

Case No: CH/2004/APP/0410

**Neutral Citation Number: [2005] EWHC 547 (Ch)**  
**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

**Before :**

**MR JUSTICE PARK**

**Between :**

**Mr R.J. Wood and Mrs R.J. Wood**

**Appellants**

-  
and -

**Mrs L.M. Holden (HM Inspector of Taxes)**

**Respondent**

**David Goldberg QC and Aparna Nathan** (instructed by **Landwells**) for the Appellants  
**Timothy Brennan QC** (instructed by **the Solicitor of Inland Revenue**) for the Respondent

Hearing dates: 8 & 9 March 2005

Judgment date: 8 April 2005

**Mr Justice Park :**

**Abbreviations, dramatis personae, etc.**

These are as follows.

AA Trust	ABN AMRO Trust, either a subsidiary or a division of ABN AMRO.
ABN AMRO	A major Netherlands banking and financial company or group.
Airone BV	Netherlands company which sold Eulalia to CIL.
Barclaytrust	Financial and trust company which, from its premises in Geneva, managed CIL.
Brennan, Mr	Timothy Brennan QC, counsel for the respondent, the Inspector of Taxes.
CGT	Capital Gains Tax
CIL	Copsewood Investments Ltd, a British Virgin Islands company, managed by Barclaytrust at its premises in Geneva; vendor to Eulalia of the shares in Holdings, the gains on which sale is the subject matter of the CGT claim which is in issue in this case.
Commissioners, the	The Special Commissioners, the tribunal whose decision is under appeal in this case.
Condor	Condor Nominees Ltd, corporate director of CIL.
Eulalia	Eulalia Holding BV; Netherlands company; acquired by CIL from Airone; acquired the shares in Holdings from CIL and later resold them to an unconnected purchaser. Whether Eulalia was resident in the Netherlands or in the United Kingdom is the crucial issue in the present appeal.
Goldberg, Mr	David Goldberg QC, counsel for Mr and Mrs Wood, leading

	Miss Aparna Nathan.
Greetings Ltd	Ron Wood Greetings Cards Ltd; United Kingdom company 96% of the shares in which were involved in the CGT scheme which is the subject matter of this case.
Holdings	Ron Wood Greetings Cards Holdings Ltd; United Kingdom company formed to carry out certain steps in the course of the scheme.
Price Waterhouse	Leading firm of chartered accountants who advised upon the scheme. As well as having a department specialising in tax matters, Price Waterhouse also had a corporate finance department. I use the expression Price Waterhouse to cover both departments.
Revenue, the	The United Kingdom Inland Revenue.
SC, followed by a number	A reference to a paragraph number in the decision of the Special Commissioners. Thus 'paragraph SC145' is a reference to paragraph 145 of the decision of the Special Commissioners which is under appeal in this case.
Senior, Mr	Accountant with Price Waterhouse at the time of the scheme; assistant to the head of the corporate finance section in Price Waterhouse's Manchester office.
Special Commissioners, the	The first instance tax appeal tribunal whose decision is under appeal in this case.
TCGA 1992	The Taxation of Chargeable Gains Act 1992.
Mr and Mrs Wood	Mr and Mrs Ron Wood; the taxpayers who appeal against the decision of the Special Commissioners.

## Overview

This is a CGT appeal from a decision of the Special Commissioners issued (according to the appellant's notice) on 18 May 2004. The appellants are Mr and Mrs Wood. The underlying subject matter of the appeal is a complex scheme designed to avoid CGT on part of the gain referable to a sale of a group of trading companies which Mr Wood had built up over the years. Before the scheme commenced the top level company in the group was Ron Wood

Greetings Cards Ltd, which I refer to in this judgment as Greetings Ltd. The transactions were carried out in 1995 and 1996, and the CGT assessment is for the tax year 1996/97. It took quite a long time before the matter came before the Special Commissioners, and it has now reached the High Court.

The scheme was carried out against the background of several detailed statutory provisions. It involved a number of quite intricate transactions, and the participation of three companies which were incorporated outside the United Kingdom. Later in this judgment I will give a thumbnail sketch of the stages in the scheme. As matters have turned out, however, the success or failure of the scheme does not turn on sophisticated points of statutory construction or on contested issues of how various statutory provisions interact with each other. Rather it turns on one of the basic concepts of United Kingdom tax law, the concept of the 'residence' of a company. One of the steps in the scheme involved a British Virgin Islands company, CIL, selling a United Kingdom company, Holdings, to a Netherlands company, Eulalia. (For the full names of CIL, Holdings and Eulalia see the abbreviations and dramatis personae at the beginning of this judgment.) The scheme assumed that CIL and Eulalia were not merely incorporated outside the United Kingdom but also resident outside the United Kingdom. The Revenue, however, after examining in detail the events which had taken place in the course of the scheme, took the view that, although CIL was resident outside the United Kingdom, Eulalia was resident in the United Kingdom. If that was right Mr and Mrs Wood, for reasons which I will outline later but which are not in themselves in issue, were liable for substantial sums of CGT. The Revenue made assessments on that basis, and Mr and Mrs Wood appealed to the Special Commissioners.

Accordingly, the question which the Commissioners had to decide was whether Eulalia was resident in the Netherlands or in the United Kingdom. Their decision was that Eulalia was resident in the United Kingdom, or perhaps that Mr and Mrs Wood had not established that it was not resident in the United Kingdom. (The latter formulation approaches the question in terms of the burden of proof which normally rests on the taxpayer in a tax appeal.) On appeal to this court Mr Goldberg QC and Miss Nathan submit that in that decision the Commissioners erred in law. I agree with them. It is not clear whether the Commissioners applied the correct test, or rather a different test of their own devising, but either way it is my respectful opinion that the decision which they reached was not one which was open to them on a correct application of the law to the facts of the case.

I shall therefore allow the appeal in principle. I understand that the Special Commissioners were asked only to decide the question of principle, and not to go into the detailed figures which would be consequential on their decision. Similarly I am not required to go into the figures, but it seems likely that several million pounds are at stake on this appeal.

### **The main elements of the facts and of the scheme**

Mr and Mrs Wood owned 96% of the shares in Greetings Ltd. The other 4% were owned by non-family members (some employees and a family friend). By early 1995 Mr and Mrs Wood were thinking about selling the company, because in March of that year they instructed Price Waterhouse Corporate Finance to try to find a buyer for the company. Price Waterhouse also advised them on the tax aspects of a sale. I do not know whether Price Waterhouse Corporate Finance was simply a department within the Price Waterhouse firm, or whether it had some form of distinct personality of its own. It does not matter which was the case. The office of Price Waterhouse with which Mr and Mrs Wood had dealings was the Manchester office.

So far as tax was concerned Price Waterhouse devised and in time the Woods embarked on a complicated scheme which was originally visualised as going through two phases, with several different steps involved in the first phase. I will go into a little more detail in the next few paragraphs, but in outline the first phase was the creation of a structure, involving a number of non-United Kingdom entities, which, so it was thought, would enable almost half of the entire gain on a realisation of the value of the Wood family's interest in Greetings Ltd and its underlying business to be sheltered from CGT. The second stage was thereafter to identify a purchaser, and to negotiate a sale to it. The first phase was carried out in 1995, but the second phase was not carried out before the appearance of the 1996 Finance Bill. That Bill contained provisions which (as a letter at the time expressed it) 'snookered' what had been expected to be the favourable CGT consequences of a simple sale from the phase 1 structure to an outside purchaser. So another phase had to be built in. That phase involved the introduction of Eulalia, the sale by CIL of Holdings to Eulalia, and subsequently the sale by Eulalia of Holdings to an outside purchaser. As I indicated in the Overview earlier, it is the sale by CIL of Holdings to Eulalia which the Revenue contend, and which the Special Commissioners have decided, to have brought about the liability to CGT which is the subject matter of this appeal.

I need not record all the steps in phase 1, but I do need to describe the final structure as it existed when phase 1 had been carried out.

- i) The 96% of the shares in Greetings Ltd which had previously been owned directly by Mr and Mrs Wood were now owned by a United Kingdom holding company, Holdings.
- ii) The shares in Holdings were held by two categories of owners.
  - i. 50.001% (henceforth in this judgment for simplicity expressed as 51%) were owned by Mr and Mrs Wood and a United Kingdom Trust which they had created for their children. As I understand it this Trust was not an essential element in the scheme; it was just something which Mr and Mrs Wood wanted to do for family reasons.
  - ii. 49.999% (henceforth referred to as 49%) were owned by CIL. CIL was a British Virgin Islands company which was managed by the Geneva office of the Barclaytrust organisation.
- iii) CIL had A shares and B shares in issue. The A shares were held by non-United Kingdom Trustees of settlements under which Mr and Mrs Wood had life interests. The B shares were held by non-United Kingdom Trustees of a discretionary Trust under which Mr and Mrs Wood had no beneficial interest.

There are two points to make about the creation of that structure.

- iv) Although it had involved Mr and Mrs Wood transferring their 96% holdings of shares in Greetings Ltd to Holdings, and although those transfers were in principle disposals for CGT purposes, there was no CGT on those disposals because they qualified for a form of relief, known as 'holdover relief',

provided for by TCGA 1992 s.165. To meet the requirements of that section the Greetings Ltd shares had had to be transferred to Holdings by way of gift.

- v) A consequence of Holdings having acquired valuable shares without paying for them was that the existing shares in Holdings were dramatically increased in value without any addition to their CGT base cost.

The original plan was that, once the phase 1 structure had been created and a purchaser had been found, the sale to the purchaser would take the form, not of a sale of Greetings Ltd itself, but rather of a sale of Holdings, which owned 96% of the shares in Greetings Ltd. I assume that the purchaser would buy the other 4% of Greetings Ltd directly from the non-family shareholders who owned them. On the anticipated sale of Holdings to the purchaser Mr and Mrs Wood and the Trustees of their children's Trust would be liable to CGT on the gains which they made on the 51% shareholding which they sold personally. However, they would, I assume, have been liable to CGT on gains of nearly as much if they had simply kept their shares in Greetings Ltd and had sold those shares to the purchaser. So the CGT on the sale by them of the 51% of Holdings would not have been a real disadvantage.

The key feature of the scheme was directed to avoiding CGT on the gain referable to the 49% of the shares in Holdings which would be sold by CIL to the outside purchaser. CIL was considered to be a company resident outside the United Kingdom, and as such it was not itself liable to CGT. There were provisions, principally in TCGA 1992 s.13, under which in certain circumstances gains made by a non-resident company fell to be attributed to resident shareholders or, if the shareholders were non-resident Trusts, to resident settlors of the Trusts. It was clear that CIL would make a very large gain when it sold its 49% holding in Holdings (because of the feature referred to in paragraph 9(ii) above), but it was believed that, for reasons based on the small print of s.13 which I need not describe, the section did not permit CIL's gain to be attributed to Mr and Mrs Wood or to any other person who could be liable to CGT. However, that was the feature of the scheme which was 'snookered' by provisions of the Finance Act 1996. That Act made changes to TCGA 1992 s.13 which had the effect that, if phase 2 of the scheme had proceeded as originally planned, the large chargeable gain which accrued to CIL on its 49% shareholding in Holdings would after all have been attributed to Mr and Mrs Wood and taxed upon them.

Price Waterhouse devised a plan to overcome that problem. The steps in it were:

- vi) CIL should acquire a Netherlands subsidiary. In the event this was Eulalia.
- vii) CIL should sell its 49% holding in Holdings to the Netherlands subsidiary.
- viii) When terms had been negotiated with an outside purchaser Holdings (owning 96% of Greetings Ltd) should be sold to the purchaser, as to 51% by Mr and Mrs Wood and the Trust for their children (as in the original plan), and as to 49%, not by CIL, but by its Netherlands subsidiary. As before, the other 4% of Greetings Ltd would be sold by the non-family owners of it directly to the purchaser.

The thinking behind Price Waterhouse's revised plan was as follows.

- ix) The sale by CIL to the Netherlands subsidiary of the 49% shareholding in Holdings would in principle be a disposal within the meaning of CGT, and in

commercial terms a gain would accrue on it. However, the gain would not fall to be attributed to Mr and Mrs Wood under TCGA 1992 s.13 and associated provisions, because by s.14 of the same Act gains on disposals between members of a non-resident group of companies were excluded from s.13. CIL and its newly acquired Netherlands subsidiary would be a group. CIL was thought to be resident outside the United Kingdom, and the Netherlands subsidiary was expected to be resident outside the United Kingdom (specifically in the Netherlands). On that basis they would be a non-resident group for the purposes of s.14: see s.14(4)(a). Therefore s.13 would not apply when CIL sold its 49% interest in Holdings to Eulalia, and Mr and Mrs Wood would not be liable to CGT by reference to CIL's gain on the sale. Before I move on I should specifically record that this is the specific element of the tax scheme which is challenged by the Revenue in the present case.

- x) On the onward sale by the Netherlands subsidiary of the 49% holding to the outside purchaser a gain would accrue to the Netherlands subsidiary (this assumes that the effects of the previous step had been as described in (i) above), but the gain would not be attributed under s.13 and associated provisions to Mr and Mrs Wood and taxed on them because of article 13(4) of the United Kingdom/Netherlands double taxation convention. That sub-article provides that gains on, among other kinds of assets, shares shall be taxable only in the state of which the alienator is a resident. On the basis that the alienator (the Netherlands subsidiary) was a resident of the Netherlands, the gain which accrued to it could not be taxed in the United Kingdom. Further, that prohibition extended to preventing the gain being taxed, not just on the Netherlands subsidiary itself, but also on anyone else (like Mr and Mrs Wood) by the operation of deeming provisions.

Price Waterhouse's revised plan was put into effect. Given the nature of the specific arguments in this case I will have to examine later some of the details of how it was all done, but at this stage I record the principal events.

On 17 July 1996 CIL acquired the shares in Eulalia. Eulalia was a Netherlands-incorporated company which had done some business in the past (I do not know of what nature), but which was dormant at the time. It was owned by a company in the well-known Netherlands banking and financial group ABN AMRO. AA Trust was appointed the corporate managing director of Eulalia, and there was a management agreement for AA Trust to manage the company.

On 23 July 1996 a contract was made for CIL to sell and Eulalia to buy CIL's 49% shareholding in Holdings for £23.7m (left outstanding for the time being) plus, in the event of an onward sale within 3 years for more than £23.7m, 95% of the excess.

On 21 October 1996 Eulalia and the other shareholders in Holdings (Mr and Mrs Wood and the Trustees of their children's Trust) sold the shares in Holdings to an outside purchaser. The price receivable by Eulalia was just below £30.8m. Holdings, it will be recalled, owned 96% of Greetings Ltd. Also on 21 October 1996 the non-family shareholders sold to the purchaser the 4% of the shares in Greetings Ltd which were not owned by Holdings.

## **The law concerning the residence of a company.**

I will return later to examine the detailed facts concerning how the critical things which Eulalia did were decided upon and implemented. For the present, however, it is convenient to consider the law about the residence of a company. I do so against the background that it is agreed that if, on 23 July 1996 when CIL disposed of its 49% shareholding in Holdings to Eulalia, CIL was not resident in the United Kingdom but Eulalia was resident in the United Kingdom, then Mr and Mrs Wood are in principle liable to CGT on the gain which accrued to CIL on the disposal. Conversely, it is also agreed that, if both companies were not resident in the United Kingdom (Eulalia being specifically resident in the Netherlands), then Mr and Mrs Wood are not liable to CGT and their appeals should succeed.

There are two sets of principles which, so far as relevant to this case, may regulate the question of where a company is resident for purposes of United Kingdom tax law. One is the set of principles which have been established by a body of case law over the years. Mr Goldberg referred to this as the common law of corporate residence. The expression may not be strictly correct, because what it describes is the meaning which case law has attributed to a concept used in statutory provisions, but the expression is nevertheless convenient, and I will adopt it. The other set of principles is found in a relatively recent statutory provision, s.249 of the Finance Act 1994. The Special Commissioners found that under both sets of principles Eulalia was resident in the United Kingdom at the critical date. Mr Goldberg submits that they were wrong in both respects.

I should add for completeness that since 1988 it has been enacted by statute that a company incorporated in the United Kingdom is automatically treated as resident in the United Kingdom: Finance Act 1988 s.66. However, since both CIL and Eulalia were not incorporated in the United Kingdom, that section is irrelevant in this case.

## **The ‘common law’ of corporate residence**

The basic test which the cases have evolved is the ‘central management and control’ test. The test seems to have originated in the Court of Exchequer in 1876: *Calcutta Jute Mills Co Ltd v Nicholson* 1 TC 83, and *Cesena Sulphur Co Ltd v Nicholson* 1 TC 88. It was adopted some thirty years later by the House of Lords in what is generally regarded as the seminal authority on the matter: *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455. Lord Loreburn said at page 458:

“... the principle that a company resides for purposes of income tax where its real business is carried on. ... I regard that as the true rule, and the real business is carried on where the central control and management actually abides.”

In all the three cases which I have mentioned the underlying trading operations were to a considerable extent carried on overseas (for example, in *De Beers*, diamond mining in South Africa), but because the central control and management of the business operations was carried on in the United Kingdom, the companies were held to be resident in the United Kingdom. In all normal cases the central control and management is identified with the control which a company’s board of directors has over its business and affairs, so that the principle almost always followed is that a company is resident in the jurisdiction where its board of directors meets.

In the previous sentence I have said ‘almost always’ because it is possible for a company to be resident in one territory even if it does not hold directors’ meetings there. The authority always cited for that proposition is the House of Lords decision in *Unit Construction Co Ltd v Bullock* [1960] AC 455. A United Kingdom parent company owned several subsidiaries which were incorporated in jurisdictions in East Africa and carried on trading activities there. The managing director of the parent company formed the view that ‘the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of [the parent company] in London.’ The board of directors of the parent company ‘decided that ... they were forced to take over management and control’. (See paragraph 5 of the Case Stated at 38 TC 716.) Thereafter the representative of the parent company in East Africa effectively usurped the functions of the local boards, which still existed but stood aside, and controlled the subsidiaries in accordance with the requirements of the parent. Much of that may have been irregular, or even unconstitutional, but it was what happened. It was held that the African subsidiaries had become resident in the United Kingdom.

*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.

That is not the normal situation as between a parent company and its subsidiaries, and in any consideration of the principles governing the common law of corporate residence the normal realities of the parent and subsidiary relationship have to be taken into account. They were not relevant in the *Calcutta Jute* or *Cesena Sulphur* cases, or in *De Beers*. In all those cases the companies were not subsidiaries. *Unit Construction* did involve subsidiaries, but, as I have explained, the circumstances were exceptional. In the context of a group of companies where matters proceed in a normal way and not in an exceptional way it is to be expected that the parent company will have plans for what it wants its subsidiaries to do, and that the directors of the subsidiaries will ordinarily be willing to go along with the parent company’s wishes. If in those circumstances the subsidiaries were resident for tax purposes wherever the parent company is resident the consequences would, in my view, be unsatisfactory, productive of double taxation clashes between different jurisdictions, and disruptive of national tax systems.

There is a difference between, on the one hand, exercising management and control and, on the other hand, being able to influence those who exercise management and control. There is another difference, highlighted by *Unit Construction v Bullock*, between, on the one hand, usurping the power of a local board to take decisions concerning the company and, on the other hand, ensuring that the local board knows what the parent company desires the decisions to be. It is also necessary to keep in mind that, while the cases which I have referred to so far all involved the residence of companies with active continuing businesses, it is possible (and is common in modern international finance and commerce) for a company to be established which may have limited functions to perform, sometimes being functions which do not require the company to remain in existence for long. Such companies are sometimes referred to as vehicle companies or SPVs (special purpose vehicles). ‘Vehicle’ has a belittling sound to it, but such companies exist. They can and do fulfil important functions within international groups, and they are principals, not mere nominees or agents,

in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why not is that in many cases the things which such companies do, though important, tend not to involve much positive outward activity. So the companies do not need frequent and lengthy board meetings.

I will now mention four quite recent cases which were cited to me, and which demonstrate how the courts recognise some of the considerations to which I have alluded in the last few paragraphs.

- xi) *Re Little Olympian Each Ways Ltd* [1995] 1 WLR 560, was not a tax case, but the principles established in the tax cases about corporate residence were expressly applied by the judge, Lindsay J. A Jersey company referred to as Supreme had brought a petition under s.459 of the Companies Act 1985 against Little Olympian Each Ways Ltd, which was an English company. An application was made for Supreme to be ordered to provide security for costs. The order could only be made if Supreme was resident outside the United Kingdom. Supreme argued that, despite being a Jersey company, it was resident in the United Kingdom, and that therefore the order could not be made against it. However, Lindsay J held that it was resident in Jersey and made the order. The members of its board were partners in a firm of Jersey advocates. It was run, in so far as it required running, from the office of the firm. Its only asset was a holding of shares in Little Olympian Each Ways Ltd, which cannot have required much managing and controlling. An individual who lived in England, Mr Lemos, put in an affidavit saying that he provided central management and control of Supreme, but he gave no details, and the judge was unimpressed. A letter from one of the Jersey advocates who were directors said that if Mr Lemos was ever to give instructions to them directly he (the Jersey advocate/director) would act in accordance with them provided that he was satisfied that they were consistent with Jersey company law and with the interests of the two persons who were understood to be interested in the share capital. Lindsay J referred at one point to 'the shadowy nature' of Supreme, but, as I have said, he held that the company was resident in Jersey.
- xii) *Esquire Nominees Ltd v Commissioner of Taxation* (1971) 129 CLR 177. This is an Australian case in which one issue was whether a Norfolk Island Trustee company was resident in Australia, as the Commissioner of Taxes argued, rather than in Norfolk Island, as the company argued and as the court held. The principles applied were the same as those of United Kingdom law. Indeed, the principal authority relied on by the Commissioner in support of his unsuccessful argument was *Unit Construction Ltd v Bullock*. The company had directors who lived on Norfolk Island. However, it had close connections with an Australian firm of accountants, whom I will call WBBC. The case involved the carrying out of a tax scheme evolved by WBBC as the advisers of an Australian family. The company acted as Trustee of a Trust which was established as part of the scheme. It was clear that the Norfolk Island directors did not take actions on their own initiative, but only at the instigation of WBBC. Nevertheless the trial judge (Gibbs J) held that the company was resident in Norfolk Island and not in Australia. In that respect his decision was not contested when the case was appealed (on another issue) to the Full Court,

but the judges of the Full Court expressly said that they agreed with his decision on residence. The following extract from his judgment gives the essence of his approach:

“As I have already indicated, it is obvious that what the appellant did in relation to the Manolas Trust was done in the course of carrying out a scheme formulated in Australia and that Messrs WBBC not only communicated to the appellant particulars of the scheme but advised the appellant in detail of the manner in which it should be carried out. But if it be accepted that the appellant did what Messrs WBBC told it to do in the administration of the various Trusts, it does not follow that the control and management of the appellant lay with Messrs WBBC. That firm had no power to control the directors of the appellant in the exercise of their powers. ... The firm had power to exert influence, and perhaps strong influence, on the appellant, but that is all. The directors in fact complied with the wishes of Messrs WBBC because they accepted that it was in the interests of the beneficiaries, having regard to the tax position, that they should give effect to the scheme. If, on the other hand, Messrs WBBC 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. It was apparent that it was intended that the appellant should carry on its business of Trustee company on Norfolk Island. It was in my opinion managed and controlled there, none the less because the control was exercised in a manner which accorded with the wishes of the interests in Australia. The appellant was, in my opinion, a resident of Norfolk Island.”

Mr Brennan pointed out that what was in issue in the case was the taxation not of the income which arose to the Esquire Nominees beneficially, but rather of the income which arose to the Trust of which it was the Trustee. However, as I understand the case, the issue turned on the residence of the company, and not on any specialised factor which was peculiarly dependent on it being a Trustee.

- xiii) *New Zealand Forest Products Finance NV v Commissioner of Inland Revenue* (1995) 17 NZTC 12,073. This was a New Zealand case, but as in *Esquire Nominees* the principles of United Kingdom law were applied. The company was established in the Netherlands Antilles as the subsidiary of a New Zealand parent company. It was a vehicle company whose purpose was to raise borrowings on the Eurobond market and to lend the money on to the New Zealand parent for use in its business or in the businesses of the group. The Netherlands Antilles subsidiary of the ABN group (the group which happens also to have been involved through AA Trust in the present case) was engaged to act as manager and bookkeeper of the company and subsequently was appointed a director of it. The ABN subsidiary provided a registered office, and ensured compliance with Netherlands Antilles laws and with the articles of

association of the company. It also attended to the day to day management of the company. Proposals for bond issues originated with the parent company in New Zealand, but were actually carried into effect by the Netherlands Antilles subsidiary, which had a local board of directors. For some of the time one of the directors was a New Zealander who was also a director of the parent company. I quote a number of passages from the judgment of Doogue J, in which ‘the objector’ means the Netherlands Antilles subsidiary:

“All the objector’s decisions in respect of issues were taken at meetings outside New Zealand. The issues could not proceed without those decisions.

Plainly those decisions of policy in respect of the borrowing were first undertaken by those responsible for NZFP [the parent company], with the reasonable expectation that they would find favour with the directors of the objector, particularly when in the time of Mr Wylie he was a director of both boards and other Australasian directors were closely associated with NZFP.

It is also clear upon the evidence, however, that the decisions of the directors of the objector were those of the objectors [sic] independently. ...

Applying the *De Beers* test, it is clear the central management and control of the objector was at all times outside New Zealand. All decisions taken by its directors were taken outside New Zealand, as were its shareholders’ meetings and its essential management functions, which took place in Curaçao. The Commissioner has argued that the true centre of management and control was Auckland and that the board of the objector merely rubber stamped NZFP decisions. As already indicated, that ignores both the legal and the factual position. ... The Commissioner’s position confuses NZFC’s policy and influence with its powers. ... [I]t was not in the interests of NZFP that the directors of the objector should act as pawns or rubber stamps in the way submitted by the Commissioner and they did not do so. ... The control and management of the objector was in the hands of its directors and, as already indicated, that was at no time exercised in New Zealand.”

- xiv) *Untelrab Ltd v McGregor* [1996] STC(SCD) 1. This is a decision of the Special Commissioners. As such it is not binding on me, but Mr Goldberg submits that it sets out correct and helpful statements of principle, and that the decision is instructive on the facts. Mr Brennan has not argued to the contrary, and I agree with what Mr Goldberg says. The case was about a Jersey company established as a wholly owned subsidiary of a substantial United Kingdom-based group of companies. Its directors met in Bermuda, not in Jersey. Its essential function was to hold surplus group funds, to invest them for the time being, and to lend them to operating companies in the group when

they were needed. All requests for loans were in fact accepted, but if a request had been improper or unreasonable it would have been refused by the local board of directors. One of the Commissioners' findings was:

“The directors of Untelrab would have carried out instructions from Unigate so long as they considered that such instructions were not to the detriment of Untelrab and if the instructions were for the benefit of the group they saw no problem with that.”

In 1987, at the request of the parent company, the directors who had previously met in Bermuda resigned and appointed United Kingdom directors in their place. Thereafter board meetings were held in the United Kingdom. However, the Revenue assessed the company to corporation tax on the basis that it had in fact been resident in the United Kingdom throughout. The company appealed, and its appeal was allowed by the Special Commissioners. A number of instructive passages appear in their decision. I will not quote them verbatim, because they appear to me to be admirably and correctly encapsulated in paragraph 2 of the headnote to the report, which I do quote:

“Although a board might do what it was told to do, it did not follow that the control and management lay with another, so long as the board exercised its discretion when coming to its decisions and would have refused to carry out an improper or unwise transaction. The subsidiary's board met in Bermuda and transacted the subsidiary's business there and would have refused to carry out any proposal which was improper or unreasonable. Although the subsidiary was complaisant to do the parent's will, it did function in giving effect to the parent's wishes and the parent did not usurp the control of the subsidiary. The subsidiary's central management and control was in Bermuda and it was therefore resident there.”

The four cases which I have described in the foregoing sub-paragraphs involve different sets of facts, and are obviously not identical. However, they do have some common features which, in my opinion, are relevant to the present case. They all involved persons based in one jurisdiction (commonly a high tax jurisdiction) causing companies to be established in other jurisdictions (commonly low or no tax jurisdictions). In all the cases the companies so established were intended to fulfil particular purposes which were ancillary to the activities of the persons who caused them to be established. In all the cases the local managements did not take initiatives, but responded to proposals (described in some passages in the judgments as instructions) which were presented to them. In all the cases they did implement the proposals, and it is obvious that, when the foreign companies had been established, the confident expectation was that they would implement the proposals. In general, although large amounts of money may have been involved, the functions which the companies were established to fulfil did not involve much regular activity, so there was no great need for frequent exercises of central management and control. It is worth stating that, except for *Unit Construction v Bullock*, Mr Brennan did not refer me to any case which might give a different impression of the law from the four cases which I have described. Further, in all four of them *Unit Construction v Bullock* was expressly distinguished. The essential ground of distinction

was that, whereas in *Unit Construction v Bullock* the parent company itself exercised central control and management of the African subsidiaries, effectively by-passing the local boards altogether, in the four cases the parent companies or their equivalents, while telling the local boards what they wished them to do, left it to the local boards to do it.

### **Residence under s.249 of the Finance Act 1994**

S.249(1) provides as follows:

“A company which-

- would (apart from this section) be regarded as resident in the United Kingdom for the purposes of the Taxes Act, and
- is regarded for the purposes of any double taxation arrangements as resident in a territory outside the United Kingdom and not resident in the United Kingdom,

shall be treated for the purposes of the Taxes Acts as resident outside the United Kingdom and not resident in the United Kingdom.”

There is a double taxation convention between the United Kingdom and Netherlands. The relevant article is article 4, which, so far as relevant, is as follows:

#### **“Article 4 – Residence**

- (2) For the purposes of this Convention, the term ‘resident of one of the States’ means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. ...
- (3) ...
- (4) Where by reason of the provisions of paragraph (1) a person other than an individual is 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.”

I will consider the possible application of the foregoing provisions later. It may, however, be helpful for me to mention here that Eulalia was certainly regarded as resident in the Netherlands for purposes of Netherlands tax (I say more about this later), so if the Special Commissioners are right that it was resident in the United Kingdom under the common law principles of corporate residence, it is nevertheless to be treated for purposes of United Kingdom taxation as a Netherlands resident if it would be so treated under the double taxation convention. Whether that is so or not depends on the application of the ‘tie-breaker’ provision in article 4(3). In which State was its ‘place of effective management’ situated? That is the question which I will consider at a later point.

## **The detailed facts concerning Eulalia.**

Against the background of the foregoing analysis of both the common law of corporate residence and of s.249 of the Finance Act 1994, it is convenient for me now to describe in detail the specific facts concerning Eulalia at and around the relevant time. The precise relevant time was 23 July 1996, when CIL sold its 49% shareholding in Holdings to Eulalia, but it is plainly appropriate to look at the position leading up to that date and to the position after it down to the date (21 October 1996) when Eulalia sold the shareholding on to the outside purchaser.

To a considerable extent the facts have to be elicited from documents which have been retained on relevant files, principally the files of AA Trust. There was not much witness evidence. Mr Brennan makes submissions about this for the Revenue, but the Special Commissioners, while agreeing with him as to the final result of the case, attach little if any significance to the absence of witnesses. In paragraph 143 of their decision they note that most of the absent witnesses had moved jobs. They comment, realistically and fairly in my view, that evidence in December 2003 of events over seven years earlier would have been of limited value except in so far as supported by or based on notes or records at the time. The head of the legal department at AA Trust, Mr Wirix, was to have been a witness, but was indisposed at the time of the hearing. Mr Brennan, who appeared for the Revenue before the Commissioners as he did before me, opposed an application for an adjournment, so Mr Wirix's evidence went in in the form of a witness statement. Mostly he gives evidence from a recent reading of the files, and says that due to passage of time he has no specific recollection of the events. The Special Commissioners realistically say that his statement in that respect is wholly credible. They would have been sceptical of evidence that he did recall events in detail.

In the following sub-paragraphs I will describe as concisely as I can the relevant events which took place.

- xv) The first specific mention of Eulalia in the documents is in a minute of the corporate director of CIL, Condor, dated 15 July 1996: *'It is noted that Price Waterhouse have recommended that Copsewood [CIL] acquire a Dutch company known as Eulalia Holding BV.'* I infer that Price Waterhouse, knowing that a Netherlands resident company was required for the scheme, had made contact with ABN AMRO and had been informed that Eulalia would be available for acquisition. Before mid-July 1996 Eulalia appears to have been a dormant company owned by a subsidiary of the ABN AMRO group called Airone BV. In so far as it required managing at all, it was managed at the offices of the group in Amsterdam. The Special Commissioners correctly say in paragraph 129 of their decision that until mid-July 1996 Eulalia can only have been resident in the Netherlands.
- xvi) A minute of 17 July 1996 records that the previous directors of Eulalia were discharged from office and that AA Trust was appointed as managing director of the company immediately after the signing of the agreement for Airone BV to sell all of the shares in Eulalia to CIL.
- xvii) On 18 July 1996 Airone BV and CIL executed an agreement for the sale of the Eulalia shares, and the shares were duly transferred.

- xviii) Also on 18 July 1996 AA Trust and Eulalia entered into a management agreement for AA Trust ('the managing director') to be responsible for the day to day management and administration of Eulalia.
- xix) On 23 July 1996 two gentlemen representing AA Trust in its capacity as managing director of Eulalia resolved, at a meeting in Amsterdam, that Eulalia should enter into a purchase agreement with CIL in the form produced to the meeting. This was, of course, the agreement for the purchase of the 49% shareholding in Holdings. The documents do not specifically show how the agreement was prepared, but I have no doubt that it had been drafted by professional advisers in the United Kingdom, and sent to Amsterdam with a view to Eulalia resolving to enter into it.
- xx) On the same date there is a reciprocal resolution of CIL to sell the Holdings shares to Eulalia. I believe that this resolution would have been formally adopted in Geneva.
- xxi) On or after 5 August 1996, by a letter of that date from Price Waterhouse countersigned by way of acceptance by AA Trust on behalf of Eulalia (possibly on 13 August 1996), Eulalia engaged Price Waterhouse to advise and represent it by way of marketing, and negotiating for a possible sale of, the shares in Holdings. It may be relevant to mention that Price Waterhouse and Mr Wood had a year or so before entered into a similar agreement relating to a possible sale of the shares in Greetings Ltd.
- xxii) By a letter of 6 August 1996 countersigned by way of acceptance on behalf of Eulalia, Eulalia engaged Price Waterhouse to provide it with taxation advice and services.
- xxiii) On 30 September 1996 Mr Senior of Price Waterhouse wrote to Mr Daspach of AA Trust a letter headed 'Eulalia'. The letter explained progress made by Price Waterhouse in relation to Holdings. Mr Senior outlined an offer which had been received from a Newco to be formed by two venture capital companies, one within the Prudential group and one within the Schroders group. The offer would value Eulalia's holding at £30.8m. Just before giving this figure Mr Senior wrote: *'This offer, which is outlined below, has now been in principle agreed to by all the shareholders in [Holdings] and [Greetings] other than Eulalia, and I would be grateful if you could also confirm your willingness to accept it on Eulalia's behalf.'* The detailed structuring of the proposed transaction was explained in a tax clearance application a copy of which Mr Senior enclosed. Completion of the proposed acquisition was planned for 10 October, and 'assuming you are happy to accept the offer', arrangements would have to be made for Eulalia to sign the appropriate documentation. Mr Senior would be grateful for a response. If there were any queries Mr Daspach should contact Mr Senior or two named colleagues. Mr Senior was an assistant to the head of the corporate finance department in Price Waterhouse's Manchester office, Mr Longinotti.
- xxiv) On 8 October 1996 one of Mr Senior's colleagues, Elaine O'Donnell, sent a fax cover sheet enclosing a letter of the same date from Mr Senior and current draft documents.. The fax cover sheet said that she would be grateful if the

personnel at AA Trust would consider the documents and revert to Price Waterhouse (1) to confirm whether they were happy in principle to accept the offer, and (2) to raise any questions they might have on the documents. Mr Senior's letter was addressed to Mr Wirix, the head of the legal department at AA Trust, and referred to a recent telephone conversation between Mr Senior and Mr van Maurik of AA Trust. It reported on the state of negotiations with the prospective purchaser of Holdings, and also gave information about an unsolicited approach from another party. It indicated what Price Waterhouse's view was, and recorded their recommendation, which was to accept the offer from the original prospective purchaser. AA Trust (for Eulalia) was asked to confirm that it was happy to proceed with the offer. If it was happy there would be consequential details relating to execution of documents and the like, and the letter also gave information about them.

- xxv) There are some communications to AA Trust from the English solicitors who were working on the draft documents on behalf of the prospective vendors (who were Mr and Mrs Wood, the Trustees of their children's settlement, Eulalia, and the non-family members who held 4% of the shares in Greetings Ltd). Various draft documents passed between the solicitors and AA Trust.
- xxvi) On 16 October 1996 Mr van Maurik and Mr Langedijk at AA Trust faxed a letter to Mr Senior. Pursuant to a telephone conversation earlier that day, they confirmed that they agreed to the draft documents. Upon execution (which probably meant engrossment) they would sign the documents on behalf of Eulalia.
- xxvii) On 21 October 1996 Mr van Maurik and Mr Langedijk faxed to the solicitors for the purchaser duly signed copies of all of the documents which required to be executed by AA Trust in its capacity as the managing director of Eulalia.

That completes my summary of the documents. It is an agreed fact that on 21 October Eulalia joined with CIL in selling the shares in Holdings (the owner of 96% of the shares in Greetings Ltd) to the purchaser, which was a new company owned by two companies, one in the Schrodgers group and the other in the Prudential group. By the same agreement the non-family shareholders in Greetings Ltd sold their 4% holdings to the purchaser. The consideration receivable by Eulalia on the sale was slightly less than £30.8m. Eulalia was, of course, liable to pay an amount by way of supplement to the price payable by it to CIL for its earlier purchase of its 49% holding. The supplement was 95% of the excess over £23.7m of the price received by it from the purchaser.

There are two other evidential items which I should mention. I have already referred to the witness statement of Mr Wirix, the head of the internal legal department at AA Trust. As I said, he did not specifically remember the events, so most of his statement is a reconstruction derived from his reading of the file. However, he does make two points of a more general nature in paragraph 10 of his witness statement. One is that normal practice within AA Trust is for its legal counsel to the transaction to review the relevant legal documentation. In this particular case he believed that he no doubt did that, although he had no specific recollection of so doing. The other point is expressed as follows:

“AA Trust judges as independently as possible whether transactions on behalf of companies we manage are in the

interest of that company and do not damage our position. This means that the relevant documentation is considered in general terms, taking into account (i) compliance with Dutch law, (ii) AA Trust's position, and (iii) ABN AMRO's reputation."

The second other evidential item arises from enquiries which the United Kingdom Revenue made of the Netherlands Revenue in the course of their investigations of the scheme. A tax inspector in the Netherlands, after enquiries had been made, including (it seems) a visit to AA Trust and a meeting with an officer of the company, made a formal statement in writing dated 19 February 2003 that Eulalia *'is a corporation according to Dutch legislation and is a resident of the Netherlands within the meaning of article 4 of [the United Kingdom/Netherlands double taxation Convention]'*. On 4 March 2003 a further letter was sent by the Netherlands Revenue authorities to the United Kingdom Revenue. It includes this sentence:

"Further investigation convinced the Dutch tax authorities that the actual management of Eulalia Holding BV was carried out by the Trust [i.e. by AA Trust], meaning that the taxable domicile of Eulalia Holding BV is located in the Netherlands."

### **The Special Commissioners' decision**

In this and the next two sections of my judgment I make frequent references to numbered paragraphs of the Special Commissioners' decision. In order not to confuse them with the numbered paragraphs of this judgment I interpolate in each case the letters SC. Thus for example 'paragraph SC145' means paragraph 145 of the Special Commissioners' decision.

The decision is lengthy, and it would be difficult for me to attempt to summarise it in this judgment. The earlier paragraphs describe the facts and the arguments. The Special Commissioners' conclusions are contained in paragraphs SC113 to SC161, of which paragraphs 113 to 147 are relevant to the issues with which I am concerned. Paragraphs 148 to 161 are directed to an argument which is no longer pursued. If this judgment is reported, as I expect it will be, most series of reports will also include in the report the full text of the Commissioners' decision, so paragraphs of the decision to which I refer in my own analysis of the issues should be readily accessible. For the assistance of readers of this judgment in the form in which I will hand it down I annex at the end a copy of paragraphs SC113 to SC147. Most of the discussion in those paragraphs relates to the common law of corporate residence. It culminates in paragraph SC145 in which the Commissioners explain the main elements of the reasoning which led them to dismiss the appeal. I reproduce the paragraph in full in paragraph 54 below, after which I analyse its contents and respectfully disagree with them in several respects. In paragraph SC146 the Commissioners, as I understand them, set out their view on the statutory test of residence under s.249 of the Finance Act 1994 coupled (in this case) with the United Kingdom/Netherlands double taxation convention. I will set out that paragraph in full in paragraph 74 below, and I will consider it in paragraphs 75 to 81.

### **Analysis and discussion: common law residence**

In my judgment, on a proper application of the law to the facts the only tenable conclusion for the Commissioners to reach was that, under the common law of corporate residence, Eulalia was resident in the Netherlands. I accept Mr Goldberg's submission that the Commissioners must either have applied the wrong test, or that, if they applied the right test,

they came to a conclusion which could not properly be reached on an application of it, so as to exhibit an error of law on familiar *Edwards v Bairstow* principles ([1956] AC 14).

There is a point of a general nature which Mr Goldberg makes with which I have considerable sympathy, but which by itself would not, I think, persuade me that the Commissioners' decision cannot stand. It is that there is an evident inconsistency between the Revenue's attitude to the residence of CIL and their attitude to the residence of Eulalia. The claim for tax which is made against Mr and Mrs Wood is made under TCGA 1992 s.13. They are said to be taxable upon a chargeable gain which accrued not to them but to CIL, and which under s.13 falls to be assessed on them. It is fundamental to the Revenue's claim for tax that CIL was not resident in the United Kingdom at the time when it disposed of the 49% holding in Holdings to Eulalia. If CIL had been resident in the United Kingdom at that time s.13 could not have applied.

However, there is no realistic difference between CIL and Eulalia as respects whether they were resident in the United Kingdom at the time. Both companies were established or acquired abroad in order to implement particular parts in the wider tax scheme of which the architects were Price Waterhouse. Both were managed in the offices of overseas financial organisations: CIL in the Geneva offices of Barclaytrust, and Eulalia in the Amsterdam offices of AA Trust. Mr Goldberg's point is that, if CIL was resident outside the United Kingdom (which the Revenue not merely accept but assert as an essential ingredient in the claim for tax which they advance against Mr and Mrs Wood), then there is no credible basis on which it can be said that Eulalia was resident in the United Kingdom. A somewhat similar point was made by counsel who appeared for Mr and Mrs Wood before the Special Commissioners. He argued that, if (contrary to his contentions but in accordance with the Revenue's) Eulalia was resident in the United Kingdom, then CIL was resident in the United Kingdom also. On that basis the assessments made upon Mr and Mrs Wood could not stand. Mr Goldberg does not now advance any submission that Eulalia was or might have been resident in the United Kingdom. Essentially he puts the point the other way round: the Revenue rightly proceed on the basis that CIL was resident outside the United Kingdom, and consistency would mean that Eulalia was resident outside the United Kingdom also.

I think that this is mostly, though not entirely, a complaint rather than a reason for allowing the appeal. As a complaint, however, it seems to me to have considerable force. Mr Brennan says that the taxpayers and their advisers presented the scheme on the basis that CIL was resident outside the United Kingdom, and that the Revenue are content to accept the taxpayers' assertions in that respect; that does not prevent them (the Revenue) from probing and thereafter contesting the taxpayers' assertion that Eulalia was resident outside the United Kingdom. As a formal matter that may be right, but I cannot refrain from observing that I find it an unattractive position. I realise that this is a case about a tax avoidance scheme, and that the Revenue have every right to test such schemes rigorously. Indeed they ought to do so. But there is an air of running with the hare and hunting with the hounds in saying that they will not investigate the residence of that one of the two companies where it suits them to accept at face value what the taxpayers say, but they will investigate and contest the residence of the other one where it does not suit them to accept at face value what the taxpayers say. Further, one specific consequence which could affect the decision of the case does, I think, follow. The Revenue, having accepted that CIL was resident outside the United Kingdom, cannot successfully argue that Eulalia was resident in the United Kingdom simply on the ground that it was a vehicle company used for a particular stage in a tax avoidance scheme devised and superintended by professional advisers in the United Kingdom acting ultimately

in the interests of United Kingdom clients. Mr Brennan has not sought to put his case as simply as that, but the point is worth spelling out nevertheless.

However all that may be, I move on on the basis that CIL was resident outside the United Kingdom, so that the only issue which has to be decided is whether or not Eulalia was resident in the Netherlands, as the taxpayers contend. In the following paragraphs I will identify and examine certain passages in the decision which appear to me to be significant, and then I will add some observations of my own. As I have said, the critical paragraph in the Special Commissioners' decision is paragraph SC145, but there are several matters which I wish to identify or discuss in some of the earlier paragraphs in the 'Conclusions' section of the Commissioners' decision.

In paragraphs SC 118 and SC119 the Commissioners refer to *Unit Construction Ltd v Bullock*, and they correctly distinguish it, saying in paragraph SC119:

“Whereas in *Unit Construction Co* the local board was by-passed or purported meetings did not take place, the directors of Eulalia and CIL were not by-passed nor did they stand aside since their representatives signed or executed the documents.”

The Commissioners proceed to say in paragraph SC120 that the case for the Revenue is that 'ABN AMRO [AA Trust] did not in fact take the decisions but did what it was told to do by Mr Wood or by Price Waterhouse acting on his behalf'. I have two comments to make.

xxviii) With reference to the passage which I have quoted from paragraph SC119, it was not just a matter of the representatives of Eulalia signing the documents which were presented to them. It is clear from the communications from Price Waterhouse from which I have quoted earlier in this judgment that Price Waterhouse and the English solicitors did not just send documents to AA Trust, saying in effect 'Sign these where marked in pencil'.

xxix) The evidence does not bear out what the Commissioners say is the Revenue's case, namely that '*ABN AMRO did what it was told to do by Mr Wood or by Price Waterhouse*'. There is no evidence that Mr Wood ever told ABN AMRO or AA Trust anything, nor would one have expected him to do so. He was a businessman, and it is overwhelmingly likely that he would leave the contacts with ABN AMRO and AA Trust to his expert professional advisers. Price Waterhouse obviously expected that AA Trust would do the things which they (Price Waterhouse) proposed to it. AA Trust obviously expected that it would do the things proposed, provided that it saw nothing objectionable in them (see as to this paragraph 10 of Mr Wirix's witness statement, quoted in paragraph 33 above). But Price Waterhouse did not propose things in the style of telling AA Trust what to do. For example, in Mr Senior's letter of 30 September 1996 he wrote: '*I would be grateful if you could also confirm your willingness to accept it on Eulalia's behalf*'. In his letter of 8 October 1996 he wrote that Price Waterhouse recommended AA Trust to accept the offer from the prospective purchaser and he asked it to confirm that it was happy to proceed with the offer. It is worth remembering that Mr Senior was a chartered accountant and an assistant to the partner who was the head of corporate finance in the firm's Manchester office.

Professional advisers such as Mr Senior are in no position to give orders to major banks and trust companies. It is inherently unlikely that he did anything of the sort, and all the evidence of his communications with AA Trust (the letters) shows that he did not.

- xxx) Mr Brennan points out that the letters which show Price Waterhouse giving professional advice and requesting AA Trust's confirmation that it was willing to proceed in accordance with the advice relate to the second stage of Eulalia's involvement; the stage in September and early October 1996 when what was in prospect was a contract for the sale of Holdings to the outside purchaser. Mr Brennan reminds me that the critical stage for the present case is the first stage, in July 1996 when Eulalia purchased the 49% interest in Holdings. It is true that the only documents on the files relating to that stage are the ones which record the appointment of AA Trust as managing director of Eulalia and the resolution of 23 July 1996 by which Eulalia approved the purchase agreement. However, the nature of the relationship between Price Waterhouse and AA Trust in September and October (one of professional advice being given, accepted and acted upon) is clearly indicative of the nature of the relationship two months earlier. The Special Commissioners themselves say (in paragraph SC126) that *'events subsequent to 23 July are only relevant in so far as they are evidence as to where the central control and management of Eulalia and CIL were on that date'*. Despite the word 'only', the events of September and October are relevant as evidence of where the central control and management of Eulalia were, not just in September and October, but also at earlier times when Eulalia was owned by CIL and taking actions under the influence and guidance of Price Waterhouse's Manchester office.

In paragraph SC125 the Special Commissioners say:

"It is also clear that the legal formalities were carried out abroad including both the meetings approving the transaction and the signing of the documents."

They nevertheless conclude that Eulalia was not resident abroad. It is of course possible for a company to be centrally controlled and managed in one jurisdiction and to carry out the legal formalities of a transaction in a different jurisdiction, but one would normally expect there to be some specific evidence that central control and management was in the first jurisdiction and not in the second one. Here there is none beyond the feature, to which I keep returning and which the authorities show not to be enough, that Eulalia was participating in accordance with the overall plan for a tax scheme devised and superintended by personnel in the Price Waterhouse Manchester office. Also, I do not accept the implication in the Commissioners' sentence that the meetings which approved the transactions can be dismissed as immaterial legal formalities. Without decisions by AA Trust in its capacity as managing director of Eulalia to enter into the agreement to purchase the holding in Holdings and into the later agreement to sell that holding those agreements would not have been made. There can be no doubt that AA Trust took those decisions in Amsterdam, and none the less so by reason of having been recommended to take the decisions by Price Waterhouse in Manchester.

I have already noted that in paragraph SC129 the Commissioners say that until 18 July 1996 Eulalia can only have been resident in the Netherlands. For all that on a tax appeal s.50(6) places the burden on the taxpayer of showing that the assessment overcharges him, undisputed features of the facts must surely be capable in appropriate circumstances of placing an evidential burden on the Revenue to demonstrate why something like the residence of a company has changed. I agree with Mr Goldberg that, it being admitted on all sides that until 18 July 1996 Eulalia was resident in the Netherlands, it was incumbent on the Revenue to produce at least some material to show a change of residence. In my judgment the Revenue produced none.

It is true that on 18 July 1996 Eulalia's shares were purchased by CIL. But a change of share ownership does not of itself entail a change in the national jurisdiction where a company is resident. Further, in this case the new owner of the shares, CIL, is accepted by the Revenue to have been resident outside the United Kingdom. It is also true that, in consequence of Eulalia having been purchased by CIL, it (Eulalia) became a participant in a tax scheme being carried out for the benefit of individuals resident in the United Kingdom and on the advice of United Kingdom professional advisers. But in that respect Eulalia's position became identical to that of CIL. The Revenue accept that CIL was resident outside the United Kingdom, and (as I have pointed out earlier) have assessed Mr and Mrs Wood to CGT specifically on that basis. It must follow that for CIL to have become a participant in the same scheme was in itself no indication that it had changed its residence to the United Kingdom.

The Commissioners go on to say in paragraph SC130 that on 18 July, following the purchase of Eulalia's shares by CIL, AA Trust became its managing director and undertook responsibility for day to day management. Indeed AA Trust did do those things, but it was a Netherlands company and it operated at its head offices in Amsterdam (where, incidentally, Eulalia had been administered in previous years, in so far as it required administration). The assumption by AA Trust of the responsibilities which it took on cannot be any indication that the residence of Eulalia moved from the Netherlands to the United Kingdom. The Commissioners then say that the appointment of AA Trust was at the behest of Price Waterhouse. If by at the 'behest' of Price Waterhouse the Commissioners mean at the request and on the introduction of Price Waterhouse, I agree, but comment that it is irrelevant. If they mean on the orders or command of Price Waterhouse (which is the dictionary definition) I do not agree.

In paragraphs SC132 and SC133 the Special Commissioners make critical remarks to the effect that AA Trust appear to have resolved that Eulalia should purchase the 49% holding in Holdings for £23.7m without having any information about whether that was or was not an appropriate price. They return to this theme in the culminating paragraph SC145, and I will postpone my comments on it until I discuss that paragraph.

In paragraph SC135 the Commissioners state that, after Eulalia had purchased the Holdings shares, it had no business other than holding them. I would ask: 'So what?' But in any event I do not agree with what the Commissioners say. Eulalia purchased the shares with a view to reselling them. It entered into an agreement with Price Waterhouse for Price Waterhouse to provide their services in advising upon and negotiating for the shares to be sold. In October it received advice from Price Waterhouse to accept the offer from Schroder Ventures. It accepted the offer and sold the shares for almost £30.8m.

To a similar effect, the Commissioners say in paragraph SC136 that the only activity of Eulalia between its acquisition by CIL and the sale of its shares in Holdings was the acquisition and sale of those shares and the matters connected therewith;. They add: ‘There was nothing else to manage.’ That is true, but how does it show that Eulalia was resident in the United Kingdom or that it was not resident in the Netherlands? What Eulalia did was a big transaction in terms of the amounts involved, but if it did not require frequent or intensive control and management, and if all the evidence that there is shows that such decisions as were needed were made in the Netherlands, the conclusion must surely be that the company was resident in the Netherlands.

There are then several paragraphs in which the Commissioners, in a balanced way, make several points. One is that there were strong commercial reasons for Eulalia to agree to the proposed sale of its shares in Holdings: the price was obviously a good one, and was acceptable to Mr Wood and to the owners of the business (see paragraph SC140). I would add, although the Commissioners do not, that the price was acceptable to Price Waterhouse, who had been engaged to advise and negotiate by Eulalia (having similarly been engaged by Mr Wood since 1995), and who positively recommended the transaction to Eulalia. The Commissioners add the pertinent comment that to a considerable extent the decision made itself. As against this, the Commissioners say that AA Trust did not give any, or at least sufficient, consideration to the issues involved in whether or not to join in the sale to Schroder Ventures Ltd of Holdings and of the outstanding 4% of the underlying company Greetings Ltd. This returns to the theme that AA Trust did not have adequate information to support its decisions. I will comment on it in connection with paragraph SC145 of the decision.

In paragraph SC142 the Commissioners say that AA Trust ‘*simply fell in with the wishes of Mr Wood expressed by his advisers, the sale having been approved by [Eulalia’s] parent, CIL ..*’. That is largely true, but it seems to me to ignore the realistic recognition in the authorities that, when companies are established in overseas jurisdictions in order to carry through some element in a wider scheme or business structure the idea for which originated with the parent company, their directors customarily do fall in with the overall plan: but the companies do not thereby fail to be resident in their own jurisdictions.

For example, in the *Esquire Nominees* case (see paragraph 26(ii) above) Gibbs J held that the company was resident in Norfolk Island notwithstanding that the local directors followed the guidance of the firm of Australian accountants, WBBC. An important part of his reasoning was that he did not believe that the directors would have acted on an instruction to do anything improper or inadvisable. I believe that the same would be true of AA Trust as a director of Eulalia, and indeed paragraph 10 of Mr Wirix’s witness statement (see paragraph 33 above) says so. If the Commissioners were not going to accept Mr Wirix’s statement, having admitted it in evidence under a rule of the procedural directions which govern appeals to the Special Commissioners, they needed expressly to say so. If Commissioners record evidence given by a witness without specific comment, the general practice of the courts on appeals from the Commissioners is to assume that the evidence was accepted.

A further example to a similar effect is the decision of the Special Commissioners in the *Untelrab* case (see paragraph 26(iv) above). Although the subsidiary was ‘complaisant’ to do the will of the United Kingdom parent company, the Commissioners rejected the Revenue’s argument that the subsidiary was resident in the United Kingdom. Thus I do not consider that the Commissioners’ comment in paragraph SC142 of their decision in this case that AA Trust

‘simply fell in with the wishes of Mr Wood expressed through his advisers’ leads to the conclusion that Eulalia was resident in the United Kingdom.

I come now to paragraph SC145 of the decision. It represents the culmination of the Commissioners’ reasoning on the application to Eulalia of the common law of corporate residence, and I think that it is sufficiently important for me to reproduce it in full at this point.

“SC145. We conclude that the Appellants have failed to satisfy us that the central control and management of Eulalia was not in London from 18 July 1996 when CIL became its shareholder. The only acts of management and control of Eulalia were the making of the board resolutions and the signing or execution of documents in accordance with those resolutions. We do not consider that the mere physical acts of signing resolutions or documents suffice for actual management. Nor does the mental process which precedes the physical act. 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. Where the geographical location of the physical acts of signing and executing documents is different from the place where the actual effective decision that the documents be signed and executed is taken, we consider that the latter place is where “the central management and control actually abides.”

I have several comments to make about this paragraph, and I will make them at some length here, even though some of them may in essence repeat points which I have made already.

The paragraph, with respect to the Commissioners, gets off to a bad start by the curious reference to London. London had nothing to do with the transaction or with Eulalia’s part in it. ‘London’ must have been a mistake by the Commissioners, but I would have wished to know what the Commissioners meant to say. Did they mean to refer to the United Kingdom, without being specific as to any particular place in the United Kingdom? Or did they mean to refer to Manchester, which was where the relevant offices of Price Waterhouse were situated? Or did they mean to refer to Bury, which is where Mr and Mrs Wood lived and where the offices of Greetings Ltd were situated? Given the form in which the sentence is cast (*‘the Appellants have failed to satisfy us that the central control and management of Eulalia was not in London’*), the Commissioners appear to have started with a presumption that Eulalia was resident somewhere in the United Kingdom, and required the appellants to show that it was not. But it is not clear where the presumed place of residence was.

A consequence of the point which I made in the previous sentence is that the Commissioners have based their decision, not upon a reasoned and positive finding that Eulalia was resident in the United Kingdom, but rather upon the propositions that the burden of proof on the appeal rested upon Mr and Mrs Wood, and that they had not discharged it. It is noteworthy that nowhere in paragraph SC145 or, as far as I can see, anywhere else in the decision, do the Commissioners say where they consider Eulalia to have been resident. The Revenue’s case was that Eulalia was resident in the United Kingdom, but the Commissioners have more

cautiously said that Mr and Mrs Wood had not satisfied them that Eulalia was not resident in the United Kingdom.

In the last sentence of paragraph sc145 the Commissioners refer to *'the place where the actual effective decision that the documents be signed and executed is taken'*, but they do not say what they consider that place to have been. In my opinion it was Amsterdam, where AA Trust resolved to enter into the agreement to acquire the shareholding in Holdings and where it later decided to accept Price Waterhouse's advice to sell the shares and to execute the required documents. Where else could it have been? The only candidates in the United Kingdom are Manchester or Bury. I do not think that either can be right.

In and from Manchester Price Waterhouse devised the scheme, superintended the carrying out of it, and advised the participants about the steps which it was appropriate for them to take next if the scheme was to proceed. Of course Price Waterhouse expected the parties to accept the advice and to carry out the steps, but I do not think that any reputable professional adviser would accept that he takes the decisions and that the clients do not. He advises them of what, in his professional opinion, it is desirable for the clients to decide. Usually they accept the advice. But the clients, not the professional adviser, make the decision. As regards Bury, I of course accept that Mr and Mrs Wood decided to instruct Price Waterhouse to advise on a scheme to avoid CGT, and that they also decided to instruct Price Waterhouse to go ahead and seek to put the scheme into effect. That is not at all the same thing as Mr and Mrs Wood in Bury taking the individual decisions which were necessary before each specific stage in the scheme would take place.

I wish to say more about the way in which the Commissioners have based their decision on what they see as the failure of Mr and Mrs Wood to discharge the burden of proving a negative. I accept, despite a submission of Mr Goldberg to the contrary, that, when an Inspector of Taxes makes an adjustment to a taxpayer's self-assessment and the taxpayer appeals against the adjustment, the statutory burden on appeal rests on the taxpayer to show that the adjustment is wrong. That is the effect of s.50(6) of the Taxes Management Act 1970:

“If, on an appeal, it appears to ... the Commissioners ... by evidence –

(c) that the appellant is overcharged by an assessment ...

the assessment ... shall be reduced accordingly, but otherwise the assessment ... shall stand good.”

However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue.

In this case, at the beginning of the appeal before the Special Commissioners the position was that the Revenue had made an adjustment on the basis that Mr and Mrs Wood were liable to CGT, and that Mr and Mrs Wood had to show to the civil standard of proof that the adjustment was wrong. I accept that the onus was on them to show that Eulalia was not resident in the United Kingdom, but rather was resident in the Netherlands. They showed that Eulalia was incorporated in the Netherlands. They showed incontrovertibly that it had been resident only in the Netherlands until it was acquired by CIL. They showed that CIL

was not itself a United Kingdom company, and indeed was a company which the Revenue asserted to have been resident outside the United Kingdom. They showed that, from the time when Eulalia was acquired by CIL, its managing director was AA Trust, a large Dutch company with offices in Amsterdam. They showed resolutions and consequential actions being taken in the offices in Amsterdam. They accepted that what Eulalia was doing was part of a tax scheme which was being superintended by Price Waterhouse in their Manchester offices. They called evidence from the Price Waterhouse partners who at the time were heads of the firm's departments for corporate finance and for tax in Manchester. They produced a witness statement from the head of the legal department at AA Trust. They were willing for the appeal to be adjourned in order that the witness could attend in person to be available for cross-examination. They produced all the documents which existed (so I assume, and no one has suggested that any documents were suppressed). The documents showed guidance and influence coming from Price Waterhouse, but no more than that. Mr and Mrs Wood were able to point out that the Netherlands Revenue had stated to the United Kingdom Revenue that the actual management of Eulalia was carried out by AA Trust, '*meaning that the taxable domicile of Eulalia Holding BV is located in the Netherlands*'. Surely at that point they can say: 'We have done enough to raise a case that Eulalia was not resident in the United Kingdom. What more can the Special Commissioners expect from us? The burden must now pass to the Revenue to produce some material to show that, despite what appears from everything which we have produced, Eulalia was actually resident in the United Kingdom.'

The Revenue produced no positive material. They had submissions to make. One was 'the missing witnesses argument'. In particular they said that there was no evidence from Mr Senior of Price Waterhouse or from some of the officers of AA Trust who had been involved in the transactions in 1996. However, that was plainly not the basis of the Commissioners' decision. As I have already described, in paragraph SC143 they said that they did not attach any real weight to the absence of the witnesses. Most of the witnesses had moved jobs, and in any event seven years had passed, so that their memories could not be expected to be accurate. I refer here to what I have already said in paragraph 30 above. I add a point which the Commissioners did not make. Unless I have misunderstood, the Revenue took a long time over their enquiries into the realisation of the Greetings Ltd business. I can well understand why, but in the circumstances it would be harsh to treat the absence of witnesses with a clear recollection as a factor counting against Mr and Mrs Wood on this appeal.

Another line of argument which the Revenue advanced was represented by a critical analysis which Mr Brennan had prepared of many of the documents which I have described. Mr Brennan repeated the argument before me, and reproduced the critical analysis in his skeleton argument. In my judgment, however, what it really amounted to was a convincing demonstration of things which are not denied: that the steps taken were part of a single tax scheme, that there were overall architects of the scheme in Price Waterhouse, and that those involved all shared the common expectation that the various stages of the scheme would in fact take place. I have already said that that does not to my mind mean that Eulalia was resident in the United Kingdom. And if it did CIL would have been resident in the United Kingdom as well, whereas it is an essential part of the Revenue's claim for tax against Mr and Mrs Wood that CIL was not resident in the United Kingdom.

For the foregoing reasons, in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of paragraph SC145 suggests that those were the critical grounds for the decision), I consider that they were in error.

The Commissioners do, however, say more in paragraph 145. The second sentence of the paragraph is:

“The only acts of management and control of Eulalia were the making of the board resolutions and the signing or execution of documents in accordance with those resolutions.”

I agree with Mr Goldberg that it is extraordinary that the Commissioners, having made that statement, came to the conclusion that Eulalia was resident in the United Kingdom, or at least came to the conclusion that it had not been shown that Eulalia was resident in the Netherlands. The making of the board resolutions and the signing and execution of documents which the Commissioners say were the only acts of management and control of Eulalia all took place in the Netherlands. A company is resident where its central management and control are situated. How, therefore, can Eulalia have been resident in the United Kingdom? How can it have been resident anywhere other than the Netherlands?

Mr Brennan urges me to read and consider the second sentence of paragraph SC145, not in isolation, but in the context of the whole of the paragraph. I have done that, but I am still mystified by the Commissioners' reasoning. What they seem really to be saying is that, although the only acts of control and management took place outside the United Kingdom, there was not much involved in them. But the test of a company's residence is still the central control and management test: it is not the law that that test is superseded by some different test if the business of a company is such that not a great deal is required for central control and management of its business to be carried out.

The Commissioners then say:

“We do not consider that the mere physical acts of signing resolutions or documents suffice for actual management. Nor does the mental process which precedes the physical act.”

I see the point of the first sentence, but not of the second. 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. Further, in this case the Commissioners had the explicit evidence of Mr Wirix, in the light of which it is impossible to regard AA Trust as in the nature of a puppet manipulated by a puppet master in the United Kingdom. The exchanges in September and October 1996 show that Price Waterhouse did not regard AA Trust as a puppet or treat it as a puppet. Price Waterhouse (mainly in the person of Mr Senior) reported to AA Trust on what they were doing in their role as the party engaged by Eulalia to advise and negotiate about an onward sale of the Holdings shares. They made a recommendation to Eulalia, and asked AA Trust to confirm that it was content for Eulalia to proceed. Of course they expected AA Trust to say that it was content, but it was clear that the sale to the outside purchaser could not proceed without AA Trust's confirmation, and that Price Waterhouse were not in a position, and did not consider themselves to be in a position, to issue orders to AA Trust about what it must do.

The Commissioners then go on to make points to the effect that AA Trust did not have sufficient information to make informed decisions. This picks up the theme of several earlier paragraphs, as respects which I said earlier that I would make my own observations in connection with paragraph SC145. That is what I now do. In paragraph SC145 the Commissioners say that *'effective decisions ... require some minimum level of information. The decisions must at least to some extent be informed decisions'*. This seems to be implying that AA Trust, as managing director of Eulalia, did take decisions, but because they were not informed decisions they somehow did not count. I cannot agree, for several reasons.

The decisions which matter are the decision in July 1996 that Eulalia should purchase the 49% holding in Holdings and the decision in October 1996 that Eulalia should sell the holding. If AA Trust, in its capacity as managing director of Eulalia, took those decisions and took them in its offices in Amsterdam, as in my view the facts which the Commissioners had before them demonstrate that it did, then the central control and management of Eulalia was in the Netherlands, and the company was resident there. Mr Brennan cited to me a passage in the judgment of Jonathan Parker J in *re Barings plc (No. 5)*, approved by the Court of Appeal at [2000] 1 BCLC 523, 535 to 536, in which the learned judge summarised the duties of directors. One point which he made was that directors have a duty *'to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors'*. The extent of the duty, and the question whether it had been discharged, *'must depend on the facts of each particular case.'* The passage is important generally, but I derive little assistance from it so far as the issues in this case are concerned. *Barings (No. 5)* was a directors' disqualification case. This case is not. Several of the directors of Barings were disqualified because of inadequacies in their performance, but no-one would suggest that the central control and management of Barings' business did not rest with its board. In this case there may or may not be grounds for saying that AA Trust could and should have gone into matters more deeply before it took the two critical decisions, but, given that it was AA Trust which took those decisions, it remains the case that Eulalia was resident in the Netherlands.

In any case, the Commissioners overstate their criticisms of AA Trust in these respects. As respects the acquisition of the shareholding in July 1996 it is apparent from the earlier paragraphs SC132 and SC133 that the Commissioners' criticism is that AA Trust did not have enough information about the basis for the price being set at £23.7m. However, at that stage in their discussion of the issues they fairly answer the criticism themselves in paragraph SC134, where they make the point that Eulalia was a wholly-owned subsidiary of CIL (the vendor), and that the price was left outstanding interest free. *'It would'*, they say, *'be a far-reaching proposition to state that any subsidiary entering into a contract to acquire property from its parent on such a basis without independent consideration of the terms is necessarily ceding its central management and control to the parent.'* In paragraph SC134 they found *'from the viewpoint of Eulalia ... nothing surprising in the fact that its directors accepted the agreement prepared by Price Waterhouse and executed by Condor on behalf of CIL'*. By the time that they reached paragraph SC145 they had formed the view that AA Trust's decision to accept the agreement was insufficiently informed to be an effective decision at all. The reasoning at the two places is difficult to reconcile.

I move to the second critical decision: the decision to concur in the sale of Holdings to the outside purchaser. In paragraph SC140 the Commissioners accepted that there were *'strong commercial reasons for Eulalia to accept terms for the sale of its shares in Holdings which were acceptable to Mr Wood and to the managers of the business.'* But in paragraph SC145

they nevertheless were of the opinion that Eulalia's decision to accept the terms was so insufficiently informed that it failed to be an effective decision. This disregards several substantially undisputed facts: that AA Trust on behalf of Eulalia had engaged Price Waterhouse to advise and represent it on negotiations for a resale (so that the critical responsibility to evaluate the terms of a resale rested in the first instance with Price Waterhouse); that Price Waterhouse twice reported in writing to AA Trust about its negotiations; that there was at least one telephone conversation between Mr Senior of Price Waterhouse and a representative of AA Trust; that Price Waterhouse recommended AA Trust to accept the offer from the outside purchaser; that the normal practice within AA Trust was for Mr Wirix to review the legal documentation and for AA Trust to judge as independently as possible whether transactions on behalf of companies which it managed were in the interests of that company and did not damage AA Trust's position; and that the transaction did not take place until two representatives of AA Trust specifically confirmed in writing to Price Waterhouse and to the solicitors acting on the sale that AA Trust agreed with the draft agreements and would execute them on behalf of Eulalia.

In those circumstances I cannot agree with the Commissioners that AA Trust's participation was *'merely going through the motions of passing and signing documents'*.

My conclusion on common law residence is that the decision of the Commissioners cannot stand. On a proper understanding of the law the only correct conclusion capable of being reached on the basis of the materials which the Commissioners had before them was that Eulalia was resident in the Netherlands.

#### **Analysis and decision: residence under the Finance Act 1994 s.249**

In this part of my judgment I consider the appeal on the assumption that I am wrong in my view, explained under the foregoing sub-heading, that Eulalia was resident in the Netherlands under the common law test of corporate residence. If I am right in that view it is in itself sufficient to mean that this appeal succeeds. However, suppose that I am wrong and that under the common law test Eulalia was resident in the United Kingdom. Eulalia was undoubtedly also resident in the Netherlands for purposes of Netherlands tax. That is clearly established by the letters from the Netherlands Revenue department to which I referred in paragraph 34 above. In that situation it would become necessary to consider the statutory test in s.249, read with article 4 of the United Kingdom/Netherlands double taxation convention. I have set out the statutory provisions in paragraph 28 above. I will not repeat them here, but the effect is that the case would be governed by the 'tie-breaker' provision in article 4(3) of the convention. Eulalia would be regarded as a resident of that one of the two States in which 'its place of effective management [was] situated'.

The Commissioners deal with the question shortly in paragraph SC146 of their decision. The paragraph does not refer specifically to s.249 or to article 4(3), but it must have them in mind. It refers to the record at paragraph SC103 of a submission by Mr Brennan, and that paragraph explicitly identifies article 4.3 as the subject matter with which it is dealing. Paragraph SC146 reads as follows:

"146. This raises the question of where the place of effective management was situated. We accept Mr Brennan's submission at paragraph 103 that in the present context there is no difference between central management and control and the place of effective management. In our judgment the place of effective management must be the place where effective management

decisions are taken. There is no indication that any effective management decisions were taken in the Netherlands.”

Mr Brennan repeated before me his successful submission to the Special Commissioners. He said that, if the central management and control of Eulalia was in the United Kingdom, then so also its place of effective management must have been situated in the United Kingdom. Mr Goldberg submitted otherwise. He said that the ‘place of effective management’ of Eulalia was in Amsterdam, and that that was so even if the common law test of residence had the effect that, contrary to his submission, the company was resident in the United Kingdom.

On that issue too I agree with Mr Goldberg. If on common law principles Eulalia was resident in the United Kingdom I think that the reason can only have been that the degree of influence emanating from the United Kingdom amounted to central management and control. Influence of one sort may have been possessed by Mr Wood, though there is no evidence that he exercised it in any positive way. Influence of another sort may have been possessed by Price Waterhouse, the personnel of whom provided detailed guidance about what it was appropriate for Eulalia’s local management in Amsterdam to do. But I find it very hard to conceive of Mr Wood’s home or his office as a place of effective management of Eulalia. Similarly, I believe that Price Waterhouse, or indeed virtually any professional firm, would resist strongly any suggestion that, because a client is relying on them for, and is following, professional guidance which they are providing on a sophisticated scheme which extends over several months, therefore their offices are a place of effective management of the client.

The way in which the Commissioners have expressed their decision does not greatly help on this. They say that in their opinion the place of effective management must be the place where effective management decisions are taken, but they do not say where that place was. They only say that ‘there is no indication that any effective management decisions were taken in the Netherlands’. I do not agree with them on that, for reasons which I have explained in several earlier paragraphs, including paragraphs 41, 47 and 56, but there is a further point to be made here. Article 4(3) requires there to be identified a ‘place’ of effective management, and it has to be a place situated in one of the two States. So far as common law residence is concerned it might be enough for the Revenue to say that the central control and management of Eulalia was carried on in the United Kingdom, without needing to be more precise and to identify specific premises. On that basis the Revenue might be able successfully to argue that Eulalia was resident in the tax jurisdiction of the United Kingdom, and that they do not need to go into any further detail.

That, however, will not do when it comes to applying the detailed wording of article 4(3). What was the ‘place ... situated’ in the United Kingdom which was Eulalia’s ‘place of effective management’? The Commissioners do not attempt to answer the question, and their misguided reference to London at the beginning of paragraph 145 increases the difficulty of inferring what their answer would have been. The only possibilities seem to be either Mr and Mrs Wood’s home in Bury, or Mr Wood’s office elsewhere in Bury, or Price Waterhouse’s offices in Manchester. For the reasons which I gave in paragraphs 56 and 57 above, which I will not repeat here, I do not think that any of those three are convincing candidates to be Eulalia’s place of effective management.

As with the common law test of residence, I do not think that it is satisfactory in this case for the Commissioners simply to rest their decision on the burden of proof and s.50(6) of the

Taxes Management Act 1970. But that is what they have done. They round off, before moving to a different issue which was not argued before me:

“We conclude therefore that the appellant has not established that Eulalia was not resident in the United Kingdom for tax purposes.”

I must point out, however, that Eulalia had the use of the offices of AA Trust in Amsterdam. It had a constitutionally appointed managing director, AA Trust, whose offices and personnel were situated in Amsterdam and on no conceivable basis were situated in Bury or Manchester. Its postal address was in Amsterdam. All documents which were required to be signed by its management were signed in Amsterdam. Its books and records were kept in the offices in Amsterdam. (That may not be found in so many words by the Special Commissioners, but it was obviously the case.) When the Dutch Revenue, at the request of the United Kingdom Revenue, investigated the residence status of Eulalia they went to AA Trust’s offices in Amsterdam, and concluded that ‘AA Trust Company BV executed the actual management of Eulalia Holding BV as a result of which the fiscal residence of Eulalia BV is located in the Netherlands’. I share Mr Goldberg’s surprise that nowhere in paragraph SC 146 do the Commissioners make any reference to the Netherlands Revenue’s conclusion.

Against that background I repeat, this time in the context of s.249 and article 4(3), something which I have already said in the context of common law residence. Surely the point has been reached at which the appellants in this case can say that they have shown a great many things from which it would appear that, although not much effective management was required for what Eulalia did, the place where the effective management was carried out was at AA Trust’s offices in Amsterdam, and the evidential burden must shift to the Revenue to produce some evidence that the place of effective management was not there after all, but rather was situated at a place in the United Kingdom: a place, furthermore, which the Revenue needed to identify specifically. In my judgment it cannot be enough for the Revenue simply to say that they are not sure what the precise place of effective management of Eulalia was, but, whatever it was, it was situated somewhere in the United Kingdom.

Therefore, if I am wrong that, on the common law test of residence, Mr and Mrs Wood have discharged the burden which s.50(6) of the Taxes Management Act places on them of showing that Eulalia was resident in the Netherlands, I nevertheless consider that the effect of s.249 of the Finance Act 1994 read with the tie-breaker provision in article 4(3) of the United Kingdom/Netherlands double taxation convention is that by statute Eulalia was resident in the Netherlands.

### **Conclusion**

For the foregoing reasons I allow this appeal.

### **Annex: paragraphs 113 to 147 of the Special Commissioners’ decision**

*(The letters SC have been added to the numbers of the paragraphs.)*

## Conclusions

SC113. There is no dispute that Eulalia was incorporated in the Netherlands and that CIL was incorporated in the British Virgin Islands. There was no evidence to suggest that under the laws of the Netherlands and the British Virgin Islands, the companies were not resident in the jurisdictions in which they were incorporated. Under English law a company incorporated in the United Kingdom is regarded for the purposes of the Taxes Acts as resident here, see Finance Act 1988, s.66. In the absence of evidence to the contrary Dutch law and British Virgin Islands law is assumed to be the same as English law. Therefore under Dutch law Eulalia must be assumed to be resident in the Netherlands and under British Virgin Islands law CIL must be assumed to be resident in the British Virgin Islands. Certainly as regards the Netherlands that accords with our understanding of Dutch law.

SC114. The test under English law in respect of companies not incorporated in the United Kingdom is however different. It is not determined by the law of the country of incorporation but by the central management and control test laid down in *De Beers* [1906] AC 455. If the result of the central management and control test is that Eulalia would be resident in the United Kingdom under United Kingdom law although resident in the Netherlands under Dutch law, then under Article 4(3) of the Double Tax Agreement between the UK and the Netherlands a company is deemed to be a resident “of the State in which its place of effective management [is] situated.”

SC115. There is no double tax agreement with the British Virgin Islands, so that the only issue in respect of CIL is the place of its residence under English law.

SC116. In respect of both companies the initial issue therefore is the place of residence under English law. For CIL that is determinative, but for Eulalia there is the further potential question of the place of effective management.

SC117. The early authorities of *Calcutta Jute Mills Co Ltd v Nicholson* (1876) 1 TC 83 and *Cesena Sulphur Co Ltd v Nicholson* (1876) 1 TC 88 established the principle that the residence of a company is where the directors meet and where they transact their business and exercise the powers conferred upon them. The basic principle established in *De Beers* [1906] AC 455 is that a company resides where its real business is carried on “and the real business is carried on where the central management and control actually abides,” see per Lord Loreburn LC at page 458. The word “actually” is crucial since it was decided in *Unit Construction Co Ltd v Bullock* that “it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company”, see per Lord Simonds at 38 TC page 729.

SC118. In *Unit Construction Co* the parent usurped the powers of the boards of the subsidiaries which stood aside and did not meet at all.

SC119. It is clear that the legal documents for the sale by CIL to Eulalia of the shares in Holdings on 23 July 1996 were executed by Anne Willing and another for Condor on behalf of CIL and by Mr Fricot and Mr Schmitz jointly representing ABN AMRO which was the sole managing director of Eulalia. The articles of CIL provided for a corporate director and article 8 of the articles of Eulalia provided for a legal entity to be appointed managing director. Whereas in *Unit Construction Co* the local board was by-passed or purported

meetings did not take place, the directors of Eulalia and CIL were not by-passed nor did they stand aside since their representatives signed or executed the documents.

SC120. The case for the Revenue is that ABN AMRO did not in fact take the decisions but did what it was told to do by Mr Wood or by Price Waterhouse acting on his behalf. The dispute is thus not dissimilar to that in *Untelrab* although the burden of proof here is on the taxpayer. The Revenue case is also that it has not been shown that the management and control of CIL was not abroad.

SC121. The basic facts are not in dispute. The issue is what inferences we should draw from those facts.

SC122. The Appellants wished to sell their shares in the business and in 1995 engaged Price Waterhouse to find purchasers and to advise on the tax aspects. A substantial liability to capital gains tax was expected. On the advice of Price Waterhouse, Holdings was formed and in October 1995 49.99 per cent of the shares in Holdings were given by the Appellants to CIL, a newly formed British Virgin Islands company. The shares in CIL were held by Barclays Private Trust (BVI) Ltd, a wholly owned subsidiary of Barclaytrust (Suisse), as trustee of settlements made by the Appellants also in October 1995. Barclays Private Trust (BVI) Ltd, the sole subscriber to CIL, appointed Condor, another company associated with Barclaytrust (Suisse), as sole director. Condor resolved that Barclaytrust (Suisse) be appointed to provide management services and that the administrative office should be at an address in Geneva which was also that of Barclaytrust (Suisse). All of this followed the advice of Price Waterhouse which recommended Barclaytrust (Suisse) to the Appellants.

SC123. Eulalia was brought into the picture because of changes in the legislation, apparently on the initiative of the Birmingham office of Price Waterhouse (see paragraph 32). Price Waterhouse made the initial arrangements with ABN AMRO, including the purchase price and an indemnity. Price Waterhouse obtained the necessary information and documents relating to CIL as purchaser from Barclaytrust (Suisse), which had been appointed to provide Corporate Management Services to CIL, and passed the data for drawing up the agreement under which CIL would purchase Eulalia to ABN AMRO Bank NV. Mr Wirix of ABN AMRO executed the purchase agreement for the Eulalia shares on behalf of CIL under a power of attorney granted by a resolution by Condor as director of CIL; the purchase was approved in another resolution by Condor on 18 July. The price was that specified by Price Waterhouse a few days earlier. On the day before the sale Eulalia paid an interim dividend to Airone BV, an associated company of ABN AMRO. .

SC124. The next step was the transfer by CIL of 49.9 per cent of the shares in Holdings to Eulalia which had been planned for the day after the purchase by CIL of Eulalia. The draft agreement was faxed by Price Waterhouse to Barclaytrust (Suisse) on 19 July providing for the sale of the shares by CIL to Eulalia for £23.7 million to be financed by an interest free loan from CIL to Eulalia repayable on demand. There was no documentation as to the basis of the price. However £23.7 million was substantially less than a pro rata proportion of the latest bid of £72 million. The final form of the agreement with loan memorandum was faxed by Price Waterhouse to Barclaytrust (Suisse) in Geneva on 23 July where two employees of Barclaytrust (Suisse) executed it for Condor on behalf of CIL. Mr Fricot and Mr Schmitz of ABN AMRO were authorised to sign for Eulalia on 23 July and did so on 24 July.

SC125. The crucial date for this appeal was therefore 23 July 1996, being the date on which either or both Eulalia and CIL must have both been members of a non-resident group of companies if section 171 of the CGTA 1979 was to apply or, alternatively, the date on which both must have been members of a resident group. It is clear that they were members of a group, the issue is therefore whether the Appellants have shown on the balance of probabilities that both were non-resident or that both were resident. It is also clear that the legal formalities were carried out abroad including both the meetings approving the transaction and the signing of the documents.

SC126. Events subsequent to 23 July are only relevant insofar as they are evidence as to where the central management and control of Eulalia and CIL were on that date.

SC127. On 13 and 14 August engagement letters with Price Waterhouse were signed by ABN AMRO on behalf of Eulalia. The next record of any communication between Price Waterhouse and either Eulalia or ABN AMRO was not until 30 September. Meanwhile Prudential/Schroder were granted exclusivity until 13 September, clearance applications were submitted to the Revenue and an approach by NatWest Ventures was not taken up.

SC128. Throughout the period from December 1995 negotiations had been continuing with Prudential/Schroders. Price Waterhouse were acting for Mr Wood. There is no record of any instructions from CIL and we infer that Price Waterhouse relied on Mr Wood's letter of engagement (see paragraph 16). Representatives of Prudential/Schroders visited the business on a number of occasions. Successive offers "subject to contract" were made for the whole business. We have no doubt that the prospective purchasers were aware of the fact that a substantial holding was held offshore. It is not clear whether they were aware of the identity or indeed existence of CIL before the summer of 1996. On 5 July Price Waterhouse sent an engagement letter for taxation services to be signed by Mr Wood and Barclaytrust (Suisse); the latter company was of course providing management services to CIL. We infer from Mr Senior's letter to Barclaytrust (Suisse) of 30 September (see paragraph 53 above) that Barclaytrust (Suisse) had not been kept up-to-date regarding the negotiations: if they were the letter was very oddly phrased. The inference must be that Price Waterhouse had not been in touch with CIL either.

SC129. We now come back to the question of the central control and management of Eulalia on 23 July 1996 when CIL disposed of the shares in Holdings to Eulalia. Prior to 18 July it is an agreed fact that Eulalia was a dormant Dutch company. The only recorded action prior to 18 July was the declaration of a dividend on 17 July. The company had no assets to manage apart from small cash balances. Up to that time it can only have been resident in the Netherlands.

SC130. On 18 July following the purchase of its shares by CIL, ABN AMRO became managing director and undertook responsibility for day-to-day management. It is clear that the appointment of ABN AMRO was at the behest of Price Waterhouse, see paragraphs 31 and 32 above. In fact Eulalia was purchased from an associated company of ABN AMRO.

SC131. Five days after the appointment of ABN AMRO Eulalia purchased from its new parent company, CIL, the shares in Holdings with the purchase price left outstanding as an interest free loan repayable on demand.

SC132. There is no evidence that any consideration was given by ABN AMRO of the basis on which the price of £23.7 million was fixed. There is no record of any explanation having been provided by Price Waterhouse who had produced the draft agreement containing that figure or of any advice being requested or given. Neither is there any evidence of any consideration being given as to the price by CIL, by Condor its director or by Barclaytrust (Suisse).

SC133. The only sources of information as to the value of the shares in Holdings would have been the company itself or Price Waterhouse who were conducting the sale negotiations. Since no written information is contained in the extensive trial bundles, and this would have been covered by the disclosure direction referred to at paragraph 86 above, we conclude that no written information was provided. In view of Mr Longinotti's evidence (paragraph 69) as to the reluctance of Price Waterhouse to advise on the terms of offers, there is no reason to believe that any oral advice was given as to the £23.7 million. Mr McKeith did not recall any advice (paragraph 75). If any advice was given no record was kept.

SC134. Eulalia was of course a wholly-owned subsidiary of CIL and had minimal cash resources. The purchase of Holdings shares from its parent was financed by an interest-free loan from that parent. It was not in any sense an arm's length transaction. From the viewpoint of Eulalia we find nothing surprising in the fact that its directors accepted the agreement prepared by Price Waterhouse and executed by Condor on behalf of CIL. It would be a far-reaching proposition to state that any subsidiary entering into a contract to acquire property from its parent on such a basis without independent consideration of the terms is necessary ceding its central management and control to the parent.

SC135. In the normal case however the subsidiary which has acquired an asset from its parent will thereafter carry on business on its own account making its own decisions, although having regard to the policy of its parent. In such a case it would be unrealistic to isolate the initial transaction and conclude that the central control rested with the parent at that point but not thereafter. Here however there was no business in fact other than holding the shares. On 21 October 1996 CIL warranted that, apart from its interest in Eulalia, Eulalia's shares in Holdings and the transactions in Holdings under the sale agreement, neither CIL nor Eulalia had an interest in other business.

SC136. In the present case the only activity of Eulalia between its acquisition by CIL and the sale of its shares in Holdings was the acquisition and sale of the shares in Holdings and the matters connected therewith. There was nothing else to manage.

SC137. If the conduct of the sale of CIL's shares in Holdings had indicated genuine involvement by ABN AMRO as director of Eulalia in the decision-making process that would have supported the contention that the central control and management was outside the United Kingdom both in October and indeed from July.

SC138. We infer from Mr Senior's letter of 30 September 1996 to ABN AMRO that there had been little or no contact between Price Waterhouse and ABN AMRO since 13 August (see paragraph 41 above). There was no mention in the correspondence between them of the disclosure letter to the purchasers or to the audited accounts to 30 June 1996 both of which were subject to warranties by Eulalia.

SC139. The recommendation by Price Waterhouse on 8 October 1996 contained no analysis or consideration of the warranties to be given by Eulalia.

SC140. We accept that there were strong commercial reasons for Eulalia to accept terms for the sale of its shares in Holdings which were acceptable to Mr Wood and to the managers of the business. Furthermore it is obvious that a refusal by Eulalia to accept terms acceptable to the other shareholders in Holdings and to the managers of the business would have created a difficult situation. It is apparent that there was a considerable goodwill element in the price which was over twice the net asset value. Damage to staff morale might have had serious implications for the value of Eulalia's shares. To a considerable extent the decision made itself.

SC141. However it does not appear that any real consideration was given by ABN AMRO at all. The statement by Mr Wirix (see paragraph 82 above) makes no mention of seeing the accounts of Holdings, the disclosure letter by Dibb Lupton Alsop or of the warranties. If there had been any consideration of these documents, we would have expected them to have been in ABN AMRO's files and to have been mentioned in Mr Wirix's statement and included in the bundle.

SC142. We conclude that although there were strong reasons for Eulalia to accept the offer to sell its shares in Holdings, no real consideration was given to the matter by ABN AMRO which simply fell in with the wishes of Mr Wood expressed by his advisors, the sale having been approved by its parent, CIL, which had agreed to enter into a guarantee.

SC143. In reaching this conclusion we do not attach any real weight to the absence of the witnesses most of whom had moved jobs. Evidence in December 2003 of events over seven years earlier would have been of limited value except in so far as supported by or based on notes or records at the time. Mr Brennan opposed a request for an adjournment because Mr Wirix was unable to attend. The statement of Mr Wirix that due to the passage of time he could no longer specifically remember the events is wholly credible. We would have been sceptical of evidence that he did recall events in detail.

SC144. We considered Mr Tallon's submission that if the central management and control of Eulalia was not exercised by ABN AMRO it was exercised in Geneva by Barclaytrust (Suisse). The difficulty about that submission is that the evidence of Mr Pollock was that he could not speak for Eulalia which was managed by ABN AMRO and not by Barclaytrust (Suisse).

SC145. We conclude that the Appellants have failed to satisfy us that the central control and management of Eulalia was not in London from 18 July 1996 when CIL became its shareholder. The only acts of management and control of Eulalia were the making of the board resolutions and the signing or execution of documents in accordance with those resolutions. We do not consider that the mere physical acts of signing resolutions or documents suffice for actual management. Nor does the mental process which precedes the physical act. 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. Where the geographical location of the physical acts of signing and executing documents is different from the place where the actual effective decision that

the documents be signed and executed is taken, we consider that the latter place is where “the central management and control actually abides.”

SC146. This raises the question of where the place of effective management was situated. We accept Mr Brennan’s submission at paragraph 103 that in the present context there is no difference between central management and control and the place of effective management. In our judgment the place of effective management must be the place where effective management decisions are taken. There is no indication that any effective management decisions were taken in the Netherlands.

SC147. We conclude therefore that the Appellant has not established that Eulalia was not resident in the United Kingdom for tax purposes.