace it with a right of first refusal in favour of Mr Bock over the Lonrho shares held by Mr Rowland and his associates, was signed in London. Under the agreement Mr Bock also

agreed to procure that the Appellant would vote its stake in Lonrho in favour of the proposed resolution that Mr Rowland be appointed President of Lonrho. Mr Bock's evidence was that, although he was a director of the Appellant, he would not have signed this agreement on behalf of the Appellant because he would have needed Mr Trapman's agreement. Mr Bock also said that he regarded his procurement obligation as something less than a guarantee and more of a "best efforts" obligation. He "hoped" he would be able to bring it about. We find that Mr Bock agreed to procure the actions of the Appellant on the basis that he considered that he would be able to do so. Mr Bock had been advised by Macfarlanes, and we do not find it credible that a man of his experience would not have understood or been advised as to the nature of the procurement obligation he was entering into. Mr Bock was asked if there was a similar word to "procure" in German with a different meaning to that in English which might have caused a misunderstanding, and he said there was not. Mr Trapman had not been involved in any of the discussions leading up to Mr Bock entering into this agreement, but there had been extensive discussions between Mr Bock and Mr Rowland in London.

(21) On the morning of 8 November 1994 Mr Bock flew to the Netherlands. On that day there was a board meeting of the Appellant at which, firstly, the board of directors was enlarged to three members (a decision that was unexplained, and was never implemented) and secondly the board took note of the obligation entered into Mr Bock "in accordance with the resolution of 26 September 1994" (translated from the Dutch). This relates to the agreement of 3 November 1994. The minutes do not indicate who was present at the meeting, but we infer that Mr Bock was present along with Mr Trapman.

(22) There were no further board meetings of the Appellant until 13 March 1996.

(23) On 17 November 1994 Mr P L Hewes of Cameron Markby Hewitt wrote to Mr Martin of Macfarlanes enclosing a first draft of an agreement to be entered into between Yeoman and the Appellant. Mr Martin returned the draft to Mr Hewes on 21 November 1994. That letter included the following statement:

"Finally, I should point out that neither your draft agreement nor these amendments have been seen or discussed with Mr Bock and they must therefore remain subject to any comments which he may have."

(24) The Deed of Priorities over the Lonrho shares dated 30 December 1994 was signed by Mr Bock personally and also on behalf of the Appellant. Mr Bock was in Germany on 30 December 1994, and we find that the deed was signed by him in Frankfurt. There is no evidence that Mr Trapman took part in discussions or negotiations in respect of this deed although we accept that he had been aware, at the time of the original

discussions with BHF Bank, of the circumstances that ultimately led to the execution of the Deed of Priorities.

(25) Following the dismissal of Mr Rowland as a director and employee of Lonrho there was correspondence between UK lawyers acting for Mr Rowland and Mr Bock cancelling the 3 November 1994 procurement agreement, and also legal proceedings in that connection. In the case of these proceedings Macfarlanes wrote to Cameron Markby Hewitt on 28 March 1995 stating that Mr Bock was prepared to procure that the Appellant take such steps as were required to release all or some of Yeoman's Lonrho shares from escrow in order to facilitate a third party sale, subject to first refusal rights in favour of the Appellant. There is no evidence that Mr Trapman was involved at this time.

(26) Following the ending of the court proceedings, at a news conference in London on 22 July 1995 Mr Bock said "I have an option to buy the remainder of Tiny's [Mr Rowland's] six per cent shareholding in [Lonrho] which is exercisable in December of this year" and confirms his intentions to buy Mr Rowland out. This was followed on 2 August 1995 by a letter from Macfarlanes to Cameron Markby Hewitt stating that "our clients would be willing in principle to purchase the Lonrho shares owned by Yeoman Investments Limited on terms equivalent to those contained in the option arrangements referred to in the Agreement of 9 December 1992." We find that the reference in this letter to "our clients" is a reference to both Mr Bock and the Appellant. There is no evidence that Mr Trapman was involved in instructing Macfarlanes, and we find that instructions on behalf of the Appellant were given by Mr Bock, and that those instructions, on the balance of probabilities, were given in London.

(27) On 2 August 1995 Nabarro Nathanson, acting for BfG Bank, wrote to Mr Martin of Macfarlanes about the Bank's equitable charge over the Lonrho shares. Mr Martin's reply states, "Thank you for your fax of yesterday. I have sent this to our client who is presently abroad and I anticipate that it may take a little while for him to revert. Equally, he may raise this directly with BFG. Meanwhile, I am sure he would not wish the Bank to take any action without further reference to him." At that time Mr Bock was in Germany and Austria. We find that the reference to "our client" is here to Mr Bock, on behalf of the Appellant, and not to Mr Trapman or to the Appellant itself. In their subsequent fax of 8 August 1995 Nabarro Nathanson asked Macfarlanes to confirm Mr Bock's agreement to the proposed arrangements regarding the Appellant's holding of Lonrho shares under which the Appellant would agree not to sell or transfer the share by order to the nominee holder within BfG Bank's written consent. The reply of Macfarlanes on 10 August 1995 confirms that instructions had been received from Mr Bock in this respect. The fax charge form confirms that Macfarlanes's client was the Appellant and not Mr Bock personally.

(28) On 20 September 1995 Mr Trapman wrote on behalf of the Appellant to Nabarro Nathanson enclosing a letter addressed to Lloyds Bank

Registrars regarding an informal stop notice procedure over the shares in Lonrho held by the Appellant. This was to provide additional security for BfG Bank. On the following day (21 September 1995) Mr Trapman sent a fax to Mr Martin at Macfarlanes querying a new draft in respect of some, what he terms, not important details that are different from the letter he had previously sent to Nabarro Nathanson. It appears from this that Mr Trapman was not giving instructions to Macfarlanes in this connection, but was acting in an administrative capacity to sign the documents, although he was aware of the nature of the documents themselves and read them sufficiently carefully to notice the difference. Both forms of the letter refer to Mr Bock, in one case as a person to contact with any questions about the procedure, and in the other as a person to whom information can be disclosed. There is no reference to Mr Trapman in these connections.

(29) On 22 September 1995 Macfarlanes wrote to Cameron Markby Hewitt to express Mr Bock's grave concern about an interest of a Zimbabwean company, Shepton Estates (Private) Limited, in the Lonrho shares that were subject to the Appellant's option with Yeoman. It is stated that : "Mr Bock would not be prepared to countenance [the Appellant] acquiring shares in which a Zimbabwean company is interested unless he is wholly satisfied that all relevant Zimbabwean Exchange Control and tax laws had been complied with in relation to those shares." Mr Bock also wrote, on 28 September 1995, to the Zimbabwean finance minister expressing the same concern. We find that in this connection Mr Bock was acting both as shareholder and director of the Appellant and also as director of Lonrho; no distinction can be drawn between the two capacities in this respect.

(30) On 11 October 1995 Macfarlanes rendered an invoice to the Appellant, addressed to Mr Trapman in the Netherlands, with copy to Mr Bock in London.

(31) According to a letter from Macfarlanes to James Capel & Co on 16 November 1995 "Current tactical thinking is that [the Appellant] will exercise the Call Option on 9 December, although this strategy may change". There is no evidence that Mr Trapman was involved in the formulation of any strategy in respect of the Call Option, and we conclude that it was Mr Bock who was devising the strategy and instructing Macfarlanes accordingly.

(32) On 8 December 1995 Macfarlanes wrote to Cameron Markby Hewitt on behalf of Mr Bock and the Appellant, having consulted at length with their clients, in relation to the option over Yeoman's shares in Lonrho. There is no evidence that Mr Trapman was involved in instructing Macfarlanes on behalf of the Appellant, and we find that instructions were given by Mr Bock alone.

(33) A shareholders' meeting of the Appellant was held on 18 December 1995 in Cape Town. Mr Trapman and Mr Bock were both present, Mr Bock having flown from London to Cape Town on that day. The only

business of the meeting was the adoption of the 1994 Accounts and discharging the directors and the (non-existent) supervisory board.

(34) On 19 January 1996 Mr Martin of Macfarlanes wrote to Mr R Whitten at Lonrho with an invoice addressed to the Appellant, in which he said: “Dieter [Mr Bock] has asked that we send our bill against [the Appellant] for work in relation to dealing with the Option arrangements with Mr Rowland and the associated disputes to you for consideration as to whether it would be in order for the Company [i.e. Lonrho] to meet these.” A copy of this letter was sent to Mr Bock at Lonrho, and to Mr Trapman.

(35) An internal Macfarlanes’ memo dated 26 January 1996 referred to Clifford Chance seeking a copy of a judgment (in relation to the dispute with Mr Rowland). Mr Millmore of Macfarlanes records that he said that he would take instructions from Mr Bock when next speaking to him. We do not find that this indicates that in this respect Mr Bock was giving instructions in relation to the Appellant. Although the Appellant would have had an interest in the outcome of the proceedings, it was not a party to the dispute itself.

(36) A draft discussion paper dated 31 January 1996 refers to recent discussions with SBC Warburg, as a result of which Mr Bock appears to have rejected a possible disposal of the “mining assets” element of his [namely the Appellant’s] holding of shares in Lonrho, and refers to one possibility being that SBC Warburg buys “DB’s [that is the Appellant’s] holding in [Lonrho]”.

(37) Yeoman having exercised its put option on the Appellant on 4 March 1996, Mr Bock’s solicitors, Sears Tooth, sent a copy of the notice of exercise to Rita Mackintosh at Lonrho’s London office. Mrs Mackintosh had previously spoken to Barbara Mooney, the personal assistant of Mr Sears, and arranged that the copy notice would be sent to her.

(38) On 7 March 1996 Mr Martin of Macfarlanes sent a fax to Mr Andrew Skinner of James Capel & Co regarding the calculation of the exercise price for the Lonrho shares under the put option. This fax was copied to Mr Bock, but not to Mr Trapman.

#### *Negotiations with Anglo*

(39) On 11 March 1996 Clifford Chance for Anglo sent to Macfarlanes a draft agreement for first refusal by Anglo if the Appellant sold the 45,529,447 Lonrho shares acquired under the Yeoman option.

(40) On 12 March 1996 Macfarlanes sent to Herr Spöttle of BfG Bank a letter from the Appellant for the Bank to countersign stating that the Bank had no charge over these shares and the Appellant was free to acquire or dispose of them. The covering letter said “I trust that by the time that you receive this you will have spoken to Dieter Bock.” Mr Trapman signed the document the same day.

(41) On 12 March 1996 James Capel & Co faxed Mr Bock in London a proposal for a “bought deal” or a “zero-cost collar structure” for the 45,529,447 Lonrho shares.

(42) On 12 March 1996 Mr Bock wrote to Sir John Leahy, the Chairman of Lonrho informing him that “it is the intention of Laerstate BV (a company owned by me)” to acquire 45,528,447 shares from Yeoman and to immediately sell them to SBC Warburg and grant an Anglo entity a right of first refusal over the balance of its holding and asking for clearance to deal in accordance with Stock Exchange requirements.

(43) On 12 March 1996 Macfarlanes faxed Mr Trapman a counter-notice that the option price should be £90,539,858.30 saying “As discussed, I attach the Counter-Notice and should be grateful if you would sign it. Please could you then fax the signed Counter-Notice...to the following addresses...It is essential that the faxes are sent by no later than 5.00pm UK time and I should be grateful if you would call me to confirm that you have sent the faxes...Many thanks for your assistance in this matter.” Mr Trapman signed and faxed it back.

(44) Minutes of a board meeting of the Appellant held in Zurich on 13 March 1996 attended by Mr Bock and Mr Trapman record that the purchase of 45,529,447 shares in Lonrho pursuant to the option with Yeoman and their subsequent sale to SBC Warburg, and a letter agreement giving Anglo a right of first refusal before the option over the Appellant’s 143,478,260 shares in Lonrho, was approved. These documents were signed by Mr Trapman. The board ratified documents already signed by Mr Trapman consisting of the acknowledgements by BfG Bank of the agreements (see paragraph 14(40)) and the counter notice to Yeoman relating to the acquisition price of the option shares. The minutes are typed probably by Macfarlanes with the address of the meeting, the directors’ names and those in attendance (“representatives of Macfarlanes, SBC Warburg and Clifford Chance”) added in manuscript.

(45) Mr Bock was sent on 4 April 1996 by Clifford Chance a draft option agreement by fax to France where he was on holiday with his family. The covering fax states that it takes account of discussions between SBC Warburgs and Mr Bock but Macfarlanes had not had an opportunity to comment. A second fax of the same date from Clifford Chance was also sent to Mr Bock saying that the draft had been revised following a meeting with Macfarlanes that day and records 12 principal points of issue, No.1 of these stating that “This is unacceptable to DB”; No.2 that “DB is concerned...”; No. 3 that “DB has requested an undertaking...”; No.6 “DB is concerned to ensure that there is an obligation for him to receive sterling”; and No.7 that “DB wants to be able to sell such nil paid rights...”. Mr Bock’s witness statement said that Macfarlanes had not been given any instructions (which we do not accept in view of the statements quoted above), and that he noticed that the fax

had not been sent to Mr Trapman and Mr Bock sent it to him. However, we do not believe that the wording of the minute referred to in the next paragraph supports any conclusion that the option agreement was in fact before the meeting, or had been reviewed by Mr Trapman before it. The minute refers to “the proposal of an option agreement” and “that such agreement should be reached”; if a draft had been before the meeting we consider that different wording would have been used such as “the draft option agreement” and “the agreement should be signed”.

(46) Minutes, which are in English, of a board meeting on 8 April 1996 at which Mr Bock and Mr Trapman were recorded as being present in Soestduinen state that “The chairman explained the purpose of the Meeting was to consider the proposal of an option agreement for the 143,478,260 shares in Lonrho Plc. It was resolved after careful consideration that such agreement should be reached with Anglo American Cooperation (sic) of South Africa Ltd.” Mr Bock’s witness statement says that the meeting was either in France, where he was on holiday with his family, or the Netherlands. This raises doubts whether this was an actual meeting or a telephone one because we presume that if it had been held in France the minutes would have said so, and if Mr Bock had broken a family holiday in France to go to the Netherlands on Easter Monday he might have been expected to remember it. It is not necessary to resolve this as a telephone meeting would be sufficient. It is clear that Mr Bock must have informed Mr Trapman about the proposal for an option, but it is not clear (as we have described in the previous paragraph) that the meeting considered the draft option agreement itself, and we find on balance that it did not.

(47) Further negotiations on the terms of the agreement took place after the board meeting, including a meeting on 11 April 1996 attended by Mr Bock in London. Mr Bock’s witness statement states that “Ed Trapman was kept informed throughout and ultimately signed the contracts on behalf of [the Appellant].” We do not accept that Mr Trapman was kept informed throughout, as there is no evidence of such contact between Mr Bock and Mr Trapman throughout this period. But we do find that Mr Bock informed that amendments had been made since 8 April 1996 and it was in order for him to sign the final version.

(48) On 12 April 1996 the Appellant entered into an option agreement with Anglo with Mr Bock guaranteeing the Appellant’s obligations. The agreement was signed by Mr Trapman and appears to have been faxed to him and faxed back. The agreement provided:

- (a) The option was over the Appellant’s 143,478,260 Lonrho shares with a call price of 220p per share and a put price of 180p per share.
- (b) The final exercise date was 13 September 1997.
- (c) Exercise of either option required (i) the giving of notice of intention to exercise it of 3 days for the call option or 10 days

for the put option, (ii) that it was in respect of the whole of the shares, and (iii) an option exercise notice.

(49) On the same day by an agreement between the Appellant, Anglo and Mr Bock, Mr Bock guaranteed the Appellant's obligations under the option agreement, and the Appellant and Mr Bock agreed not to acquire any further shares in Lonrho. The agreement was signed by Mr Trapman and appears to have been faxed to him and faxed back.

(50) The Lonrho press release of the same day quotes Mr Bock as saying "I have decided to strengthen Anglo American's existing right of first refusal over *my* holding in Lonrho to further secure the long-term commitment of Anglo American" (our italics). The body of the press release does, however, refer to the Appellant granting the option to Anglo.

(51) On 15 May 1996 Mr Bock sent a handwritten fax to Clifford Chance saying "this is the confirmation, Laerstate BV would like to receive from Anglo" which deals with the possibility of exercise of the option which required governmental approval that had not been obtained. On the same day Clifford Chance recorded a voice mail message from Mr Martin of Macfarlanes saying: CC note of Macfarlanes voicemail: "Dieter has received your letter. His comment on it is that what he really needs is confirmation of what Adam Signy [of Clifford Chance] said the day before signing, namely that in the event of any problems with the [European] Commission and the exercise of the option Anglo will give such undertaking in relation to the voting shares as will enable completion of the option to take place. So if we could have that confirmation in those terms that is what it is that Dieter is seeking in addition to what you provided." On 28 May 1996 Macfarlanes chased Clifford Chance for copies of papers filed by Anglo with the European Commission in relation to the option "that Peter Gush has promised Dieter." On 29 May 1996 Mr Gush faxed a reply to Mr Bock. There are handwritten notes of a meeting between Mr Bock and Macfarlanes on 30 May 1996 and Macfarlanes wrote to Mr Bock on 31 May 1996 about a meeting with Clifford Chance who explained that any European Competition problems were Anglo's problem and not an issue for the Appellant to be concerned about. They sent a copy of this letter to Nabarro Nathanson acting for BfG Bank. There are further handwritten notes of a meeting on 6 June 1996 attended by Mr Bock at which the same problem appears to have been discussed.

(52) On 4 July 1996 Macfarlanes sent their bill against the Appellant to Mr Bock with some explanation and to Mr Trapman without any explanation.

(53) BfG Bank wrote to Mr Bock in London on 15 August 1996 offering to extend their loan of £125m until the end of 1996 recording that (in translation) "In your estimation the option will be dealt with by concluding a purchase agreement after the change to the new structure at Lonrho prematurely in the second half of this year." Mr Bock initialled the letter accepting the conditions on 11 September 1996 in London.

There is space for signature on behalf of the Appellant but the copy we saw was not signed.

15. We find that Mr Bock was negotiating with Anglo not only in his capacity as director of Lonrho but also on behalf of the Appellant. There is no evidence other than Mr Bock's witness statement, which we have not accepted, that Mr Trapman was being kept informed, and this seems contrary to the fact that Mr Bock was carrying out all the negotiations without any papers being sent to Mr Trapman. When Macfarlanes faxed the counter notice to Mr Trapman (see paragraph 14(43) above) they gave no advice but merely asked him to sign it before 5 pm; we are sure that if they did give him advice on the telephone call ("as discussed") they would have recorded it and find that they did not give him any advice. While there was a board meeting on 8 April 1996, we have found that "the proposal of an option agreement" was not before Mr Trapman in the form of a draft agreement. In any case Mr Bock negotiated further changes after that meeting, and followed up issues relating to the options without reference to Mr Trapman. From the Appellant's point of view this is the strongest example of Mr Trapman being involved in decision making but in our view it falls far short of showing that Mr Trapman was really taking part in the decision-making process as opposed to signing documents that were sent to him. Macfarlanes were looking to Mr Bock for instructions throughout and they sent him their bill with explanations that were not given to Mr Trapman.
16. In the whole of this period Mr Bock was a director of the Appellant. As such, in the same way as Mr Trapman, Mr Bock was under the constitution of the Appellant independently authorised to represent the Appellant at law and otherwise. We find that during this period, both at the times when board meetings were held and during the period when there were no such meetings, Mr Bock himself conducted the business of the Appellant. We accept that on occasion he did so with the assistance, cooperation and concurrence of Mr Trapman and that acts of management took place in various locations, including in the Netherlands and Germany, but throughout the period during which Mr Bock was a director we find that he carried out activities of the Appellant of a strategic and policy nature and managed the business of the Appellant, and that he did so to a substantial extent in the UK. During this period, although Mr Trapman was a director, the evidence shows that his involvement was very much secondary to that of Mr Bock, who was responsible for all the negotiation and strategic decisions on matters affecting the Appellant at these times. For a considerable time during this period there were no board meetings of the Appellant, even though there were, as we find, significant management activities taking place. Those management activities were undertaken by Mr Bock, substantially in the UK.

#### **Mr Bock ceasing to be a director of the Appellant**

17. We find the following facts in relation to Mr Bock ceasing to a director of the Appellant.

(1) He ceased to be a director of the Appellant on 30 August 1996. This is about two weeks after BfG Bank had, as mentioned above, recorded on 15 August 1996 in a letter to Mr Bock in London that (in translation) “In your estimation the option will be dealt with by concluding a purchase agreement after the change to the new structure at Lonrho prematurely in the second half of this year.” It is less than a month before the Appellant give notice of intention to exercise the put option on 24 September 1996.

(2) Mr Bock said in his witness statement that when he met with Mr Ogilvie Thompson on 18 June 1996 in Johannesburg he realised for the first time that he had a conflict of interest between his duties to Lonrho and as a director of the Appellant. He explained this in oral evidence that as a director of the Appellant he might wish to exercise the option, resulting in Anglo becoming the largest shareholder in Lonrho, but as CEO of Lonrho that might not be the best thing for the shareholders. In oral evidence he said:

Q. When you resigned as a director of Laerstate how did that do anything to resolve the conflict of interest which you assert in relation to the Anglo put and call option?

A. Well, then I could really concentrate only on my responsibility from the CEO position in Lonrho.

Q. What, because had you resigned as a director of Laerstate, it was now outside your control as to whether Laerstate exercised its put option on Anglo? Is that what you are saying?

A. It was definitely out of my control, yes. It was completely left to the only remaining director.

Q. Over whom you had no influence?

A. No, I did not want to use any influence. As a shareholder, I can stand by and make no decisions but as a director, in my feeling, I had a different responsibility.

(3) Mr Bock did not tell BfG Bank (or anyone else) that he had resigned as a director of the Appellant.

18. We accept that there was a potential conflict of interest between Mr Bock’s two roles although ultimately what was good for the shareholders in Lonrho would have been good for the Appellant as a significant shareholder. We do not accept that this was the reason for his resignation as a director of the Appellant. Nor do we accept that he first thought about the conflict at his meeting on 18 June 1996 but did nothing until 30 August 1996 for which there was no explanation. We cannot accept that having resigned as a director of the Appellant, it was out of his control whether or when the Appellant exercised the option for the reasons we set out in paragraph 19(13) below. We regard the timing of his resignation coming between telling the bank that he was likely to exercise the option before the end of the year, recorded in their letter of 15 August 1996, and the Appellant giving notice of intention to exercise the option on 24 September

1996 as not likely to be a coincidence. We suspect that he had concluded that he should not be a director at the time of disposal of the Appellant's shares in Lonrho.

### **The sale of Lonrho shares by the Appellant to Anglo**

19. We find the following facts:

(1) According to Mr Bock's diary he met Mr Julian Ogilvie Thompson, the CEO of Anglo on 4 and 13 September 1996. He was in the UK on these days according to Mrs Mackintosh's evidence.

(2) On 24 September 1996 the Appellant in a document signed by Mr Trapman gave notice to Anglo of its intention to exercise the put option ("the notice of intention"). This was acknowledged by Anglo on 26 September 1996 saying that the earliest date for exercising the put was 9 October 1996 and the latest date for completion was 22 October 1996.

(3) In relation to the notice of intention Mr Bock said in evidence:

Q. "Do you say that once you resigned as a director, you didn't take any part in decisions about the put option?"

A. Yes.

...

Mr Trapman was keen to exercise the option and I left it completely up to his discretion what to do insofar I supported whatever he decided. If he would have decided not to put the shares, I would have also supported him. I was -- insofar I cannot say I asked him to exercise or not to exercise, but I confirmed to him I would not object in which way ever."

Mr Trapman said in his witness statement:

"Dieter Bock informed me that he would not object if [the Appellant] would send a notice to Anglo American of the intention to exercise its Put Option. He also informed me of his wish to resign as a director of [the Appellant].

(4) On 26 September 1996 Mr Bock wrote to Mr Ogilvie Thompson on Lonrho letter heading saying:

"I regard Lonrho as a massively undervalued company—undervalued mainly because it is in far too many businesses for any management to have a chance of realising its true value. I believe even more strongly that as we succeed in unbundling the different bits of Lonrho so that they are managed in a more focused way, their value will increase. I saw—and continue to see—an alliance between myself and yourself as being an elegant way of applying dedicated management to the mining and African businesses respectively.

In this context failure on both our parts to reach agreement on the sale of my shares to you will be a serious set back to realising shareholder value.

...

Hence my telephone call in which I informed you that I would be putting you on formal notice to put my shares to you under our agreement. This, I must emphasise is not a satisfactory outcome for me for both personal and emotional as well as financial reasons. It involves me selling out at a price which is less than my own estimate of the value (and those of virtually every independent commentator!). However it does seem to me that, if we reach a stalemate, the responsible thing to do will be to sell out and, in a newly clarified situation, leave it to you and to other shareholders to determine what happens to the business. I hasten to add that I will not leave the business in the lurch still less do any precipitate. However I see no benefit to the company in remaining the largest shareholder if as a result of an agreement that I have entered into the company is stymied in its development.

There is, however, another option available to us.

...This is that we recognise the reality that we cannot reach agreement and announce it; at the same time as explaining that we couldn't agree dismantling the put and call arrangement between us, but that while I was prepared to end it you were not. This certainly was not the ideal solution for myself! Many people would have been a little surprised to see me remove my backstop! However in the situation we found ourselves I believe that this would give a much better chance of realising value in the interest of all the shareholders."

(5) In the light of this letter we do not accept the statements of Mr Bock or Mr Trapman in paragraph (3) above because freedom for Mr Trapman to decide if and when to give the notice of intention is inconsistent with the timing of the telephone conversation referred to in the letter. The letter said that Mr Bock had said in the telephone call that the notice of intention would be given, and it was given on 24 September 1996, which must be shortly after the telephone call. We explore this in more detail in the reasons for our decision below.

(6) Mr Gush of Anglo made a note of his lunch with Mr Bock on 2 October 1996 (when he was in the UK according to Mrs Mackintosh's evidence) which includes the following:

"He [Mr Bock] is very worried about the looming put on 9 October and appears to be getting very concerned about that deadline. He is now talking about placing his shares into a 'pool' or an 'escrow account' which will be financed at the level of 180p....When asked how this would be terminated, he said after six months, if nothing had happened, the shares would then be passed across at 180p....The worst case if nothing was realised or if excess value was not realised, the shares would come across to us at 180p. The best case if hotels were sold satisfactorily and if Africa was sold off for what he hopes to get, then there could be upside of 20p+ on his 180p.

(7) On 4 October Mr Ogilvie Thompson wrote to Mr Bock in London saying that the proposed change would require public disclosure and that

everyone's best interests would be served by exercising the option. "If you decide to delay exercising the put you are of course free to do so but as you will understand this will cause us considerable inconvenience as we will have organised ourselves to close with you on 9 October."

(8) On 7 October 1996 Mr Bock sent a memorandum to Mr Gush which states that the put and call option has created confusion and uncertainty about the future control of Lonrho which has depressed the share price; that if Mr Bock executed the put option the result will be unsatisfactory for both of them; and that as a result the option should be cancelled.

(9) On 8 October 1996 Mr Ogilvie Thompson rejected the proposal saying that they understood that the closed period will not commence until mid-November "so that there are a few weeks in which we can get greater clarity on the sale of the hotels at least and on the other matters we are attending to."

(10) Mr Bock's witness statement also said (and we accept) there were further negotiations with Peter Gush and SBC Warburgs but we did not see any documents.

(11) On 29 October 1996 Mr Trapman signed the notice of exercise of the put option ("the exercise notice") specifying that completion would take place on 7 November 1996 in Zurich and sent it to Anglo with a copy to Clifford Chance. On 5 November 1996 Mr Trapman gave notice of the split of bankers' drafts required on completion on 7 November, which totalled £258,260,868. Mr Bock and Mr Trapman attended the completion meeting on 7 November 1996.

(12) In relation to the ultimate exercise of the option Mr Bock's witness statement says:

"I indicated to Ed Trapman that I had no objection to Laerstate putting the shares to Anglo, which Ed Trapman then did on 29 October 1996."

Mr Trapman's witness statement says:

I know Dieter Bock still tried to move Anglo American to a more active role in support of Lonrho's mining interests. I assume he believed my notice of the intended option exercise would support him achieving his intentions. Eventually when he informed me to not any longer expect the desired success in his efforts I moved forward with the exercise of the option itself."

We consider below whether we accept these statements as a fact.

#### *Subsequent events*

(13) In November 1996 Mr Bock ceased to be chief executive of Lonrho.

(14) On 13 December 1996 the office of the Appellant was changed to an address in Curacao, Netherlands Antilles, Mr Trapman resigned as a director and a director in Curacao was appointed. Mr Bock's witness

statement said that this was on advice from PricewaterhouseCoopers for tax reasons.

(15) It was said that some of the records of the Appellant were lost in the course of the transfer. While we accept that this occurred we consider that this did not disadvantage the Appellant since records from other parties dealing with the Appellant could have been (but was not) obtained.

(16) We saw documents relating to correspondence conducted by Mr Bock in 1997 without reference to the directors of the Appellant relating to the Appellant's entitlement to the Lonrho dividend for the period spanning the exercise of the option. As this is after the end of the period assessed we make no findings in respect of it.

### **Minutes of board meetings of the Appellant company**

20. We have referred above to a number of board meetings of the Appellant. It is convenient to summarise the minutes of the board meetings as follows:

(1) Resolution of 7 December 1992 (in Dutch) by Mr Trapman as sole director quoted at paragraph 12(5) above.

(2) Resolution of 19 October 1993 by Mr Trapman (in Dutch) changing the office of the Appellant and appointing auditors.

(3) Resolution of 21 March 1994 by Mr Trapman (in Dutch) approving the 1992 accounts. We have found that Mr Bock was also present although this is not recorded.

(4) Resolution of 24 May 1994 by Mr Trapman (in Dutch) that Lonrho dividends would be paid into Mr Bock's bank account at BfG Bank at the Bank's request; and that the auditors will audit the 1993 accounts.

(5) Resolution of 26 September 1994 of a board meeting at the offices of Advanta in Frankfurt by Mr Trapman (in Dutch) renouncing the rights under the option agreement with Mr Rowland [sic: the agreement was with Yeoman] in the event of Mr Rowland leaving the Board of Lonrho prematurely. We have found that Mr Bock was also present although this is not recorded.

(6) Resolution of 8 November 1994 by Mr Trapman (in Dutch) enlarging the board to three members [which did not happen]; and taking note of the obligation entered into by Mr Bock with Mr Rowland in accordance with the resolution of 26 September 1994. We have found that Mr Bock was also present although this is not recorded.

(7) Resolution of 7 March 1995 by Mr Trapman (in English) appointing Mr Trapman as authorised representative of the Appellant at the AGM of Lonrho on 24 March 1995.

(8) Minutes of a meeting held in Zurich on 13 March 1996 (in English) attended by Mr Bock and Mr Trapman at which the purchase of 45,529,447 shares in Lonrho pursuant to the option with Yeoman and their subsequent sale to SBC Warburg, and a letter agreement giving Anglo a right of first refusal before the option over the Appellant's 143,478,260 shares in Lonrho, was approved. The board ratified documents already signed by Mr Trapman consisting of the acknowledgements by BfG Bank of the agreements and the counter notice to Yeoman relating to the acquisition price of the option shares. The minutes are typed probably by Macfarlanes with the address of the meeting, the directors' names and those in attendance ("representatives of Macfarlanes, SBC Warburg and Clifford Chance") added in manuscript [SBC Warburg and Clifford Chance were acting for Anglo].

(9) Minutes of a board meeting on 8 April 1996 (in English) at which Mr Bock and Mr Trapman were stated to be present and the option agreement with Anglo was approved.

21. Accordingly, there are minutes of five meetings attended by both directors. No (3) above was a formal one; No (5) records a decision about which we have no information about earlier negotiations, and we accordingly find that it records a decision made at the meeting; No (6) takes note of an agreement already made by Mr Bock; No (8) records the signing of agreements already negotiated by Mr Bock; and No (9) approves an agreement that Mr Bock had negotiated and continued to negotiate after that meeting. The other four meetings were records of actions taken by Mr Trapman. All other acts of management were taken outside board meetings. We bear in mind Mr Kemper's evidence (see paragraph 4(2)(g)) that "there is no requirement for a formal written record to be kept of the matters discussed and decided at meetings of the board of Directors."
22. Mr Bock's witness statement lists the dates on which he met Mr Trapman, of which, starting in November 1992, there was 1 in 1992 (Advanta board meeting); 6 in 1993 (4 of which were Advanta board meeting); 9 in 1994 (4 of Advanta board) meeting; 5 in 1995 (4 Advanta or GA Properties board meetings); and 8 in 1996 (4 Advanta board meetings, 2 closing meetings in Zurich on the Appellant's business). The others are described as personal visits or personal meetings (this includes the board meetings of the Appellant on 21 March 1994, 8 November 1994, and 8 April 1996).
23. In addition we saw minutes of the AGM appointing Mr Bock as a director (see paragraph 12(12) above), and one of 18 December 1995 (in Dutch) held in Cape Town adopting the 1994 accounts (according to Mr Bock's list this was a visit for an Advanta board meeting).

## Contentions of the parties

24. There was little disagreement between the parties about the legal test for corporate residence. We shall deal with any differences when outlining the test. The main difference was in relation to how the test should be applied to the facts of this appeal. The following indicates the main differences in approach without setting out their detailed contentions.
25. Mr Baker, for the Appellant, concentrates on the fact that acts of central management and control (“CMC”) can be identified as carried out outside the UK. He treats as the act of CMC the resolution where this precedes the signing of a document, or the signing of the document itself where there is no resolution. He sets these out as follows:

<b>Date</b>	<b>Act of central management and control</b>	<b>Location</b>
<u>1992</u>		
7 December	Appellant Board Resolution to purchase shares in Lonrho	Netherlands
9 December	Appellant General Meeting of Shareholders appointed Mr Bock as director	Netherlands
<u>1993</u>		
11 June	BfG Bank, Appellant and Mr Bock enter into Pledging Agreement	Germany
6 October	Appellant, BfG Bank and Mr Bock enter into charge	Germany
19 October	Appellant Board Resolution: registered office moved to Soestduinen and auditors appointed	Netherlands
<u>1994</u>		
17 March	Appellant issues instruction for dividends from Lonrho to be paid to ABN-AMRO account	Netherlands
21 March	Appellant Board Resolution – approves 1992 accounts	Netherlands
24 May	Appellant Board Resolution resolves that dividends be paid directly to account	Netherlands
25 May	Appellant and Landesbank enter into charge	Germany
11 June	Appellant agrees to transfer dividends from Lonrho direct to BfG Bank	Germany Netherlands
26 September	Appellant Board Resolution decides to renounce option agreement with Mr Rowland	Netherlands
8 November	Appellant Board Resolution – takes note of Mr Bock’s obligation entered into with Mr Rowland in accordance with 26 <sup>th</sup> September resolution	Netherlands
30 December	Appellant, Mr Bock and BfG Bank enter into a	Germany

Deed of Priorities regarding the Lonrho shares

1995

3 March	Appellant gives instructions for payment of dividend direct to BfG Bank	Netherlands
7 March	Appellant Resolution of directors appointing Mr Trapman as proxy	Netherlands
20 September	Appellant consents to informal stop notice procedure over its shares in Lonrho	Netherlands
18 December	Appellant General Meeting of Shareholders in Cape Town approves accounts for 1994	South Africa

1996

12 March	Appellant issues counter-notice to Yeoman	Netherlands
13 March	Appellant Board Meeting agrees to acquire and dispose of option shares and to grant a right of first refusal to Anglo over all LBV's shares in Lonrho	Switzerland
8 April	Appellant Board Resolution to accept offer of an option agreement with Anglo	Netherlands <sup>1</sup>
24 September	Appellant gives notice to Anglo of its intention to exercise the put option	Netherlands
29 <sup>th</sup> October	Appellant gives notice to Anglo of the exercise of its put option	Netherlands

26. Mr Brennan, for HMRC, naturally accepts that where a company is run at board meetings the place of CMC is likely to be where the board meets, but he contends that the prior question is whether the Appellant was run in this way. He contends:

(1) That the decisions about the Appellant were not made at board meetings at all. Mr Bock was the only person personally interested in the Appellant. Prior to 1996 the board of directors did not meet.<sup>2</sup> Even Mr Bock accepts that the “meetings” were not really meetings and that no discussion took place. The decisions as to what happened with Mr Bock’s company were not made at board meetings and were not made by Mr Trapman at all.

(2) This is not properly seen as a case of “usurpation.” It is a case where the board did not function as a board of management but where one dominant director, who was at all relevant times the 100% shareholder

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<sup>1</sup> [Mr Baker’s footnote] Mr Trapman records this meeting as taking place in the Netherlands; Mr Bock cannot recall whether it was in the Netherlands or in France (where he was on holiday). However, it is clear that it did not take place in the UK.

<sup>2</sup> We have, however, found that Mr Bock was present on three occasions, although this is not recorded in the minutes.

(and also hugely in debt in the interests of the company) made the business decisions. His decision-making did not cease after his resignation as a director.

(3) There is a difference between, on the one hand exhortation or persuasion by a UK resident of a non-resident director, or board of directors, and, on the other hand, the abdication of responsibility by the non-resident board or usurpation by the UK. An important issue in this case is whether Mr Bock exhorted or persuaded Mr Trapman (who decided), or whether Mr Bock made the decisions. Even Mr Bock asserts that when his company was about to exercise the Anglo put option (September 1996), and in immediate advance of which he resigned as a director, he did not even exhort or persuade. His case is that Mr Trapman acted of his own volition. There is no room, faced with Mr Bock's express denial of that proposition, for a finding that this was a case of exhortation and persuasion.

(4) If CMC is established in the UK, it is hard to see on the facts of the present case how POEM cannot be in the UK too. POEM is a tie-breaker between competing jurisdictions. The amount of effective management taking place in the Netherlands was minimal, or nil.

(5) It is agreed that a significant feature of the present case is that Mr Bock was a director at all material times until his resignation in 1996, just in advance of the disposal of the Lonrho shares. Was it Mr Trapman running the company? Or Mr Bock? Or both? There is no substantial evidence that Mr Trapman was exercising CMC. The board did not even meet before March 1996. The minutes of "board meetings" before then are just records of Mr Trapman having a meeting with himself.<sup>3</sup> There is no reliable contemporaneous evidence that Mr Trapman ever received any material on which to make any decisions. Throughout the relevant period it was Macfarlanes who gave the legal advice and corresponded on behalf of Laerstate. There is no evidence that Schaap and Partners were involved in any of the key events; one invoice was produced from them, dealing with early, and formal matters.

## **Reasons for our decision**

### *The law*

27. We can deal with the legal test for corporate residence quite shortly as there is little disagreement about it. As Lord Loreburn LC said in *De Beers Consolidated Mines Limited v Howe (Surveyor of Taxes)* [1906] AC 455 at p458:

“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... the decision of Kelly CB and Huddleston B in the *Calcutta Jute Mills v Nicholson* and the *Cesena Sulphur Company v Nicholson*,

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<sup>3</sup> See footnote 2.

now thirty years ago, involved the principle that a company resides for 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.”

There is no assumption that CMC must be found where the directors meet. It is entirely a question of fact where it is found. Where a company is managed by its directors in board meetings it will normally be where the board meetings are held. But if the management is carried out outside board meetings one needs to ask who was managing the company by making high level decisions and where, even where this is contrary to the company’s constitution.

28. It is significant, we think, that Lord Loreburn referred to the test as being where central management and control “abides”. This is a test that does not confine itself to a consideration of particular actions of the company, such as the signing of documents or the making of certain board resolutions outside the UK if, in a given case, a more general overview of the course of business and trading demonstrates that as a matter of fact central management and control abides in the UK. As Lord Loreburn said (at p 458), the factual question must be considered “upon a scrutiny of the course of business and trading”.
29. This is consistent with the analogy with individual residence which was the basis on which Lord Loreburn propounded the central management and control test. Just as for an individual, for example, where a temporary departure from the UK would not of itself give rise to a change of residence, the residence of a company will not fluctuate merely by reason of individual acts of management and control taking place in different territories. The whole picture must be considered in each case.
30. The facts of *Bullock v The Unit Construction Co Ltd* [1960] AC 351, 38 TC 712 are well-known, and we need only make very brief reference to them. The issue was whether, where all acts of central management and control of certain East African subsidiaries took place in England, the subsidiaries could be UK resident despite the fact that the persons performing those acts had no authority, and meetings in England were invalid under the subsidiaries’ constitution. It is relevant in this case only to the periods during which Mr Bock was not a director. Whilst Mr Bock was a director he had full authority under the Articles of Association of the Appellant to bind the Appellant to a third party.
31. In *Unit Construction* Lord Cohen made the point that it would be exceptional for a parent company to usurp control of its subsidiary, as a parent company usually operates through the boards of its subsidiaries. This theme was picked up by Park J in *Wood v Holden* [2005] STC 789, where he said at [23]:

*Unit Construction v Bullock* is a very important case, but it is also in my view a highly exceptional case in terms of the result. It was not a case where the local boards still exercised central management and control, but did so under guidance and influence from the parent

company in the United Kingdom. It was a case in which the local boards stood aside altogether, and the parent company effectively usurped what in theory were the functions of the local boards.

32. *Wood v Holden* was a case in which it was held that all decisions had been made at meetings in the Netherlands by the managing director of the company. Those meetings could not be dismissed as immaterial legal formalities. Without the decisions of the managing director in the Netherlands the relevant agreements would not have been made. Like *Unit Construction*, therefore, we regard *Wood v Holden* as applicable in this case only to the periods during which Mr Bock was not a director of the Appellant; it is not in our view directly relevant to the period when he was a director.

33. In relation to the actions taken by the Appellant and the Appellant's board, it is clear that the mere physical acts of signing resolutions or documents do not suffice for actual management. This finding of the Special Commissioners in *Wood v Holden* was approved by Park J, but he went on to say at [66]:

If directors of an overseas company sign documents mindlessly, without even thinking what the documents are, I accept that it would be difficult to say that the national jurisdiction in which the directors do that is the jurisdiction of residence of the company. But if they apply their minds to whether or not to sign the documents, the authorities, which I will not repeat, indicate that it is a very different matter.

34. There is nothing to prevent a majority shareholder, whether a parent company or an individual majority shareholder, indicating how the directors of the company should act. If they consider the wishes and act on them it is still their decision. The borderline is between the directors making the decision and not making any decision at all. At the extreme end is the case where, for example, an agreement is put in front of the directors open at the signature page and they sign it regardless. This is an example of the mindless signing to which Park J refers.

35. Moving up the scale is the situation where the directors know what they are signing, for example that it is an agreement for the sale of shares, and sign it without considering whether it would be better to sign it or not. An objective way of testing whether this is the case is to ask whether the directors have the absolute minimum amount of information that a person would need to have in order to be able to make a decision at all on whether to agree to follow the shareholder's wishes or to decide not to sign: in our example this would include such matters as whether they had any knowledge of, or received any advice on, whether the price was sensible. In that case there is still no decision by the directors. We have in mind the Special Commissioners' finding in *Wood v Holden* at [145]:

We do not consider that the mere physical acts of signing resolutions or documents suffice for actual management....What is needed is an effective decision as to whether or not the resolution should be passed and the documents signed or executed and such decisions require some minimum level of information. The decisions must at least to some

extent be informed decisions. Merely going through the motions of passing or making resolutions and signing documents does not suffice.

It seems to us that our reference to an absolute minimum of information may have been what the Special Commissioners had in mind in this passage, and that, with respect, in finding that the reference to an “effective decision” was an error of law the Court of Appeal [2006] STC 443 (Chadwick LJ at [42], [43]) may have had a different situation in mind, namely the one in the next paragraph below. (We agree that the expression “effective decision” is unfortunate, implying the existence of a decision that is not an effective one, although in the context of the above quotation we believe that the distinction was being made between making a decision at all, and going through the motions of making a decision.) An example (irrespective of the decision in that case) might be the Special Commissioners’ finding at [40] in relation to the purchase of shares in Eulalia Holding BV that “The statement of Mr W [the head of the legal department of the company that was the director of Eulalia, who did not give oral evidence]... contains no reference to any material showing the basis of the price of £23.7m or of any advice being received in respect of the transaction.” The accountants who sent the agreement to Eulalia for signature, via a company that provided corporate management services to the vendor, were not appointed as advisers to Eulalia until later and then at their instigation, see [41], [42].

36. Next up the scale is the case where the directors follow the wishes of the shareholder after considering whether or not to follow them and have at least the absolute minimum information referred to in the previous paragraph but less information than a reasonable director would require in order sensibly to decide whether or not to follow the shareholder’s wishes: “Ill-informed or ill-advised decisions taken in the management of a company remain management decisions” (*Wood v Holden* in the Court of Appeal at [43]). The distinction between this case and that in the previous paragraph is that in the latter there is no decision by the directors because nobody could have made a decision based on less than the absolute minimum of information necessary to make such a decision, while here there is at least such an absolute minimum of information and so there is a decision by the directors, although an ill-informed one.
37. At the other extreme is where the directors have sufficient information to make an informed decision. The relevance of whether the directors would have declined to do something improper or inadvisable, about which the parties were not in agreement, is in our view, merely an example of this category. As Gibbs J said in the Australian case of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1971) 129 CLR 177 at 191:

“The directors in fact complied with the wishes of Messrs...[the accountants who recommended actions to the directors in relation to trusts of which the company was trustee] because they accepted that it was in the interest of the beneficiaries, having regard to the tax position, that they should give effect to the scheme. If, on the other hand, Messrs...had instructed the directors to do something which they

considered improper or inadvisable, I do not believe that they would have acted on the instruction.”

The Special Commissioners in *Untelrab Ltd v McGregor* [1996] STC (SCD) 1 at [74] identified as a principle:

“...that although a board might do what it was told to do it did not follow that the control and management of the company lay with another, so long as the board exercised their discretion when coming to their decisions and would have refused to carry out an improper or unwise transaction;...”

The context of the quotation from *Esquire Nominees* indicates that the directors were sufficiently informed to make a judgment, and did make a judgment, about whether the recommended action was in the interests of the beneficiaries. We agree with Mr Brennan that there is no need to enquire about whether directors would do something improper or inadvisable; the quotation from *Untelrab* could have finished with the word “decisions” without changing its meaning. We also record that Mr Brennan said that Park J in *Wood v Holden* at [26](ii) had misunderstood his submission as being confined to trust companies, although in his skeleton argument before us he said that this was important to deciding whether the person in charge would have acted in breach of trust. The corollary is perhaps more relevant in that if the directors did follow the shareholder’s wishes and did something inadvisable it would indicate that the decision was that of the shareholder and not of the directors.

#### *Application of the law to the facts*

38. We now turn to applying these principles to the facts we have found. The relevant period for our decision is from 1 October 1993 to 31 December 1996. During the first part of this period, up to 30 August 1996, Mr Bock was a director of the Appellant, and during the second part he was not. We therefore give separate consideration to each of these periods.

#### *Period to 30 August 1996*

39. It is clear, and it was not disputed, that the mere fact that Mr Bock was resident in the UK during this period does not of itself mean that the Appellant is resident in the UK. The question is whether he was, as he had authority as a director of the Appellant to do, exercising central management and control in the UK.
40. Mr Baker argued that all acts of central management and control of the Appellant took place outside the UK. He submitted that, although meetings with lawyers and other advisers might have taken place in the UK, such acts did not constitute acts of central management and control. He relied in support of this proposition on the Special Commissioners’ decision in *News Datacom Ltd and another v Atkinson (Inspector of Taxes)* [2006] STC (SCD) 732 at para 63, where a meeting that was concerned only with ministerial matters and matters

of good housekeeping and was not concerned with policy, strategic or management matters relating to the conduct of the business of a company was held not to be an exercise of central management and control. We agree with what the Special Commissioners said in *News Datacom*, but we do not accept that, on the facts in this case, all acts of central management and control of the Appellant took place outside the UK. We have found that Mr Bock's activities as a director of the Appellant in the UK went much further than ministerial matters or matters of good housekeeping. His activities in the UK as a director of the Appellant were certainly concerned with policy, strategic and management matters, and, we have found, included decision-making in relation to the Appellant's business in this period. We reject Mr Baker's proposition that we should attempt to classify certain acts as "acts of central management and control" (on his argument the board resolutions, or the signing of documents where there was no preceding resolution) and have regard only to those acts. This runs counter to the factual exploration of the "course of business and trading" that Lord Loreburn in *de Beers* made clear is the proper test.

41. Accordingly, we find that in the period to 30 August 1996, central control and management of the Appellant was exercised in the UK. Apart from s 249 of the Finance Act 1994, we find that the Appellant would be resident in the UK throughout this period.

*After Mr Bock had ceased to be a director of the Appellant*

42. In relation to the time after Mr Bock ceased to be a director, only Mr Trapman could sign for the Appellant in a way that would bind a third party. For this period our analysis starting at paragraph 31 above is relevant and we now apply it to the facts. The issue is whether Mr Trapman acted on Mr Bock's instructions without considering the merits of them, or whether he considered Mr Bock's wishes and made the decision himself while in possession of the minimum information necessary for anyone to be able to decide whether or not to follow them. There are three particular actions (or inactions) of the Appellant to consider: (1) giving the notice of intention on 24 September 1996; (2) not exercising the option on 9 October 1996, the earliest possible date following the notice of intention; and (3) the giving of the exercise notice on 29 October 1996. In relation to (1), Mr Bock recorded in his letter of 26 September 1996 the effect of a telephone conversation with Mr Ogilvie Thompson that must have taken place shortly before the notice of intention was given on 24 September 1996: "I informed you that I would be putting you on formal notice to put my shares to you under our agreement." Mr Bock must have needed to be in a position to say in the telephone conversation that the notice of intention would be given immediately. If he said that he discussed the matter fully with Mr Trapman before the telephone call, indicated to Mr Trapman that he wanted him to give the notice and why it needed to be given immediately, and if Mr Trapman had said that he considered the alternatives of giving the notice or doing nothing, and decided to give the notice, we would have concluded that Mr Trapman made the decision. But they deny that this is what happened. Mr

Bock said in oral evidence: “I left it completely up to his [Mr Trapman’s] discretion what to do insofar I supported whatever he decided;” and Mr Trapman said in his witness statement: “Dieter Bock informed me that he would not object if [the Appellant] would send a notice to Anglo American of the intention to exercise its Put Option.” We have already stated that we do not accept this. It was essential to Mr Bock’s negotiation that he could tell Mr Ogilvie Thompson that the notice of intention would be given immediately. His words in the letter are instructive. He did not say that he had discussed it with the director of the Appellant who had decided to give the notice of intention; he said what he would do with “my shares.” If the timing was not discussed between Mr Bock and Mr Trapman the only alternative possibility is that Mr Bock made the decision that the notice would be given and told Mr Trapman to sign it, which Mr Trapman did without considering whether or not to do so and not having the necessary information to make such a decision anyway.

43. In relation to item (2) if Mr Trapman was a decision-maker he would also have decided to do the natural follow-up to the notice of intention of giving the notice of exercise at the earliest possible date, 9 October 1996, of which was aware because Anglo had stated this in their acknowledgement of the notice of intention. Why did he not do so? Again if Mr Bock had said that he discussed the matter fully with Mr Trapman just before 9 October 1996, indicated to Mr Trapman that he did not want him to give the exercise notice on 9 October 1996 and why he did not want this to be done, and if Mr Trapman had said that he considered the alternatives of not giving the notice on 9 October 1996 or not doing so, and decided not to give the notice, and if we had accepted both statements, we would have concluded that Mr Trapman made the decision. But again neither of them said that this happened. Indeed neither gave any explanation about why the exercise notice was not given on 9 October 1996, a date that we have seen in paragraph 19(6) was of concern to Mr Bock. On 7 October 1996 Mr Bock proposed to Mr Gush the cancellation of the option saying that it was in neither of their interests, and on 8 October 1996 Mr Ogilvie Thompson rejected the suggestion but said there was time to consider it further. Mr Bock must have accepted the suggestion of further time and told Mr Trapman not to give the exercise notice. The decision must have been Mr Bock’s but again both he and Mr Trapman deny discussing it. We do not accept this and find that Mr Bock told Mr Trapman not to give the notice (or if Mr Trapman had already agreed not to take any action without Mr Bock’s instructions, Mr Bock said nothing to him), which Mr Trapman accepted without considering whether or not to do so and not having the necessary information to make such a decision anyway (or was not even told to do nothing as that is what he had already agreed would happen). The existence of item (2) fortifies our conclusion on item (1). If it was Mr Trapman’s independent decision to give the notice of intention then a businessman of Mr Trapman’s experience would have followed it up with an exercise notice at the earliest possible time. The fact that he waited another 20 days, thereby delaying receipt of £258m for that period, requires an explanation. None was forthcoming. This lends weight to our conclusion on item (1).

44. In relation to item (3) the position is slightly different. Mr Bock said in his witness statement: “I indicated to Ed Trapman that I had no objection to Laerstate putting the shares to Anglo, which Ed Trapman then did on 29 October 1996;” and Mr Trapman’s witness statement said: “Eventually when he [Mr Bock] informed me to not any longer expect the desired success in his efforts I moved forward with the exercise of the option itself.” If, as we have found, the previous action and inaction was not discussed with Mr Trapman, it would be strange if Mr Bock discussed the exercise of the put option fully with Mr Trapman in such a way that Mr Trapman was in possession of the minimum information to be able to make a decision whether to give the exercise notice at the time or not. We find that this did not happen and, as in relation to items (1) and (2) Mr Bock told Mr Trapman to sign the exercise notice on 29 October 1996, which he did without considering it because that was what Mr Bock wanted.
45. Therefore in relation to items (1), (2) and (3) we find that Mr Trapman did not make the decision to do any of them. The decision was that of Mr Bock; Mr Trapman signed the necessary documents for items (1) and (2) at the time dictated by Mr Bock. We did not detect any change in the way the Appellant was managed before and after Mr Bock’s ceasing to be a director of the Appellant (or before he became a director). For the reasons given above Mr Bock predominantly made those decisions in the UK. The Appellant was therefore resident in the UK during the time after Mr Bock ceased to be a director on 30 August 1996 until at least 31 December 1996.

*Dual residence*

46. Where a company is resident in the UK under domestic law and resident in the Netherlands under Dutch law (on account of incorporation there) art 4 of the double taxation convention (1980) provides:
- “3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.”
47. The UK-Netherlands double tax convention is relevant, firstly in determining whether the Appellant is treaty resident in the UK or in the Netherlands in relation to its claims for repayment of treaty tax credits in relation to its Lonrho dividends between 1 October 1993 and 31 December 1996, and secondly, from 30 November 1993 (the date on which s 249 Finance Act 1994 took effect) in determining whether the Appellant, having been found to be centrally managed and controlled in the UK on that date and thereafter, is in that period resident on the UK under UK domestic law.
48. Neither party disagreed with the Special Commissioners’ approach to the interpretation of treaties generally and their decision on the interpretation of

POEM in *Smallwood v HMRC* [2008] STC (SCD) 209. We adopt their reasoning and conclusions, in particular the following passage:

“111. There was thus some debate about whether, or to what extent, POEM differed from CMC. We consider that this misses the point; the two concepts serve entirely different purposes. CMC determines whether a company is resident in the United Kingdom or not; POEM is a tie-breaker the purpose of which is to resolve cases of dual residence by determining in which of two states it is to be found. CMC is essentially a one-country test; the purpose is not to decide where residence is situated, but whether or not it is situated in the United Kingdom...

112. POEM, on the other hand, must be concerned with what happens in both states since its purpose is to resolve residence under domestic law in both states, caused for whatever reason, which could include incorporation in one state and management in the other, or different meanings of management applied in each state, or different interpretations of the same meaning of management applied in each state, or divided management. One must necessarily weigh up what happens in both states and according to the ordinary meaning to be given to the terms of the treaty in their context (to quote art 31 of the Vienna Convention on the Law of Treaties) decide in which state the place of effective management is found. Effective is used elsewhere in the OECD model and the treaty in 'effectively connected' in arts 10, 11 and 12 which is an odd use of English. We believe 'effective' should be understood in the sense of the French 'effective' (siège de direction effective) which connotes real, French being the other official version of the model, though not of the treaty. In our hypothetical example of De Beers being a dual resident, it then becomes material to what level of management the effective management refers, and only then is it relevant to discuss whether the level of effective management is similar to the level of CMC. Fortunately matters of that sort do not arise in this appeal. Accordingly, having regard to the ordinary meaning of the words in their context and in the light of their object and purpose we approach the issue of POEM as considering in which state the real management of the trustee qua trustee is found.”

Here we would substitute “company” for “trustee qua trustee” in the last sentence as we are not dealing here with a trust company.

49. There was disagreement between the parties about the time over which one applied the issue of POEM, Mr Baker contending that it should be at the time of each relevant event, such as the option exercise notice on the analogy of Mann J applying POEM at the date of the capital gains tax disposal in *Smallwood v HMRC* [2009] STC 1222 at [43], and Mr Brennan that it should be applied throughout the period of dual residence. This may be a distinction without a difference because it is of the nature of POEM, as it is with CMC, that it has to be applied by reference to facts taken over a period; Mann J was there considering the permanent home tie-breaker example from Mr Baker’s book (*Double Taxation Conventions and International Tax Law*, 3rd ed, 2001), which

is a special case as it can be applied at a point of time, but Mr Baker's book goes on, in a passage not quoted by Mann J, to explain that the same approach could not be applied to the habitual abode tie-breaker. Whatever period is applied here will give the same result and so it is unnecessary for us to pursue this point.

50. We have found that Mr Bock's activities were concerned with policy, strategic and management matters throughout the time when he was a director of the Appellant and also after he ceased to be a director. We find that his activities constituted the real top level management (or the realistic positive management) of the Appellant and Mr Trapman's activities were limited to signing documents when told to do so and dealing with routine matters such as the accounts. As such the place of effective management was in the UK.
51. Accordingly we find that the Appellant was resident in the UK both in domestic law and under the double taxation agreement throughout the relevant period and we dismiss the appeals in principle and uphold the refusal of the claims.