

Neutral Citation Number: [2006] EWCA Civ 26

Case No: C3/2005/1073

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR JUSTICE PARK)
CH/2004/APP/0410

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2006

Before :
LORD JUSTICE CHADWICK
LORD JUSTICE MOORE-BICK
and
SIR CHRISTOPHER STAUGHTON

Between :

WOOD and another

**Appellants/
Respondents**

- and -

HOLDEN (HMIT)

**Respondent/
Appellant**

Mr Timothy Brennan QC (instructed by HM Revenue and Customs Solicitor's Office, Somerset House, Strand, London WC2R 1LB) for the Appellant

Mr David Goldberg QC and **Miss Aparna Nathan** (instructed by Landwells, 1 Embankment Place, London WC2N 6DX) for the Respondents

Hearing dates : 29 and 30 November 2005

Judgment

Lord Justice Chadwick :

1. This is an appeal from an order made on 8 April 2005 by Mr Justice Park on an appeal under section 56A of the Taxes Management Act 1970 (“TMA 1970”) from a decision of the special commissioners (Mr Theodore Wallace and Dr Nuala Brice) of 18 May 2004. The special commissioners had dismissed the appeals of Mr Ron Wood and his wife, Mrs Gail Wood, from amended assessments to capital gains tax made by the inland revenue on 17 October 2001. The judge allowed the appeal of Mr and Mrs Wood from that decision. The revenue appeals from the order of 8 April 2005 with the permission of this Court (Lord Justice Lloyd) granted on 1 July 2005.
2. Mr and Mrs Wood were assessed to tax under section 13 of the Taxation of Capital Gains Tax Act 1992 (“TCGA 1992”) on gains said to have accrued on a disposal on 23 July 1996 of shares in Ron Wood Greetings Card Holdings Ltd (“Holdings”). The relevant disposal was a sale of the shares by Copsewood Investments Ltd (“CIL”), a company registered in the British Virgin Islands, to Eulalia Holding BV (“Eulalia”), a company incorporated in the Netherlands. The shares were sold by CIL to Eulalia for a consideration of £23.7 million, with a provision for uplift if Eulalia sold the shares on within three years. In the event Eulalia sold the shares to Birthdays Group Limited on 21 October 1996 for £30,799,384.
3. It was common ground that – if, for the purposes of TCGA 1992, gains did accrue to CIL on that disposal – then the effect of section 13, read with section 86 and paragraph 1(3) of schedule 5, is that chargeable gains were properly treated as accruing to each of Mr and Mrs Wood as the settlor of family settlements, the trustees of which were non-resident. The issue was whether the disposal was brought within section 171(1) TCGA 1992 by the provisions of section 14 of that Act.
4. Section 171(1) TCGA 1992 provided, so far as material, that where a member of a group of companies disposed of an asset to another member of the group, both members should be treated for the purposes of corporation tax on chargeable gains as if the asset acquired by the member to whom the disposal was made were acquired for a consideration of such amount as would secure that on the other’s disposal neither a gain nor a loss would accrue to that other. Section 14 TCGA 1992 is in these terms:
 - “14(1) This section has effect for the purposes of section 13.
 - (2) Sections 171 to 174 and 175(1) shall apply in relation to non-resident companies which are members of a non-resident group of companies, as they apply in relation to companies resident in the United Kingdom which are members of a group of companies.
 - (3) . . .
 - (4) For the purposes of this section –
 - (a) a ‘non-resident group’ of companies

- (i) in the case of a group, none of the members of which are resident in the United Kingdom means that group, and
 - (ii) in the case of a group, 2 or members of which are not resident in the United Kingdom, means the members which are not resident in the United Kingdom;
 - (b) ‘group’ shall be construed in accordance with section 170 without subsections (2)(a), (9) and (12) to (14).”
5. On 23 July 1996 Eulalia was a wholly-owned subsidiary of CIL; its shares having been acquired by CIL on 18 July 1996. The revenue did not challenge the taxpayers’ contention that CIL was not resident in the United Kingdom. But the revenue did not accept that Eulalia was not resident in the United Kingdom. It followed, on the revenue’s view, that CIL and Eulalia (together) were not “non-resident companies which are members of a non-resident group of companies” for the purposes of section 14(2) TCGA 1992; so the disposal of the Holdings shares by CIL to Eulalia was not brought within section 171(1) of that Act.
6. It is common ground that the question whether or not Eulalia was resident in the United Kingdom on 23 July 1996 for the purposes of TCGA 1992 turns, in the first instance, on “where its real business [was] carried on . . . where the central management and control actually abides”. That was the test adopted by the House of Lords in *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)* [1906] AC 455 (*per* Lord Loreburn, Lord Chancellor, at 458). But if, on the application of that test, Eulalia were found to be resident in the United Kingdom, then the provisions of section 294(1) of the Finance Act 1994 would require that question to be determined by reference to the double tax convention of 7 November 1980 between the United Kingdom and the Netherlands (SI 1980/1961). Under article 4(3) of the double tax convention Eulalia would be deemed to be a resident of the state “in which its place of effective management is situated”. It is not clear – at least, not clear to me – whether the article 4(3) test differs in substance from the *De Beers* test; and, if the two tests are not, in substance, the same, I find it very difficult to see how, in the circumstances which the special commissioners had to consider, they could lead to different answers.
7. As I have said, the revenue did not accept that Eulalia was not resident in the United Kingdom on 23 July 1996. It was on that basis that the inspector amended (under section 28A(2) TMA 1970) self-assessments to tax made on behalf of Mr and Mrs Wood for the year 1996/97. Mr and Mrs Wood were assessed on the basis that the whole of the purchase consideration payable by Eulalia for the Holdings shares was a chargeable gain. £27,874,000 of that gain was apportioned to Mr Wood; the balance, £2,919,700, was apportioned to Mrs Wood. They were assessed to tax, respectively, in the amounts of £11,149,600 and £1,167,881.
8. Mr and Mrs Wood appealed to the special commissioners from the amendments under section 31(1) and (4) TMA 1970. Section 50(6) of that Act is in these terms, so far as material:

“50(6) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant . . . or by other evidence –

(a) that, by reason of an amendment under section 28A(2) . . . of this Act, the appellant is overcharged by a self-assessment ;

...

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

It was common ground before the special commissioners that section 50(6) TMA 1970 had the effect that it was for the taxpayers to establish on the appeal that Eulalia was not resident in the United Kingdom on 23 July 1996: it was not for the revenue to establish that Eulalia was resident in the United Kingdom. Given the way in which the special commissioners expressed their conclusion, the question on whom did the burden of proof lie has assumed some importance. Counsel for the taxpayers (who did not appear before the special commissioners) has sought to argue in this Court (as he did before the judge) that the special commissioners were wrong to treat the burden of proof as they did.

The agreed statement of facts

9. The parties had agreed a statement of facts in advance of the hearing before the special commissioners:

“1. Ron Wood Greetings Card Ltd (‘Greetings’) was a trading company operating the Birthdays chain of card shops. Mr and Mrs Wood held 380,920 and 40,000 ordinary shares respectively in the company. These shares formed approximately 96% of the ordinary share capital. Other shares were held by a number of employees and a personal acquaintance of Mr Wood, Mr Bryan Robson.

2. On 27 March 1995 Mr and Mrs Wood engaged Price Waterhouse Corporate Finance to locate a buyer for the company.

3. On 18 October Mr and Mrs Wood set up a number of settlements (the Ron Wood Family Settlements Nos 1-8 the Gail Wood Settlements Nos 1-2 and the Ron Wood Discretionary Settlement). The amount settled on each trust was £1,000. Apart from the Discretionary Settlement, either Mr or Mrs Wood had a life interest in each settlement. The trustee of the 10 life interest settlements was Aiglon Trustees (BVI) Limited (which changed its name on 6 March 1996 to Barclays Private Trust (BVI) Limited) a wholly owned subsidiary of Barclaytrust, who were based in Geneva. Barclaytrust was the trustee of the Discretionary Settlement.

4. On 31 October 1995 the trustees of the above settlements incorporated CIL, a company registered in the British Virgin Islands. The share capital was split into A shares which were held by the interest in possession settlements and B shares which were held by the discretionary settlement. The B shares carried all the rights to assets of CIL in the event of a winding up.

5. Ron Wood Greetings Card Holdings Ltd ('Holdings') (formerly Coverphone Limited) was formed as an off the shelf company on 22 September 1995. The company had an authorised share capital of 100,000 £0.01 ordinary shares. Mr Wood acquired 200 £0.01 ordinary shares on 24 October 1995. A further 90,297 of these shares were allotted to Mr Wood and the remaining 9,503 shares allotted to Mrs Wood on 24 October 1995 for cash,

6. On 24 October 1995 Mr and Mrs Wood gifted 45,248 and 4,751 shares respectively in Holdings to CIL.

7. On 26 October 1995, Mr and Mrs Wood gifted 380,920 and 40,000 shares respectively in Greetings Ltd to Holdings. The chargeable gains arising on the transfers of the shares to Holdings were held over under s.165 TCGA 1992.

8. On 27 October 1995, Mr and Mrs Wood gifted 4,525 and 475 shares respectively in Holdings to The Wood Children's Trust, a UK resident accumulation and maintenance trust established for the benefit of the children of Mr Wood, being Samantha Jayne Wood (date of birth 17 April 1976) and Steven Ronald Wood (date of birth 19 November 1978). The chargeable gain[s] arising on the transfers into the trust were held over under s.165 TCGA 1992.

9. CIL purchased from Airone BV, a subsidiary of ABN AMRO Bank NV, on 18 July all the shares in a dormant Dutch incorporated company Eulalia Holdings BV. ABN AMRO Trust Company was appointed as sole managing director of Eulalia and took an indemnity from Barclaytrust.

10. On 23 July 1996 CIL disposed of its shareholding in Holdings to Eulalia for £23.7 million plus, in the event of a sale within 3 years in excess of that amount, 95% of such excess. A group structure diagram as at August 1996 [was] attached.

11. On 21 October 1996 Eulalia sold its shares in Holdings to Birthdays Group Limited for £30,799,384. The other shareholders (both in Holdings and the minority shareholders in Greetings) also sold their shares simultaneously.

12. The following statement (the correctness of which is disputed by the Inland Revenue) was made by way of additional disclosure in the capital gains tax section of the income tax returns of Mr & Mrs Wood for the year ended 5 April 1997.

‘During the year CIL, the BVI company owned by R J Wood family settlements 1-8 and G E Wood Family Settlements 1&2 acquired a Dutch incorporated and resident company Eulalia and sold its Holdings shares to Eulalia in exchange for debt. Eulalia subsequently disposed of the Holdings shares making a gain which, if it were to be calculated in accordance with UK CGT principles, would amount to around £30,800,000. The entire share capital of Holdings was purchased at this time by a third party.

I believe that the disposal of shares in Eulalia does not result in a charge to capital gains tax arising on me by virtue of s 13 TCGA 1992 and/or s 86 TCGA 1992 as Eulalia’s gains are within the charge to Dutch tax (calculated by reference to their principles) and Article 13 of the Anglo/Dutch taxation treaty provides for gains from such property to be taxable in the state where the person making the disposal is resident.’”

The special commissioners observed that:

“The diagram referred to at paragraph 10 of the agreed Statement showed CIL as owning all the shares in Eulalia which in turn held 49.99 per cent of the shares in Holdings. Mr Wood held 40.724 per cent of the shares in Holdings, Mrs Wood held 4.277 per cent and a trust for their children held 5 per cent. Holdings held 96.24 per cent of the shares in Greetings with Mr Robson holding 1.86 per cent and five other shareholders holding 0.38 per cent each. Greetings had five wholly-owned subsidiaries.”

The further findings of primary fact made by the special commissioners

10. The special commissioners heard oral evidence from Mr Peter Longinotti and Mr David McKeith, partners in Price Waterhouse at the relevant time and, respectively, head of the North West Corporate Finance team and senior tax partner in Manchester and Liverpool; from Mr Neal Shepherd, a partner in DLA, solicitors for the Greetings’ shareholders; and from Mr Martin Pollock, as senior trust manager at Barclaytrust (Suisse) SA. A witness statement of Mr Hendrik Justus Wirix, of ABN AMRO Trust Company (the contents of which were not agreed by the revenue) was admitted in evidence under regulation 17(5) of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994. And there was substantial documentary evidence.

11. On the basis of that evidential material the special commissioners made extensive findings of primary fact, which supplement the statement agreed by the parties in advance of the hearing. The findings on the documents are set out at paragraphs 15 to 68 and 83 to 85 in the decision of the special commissioners ([2004] STC (SCD) 416, [2005] STC 789, 791j-804a, 807e-808b); further findings, based on the oral evidence are set out at paragraphs 69 to 82 ([2005] STC 789, 804b-807d).
12. Before I rehearse the findings made by the special commissioners as to the circumstances in which Eulalia was acquired and subsequently participated in the disposal of the shares in Holdings it is convenient to note that, at paragraph 121 of their decision ([2005] STC 789, 813a and 846c), the special commissioners observed that the basic facts were not in dispute. They summarised those facts at paragraphs 122 to 124 of the decision (*ibid*, 846d-847b):

“122. The Appellants [Mr and Mrs Wood] 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.

123. 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.

124. 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.

13. The changes in legislation, which – as the special commissioners indicated at paragraph 23 of their decision – led to the need for a non-resident company to which CIL could dispose of its shares in Holdings, were the changes to section 13 TCGA 1992 introduced (with effect from 28 November 1995) by section 174 of the Finance Act 1996. The circumstances in which Eulalia was acquired and subsequently participated in the disposal of the shares in Holdings are described by the special commissioners in more detail at paragraphs 30 to 40 of their decision:

“30. By April 1996 it was intended that a Dutch holding company should be inserted into the offshore structure (see paragraph 32) and ABN AMRO had stated the terms on which it would act. Following a meeting with Mark Senior at Price Waterhouse Corporate Finance, Lovell White Durrant, the solicitors acting for the purchasers wrote to Prudential Venture Managers Ltd [who were co-ordinating the offer] on 26 June 1996 stating amongst other matters, ‘We have de facto exclusivity even though they cannot confirm it in writing for tax reasons. The letter mentioned the tax structure and continued:

‘The holding of the Wood family in Holdings is held, some direct and some through trusts. About 50% of the trusts are onshore and 50% are offshore through the British Virgin Islands. Apparently the structure set up has now been snookered by the last Finance Act and they want to get over the point by interposing a Dutch holding company between the BVI Company and Holdings’

‘They’ in the context referred to Price Waterhouse.

31. On 5 July 1996 a letter setting out the terms of engagement for taxation services in relation to Project Marvel [the sale of the Greetings' business by Mr and Mrs Wood] was sent by Price Waterhouse addressed to the shareholders of Holdings with spaces for Mr Wood and Barclaytrust (Suisse) . . . to sign. It is not clear whether it was in fact signed. It covered assistance during the sale of the shares in Holdings encompassing 'the identification and implementation of strategies, consistent with underlying commercial requirements, for the sale of the shares at an acceptable tax cost'. It provided that only Mr Wood and Barclaytrust (Suisse) would have authority to issue Price Waterhouse with instructions in relation to Project Marvel and that Price Waterhouse would report only to those persons. A fee of £180,000 excluding disbursements would be payable on completion in respect of the fees of Price Waterhouse in the UK for 'time on the capital gains tax planning aspects . . . up to completion'. The fee did not include 15,000 Dutch florins for Price Waterhouse's colleagues in Holland. The letter stated,

'I also understand that ABN AMRO who will set up and run the Dutch company on [CIL's] behalf will charge D Fl 10,000 per annum.

32. On 11 July Price Waterhouse in The Hague sent an urgent telefax to Anne Willing at Barclaytrust (Suisse) referring to a telephone conversation that morning. The writer said that the Birmingham office of Price Waterhouse had requested him or her

'to contact you directly in order to follow up on the purchase of Eulalia Holdings BV on behalf of his client Mr Ron Wood'

A plan of action was enclosed of which that letter was step 5. The letter then covered the purchase price and local management; in addition to the total costs of the structure, the letter referred to a memorandum dated 16 April to the Birmingham office of Price Waterhouse (which though attached to the letter was not in the bundle for the hearing), giving the total purchase price as NLG 67,500. The memorandum stated that ABN AMRO Trust Company (Nederland) BV ('ABN AMRO') would provide for management and bookkeeping services and would require an indemnity and a management agreement and a resolution in writing. Examples of those documents were attached. The letter continued:

'Usually, the parties to the indemnity agreement are the client, i.e. a private person, in this case the settler of the trust, and ABN AMRO Trust. However, for these

particular cases, we could arrange with ABN AMRO Trust, that by way of exception the indemnity agreement being executed by the Trustees, (in)directly holding the shares in the BV . . .’

The letter then said under ‘Purchaser’,

‘I understand that the purchaser of Eulalia Holdings BV will be [CIL] established at the British Virgin Island, and that this company is administered by you.’

A number of documents relating to CIL and the trust (in the singular) were then requested. The letter enclosed a draft power of attorney for execution of the stock purchase agreement on behalf of CIL to be executed by the duly authorised director together with a draft power of attorney for execution on behalf of CIL of the Notarial deed of transfer of the shares (also to be executed by the director) which had been prepared by the civil law notary.

33. On 15 July the same person at Price Waterhouse in The Hague wrote to ABN AMRO Bank NV with data required for drawing up the purchase agreement for Eulalia. The letter confirmed that the purchase price would be NGL 67,500 and stated that the individuals were the two Appellants whose passports and bank references would be sent to Mr Wirix. The letter continued,

‘Immediately after the transfer of the shares in [Eulalia] to [CIL], the latter company will transfer 49.9 per cent of the shares in the share capital of [Holdings] to [Eulalia]. As discussed, our aim is to have the structure in place by Friday July 19, 1996. If we are to achieve the aim, the deed of transfer of the shares in [Eulalia] should be executed by Thursday July 18, 1996, and the transfer of [Holdings] shares to [Eulalia] should take place by Friday July 19, 1996 . . .

In connection with the transfer of the [Holdings] shares to [Eulalia], I have requested Barclays Trust Suisse SA to contact Mr H Wirix’

A further letter from Price Waterhouse on that day to Barclaytrust (Suisse) said that by 19 July not only the transfer of the shares in Eulalia to CIL ‘should be completed’ but also the transfer of the 49.9% of the shares in Holdings to Eulalia. Also on 15 July 1996 Lovell White Durrant prepared the first draft of the sale agreement for the shares in Holdings to the new company to be formed by Prudential/Schroder.

34. Also on 15 July Condor, the sole director of CIL, 'noted that Price Waterhouse have recommended that [CIL] acquire a Dutch company known as Eulalia Holding BV' and resolved that CIL acquire the shares in Eulalia and grant a Power of Attorney to HJ Wirix and RGN Verhoef both of ABN AMRO to execute the stock purchase agreement for the acquisition of Eulalia. There was no mention in this resolution of the transfer of the shares in Holdings to Eulalia.

35. On 16 July Lovell White Durrant sent the first draft Sale and Purchase Agreement on behalf of Prudential/Schroder to Dibb Lupton Broomhead, the solicitors acting for the shareholders in Holding and Greetings. The identities of the vendors were not completed because they still required details from Price Waterhouse of the tax structure proposed. Also on that day Anne Willing at Barclaytrust (Suisse) sent to ABN AMRO a series of documents relating to CIL and the settlements including Financial Statements at 5 April 1996.

36. On 18 July at an EGM of Eulalia at noon the proposal of the existing managing directors to resign on 18 July, immediately after the signing of the agreement in which Airone BV was to sell all the shares in Eulalia to CIL, was approved as was the appointment of ABN AMRO as managing director immediately after the signing of the agreement for sale. At 1700 hours at another EGM of Eulalia it was resolved to distribute a dividend of Dutch FL 1,109.16 as well as a dividend at the charge of the general reserve of Fl 83,243.15.

37. On 18 July Mr Wirix executed the purchase agreement for the shares in Eulalia on behalf of CIL and the deed of transfer was notarised; that showed the principal place business of CIL as Geneva. Earlier on that day Barclaytrust (Suisse) had sent to Mr Wirix a copy of the draft agreement approved by Condor on behalf of CIL. The shares had been acquired by Airone BV in March 1995, its registered office was in Amsterdam and the address of its principal place of business was the same as that of ABN AMRO. On the same day a management agreement was prepared between Eulalia and ABN AMRO providing that ABN AMRO would be responsible for the day to day management of Eulalia.

38. Also on that day Dibb Lupton Broomhead wrote to Price Waterhouse referring to 'those shares which are being sold by the Dutch BV and/or any Trustees' asking for a letter from the directors or the Trustees as appropriate formally instructing them to act on their behalf.

39. On 19 July at 1240 hours Price Waterhouse in Manchester faxed to Barclaytrust (Suisse) a draft agreement for the sale of CIL's shares in Holdings to Eulalia for £23,700,000 together

with a draft memorandum by Eulalia acknowledging a loan by CIL of that sum free of interest repayable on demand asking for any comments as soon as possible. The draft agreement provided that if Eulalia should transfer any shares within three years to a third party it should pay an additional consideration equal to 95 per cent of the excess over £23,700,000 less expenses.

40. On 23 July an agreement was signed in identical terms to the draft sale agreement apart from the insertion of the registered number of Eulalia and its address and the name and address of Barclaytrust (Suisse) S.A. for the purpose of notices to the vendor. It was executed by Condor on behalf of CIL and by L Fricot and P J Schmitz on behalf of Eulalia and for Condor by Anne Willing and another on behalf of CIL. The original was faxed copy. From the Fax print-offs it appears that it passed successively from Price Waterhouse Tax to Barclaytrust (Suisse) on 23 July at 1735 hours to ABN AMRO on 24 July at 1753 hours. Mr Fricot and Mr Schmitz had been authorised to sign on behalf of Eulalia at a board meeting on 23 July. The statement of Mr Wirix made after examining the files of ABN AMRO on Eulalia contains no reference to any material showing the basis of the price of £23.7 million or of any advice being received in respect of the transaction. Neither did Mr Pollock give evidence of any such material in the files of Barclaytrust (Suisse) or Condor. A letter from Barclaytrust (Suisse) of 24 July to ABN AMRO marked 'By Courier' referred to enclosing the agreement signed by CIL to be signed by Eulalia and returned. Another letter from Barclaytrust (Suisse) on that day to Price Waterhouse stated that Anne Willing would discuss with Mr Wood on his return the cost of sending the certificate to Holland; presumably this was the Holdings certificate. A further letter by ABN AMRO to Barclaytrust (Suisse) on 24 July stated that the duly signed agreement was forwarded therewith. On the same day ABN AMRO forwarded to Barclaytrust (Suisse) a resolution, the management agreement and an indemnity agreement stating that all had been signed. On 25 July a resolution by Barclaytrust (Suisse) for the trustees as ultimate beneficiary of Eulalia approved the management agreement between Eulalia and ABN AMRO; this provided for ABN AMRO to act as managing director and obliged it to 'act in accordance with the resolutions of the Board of Directors of the Company and policy instructions issued by the Shareholders of the Company'. No policy instructions were in fact issued."

14. The special commissioners directed themselves (at paragraph 126 of their decision) that events after 23 July 1996 were relevant only insofar as they evidenced where the central management and control of Eulalia was on that date. They addressed the position after 23 July 1996, shortly, at paragraphs 127 to 129. They observed that:

“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.”

And that:

“We infer . . . that Barclaytrust (Suisse) had not been kept up-to-date regarding the negotiations [for the sale on by Eulalia to the outside purchaser, Birthdays Group Ltd, of the shares in Holdings which Eulalia had acquired on 23 July 1996]”

The special commissioners' approach on the law

15. The special commissioners reminded themselves that, under English law, the residence of a company not incorporated in the United Kingdom was not determined by the law of the country of incorporation but by the central management and control test propounded by the House of Lords in *De Beers*. At paragraphs 117 they observed:

“117. 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.”

16. They pointed out (at paragraph 118) that in *Unit Construction Co* the parent company usurped the powers of the boards of the subsidiaries, “which stood aside and did not meet at all”. But that was not the position in the present case, as the special commissioners explained at paragraph 119 of their decision:

“119. 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.”

17. It is clear, from that paragraph, that the special commissioners did not see this as a case where the board of directors of Eulalia took no part in the implementation of the transfer of shares to that company on 23 July 1996. Nor did they think that that was the revenue’s contention. They set out the revenue’s case (as they understood it) at paragraph 120 of their decision:

“120. 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 [Untelrab Ltd v McGregor [1996] STC (SCD) 1]* although the burden of proof here is on the taxpayer.”

18. Starting from the position that, until 18 July 1996, Eulalia “can only have been resident in the Netherlands” (paragraph 129) the special commissioners reached the conclusion (at paragraph 145) that “the Appellants have failed to satisfy us that the central control and management was not in London from 18 July 1996 when CIL became its shareholder”. In order to analyse the reasoning which led the special commissioners to that conclusion it is, I think, necessary that I set out in this judgment paragraphs 130 to 145 of the special commissioners’ decision:

“130. 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.

131. 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.

132. 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).

133. 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.

134. 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 necessarily ceding its central management and control to the parent.

135. 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.

136. 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.

137. 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.

138. 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.

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

140. 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.

141. 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.

142. 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.

143. 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.

144. 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).

145 . . . 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.'"

19. The special commissioners' reasoning, as it appears from those paragraphs, may fairly be analysed as follows:

(1) From 18 July 1996 responsibility for the day to day management of Eulalia lay in ABN AMRO, as managing director. ABN AMRO had assumed that office and that responsibility at the instigation of Price Waterhouse.

(2) On 23 July 1996, Eulalia – a company with “minimal cash resources” – had agreed to purchase the Holdings shares from CIL at a price of £23.7 million, with provision for uplift. There was no evidence that any consideration was given by ABN AMRO to the question whether that was a proper price for Eulalia to pay for the Holdings shares. In particular, no explanation was given as to the basis upon which that price was fixed; and no advice was received upon which ABN AMRO could have relied.

(3) Nevertheless, Eulalia was purchasing the shares from the company (CIL) of which it was a wholly-owned subsidiary; and the purchase was funded by an interest free loan from CIL equal to the full amount of the purchase price. So, the purchase itself did not necessarily give rise to the conclusion that Eulalia had ceded central management and control to CIL. As the special commissioners put it (at paragraph 134): “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”.

(4) But there were two other factors to be taken into account. First, Eulalia had no business other than the acquisition, holding and sale of the shares in Holdings: “. . . 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”.

(5) Second, although there were “strong commercial reasons” for Eulalia to accept the offer to sell the shares in Holdings (in October 1996), no “real consideration” was given by ABN AMRO to the terms of that sale. ABN AMRO “simply fell in with the wishes of Mr Wood expressed by his advisers”.

(6) The failure of ABN AMRO to give any, or any sufficient “real” or “informed” consideration to the terms upon which the shares in Holdings were acquired by Eulalia on 23 July 1996 – or sold on to Birthdays Group Ltd in October 1996 – had the effect that “the actual effective decision that the documents be signed and executed” was not taken by ABN AMRO in Amsterdam.

20. The special commissioners had rejected the suggestion that “the actual effective decision that the documents be signed and executed” was taken by Barclaytrust (Suisse) in Geneva. They did not find it necessary to say where, or by whom, the “actual effective decision” was taken; but the inference is that they thought the decision was taken by one or other (or both) of Price Waterhouse and Mr Wood. Why they thought that the decision was taken in London (rather than in, say, Manchester) is not clear.
21. Having reached the conclusion that Mr and Mrs Wood had failed to satisfy them that, on the basis of the “central management and control” test, Eulalia was not resident in the United Kingdom, the special commissioners turned to consider the position under the test of “effective management” posed by article 4(3) of the double tax convention. They did so summarily, at paragraph 146 of their decision:

“146. This raises the question of where the place of effective management was situated. We accept Mr Brennan's submission . . . 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.”

That led them to conclude, at paragraph 147, that “the Appellant has not established that Eulalia was not resident in the United Kingdom for tax purposes.”

The appeal to the judge

22. It is important to keep in mind that an appeal from a decision of the special commissioners to the High Court – and any further appeal to this Court – is limited to cases in which the appellant is “dissatisfied in point of law” with that decision. The

jurisdiction of the High Court – and of this Court – under section 56A TMA 1970 is to “hear and determine any question of law” on such an appeal. The court’s task is to examine the decision “having regard to its knowledge of the relevant law”. In *Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14, Lord Radcliffe went on to say this (*ibid*, 36):

“If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination.”

23. That the judge approached his task with that guidance in mind appears from paragraph [37] of his judgment ([2005] EWHC 547 (Ch), [2005] STC 789, 833*c*):

“[37] 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).”

24. The judge’s reference, in that paragraph, to “the common law of corporate residence” is to the *De Beers* test of “central management and control”. The judge had set out that test at paragraph [21] of his judgment. At paragraphs [22] and [23] he had considered the subsequent decision of the House of Lords in *Unit Construction Co Ltd v Bullock (Inspector of Taxes)* [1960] AC 351 – which he described as “a very important case, but . . . a highly exceptional case in terms of the result”. As he explained:

“[22] . . . 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.

[23] . . . 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.”

25. At paragraph [25] of his judgment the judge had emphasised the distinction which he had drawn in paragraph [23]:

“[25] 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.”

And he went on to say this (*ibid*):

“ . . . 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.”

26. At paragraph [26] of his judgment the judge had examined four cases in which (as he said) the courts had recognised the considerations to which he had just alluded. Those cases were *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560, *Esquire Nominees Ltd v Commissioner of Taxation* (1971) 129 CLR 177, *New Zealand Forest Products Finance NV v Comr of Inland Revenue* [1995] 2 NZLR 357 and *Untelrab Ltd v McGregor (Inspector of Taxes)* [1996] STC (SCD) 1. He accepted, of course, that each of those cases was decided on its own facts; but “they do have some

common features which . . . are relevant to the present case”. He identified those features at paragraph [27]:

“[27] 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.”

And he observed that (*ibid*):

“ . . . 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.”

27. In my view the judge was correct in his analysis of the law. In seeking to determine where “central management and control” of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are “usurped” - in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an “outsider” in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an “outsider” is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function.

28. As I have said, the judge took the view that, on a proper application of the law to the facts, the only tenable conclusion for the special commissioners to reach was that, under the common law of corporate residence, Eulalia was resident in the Netherlands. He expressed that view at paragraph [37] of his judgment; and, after a full and careful analysis of the special commissioners' decision, he expressed the same view, again, at paragraph [72]. He observed that, if he were correct in that view, the appeal must succeed: it was unnecessary to consider whether the "place of effective management" test, required by article 4(3) of the double tax convention, would have led to a different conclusion.
29. Nevertheless, the judge did address that question. At paragraph [81] he said this:

"[81] . . . 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."

His reasons for reaching that conclusion are set out at paragraphs [73] to [80] of his judgment. Put shortly, he held that – even if it might be sufficient (in the context of the common law test) "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" - that would not do when it came to applying the detailed wording of article 4(3) of the double tax convention. In that context the revenue needed to identify, specifically, the place where the effective management of Eulalia was: ". . . it cannot be enough for the Revenue simply to say that they are not sure what the precise place of effective management was, but, whatever it was, it was situated somewhere in the United Kingdom".

30. The judge noted that the special commissioners had expressed their conclusion as to the central management and control of Eulalia (at paragraph 145 of their decision) in terms which suggested that they had based that conclusion on what they saw as the taxpayers' failure to discharge the onus which was placed upon them by section 50(6) TMA 1970. As the special commissioners had put it: "the Appellants have failed to satisfy us that the central control and management was not in London from 18 July 1996 when CIL became its shareholder". The judge accepted that the special commissioners had been correct, in principle, to approach the matter on the basis that it was for Mr and Mrs Wood to show that the amendments made to their self-assessments in October 2001 had been wrongly made. He said this, at paragraph [59] of his judgment:

"[59] 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.’”

But he went on (*ibid*):

“ . . . 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.”

The judge’s conclusion at paragraph [63] must be read with those observations in mind.

31. At paragraph [63] of his judgment the judge said this:

“[63] . . . 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.”

He could not have been intending to suggest, in that paragraph, that the special commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the special commissioners had been wrong in failing to appreciate that the evidential burden had passed to the revenue in the present case. He had set out his view of the position at paragraph [60]:

“[60] 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 [ABN AMRO] 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 [ABN AMRO] Trust [Mr Wirix]. 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 [ABN AMRO] 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.'"

32. As the judge pointed out, the revenue had produced no positive material to show where the central control and management of Eulalia was. It was not enough (as the judge thought) for the revenue to criticise the lack of evidence from some of those at Price Waterhouse and ABN AMRO who had been involved in the transaction in 1996. The special commissioners had said that they would not have been assisted, to any material extent, by oral evidence of events then some seven years in the past. Nor was it enough to demonstrate, as counsel for the revenue had done convincingly, "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". As the judge observed, those matters were not denied. Taken together they did not, of themselves, lead to the conclusion that Eulalia was resident in the United Kingdom.
33. In *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, Lord Brandon of Oakbrook pointed out (*ibid*, 955H-956A) that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: "He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden". But that is not a course which should be adopted unless "owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him

to take”. It is a feature of tax litigation - not least where the litigation arises from a tax avoidance scheme – that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The revenue will not have been party to the transaction; and will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the revenue’s investigatory powers. I have no doubt that there are cases in which the evidence before the special commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof which section 50(6) TMA 1970 has placed upon him. But, equally, I have no doubt that the judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases. There was no reason to think that the material facts had not been disclosed; and the commissioners did not hold that it was for that reason that they were unable to decide the question of residence. I agree with the judge that, in the present case, the “third alternative” to which Lord Brandon referred in *Rhesa Shipping* was not one which was properly open to the special commissioners.

34. I agree with the judge, also, that it would be wrong to treat the special commissioners’ decision as turning, solely, on their view that Mr and Mrs Wood had failed to discharge the burden of proof. The reasoning in paragraph 145 of the special commissioners’ decision goes beyond that. As the judge pointed out paragraph 145 contains the following observations:

“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 . . . the latter place is where ‘the central management and control actually abides.’”

In paragraphs [64] to [71] of his judgment the judge explained why he rejected that reasoning.

35. For my part I find the judge’s analysis compelling. At paragraphs [64] and [65] he said this:

“[64] . . . 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?”

[64] . . . What [the Commissioners] 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.”

36. The judge went on, at paragraph [66] to say this:

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

In addressing the question whether ABN AMRO had taken “effective decisions” the judge pointed out, at paragraph [68] of his judgment, that the two decisions “which matter are the decision in July 1996 that Eulalia should purchase the 49% holding in Holdings and the decisions in October 1996 that Eulalia should sell the holding”. He had rejected (at paragraph [67]) the suggestion that, if ABN AMRO did take those decisions, “because they were not informed decisions they . . . did not count”. He went on to say this:

“[68]. . . . If [ABN AMRO] 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. . . . [T]here may or may not be grounds for saying that [ABN AMRO] Trust could and should have gone into matters more deeply before it took the two critical decisions, but, given that it was [ABN AMRO] Trust which took those decisions, it remains the case that Eulalia was resident in the Netherlands.

[69]. In any case, the Commissioners overstate their criticisms of [ABN AMRO] 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 [ABN AMRO] 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 [ABN AMRO] 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.

[70] 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 [ABN AMRO] 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 [ABN AMRO] Trust about its negotiations; that there was at least one telephone conversation between Mr Senior of Price Waterhouse and a representative of [ABN AMRO] Trust; that Price Waterhouse recommended [ABN AMRO] Trust to accept the offer from the outside purchaser; that the normal practice within [ABN AMRO] Trust was for Mr Wirix to review the legal documentation and for [ABN AMRO] 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 [ABN AMRO] Trust's position; and that the transaction did not take place until two representatives of [ABN AMRO] Trust

specifically confirmed in writing to Price Waterhouse and to the solicitors acting on the sale that [ABN AMRO] Trust agreed with the draft agreements and would execute them on behalf of Eulalia.”

And, at paragraph [71] the judge rejected the suggestion that the participation of ABN AMRO was “merely going through the motions of passing and signing documents”.

37. As I have said, the judge held that the special commissioners’ decision on common law residence could not stand. On a proper understanding of the law the only conclusion which could be reached on the materials which were before the special commissioners was that, on the central management and control test, Eulalia was resident in the Netherlands. So he allowed the taxpayers’ appeal. He indicated that, had it been necessary for him to do so (which it was not), he would have held that Eulalia was resident in the Netherlands on the “place of effective management” test applicable under section 249 of the Finance Act 1994, read with article 4(3) of the double tax convention.

This appeal

38. The revenue appeals to this Court. The grounds of appeal are that the judge was not entitled to interfere with the decisions of the special commissioners either as to common law residence or as to residence under the double tax convention. Put shortly, it is said that the special commissioners had directed themselves correctly in point of law; and that, on an appeal under section 56A TMA 1970, there was no power to set aside their decision on the facts. Those grounds were developed in a lengthy written argument and in oral submissions; but, in substance, the revenue’s “short but critical submission” (expressed in paragraph 21 of the written argument) is that “the Judge simply stepped outside his proper role in interfering with the special commissioners’ conclusion”. It is said that: “The only basis on which he could properly interfere was *Edwards v Bairstow* [1956] AC 15 (*sic*), that the only true and reasonable conclusion was the opposite of that to which the Commissioners came. Even if (which is disputed) another tribunal might properly have come to a different decision, the Special Commissioners decision was not open to reversal on this ground.”
39. As I have said, the judge was well aware of the limitations imposed on his jurisdiction by section 56A TMA 1970; and of the guidance given by the House of Lords in *Edwards v Bairstow* [1956] AC 14, 36. He referred, at paragraph [37] of his judgment, to the need to be satisfied 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”. The judge held (at paragraphs [37] and [72] of his judgment) that on a proper application of the law to the facts the only correct conclusion was that Eulalia was resident in the Netherlands. In my view it cannot be said that the judge usurped the fact-finding role which the legislature has entrusted to the special commissioners. The question for this Court is whether the judge was correct to hold that the conclusion which the special commissioners had reached on the facts which they had found was a conclusion which was not open to them in law. If he were correct in that, he was right to allow the appeal. And, if he were correct to hold that the only conclusion open to the special

commissioners was that Eulalia was resident in the Netherlands, effect should be given to that by setting aside the amendments made on 21 October 2001.

40. In my view the judge was correct to hold that the only conclusion open to the special commissioners, on the facts which they had found, was that Eulalia was resident in the Netherlands. The special commissioners made two findings of fact which, as it seems to me, lead necessarily to that conclusion. The first (at paragraph 119 of their decision) was that “the directors of Eulalia . . . were not by-passed nor did they stand aside since their representatives signed or executed the documents”. That finding takes this case outside the class exemplified by the facts in *Unit Construction Co Ltd v Bullock*. The second - implicit in the finding that “their representatives signed or executed the documents”, but made explicit in the observation (at paragraph 134 of the special commissioners’ decision) that “From the viewpoint of Eulalia we find nothing surprising in the fact that its directors accepted the agreement prepared by Price Waterhouse . . .” - was that ABN AMRO (the managing director of Eulalia), through Mr Fricot and Mr Schmitz, did sign and execute the documents (including the purchase agreement); and so must, in fact, have decided to do so.
41. Those two facts make it impossible to treat this case as one in which ABN AMRO, as managing director of Eulalia, made no decision. There was no evidence that Price Waterhouse (or anyone else) dictated the decision which ABN AMRO was to make; although, as the special commissioners and the judge pointed out, Price Waterhouse intended and expected that ABN AMRO would make the decisions which it did make. There was no basis for an inference that Price Waterhouse (or anyone else) dictated to ABN AMRO what decision it should take; and it is inherently improbable that a major bank (or its trust company) would allow its actions to be dictated by a client’s professional advisers (however eminent). On a true analysis the position was that there was no reason why ABN AMRO should not decide to accept (on behalf of Eulalia) the terms upon which the Holdings shares were offered for sale by CIL; and ample reason why it should do as it was expected it would.
42. The legal flaw in the special commissioners’ approach, as it seems to me, was to treat the decision that was made by ABN AMRO, as managing director of Eulalia, as if it were not an “effective decision” by a constitutional organ exercising management and control. If – as the special commissioners found at paragraph 136 of their decision – “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 no basis for refusing to treat a decision that was made in connection with that activity as an “effective decision” on the ground that ABN AMRO made no other decisions. As the judge pointed out, there were two critical decisions for Eulalia to make – the decision to purchase the Holdings shares in July 1996 and the decision to sell those shares in October 1996 – and both decisions were, in fact, made by ABN AMRO as managing director. There was nothing else to manage.
43. A further flaw in the special commissioners’ approach was to treat the decisions which were made by ABN AMRO as not “effective decisions” because they were reached without proper information or consideration. But a management decision does not cease to be a management decision because it might have been taken on fuller information; or even, as it seems to me, because it was taken in circumstances which might put the director at risk of an allegation of breach of duty. Ill-informed or

ill-advised decisions taken in the management of a company remain management decisions. I should add (in fairness to ABN AMRO) that it is not said that, with fuller information, further consideration or independent professional advice, the decisions in the present case as to the purchase and sale of the Holdings shares would have differed from the decisions actually taken; but nothing turns on that. The decisions which were taken would have been no less “effective decisions” if (on the facts) different decisions would have been reached if ABN AMRO had approached the decision making process with greater circumspection.

44. For those reasons I would uphold the judge’s decision to reverse the special commissioners’ finding as to the residence of Eulalia on the basis of the central management and control test. That makes it unnecessary for me to consider what the position would have been if the effective place of management test posed by the double tax convention had become relevant. I have already indicated that I find it very difficult to see how, in the circumstances of this case, the two tests could lead to different answers.

Conclusion

45. I would dismiss this appeal. But, subject to any further submissions that the parties may wish to make, I would vary the order of 8 April 2005 by adding a direction that the amendments made on 21 October 2001 to the tax-payers’ self-assessments be set aside.

Lord Justice Moore-Bick:

46. I agree.

Sir Christopher Staughton:

47. I wholly agree with the judgment of Lord Justice Chadwick. Eulalia Holding BV was a Netherlands company in the sense that it was incorporated there. But the Inland Revenue maintains that it was resident in the United Kingdom. If that is right, capital gains tax in a very large sum was payable, directly or indirectly, by Mr and Mrs Wood. But in my view the Inland Revenue was wrong.
48. The leading case on residence for the purpose of income tax, and of capital gains tax apparently, is De Beers Consolidated Mines Ltd v. Howe (Surveyor of Taxes) (1906) AC 455. Lord Loreburn (at p. 458) said this:

“In applying the conception of a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of

management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad.... I regard that as the true rule, and the real business is carried on where the central management and control actual abides. ”

The sole director of Eulalia was AA Trust, which was part of a well-known Netherlands banking and financial group ABN AMRO. AA Trust entered into the agreement to buy the shares from CIL, and into the later agreement to sell the shares. Those decisions were taken in Amsterdam.

49. Whether Eulalia was resident in the United Kingdom was not a question of fact in this case. It was not a question which one witness might answer Yes, and another witness might answer No. The available facts were sufficient to enable the judge to decide whether, in law, Eulalia was resident in the United Kingdom. The only answer was that Eulalia was in the Netherlands. There might have been further facts; and if they had been proved, they might have contradicted the facts previously established. As it was, the facts that were proved showed that Eulalia was resident in the Netherlands.

50. There was discussion at the hearing as to what happened “in real life”, where there were “real decisions”, what happened in “a real sense”, and whether all that happened was “a piece of paper”. I decline to use such language so as to avoid the effect of what actually happened: the transaction was conducted by AA Trust as the director of Eulalia and in the Netherlands. AA Trust might have had every incentive to carry it out; but it had the right to refuse if it wished, and had the power to do so. In my judgment Eulalia was and remained in the Netherlands, and was not resident in the United Kingdom. I would dismiss the appeal.