[2017] UKFTT 0565 (TC)

TC06007

Appeal number: TC/2014/06370
TC/2014/06371
TC/2014/06372
TC/2014/06376
TC/2014/06382
TC/2014/06381
TC/2014/06380

CORPORATION TAX – whether the appellant was resident outside the UK – held central control and management was exercised in the UK – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEVELOPMENT SECURITIES (No 9) LIMITED **Appellants**

DEVELOPMENT SECURITIES PLC

DEVELOPMENT SECURITIES (No. 18) LIMITED

DEVELOPMENT SECURITIES (No. 25) LIMITED

DS JERSEY (No.1) LIMITED

DS JERSEY (No.2) LIMITED

DS JERSEY (No. 3) LIMITED

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER: MRS JANET WILKINS

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 11 to 22 July 2016

Mr Sam Grodzinski QC and Mr Julian Hickey, counsel, for the Appellant

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

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DECISION

1. The appellants have appealed against decisions made by HMRC in October 2014, the overall effect of which is to deny the appellants the benefit of various capital loss relief provisions in the Taxation of Chargeable Gains Act 1992 ("**TCGA**") on the disposal by the appellant in 2004 of certain assets. It is not disputed that the assets were disposed of as part of the implementation of a plan designed by PricewaterhouseCoopers ("**PwC**") to enable the property development and investment group of companies of which Development Securities Plc is a member ("**DS Plc**" and, as regards the group, "**DSG**") to crystallise latent capital losses on the assets on the basis that indexation would in effect be comprised in the loss. It was essential to the success of the planning that the Jersey companies were resident in Jersey and not the UK in the period from incorporation until 20 July 2004. It is common ground that the only issue is whether the relevant Jersey companies were UK tax resident in the relevant period.

Outline of the transaction and the issue

2. DS Jersey (No. 1) Limited, DS Jersey (No. 2) Limited and DS Jersey (No. 3) Limited (respectively "**DS1**", "**DS2**" and "**DS3**" and together the "**Jersey companies**") were incorporated in Jersey on 10 June 2004 as subsidiaries of DS Plc. The companies were set up by Volaw Trust and Corporate Services Limited ("**Volaw**"), a Jersey company associated with the Jersey law firm, Voisin & Co. The initial shareholders were nominees provided by Volaw, who held the shares for DS Plc as the beneficial owner.

3. The board of directors of each of the Jersey companies (the "**board**") comprised three Jersey based and tax resident directors provided by Volaw: Mr Simon Perchard, Mr Trevor Norman and Mr Robert Christensen; and a UK based and tax resident director, Mr Stephen Lanes, who was the company secretary of DSG.

4. The Jersey companies each held board meetings in Jersey on 11 June, 25 June, 12 July and 20 July 2004. In outline, in respect of each of the Jersey companies:

(1) At the first meeting the proposal was put to the board, as outlined by Mr Lanes, that DSG UK member companies would grant them call options which, if certain conditions were satisfied, would entitle DS1 to purchase shares in certain property owning companies (the "**L&R companies**") and DS2 and DS3 respectively to purchase properties at Sheffield and Bexleyheath (the "**properties**"). It was envisaged that, if the directors decided to exercise the option, DS Plc may be willing to make a capital contribution to assist in the purchase of the relevant asset.

(2) On 25 June 2004 the board agreed to execute the call options having received a resolution from the nominee shareholders (issued on the instruction of DS Plc as beneficial owner) approving the transaction and notifying the board it was for the benefit of the companies and a letter of intent from DS Plc that it would consider making a capital contribution (although there was no contractual commitment to do so). The conditions for the exercise of the options included that the FTSE Real Estate Total Return Index closed at 2082 or

above for at least five consecutive days in a specified period (the "**FTSE condition**") and approval by DS Plc.

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

(2) On 20 July 2004 the Jersey directors resigned and UK directors were appointed with a view to the Jersey companies becoming UK tax resident from that time. Shortly after, once it was considered that the Jersey companies were UK tax resident, steps were taken for the Jersey companies to sell or dispose of the relevant assets thereby triggering a capital loss as set out below.

5. In each case the relevant asset acquired by each of the Jersey companies on exercise of the options was standing at a loss for capital gains purposes as the market value of the asset had fallen since it was acquired by DSG. Under the capital gains rules, indexation (an allowance for inflation) does not increase the amount of a capital loss which can be off-set against chargeable gains for UK tax purposes. The idea of the scheme was to enable DSG to achieve an increased capital loss by including the indexation element.

6. In outline, to achieve this, the price payable by the Jersey companies on exercise of the option was an amount equal to the relevant DSG company's historic base cost in the relevant asset for capital gains purposes (broadly, being the amount originally paid for the asset) plus indexation accrued to that time. This meant that the price was considerably in excess of the then market value of the asset. It is not disputed that, on the assumption that the Jersey companies were non-UK resident at the relevant time, the UK members of DSG did not realise any tax charge on the sale of the assets to the Jersey companies and the Jersey companies acquired the assets for capital gains purposes for the actual amount paid rather than by reference to market value. Therefore, when the Jersey companies later sold the assets, they were standing at a larger loss, as increased by the indexation element. The amount of money DSG stood to save from the planning was around £8 million (although significantly less than that was saved in the end). The total price paid for the acquisition of the assets (as funded by DS Plc) was £24,495,000.

7. It is common ground that a company is resident where the central management and control ("**CMC**") is carried out as that test has been set out in case law. In summary:

(1) The appellant argued that CMC of Jersey companies was exercised in Jersey on the basis that the board of directors of the Jersey companies, as the organ constitutionally entitled take such decisions, took all material decisions, in particular, the key decisions, of whether to enter into and exercise the options, at board meetings in Jersey.

(2) The appellant considered it is clear from the decisions of the High Court and Court of Appeal in *Wood & Anor v HM Inspector of Taxes* ([2005] EWHC

547 (Ch); [2006] EWCA Civ 26 [2006] STC 443) that it is the directors who exercise CMC at board meetings unless they have been usurped, in the sense that control has been exercised independently of, or without regard to them or their decisions are essentially "dictated" by another party. A person (whether a parent company or advisers) who merely proposes, advises on, and influences decisions of the directors is not thereby dictating to the directors or usurping their role. That was all that it can be said that any of the UK parties involved were doing in this case.

(3) HMRC took the view that CMC of the Jersey companies was in the UK on the basis that (a) there was a scheme of management in the UK looking at the activities of the relevant persons at DSG, including Mr Lanes, and the UK advisers or (b) that the relevant decisions, which in their view extended beyond those to enter into and exercise the options, were taken in the UK by the UK parties (relying, in particular, on the decisions in the Court of Appeal in *HM Revenue and Customs v Smallwood & Anor* [2010] EWCA Civ 778 [2010] STC 2045 and in the tribunal in *Laerstate BV v Revenue & Customs* [2009] UKFTT 209 (TC)). They considered that the appellant was wrong to point only to the decisions taken at board meetings. In fact a much broader enquiry is required of all of the activities in the relevant period.

(4) In addition, HMRC argued that if it is found that the companies were not solely resident in the UK, there were sufficient acts taking place in the UK for them to be regarded as resident both in the UK and Jersey (referring to *Swedish Central Railway Company* 9 TC, *Union Corporation, Ltd v Inland Revenue; (2) Johannesburg Consolidated Investment Co, Ltd v Inland Revenue; (3) Trinidad Leaseholds, Ltd v Inland Revenue* [1953] UKHL TC 34 207 and *Bullock (H M Inspector of Taxes) v The Unit Construction Co, Ltd* [1959] UKHL TC 38 712).

Facts and evidence

8. We have based our findings of fact on the documents in the bundles evidencing the transactions, board meetings and related correspondence and the witness evidence of the Jersey directors and Mr Michael Marx of DS Plc, all of whom attended the hearing and were cross-examined. We also received a letter from Ms Anne Hembry, who was an administrator at Volaw at the relevant time. We have considered this but have attached little weight to it given that she did not attend the hearing and therefore could not be cross examined. Each witness who attended the hearing gave evidence without hearing the evidence of the other witnesses.

9. The Jersey directors each have many years of experience of acting as professional directors in a variety of contexts. We found they tried to answer questions on the relevant events as best they could but, as they acknowledged, given the considerable lapse of time since the transaction took place, they had little, if any, actual recollection of the specifics of the relevant events. Their evidence was largely based on their interpretation of the available documents, in particular, the typed board minutes and Ms Hembry's handwritten notes relating to the board meetings of the Jersey companies, and how they would generally conduct matters such as this. So, whilst we accept their evidence as to their general practices, their evidence sheds little further light on what actually occurred and was discussed by the board at the relevant time as evidenced in the written documents. We found Mr Marx to be a credible

witness who was clear and consistent. He seemed to have some actual recollection of the transaction certainly as regards his role in the overall planning and strategy albeit (as is to be expected at this stage) not of the specifics. We have commented further on our approach to the evidence in the facts section below.

Facts - Parties involved

DSG personnel

10. The main personnel involved in the transaction in the DSG group were Mr Marx, Mr Chris Christofi ("**CC**") and Mr Lanes all of whom were UK tax resident at the relevant time. In 2004:

(1) Mr Marx was a member of the board of directors of DS Plc and other DSG companies (as well as of various other non-DSG companies). He was qualified as an accountant. He was the driving force at DSG behind the decision to implement the tax planning.

(2) CC was the financial controller of DSG. He reported to, and took instructions from, Mr Marx, as Mr Marx accepted, as his "right hand man, as far as his function was concerned". Mr Marx described him as a "first class chap" who was very much his "delegated support" but "by no means a primary actor". CC was a member of the DSG team involved in the tax planning and clearly took a very active role as set out below.

(3) Mr Lanes was DSG's company secretary who also reported to Mr Marx. Mr Marx described his role at DSG as being to ensure the proper administration and governance of the company secretarial desk of the group. He regarded Mr Lanes as "a competent and experienced company secretary" whom he "trusted to ensure that the appropriate standards of company secretarial administration and corporate governance were maintained across [DSG]". He described his role within DSG as almost entirely concerned with administration of "company secretarial matters" such as assembling documents for presentation to the different boards, ensuring proper filings were made at Companies' House, the preparation of board minutes and dealing with professional insurance indemnities. Mr Lanes was qualified as an accountant.

11. Mr Marx and Mr Lanes had adjoining offices and shared a secretary. CC was located in an open plan area outside Mr Marx's office. They all worked closely together as a "team" and Mr Marx said he was "supervising" Mr Lanes and CC.

12. Mr Marx said he was close to what was going on as regards the transactions in issue at least up to around 25 June 2004 when a board meeting of DS Plc took place. By closely involved he meant as far as the DS Plc aspects were concerned and making sure that the presentation of everything went to the main board correctly. He was definitely aware of what was happening but even when he was closely involved the project did not occupy a great deal of his time on a day to day basis.

Volaw personnel

13. Volaw is a Jersey company, incorporated in 1982, which carries out various trust, private client, and financial work for clients in Jersey. As at 2004 Volaw had at least 1,300 clients of which around two thirds were companies (as opposed to trusts)

and employed around 15 to 20 administrative staff, including Ms Anne Hembry and Ms Tracey Leigh. Ms Hembry's role is described further below.

14. Mr Christensen joined Volaw, from Voisin & Co, when it was incorporated in 1982. As at 2004, he was the managing director of Volaw and also acted as director of client companies. Much of his work involved special purpose real estate vehicles; he was described as a "director of a number of SPVs, collective investment funds as well as other investment and finance companies".

15. Mr Perchard and Mr Norman had been at Volaw since 1998 and 1988 respectively. In 2004 they were both directors of client administration and their primary responsibility was described as "the management of [Volaw's] private client administration team". They both also had roles in relation to client banking relationships and Volaw's in-house training programme and Mr Norman was a director of IT. Both of them also had considerable experience in real estate transactions. In addition to attending board meetings, a large part of Mr Perchard's day was spent "working with administrators on client handling affairs".

16. Mr Norman and Mr Perchard were questioned about how many directorships they held in 2004. They could not really remember but to give an idea Mr Perchard thought that at present he was a director of at least 40 to 50 client companies of a range of types and that he would attend roughly 25 to 30 board meetings per month. Mr Norman thought, although it was something of a guess, that as at 2004 he was a director of around 300 to 400 companies and that he could have been attending as many as 12 to 15 meetings a month. They both noted that some of the companies were within the same group. There was some suggestion from HMRC that the fact the Jersey directors held a large number of other positions meant they were not up to speed and focussed on these transactions. We draw no inference to that effect from the limited information available on this point.

PwC and Landwell personnel

17. The main members of the PwC team were Mr Keith Mansfield (the lead partner), Mr Victor Clarendon ("**VC**"), Mr Daniel Musikant ("**DM**") and Ms Rebecca Lewis ("**RL**"). The law firm associated with PwC at that time, Landwell, also provided advice acting primarily through Ms Cynthia Chan.

Initiation of the proposal - PwC's tax planning paper

18. PwC carried out a review of DSG's overall structure and tax affairs which culminated in advice on how certain latent capital losses on assets held within DSG could be utilised as set out in a paper dated 6 April 2004. PwC's advice was that these capital losses could be used to reduce the taxation on the potential capital gains that DSG hoped to make in that accounting year. The essential elements of the planning set out in the paper reflected the steps which were eventually implemented.

19. PwC noted the following in the paper:

(1) The planning was "technically complex" and it would "require precise implementation and meticulous attention to detail" such that the steps must be "carefully implemented" under PwC's "close supervision" and "great care must be taken in the course of implementation". HMRC were "almost certain" to enquire into tax returns of the companies carrying out the scheme

(2) "As the planning involves the use of a subsidiary company controlled by Jersey resident directors, which will hold assets of [DSG], and through which cash must flow, corporate governance and bank/cash-flow issues need to be considered at an early stage of implementation".

(3) As there was "an absence of corporate benefit" to the Jersey companies in acquiring the assets, the directors would:

> "need to satisfy themselves that the exercise of the call option would not prejudice any creditor of the company, nor prejudice the solvency or capital maintenance of [the Jersey companies]. In the absence of corporate benefit, the directors… would need to go through a Jersey law "Article 74(2) process" whereby the directors would first be required to obtain prior shareholder approval to enter into the transaction proposed. They would then need to satisfy themselves as to the company's on-going solvency. Following that process could be detrimental to the tax planning since it would require the shareholders …to influence a decision of the Jersey Board. This could compromise the [CMC] test."

(4) It was noted that it was "essential" that the option was a "genuine option" which might or might not be exercised:

> "The exercise conditions in the option agreement will include a condition that is outside the control of [DSG], such that there is a practical likelihood that the option will not be exercised. [DSG] should be aware that there would be a definite, although relatively low, chance that it will not be possible to exercise the option and the planning could not proceed……The [call] option must be such that its exercise is not inevitable at the time of grant. This is to protect against an Inland Revenue challenge under the Furniss v Dawson principle".

(5) It was "vital that where a company is required to be Jersey resident, all the necessary procedures are put in place and followed to ensure that the companies cannot be shown to be UK resident" and that "suitably qualified" individuals needed to be identified as directors.

(6) Having referred to the intention that the option would only be exercisable if the FTSE real estate index closed above a certain level for a set number of consecutive days, PwC also advised: "In addition, the essence of an option is that it confers on the grantee the real choice of whether to exercise or not. Assuming that [the Jersey company] is properly managed and controlled in Jersey, the company will have a choice to exercise the option or not."

20. As regards the residence issue PwC advised that "all board meetings need to be held in Jersey" but that, even if board meetings were held in Jersey, other factors could potentially render the companies UK resident. They advised that:

(1) The UK directors "should not be in a position to be said to be running the Jersey companies whilst in the UK" and there must be no "decisions made in the UK by the UK based directors on the affairs of [the Jersey companies]" and no "attendance by directors at [Jersey company] board meetings by way of telephone calls from the UK".

(2) There should be "no evidence to show the decisions made by the overseas company are initiated from the UK", shareholders must not "give instructions to the directors as to how they are to carry out their duties" and a "dominant personality" shareholder or director must not influence the board.

(3) The local directors must "apply their minds to "suggestions" from the parent company and form an independent judgment before implementing the parent's wishes" and must exercise "their discretion in coming to decisions". PwC also advised that "the reasons for accepting or rejecting the advice should reflect the interests of the company itself and not merely its parent company's interests".

21. Mr Marx said that he thought that when the planning was described by PwC as complex that meant in terms of the interaction of the tax legislation with the required steps not that those steps were complex in themselves. The four or five steps involved could not be described as complex; even "his relatively untrained mind" could understand those steps.

Discussions in April and May 2004

22. Throughout the remainder of April and in May 2004, there were ongoing discussions between Mr Marx, CC and PwC regarding the development of the plan which became known as Project Peru. Mr Marx gave evidence that the decision to pursue the tax planning was his; he "took responsibility" for the planning on behalf of DSG. He agreed that DSG's meetings and calls with PwC throughout this period to discuss tax planning would have been "strategic" in nature, their plan being a strategic overarching plan. As noted, Mr Marx was closely involved in what was going on with the transactions although it did not take much of his time on a day to day basis. He said that he would have "been monitoring the steps that were being taken" and described himself as "supervising" the implementation of the project.

23. It appears that Mr Lanes became actively involved in early May 2004. On 6 and 7 May 2004:

(1) DM of PwC emailed CC, with a copy to Mr Lanes, Mr Marx and others at PwC, with the names of counsel to consult about the project. At CC's request, the names of both UK counsel and Jersey counsel were put forward. PwC also provided "a draft implementation timetable" for the project. Later that day, CC emailed Mr Lanes asking whether the proposed Jersey counsel, Mr Bill Gibbons of Voisin, was familiar to DSG.

(2) The following day PwC sent an email to CC (copied to Mr Marx) regarding fee proposals in which they noted they were "part way though" the planning and were arranging a conference with UK and Jersey counsel "in the next two weeks at which the planning will be discussed".

24. It was put to Mr Marx that the email correspondence showed that from the early stages CC had a central role with PwC in the origins of this strategic tax planning. He said CC had an important role. He thought it was a team effort between him and CC.

25. At around this time, an "implementation team" was formed, made up of Mr Marx, CC and Mr Lanes and various persons at PwC and Landwell. A weekly conference call was scheduled and, on occasion, calls were also held bi-weekly. There were sometimes informal calls and/or meetings.

26. It was put to Mr Marx that the fact a significant team was required demonstrated that this was not a straightforward project. He said it required implementation with great care and "that these people were involved in order to ensure that whatever was done and implemented was done with a great deal of care so that it would succeed against any challenge from HMRC".

Correspondence in early June 2004

Meeting on 1 June 2004

27. It appears that Mr Lanes was identified as a director of the Jersey companies by this time if not before. He attended meetings with Landwell on 1 June 2004 and with DM of PwC on 8 June 2004. At the meeting on 1 June 2004, two senior members of DSG were also present (as noted in the documents) which, as Mr Marx agreed, were likely to have been him and CC although he could not remember. CC attended the second meeting; on 2 June 2004, CC emailed Mr Lanes saying "it is probably a good idea if I sit in on your meeting".

28. Mr Marx said he thought it was going a little bit far to suggest that Mr Lanes was acting as the intended director of the Jersey companies at the stage of the meeting on 1 June. He said "that may have been far from their minds at that time. He could have been there in the totality of ….in the implementation of these steps. He may also have been there as company secretary of the group". Mr Marx had no specific recollection but he thought he would have been there as part of the "holistic" planning of the exercise.

Critical Issues List

29. On 2 June 2004, PwC sent an email to the team stating that they would shortly be circulating a "critical issues list", setting out matters to be dealt with to get the project properly underway and summarising the main steps which would be needed, including the following:

> (1) On 9 June 2004 the Jersey companies would be incorporated. On 10 or 11 June 2004 there would need to be an initial meeting of the Jersey boards to consider the option agreement and general management matters in relation to starting the Jersey companies.
>
> (2) The boards of directors "could then formulate any pertinent questions for the UK group/PwC/Landwell".
>
> (3) PwC thought "it is important that they [the Jersey directors], instruct Counsel, albeit that we expect Landwell will be able to provide them with draft instructions for the first meeting. The Jersey-based directors are, I believe, being contacted through the Jersey solicitors."

(4) The directors "should not simply be partners or employees" in the relevant Jersey firm but rather "professional [administrators] with commercial experience".

(5) Then "a second meeting could then be held early in the next week (commencing 14 June) "with Stephen Lanes attending to formally decide on the course to take".

(6) PwC said that they needed "to try to book counsel for the week commencing 14 June" and "ensure if the Jersey directors do consider all this appropriate that they can then formally enter the option [] week."

(7) It was noted that timings "may be a little tight", but PwC wanted to take "all steps we can to ensure the planning can be effected as close to 30 June as possible" to avoid "the risk of the opportunity being missed".

30. Mr Marx agreed that "the driver for the speed" of the proposed planning was a concern that DSG would otherwise have to notify HMRC of the schemes as this was just before the DOTAS regime was introduced. However, on 25 May 2004, PwC advised CC that they would be "completely open with the Inland Revenue in our disclosure but rely upon the technical argument to support the tax treatment…"

31. On 2 June 2004, there was correspondence indicating that the team was close to proceeding to engage Jersey directors and were putting together what they thought the Jersey directors would need to see:

(1) CC emailed PwC and Mr Lanes (copying in Mr Marx) stating "presumably we need to provide information to the Jersey directors ahead of Stephen's meeting there – will you/Landwell deal with this".

(2) PwC responded (copying Mr Marx and Mr Lanes) stating "I think it would be a good idea to pull together information they [the Jersey directors] may want. My experience is that professional directors in places [like] Jersey often want more than you expect – and may even want changes to the agreements. This is all entirely appropriate".

(3) PwC then circulated the critical issues for DSG's "urgent attention" which comprised a suggested action list for each person with suggested dates for completion again setting out scheduled dates for each step to take place including that by 9 June 2004 the Jersey companies would be incorporated, with a "suitably qualified board of directors" and the first board meeting would be on 10 or 11 June 2004.

32. Shortly after receiving the above email CC requested extracts of tax legislation relating to the scheme from PwC. Mr Marx agreed that this request showed "close involvement" by CC in the implementation process. He also agreed that the timetable of events set out in PwC's critical issues list above was "extremely tight", particularly in terms of identifying and appointing Jersey directors one day before it was envisaged the Jersey board of directors would meet.

Information for Jersey companies

33. On 3 June 2004, CC emailed Mr Lanes regarding the provision of information to the Jersey directors. He said that PwC would think about what may be required for discussion the following week and in the meantime he would obtain copies of the accounts for the L&R companies and valuation details for the properties. These documents were later provided to the Jersey directors, as referred to in Miss Hembry's notes of the first board meeting of the Jersey companies on 11 June 2004.

Booking of conference with UK counsel

34. At around this time, PwC/Landwell booked a conference with UK corporate law counsel for 15 June 2004 at 3pm. Instructions to counsel were drafted by Landwell and later sent out in DS Plc's name. Mr Perchard said that it was an "important matter for the board to know what the counsel's opinion was". He agreed that it was the role of directors of a company to choose and appoint or authorise the appointment of their legal advisors, and said that the board of directors of the Jersey companies "were comfortable to contact them".

Meeting on 8 June 2004

35. On 7 and 8 June 2004, PwC circulated a number of papers to Mr Marx, CC and Mr Lanes on the proposal which it seems likely were considered at the meeting on 8 June 2004 :

(1) On 7 June DM sent an email attaching (a) guidelines on the matters and documents that "you may wish to consider for discussions at the board meetings of the Jersey companies" such as documents detailing the ownership of the properties and the draft call option agreements, (b) a "suggested agenda for discussion at the first board meeting" with suggested items such as "whether advice will be obtained from company law Counsel as to whether the proposed transactions may be ultra vires" and "opening of bank accounts and which bank will be used" and (c) guidelines from PwC on residence issues.

(2) The residence guidelines included that "the appointment of the directors should reflect the commercial needs of the company – each director should have a necessary role and their duties/responsibilities should be clearly outlined", that "there should be evidence that the board of the Jersey company can make decisions without referral to UK resident persons" and "any communications to DS plc should be phrased as giving/seeking information rather than asking for approval". Mr Marx agreed that PwC were advising Mr Lanes as to the language that he should use in his role as a member of the board of directors.

(3) DM stated in the email that "we will build on the contents of these guidelines in our meeting tomorrow", being the meeting of 8 June 2004.

(4) On 8 June 2004 PwC sent a revised timetable and documents concerning the cash movements.

36. Mr Marx agreed that the above guidelines and advice were sent by PwC to Mr Lanes in anticipation of his becoming a director of the Jersey companies and that Mr Lanes may in part have been attending the meeting of 8 June 2004 in that capacity. However, he disagreed that, given the content of the correspondence from PwC in the run up to this meeting, the subject matter of the meeting was Mr Lanes' role as a

director of the Jersey companies. He thought that PwC's guidance as regards residence was meant as a generic guide for the Jersey board not just for Mr Lanes. The meeting was to brief Mr Lanes as to what he might expect the role of the Jersey board to be once it was constituted. He thought the papers produced by PwC indicated that they were preparations for Mr Lanes so that he could guide, help, and assist the Jersey directors, once the Jersey companies were incorporated, as to the subject matter that they would want to discuss and as to the documents they may want to seek. He did not know why PwC/Mr Lanes did not wait a day or two and have a meeting with the Jersey directors themselves but he did not see why "if you wanted to be thorough and have good preparation that there was any reasons why you would not want to go down this route".

37. Mr Marx agreed that CC would have been sitting in on this meeting as his "right-hand man" and that the meeting would have involved a "detailed discussion of the implementation" of the proposed transactions and discussions about strategy "with regard to the implementation of the tax planning".

38. Mr Marx agreed that the cash movements in Project Peru were "fundamental" to the transactions that were proposed to be entered into by the Jersey companies. It was, as he agreed, "a complicated transfer" and "complex transaction". He disagreed, however, that these matters or providing an agenda and guidelines could be described as strategic. As regards the cash flows, he said that the matters being discussed were: "detailed matters, but … I cannot see anything in there that's necessarily strategic. Cash analysis, revised calculations of costs, these seem to be matters of detail, maybe for detailed accuracy for future cash flows rather than strategic". He described the agenda as a preparatory document for a coming meeting. The agenda was not a rigid determination as it would be up to the individual directors to decide what they wanted to discuss at the meeting; the draft agenda was a proposal as to what was to be covered. These were matters of detail of administration – they did not preclude the directors of the Jersey companies from adding any items.

39. Mr Marx confirmed that at this stage his own involvement was monitoring what was going on. He was happy the matter was being dealt with by extremely competent people in the PwC and legal advisory team. He paid attention and to that extent he was involved.

40. We consider that from the above it is likely that Mr Lanes was fully briefed at the meetings of 1 and 8 June 2004 on the plan including as regards what PwC regarded as necessary for the Jersey companies to be non-UK resident and the cash flow mechanics/issues. They were advising Mr Lanes on what it was necessary for him and the Jersey board members to do in order for the plan to be implemented successfully. We accept that making Mr Lanes fully aware of what was expected does not amount to PwC giving orders to the Jersey directors albeit Mr Lanes may well have been expected to pass the information on to the Jersey directors/and do what he could to ensure they followed the guidelines.

Implementation phase - events on 9 June 2004

41. The first written record of any contact between DSG and Volaw is correspondence on 9 June 2004 between the Volaw administrators and Mr Lanes

regarding the set-up of the new Jersey companies, opening of bank accounts and arrangements for the first board meeting on 11 June 2004.

42. In summary, the following took place on 9 June 2004:

(1) DM sent CC, Mr Marx and Mr Lanes (copied to the implementation team) a revised steps paper PwC intended to send to UK counsel together with their notes of conference. DSG were asked to provide "any comments on the draft note of conference (provided at yesterday's meeting) as soon as possible". CC responded to DM thanking him for the revised steps paper and noting he awaited the board papers for the Jersey and DS Plc boards.

(2) Mr Lanes initially contacted Ms Leigh at Volaw stating that he needed to open bank accounts for the proposed Jersey companies and that Barclays in Jersey had advised him "that it is easier for Volaw and Barclays to arrange the documentation for opening accounts". She responded that: "this will be done ready for tabling at the meeting on Friday [11 June 2004]". Ms Hembry later followed this up by email stating that she would ask Mr Cathan of Barclays to send her the account opening documentation "so we can complete them at the meeting if required". Mr Lanes replied further explaining that large tranches of money "will be deposited into the account and then immediately withdrawn back to Barclays, London, as consideration for the acquisition of the [assets] which are to be acquired". He said he understood that opening the account via Volaw was quicker than doing it remotely himself and "if so, please could you arrange for the appropriate documentation to be provided at Friday's board meeting so we can execute".

(3) Ms Hembry also said to Mr Lanes that she had sent Ms Chan a copy of a draft agenda asking for "her suggestions for any amendments" and in response he said that he understood the agenda and associated documentation for the meeting was still being finalised.

(4) The correspondence indicates that Volaw had already sent DSG the paperwork they needed to be able to proceed. In the same email Ms Hembry told Mr Lanes that she had also forwarded to Ms Chan the draft company administration agreement and directors' and officers' appointment forms. She said "I am now awaiting the completed inquiry forms before being able to proceed with the company incorporations" but later confirmed she had received the completed company incorporation forms.

43. The completed company incorporation forms referred to the Jersey companies being incorporated as a "SPV holding company", as regards DS1, "to hold the shares of a number of UK subsidiaries" and, as regards DS2 and DS3, "to hold legal title to two properties". The reason for the companies being incorporated in Jersey was stated to be that "the Group has held companies on previous occasions in Jersey". The business of the companies was described as "holding companies only". Barclays – Jersey was listed as the bank where bank accounts were to be opened. Only Mr Lanes name was given as a director. Landwell and PwC were listed as advisers to the beneficial owner of the new companies, DS Plc. DSG stated that, as at the time of completing the form, they had not yet seen Volaw's standard terms and conditions.

44. The form was completed with the "bare bones" of the requested information only. In a number of sections, the forms request as much detail as possible, such as regards the nature of the business of the new companies and how it is to be conducted and the nature of professional advice taken by the beneficial owner as regards the new companies. The above is the only relevant information provided in response.

Formation of the Jersey companies and appointment of directors

45. As noted the requests for the incorporation of the Jersey companies were received from DSG on 9 June 2004 and they were incorporated on 10 June 2004.

Company administration agreement and appointment of directors

46. Volaw and DS Plc later entered into a company administration agreement on 14 June 2004 pursuant to which the services of Volaw, including those of the Jersey directors, were provided. This agreement and the standard terms of business were not given to Mr Lanes until the first board meeting on 11 June 2004. The shareholders of the Jersey companies passed written resolutions appointing the directors on 11 June 2004. The letters which all of the directors signed accepting their appointment were dated 10 June 2004. However, it appears that the letters were not signed until sometime after 10 June 2004 and probably not until 25 June 2004 (the signing of the appointments was noted as an agenda item for that meeting):

(1) Mr Norman said the document was supposed to recognise the date from which the director was accepting appointment; that date and the date on which it was actually signed should have been dealt with separately. Overall he agreed that the wording was not perfect and could give a misleading impression (and the standard form had been amended not long after). He agreed it was unusual for the letters to be signed so long after the effective date as it appears they were not signed until 25 June 2004.

(2) Mr Christensen described it as an administrative issue and of no consequence that the date stated in the letter was 10 June but the appointment was not made until the following day. He said he was certainly accepting an appointment as a director with effect from 10 June.

47. We accept from this and from the fact that the Jersey directors were clearly acting as such (in attending the board meeting of 11 June 2004) that they accepted their appointment as directors with effect from 10 June 2004 albeit that the formalities of signing the relevant letters were not completed until later.

48. The signed company administration agreement confirmed, amongst other things, that DSG accepted Volaw's fees and charges for the project and that DSG would provide Volaw with an indemnity in respect of any liability for carrying out the project. The terms of the engagement included an undertaking by DS Plc that "you [DS Plc] will have no authority to commit us [Volaw] or any of our directors, officers, employees, agents, or nominees in any manner whatsoever, whether in relation to the affairs of the company of otherwise".

Articles of Association

49. The Articles of Association of all three Jersey Companies stated at para 95 and 100:

> "The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit.
>
> No meetings of Directors shall be held in the United Kingdom and any decision reached or resolution passed by the Directors at any meeting which is held in the United Kingdom shall be invalid and of no effect. Questions arising at any meeting shall be determined by a majority of votes…"

Initiation of contact with Volaw

50. From the above correspondence it appears that contact must have been made with Volaw, by DGS or their advisers, at some time prior to Mr Lanes making contact with Ms Leigh and Ms Hembry, given that on 9 June 2004 they were both clearly aware of the proposal for the Jersey companies to be set up, Ms Hembry had already been in contact with Ms Chan regarding the agenda, the company incorporation forms had already been sent to DSG and Ms Leigh and Ms Hembry were prepared to initiate the bank account opening process at the request of Mr Lanes. We do not have any written evidence of any prior contact, however, which sets out what Volaw was told of the project by that time and the witnesses were not able to shed much light on precisely how the introduction occurred.

51. Mr Marx thought that the name of Volaw was provided either by Linklaters and/or PwC, as being a firm of top stature that employed top quality people with all the qualities that he would expect from directors in any company in DSG. That was, he said, "I believe, how I was satisfied that that in the hands of Volaw we would be safe from a point of view of dealing with people of proper stature". He relied on that recommendation and had no involvement in picking the individual Jersey directors.

52. Mr Perchard said in his witness statement that Volaw had had a professional relationship with DSG since 2001 when they had provided very limited registered office services to a Jersey based company, which had been acquired by the group. He thought the connection was initially through Voisin. Mr Norman said that he thought that the original introduction was from PwC to Bill Gibbons at Voisin, although he was not aware of that at the time, but it was the only reference he had seen in the documents to the original source of the business for Volaw (see [23(1)] above). He also noted that Volaw had had a previous relationship with DSG providing services to another company.

53. We cannot form any conclusion as to precisely how contact was first made with Volaw regarding this transaction. It is clear, however, from Mr Marx' comments above and the evidence set out below that he had no involvement in picking the particular directors or contact with them, other than through Mr Lanes.

Internal selection of the Jersey directors

54. It appears that the individual Jersey directors were selected internally. Mr Perchard said in his witness statement that at the time he, Mr Norman and Mr Christensen were the three client-handling directors. Mr Norman said "I think

internally we would have decided who had the experience and knowledge of real estate structures". Because of his involvement in the Middle East, where real estate is the main asset, he did a lot of real estate work and the others also specialised in administration of real estate vehicles. He confirmed that he, Mr Perchard and Mr Christensen were the usual three directors on corporate style structures. Ms Hembry also later informed a colleague that the three "usual" directors were acting.

55. Mr Perchard stated in his witness statement that it was not unusual for there also to be a director external to Volaw who in this case was Mr Lanes. He said he did not feel at any point that he, DS Plc, PwC or any other person were giving the Jersey directors orders and controlling the decisions reached by the Jersey directors.

Preparations on 10 June 2004

56. On 10 June 2004, PwC finalised and circulated a pack of papers intended as a briefing for the Jersey directors. This is one of a handful of examples where PwC had any direct correspondence or contact with the Jersey directors:

(1) CC emailed DM (copying in Mr Lanes and the rest of the implementation team) referring to a revised draft implementation timetable:

(a) He noted that PwC were collating a board pack and papers for both the UK and Jersey, he asked DM whether he had "any comments regarding the proposed agenda" for the meeting on 11 June 2004 and queried whether "we should add the formalities of banking, appointment of Volaw and any other advisors etc to the agenda".

(b) He commented on the revised timetable including noting that there was a "conflict on timing of the second board meeting" as the DS Plc board was not due to meet until 24 June, whereas "I believe you had planned for the grant of the options and transfer of the L&R companies by 17 June. We will need to review this part of the timetable".

(c) He also added further points to a "list of questions/items" for the Jersey board to consider" including "whether advice will be obtained from company law for UK law and Jersey advisers for Jersey law".

(2) VC said in an email in response that - "It is up to [Mr Lanes] and the Jersey directors to decide what they want [sic] to talk about but this gives them a guide as to the number of issues in hand. I have little doubt they have other issues."

(3) PwC then sent an email (at 4.12pm that day) to Mr Lanes, copied to Mr Christensen, Mr Norman and the implementation team, attaching the pack of papers for the meeting on 11 June 2004 being:

(a) Documents prepared by PwC/Landwell including "draft call option agreements".

(b) An agenda for the meeting of 11 June 2004.

(c) A paper prepared by PwC relating to the background and steps of transactions.

(d) Instructions to UK company law counsel had already been sent to the directors.

57. The PwC explanatory paper is a short document with five pages of text and diagrams. It set out that the proposal was "to transfer the assets to the Jersey companies (owned by [DSG]) at more than market value using call options. This will achieve a step up in base cost of the assets in the hands of the Jersey companies by the amount of the indexation, thus accessing the benefit of the indexation that would not otherwise be available". It was noted that "although the proposals have only marginal benefit for the Jersey companies, significant advantages could be achieved for the Jersey companies' shareholders – DS Group and its subsidiaries." There then followed an explanation of the steps involved including that each Jersey company would receive an option to purchase the relevant asset at a price well above the present market value and that the option would not be exercisable unless the FTSE condition was satisfied. It was noted that "if the Jersey directors are in a position to exercise the option (because all the conditions for exercise have been met) and if the directors decide to exercise, then DS plc may be willing to make a capital contribution to assist in the purchase of the assets. This would not be a contractual obligation of DS plc but a declaration of intent." If the conditions were met the relevant Jersey company "needs to consider whether to exercise the option".

58. Mr Perchard did not attend the first board meeting of 11 June 2004 and could not remember why that was. He did not know why he was not copied into the email from PwC attaching the papers. He noted that the three Jersey directors worked at that time very closely as regard matters which the others needed to be brought up to speed on – "the opportunities to talk about things in relation to business existed". He said he was confident that his colleagues would make sound, sensible decisions, and the meetings would have been quorate without him and "work has to go on, you can't necessarily expect every director to be present at every decision".

59. As Mr Norman agreed, the papers were clearly of relevance to Mr Perchard, as a director of the Jersey companies, even though he was not able to attend the meeting and it seemed unusual and surprising that he was not on this PwC distribution list. Mr Marx said that he had "no idea" why he was copied into this email when the paper contained material for the Jersey board. Whilst it is a bit odd that Mr Perchard was not sent the papers, we draw no particular inference from that fact. As Mr Norman said it was not the Jersey directors' distribution list. The directors gave consistent evidence they worked closely together and Mr Perchard said he would have been brought up to speed.

Jersey directors' evidence on appointment process

60. It is clear that, as set out above, some activity had already commenced before the formal appointments of the directors were made and before any due diligence process was fully undertaken by Volaw. This was out of kilter with the stated practice of Volaw in this regard. Mr Perchard said the following in his witness statement as regards the usual procedure and what occurred in this case.

(1) When taking on a new client, Volaw would seek to gain an understanding of the client's background and wishes with regard to the planned activity, if possible by meeting with the client and/or their advisers or otherwise through the receipt of papers from them. That process commenced with the client filling in a company incorporation questionnaire. Ms Hembry, as an administrator, did not have "the authority to commit Volaw to agree to form a new entity" as such a decision "would be taken by the directors". The directors would normally discuss such a matter amongst themselves, sometimes also with someone from compliance, before reaching a decision.

(2) In acting as director he needed to feel comfortable that he understood why the relevant company was formed, "that the client is undertaking a reputable transaction and that what is proposed is sound and makes sense". He also needed to understand how the company was to be funded and the nature and source of the assets (in particular in view of money laundering requirements).

(3) He said that: "From the files and from my own memory, I can say in brief that the companies were formed as part of a DS group reorganisation regarding certain assets within the group." DS Plc was a "reputable" UK Plc which "put together a board to represent the Jersey companies which was "competent, experienced and capable of understanding what was being considered commercially".

(4) He said he would have seen the completed formation questionnaire which "clearly outlined that the [Jersey companies] were to be set up for their respective purposes as defined" in that document and he and the other directors would have "adjudged that the [Jersey companies] and their purposes were understood in outline and were not going to conduct business" they/Volaw felt uncomfortable undertaking.

(5) In accepting the directorships, he would expect to be briefed on the nature of the proposed business and he noted that he could clarify any matter at any time so he was personally comfortable with board decisions. In considering what was proposed it was necessary to consider any knock on impact for the company such as for creditors.

(6) He could not remember when he would have seen the initial pack of papers sent by PwC but he would have read and discussed them and received a briefing from the other directors before he became involved and he would then have had a more "in depth understanding" of the purposes of the companies. He later noted that he was aware that PwC had been advising DS Plc on tax issues and that this advice had lead to the request to incorporate the new companies.

61. We note it is unrealistic to say that DS Plc "put together" the board when Mr Marx was clear that he had no input on what individual directors were selected; he relied on the advisers' recommendation of the firm. The company forms which Mr Perchard referred to as clearly outlining the purposes for which the Jersey companies were formed only referred to them holding assets. Mr Perchard clarified at the hearing that he was aware that the purpose of the project was to create or increase capital losses that could be used by the group to shelter anticipated gains and "it certainly had tax planning as underpinning the structuring". He could not recall,

however, exactly when he became aware of that. As he was not at the first board meeting it may have been at a later stage; as noted, he would expect he would have been brought up to speed by the other Jersey directors.

62. It was put to him that given the nature of the correspondence the Volaw administrators had with Mr Lanes on 9 June 2004 in fact the directors must have had some knowledge of the project at that point. He said he did not know but it was reasonable to suppose that Ms Hembry would have spoken to one or more of the directors about what she was doing.

63. Mr Norman and Mr Christensen both emphasised in their witness statements that they took their obligations very seriously, as Mr Christensen said, in terms of being absolutely sure that he was not involved in taking on business that would adversely affect the reputation of the firm or, as Mr Norman said, in not taking on any new business that might adversely prejudice his career or reputation. Mr Christensen noted that he was the managing director and ultimately responsible for compliance with Jersey's anti-money laundering legislation and other relevant laws/regulations.

64. Mr Norman said that before accepting the appointment he would have considered "who is the client and, by inference, what is the client doing". He thought that "certainly we would have had a rough idea" about the project but the first consideration is: "who is the underlying client, what do we know about them" and then "what are the transactions they are considering?" The two would almost be synonymous. The primary one, though, would be the reputation and the knowledge of the underlying client themselves.

65. He said that his recollection was that prior to the first board meeting, the directors received papers which they reviewed in advance of Mr Lanes arriving in the office. Mr Christensen and he had the briefest of meetings that morning of around 10 to 15 minutes to discuss the papers before the board meeting. He recalled looking at DSG's website accounts; "being a boring accountant, I tend to start with a company's latest accounts, look at shareholder, investor notifications. That would be the way I would normally operate". Mr Christensen did not remember this short meeting specifically but thought it likely there was a discussion as it was in accordance with his usual practice. In his witness statement he noted that in general before the board meetings Ms Hembry would provide the directors with any papers or drafts which needed to be looked at beforehand.

66. As regards the capacity in which the board were acting before the formalities were completed, Mr Perchard said that whilst ideally the letter of engagement should be concluded with the client before Volaw started work "a client's actions probably can dictate that they may want to move things more quickly, and their actions demonstrate that they are accepting a view and your services that you are prepared to offer to them. So you almost act in good faith." He described the questionnaire as designed "more to satisfy ourselves whether or not we are willing to create the relationship and form whatever entity".

67. Mr Norman similarly said that the directors were probably "just acting in good faith" that a listed company such as DS Plc would stand by its instructions. He said "It is extremely common for us to allow our clients to be lenient - or to be lenient with our clients in returning these agreements". Back in 2004 Volaw was not as diligent

and clients "often wanted us to get on with the work, rather than document it, and the administration agreement actually was often one of the last documents to be sorted out. We didn't actually protect Volaw enough, dare I say, from our clients…… we had many clients where we did not have administration agreements and therefore, when they defaulted, we had nothing."

68. As regards the actions taken on 9 June 2004 regarding the opening of the bank accounts, Mr Perchard said that Ms Hembry was merely trying to facilitate matters in preparation for the first board meeting. He described her as a "very efficient, meticulous individual" and to "to try and help matters" she contacted the bank to get things going as opening a bank account is "not a quick event". So "she was probably just trying to assist matters by running administrative matters alongside…..the formation process of the company". He did not accept that in reality the decision to open the bank account with Barclays was made on 9 June 2004.

69. The fact that Mr Lanes booked his flight to come to Jersey before the companies were formed and the relationship with Volaw was formalised he regarded as "nothing more than somebody deciding of their own volition to come over to Jersey". Separately Ms Hembry was trying to "sort out things that might help with what was planned" but "it still comes down to a regulatory based decision as to whether or not you are happy to form the company". He did not see that "prevents you from doing sort of bits around the side which might help something down the road. I don't think you are committing to a relationship at that stage by having somebody seeking contact with a bank about potentially opening a bank account. I think that is the ordinary course of business for our clients."

70. He continued that he thought that Ms Hembry was following a reasonable process. He did not think she was circumventing procedures but was simply "trying to move things on quickly" and he did not see an issue with her "just moving things on to help facilitate…..a timeline that [Mr Lanes] had suggested". It would nevertheless have been for the individuals dealing with the new client process to decide whether or not that was "appropriate". It did not mean that Volaw had to form the companies; that was a decision for Volaw which could only take place once the directors were "satisfied that it is appropriate to do so". The company formations would only have taken place once the directors were satisfied that it was appropriate to proceed; he thought the evidence of that approval was the signing of the formation form or the submission of the articles to the Jersey Financial Services Commission, both of which were dated 10 June 2004.

71. It was put to Mr Perchard there was no real activity by the Jersey directors until they received the papers on 10 June. He said:

> "I don't think it is reasonable to say there was no activity or very little activity because the companies had been formed that day, so going back to what I said about due diligence process, there must have been action undertaken by the directors to consider the relationship from a regulatory perspective, and the subscriber documents were signed for forming the companies".

Conclusions on appointment

72. We do not consider it credible that Volaw had not in effect committed to the relationship and agreed to provide their services as at 9 June 2004 given, in particular, that a board meeting was arranged for only two days later for which Mr Lanes had by that time booked his flight and for which Ms Hembry had prepared a draft agenda. In any event this was certainly the case by 10 June 2004 when the companies were incorporated and the Jersey directors accepted their appointment as directors.

73. Given their own evidence on the importance of understanding what they were asked to do and the actions taken by Ms Hembry on 9 June 2004 (indicating she had some understanding given she prepared an agenda and was happy to start contacting the bank), it is reasonable to suppose that at least one or more of the Jersey directors must have had some idea what the project involved by the time Mr Lanes made contact with the Volaw administrators on 9 June 2004.

74. Mr Perchard and Mr Norman emphasised the importance of understanding both the nature of the client and the proposal both from a reputational and regulatory perspective. They were satisfied with the nature of the client as a UK plc and Mr Norman thought he would have looked at the client's accounts. However, as regards knowledge of the proposal, somewhat out of kilter with his evidence on his general practice on this, Mr Perchard said that the scant information in the company form that the Jersey companies were to be holding companies sufficed for him to be satisfied he could act. At the hearing he confirmed he was aware of the tax nature of the project but could not remember precisely when he had acquired that knowledge. It is not clear, therefore, what Mr Perchard knew of the project when the appointment was accepted.

75. We note that the PwC pack of papers was received by Mr Christensen and Mr Norman on 10 June 2004 and, given their concerns as to accepting suitable appointment, it would seem likely that they would have reviewed those papers as part of the process of deciding whether to accept the appointment (albeit they may not have updated Mr Perchard until later). From the content of those papers, those directors could not have failed to be aware, on 10 June 2004 or any rate prior to the first board meeting, that they were being asked to set up Jersey companies and to run them from Jersey for a short period only for the purpose of undertaking a specific sole transaction of acquiring assets at an overvalue, which was thereby wholly uncommercial for the companies themselves. We find it difficult to see that in reality, in accepting the appointment in effect to carry out such a limited and specific project, which could only lawfully take place with approval from the parent, the Jersey directors were doing anything other than thereby agreeing to implement the plan for their client, subject only to checking of the legality of it. We have considered this further in our conclusions.

Mr Marx' evidence on role of Mr Lanes and the Jersey directors

76. Mr Marx acknowledged that DSG were concerned to have a degree of control over the transactions. He agreed that one reason to have a representative from DSG on the board of the Jersey companies was because they would be receiving not just assets but substantial sums of the group's money although the corporate governance aspect was also important – "they were significant transactions and we felt it

appropriate to have representation in the board of the subsidiary company that was going to undertake the transactions or….substantial sums of money". It was put to him he would not have done the transaction if there were only Jersey directors. He said that he really was not sure that would be the case. He was advised that he had the option of having Mr Lanes without that affecting the tax efficiency of what was proposed. So it made sense to include him as a director.

77. From sometime in May or June 2004 (Mr Marx could not recall the date), he had begun to envisage that Mr Lanes could be the UK director of the Jersey companies. It was his choice to appoint Mr Lanes in that role. Mr Marx said that he would not have relied upon Mr Lanes to make decisions, as a normal company director, if he had been acting on his own as he thought he lacked the commercial acumen. But in this case he thought that he would bring to the board of the Jersey companies, his discipline of company secretarial and governance and would also ensure facilitation of information, as and when required between the Jersey board and advisers or others. So he viewed Mr Lanes as on the board of directors of the Jersey companies as a facilitator and not for his strength of commercial judgment. For those aspects Mr Marx said he would be relying more on the Jersey directors themselves. In his witness statement he said:

> "I would have asked Stephen to assist in the various transactions in order to liaise on an administrative basis with Volaw and the other directors of the Jersey companies and with PwC and our solicitors, Landwell ie he had an administrative role on projects Peru and Llama in terms of facilitating the flow of information to the decision-makers."

78. It was put to Mr Marx that it must be the case, therefore, that he did not see Mr Lanes as a decision maker. He responded that:

> "with his role, with the hat on of being a director of a Jersey company he is, by default, a decision-maker, but if I would have been relying solely on Stephen's decision on matters other than administration, I would have been much more careful. In other words he was there as an administrator, as I have said, to facilitate information. But his presence on the board was [with] people who would have had these skills and the stature that I knew I was looking for."

79. Mr Marx thought that Mr Lanes brought a communication benefit to what was "a complex process to go through" because he thought that he would be "helpful and constructive to the people because he knew the people in London, he knew our advisers, and if communication was needed between the Jersey board and any of those other people at any time, he would have been perfectly positioned to do that". That seemed to Mr Marx "to be a perfectly proper role for a director."

80. It was put to him that Mr Lanes in effect had a greater role as he had been involved in the development of the project and therefore must have had greater knowledge of it than the Jersey directors and that he was in effect speaking for DSG. Mr Marx said that he did regard Mr Lanes as "the eyes and ears" for the group but certainly not its mouth.

81. He noted that Mr Lanes "would have been voting after discussion with the other directors and no doubt after taking into account everything he knew about the projects but he would have done so in tandem with the other members of the board". He continued that "of course, he would have been aware of all the background to the history of the planning steps, perhaps more thoroughly, but equally no information as far as I'm aware was withheld from the Jersey directors". He noted that the Jersey directors saw the strategic planning steps paper; they understood who DSG were and they understood the wishes of the parent company. He said it was not "as if Mr Lanes arrived with some deep insight that none of the other directors….had. They were all more or less on a level playing field with what was going on - what the strategic steps were. Mr Lanes had I would agree possibly more familiarity with it because he had been involved for some months beforehand."

82. Mr Marx' evidence was that he did not instruct Mr Lanes how to vote as a Jersey director. He said in his witness statement that Mr Lanes would "not have been given any instructions or impression from me or anyone else in DS Plc or PwC that these transactions would or must occur." He said at the hearing:

> "I entrusted them to make the sensible decisions if they felt that those were the decisions to make. At no point did I say to Stephen Lanes – when it comes to a vote, Stephen, you have to vote this way. And if that's what is being suggested, that is not correct. No I did not entrust him with responsibility for implementing it. He was part of the team that implemented it. He was not the sole member responsible for implementation……My point is merely that Stephen had a better grounding in fact, a better grounding in the circumstances and added some value and depth to the discussions when it came to that. But he carried, as far as I can see, no distinct message, certainly not from me, no distinct it must be this or it must be that….Mr Lanes brought the same knowledge but in more detail as the other directors. There is an element of jeopardy here for DS in that we were appointing directors we had not met."

83. It was put to Mr Marx that Mr Lanes' principal role was as a director of the Jersey companies. He said it was an important role but he had other roles such as acting as company secretary for DSG and that he was responsible for the governance of the project. His role as director went beyond administrative tasks; as a director he had duties to make sure what happened was proper, that he took decisions with integrity and that he took into account all the circumstances and facts he needed to take into account when decisions were made at the board. Those were matters which were above mere filing and administration.

84. He was questioned about why he was so comfortable with the Jersey directors given he had no personal knowledge of them. He confirmed what he said in his witness statement that it was because Volaw had been recommended by PwC and possibly also by Linklaters and so he was relying on "maybe the top accounting firm and maybe the top law firm in the UK". He also noted that he was aware that they had also provided limited administrative services to another DSG Jersey company.

85. It was noted that in his witness statement he gave, as the second reason which gave him comfort as regards entrusting the assets to the Jersey companies, the nature of the assets being transferred, in that (a) the L&R companies were standing at a loss and were relatively mature assets in the portfolio and (b) ownership of the properties was a matter of public record in the Land Registry and both properties were pledged as security against borrowings of the group. He accepted, however, that this did not take into account the substantial funds which were to pass through the Jersey companies which, as he had acknowledged, was a concern.

86. It was put to him that DSG was not willing to give the Jersey directors control over the money required to finance the transaction and that was why there was the condition that any payment by the company over £5,000 required Mr Lanes' approval and why Mr Lanes had wanted the bank mandate changed so that no changes to the signatory list could be made without Mr Lanes' approval (see [175] to [179] below). He said "yes" but he was not sure he gave the instruction; Mr Lanes might have done so on his own initiative. He noted that Mr Lanes would have been aware, as company secretary, that in all of DSG's bank accounts joint signatories were required above a certain amount, and it may be that he had seen that the initial bank mandate form for the Jersey company did not have that and maybe he felt that the position should be brought into line with the other companies in the group.

87. In his witness statement Mr Marx said that the Jersey directors looked after the commercial, technical and administrative issues. Mr Marx was asked if he could comment on what each director brought to their role given that PwC had advised that each director should have a necessary role. He said he could not but his expectation of the Volaw directors as a whole was that they would:

> "first and foremost, have to be independent minded; to have a clear sense of integrity; to have some understanding of Jersey law and maybe even to a lesser extent any taxation implications in Jersey and to have the knowledge and qualifications to act properly in all respects as a director of a Jersey company."

88. It was put to him that these are just generic qualities of directors whereas PwC advised that each director should have a necessary role. Mr Marx said that it was not "as if the Jersey company needed a sales director, a production director or a human resources director". He thought that in the context of the commercial needs of the company, the directors' "duties and responsibilities are quite clear"; with the exception of one of the Jersey directors being appointed chairman there was no distinction between their roles. As set out above it was because they had been recommended by what he considered to be top advisers that he thought they could be relied on as "people of proper stature".

89. In his witness statement he said that he fully appreciated that the directors would not act as "mere puppets" of DS Plc and that it could not take control of the board function. He said that throughout his career he had applied the highest commercial standards and he would not have expected any professional director to act in a way that was not independent. The position as he understood it was that the power to make decisions in respect of the Jersey companies rested solely with their directors. He noted that in a career of some 39 years he had experience of meeting

many professionals and throughout his dealings with Volaw he was impressed with the "stature and professionalism of the three Jersey directors in their conduct and modus operandi".

90. He thought it clear based on the information provided by the directors and the number of trips made by Mr Lanes to Jersey that they would not act merely as puppets in an unquestioning manner doing anything that DS Plc would request. It was important to him that their integrity was of a high standard. This view was reinforced when he later met the directors in relation to another transaction. He noted that he appreciated there was a degree of commercial risk in these arrangements given the Jersey companies would, if they exercised the options, receive the assets. However, he was comfortable for the reasons already set out.

91. We accept that Mr Marx was concerned that the Jersey directors were persons of appropriate "stature", given, in particular, that the Jersey companies would be in receipt of substantial assets and funds, albeit that he relied entirely on his advisers in choosing a suitable firm which they felt could be relied on to provide appropriate persons. Beyond that it appears that he/DSG were indifferent to who the individual directors were.

92. It is also clear that he certainly appreciated that the advice he was given by the advisers meant that, in their view, it was essential to the success of the plan that the Jersey directors acted "independently". It seems he and the advisers thought that to demonstrate this was the case required that the Jersey board approved the relevant matters without any direct contact with or influence from persons in the UK. Hence, it seems the reason for the lack of direct contact between DSG in the UK (other than through Mr Lanes) or the advisers and the Jersey directors. Mr Marx later gave evidence that he was careful to step back from any direct dealing with the Jersey directors (see [165] below). He was not involved, therefore, in any contact with the Jersey directors and had no personal knowledge of them at all throughout this project. It is not clear to us, however, what independent discretion Mr Marx thought the Jersey directors would be exercising, as regards the main substantive action to be taken by the board of entering into the options and thereby acquiring the relevant assets, given it was clear from the PwC papers that it was known from the outset that this required in effect instruction from the parent (see [19(3)]). We have commented on this further in the discussion section.

93. Given that Mr Marx had no actual contact or knowledge of them at all, we do not consider that we can conclude anything from his evidence as regards the actual actions or approach of the Jersey directors as regards this project. Nor do we agree that anything can be inferred as to the "independence" of the directors from the fact that Mr Lanes made a number of trips to Jersey. Those trips were for the purpose of the board meetings which were always scheduled to take place in Jersey as set out in the plan prepared by the advisers. We have commented further on this and on the evidence as regards the role of Mr Lanes below.

Jersey directors' evidence on their roles and the roles of Mr Lanes and Ms Hembry

94. The Jersey directors made the following statements in their witness statements as regards their conduct and independence. Mr Perchard said:

> "Our role was not to be 'yes men' but to act on behalf of the Jersey companies. If we had been asked to do something improper, or contrary to the interests of the companies of which we were directors, we would not have done it. If however what we were being asked to consider was commercial, lawful and proper then we would try to act in accordance with the wishes of the companies' shareholder. However, we would not allow our discretion as directors to be controlled by a third party, including the shareholder."

95. Mr Norman said that he would not accede to demands from any third party that in any way shape or form infringed Jersey law or the interests of the companies on whose boards he sat and he specifically rejected that his decisions in this case were made for him by a third party or that he was controlled by DS Plc, Mr Marx, Mr Lanes or the advisers and said:

> "Throughout the course of the transactions I exercised independent thought at all times, and I only reached decisions on behalf of the Jersey companies that I was in agreement with, and which I believed to be in the interests of those companies."

96. Mr Christensen added:

> "Nor would I simply accede to demands that infringed Jersey law or regulations or Volaw's own policies or the interests of the companies on whose boards I sat. I exercised independent thought at all times, and I only made decisions on behalf of the Jersey companies that I was in agreement with and which I believed to be in the interests of the those companies and of the stakeholders in those companies" by which he meant both shareholders and creditors which "in the context of the transactions being contemplated by DS1 and DS3 in particular could have been relevant (as they were buying assets at an undervalue)".

97. Mr Christensen also said he endorsed the comments of Mr Norman above and concluded:

> "I have spent my entire professional life, more than 35 years, providing trust and company management services to clients all over the world. Any client seeking to "control" my decision making process would receive short shrift from me."

98. He said that the decisions made by the board of the Jersey companies were the decisions of the directors and they were accountable for them:

> "Clearly we were alert to the wishes of DS Plc – it was the sole shareholder – but this did not remove the need for [the Jersey directors] to exercise proper control over the companies, having regard to our professional, commercial and regulatory responsibilities as directors. For instance, we would not sign documents without considering what the commercial

> implications could be, and we would sometimes require professional advice to help us to do this. This is the approach we take in respect of all the companies of which we are directors."

99. He said that the Jersey directors were well aware that the transaction had tax advantages for DSG but he was clear in his mind that he had to act "in the best interests of the [Jersey companies]". Whilst Mr Lanes provided an outline of the matters, he certainly did not consider he was going to sit "mindlessly" at board meetings being told what to do by any third party. He acted "independently" in assessing whether he should agree to any proposed transaction.

100. We note that each of the Jersey directors said that they would only make decisions which were in the interests of the companies themselves and Mr Perchard said he would not approve a requested action unless it was "commercial" (as well as proper and lawful). However, on the face of it that cannot have been the basis on which the Jersey directors were acting given it was apparent from the outset (and indeed it was intrinsic to the plan) that the transaction which the companies were to undertake was, on any view, not in their own interests, given they were to acquire assets at an overvalue. Mr Christensen did also say that he would usually consider the interests of stakeholders in the company, meaning the shareholders and creditors. This was further explored in the questioning at the hearing as set out in further detail below. Mr Perchard and Mr Christensen also set out in their witness statements on what basis the specific decisions to enter into and exercise the options were made, which is set out in considering the relevant board meetings.

101. At the hearing, Mr Norman was asked what aspect of the company's affairs he and the other Jersey directors had responsibility for. He said that he had no specific role. Mr Perchard was the lead director within Volaw and therefore coordinated the minutes and Ms Hembry's role in administering the companies. Mr Christensen was more involved in the reviewing of some of the legal documents and pointing out some of the points on company law and seeking the opinion of the associated law firm.

102. As regards the directors' working practices, Mr Christensen said he and the other directors would sometimes catch up informally between the relevant meetings as they were all based on the same floor in their offices. He said this was not a substitute for the board meetings but rather "an opportunity for us to air any thoughts which we had in relation to the transactions pending full discussion at the board meetings". He could not after such a long time recall specific discussion but he did recall that this was something the directors did. Mr Norman and Mr Perchard also gave evidence that the Jersey directors worked closely together and that it was their general practice to catch up with each other informally. We accept their consistent evidence on this.

Role of Mr Lanes and Ms Hembry

103. Mr Perchard described Mr Lanes as both involved in the transactions as director subject to the ultimate oversight and control of the board and as having a role in acting as a line of communication between DS Plc, their advisers and the Jersey board. He communicated with the board primarily through Ms Hembry and worked "heavily" with her in providing administrative support and co-ordination which "seems to fit with his background in being the DS Plc company secretary and he

always appeared to be knowledgeable about corporate governance." Mr Norman also said he saw Mr Lanes as having a dual role as "a representative of our client and a fellow director" and that, as he was acting as company secretary of DS plc as well as a director, "he was a natural coordinator and facilitator" for the Jersey board.

104. Ms Hembry was a long standing member of staff who had been at Voisin since 1988. She ran the administration of the project below director level and reported to Mr Perchard. She had no role in making management decisions but was a highly professional employee who Mr Perchard regarded as "very efficient in the administrative processing of information and documents" and "meticulous and diligent in her work". He said she ably fulfilled the role of being a central point of contact for clients and others involved in transactions so that they could send her emails and documents relating to matters which the directors were working on.

105. Mr Perchard noted that Miss Hembry sent Mr Lanes information such as draft board minutes, copies of regulatory documents and updated him on the movement of funds from Barclays bank. He said that "consistently with how I work generally I absolutely did not regard myself as in any way having given over control of the Jersey companies of which I was a director to Anne or Stephen or DS plc or anyone else".

106. Mr Perchard noted that Mr Lanes provided the draft agendas, background information and documents that were needed in order for the Jersey directors to be properly informed for the board meetings. He answered their questions and explained the background at the meetings after which the directors carried out their duties as directors by making the necessary decisions.

107. Mr Perchard said that Ms Hembry attended board meetings to take minutes in hand written form which she then typed up. Ms Hembry's letter to the tribunal confirmed this. She stated that her memory was not "very good". Her practice was therefore to take such minutes by hand at the time of meetings and to type up those minutes later based on her handwritten notes. Mr Perchard said he would expect Ms Hembry usually to take notes at every formal meeting that she attended although some meetings may be very quick, in which case she was quite happy just to record that very quickly thereafter by going straight to her desk and typing up minutes. He confirmed that it would be reasonable to expect that the directors would not take notes at board meetings.

108. Mr Perchard said that Ms Hembry would leave hard copies of the suggested minutes in the in-trays of the Jersey directors for comment and then send the typed notes to Mr Lanes for his comment and suggestions. The Jersey directors were happy for her to co-ordinate with Mr Lanes in this way as they both had backgrounds in company administration and it was helpful to ensure that he would capture any of the detail in the draft board meetings that had been missed by Ms Hembry. The Jersey directors would then review the final minutes and, if in agreement, sign them. Mr Perchard noted that he was typically the director of the Jersey companies who chaired the meetings and therefore signed the minutes. He said:

> "I do not just sign or "rubber stamp" the final board minutes and would always read them to ensure that they reflected the substantive discussions of the board of directors. To the extent

that any new points arose these would have been discussed with at least one other of the Jersey directors prior to finalisation."

Reliability of written evidence on board meetings

109. HMRC made a number of points as regards Ms Hembry's notes and the typed minutes as a reliable record of what actually occurred. They also submitted that they show that no real consideration was given by the directors to the decisions they record as having taken place and that, the fact that they contain some errors, casts doubt on whether the Jersey directors were paying proper attention to the relevant matters. We make the following general points.

Evidence on Ms Hembry's note taking and role of typed minutes

110. The Jersey directors were questioned about the accuracy and importance of Ms Hembry's notes and the board minutes:

(1) Mr Norman said that Ms Hembry's handwritten minutes would, most likely, have recorded any key things said during meetings; he thought they would not have omitted any significant points which were discussed. Mr Perchard said he would "expect her to be very good at taking notes". As regards whether he could be sure the notes encapsulated all discussions, he said "I think it depends on how meetings can evolve….it may be difficult for you to pick up everything that's said and people may, you know, be talked to after the event and she may have missed something that was said and that needed to be recorded, so I would say she would be very competent at taking minutes or notes of a meeting". He added that "it is just difficult to be certain that her notes would be complete and correct". He later remarked that "she is not the type of person to concoct anything. Her notes would be her record of the event as discussed at the time".

(2) Mr Perchard was asked whether, as he had described Ms Hembry as "highly professional and very efficient" (see [104] above), her handwritten notes were the best contemporaneous record of what took place. He said he thought they are "the most helpful reminder, or prompt for me of what happened" and they were "a useful reminder to me that those things must have been considered or at least discussed around the table". He said in effect the notes and the typed minutes should be looked at in combination. They should both be seen as a record of what was said at the time, "not in a transcript form in Anne's notes, and then the decisions that the directors were happy to approve at the time and then recorded after the event by way of the minutes". He noted that, "what struck me when I was reviewing this was there is a lot of similarity to what was going on."

(3) The witnesses agreed that board minutes are "an important document" which should be accurate. Mr Perchard initially described board minutes as "a record of discussions that the chairman and those attendees are happy to place on the record for the company or companies". He later accepted that they should be a record of what was actually discussed by those in attendance. As noted he thought that the notes and typed minutes should be considered together.

Ms Hembry's notes as contemporaneous evidence

111. Ms Hembry's handwritten notes are contemporaneous evidence of what occurred at the meetings and, therefore, are a key part of the evidence. The directors were consistent in their evidence as to Ms Hembry's note taking role and that whilst there could be scope for human error she was reliable in that role.

112. As set out in detail below, Ms Hembry's notes are written as notes or summaries often of points for discussion, conclusions or actions to take. They are not fully descriptive and in some places are written in an abbreviated format but taken together with the typed minutes, correspondence and witness evidence, generally the meaning of the notes is clear. We accept the consistent evidence of the Jersey directors that Ms Hembry's notes were just that. They were not intended to be a verbatim record of what was said but rather they were, as Mr Norman said, "memory joggers" or as Mr Christensen put it "merely shorthand notes of the discussion. They are bullet points, if you like." We consider that is in any event evident from the format and content of the notes themselves.

113. HMRC contended that Ms Hembry's notes indicated that issues were not discussed as they tended to be short statements of conclusions reached. We have commented on this further below. However, in general terms we note that determining whether the issues were considered is a matter of evaluating all the available evidence which does of course include the notes but also comprises the evidence of the Jersey directors.

Inconsistencies between typed minutes and notes

114. As Mr Perchard commented, the typed minutes generally tally with the handwritten notes. That is the case, except that in some instances the notes contain more details, such as in relation to the next required actions, but they omit certain of the formalities (such as that a quorum was present and the appointment of the chairman).

115. HMRC put it to Mr Norman, as regards the first board meeting, that the fact that some of the formalities recorded in the typed minutes (see [135]) were not recorded by Ms Hembry in her handwritten notes (see [136]) means that it is unlikely that those events actually took place. He said he disagreed completely. He described these matters as "absolutely standard" or "almost housekeeping matters that we would record at the inaugural meeting of any Jersey company" which almost "come off our template" and they would have certainly been recorded at the start of the meeting. In that context he said that Ms Hembry's notes were just that; "they are her headings from which she derived her minutes, they are not verbatim minutes or notes of the meeting" or "her memory joggers rather than …detailed notes".

116. We accept that, as Mr Norman said, the relevant matters omitted from Ms Hembry's notes are "formulaic" items which occur at all or most board meetings and so are not ones that Ms Hembry, as an experienced administrator for Volaw, would be likely to need to record. We do not consider that the fact she did not record these items of itself casts doubts on the reliability of her notes or the typed minutes or necessarily indicates that the relevant matters did not occur.

117. As regards the meeting of 11 June 2004, we note that one item recorded in the typed minutes as resolved at that meeting did not in fact take place, namely, that any change of signatories on the bank mandate would need approval from all of the directors of the company. This was not recorded in Ms Hembry's notes or the earlier drafts of the typed minutes. This was because, as is apparent from the correspondence, in fact Mr Lanes had required this at a later stage (following a later meeting with DS Plc and Barclays). Ms Hembry recorded that it was agreed this would be reflected simply by amending the minutes for the meeting of 11 June 2004 (see [175] to [179]).

118. Mr Perchard agreed that this was not usual practice and it was perhaps misleading to record this as having taken place at this meeting when it had not been discussed. Mr Norman thought the change to the bank mandate would have been agreed amongst the directors at the time following the interjection from DS Plc and Barclays in London. He thought that whilst this could be said to be misleading it simply reflected the subsequent resolution of the on-going banking issues, as discussed on 11 June. He said that "in hindsight, I agree it would have been better to have recorded that at a subsequent meeting". It is not clear to what extent the change was discussed with the Jersey directors although Mr Norman signed-off the minutes of this meeting with this change in it. However, in our view, the fact that the directors were prepared to make such changes to the minutes, to reflect matters which had not taken place, must cast some doubt on the overall credibility of the typed minutes.

Review of typed minutes

119. Mr Perchard's evidence was that he also carefully reviewed minutes and did not just "rubber stamp" them (see [108] above). It was noted to Mr Perchard that as chairman he signed the minutes of the board meeting on 25 June 2004 on 12 July 2004 some three weeks after the event and he was asked whether it would be fair to say that in such circumstances he would not have a good recollection, given what had passed between those dates and the number of other board meetings that he would have attended. He said that if he signed a set of minutes it would have been because he "felt they were an appropriate record of the meeting". He noted Ms Hembry's meeting notes could have been presented to him as evidence to support what was discussed, if he needed any help.

120. It was put to him that if he had been given Miss Hembry's handwritten notes, given the comparison between those handwritten notes and the formal typed-up minute notes, they would not have been of much help. He disagreed stating, consistently with his evidence above, he thought they would have been of some assistance, "definitely, to remind me what - if I had to look at them, there was clearly a meeting held in Jersey, who was present, and she detailed points which to my mind are evidence of what was discussed in the meeting." It was at that point he said Ms Hembry was not the sort of person to concoct anything.

121. We note, however, there are examples of the Jersey directors not paying full attention to the review of documents including the minutes of the meeting of 20 July 2004. We also note that the typed minutes, as the formal record of what occurred at the meetings, were clearly the subject of scrutiny by Mr Lanes and the advisers. We do not suggest that the minutes were not intended to reflect what actually occurred but it is clear from the correspondence set out below that Mr Lanes and the advisers were concerned with what they considered to be the best presentation of matters.

Timing presentation of the typed minutes

122. We do not consider that of itself it is material to the reliability of the records that on each occasion there was clearly a single meeting for all of the Jersey companies, as shown by Ms Hembry's notes, but the formal typed minutes show three separate meetings with a separate timing shown for each meeting so recorded. In his witness statement Mr Perchard said that although the transaction had to be considered for each of the companies it was obvious that there was a large degree of overlap in the commercial issues and the board meetings were not, therefore, artificially split into three physically and chronologically separate meetings. The board minutes on the other hand were written up in the orthodox fashion and common or related decisions made by the directors affecting the three companies appeared in the minutes of each.

123. It was put to Mr Perchard (as regards the minutes for the second meeting) that recording the timings of the meeting in that way gave a misleading impression given it was not in accordance with the reality of what occurred. He agreed that the timing that was placed on the typed minutes was perhaps misleading or unhelpful. However, he did not consider that Ms Hembry's notes were anything other than taken at the time of the meetings contemporaneously and they were in his view "a helpful pointer as to what was discussed and what she noted as being discussed at the time."

124. We accept that typed minutes were prepared for each company for administrative purposes to ensure a complete record for each company. As regards the artificial division of the timing of the meetings, this clearly did not reflect reality and could be said to be misleading. However, given the otherwise close correspondence between the notes and the typed minutes, we do not consider that this administrative practice of itself undermines the validity of the typed minutes as a record of the substance of what occurred.

125. HMRC asserted that in fact the suggestion for the minutes to be divided in this way came from PwC (via Mr Lanes) who, as the architects of the scheme, wanted to be able to demonstrate there was separate consideration given to the position of the three companies. Whether the suggestion came from PwC or not does not affect our conclusion on the reliability of the record.

126. Nor do we consider that the holding of a single meeting (rather than three separate meetings) adversely reflects on whether the directors considered the issues as regards each of the companies. Given that identical issues arose for the three companies in many respects, it is unrealistic to expect the board to consider those issues separately three times. Where there were separate issues (such as in the later meetings regarding the property specific issues) those were recorded.

Other inaccuracies/failures to spot errors

127. There are a number of other oddities in the records/procedural aspects, further details of which are set out below. In summary:

> (1) On 16 June 2004 Ms Hembry circulated to the Jersey directors and Mr Lanes draft minutes of a meeting on 15 June 2004 which did not in fact take place (see [157]). The Jersey directors had no recollection of what happened and why it appears they did not pick the error up (see [180] to [182]).

(2) The minutes for the DS Plc board meeting held in 12 July 2004 recorded receipt of letters from the Jersey companies requesting capital contributions when in fact those letters were not sent until later that day. The minutes were presented to the Jersey board meetings held later that day but the discrepancy was not spotted (see [227] to [231]). (There was also a timing oddity on the face of the faxes by which the letters were sent later that day but we accept the explanation that the fax machines had not been updated for daylight saving (see 252(3)).

(3) The minutes for the Jersey board meetings of 20 July 2004 record that both an extraordinary general meeting was held to pass a resolution and a written resolution was signed as regards a change to the companies' articles of association (see [262] to [268]). This was incorrect as only one of those procedures needed to be followed. Mr Perchard signed the minutes with this error in them. A further oddity is that from the correspondence, it is apparent that Ms Hembry was preparing documents which the minutes state were presented to the meeting whilst the meeting is recorded as taking place.

128. From the above it is clear that mistakes were made and, perhaps due to the short timetable, written records were not always examined as carefully as might be expected in accordance with best practice. The errors of 16 June 2004 and 20 July 2004 indicate that what might be described as standardised procedural matters, such as the documentation for transfers of shares and resolutions for changes to the articles, were not paid much attention to by the board at all. We do not extrapolate from these incidents, however, that the Jersey board were necessarily inattentive to the substantive issues or that the meetings which are shown as taking place did not in fact do so.

Conclusion

129. Overall, whilst we accept that the typed minutes are important evidence we regard them as somewhat secondary to Ms Hembry's notes, as contemporaneous evidence, and which were not subject to the possibility of any change after the event. Looking at the documentary evidence, placing the most weight on Ms Hembry's notes and, from a secondary perspective (and to the extent they tally with the notes) the typed minutes and, having regard to the evidence of the Jersey directors as set out below, we consider that it is more likely than not that the key events which are recorded as having taken place at the board meetings in Jersey on 11 June, 25 June and 12 July 2004 did in fact take place albeit that the precise order and timing of events may not be exactly as recorded. We accept that the relevant meetings were held and the directors took the actions stated to have occurred at those meetings. We also accept that it was likely that there was a meeting on 20 July 2004, for the reasons set out in further detail below. Given that the written records are a key part of the evidence, we have set out full details of them.

Board meeting on 11 June 2004

130. The first meeting of the board on 11 June 2004 was attended by Mr Christensen, Mr Norman and Mr Lanes with Ms Hembry present in her role as administrator and note taker.

131. To recap, by the time this took place, from the evidence set out above, there was a settled, defined plan and detailed timetable for the Jersey companies to implement the required steps. From Mr Marx' evidence it is clear that he, as the driving force at DSG behind the planning, had decided that the planning should be implemented subject to formal DSG board approval and to setting up the Jersey companies, and their boards approving and implementing the required acquisition of assets under the option arrangements.

132. DS Plc, through CC and Mr Lanes, and the advisers had worked together to put in place as much as possible to facilitate the actual implementation of the plan within what was clearly a very tight timescale. They had identified the issues, such as the corporate benefit problem, suggested topics for discussion at the first scheduled board meeting of the Jersey companies and lined up the obtaining of some of the advice which they thought that the Jersey directors would need to take by booking a conference with UK counsel. PwC had also provided detailed guidance on how an overseas company should be operated to ensure it was non-UK resident. It is reasonable to suppose that they briefed Mr Lanes on this aspect in some detail at the meetings of 1 and 8 June 2004. In addition, Mr Lanes had, on 9 June 2004, been in contact with the Volaw administrators regarding the opening of bank accounts with Barclays, which Ms Hembry put in motion. All involved were clearly acting in the expectation and on the assumption that the Jersey companies would take the steps required for the planning to succeed.

133. As noted there was one combined meeting for all three companies, as recorded in Ms Hembry's notes but a set of typed minutes was prepared for each company, as though there were three separate meetings with different timings. The agenda stated the meeting was to consider the possibility of the Jersey companies entering into the call options, of instructing counsel to advise on the exercise of the options as the price would be in excess of market value, a possible increase in authorised share capital, the opening of a bank account at Barclays and arranging a future meeting. The meeting lasted from around 11.00am until 4.00pm although there was a break for lunch.

Preparation for the meeting

134. The evidence from Mr Christensen and Mr Norman was that they would have read the papers received from PwC on 10 June 2004 and discussed them in advance of the meeting as set out above (see [65]).

Typed minutes of the meeting

135. The following was recorded in the finalised written minutes for each company:

(1) The minutes start by recording (a) formalities as regards the meeting (such as that Mr Norman was appointed as chairman, a quorum was present, and notice was dispensed with) and (b) confirmations and resolutions regarding the set-up of the company, including that the company had been registered on 10 June 2004, the subscribers had appointed the named directors, Volaw was appointed as secretary, a seal was adopted, confirmation of the registered office and that shares should be allotted to the subscribers.

(2) Mr Lanes made a presentation to the meeting regarding the possible acquisition of assets from DS Plc and its subsidiaries and set out the proposed

steps of the transaction for consideration by the directors. Mr Lanes then explained that the relevant company may grant the company an option to buy the relevant asset for a specified price with an option fee of £1.00. The option would not be exercisable if the FTSE condition was not satisfied and there would be other conditions. If the directors decided to exercise the option then DS Plc may be willing to make a capital contribution to assist in the purchase of the relevant asset. DS Plc was proposing to hold a meeting on 24 June 2004 to discuss this transaction further, and if approved, would make a declaration of intent confirming the intention and also as regards the funding of the transaction. In the minutes for DS1 there are references to various matters regarding the L&R companies reflecting what is recorded in Ms Hembry's handwritten notes (see [136(2)] below).

(3) The directors discussed this proposal and agreed that they would seek counsel's opinion on the proposed transaction both in the UK and in Jersey. It was noted that a telephone conference meeting had been arranged for 15 June 2004 with UK counsel. Mr Christensen agreed that he would be available to attend the conference call. The directors also agreed that they would instruct Advocate Strang of Voisin to provide his legal opinion on the proposed transaction under Jersey law.

(4) The directors considered the following matters arising from the proposals:

(a) That they would have the right to enter into the call option agreement even if the company may lose money on the transaction if the shareholders of the company authorise them to do so.

(b) If the instructions are given by DS Plc to the Jersey directors would this effectively move management and control of the company back to the UK?

(c) If the company received payment by way of capital contribution from DS Plc, as proposed, does DS Plc have the right to do this or, is there any impediment to the transaction

(d) What is the stamp duty position on the proposed transaction?

(e) Whether it would be possible to undertake a lesser number of banking transactions in one day rather than the proposed various separate payments over several days.

(5) The directors felt they needed UK tax advice on this and at 12.40pm telephoned RL at PwC for her advice. In response to the directors' queries she confirmed:

(a) If the shareholders of the company approve the proposed transaction then the directors may proceed with the transaction without problem or recourse although it was for the directors to decide the most appropriate course of action and they should take whatever legal advice they considered necessary in Jersey.

(b) That there is relief for stamp duty in these circumstances.

(c) That the company be advised to discuss the proposed banking arrangements with Barclays, Jersey.

(d) Mr Norman advised Rebecca that the enquiry forms for the companies were stated to be "tax resident". He explained that all companies in Jersey are tax resident and are either exempt or income tax paying and that this company was set up as an exempt company which Rebecca confirmed was the intention.

(e) That the company should consider all the implications of the proposed transaction separately from DS Plc and take separate legal advice.

(f) That since properly constituted and substantive board meetings are being held in Jersey and that such issues are being seriously considered then this was evidence that the company is being managed and controlled in Jersey. In addition, Rebecca advised that in a group situation there would always be an element of influence from the parent company, but that in itself would be unlikely to cause the overseas subsidiary to become UK resident. The important issue is that the directors of the Jersey company take their full and active responsibility for the company in Jersey and, for example, take their own legal and professional advice as appropriate.

(6) It was resolved that an account for the company should be opened with Barclays and that any change to the signatories on the bank mandate would need approval from all of the directors. It was noted that the authorised signatories were (a) for amounts in excess of £5,000, Mr Lanes together with another director and (b) for amounts less than £5,000, to be approved in accordance with the authorised signatories of Volaw.

(7) It was noted that Mr Cathan of Barclays joined the meeting at 2.30pm and Mr Lanes explained the background and the request to open a bank account for the company and proposed scheme. After discussing the proposed arrangements, Mr Cathan explained that whilst ICeB facilities would be available the proposed transactions would be more efficiently managed with manual payments so that Barclays would be able to process them and be in control when funds are received and payments sent with little delay.

(8) It was resolved to convene an extraordinary general meeting of the shareholders of the company on 25 June 2004, to consider a resolution amending the company's articles of association to increase the company's authorised share capital.

(9) Against "any other business" it was recorded that: "The Directors had fully considered the proposed arrangements and perused the documents setting out those arrangements and IT WAS RESOLVED to postpone the decision of the arrangements and proposed transactions until they had received Counsel's Opinion and that a further Meeting would be held in the future on this matter".

Handwritten notes

136. Miss Hembry's hand written notes record the following (following the order set out in the notes themselves). This is not an exact replica of the notes, in that, in some instances, where the meaning of abbreviations is clear we have set out the full wording or what the notes can be taken to mean (and the same approach is taken in relation to the description of the notes for the later meetings):

(1) The notes start with references to (a) the need to issue share capital and increase the authorised share capital (b) a second meeting to discuss other issues such as the bank account (c) in a column headed "action/follow up", "amend and email final form to minutes and letter of appoint etc to Stephen" (d) "costs – fee schedule given" and "CAA and DOA forms given to Stephen to complete and sign". This appears to refer to Volaw's company administration and due diligence forms they usually required to be completed before accepting an engagement.

(2) There are references to various matters regarding the L&R companies noting "copy of 2002 accounts held, all dormant, all with net assets, not traded (or declared dividends) since 2002" and "transferred to DS (No. 18) Ltd to Jersey No.1", which is a reference to intra group transfers which were to take place in the UK prior to the transaction with the Jersey companies.

(3) There are the following notes:

- "Bank account – signatories [in a column headed - action/follow up]
- Instruct Counsel – 3.00pm 15/6 [in the action/follow up column]
- Consider Option Agreement

DS quoted plc major client of Barclays UK, Lombard Street. Len Cathan.

- PwC – tax adviser
- another meeting after Counsel's Opinion
- enter into Option Agreements then
- proposals happen"

The notes then refer to asking Voisin for their opinion on the transaction. In the "action/follow up" column alongside this note it was recorded that a letter of opinion was required from Advocate Strang as regards the Jersey law position and that Mr Christensen was "to review draft instruction ex Landwell and let [Mr Lanes] know".

(4) It is stated that -

> "shareholders instruct directors to enter into transaction even if not for immediate apparent commercial benefit for company ie L&R Cos – values not likely to increase."

(5) The names of Cynthia Chan and VC are given.

(6) There is then a note "collate points and telephone to amend Instructions to Counsel – poss".

(7) It is then stated –

> "[DS1] – instruction from shareholders to enter into transaction therefore right to enter into Call Option Agreement even if the company loses money on this transaction
>
> If instruction to Jersey directors does this move jurisdiction back to the UK ie effective management?"

(8) There is then a note of a "gift by way of capital contribution

- has to be a distributable reserve ex DS plc to [DS1]
- does DS plc have power to do this? UK law impediment to do this."

(9) As regards Barclays bank there is a note that "we input and bank releases upon Stephen's password".

(10) There is a reference to a:

> "letter from DS Plc advising directors of [the Jersey companies] that transactions are in best interest and will pay funds".

(11) "Rental income and costs of running properties whilst owned by Jersey companies".

(12) "Stamp duty position? Exemption? – s 42 - under same group."

(13) On the banking it is noted:

> "Transaction in one day
>
> - Rather than 15 separate payments
> - Irrevocable instruction to Barclays to pay B – Lombard St upon receipt of funds"

(14) There is a reference indicating the call to "Rebecca Lewis –PwC London 12.40 pm". Seemingly as regards this call two queries are noted: (1) subsidiary in group – "resident directors to get shareholders to approve a shareholder resolution – no problem and "proper legal advice in Jersey from Voisin" and (2) move management to UK? – "grey area" and "parent gave orders to overseas cos – okay" and "meeting/legal advice and debate in Jersey".

(15) There is a note indicating there was a question requiring a company law opinion/UK counsel regarding the power for DS Plc to make a capital contribution to DS1.

(16) The meeting resumed at 2.30 pm with the same parties plus Mr Cathan of Barclays in attendance and, as regards the banking/payment arrangements:

> "SL explained background to request to open accounts relating to proposed scheme
>
> SL explained re proposed payments – better with manual payments not IceB

Can Barclays provide facility to make payment re £17.6 m? [and there is shown a flowchart it appears of the required payment flows].

Steve Sprigens, Barclays Lombard, Manager. Charge in UK re above? – over shares in [DS1].

Rental income to be paid to the two Jersey bank accounts No 2 and No 3

Funds into [DS1] for ongoing incidentals

Volaw

- under £5,000 Volaw A and B.
- over £5,000 any Volaw plus SL.
- fax indemnity

Cheque books for [DS1] and the same and paying in for [DS2] and [DS3].

Viewing facility for SL on Iceb"

(17) There is then what appears to be a summary of the next steps required:

"(1) - Plc board meets 24/6 – letter awaited and funding

(2) - Counsel's opinion

(3) - Enter Option Agreement

(4) - Waiting period

(5) - Action – exercise Option – funds move"

(18) The final page sets out the following:

"Considered documents but await.

Postpone or convene further meeting after Counsel's Opinion?

Plus transfer 2 shares to DS plc – separate meeting after increase in share capital

Draft of today's meeting to SL first

Change minutes appropriately for No. 2 and No. 3 re properties – current valuations to be provided."

Decision to use Barclays bank

137. It was put to Mr Norman that, given Mr Lanes' six weeks of involvement in the planning of this project, that as at the time of the first board meeting on 11 June, Mr Lanes' knowledge of the project was vastly superior to his and that of Mr Christensen. He said "quite naturally, yes…..He presented to the board, yes. As you say, he had the background. It's only natural that we allowed Stephen to present to the board."

138. It was put to him that it would have made more sense, given Mr Lanes' superior knowledge of the project, and given his familiarity with the project and the documentation, for him to be the chairman of the meeting. Mr Norman disagreed. He said "you want the expert to be independent of the chair so the chair can ask questions, or the chair and the other directors can ask questions."

139. It was put to Mr Norman and Mr Perchard that the decision that the Jersey companies would have bank accounts with Barclays had in fact been taken prior to this board meeting.

(1) Mr Norman said that using Barclays seemed to have been agreed between Ms Leigh and/or Ms Hembry with Mr Lanes but there was no reason to object. He noted that Barclays are one of Volaw's principal bankers and "if a client says they wish to use Barclays as a banking operation, we are not going to object….it is far easier to move money within a group if it's with the same bank" and "it would have made life easier to open the bank accounts in Jersey because the Jersey branch of Barclays would reflect KYC (know your client) held by their parent". So "it was a logical bank to go with on both sides". Mr Perchard similarly said that as DSG had a relationship with Barclays it was thought helpful to continue that relationship which he considered "quite a sensible thing to do" noting that it was easier for Volaw because Barclays knew them as a business and would understand their take on procedures.

(2) Mr Norman said that he particularly remembered Mr Cathan being in the office that afternoon for quite some period of time and that the directors spent a long time discussing DSG controls over the bank account. There were "extensive discussions that afternoon with Len as to how the significant amounts of money that were going to flow through the bank accounts could effectively be secured and made such that Volaw couldn't run off with them, not that we would".

(3) Mr Perchard acknowledged that Ms Hembry and Mr Lanes "were certainly working to help towards" the opening of the bank account with Barclays but said "of course, it's not their decision to get the account open because Barclays still have to decide whether to open the bank account. It is not unilaterally any one person's decision in the whole process but they were clearly……working to try and make things easier by starting the process." He noted that Ms Leigh said in her email of 9 June that: "This will be done ready for tabling at the meeting on Friday." He interpreted this as meaning that it was a preparatory stage to try and assist matters. He saw Ms Hembry as driving the connection with Barclays from the Volaw side albeit that Mr Lanes had contacted Barclays separately and Ms Hembry was then acting on his requests.

140. Mr Perchard also noted that the Barclays bank account opening and instructions forms were signed initially by Mr Norman on 11 June but on 18 June Mr Norman signed further bank mandate forms. He said this would most likely have been agreed to in oral discussions between the Jersey directors. He noted that the Jersey directors sat within very close proximity to each other at the Volaw office and would often talk about matters connected to the companies they were involved in. So it was by no means the case that every communication between them was done in writing/email.

Conference with Counsel

141. As regards the pre-booking of the conference with counsel, in his witness statement Mr Perchard noted that he was not surprised that a call with counsel had been pre-arranged by PwC/Landwell; it would normally be prudent to book counsel in advance given how busy they are. Mr Christensen and Mr Norman were consistent in

their evidence that the main thing was that they needed the advice. Mr Christensen said that as his concern was to obtain advice, he was not concerned with who had actually fixed the date with counsel. Mr Norman stated in his witness statement that he had no objection to the proposed call with counsel since clearly advice was required.

Consideration of the option proposal

142. In his witness statement Mr Christensen said that all of the meetings that he attended involved an active discussion of the relevant issues. As regards the consideration of the option, he noted the following in addition to the general statements as to how the directors approached matters as set out above. The directors were well aware that the proposed transactions had UK tax advantages for DSG but he was clear he had to act in the best interests of the companies. As the assets were to be acquired at a price above the market value "both Trevor and I were keen to ensure that the company law considerations had been thought through". PwC had suggested that UK counsel would be instructed and he was keen to do so and also that the directors ensured the proposals did not cause any problems. The directors were also keen to understand more about the tax aspects of the proposal and that is why they called PwC. He thought the call had not been scheduled beforehand. He said that RL's input was fairly limited and the fact that it was for the directors to decide the appropriate course of action, as she advised, was something that he and Mr Norman were well aware of. He said that a decision was premature at this stage as they agreed to take counsel's advice and the subsequent advice "gave us comfort regarding the legal position".

143. He noted that he first raised the issue of the bank charge over one of the properties to be acquired at this meeting and that Mr Lanes subsequently emailed him about this but he had misunderstood and he had clarified this in the later correspondence (which is set out below).

144. Mr Christensen was asked a number of questions at the hearing relating to what the directors had discussed about entering into the options.

(1) He said that his recollection:

> "is that there was a degree of concern perhaps or questioning possibly by both me and I think it was Trevor Norman who was present - as to whether it was appropriate, indeed lawful, for a company to enter into a contract where it would be paying a great deal more for assets than they were worth, and that was something over which we were naturally keen to receive advice upon, and so I think that the issue about instructing counsel was far from a controversial issue. It was a natural thing for us to do in order to allay concerns that we might have about the transaction".

(2) It was put to him that these concerns are not recorded in Ms Hembry's notes of the discussion. He agreed but said that the notes were not "intended to be a verbatim record of what was discussed….They are merely shorthand notes of the discussion. They are bullet points, if you like".

(3) He agreed he did not have a precise recollection of what was discussed but he did recollect that the directors were concerned about buying assets "for far more than they were worth". He understood from the PwC paper that the acquisition of the assets at an over value was an integral part of the tax planning but that did not address the issue as to whether or not the board would be putting the companies at risk in other respects if they were to enter into such a transaction. That was an issue on which the directors wanted counsel's opinion and they were not just satisfied with an opinion from UK counsel but also felt they should instruct Jersey counsel.

(4) It was put to him that it was likely that Mr Lanes, given that he was a party to the correspondence of the previous day, would have raised the seeking of or obtaining of advice also from Jersey counsel. Mr Christensen said that was possible but he noted the comment in Ms Hembry's notes "RAC to review draft instructions to counsel" as "a clear indication" that he was "quite involved in that issue".

(5) Mr Christensen noted that there was no commercial benefit for the Jersey companies but:

> "The benefit arose to our shareholders, and it's perfectly reasonable for the directors of a company to enter into a transaction that benefits its shareholders. In fact, it is right for them to do so as long as it is not going to in any way disadvantage stakeholders in the company. There was benefit to the shareholder and that's what we took into account in considering this transaction."

145. Mr Norman was questioned on why the directors entered into the options in the context of the third board meeting but his comments are also relevant here. It was put to him that there was no evidence of any consideration of what was in the best interests of the individual Jersey companies. He said that:

> "under basic principles of Jersey law, we are able to look to the interests of our parent company to the extent that we do not adversely affect any creditors….. There were no third party creditors that we had to particularly consider here. We were looking to protect the interests, or the interests of the company were those of the interests of our parent."

146. He was asked how it was in each Jersey company's best interests to enter into contracts to acquire assets at a substantial overvalue. He again said that:

> "it is a basic principle of Jersey law that we can look to the interests of our parent, our shareholders and, as such, that is the benefit of what we are doing….It was to assist the best interests of the group of which the companies are a member. That is all I can say…..They are part of a group structure. They are supported by their parent".

Observations on evidence relating to meeting of 11 June 2004

147. The above records indicate that Mr Lanes took the lead in setting out details of the plan, which accords with the evidence of his role as a facilitator and communicator. It seems to us that, given his role within DSG, his very close involvement with the advisers and the DSG implementation team and the complete lack of the Jersey directors' direct contact with those parties, Mr Lanes was in effect acting at this meeting on behalf of DS Plc, as the client of Volaw/the Jersey directors, in taking the lead and explaining the plan. Aside from Mr Lanes acting as the primary point of information, his role essentially as an administrator is apparent from the references to him dealing with various forms.

148. Whilst Mr Christensen said in his witness statement that the directors were keen to know more of the tax aspects, the minutes and notes record that when they called PwC the only tax aspect recorded as discussed was stamp duty and whether the CMC issue was affected by the parent approving or giving instructions as regards the transaction. There is no record of any discussion with PwC (or any other adviser) as to the operation of or merits of the tax planning.

149. HMRC argued that the decisions to appoint counsel and to open an account with Barclays were in fact taken in the UK in effect by DS Plc acting through Mr Lanes and CC. They noted that UK counsel had already been booked before the meeting without any reference to the availability of the directors and the agenda, as suggested by PwC/Landwell included that Jersey advice should be obtained. They asserted that it was proposed that Mr Christensen would look over the instructions only because PwC/Landwell wanted the instructions to be sent from Jersey, as envisaged in the earlier planning. As regards the bank account they pointed to the correspondence on 9 June in which Mr Lanes appeared to be instructing Ms Leigh and Ms Hembry to open an account with Barclays.

150. The consistent evidence of the Jersey directors was that they did not object to the conference with UK counsel being pre-arranged; the important thing was that they needed the advice. This accords with the evidence that the key concern for the board was the implication of paying for the assets at an overvalue and hence the legality of the transaction. Mr Christensen thought he was quite closely involved in instructing Jersey counsel, as supported by Ms Hembry's notes, which refer to him reviewing the instructions, and by the fact that he attended the conference call with UK counsel on 15 June 2004. We note that Mr Norman referred to Mr Christensen as having a role in dealing with corporate law issues and so usually more involved in legal advice. Taking all of this into account and, in particular, the importance which the Jersey directors' consistently placed on the advice and the legality issue to which it related, we accept the Jersey directors' evidence that they wished to obtain the advice. We can see no substantiation for the assertion that Mr Christensen was involved in that process only for presentational purposes. In the light of their consistent evidence on this point, we consider that the Jersey directors were serious in their concern to check the legality of what the Jersey companies were being asked to do.

151. As regards the decision to use Barclays as the Jersey companies' bankers, the Jersey directors' evidence was not only that Volaw had no reason to object but also that there were positive reasons for them to agree. Mr Lanes appeared to think that he could decide what bank to use without any need for the Jersey board's approval (as he

referred to opening the accounts himself but that he had been advised it would be easier as a process for Volaw to deal with it). However, neither that nor the fact that Ms Hembry was prepared to put the steps in motion (presumably in view of the tight timetable) of itself indicate that the Jersey board had accepted Barclays as the bank until it was put to them at the board meeting.

152. The written records do not record that there was any discussion as to the merits of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group. The only relevant matters recorded relating to the substantive issue of the proposed acquisition of the assets were (a) as noted, the need to take UK and Jersey advice concerning the legality of the proposal, (b) the query on the capital contribution, which was required to fund the acquisition and (c) the notes suggesting instruction or approval from the parent was required and a letter would be provided by the parent that the transactions were in "best interests" and funds would be provided.

153. That DS Plc was to instruct the companies to enter into the option arrangements is evident from both Ms Hembry's notes and the typed minutes. Ms Hembry referred twice to the proposal that the shareholder would have to "*instruct*" or give "*instruction*" to the directors and, as regards the call with RL on which this point was raised as regards whether it affected the CMC issue, noted "resident directors to get shareholders to approve a shareholder resolution – no problem…..parent gave *orders* to overseas cos – okay". She also referred to a letter from DS Plc advising directors of [the Jersey companies] that transactions are "in best interests and will pay funds". The typed minutes refer to this in terms of "instructions" from or "authorisation" by the parent.

154. There is no indication in these records as to who raised this issue. Given that the need for this was clearly identified as a requirement in the PwC paper of 6 April 2004 due to the lack of any benefit for the companies themselves, it is possible that it was raised by Mr Lanes in his explanation of the proposal. Whoever raised it, we consider it is clear from the wording of Ms Hembry's notes that it was envisaged that there was to be an instruction from DS Plc for the board to enter into the transaction on the basis that the parent was to confirm that it was in was in the "best interests" of the group to do so.

Events between 12 June 2004 and the next board meetings on 25 June 2004

155. In the period before the next board meeting on 25 June 2004, in summary, the following main events took place:

(1) On 15 June 2004, the conference call took place with UK counsel (Mr Michael Todd QC) and was attended by Mr Lanes, Mr Christensen, Landwell and Mr Strang. DM then sent Mr Marx, CC and Mr Lanes (copied to the implementation team) a draft report for the board of DS Plc. Following that written Jersey legal advice was received from Mr Strang (on or before 21 June 2004).

(2) On 18 June 2004 Mr Norman and Mr Perchard signed written resolutions of the Jersey companies electing to dispense with the requirement to hold annual general meetings in that year and future years.

(3) There were discussions on the banking arrangements which largely took place between Mr Marx, Mr Lanes and Mr Sprigens of Barclays in the UK.

(4) The draft minutes for the meeting of 11 June 2004 were circulated including to the implementation team and commented on.

(5) The documents relating to the formal appointment of Volaw and the directors/officers were signed.

(6) Preparations were made for the meeting on 25 June 2004 such as that Ms Hembry sent Mr Lanes a draft agenda and liaised with Ms Chan on the documentation for the proposed increase in share capital of the companies.

Correspondence between Mr Lanes and Ms Hembry

156. On 14 June 2004:

(1) Ms Hembry emailed Mr Lanes noting that she was completing the draft minutes for the meeting on 11 June and dealing with the paperwork for the increase in the authorised share capital. She said she hoped to complete the bank account opening documentation soon and she would "also transfer the shares as discussed", meaning the transfer of the shares in the Jersey companies from the initial subscribers, the Volaw nominees, to DS Plc, the beneficial owner.

(2) Mr Lanes responded noting that (a) Landwell had advised that the proposed capital contributions were permitted in a conference call that morning, (b) he had been in touch with Mr Steve Sprigens at Barclays on the banking proposals (c) PwC had asked him to remind her to obtain Voisin's corporate advice (d) both Jersey counsel and Mr Christensen were able to attend the conference call on 15 June 2004 and (e) he had now "signed on behalf of DS Plc the Volaw appointment and indemnity letters".

(3) Ms Hembry responded that instructions had been given to Voisin for their opinion on the transactions and that she would let Mr Lanes have the draft minutes when completed.

157. On 16 June 2004, Ms Hembry sent Mr Lanes:

(1) An email, with a copy to Mr Christensen and Mr Norman, attaching (a) a letter of instruction to Mr Strang, (b) the draft minutes for the board meeting of 11 June and (c) draft minutes of a meeting of the board approving a transfer of shares dated 15 June 2004. She said that the minutes approving the increase in authorised share capital and the bank account opening documentation would follow and that she was still waiting for the signed company administration agreements and the directors'/officers' appointment forms.

(2) A further email to Mr Lanes only stating that she had "noticed an error in the minutes approving the transfer of shares" and therefore she attached an amended version and noting that the letter of instruction had been passed to Mr Strang that day.

It is not clear why Ms Hembry did not include Mr Perchard in these emails. Mr Norman and Mr Perchard agreed the email would have been relevant also to Mr Perchard.

158. In the evening of 16 June 2004, Mr Lanes telephoned Ms Hembry leaving a voicemail message (as recorded in a note by Miss Hembry). He said that he had perused the minutes of the 11 June 2004 and that they were "quite good" although he had "some minor amendments" and would ring the following day to discuss them. He confirmed that the agreement and appointment forms Ms Hembry had referred to had been sent back and noted that there was a meeting with Mr Sprigens the following day to discuss the banking arrangements.

159. On 17 June 2004:

(1) Ms Hembry wrote to Mr Lanes noting that the minutes increasing the authorised share capital were being checked that day and would be forwarded shortly, the banking documentation had been completed and was awaiting Mr Norman's return to the office and she had received the agreement/forms he had sent.

(2) Mr Lanes later telephoned Ms Hembry to discuss his comments on the draft minutes of 11 June 2004 as recorded in notes by Ms Hembry from which it appears:

(a) He asked her to replicate some of the decisions for DS1 in the minutes for DS2 and DS3 "in order to place the background on record for those particular transactions". She noted "copy and paste to No 2 and No.3 – not specific to exact assets – Counsel's opinion – talking to PwC".

(b) It was noted that "funds to follow for fees, running expenses when bank a/c opened".

(c) He asked her to change references to the fact that events (such as the grant of the option/transfer of beneficial ownership in the assets) "would" happen to that they "may" happen.

160. Mr Norman agreed that, if the changes to the wording above reflected a departure from what Mr Lanes actually said at the board meeting, that would be "inappropriate". He did not accept, however, that "would" reflected what had been said at the meeting. It appears that the request in the change to the language was made in response to an email from Mr Marx on the use of language as set out below.

161. Later in the afternoon of 17 June 2004, Ms Hembry emailed a colleague at Volaw advising her that the Jersey companies were incorporated on 10 June 2004, that the companies were tax exempt and that there were "the usual three in-house directors" and one outside director. She noted that Mr Lanes had advised her that the auditors were to be Deloitte & Touche in Jersey.

162. On 18 June 2004 Ms Hembry sent Mr Norman a memo attaching the redrafted minutes for the meeting of 11 June 2004 noting that these were as discussed with Mr Lanes and that he "would like a "cut and paste" job taking the majority of the information from the minutes for DS1 to DS2 and DS3 "particularly the reference to Counsel and PwC". She asked Mr Norman if he agreed and said that, if so, she would redraft the minutes for the other companies before sending them to Mr Lanes for further comment.

163. On 21 June 2004:

(1) Ms Hembry sent Mr Lanes (a) the redrafted minutes of the 11 June meeting, (b) a copy of the bank account opening documents for his information and (c) the written Jersey legal advice which had then been received. She also noted that she held "all the supporting documentation and will ask you to sign the acceptance (and undated letter of resignation) letters as a director of each company at our meeting on Friday [25 June]" and that, whilst both Mr Christensen and Mr Norman were away, Mr Perchard would be at the meeting.

(2) Mr Lanes responded as follows:

(a) He asked her to circulate the minutes for the meeting of 11 June 2004 more widely. He noted that they had been discussed "at our conference call on Friday with various representatives of PwC and Landwell" and it was suggested that Ms Hembry circulate the draft minutes to all members of the implementation team (whose email addresses he provided) as "you are based in Jersey". He said the suggestion was made that they be merely attached to an email stating in effect they were provided for information only and that "we should not seek comments, which is advisable since none of the individuals were in attendance (albeit Rebecca by telephone). However, if there is anything untoward, I'm sure they will shout."

(b) He confirmed his attendance at the board meeting planned for 25 June 2004, said that "the bank mandates look okay" and asked Ms Hembry to advise him once the accounts were opened.

(c) He asked for an email copy of Mr Strang's opinion and informed Ms Hembry that "Landwell are preparing a small package of documents for Friday's meeting".

(d) He said he did not think the meeting of 25 June "would be complicated unless Simon Perchard has to be brought up to speed (I assume you can give a briefing beforehand)" and the "main crux" would be to "consider counsel's opinion in the UK, advocate opinion in Jersey, review option agreement, confirm that DS Plc is willing to provide the capital contribution and wishes the Jersey companies to proceed with the transaction as the shareholder, before approving the option

agreement". He hoped the above could be achieved "certainly within 2 hours so I can catch the plane home".

164. Mr Perchard commented that he did not know why Mr Lanes thought that the minutes should be circulated by Miss Hembry because she was in Jersey. The directors would not have minded who circulated the minutes.

165. It was noted to Mr Marx that he may have been included in the implementation team conference call, to which Mr Lanes referred, at which it was clear from the above correspondence that the minutes for the first board meeting were discussed. He said that if he had been on the call he would not have commented on the minutes. As he had not attended the meeting on 11 June 2004 he thought he should not become involved in amending the meeting minutes:

> "I understood 300 per cent that I had to stand back totally from anything to do with the Jersey companies, anything whatsoever and I never spoke to any – I have no recollection of speaking to any Jersey directors, sending them any emails, commenting on what they did - correcting what they did. It was very important to me to have a complete hands-off approach to the chain of events that was or was not going to happen within Jersey and I was firm in my self discipline on that because I realised that was very important in this particular process."

166. On 22 June 2004:

(1) Ms Hembry circulated the draft minutes for the 11 June board meeting to the implementation team, as Mr Lanes had requested the day before, using the wording he had required in her covering email.

(2) She then sent Mr Lanes a copy of a draft agenda for the board meetings on 25 June 2004 stating "please amend as appropriate" and "let me know the changes so I can print off a completed agenda before Friday." Mr Norman agreed that, if the board had been functioning as a normal board, he would have expected to have been copied into emails such as agendas in advance of meetings.

167. On 24 June 2004:

(1) RL emailed Ms Hembry with some comments on the minutes relating to the wording in the minutes of the first board meeting which specifically referred to her. She noted that Ms Chan also had legal non-tax comments about which she thought it might be helpful to have a word on the phone.

(2) Ms Chan later had correspondence with Ms Hembry regarding the proposed share subscription by DS Plc in the Jersey companies totalling around £24 million. Ms Chan recommended the amount by which the share capital should be increased and asked Ms Hembry to prepare the relevant share subscription documents. She later informed Ms Hembry that the share subscriptions had been postponed but asked for the increase in share capital to go ahead on the following day. Ms Hembry responded that she would redraft the minutes and supporting documentation as regards the amount of the increase in authorised share capital.

168. It was noted to Mr Perchard that the above indicated that Miss Hembry was drafting in advance the minutes of meetings that were due to take place the next day. He said that "changing an authorised share capital, it's a very standard concept…..so we would have had templates, I think, on the system, just to help speed up the preparation of minutes. Because they are very formulaic". We do not see there is anything unusual in preparing such documents in advance. It was put to him that there was no evidence that he or the other Jersey-based directors were being kept informed of any of this. He agreed that there was little documentary evidence but noted again how closely they worked together as a team.

Banking arrangements

169. On 14 June Mr Lanes wrote to Steve Sprigens at Barclays (copied to Mr Marx, CC and Mr Cathan) about the banking arrangements:

(1) He said he had been appointed director of the Jersey companies "*which is accepting ownership* of the [relevant assets]".

(2) He explained that the transaction required a number of cash transfers and that "the experience of the fellow Jersey directors is that the greater number of cash transfers the greater likelihood of incurring a delay, or even losing the transfer in the banking system".

(3) He noted the meeting with Mr Cathan and that it was suggested that "*since the transfers were all going*" from one Barclays account to another it may be possible for Barclays to effect the transfer at the higher amount but strictly under Barclays control to avoid the money going astray but that would require the goodwill of Barclays.

(4) Mr Lanes added that he was due to receive proposals on the possibility of retaining a charge over the Sheffield property (which was currently charged to Barclays) once it was transferred to the Jersey company:

> "The suggestion by the fellow Jersey directors is that it may be easier to retain the charge in the UK, rather than under Jersey jurisdiction….a charge may need to be retained *once it is transferred to the Jersey company*". (The emphasis in italics is in each case added).

170. Mr Marx agreed that the above email would have been written by Mr Lanes, following his attendance at the first Jersey board meeting and would have been "informed" by any discussion at that meeting. Mr Marx accepted that Mr Lane's concern as to money "going astray" was, again, about the issue of "control" by DSG over the money.

171. On 15 June 2004 Mr Marx responded to Mr Lanes' email to Mr Sprigens stating that he needed to be "much more careful" with the language he used to communicate on the project as "careless notes could prove expensive". The concern appeared to be that Mr Lanes language indicated that the stated events would happen as opposed to that they only may happen (see the wording in italics in [169] above).

172. Mr Marx agreed that this was an "instruction" being given by him to Mr Lanes as to how he should communicate when acting as a director of the Jersey companies. He was saying to Mr Lanes "you need to be careful" with the language used. In his

view it is self-evident that Mr Lanes understood that the transaction "may" only happen. It is not credible that Mr Lanes thought it "will" happen when he, "possibly more than anybody else but, at least equally to lots of people, would have understood the conditionality of the things that needed to happen". So he did not consider that he was attempting to change Mr Lanes' understanding of events. He was merely saying he needed to be careful in the language used "in case it could be interpreted that you think something is going to happen when we all know, …that this only may happen".

173. Following this Mr Marx requested a meeting with Barclays. On 16 June 2004, Mr Marx emailed CC and Mr Lanes notifying them that Steve Sprigens of Barclays was coming to the office "tomorrow at 1.30pm so we can decipher for him our various emails".

174. Mr Marx said that he recalled requesting the meeting with Barclays because he wanted to clarify personally to Mr Sprigens the conditionality of the request, so that the bank fully appreciated the context of these contingent arrangements and that it also depended on the independent Jersey directors being able to and then agreeing to enter into the option agreements. By establishing these arrangements, DS Plc was requesting its bankers to go to some considerable lengths and trouble to prepare for a series of transactions that involved significant amounts of money but which may or may not happen. It was important to Mr Marx that the bank appreciated the transactions could prove abortive due to circumstances outside of his or DS Plc's control. He was also unsure of the strength of internal communication between Mr Cathan and Mr Sprigens. He wanted to be sure that the requests and reasons for them were fully understood by the DS group relationship manager within Barclays.

175. On 17 June the meeting with Mr Sprigens took place in London attended by Mr Marx, CC and Mr Lanes. A summary of this meeting was provided by Mr Lanes to Ms Hembry shortly after, the notes of which record that:

> (1) As regards the cash flow: "It was discussed that funds would be overnight in Jersey upon receipt at the Bank and then circulated over a number of days… A meeting would then be held in Jersey with Stephen in attendance and he would sign Letters of Instruction for funds to be transferred on certain value days".
>
> (2) "Stephen would like the bank documentation to be amended to include statements signed by the Directors that the Mandates cannot be changed without Stephen Lane's authority".
>
> (3) Mr Lanes advised that he would send Mr Christensen an email asking him why there should not be a charge on the property (being the Sheffield property) with Barclays in Jersey.

176. Mr Marx agreed that Mr Lanes attended the above meeting with Barclays at least in part in his capacity as a director of the Jersey companies. These were, as Mr Norman agreed, "high level discussions" about the banking arrangements that the Jersey bank would be entering into. Mr Marx agreed that the banking matters being discussed at this meeting were "a critical matter" for the Jersey companies, again, the banking was "fundamental" to the transactions. Matters discussed at this meeting were managerial matters for the Jersey board; for example, Mr Marx accepted that the

decision regarding the bank mandate was "an important management decision" for the board. He agreed that this change was proposed so that DSG could retain "control" over the company's banking.

177. Later that day:

(1) Mr Cathan telephoned Ms Hembry to say that he had discussed with Mr Sprigens "why a charge could not be taken up with Barclays in Jersey rather than in the UK". Ms Hembry said that Mr Lanes would be sending an email to Mr Christensen asking him for his advice on this.

(2) Mr Lanes sent an email to Mr Christensen (copied to Ms Hembry, Mr Cathan and Mr Norman) noting that Mr Christensen had said in the meeting that it would be preferable if the Sheffield property were not to be transferred subject to a charge under Jersey law. He explained that he had met with Mr Sprigens that day and had discussed the issue and "to assist in making a final decision how to proceed" he would welcome if Mr Christensen could expand on his reservation of a Jersey charge.

178. Mr Christensen responded to Mr Lane's email on 21 June (copying in Ms Hembry, Mr Cathan and Mr Norman) clarifying that the point regarding the Sheffield property was that the charge should be a charge under English law, not Jersey law. He stated that the Jersey companies did have the power to give such a charge and it would be a matter for "the bank and their advisers" how to proceed.

179. On 21 June 2004 Miss Hembry emailed Mr Lanes stating that she had spoken to Mr Cathan at Barclays about the "signatories on the mandate" and that "rather than altering the mandate itself we have agreed… that I will amend the minutes to include a further sentence stating that no changes can be made [sic] to the bank mandate without all the directors' agreement".

Minutes for meeting of 15 June 2004 which did not take place

180. In his witness statement Mr Perchard stated that "on 15 June 2004 there was a short board meeting in which I participated whereby the Jersey directors approved the transfer of legal title to the shares in DS1 to DS plc". However, in examination-in-chief, Mr Perchard corrected this; the meeting did not take place on that date. The other two Jersey directors also accepted at the hearing that the fact that the minutes circulated by Ms Hembry were not signed indicated that there was no meeting on 15 June 2004.

181. The Jersey directors could not explain why Ms Hembry prepared and emailed minutes of a meeting which had not in fact taken place on the stated date, being the day before she circulated the minutes. Neither Mr Christensen nor Mr Norman could explain why, when these minutes were sent to them, they did not notice the error. Mr Christensen said that he was probably busy and did not read the email properly before deleting it – he may have just scanned it to look at the items of most relevance to him such as Mr Strang's opinion.

182. It can only be described as very odd that Ms Hembry circulated minutes of a meeting stated to have taken place on the previous day which it is clear did not take place. No viable explanation was provided for this. It is a matter of some speculation but an explanation could be that Ms Hembry thought the meeting had taken place

between the directors although that somewhat undermines the evidence on the close liaison between her and the directors. Another explanation is that the directors were happy to sign off on procedural matters without actually holding the relevant meeting. We do not know. In any event the fact that the directors did not pick this up indicates they were not paying full attention at any rate to what may be termed procedural matters as is also evidenced by other errors.

Activity in the UK implementation team

183. In this period the implementation team continued to correspond amongst themselves (without copying in the Jersey directors) with updated information and timetables for the project. On 17 and 18 June 2004 DM circulated emails relating to "base costs of properties/L&R Cos" and a "revised cash flow summary". Mr Marx agreed that these emails and discussions around them would have included matters of "policy, management and strategic matters". On 23 June 2004, PwC sent Mr Marx and Mr Lanes (copied to the implementation team) an email with a further revised implementation timetable with "target dates for each step in the transaction". Mr Perchard agreed that this was an "important document" for both DSG and the Jersey directors and that he would have expected to see such documents. We find it odd that the Jersey directors were not kept informed of such matters which were plainly relevant to them.

Board meetings on 24 and 25 June 2004

184. At 9.30 am on 24 June 2004, a board meeting was held of DS Plc, attended by Mr Marx and Mr Lanes:

(1) The tax planning nature of the proposed transactions was noted: "The precise manner in which the losses may be realised is complicated and involves the use of companies located in Jersey" and:

> "Tax counsel advice has been obtained on the proposal together with corporate counsel in the UK and legal advice in Jersey on the possibility that the transaction may be considered ultra vires, since the Jersey companies will be acquiring the assets at an overvalue."

(2) The board of DS Plc resolved that to assist the Jersey companies in entering into a transaction of this nature it would, as beneficial owner of the Jersey companies, approve the tabled written resolutions to be passed by the nominee shareholders of the Jersey companies (see [185(3)] and [185(4)]) and the issue of letters to the companies stating it may be prepared to make a capital contribution.

185. On 25 June 2004:

(1) The boards of the relevant DSG UK subsidiaries met in the morning in London and approved the grant of the call options to the Jersey companies. The option agreements stated that exercise of the options was conditional on the FTSE condition being satisfied, DS Plc approving the exercise and, as regards DS2 and DS3, the release of charges over the properties.

(2) On behalf of DS Plc Mr Marx wrote separately to the board of each of the Jersey companies setting out that DS Plc would consider making capital

contributions to assist them to acquire the assets under the call options. It was noted this was not a contractual commitment to provide the specified funds.

(3) The board of DS Plc wrote to the nominee shareholders of the Jersey companies confirming that draft resolutions approving the call option transactions had been approved by the board at the meeting the previous day and that "we hereby instruct you, in our capacity as the beneficial shareholder of each of [the Jersey companies], to compete, execute and deliver the resolutions".

(4) The nominee shareholders of the Jersey companies, in accordance with this instruction, approved written resolutions for each company that the proposed entry into the call option agreements by the company:

> "was in the best interests of the [company] and to the corporate benefit of the [company] and its members and that it be and hereby is approved and that (for the purposes of Article 74(2)(a) of the [relevant Jersey law provisions]), the directors of the [company] are authorised to enter into, execute and deliver on the said call option agreement (with such amendments thereto as the directors may in their discretion think fit) in the name of and for the benefit of the [company]".

(5) The second meeting of the board of the Jersey companies was held at 2.30pm attended by Mr Christensen, Mr Perchard and Mr Lanes with Miss Hembry in attendance at which it was resolved to enter into the option agreements as set out below.

(6) The directors of the Jersey companies also resolved later that day to amend the articles of association so as to allow an increase in their respective authorised share capital and to increase the capital.

186. Mr Marx noted in his witness statement that clearly there was nothing anyone in DSG could do to influence the satisfaction of the FTSE condition. His understanding from PwC was that there was a 90% probability of the condition being met. He could not really say what would have happened if the condition had not been met but there was no back up plan or other arrangements in place to try and repeat the transactions if the options were not exercised. In that case so far as he was concerned the transactions would have failed to deliver the outcome hoped for and that would have been the end of the matter.

Preparation for second board meeting

187. Initially it appeared that only Mr Perchard of the Jersey directors could attend the meeting of the board of the Jersey companies scheduled for 25 June 2004. Mr Christensen was not shown on the agenda but did in fact attend which he attributed to the fact that his diary must have changed as was a frequent occurrence. It was put to Mr Christensen that it is to be expected that the board meeting to consider a matter such as entering into the option agreement would be fixed at a time when all or at least three of the statutory directors would be available to attend. He said "in Utopia, yes, absolutely".

188. In his witness statement Mr Perchard said that although he had not attended the first meeting, by this stage he had caught up with the paperwork and discussed the matter with Mr Christensen and Mr Norman. He noted that he did not recall the specific dates but this is how he had always approached matters during his professional career through catch-up briefings with his fellow directors on any particular aspect that he had missed.

189. It was put to Mr Perchard that there is no evidence that any papers were sent to the Jersey directors or Ms Hembry prior to this meeting. He noted that Mr Strang's opinion was sent to Ms Hembry a few days before this meeting, so he thought that he would have seen that. He noted again that the way the Volaw team worked was that Ms Hembry would "often be the central communication point" and he thought she would pass on such information as she had.

190. The Jersey directors gave consistent evidence that they worked together in tandem as a team with Ms Hembry as the point of communication between them and the client. We accept that it is likely that Mr Perchard would have been brought up to speed by the other directors and that Ms Hembry would have passed on items such as Mr Strang's advice and that would not necessarily have taken place by email but rather by handing out physical copies given the physical proximity in which the directors and Ms Hembry worked. We note this also accords with Mr Lanes expectation when in the run up to this meeting he wrote to Ms Hembry stating that he did not think the meeting of 25 June "would be complicated unless Simon Perchard has to be brought up to speed (I assume you can give a briefing beforehand)."

191. We note that Mr Christensen was at the first meeting on 11 June 2004 and that he attended the conference with counsel. Given the timetable and short period between the meetings, even though the directors may well have been dealing with a number of other matters, it seems unlikely that they would have forgotten what was happening from one meeting to the next.

Typed minutes

192. The minutes for each of the Jersey companies record the following:

(1) Mr Perchard was appointed chairman, the minutes of the meeting of 11 June 2004 were read to the meeting and approved and it was noted the bank account had been opened.

(2) The chairman reminded the meeting that the company may be granted an option to buy the relevant asset and that should the directors decide to exercise the option DS plc may be willing to make a capital contribution to assist in the purchase and would provide a letter of intent.

(3) Mr Lanes presented the opinion of Mr Michael Todd QC dated 21 June 2004. It was noted by the directors that, on counsel's advice, there should be funds to exercise the option and that counsel's opinion offered comfort on the proposed transaction.

(4) Mr Perchard presented an opinion dated 16 June 2004 from Advocate Strang. It was noted that following this advice and further advice from Advocate Strang on 24 June 2004, "there was no legal impediment to the proposed transactions". Advocate Strang had also "pointed out the position in

insolvency and advised that provided the company had assets to meet its liabilities despite buying at an overvalue then the transactions could proceed".

(5) Mr Perchard presented the call option agreement to the meeting briefly describing its terms, the directors perused its terms and observed that the exercise condition was slightly different from that originally proposed. Mr Lanes explained that this was the result of a valuation exercise undertaken with DSG which had resulted in the revised figure.

(6) The chairman noted that under clause 4.1 completion would be no more than 10 days from the date of the option notice and under the form of the option notice was stated to be 5 days. The directors called Ms Chan at Landwell who confirmed that it should be 10 days not 5. It was noted that the figure for the FTSE condition would be telephoned to the directors during the meeting and it could then be inserted in the agreement. Mr Lanes explained that the transaction had already been approved at the DS Plc board meeting on 24 June and he was authorised as secretary of DS Plc as beneficial owner of the company to instruct the nominees to complete a written resolution resolving to enter into the transaction. Ms Chan confirmed the FTSE condition figure. It was stated that "after consideration it was resolved" to execute the agreement and that Mr Perchard be authorised to sign it. Mr Perchard noted that DS Plc had executed a letter of intent confirming that DS Plc would consider making a capital contribution to the company.

(7) The directors authorised the invoicing of legal and administrative costs and that these would be rendered after the call options had been exercised or after the exercise periods lapsed.

(8) It was agreed that the next meeting would be on 12 July 2004 to consider whether the conditions of the agreement had been met and whether to exercise the option notice.

Ms Hembry's notes

193. The handwritten notes made by Ms Hembry record the meeting as having started at 2.30pm and stated the following:

(1) In the "action/follow up" column – it is stated "approve previous minutes".

(2) It was recorded that DS Plc had approved the transactions at a board meeting yesterday and the bank accounts were now open. There was a note to email the details to Mr Lanes.

(3) Mr Lanes presented the Counsel's opinion (Michael Todd QC) dated 21 June 2004 to the meeting:

- "Funds to exercise
- Comfort
- Probability not certainty re option
- Index will go up. Probability (one of the conditions)
- Option period 2 weeks
- 12 July – another meeting

- Noted all okay to proceed"

(4) Advocate Strang's opinion of 16 June "was discussed":

- "Insolvency situation
- Noted my email last night ex IWSS re further advice
- Provided company is solvent ie has assets to meet liabilities despite buying at an overvalue"

(5) There are the following notes on the call options:

"Call Option Agreements

- option price
- quantify cost of asset and costs
- No. 2 beneficial ownership only
- Completion 4.1 = 10 days revised. 5 days under Option Notice
- Considered and noted
- FTSE index ex Rebecca"

(6) There follow notes as regards the capital contribution and share subscriptions:

"Letters of Intent ex DS Plc confirming DS Plc will make capital contributions (ie gifts)".

"Banking transactions; 12/7 £24,495,000 to 1, 2 and 3. All letters of instruction ready to sign by SL on 12th all dated respective dates."

"Bill after 12/7 incorp and admin."

"Share capital Bo. 3 Friday 16th £11,600,000 fixed over w/e if in on 16th."

"Application for shares – amended. Email to SL for him to get signed to bring with him on 12/7."

(7) There is a reference to calling Ms Chan 4.00pm:

(a) "Should be 10 days not 5 in Option Agreement.

(b) Written Resolution ex shareholders cannot give without equivalent confirmation (instruction) ex DS Plc.

- Approved at board meeting of DS Plc 24/6/04
- Authorise SL as secretary of DS Plc as beneficial owner to instruct nominee shareholders to complete
- Note as beneficial owner and authority granted to SL to complete
- Index figure 2082"

(8) As regards entering into the transaction:

"Call option – upon receipt of instruction ex DS Plc

- Agree and execute Call Option Agreements. SRP to sign as director/AEH to witness. Signed copies to follow ex SL.

Written resolutions of shareholders signed."

(9) It was noted that the next meeting would be on 12 July all morning:

- "Execution of Option Notice
- AOB
- Banking transactions
- Consider whether conditions of call options met"

(10) Finally it was noted that PwC were to assist with application for register under non-resident landlord scheme and Linklaters were acting on the transfer of properties and share certificates. It was noted: "Keep register here and statutory records here. But minute book - can this be moved to UK when directors/secretary change to UK and companies become UK tax resident?"

Pre-Signing of resignation letters

194. One item on the agenda for this meeting was the signing of the letters of acceptance and resignation as a director of the relevant company. It was noted to Mr Perchard and Mr Norman that it appeared from this that the resignation letters were signed in advance of the resignations actually taking place. They both said essentially that this was just a practical or administratively convenient way of catering for situations such as, as Mr Perchard said, when directors may leave the employ of the business or, as Mr Norman said, where there is a recalcitrant director. So Mr Perchard thought it possible that the letters may have been signed by the directors in advance and Miss Hembry may have dated them as part of such a process. He noted when he signs a document he personally does not necessarily fill everything in. Mr Norman did not agree that the fact that the letters were signed in advance meant that it was predetermined that that resignation would take place. He said that these letters would have been signed whether there had been that plan in place or not; they were a standard feature of the way Volaw established companies. We accept this evidence.

Consideration of options

195. In his witness statement Mr Perchard noted that the companies had received advice from Jersey and UK counsel and as a result "we were comfortable entering the agreements". He said that Mr Lanes had informed the board that (a) he was authorised by DS Plc to instruct the nominees to pass resolutions approving the entry into the options which "meant that the sole shareholder had properly indicated its own agreement with what was proposed and that the proposed course of action had the approval of the shareholder" and (b) DS Plc had executed letters of intent regarding the funding.

196. He said that the "second leg" was for the Jersey directors to decide whether to commit the companies to the options. They went through the draft options, noticed the discrepancy and phoned PwC who also confirmed the FTSE condition. The options were approved as by this time "we could see no valid reason not to and we felt that the transactions were reasonable". He continued that:

> "In this respect, we had received UK and Jersey corporate law advice from counsel which confirmed the legal position to our satisfaction. We examined the proposed call options, pointed out a flaw in the paperwork, ensured that this was corrected and then gave our approval accordingly. Whilst I cannot now recall the

> specific detail, it is likely that in reaching this decision we would have considered each company's financial position such that it had the ability to fund the acquisition of the assets and also that the company's actions were not considered to act in a detrimental way to any known creditors of the company. It is also likely that we would have also noted that the company's beneficial owner had knowledge of the proposed transaction and had not expressed any discontent with what the directors had been asked to consider and, if thought appropriate, approve."

Consideration of options – evidence at the hearing

197. It was put to Mr Perchard that there was no actual record in the minutes of any discussion at all amongst the directors as to whether the option agreement should be entered into. He noted that in the typed minutes it said "*after consideration* it was resolved to execute the agreement" and that followed on from the discussion about the agreement and the legal opinions. He said that "if we resolved to enter into that then we must have satisfied ourselves it was in our interests to do that". He also thought that there was a discussion was indicated by Ms Hembry's notes which referred to "agree and execute Call Option Agreements". He noted again that the notes and the minutes are not a full record:

> "I don't think Anne's notes are a transcript of what was discussed by each person…….I don't see minutes are there to provide a transcript of full discussions. I think they are there to just assist and provide a record of the discussions that were had and maybe key points that the directors wanted to place in the minutes to demonstrate what was maybe put in front of them to help that. To me that reads that there was some - there was a discussion and there was agreement to enter into them."

198. It was put to him that there was also no evidence that there was any separate consideration of each of the three option agreements. He noted that there was a combination of events going on at the time; the directors could well have discussed the option agreements collectively, having received one opinion from UK and Jersey counsel, which would focus attention on that point in the meeting. He thought that the directors discussed each option agreement separately but agreed and executed them collectively (as he thought was also indicated by Ms Hembry's note).

199. He did not agree that there was no record of any consideration of the company's financial position. He noted that the minutes record Mr Strang's opinion regarding the issue about insolvency and assets. At the time, the company had not done anything, so it was minimally capitalised, with minimal cash, and he thought the directors were not aware of any creditors.

200. It was put to him that, as directors, he and his colleagues would have had to consider what would happen if DS Plc did not provide funding, as no contractual commitment was given by the shareholder. Mr Perchard said that in that case it would be difficult to see how the transaction could proceed without the Jersey companies perhaps getting external funding. It did not appear the directors had considered any alternative funding "probably because it was considered that at that

point in time it was appropriate to focus our attention to the shareholder funding the activities. I don't think it's unreasonable for a company to ask its shareholder to fund its activities from time to time. I've been in companies when that happens."

201. It was put to him that clearly the transactions were not beneficial to the individual Jersey companies. He replied that:

> "given the unusual nature of the transactions, I expect we would have realised that the benefit of the transactions was just as much, if not more, for the shareholder as part of the group restructuring. Clearly there was a benefit to be had there at that level. I think we are entitled to think of it in that manner….we were probably alive to its unusual nature because of the value which we were buying it at versus the fair value or the market value, so that would be an unusual transaction; and I think probably as a result of Jersey legal advice we sought the shareholders' blessing to that under article 74.2…… it does happen on a frequent basis where Jersey company boards feel that they want to…bring to their shareholders' attention the nature of a transaction, or the concept of a transaction that could be….quite significant for that company."

202. In that context it was noted to Mr Perchard that Ms Hembry's notes for the meeting of 11 June 2004 record "shareholders instruct directors to enter into transaction even if not for immediate apparent commercial benefit for the company." He commented:

> "well, this was a meeting I wasn't at, but it tells me that potentially the directors at that meeting were conscious of what I would call the unusual nature of it, and they were turning their minds to the fact that….the article 74.2 Jersey company law resolution from the shareholders possibly might be appropriate for them because they didn't see the benefit at the company level but they probably foresaw it as a shareholder benefit, part of the group restructuring and the transactions that were going on".

203. It was put to him that there is no record of any discussion of the risks involved in this transaction or that the directors questioned that the assets were to be bought at an overvalue. He thought Ms Hembry's notes indicated that there was discussion of risk in the mention of Mr Strang's opinion. He acknowledged there was no specific note on the overvalue issue but he thought it would have been part of the consideration of the whole transaction.

204. It was noted that the board did not seek any independent valuation of the assets and it was put to Mr Perchard that there was no consideration given to the future yields from the properties. He said that he thought the board were aware that they were, in some cases, probably income bearing, "so I can't say whether there was any question about the suitability of quantum, but if you have a leased property.....you have to accept the building in its leased form. You won't be able to necessarily change it the minute you buy it". He accepted that there was no record of any discussion on the likely future position.

205. It was put to him that it is clear from Ms Hembry's notes that in making the decision to execute or enter into the option agreement, the only consideration that was given was as to whether it was legal, whether it would work from a tax planning point of view and whether the conditions were met and no consideration was given to the interest of the companies. He again referred to the fact that the typed minutes refer to the decision being made "after consideration" and Ms Hembry's notes. He said:

> "I was at the meeting so I must have been comfortable that the minutes, when they used that sort of phrase "after consideration", was fair and actually reasonable of the fact that consideration was had. And I assume my other directors at the meetings were also in agreement because I expect that they saw the draft minutes and they were comfortable as well with that as the position".

206. Mr Christensen was questioned in a similar manner. It was put to him that there is no documented record of any discussion of whether or not this transaction was in the interests of the Jersey companies. He replied that:

> "we knew from the outset that there was no commercial benefit to the Jersey companies in buying these assets at over value. If we were paying more than they were worth, clearly to the companies per se taken individually, there was no commercial benefit. To the DS group as a whole there was benefit, and as they were the companies' shareholders, it was reasonable for us to take that into consideration, that we were providing benefit to the shareholders through this transaction, provided that…..we didn't in any way disadvantage any other stakeholder. That's why when we go back to the discussion in these notes about Advocate Strang's opinion and it says insolvency situation, if these transactions had in any way created an insolvency position for the Jersey companies by buying assets at greater value, there would have been a real problem for the Jersey companies entering into those transactions. So that's what was the key issue here. I acknowledge that there was no commercial benefit for the Jersey companies per se, but there was benefit to [DSG]."

207. It was put to him that there was no written record of the thought process that he described. He said that it was encapsulated in the discussion around Mr Strang's opinion which is recorded. He said:

> "And I can tell you that that opinion was entirely centred around that issue as to whether it was lawful for the companies in these circumstances to enter into a transaction buying assets at above their market value."

208. It was put to him there was no record of any discussion amongst the directors about why the Jersey companies were entering into the options. He thought that this was encapsulated within all of the other documents which were presented to the earlier meeting, such as the PwC note.

209. He was asked which of the Jersey companies' creditors he took into account as regards the decision to enter into the option agreements. He said that the obvious ones were businesses that had provided services to the Jersey companies, including Volaw and Voisin, the bank (as it was claiming a fee), the controller of taxes in Jersey and the Companies Register in Jersey.

210. He noted that if these transactions had put the Jersey companies into an insolvent position by buying assets at an overvalue, then the position of creditors would have been compromised. However, the Jersey companies were capitalised either through share capital or through the capital contribution in a way that ensured that there was no insolvency situation, and that is the issue that the directors wanted advice upon, in relation to that purchase of assets at higher than market value. He was asked why there was no reference to that in the handwritten notes. He said:

> "As I said, it was part of - these handwritten notes are not a verbatim discussion. We talked about the advice that we had received from Mr Todd. We have talked about the advice received from Advocate Strang, and in talking about that advice we would have discussed what the issues of concern were."

211. It was put to him that in respect of the entering into the option agreement as with the seeking of advice this was all in accordance with the plan that had been formulated by PwC. He agreed that "it was entirely consistent with the plan that PwC had put together".

212. It was noted that he said that he exercised independent thought at all times but his evidence was that that from the outset he knew that these transactions were not in the best interests of the Jersey company. He said he would put it differently:

> "In the case of a company that is clearly solvent – these companies, because of the way in which they had been capitalised and monies had been gifted to them, there was no threat at all to any of the other stakeholders. The duties of the directors, as I understand them, is to consider what is in the best interests of the shareholders, and it is almost impossible to separate the duties to the company and the duties to the shareholders. The two are effectively the same."

213. It was put to him that in reality this was a plan on the part of PwC and the reason why there is no documented discussion is because the directors were simply all implementing the project that they had been engaged to carry out. He replied:

> "No, I don't agree with that. I know we did discuss and the reason we consulted counsel both in London and in Jersey on this issue, we did discuss our concerns about buying assets at over value and whether or not this was a transaction that it was proper for the directors of the company to enter into. It was an issue that had exercised quite a bit of our thought processes and had been a matter of considerable discussion, both formally and informally."

214. Finally it was pointed out to Mr Perchard that Ms Hembry's notes record that "all letters of instruction ready to sign by SL on the 12th, all dated respective dates" and that this shows an assumption that this was going to happen. He said he assumed it was discussed because it was the notes which are "relevant memory-joggers of the event". It could be that Ms Hembry "was thinking ahead, as she is quite efficient, so maybe she thought that there was some preparation work" that could be done if the option was exercised.

Observations on evidence regarding the meeting of 25 June 2004

215. We note the following as regards the evidence on this meeting:

(1) It is clear that the directors reviewed the option agreement from the fact that they picked up a discrepancy as regards the notice period and that they noticed a difference in the FTSE condition.

(2) Again there is no written record of any discussion between the directors on the merits of entering into the option and acquiring the assets. The hand written notes refer, however, to the opinion of UK counsel and to a discussion regarding the Jersey opinion. The issues recorded in both the notes and the typed minutes as emerging from those opinions were that the companies should have funds to cover the price for the assets, that there was no impediment under Jersey law and that buying assets at an overvalue was fine provided the companies were solvent. The hand written notes also refer, as regards the advice from UK counsel, to "probability not certainty re option" and "index will go up" which presumably related to the FTSE condition but we do not know what advice was being sought from company law counsel on that.

(3) We accept that it is likely that these opinions were reviewed and there may have been some discussion around those opinions or, at any rate, the Jersey opinion given the reference to "discussion" in Ms Hembry's notes and that, the issue of whether it was lawful to purchase assets an overvalue was, as Mr Christensen emphasised, the concern for the directors and as Mr Perchard said, an unusual aspect of the transaction. Mr Christensen appeared to have some actual recollection of the Jersey legal opinion and said that it was all about the overvalue issue.

(4) The only other substantive issue relating to the agreement to execute the call options was the passing of the resolution by the nominee shareholders approving the transaction, which was done on the instruction of DS Plc. Ms Hembry's notes refer to the need for shareholder approval and include the statement "*Call option – upon receipt of instruction ex DS Plc - Agree and execute Call Option Agreements*" (emphasis added). The typed minutes also refer to the obtaining of parental approval. We note that the reference to an instruction could refer to that given by DS Plc to the nominees to execute the resolution giving the approval. However, given the use of similar language in the notes for the earlier meeting, which clearly related to DS Plc instructing the Jersey companies themselves, we consider that the more likely meaning here.

(5) At the hearing Mr Perchard was not clear on why he thought that the board approved the options. He referred to the "after consideration" wording in the minutes as demonstrating that consideration was given. We do not accept that

formulaic wording sheds any material light on the extent of any consideration. He seemed to suggest that the directors considered the Jersey companies' position as well as the benefit to the parent (albeit there was more benefit to the parent) but did not identify what that benefit was.

(6) Mr Christensen was clear that there was no commercial benefit for the Jersey companies themselves but said that rather the directors acted on basis of the benefit to the parent which in his view was reasonable provided other stakeholders were not disadvantaged which was not the case (as there were no material creditors). Mr Norman gave a similar explanation. We note that whilst they said this is the basis on which they were acting they did not seem to suggest they had any discussion on the benefit to the parent. The recollections of any discussion were of those on the legality issues. There is also no written record of any discussion to that effect. The directors all considered Ms Hembry to be an accurate note taker. Whilst we accept that her notes are not a transcript, they are clearly aimed at recording the items discussed and future actions, as she was the person responsible for preparing the formal minutes (and dealing with administrative matters). We consider it unlikely that she would have omitted any note on a segment of discussion on a matter of importance such as why the Jersey directors considered it appropriate to enter into the options. We conclude, therefore, that there was no such discussion.

(7) We note Mr Christensen's comment that the duty of the directors is to consider what is in the best interests of the shareholders, and "it is almost impossible to separate the duties to the company and the duties to the shareholders". Clearly in many cases where a company carries on a commercial operation, the interests of the company and the shareholders are aligned, in that the more successful the business of the company, the greater the potential return for the shareholder. However, it is a rather different scenario where a company is asked to act in a way which has no commercial attraction for it (and indeed is commercially disadvantageous) solely in order to generate a potential benefit for its parent or the wider group.

(8) Overall we consider that the evidence as regards this meeting, in combination with that for the previous meeting, indicates that the Jersey directors were acting on the basis of what was in effect an instruction from the parent to undertake a transaction which was wholly uncommercial from the Jersey companies' perspective on the basis that the parent in effect certified, as part of that instruction, that the transaction was for their/the group's benefit. Therefore, the directors were acting on the basis of the group benefit only in the sense that they were told it was beneficial as part of the instruction they were to receive. That is not the same thing, and it is not clear that the Jersey directors were in any event suggesting this, as the directors considering and deciding upon the merits of any such benefit for themselves. We have set out our views on this further in the discussion section.

Board Meeting of Jersey companies on 28 June 2004

216. At 11.00am on 28 June 2004 a further board meeting of the Jersey companies was held at which it was resolved to approve the transfer of shares in the companies from the initial holders, the two Volaw nominee companies (Nominal Ltd and St

James House Nominees Ltd), to the beneficial owner, DS Plc. Mr Perchard chaired the meeting, and Mr Christensen also attended, together with an alternate for Mr Norman, Denise Marett.

Events between 28 June and 12 July 2004

217. As Mr Perchard said in his witness statement, there was little activity from the Jersey directors' perspective from 25 June 2004 until shortly before 12 July 2004 although a number of "administrative matters" were largely dealt with by Mr Lanes and Miss Hembry as set out below. These largely related to matters which would need to take place if the call options were exercised, such as DS2 and DS3 registering for VAT, opting to tax, appointing a managing agent of the properties and making applications under the "non-resident landlords' scheme" ("**NRLS**") to receive rents without the deduction of UK tax and, as regards all of the Jersey companies, the increase of authorised share capital and the issue of further shares.

218. On 29 June 2004:

(1) Ms Hembry forwarded to Mr Perchard an email from Ms Chan querying whether the shares in the Jersey companies could be issued as fully paid asking him how he wanted her to respond. She also informed him that all the minutes and supporting documentation for the meeting of 11 June 2004 had now been prepared and were in his tray for him to check. She noted that the minutes of the meetings held on 25 June 2004 were yet to be typed but as soon as she had checked those minutes, she would pass them on to him for amendment as appropriate, before sending them in draft form to Mr Lanes for his comments.

(2) Mr Perchard responded that he had checked with Voisin and "we can issue the shares as fully paid if we record a debtor in the books of each relevant Jersey Co. in the knowledge that monies to pay for the shares in full will be forthcoming".

(3) Ms Hembry responded to Ms Chan repeating what Mr Perchard had said. She later sent this on to Mr Lanes for his information stating also that, as soon as the draft minutes of 25 June 2004 had been typed she would send them to him for his comments.

(4) Mr Lanes emailed Ms Hembry acknowledging receipt of the three call option agreements that morning.

219. On 30 June 2004 there was correspondence between Ms Hembry and Ms Chan regarding the transfer of the shares in the Jersey companies to DS plc so it became the registered owner. Ms Hembry confirmed that this had been done later in the day.

220. On 1 July 2004:

(1) Ms Hembry sent Mr Lanes by email copies of documents (including special resolutions and minutes) in respect of the increase in authorised share capital for the Jersey companies. Mr Lanes responded that they looked fine.

(2) The typed minutes for the board meeting of 11 June 2004 were signed off by Mr Norman. Ms Hembry then sent copies of these to Mr Lanes by email. He said they looked fine and asked her to distribute them to PwC, Landwell and DS

Plc as previously. Mr Perchard commented in his witness statement that this was just the provision of information to the shareholder and third party advisers; they had no control over the final agreed content of these board minutes or any other board minutes of the Jersey companies.

221. On 2 July 2004:

(1) As set out Ms Hembry's file note, there was a telephone call between Ms Hembry and Mr Lanes in which Mr Lanes raised the following as regards the next meeting on 12 July 2004:

(a) That the claim forms for the Jersey companies' exempt tax status could be dealt with at that meeting.

(b) PwC would be happy to assist in the application under the NRLS and that Ms Hembry should contact DM in order to have the applications ready to sign on 12 July 2004.

(c) "There should be funds held in all three companies after the transactions due to go through on and after 12th July".

(d) An invoice for Volaw's fees should be presented at the meeting and Ms Hembry should ask Ms Chan at Landwell to prepare the agenda for the meeting.

(2) Ms Hembry then sent the draft typed minutes of the 25 June 2004 board meeting to Mr Lanes asking him to revert to her with his "comments" so she could then "amend appropriately". There then appears to have been a telephone call in which Mr Lanes dictated certain changes to the minutes (as recorded by hand by Miss Hembry on the minutes).

(3) Ms Hembry emailed Mr Perchard asking him whether he was happy for her to liaise with DM regarding the NRLS and, if so, advised that she would need to progress this in time for the meeting on 12 July "when Stephen wants the applications to be signed". Mr Perchard replied "yes…but of course we cannot submit any papers until the options have been exercised, the properties transferred into our names etc."

222. On 6 July 2004 Ms Hembry emailed DM asking him to provide the NRLS forms stating that she "would like to be prepared in case the directors do agree to exercise the options". DM then sent the forms in response stating that she should let him know if she needed any assistance completing them.

223. On Wednesday 7 July 2004:

(1) Ms Hembry circulated the draft minutes of 25 June 2004 to the PwC/DSG distribution list stating this was for their information.

(2) She then sent them to Mr Lanes stating that he would have the agenda for the board meeting on 12 July 2004 on Friday.

(3) Mr Lanes replied saying he would "collate and review all the relevant documentations tomorrow to bring along [to the board meeting]". Separately he sent her by email (copied to Ms Chan) VAT elections and VAT registration forms and accompanying letters. He noted they needed to be completed "in

readiness for signature" and that he did not know "if one of the Jersey representatives would like to sign (which would be preferable)" or otherwise he would.

224. On 8 July 2004:

(1) Mr Lanes emailed Ms Hembry (a) with revised VAT elections (b) stating he would bring along the VAT registration forms of which "virtually all the sections have already been completed" (c) three forms "for putting on company letterhead paper relating to the formal exercise of the option" (d) two letters in final form "for inclusion on DS Jersey letterhead" in respect of the appointment of DS Plc as management agent as regards the properties and (e) "completion statements for the properties". It was confirmed in the board meeting minutes for 12 July 2004 that Landwell drafted most of these documents.

(2) He said in the correspondence that he was still "wading through piles of papers" which all arrived the day before and that he had been asked to provide info on VAT notice 742 which is referred to in the election to waive exemption notice. He attached a copy pointing out the part he thought relevant and concluding, "Simon can spend many happy hours reading the remainder".

(3) DM emailed Ms Chan (copying in the implementation team) stating that he had sent out the suggested accounting treatment for the capital contributions which DS Plc may make to its subsidiaries.

(4) Mr Lanes later emailed Ms Hembry saying they were "just about there for Monday" and "have successfully removed the charges on Bexleyheath and Sheffield". He also said that he would bring with him the "TR1" form for the "legal transfer" of the properties to the meeting noting these would be executed if the option is exercised.

225. On 9 July 2004 Ms Hembry sent Mr Lanes (copied to Ms Chan, Mr Perchard and Mr Christensen) the final agendas for the board meetings to be held on 12 July 2004. DM also sent Ms Hembry information relating to the FTSE condition.

226. It was noted to Mr Perchard that as he was the chairman of the meeting on 25 June 2004, he would surely expect that the minutes would go to him for review but the correspondence indicates that Miss Hembry sent them to Mr Lanes and others for comment without copying him in. He said that was a reasonable expectation and he thought that Ms Hembry perhaps "wanted to be very pleasant and courteous to what she saw as a client entity, in this case Stephen Lanes." It was also noted that Ms Hembry proceeded to circulate the draft more widely without copying the Jersey directors in but that the Jersey company directors would surely expect to be copied to an e-mail like that. He said:

> "Not necessarily. She may have, as I have explained earlier, she could have shown us those minutes in a printed form for us to review……. she didn't necessarily have to e-mail to us because we were in close proximity in the office. You know, so I would suggest she probably was working on a paper trail with us."

Board meetings of DS Plc on 12 July 2004

227. At 6.30am on 12 July 2004 a board meeting of DS Plc was held in London attended by, amongst others, Mr Marx and Mr Lanes. The typed minutes note the following:

(1) DS Plc resolved:

(a) in its capacity as sole shareholder of the Jersey companies to authorise the exercise by the Jersey companies of the call options;

(b) to make non-recourse capital contributions to the Jersey companies (of around £9.55 million to DS1; £11.375 million to DS2; and £3.57 million to DS3); and

(c) to subscribe for additional shares in the Jersey companies at £1 per share (£17,600,763 for DS1; £7,900,000 for DS2; and £11,600,000 for DS3).

(2) The capital contributions and share subscriptions were to be made to fund the Jersey companies to purchase the relevant assets should they exercise the options.

(3) DS Plc had "since received written requests" from the Jersey companies requesting it to make the cash contributions.

228. The statement that DS Plc had received written requests for cash contributions when the meeting was held is incorrect. In fact the requests were not sent by the Jersey companies to DS Plc until later in the day (although the precise timing is disputed, on any view, it was later than this meeting).

229. Mr Marx signed the relevant minutes with this error in them. He said in his witness statement that he thought Mr Lanes may have been at the meeting or at least in his office and it appears that he took a copy of the resolutions approved by DS Plc to the later board meetings of the Jersey companies. He thought it likely that the minutes were drafted by Landwell (given the technical complexity and looking at the typeface/font). In any event he would have scanned the draft minutes at the time of the meeting. He thought that either he did not consider it necessary to amend the wording, as at that time he would not be able to speak to the legal team who had prepared them or, perhaps under the pressure of time if Mr Lanes was running to catch a plane to Jersey, he simply failed to strike through the relevant wording before he signed them. In any event the role of the directors at that meeting was to evaluate whether the transactions were in the best interest of the company and DSG and, if necessary, make any commercial amendments to the proposed resolutions. That is what his focus was on.

230. He went on to note that the Jersey companies later sent through the requests for capital contributions. He noted that his diary shows he was in the office that morning and that he had "more than a vague recollection that I needed to be available on that day in order to sign documents on behalf of DS Plc" should the Jersey directors make the request. He confirmed that he later received the requests and agreed to them on behalf of DS Plc by counter signing them. He noted that the first page of the request

is marked for the attention of CC and it "would not be uncommon for me to be interrupted during a meeting for the purposes of me signing documents. I believe this is what would have happened."

231. The Jersey directors did not know why, although the minutes of the DS Plc board meeting were stated to be read out in their own later board meeting that same morning, they did not spot the mistake. They simply considered this issue to be, as Mr Norman, put it "an anomaly".

Board meeting of the Jersey companies on 12 July 2004

232. A fourth board meeting of the Jersey companies was held on 12 July 2004 attended by Mr Perchard, Mr Norman, Mr Lanes and Ms Hembry. A two stage process was envisaged in both PwC's initial board paper to the Jersey board and in the agenda prepared by Landwell being, first, to establish "whether all the conditions to exercise the call option have been satisfied" and, secondly, "whether the [company] should exercise the call option".

233. Miss Hembry's notes record that the meeting started at 10.35am and show that there was a single continuous combined meeting for all three companies. The typed minutes of this meeting were prepared as though there were two separate meeting for each company; for DS1 at 10.35am and 11.30am, for DS2 at 12.15pm and 12.45pm and for DS3 at 12.30pm and 1.45pm.

234. The typed minutes for the first meeting of each of the Jersey companies contained the following (with the only differences for DS2 and DS3 expressly set out):

> (1) Mr Perchard was appointed as chairman. The minutes of 25 June 2004 were read to the meeting and it was resolved to approve them.
>
> (2) The chairman presented to the meeting a call option agreement brief details of which were set out. It was noted that the option may only be exercised if the conditions were satisfied (brief details of which were set out). Mr Lanes presented to the meeting a copy of a written resolution passed by DS Plc that morning approving the exercise of the option. The directors discussed a copy of a report forwarded to them by PwC in which it was noted that the Index had closed above 2082 on each of the relevant trading days. As regards the properties Mr Lanes produced the relevant release of the charge. The directors noted that the conditions were satisfied and "after consideration" it was resolved that the company exercise the option to buy the relevant asset and that Mr Perchard be authorised to sign the notice of option exercise.
>
> (3) The chairman reminded the meeting that DS Plc had executed a letter of intent confirming it would be willing to consider making a capital contribution to assist in the purchase of the relevant asset. "After consideration" it was resolved that Mr Perchard be authorised to sign a letter of request to DS Plc for payment of a capital contribution and it was resolved to consider seeking an application from DS Plc for a subscription for shares.
>
> (4) The chairman presented to the meeting an application form for exempt company status and Ms Hembry was instructed to complete it and file it.

(5) It was resolved to defer the authorisation of any invoices for company formation and administrative fees until a later date.

235. It appears that the intention was that there was then a break in the meeting whilst the letters requesting the capital contribution and share subscription were faxed to DS Plc (as the minutes of the second meeting refer to that having been done). However, on the face of it, the letters were faxed to DS Plc prior to the start of the meeting. The relevant faxes show the times of 10.12am and 10.13am. The times shown on the countersigned copies faxed back by DS Plc are 11.18pm, 11.19pm and 11.21pm.

236. The minutes of the second meeting record the following:

(1) The chairman tabled the signed request for a capital contribution counter signed by DS Plc and it was noted that the contribution would be made for value on that day.

(2) The chairman reminded the meeting of the proposed share subscription by DS Plc and produced the letter of application and it was resolved to approve the issue of shares to DS Plc.

(3) It was noted that the completion date of the exercise of the option would be 15 July 2004 and the directors resolved to authorise Mr Lanes and Mr Norman to pay the purchase price under the option in two tranches on 13 and 15 July 2004.

(4) In relation to DS2 and DS3 various further matters were recorded including that the directors discussed applications to register the company under the NRLS, the need for the company to register for VAT and opt to tax and the appointment of DS Plc as managing agent and that it was resolved to approve all of the same and to submit the relevant forms and for the secretary to draw up a letter of engagement with DS Plc.

237. The handwritten notes of Miss Hembry noted the following:

(1) The written resolution was received from DS Plc and the FTSE index figure was provided. "Noted conditions satisfied".

(2) The breakdown of the values for each of the companies and stock transfer forms were to follow.

(3) The "option exercised as conditions have been met".

(4) As regards the exercise call notice "SRP authorised to sign Notices - completion 15/7".

(5) She noted the request to DS Plc for the cash contribution and share subscription and that Mr Perchard was authorised to sign the request letters.

(6) On receipt of funds the directors were to instruct the bank and Mr Lanes and Mr Norman were to sign letters to bank.

(7) The minutes of 25 June 2004 were approved and Mr Perchard was to sign them.

(8) Application letters for new shares ex DS Plc.

(9) Her other notes related to the mechanics/follow up action. For example she noted that Mr Perchard was to sign the exempt status forms, the invoicing of fees was to be deferred, various actions were required as regards the transfer of shares to the relevant company and as a result of the relevant companies acquiring the properties:

(a) She recorded "Non-resident landlord application 2 and 3 – appoint DS plc as letting agent subcontracting (DHL). Discussed – to be completed – approved".

(b) On the VAT position she noted "exempt to tax election re VAT – property opted to tax currently, charge VAT on rent to tenants at moment, both redeveloped properties, reg VAT as vendor already reg for VAT – transfer of going concern therefore applicable to registration".

(c) She also noted "appointment of DS plc as managing agent. Landwell drafted. Directors approved".

238. Notices were given on 12 July 2004 by each of the Jersey companies (signed by Mr Perchard in Jersey) to each of the corresponding DSG subsidiaries in the UK, exercising the call options and the capital contributions and share subscriptions were duly made. The timing shown on the notices was before the meetings are recorded in the typed minutes as having taken place.

Evidence on timing discrepancies

239. Mr Perchard thought that the reason for the timing shown on the faxes to DS Plc requesting the capital contribution was because the fax machine had not been updated for daylight saving so that in fact the time was one hour later than that stated. He stated in his witness statement that "we investigated the position in 2009 and reached the conclusion that the fax machines were not capable of updating themselves and Volaw had no procedure in place to deal with alteration in clock times for the summer". He said that he thought that the fax machines were not connected to the main system; "they were standalone things". He thought that the business still did not have standalone machines. So whilst he could not be entirely certain of the position, he took it from Ms Hembry's meeting notes that the discussion started at 10.35am and it would then make sense that the relevant faxes went out around 35 to 40 minutes or so later.

240. It was put to Mr Perchard that the explanation was implausible as, if that were correct, Mr Marx would have sent faxes back within minutes of receiving the requests which is not viable. He said he thought it was more likely that the faxes were sent at the later time, in particular, as his explanation tallied with the meeting starting at 10.35am.

241. It was put to Mr Perchard that it was highly unlikely that all that needed to be done at the meeting could have been achieved in around 35 minutes or so. He did not agree, noting in effect that there was in reality little to review: the option agreements were signed already and would have been known to those present from the prior meetings, the written resolutions were short and virtually identical, "the letters of intent, "we reminded ourselves of, but again, they were short documents", the FTSE

index "I think was just a schedule that showed where the FTSE index was, and I think that was the same …or very similar for all three, so you would probably have in your mind what the numbers were" so:

> "I think you would probably feel that with the written resolutions and the FTSE exercise, the conditions were met quickly because they were just sort of…..yes or no …. so we were reacting to the terms of the option agreement and then…we decided to exercise the option which….that may have been the time it probably took the most to consider".

242. It was put to him that it would surely have taken some time to read out the minutes of the earlier meeting on 25 June 2004 (as was recorded as taking place in the typed minutes). He said that generally as regards minutes of previous meetings "we don't go line by line each point." Rather the salient points are picked out as a reminder. The directors would have seen those minutes in the run-up to those meetings at least in draft. The reading of prior minutes was really just an opportunity to pick up on matters that were highlighted as an action item for the next meeting. He noted that Ms Hembry's notes were just that; "they are not a transcript of what was actually said at the meeting because they are in short form."

243. He said he did not know why notification of exercise of the options appeared to precede the time of the later part of the board meetings recorded in the typed minutes. He thought Ms Hembry had simply allocated the total time taken between the companies as a matter of convenience and practicality given the similarity in the position for the three companies.

244. Mr Norman said he could not add anything as regards the timing discrepancy in respect of the faxes. It was put to him also that 35 minutes or so did not seem sufficient to deal with all that had to be dealt with at the meeting. Mr Norman noted that option agreement had been signed at the previous board meeting and the directors were not having to receive and review the option agreement itself. The meeting was to review the conditions attached to the option agreement and whether those had been met. He agreed it was, however, difficult or tricky to achieve.

Consideration of the exercise of the options – provision of information

245. It was put to Mr Perchard that there was no evidence of any further documents or information being sent to the directors prior to this meeting. He queried what other papers would be required given the agenda but noted that the e-mails demonstrated that there were some documents that, as an administrative preparation process, Mr Lanes was clearly sending through. The option agreement had been signed by then, so it was a question of considering whether or not conditions had been met for the directors to exercise and then how the Jersey companies obtained the money to fund that.

246. It was put to Mr Norman that, given he had no active involvement with this company since 11 June, and was not, at least as at 9 July, scheduled to be attending this board meeting of 12 July it would have taken some time to get him back up to speed at the meeting. He said:

> "No. As I have said repeatedly during the course of the day, the way we operated was four offices down the line: Rob is managing director, the cell, which was a sort of breakout room, Simon's office, my office. We spoke to each other, we actually interacted. We discussed what our clients were doing. They may not be documented, those meetings may not be documented but we did talk to each other. We knew what was going on."

247. It was put to him that, as Mr Lanes was the person who was liaising with PwC and Landwell in the run up to this meeting, just as with the first meeting on 11 June 2004, he was in a vastly superior position in terms of information and knowledge and he would have needed to being the other directors up to speed which would take some time. Mr Norman agreed that Mr Lanes was central to the communication between DS Plc and the directors in Jersey. But he thought that the transactions themselves were not that complex. There was an option agreement and there were conditions to be met, and "then we had to make a decision based on the documents we had. It was not, dare I say, compared to some structures, that complex."

Consideration of whether to exercise options

248. In his witness statement Mr Perchard said that the decision to exercise the options was taken "following discussion and consideration of the information available to us" such as that on the FTSE condition, that the parent had approved the transaction and the letters of intent to make a capital contribution. It was put to Mr Perchard that the reality was that the directors knew that they were being engaged simply to effect a project irrespective of whether it was in the interests of the Jersey companies, and that is why no consideration was given as to whether, the conditions having been met, that option should be exercised. He said that he did not accept that no consideration was given when the minutes clearly stated that it was.

249. It was noted to Mr Norman that the minutes do not record any separate consideration of whether the Jersey companies should enter into their respective transactions. He said "No, the options were exercised as the conditions had been met". He was asked if he was, therefore, accepting that there was no separate consideration given to the three independent transactions. He said he was not; it was the case that the conditions had been met for the option exercise and:

> "there was no reason not to exercise. The directors had appropriate legal opinions on whether they should enter into them and whether entering into those agreements were effectively to the benefit of our shareholder".

250. Mr Norman also made the comments set out at [146] and [147] above as regards what was considered. It was put to him that to the extent any decision was made, it was made prior to that board meeting because all that was being done was going through the motions without consideration of the actual interests of each of the Jersey companies. He disputed this:

> "This is a structure that had been evolving over the course of a month. What happens in a board meeting is often a summary of things that have happened elsewhere during the course of discussions. With the risk of repeating myself, Robert, Simon

and I did talk to each other, that's the sort of people we are as you may judge from our evidence."

[The decision was taken at that meeting because] "that is the time when we determined that the conditions on the option agreement had been met. We could not take that decision prior to the relevant time period and the option agreement having expired and the various conditions having been met. It could not be taken. The decision had to be taken once we had all the ducks in a row, so to speak."

251. It was put to Mr Perchard that a number of steps, such as those relating to the appointment of the managing agent and finalising of the VAT and NRLS forms, were done by Mr Lanes with no input from the Jersey directors. He viewed the completion of the forms merely as "secretarial administrative" matters and noted that the relevant documents would only be effective if the directors agreed to exercise the options and then to execute any other documents that may be necessary as a result of that. So he regarded this as "simply part and parcel" of trying to assist in this process given clients like to move very quickly once the transaction gets going. As regards the managing agent letter, he regarded Mr Lanes as merely suggesting that Ms Hembry should put in place the letter in final form in readiness but that did not detract from the fact that it had to be considered at the meetings and approved by the directors.

Observations on evidence regarding meeting of 12 July 2004

252. We note the following from the above evidence:

(1) We accept on the basis of the directors' consistent evidence as to how they worked together that, although Mr Norman had not attended the board meeting of 25 June 2004, he would have been brought up to speed by the other directors. Mr Perchard was at the meeting on 25 June 2004 and it is unlikely he would have forgotten what was happening by 12 July 2004. There is also evidence of him taking an active interest in the period between the meetings in that he asked for information on the option to tax.

(2) The directors did not pick up the incorrect record in the resolution of DS Plc when that was presented to the meeting. This indicates that the directors were not thoroughly reviewing documents received. There are other such discrepancies which also indicate a lack of attention. However, we can see that on this occasion, from the directors' perspective, the important thing was that the parent had given approval to the option exercise.

(3) We accept that the most likely explanation for the timing discrepancy as regards the faxes relating to the capital contributions is that the timings shown on the fax machines had not been altered to reflect daylight saving hours. It is plausible that there was sufficient time in around half an hour or so for the directors to check that the conditions for exercise of the options were satisfied. As the witnesses said, checking that the conditions were met was not a lengthy process. We note that Mr Marx thought he was awaiting the faxes such that it is credible that there was a quick turn around with only a few minutes between receipt and signature by him and the return of the faxed copies to Jersey.

(4) HMRC asserted that as Mr Lanes and Ms Hembry had been liaising (with input from PwC/Landwell) on the matters that the relevant Jersey companies would need to undertake as regards VAT, the NRLS and the appointment of a managing agent as well on as the increase of capital and allotment of shares and as Mr Lanes had prepared the relevant forms so far as possible ready for signature, Mr Lanes/DS Plc made the decisions on these issues. However, in our view, there is no evidence that Mr Lanes and Ms Hembry were doing anything other than performing administrative tasks in preparing the relevant items ready for consideration and approval by the directors at the meeting of 12 July 2004. The fact that the documents were in final form and ready for signature does not of itself indicate that a prior decision was made.

(5) Again there is no written evidence of any discussion as to whether the option should be exercised. In this instance, we do not find that surprising. It seems to us that the critical decision was whether to enter into the options in the first place. In that respect the reference in the agenda to a two stage process of considering (a) whether the conditions were satisfied and (b) whether to exercise, is unrealistic. There would not have been any point in entering into the options if there was no intent to exercise, subject to the relevant conditions being satisfied. The more likely time, therefore, for consideration of whether to enter into the transaction, was the earlier time, when the option agreement was signed. At this meeting, as accords with the written records and evidence of the directors, the directors checked that the relevant conditions were satisfied and that the funding was in place. As Mr Norman said, once all the "ducks were in a row" in terms of the approval from the parent and having obtained the legal advice, there was no reason not to exercise the options. Mr Perchard said that there was consideration of whether to exercise but did not in his written or oral evidence identify anything other than the review of the document and the satisfaction of the conditions.

(6) We note Mr Norman's evidence that the directors authorised the acquisition of the assets for the benefit of the parent and the wider group. There is no record that this was discussed at this board meeting (and, as noted, we have concluded that it was not discussed at the previous meeting). We have commented on this further in our conclusions.

Events between 12 and 20 July 2004

253. In accordance with the resolutions referred to above:

(1) The Jersey companies (acting by their directors) paid the consideration for the assets (as specified in the call option agreements) to the relevant DSG subsidiaries on 12 and 13 July 2004, with the payment instructions to Barclays in Jersey.

(2) On 14 July 2004, DS2 and DS3 made applications (signed by Mr Norman in Jersey) to HMRC for registration under the NRLS and notified the relevant lessees concerning the transfer of the properties to them.

(3) On 15 July 2004, DS2 entered into a declaration of trust, signed by Mr Perchard and Mr Norman in Jersey, in respect of the Bexleyheath property.

(4) On 19 July 2004, a TR1 stamp duty form was signed by Mr Perchard and Mr Norman in Jersey, relating to the transfer of the Sheffield property to DS3.

254. As regards correspondence in this period, there were a number of emails on 13 and 14 July 2004 between Ms Hembry and Mr Lanes regarding the funding (and confirming receipt/payment of funds) and dealing with the finalisation of the various matters set out above. In an email of 13 July Mr Lanes noted that they had managed to cover everything that was required on 12 July 2004 "even though we had problems with the final cash receipt and the last minute panic on ensuring the VAT submissions re [sic] made directly from Jersey to ensure greater authenticity". He also noted to Ms Hembry that one of his colleagues had just spotted an error in the managing agent appointment letter and advised how the error should be corrected.

255. Ms Hembry and Mr Lanes also corresponded on settling the fees due to Barclays and Volaw, the minutes for the meeting of 12 July 2004 and what needed to be done at the next meeting on 20 July 2004. On 16 July 2004:

(1) 'Ms Hembry sent an email to Mr Lanes noting that the Barclays' fees for the three companies were £3,000. She said: "Shall I instruct them to settle their fees by debiting each of the three company accounts with £1,000". She said she would send the draft minutes of the meetings held on 12 July as soon as she could.

(2) Handwritten notes on the above email indicate that Ms Hembry then had a call with Mr Lanes regarding the proposal for the Jersey companies to be UK resident and the possibility that there may have to be only one director for a day. The manuscript notes record, amongst other things, the comments "Phase 2 now – PWC – UK resident" and "Sole director for one day?"

(3) Ms Hembry sent Mr Lanes an email subsequently saying she had just checked the articles of association" which provided for the minimum number of directors to be two and suggesting that this could be changed perhaps at a general meeting the following Monday. She said that she would send Mr Lanes a copy of the relevant clauses for discussion later that day. She also added that she was "working on the issue of the additional shares in DS1 at the moment" and, once she had received notification that funds had come in, would speak to the bank about overnight rates.

256. Mr Christensen accepted that the discussion around amending the articles of association was something which would have been of interest to anyone implementing "phase two" of the proposed transaction, including the Jersey directors. It is not therefore clear why the Jersey directors were not copied into this email communication.

257. Ms Chan then emailed Ms Hembry (copied to Mr Lanes), as Mr Lanes had forwarded on the email regarding reducing the number of directors, stating that she would write to her early next week as to whether the number of directors would be reduced or not. She said that "it is likely that the new directors will be appointed so that the minimum number will remain the same. However we will probably need to amend the articles of the Jersey companies… I will come back to you as to how they should be amended".

258. On 19 July 2004 (as Mr Lanes had requested (see [221] above), Ms Hembry prepared invoices for each company in respect of Volaw's fees for "professional services for the incorporation of a Jersey company", an "administration and attendance fee to 18 July 2004" and a "book keeping service to 18 July 2004", as well as other sundry costs for faxing/photocopying/disbursements. The amounts billed for each company were almost identical (with minor variations on the sundry costs), all being around £6,970.00.

259. As regards the payments of fees, Mr Christensen agreed that the question as to how the companies' monies would be spent was an issue for all the directors of the company. But he also explained that "I wouldn't imagine that an issue such as this would be directed to or would be addressed to all of the directors… in the context of the transactions it's a relatively small amount of money". He was asked why Miss Hembry sought Mr Lanes' approval for the payment of fees. He said that he thought that under the terms of the relevant agreements, the fees were simply due and should have been collected by Ms Hembry without reference to any of the directors. He did not think that this is an issue of management of the business; it was purely an administrative issue that the fees were due. They should have been deducted from the bank accounts. He had no idea why Ms Hembry consulted Mr Lanes; she should have arranged for payment without any reference to Mr Lanes. We agree that, as Mr Christensen said, the payment of the fees was simply an administrative matter. We do not regard this as evidence that the Jersey directors had ceded control over the payment of fees to Mr Lanes. There was no question of any negotiation over the amount of the fees or issue as to whether the fees would be paid.

Board meeting and related actions on 20 July 2004

260. On 20 July 2004:

(1) Around half an hour before the Jersey board meeting held that afternoon, DM sent an email to CC, Mr Lanes and Mr Marx (copied to the implementation team) attaching (a) another implementation timetable which stated that on 20 July 2004 the Jersey companies would be migrated to the UK and (b) a migration checklist. This recorded that on 20 July:

> "…The Jersey resident directors resign and two further UK resident directors are appointed to each company….Board minutes reflect the actions taken and the reasons why the Jersey directors resign in favour of UK based directors (such as administrative convenience…). Stephen Lanes to remain director of the Jersey companies (he does not attend board meeting in Jersey)… Other items to be discussed at the board meeting may include de-registering from the [NRLS]".

(2) DM stated, in the covering email, that he understood that work was being carried out on the proposed changes to the articles of the Jersey companies and that Ms Chan would shortly circulate draft board minutes for the board meetings to be held in the UK on Thursday.

(3) Ms Hembry emailed Ms Chan confirming that she had now posted the NRLS applications, the minutes for the meeting of 12 July 2004 were with Mr

Perchard and that as soon as he had returned them to her she would send them to Mr Lanes and Ms Chan. She said that: "As there are nine Articles to be amended this may take a little while this afternoon to prepare all the documentation in relation to the filing of the Special Resolution. I will be in touch as soon as I can" seemingly referring to amendments to be tabled at the board meeting.

(4) Ms Hembry subsequently forwarded her email to Ms Chan on to Mr Lanes for his information. She also attached a copy of the draft invoices for Volaw's fees and asked him to confirm whether "settlement may be made from the funds held in each company at Barclays".

(5) The board meeting is shown in the typed minutes as starting at 4.15pm that day as set out below. During the time scheduled for the Jersey board meetings:

> (a) At 4.24pm Mr Lanes emailed Ms Hembry to confirm that "the invoices are acceptable". He also stated that "in view of the impending transfer of control over the bank accounts with the introduction of the new mandate which may take time to register with Barclays Jersey, I confirm that you may take the monies from the relevant DS Jersey bank accounts, which are currently under your control… Since we are also taking over the accounting in the UK, you may wish to reflect in the trial balance as part of the handover of the accounting records".
>
> (b) At 5.13pm, Ms Hembry responded that the original invoices would be posted to him shortly and that the bank mandates were sent to him on 16 July 2004.
>
> (c) At 5.24pm, Ms Hembry sent Mr Lanes (copied to Ms Chan) the draft minutes for the 12 July meeting for his perusal.

(6) At 6.41pm Ms Hembry then emailed Mr Lanes (copied to Ms Chan), thanking him for his phone message at 6.30pm. She stated that she had "had the telephone on voicemail so I could concentrate on the draft documents for today's meeting". She added that she would amend the minutes of 12 July for DS3 as he had requested and speak to him tomorrow about the other minor changes. In the meantime, she attached the draft documents "for today" for DS1 only. She said that as and when the amendments have been completed she would prepare the same for the other Jersey companies.

Typed minutes

261. The typed minutes record that the final board meeting was held on 20 July 2004 at 4.15pm, attended by Mr Perchard, Mr Christensen and Mrs Denise Marett as alternate for Mr Norman. As there are no handwritten notes of this meeting and Ms Hembry is not recorded in the typed minutes as being present, she may not have been at this meeting.

262. The typed minutes record:

(1) The minutes of 12 July 2004 were read to the meeting and were approved.

(2) The chairman proposed that the resolutions set out be adopted as special resolutions of the company. The resolution related to amendments to the company's articles of association relating to directors and for an allotment of shares to DS plc. It is stated that the chairman tabled written resolutions to the sole member for approval.

(3) It is then stated that it was resolved to convene an extraordinary general meeting of the sole member of the company on 20 July at 4.30pm to consider the resolutions and if deemed expedient to adopt them as special resolutions of the sole member and the resolutions were then set out again. It was stated that the secretary was instructed to issue notice to convene the extraordinary general meeting.

(4) It was stated that the directors considered the amendments to the articles of association and discussed that, as the subsidiaries/assets of the company were held in the UK, they would appoint additional UK directors of the company "for administrative convenience" subject to the amendments to the articles having been accepted by the sole member of the company. It was noted that Mr Lanes would continue as a director of the company. It was resolved that with immediate effect Mr Marx and Mr Weiner be appointed as additional directors of the company.

(5) The chairman then presented to the meeting letters of resignations from the Jersey directors and it was resolved to accept their resignation from the close of the meeting.

(6) It was noted that Volaw would remain as company secretary to provide administrative services and ensure the statutory requirements of the company were fulfilled and that the statutory books of the company would remain at the offices of the secretary.

263. The bundle contained copies of both (a) signed notices convening an EGM of the sole member of each of the companies to consider the above resolutions together with an agreement to the convening of the meeting at short notice and (b) written resolutions of the sole member approving the resolutions. The bundle also contained forms signed by Mr Perchard notifying Companies House in Jersey that the special resolutions had been passed at a meeting of the company held on 20 July 2004.

264. Mr Christensen thought that the reference to both an EGM and a written resolution was an administrative error. Either a resolution approved at an EGM or a written resolution was required to change the articles, not both. It seemed in this case that the change was made by written resolution and the reference to an EGM was unnecessary. He thought that the minutes reflected perhaps a misunderstanding of that issue by Ms Hembry although perhaps it is surprising that it was not picked up by Mr Perchard (who signed the minutes as the chairman). He said that he could only speculate as to what happened but it seemed that Ms Hembry was under quite a degree of time pressure. She would have prepared a significant volume of the documentation in preparation for these meetings, and he suspected that she would

have come along to the meetings. In those circumstances she probably felt it unnecessary to take handwritten notes, or certainly there is not any evidence of handwritten notes being prepared by her, but he thought that was "hardly surprising" given that she was under time pressure and this was "pretty formulaic stuff".

265. He was asked if he could explain why the draft documents for DS1 were only prepared after they are recorded as having been presented to the meeting at 4.15pm. He said the minutes of the board meeting would have been prepared after the meeting and not before. There would have been other documents which could have been prepared in advance such as the draft resolutions to amend the articles of association.

266. It was put to him that it could not seriously be said, as recorded in these minutes, that administrative convenience was the reason for the resignation of the Jersey directors and appointment of UK directors. He replied that "what I am seriously saying is that it is clear that in addition to achieving the tax planning objectives, there was administrative convenience".

267. HMRC submitted that this meeting did not in fact take place given, in particular, that Ms Hembry was corresponding and preparing the required documents whilst the meeting was apparently being held and the error in the documentation and minutes as regards the holding of an EGM and passing of a written resolution. They said that the fact that Mr Perchard was willing to sign off the minutes of this meeting calls into question whether the directors were genuinely reading documents or were just signing mindlessly. HMRC disputed that in any event any decision was actually taken by the board during the meeting. No documentation was sent to them in advance of the meeting and, again, only two Jersey directors were said to have been present (one of whom was an alternate). They noted that the typed minutes do not record any real discussion or rationale for the relocation, the reference to this being done for "administrative convenience" being implausible and identical to PwC's suggested reasons.

268. Given the directors' evidence that they would not sign minutes without reviewing them as an accurate record of what occurred, we consider that it is likely that the meeting did take place but it may not have been held at the time recorded, events may not have happened exactly as recorded and clearly the minutes cannot have been given more than a cursory review when signed off. It seems likely Ms Hembry did not attend the meeting and documents stated to be tabled were not in fact produced until later on. This, combined with the other errors set out above, indicates that the Jersey directors were not paying full attention or, in this case it seems, much attention at all, to what can be described as more standardised matters such as the amendment to the articles. We have commented on the decision to relocate to the UK in our conclusions below.

Events after 20 July 2004

269. On 21 July 2004, there were correspondence and calls between Ms Hembry and Mr Lanes regarding the finalisation of the minutes for the meetings of 12 July 2004. Ms Hembry also sent Mr Lanes (copied to Ms Chan) draft minutes for the board meeting of 20 July 2004 for DS1 only (noting that minutes for the other companies were to follow) and draft documents relating to that meeting. Mr Lanes was not

present at the meeting of 20 July 2004 but provided comments such as "DS1 being replicated on No. 2 & No. 3" and a comment regarding the timing of the EGM that "date of Mins & EGM= at same time. Check all three companies".

Role of PwC/Landwell and interaction with Mr Lanes and Ms Hembry

270. HMRC submitted that the reality is that Mr Marx wanted a UK-based director on the board that he could supervise or control, and that Mr Lanes' role as director was to represent the implementation team and ensure the project was implemented in accordance with the parent company's wishes. He was, in their view, a proxy for Mr Marx, and contrary to Mr Marx's assertions, he was his mouthpiece. They asserted that in effect Ms Hembry was reporting to him. They considered it notable that apart from the calls to PwC at the board meeting of 11 June 2004 and to Landwell on 25 June 2004 the Jersey directors had no direct contact with the advisers. In contrast, Mr Lanes was clearly liaising with them on a regular basis in between the board meetings, they asserted, at least to some extent in his capacity as Jersey director. They noted that the correspondence between him, Ms Hembry and the advisers was conducted, in the vast majority of cases, without copying in the Jersey directors.

Role of PwC and Landwell

271. There is no evidence that PwC or Landwell had any formal engagement with the board of the Jersey companies. Other than the provision of the pack of papers for the first board meeting, and the two phone calls made at the board meetings, there is no evidence of any direct contact or correspondence between the Jersey board and the advisers.

272. Mr Marx described PwC in his witness statement as being employed as a third party advisor to DSG and also later to the Jersey companies themselves. The Jersey directors gave different views on their relationship with the advisers:

(1) Mr Norman said DS Plc had appointed PwC for the Jersey companies; they already were in place for DSG and there was no reason not to stick with them. He said if there was any reason to question PwC's appointment, "we would have probably done so, but PwC's standing in tax advice spoke for itself". He did not know but he assumed DS Plc also appointed Landwell for the Jersey companies.

(2) Mr Perchard did not specifically recall if the Jersey companies explicitly appointed the advisers. He said: "given that Landwell were involved in the overarching advice" they were "a sensible party given their professional skill set, to comment on and talk to". He noted that the directors would have known Landwell and PwC's connection with DS Plc and so "it would be a sensible position for the directors…..to call them".

(3) Mr Christensen did not think that PwC or Landwell were ever appointed advisers to the Jersey companies; suggesting, at one stage, that PwC dialled into board meetings to be "the ears of DS Plc so that they would know what was going on in the board meeting". He confirmed he had no direct contact with the advisers except at the beginning of the transaction. He said:

> "I think that PwC regarded their client as DS Plc and not the Jersey companies. So it was a matter for PwC to direct their review of the transaction and their advice to DS Plc and not to the Jersey companies."

(4) He noted that DS Plc, as shareholder of the Jersey companies, obviously had an interest in what the Jersey companies were doing; they were set up by DS Plc to undertake specific transactions on its behalf. So clearly it was in the interests of DS Plc for their advisers to know what the Jersey board was doing. The Jersey subsidiaries were using the advice that the DS Plc advisers had given "to inform the decisions of the Jersey board."

273. In our view, looking at all the evidence, Mr Christensen's view is more realistic. It seems that, throughout, the advisers were acting primarily for DS Plc as the parties who were responsible to it for ensuring the correct implementation of the plan (which was instigated by it and was done for its benefit). In much of what they were doing the advisers were ensuring the correct implementation of the plan for DS Plc and were only acting for the Jersey companies on limited specific matters.

274. This accords with the fact that, throughout the period, the advisers corresponded with the UK implementation team, including Mr Lanes, and not the Jersey directors on matters impacting the overall plan such as updated timetables for the steps, agendas and the cash flow mechanisms. Accordingly, Mr Lanes was involved in the on-going dialogue with the advisers as regards what can be described as strategic matters concerning the on-going formulation of the overall plan.

275. Through his on-going participation in calls as a member of the implementation team it appears that Mr Lanes was keeping the advisers, as the architects of the scheme responsible to the parent for its correct implementation, informed on the progress of the project in Jersey, for example, as regards the form and content of the minutes. In that context it appears that they were to some extent directing Mr Lanes as regards the detail of the implementation, in relation to the best way in which to present and evidence matters, in particular, as regards ensuring that the Jersey companies were not UK tax resident. It was following a call with the advisers that Mr Lanes asked Ms Hembry to circulate the minutes of the meeting of 11 June 2004 from Jersey rather than the UK without asking for comments (specifically stating what she should say in the email). He noted that the advisers would "shout" if there was anything "untoward" with the minutes. He later referred to the need for VAT forms to be dealt with from Jersey "for greater authenticity" and that it would be better for the Jersey directors to sign the relevant forms. There is no indication, however, that Mr Lanes was consulting the advisers on the minutes at the instigation of the Jersey board. We cannot see any basis for a suggestion that PwC were otherwise somehow controlling Mr Lanes in any actions he took as a director of the Jersey companies.

276. Other than that, the advisers prepared paperwork for DSG, including in some limited instances for the Jersey companies (such as the NRLS and VAT forms), on which they liaised with Mr Lanes and they liaised with Ms Hembry on procedural matters. The paperwork and administration required from the Jersey side of things was left entirely to Mr Lanes and Ms Hembry to co-ordinate, with assistance from the advisers, for presentation at the board meetings. Mr Lanes had a stream of

correspondence with Ms Hembry on this and in which they liaised and exchanged information on progress. The Jersey directors were not generally copied in on the correspondence between the advisers, Mr Lanes and Ms Hembry.

277. The Jersey directors otherwise took only limited advice from the advisers. The board received papers from PwC essentially briefing them on the project on behalf of the parent. Whilst the paper set out the overall tax aim, it did not set out details of the tax analysis. In calling RL at the board meeting on 11 June 2004, from the nature of the queries raised it appears the Jersey directors were largely seeking clarification of certain aspects of the plan/advice given to the parent. In response RL confirmed the position but said that the Jersey directors should take their own legal and professional advice. The call to Landwell was in relation to clarifying the intended effect of the option notice provisions. Otherwise the Jersey directors did not take any advice on the proposed tax planning transaction other than consulting UK and Jersey counsel on the corporate law aspects.

278. Mr Marx said that although PwC were advising on the technical basis for the transactions and the projected timetable, "I certainly did not regard them as being in control of any participant (whether company or individual) in the transactions; and I did not witness any such control being exerted by PwC":

> "But their role was that of advisor and not controller in respect of the [Jersey companies]. We were all aware that any director of the [Jersey companies] would require information to reach their decisions independently, and we (including PwC) were aware that the directors would review the transactions and if necessary request any further information to assist them in making their decisions".

279. We agree that, given that PwC had such limited contact with the Jersey directors, we cannot see that they could be said to seeking to exercise any direct control over them (even if that were possible). Indeed quite to the contrary it appears they were making every effort to avoid direct contact with them it seems because they thought that was necessary for the directors were to be seen to be acting "independently". This was somewhat taken to extremes in that the directors were not copied on in any correspondence as regards the overall plan, such as the timetable, agendas and cash flows, all of which was plainly relevant to them. Mr Marx similarly deliberately distanced himself from the Jersey board. This created the rather odd situation that the board appeared to be acting in isolation from the rest of the group with only Mr Lanes as their point of contact. We can see, therefore, why HMRC seek to ascribe particular emphasis to the role of Mr Lanes as the sole point of contact between the board and the UK group and its advisers. However, overall, as set out below, we cannot see that Mr Lanes actually had any particularly dominant or influential role as regards the Jersey board.

Role of Mr Lanes – at board meetings

280. Inevitably, given his dual role as company secretary of DSG and director of the Jersey companies, there is some blurring of Mr Lanes' precise role such that it is not always entirely clear whether at given points he was acting for DSG or the Jersey companies. Overall, however, it appears from what he was doing, in particular, in his

close liaison with the advisers, who we consider were primarily acting for DS Plc, that he was largely acting on behalf of DS Plc in ensuring the correct implementation of the transactions whether that was through the facilitation role he performed at board meetings or the preparatory and administrative tasks he performed outside of those meetings.

281. As regards his role at board meetings, he clearly took the lead in a sense, at least in the first meeting, in presenting the proposal essentially on behalf of DS Plc. The Jersey directors accepted that Mr Lanes had more knowledge of the project than they had (certainly at the start of their involvement) and that he was key to the communication with DS Plc and the advisers. That is why they considered it was appropriate for him to present to them at the meetings. Mr Norman rejected the idea that Mr Lanes should have been the chairman; the Jersey directors wanted the chair of the meetings to be independent from Mr Lanes so that they could ask him questions. At the later meetings he is recorded as having presented information such as, at the meeting on 25 June, on the UK company law advice and, at the meeting on 12 July, as regards the approval given by the parent and the removal of the charges on the Properties. This accords with Mr Marx' view of Mr Lanes' role as a facilitator of information.

282. We accept Mr Marx' evidence that he did not expressly tell Mr Lanes what to say at board meetings of the Jersey companies on particular issues in terms of "you must say x or decide y". However, Mr Lanes can hardly have been in any doubt as to the expected overall result, without having to receive a specific order or instruction from Mr Marx to that effect. Given the only substantive action for the Jersey companies to take, on which the plan hinged and which was the subject of lengthy discussion before the Jersey companies were incorporated, was the acquisition of the assets at an overvalue, a transaction which only made commercial sense for the parent company/wider group, Mr Lanes cannot have thought he was tasked with anything other than achieving that, whether with his company secretary hat on or in his capacity as director of the Jersey board. As an employee of DSG, in an important but subordinate role as company secretary, who reported directly to Mr Marx (the force at DSG behind the planning), and who received it appears an extensive briefing from the advisers on the implementation, it is likely he would have been highly conscious that was the case.

283. We find it unrealistic that it could be said (as Mr Marx said in his evidence) that Mr Lanes, as the representative of the parent and client of Volaw, was not carrying any "particular message" to the Jersey board. In the context in which he was appointed as a director and presented the proposal, we cannot see how he was there otherwise than to ensure the specific purpose for which the Jersey companies were set up, to implement a sole transaction for the parent's benefit, was carried through. From Mr Lanes' own perspective, he can hardly have thought, given the briefing from the advisers and his on-going role in liaising with them, that he was tasked with anything other than ensuring the correct implementation of the relevant steps. That is commensurate with Mr Lanes' use of language that the transaction "would" happen.

284. We note that Mr Marx stepped in as regards Mr Lanes' role in implementing the plan, when Mr Marx thought he was in danger of throwing the plan off course by the use of this "careless" language in his correspondence with Barclays. Mr Marx'

concern was that this suggested events would necessarily occur when the plan comprised within it, as essential features, that the Jersey board was the party which made the decision to acquire the relevant assets and that the exercise of the options was not a foregone conclusion due to the external FTSE condition. It seems it was in response to this instruction that Mr Lanes then asked for the language in the minutes of the meeting of 11 June 2004 to be amended from referring to the fact that events "would" happen to that they "may" happen. To that extent at any rate, Mr Marx gave Mr Lanes instructions as to how to present the transaction in writing, which he complied with.

285. Mr Marx' view was that Mr Lanes was just using careless language and he cannot have been in any doubt as to the conditionality of the proposal. It would indeed be surprising, given that was clearly central to the advice and given the briefing given to Mr Lanes by the advisers, if Mr Lanes did not appreciate the "conditionality" and that it was integral to the plan that the board had to be making their own decision to enter into the options and acquire the relevant assets. However, it is not to our minds surprising that, notwithstanding he may well have appreciated that, he was clearly of the view that the transactions would in fact happen. The FTSE condition had around a 90% chance of being satisfied. In circumstances where a board is, as is evident from the PwC briefing paper, appointed for a very short period to carry out a single specific transaction, which could only be carried out lawfully on the approval of the parent, one wonders what reason there would be to suppose the board would not, having agreed to act, refuse to put into effect what they were in effect to be instructed to do, subject to being satisfied on the legality. In such circumstances, any further "orders" to the board would hardly have been necessary.

286. As regards Mr Lanes' own position as a director of the Jersey companies, it is difficult to see him as anything other than a puppet of DS Plc/Mr Marx. Mr Marx was clear he did not trust him to make his own commercial decisions. He described him as making decisions in tandem with the Jersey directors. However, given the way Mr Lanes assumed events would happen and the way Mr Marx stepped in and sought to exercise control over him when he considered it necessary, we consider it more likely that Mr Lanes considered himself as acting on behalf of DS Plc to do what it wanted.

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

288. In our view it is inherent in the very act of taking on such a specific project, which was only lawful if the companies were instructed in effect to do the transaction by their parent, that in reality the Jersey directors were agreeing to administer the parent's plan subject to checking the legality. In that context, we accept that Mr Lanes had no particular influence over the only matters which it appears the board discussed, namely, the issues surrounding the legality of the acquisition at an overvalue. We also accept that the Jersey directors would not have agreed to the transaction if it was found to be unlawful thereby bringing them/their firm into

disrepute. For clarity, nor do we imagine DS Plc would have tried to proceed in such circumstances. There is no suggestion here that anyone involved was acting in way other than in accordance with the advice received on the law. Our further views on this are set out in the discussion section.

Role of Mr Lanes in liaising with advisers/Ms Hembry

289. As regards Mr Lanes' role in liaising with the advisers, it was put to Mr Norman that it was not in accordance with the normal functioning of a board for only one director to have contact with the company's professional advisers. Mr Norman said that if the role had been delegated to him or it was more obvious for him to coordinate it, he did not see a problem. It was noted that there is no evidence of delegation to Mr Lanes. Mr Norman said "yes, but we consulted with them [the advisers] during board meetings and received appropriate reports at the following board meetings" and that it was "quite normal to have a director taking responsibility for a particular aspect of the company's affairs".

290. As set out above we consider that in any event Mr Lanes was largely acting in this liaison on behalf of DS Plc rather than the Jersey companies albeit he then updated the directors on the time table and other matters. We do not, therefore, consider that in many of his actions in liaising with the advisers Mr Lanes was carrying out to any material extent any function for the Jersey board except as regards the banking arrangements and preparation of forms for the Jersey companies, such as the VAT documents, NRLS application and appointment of the managing agent. (We have already dealt with the decisions to choose Barclays as the bank for the Jersey companies and to seek advice from counsel above.)

291. HMRC argued that in fact, Mr Lanes, in conjunction with DS Plc/the advisers, was taking decisions in the UK on those matters. However, except as regards the banking arrangements, we cannot see that there is any evidence to suggest that Mr Lanes was doing anything other than preparatory and administrative tasks in co-ordinating between PwC/Landwell, as the architects of the scheme, and Ms Hembry who was largely dealing with the documentary side of the implementation from the Jersey companies' perspective with a view to the presentation of the relevant items at the Jersey board meetings. Neither Mr Marx nor the Jersey directors saw Mr Lanes as a decision maker.

292. We note that Ms Hembry appeared to treat Mr Lanes with a degree of deference, it seems as he was the representative of Volaw's client, DS Plc. She sent him the draft agendas for meetings and initial draft of the typed minutes of the meetings, on some occasions before she sent them to the Jersey directors. The tone and substance of the correspondence indicates that as regards the matters on which they were corresponding Mr Lanes was giving Ms Hembry instructions which she complied with. However, on some occasions she sought prior approval from the Jersey directors. When Mr Lanes asked for changes to the minutes for the 11 June meeting she asked Mr Norman if he agreed to the "cut and paste job" he requested and she asked Mr Perchard if he was willing to agree to PwC providing the NRLS form. There is also some evidence that the Jersey directors were actively engaged in some of the relevant matters outside of the board meetings (such as that Mr Perchard requested information on the VAT position). The evidence of the Jersey directors was that as the focal point of communication at their end, Ms Hembry may well have been

liaising with them more extensively than shown in the correspondence. In accordance with how they usually worked she would discuss what she was doing with them; they did not have extensive email communication amongst themselves. The directors gave evidence that they did not regard themselves as ceding control over such matters to Mr Lanes or Ms Hembry. Overall, we conclude that there is no reason to suppose that the directors were not undertaking what they were engaged to do as regards these matters, in effect in administering the assets for the short while they were intended to be managing the Jersey companies. We do not consider that the decisions on these matters were taken in the UK by Mr Lanes or any other party in the UK.

293. As regards the banking arrangements, we can see more of an argument that DS Plc, through Mr Marx and Mr Lanes in effect took over control of that aspect from the UK, in particular, as a result of the meeting Mr Marx instigated with Mr Sprigens of Barclays in London and the fact that the Jersey directors were not copied in on papers from the advisers on the cash flow mechanics (see also [169] to [179]). The Jersey board clearly did have some involvement at least initially as they had quite an extensive discussion with Mr Cathan of Barclays at the first board meeting, Mr Christensen dealt with a query on the charge over the properties and Mr Lanes reported back to Ms Hembry on the meeting in London. It appears, however, given Mr Marx evidence on why he wanted the meeting, that direction as to the overall plan or strategy for the banking mechanics was given by DS Plc from the UK albeit the Jersey directors dealt with the forms and procedures required in Jersey. Following the meeting in London Mr Lanes notified Ms Hembry that the bank mandate was to be changed and she then recorded that it was agreed that this would be done in effect by way of an amendment to the minutes for the first meeting. Mr Norman thought that the Jersey directors would have discussed this (see [117] and [118]) although there is no written evidence supporting that. We accept it is unlikely that Ms Hembry would have simply agreed to change the mandate without their approval given the directors consistent evidence on her role and their interaction with her. We conclude that it is likely one or more of the Jersey directors did approve the change to the bank mandate albeit informally and not as recorded at the first meeting on 11 June 2004. We also note that Mr Marx thought the change to the mandate was in line with that for DSG companies generally. We find nothing untoward in the parent wanting the position for the Jersey companies to confirm with the general group position and that the Jersey board were prepared to agree to that.

Case law

De Beers CMC test

294. As set out in brief, it was common ground the starting point is the often quoted formulation of the residence test set out in *De Beers* by Lord Loreburn:

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

> protection of English law and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad…….The test is where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the [CMC] actually abides. You reach that conclusion based on a scrutiny of the course of business over the relevant period, informed by what had taken place immediately prior to incorporation."

Bullock v Unit Construction

295. The decision in *Bullock v Unit Construction* reinforces the point that it is the factual position as to who actually makes decisions and where those decisions are made, that is determinative of where "the real business" is carried on. There can be no presumption that a company's affairs are in fact conducted in accordance with its constitution. In that case, the African subsidiaries of a UK company were held to be resident in the UK as a result of the board of directors of the parent taking over control and management of the subsidiaries notwithstanding that was prohibited under the subsidiaries' constitution. The House of Lords also confirmed that a company could be dual resident which was of relevance as it was admitted by the appellant that the subsidiaries were resident in Africa (as set out in further detail in the section on dual residence below).

296. The House of Lords rejected the notion that residence could not be found where and by the persons by whom CMC is actually carried out if it was unlawful or unauthorised for it to be carried out in that way. Viscount Simonds said, at 736, that "residence is determined by the solid facts, not by the terms of its constitution, however imperative…..it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company".

297. Lord Radcliffe noted, at 738, that the government could have laid down a statutory residence that might have taken a variety of forms; "the country of incorporation, the site of general meetings, the site of meetings of the directors' board were all possible candidates for selection as the criterion". In fact the principle was adopted that a company is resident where its CMC abides as set out in *De Beers*. To him it seemed "impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting *the* test of residence". In that context he considered the impact of the dual residence cases but concluded that the *De Beers* test emerged supreme. On that approach this "is a pure question of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading" or by Lord Halsbury in *American Thread Co. v. Joyce*, 6 T.C. at page 165: ".. the real test . . . and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the Company is really directed and carried on in that sense."

298. Lord Cohen noted, at 744, that Court of Appeal relied on the judgment of the Court of Appeal in *Union Corporation* and cited the passage from the judgement of Sir Raymond Evershed at page 271 (see below). He commented on this that he did

not read those comments as intended to make any addition to the *De Beers* test but rather he was saying:

> "that in almost every case, the articles of association of a limited company vest the control of the company in the board of directors and that, accordingly, if you found out that the board of directors habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be if, for instance, the control was vested not in the board but in managing agents."

299. He concluded that the facts of the present case were "most unusual" and that it was "surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies", and had that been found as a matter of substance to have happened, it may well be that finding could not have been disturbed but the finding was to the contrary (for which he considered there was sufficient evidence).

Wood v Holden – High Court

300. In *Wood v Holden*, a case on which the appellant placed reliance, the High Court and the Court of Appeal based their decisions in part on the distinction, as they saw it, between unusual or exceptional cases where, as in *Unit v Bullock Construction*, the authority of the board is usurped by an "outsider" (a non-board member) and that where an "outsider" is merely influencing or making suggestions but the decisions remain those of the board.

301. This case concerned the tax residence of a Netherlands company, Eulalia, which played a role in a tax planning structure devised by Price Waterhouse ("**PW**") to enable the taxpayers to avoid capital gains tax on part of the gain referable to a sale of a group of trading companies. Under the original plan, an overseas company, CIL, which owned a 49% holding in the UK holding company of the group, Holdings, was to sell its interest direct to the outside purchaser. However, due to a change in law, this would have lead to a capital gains tax charge. Eulalia, was introduced into the structure specifically with the aim of avoiding this charge. Under the revised structure:

> (1) In July 1996 CIL acquired the shares in Eulalia from the Netherlands banking and financial group, ABN AMRO. Eulalia was dormant at the time but had done some business in the past. ABN AMRO Trust ("**AA**") was appointed the corporate managing director of Eulalia.
>
> (2) A few days later CIL entered into a contract with Eulalia for it to buy CIL's 49% shareholding in Holdings for £23.7m (to be 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.

(3) In 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.

302. For the planning to work both CIL and Eulalia had to be resident outside the UK when the above steps took place but HMRC did not accept this as regards Eulalia. Essentially HMRC's case was that the AA did not exercise CMC outside the UK because it did not in fact take the decisions but did what it was told to do by Mr Wood or by PW acting on his behalf. On appeal the Special Commissioners decided for HMRC but the High Court and the Court of Appeal decided in favour of the taxpayers.

303. In the High Court Park J made a number of comments on the theme that the fact that a parent company may influence and provide guidance to a subsidiary, such as one established to perform a particular function for the group, does not in normal cases result in the subsidiary being resident where the parent company is resident. In his view that is not the same as the situation in *Unit Construction* where the parent usurped or simply took over the function of the subsidiary's board.

304. He started by acknowledging that in "all normal cases" CMC 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". He noted, at [22], that he 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 on the authority of *Unit Construction.* Whilst, at [23], that is a "very important case" it is also "a highly exceptional case in terms of the result" because:

> "It was not a case where the local boards still exercised [CMC], but did so under guidance and influence from the parent company in the [UK]. 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".

305. He contrasted, at [24], such an "exceptional" case, where the authority of the board was usurped, with the normal realities of the parent and subsidiary relationship:

> "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".

306. In his view, if in those circumstances, subsidiaries were resident for tax purposes wherever the parent company is resident "the consequences would…..be unsatisfactory, productive of double taxation clashes between different jurisdictions, and disruptive of national tax systems." Accordingly, at [25], there is a difference between, exercising management and control and, on the other hand, being able to influence those who exercise management and control. As highlighted in *Unit Construction*, there is another difference 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".

307. He noted that it should be borne in mind that 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. He noted that such vehicles may fulfil important functions, they usually have board meetings where they are considered to be resident but the meetings "may not be frequent or lengthy". He said the reason for that is that in many cases although the things such companies do are important they "tend not to involve much positive outward activity. So the companies do not need frequent and lengthy board meetings."

308. He then referred, at [26], to four cases which he thought illustrated these principles; *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 Commissioner of Inland Revenue* (1995) 17 NZTC 12,073 and *Untelrab Ltd v McGregor* [1996] STC (SCD). The *Little Olympian Ways* case is not a tax case and we do not consider it relevant. A short summary of the other cases is as follows:

(1) In *Esquire Nominees Ltd* it was held by the judge in the lower court that a company, which acted as trustee of a trust established as part of a tax scheme devised by an Australian firm of accountants, was resident in Norfolk Island where its directors were based notwithstanding that the directors did not take actions on their own initiative, but only at the instigation of the accountants. The case was ultimately decided on other grounds although the higher court endorsed that view. The judge noted that the firm "had no power to control the directors" rather it "had power to exert influence, and perhaps strong influence, on the appellant, but that is all". He said the directors in fact complied with the wishes of the firm 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, the firm had instructed the directors to do something which they considered improper or inadvisable, he did not "believe that they would have acted on the instruction".

(2) The *New Zealand Forest* case and the Special Commissioners decision in *Untelrab* each concerned the residence status of group subsidiaries set up in a different jurisdiction to the parent/other group companies to fulfil a specific group function, broadly, to raise and provide finance. In each case proposals were instigated by the parent but it was nevertheless held that the local board of directors made the relevant decisions and exercised CMC in the local jurisdiction. Again, in each case it was held that the fact that the parent influenced the subsidiary or made suggestions it fully expected to be adopted did not mean that the parent was making the decisions rather than the board.

(3) In the *New Zealand* case the judge noted that all of the subsidiary's decisions were taken at meetings outside the parent's jurisdiction, New Zealand,

and the finance raising bond issues could not proceed without those decisions. He said that whilst plainly "those decisions of policy in respect of the borrowing were first undertaken by those responsible for" the parent, "with the reasonable expectation that they would find favour with the directors of the subsidiary", it was also clear on the evidence "that the decisions of the directors" were those of the subsidiary "independently". He said that the revenue's argument that the board merely rubber stamped the parent's decisions "ignores both the legal and the factual position" as it "confuses the [parent's] policy and influence with its powers. … [I]t was not in the interests of the [parent] that the directors of the subsidiary should act as pawns or rubber stamps….and they did not do so...." This conclusion was not affected by the fact that one of the directors of the subsidiary's board, Mr Wylie, was also for some of the time a director of the parent's board.

(4) As regards *Untelrab* Park J cited paragraph 2 of the headnote to the report:

> "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 [CMC] was in Bermuda and it was therefore resident there."

309. At [27] he said although not identical these cases had some "common features" which he thought were relevant to the present case being:

> "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)…. 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…..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…… 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 [CMC]."

310. He noted that in all of these cases *Unit Construction* was expressly distinguished on the basis that, whereas in that case the parent company itself exercised CMC of the African subsidiaries, effectively by-passing the local boards altogether, in these cases the parent companies/equivalents, while telling the local boards what they wished them to do, left it to the local boards to do it."

311. Park J then undertook a detailed review of the Commissioners' decision in which he criticised the Commissioners' findings essentially on the basis that they had not properly applied the distinction he drew above to the facts of the case.

(1) He said, at [42], that they correctly distinguished *Unit Construction* (at [119] of their decision) on the basis that the directors of Eulalia and CIL were not by-passed nor did they stand aside since their representatives signed or executed the documents. He noted that they went on to state (at [120]) that the case for HMRC was that "[AA] did not in fact take the decisions but did what it was told to do by Mr Wood or by [PW] acting on his behalf". He did not regard this case as made out on the facts:

> (a) It was clear that the advisers did not just sign what was presented.
>
> (b) There was no evidence that the taxpayer ever told ABN AMRO or [AA] anything, nor would one have expected him to do so (as he was a businessman, and it is "overwhelmingly likely" that he would leave the contact with them to his expert professional advisers).
>
> (c) "[PW] obviously expected that [AA] would do the things which they proposed to it. [AA] obviously expected that it would do the things proposed, provided that it saw nothing objectionable in them…..But [PW] did not propose things in the style of telling [AA] what to do….Professional advisers……are in no position to give orders to major banks and trust companies."
>
> (d) Whilst the correspondence which showed PW giving professional advice and requesting [AA's] confirmation related to the stage when the shares in Holdings were sold and not "the critical early stage" when Eulalia purchased the shares in Holdings, "the nature of the relationship between [PW] and [AA] at the later stage (one of professional advice being given, accepted and acted upon) was clearly indicative of the nature of the relationship earlier.

(2) At [43], as regards the finding that the legal formalities were carried out abroad, he accepted that it was possible for CMC of a company to take place in a different country from that where the legal formalities took place but he would expect there to be specific evidence of that. There was none; it did not suffice that Eulalia "was participating in accordance with the overall plan for a tax scheme devised and superintended by personnel in [PW]." He did not accept that the meetings which approved the transactions could be dismissed as

immaterial legal formalities. Without the decisions by the director of Eulalia the relevant agreements to buy and sell the shares in Holdings would not have been made. In his view there was "no doubt that [AA] took those decisions in Amsterdam, and none the less so by reason of having been recommended to take the decisions by [PW]."

(3) At [44], he commented that on the basis that the Commissioners accepted that until purchased by CIL Eulalia can only have been resident in the Netherlands it was "incumbent on [HMRC] to produce at least some material to show a change of residence" but they had failed to do that.

(4) At [48] and [49] he said that the Commissioners findings that, after Eulalia had purchased the Holdings shares, it had no business and it had nothing else to manage apart from the acquisition and sale of the shares, had no real bearing. In any event he did not agree as Eulalia purchased the shares with a view to reselling them and whilst what it did was a big transaction in terms of the amounts involved, "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 be that it was resident in the Netherlands.

(5) He then noted that the Commissioners accepted 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 [140]). He said he would add "that the price was acceptable to [PW], who had been engaged to advise and negotiate by Eulalia and who "positively recommended the transaction to Eulalia". He said that the Commissioners "add the pertinent comment that to a considerable extent the decision made itself but that they said [AA] "did not give any, or at least sufficient, consideration to the issues involved in whether or not to join in the sale …..of Holdings". He addressed this later.

(6) He agreed that it was largely true as the Commissioners said (at [142]) that [AA] "simply fell in with the wishes of Mr Wood expressed by his advisers, the sale having been approved by [Eulalia's] parent, CIL" but that seemed to him:

> "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."

(7) On the last point he noted that in *Esquire Nominees* an "important part" of the reasoning was that the judge did not believe that the directors would have acted on an instruction to do anything improper or inadvisable. He believed that the same would be true of [AA], and indeed the witness evidence said that (and the Commissioners had not specifically rejected the evidence). Similarly in the *Untelrab* case, although the subsidiary was "complaisant" to do the will of the

United Kingdom parent company, the Commissioners rejected the argument that the subsidiary was resident in the UK.

312. At [54]) he set out the Commissioners conclusion (at [145] of their decision) in full.

> "….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."

313. Mr Justice Park had a number of criticisms of this conclusion. Essentially he considered that that the Commissioners had (1) incorrectly based their decision on the basis that the taxpayers had failed to satisfy the burden of proof and (2) incorrectly concluded CMC was not in the Netherlands given they said the only acts of CMC were the execution and signing of the documents which took place there.

314. On the burden of proof point, he said (at [55] to [57]) that whilst the Commissioners seemed to presume that Eulalia was resident somewhere in the UK and, therefore, to require the appellants to show that it was not, it was not clear where that place was. This indicated that they based their decision, "not upon a reasoned and positive finding" that Eulalia was resident in the UK, but rather on the basis that the burden of proof on the appeal rested upon the taxpayers, and that they had not discharged it.

315. He continued, at [58], to note that the Commissioners had not identified where in their view the place was that the actual effective decision was taken. In his view it was Amsterdam, where AA Trust entered into the relevant resolutions to buy and later sell the shares. The only candidates in the UK were Manchester (where the PW advisers were) or Bury (where the taxpayers were) but neither could be right:

> "[PW] 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 [PW] 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…..I of course accept that Mr and Mrs Wood decided to instruct [PW] to advise on a scheme to avoid CGT, and that they also decided to instruct [PW] to go ahead and seek to put the scheme into effect. That is not at all the same thing as Mr and Mrs Wood…..taking the individual decisions which were necessary before each specific stage in the scheme would take place."

316. At [59], he accepted that the onus was on the taxpayers to show that Eulalia was not resident in the UK but they had satisfied that initial burden such that the burden then shifted back to HMRC. The factors he pointed to included that Eulalia was incorporated in the Netherlands, it had been resident only in the Netherlands until it was acquired by CIL, CIL was not itself a UK company, from the time when Eulalia was acquired by CIL, its managing director was AA, resolutions and consequential actions were taken in the offices in Amsterdam. He noted that the taxpayers produced evidence from PW and AA and all the documents which existed "which showed guidance and influence coming from [PW], but no more than that." They were able to point out that the Netherlands revenue had stated to HMRC that the actual management of Eulalia was carried out by [AA].

317. He continued to note that HMRC produced no positive material. They pointed to the lack of evidence from some of the personnel at PW and [AA] but that was plainly not the basis of the Commissioners' decision. They did not attach any real weight to the absence of the witnesses; most of the witnesses had moved jobs, and 7 years had passed, so that their memories could not be expected to be accurate. He also noted that "the Revenue took a long time over their enquiries…..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." HMRC had advanced a critical analysis of many of the documents but "what it really amounted to was a convincing demonstration of things which are not denied" and which as he had already said did not mean that Eulalia was resident in the UK:

> "that the steps taken were part of a single tax scheme, that there were overall architects of the scheme in [PW], and that those involved all shared the common expectation that the various stages of the scheme would in fact take place."

318. He continued, at [64] to [66], that, given the Commissioners had said "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", in his view, their conclusion was "extraordinary". He thought, at [65], that what the Commissioners seemed really to be saying was that, although the only acts of CMC took place outside the UK, "there was not much involved in them". But in his view that did not suffice:

> "the test of a company's residence is still the [CMC] 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 [CMC] of its business to be carried out."

319. He continued, at [66], that "if directors of an overseas company sign documents mindlessly, without even thinking what the documents are", he accepted that it would be difficult to say that the jurisdiction in which that took place was where the company was resident. But "if they apply their minds to whether or not to sign the documents, the authorities……indicate that it is a very different matter". Further, in this case the Commissioners had explicit evidence, in the light of which it is "impossible to regard [AA] as in the nature of a puppet manipulated by a puppet master in the [UK]":

> "The exchanges in September and October 1996 show that [PW did not regard [AA] as a puppet or treat it as a puppet. [PW]….. reported to [AA] 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] to confirm that it was content for Eulalia to proceed. Of course they expected [AA] to say that it was content, but it was clear that the sale to the outside purchaser could not proceed without [AA's] confirmation, and that [PW] were not in a position, and did not consider themselves to be in a position, to issue orders to [AA] about what it must do."

320. He continued to note, at [67], that the Commissioners seemed to "be implying that [AA], as managing director of Eulalia, did take decisions, but because they were not informed decisions they somehow did not count". He said he could not agree:

> "In this case there may or may not be grounds for saying that [AA] could and should have gone into matters more deeply before it took the two critical decisions [to buy and sell the shares in Holdings], but, given that it was [AA] which took those decisions, it remains the case that Eulalia was resident in the Netherlands."

321. He thought that in any case, at [69], the Commissioners "overstate their criticisms of [AA] in these respects". Essentially he thought some of their findings of fact were inconsistent with the finding that the decision was insufficiently informed to be an effective decision:

> (1) He thought the Commissioners seemed to be critical that [AA] did not have enough information about the basis for the price to be paid for the shares in Holdings. However, he thought they answered that where they noted that Eulalia was a wholly-owned subsidiary of CIL, and that the price was left outstanding interest free. They had also noted "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 [CMC] to the parent" and found that there

was "nothing surprising in the fact that [Eulalia's] directors accepted the agreement".

(2) On the decision to concur in the sale of Holdings to the outside purchaser he noted, at [70], that the Commissioners accepted, at [140], 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." In nevertheless forming the opinion that Eulalia's decision to accept the terms was so insufficiently informed that it failed to be an effective decision they disregarded several substantially undisputed facts:

> "that [AA] on behalf of Eulalia had engaged [PW] 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 [PW]); that [PW] twice reported in writing to [AA] about its negotiations; that there was at least one telephone conversation between…. [PW] and a representative of [AA]; that [PW] recommended [AA] to accept the offer from the outside purchaser; that the normal practice within [AA] was for [the personnel within it] to review the legal documentation and for [AA] 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's] position; and that the transaction did not take place until two representatives of [AA] specifically confirmed in writing to [PW] and to the solicitors acting on the sale that [AA] agreed with the draft agreements and would execute them on behalf of Eulalia".

322. He concluded that "In those circumstances I cannot agree with the Commissioners that [AA's] participation was "merely going through the motions of passing and signing documents".

Wood v Holden – Court of Appeal

323. In the Court of Appeal Chadwick LJ (with whom the other Lord Justices agreed) concluded, at [27], that Park J was in his view "correct in his analysis of the law" (being the passages set out at [21] to [26] of Park J's decision). He agreed it is essential to distinguish between cases where control is exercised through the company's own constitutional organs and that where the functions of those organs "are "usurped" - in the sense that management and control is exercised independently of, or without regard to", those organs. He said that 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."

324. Lord Justice Chadwick went on to consider Park J's comments on the burden of proof citing the passage at [60] in full (at [31]). He continued, at [32], that as Park J pointed out, HMRC had produced no positive material to show where the CMC Eulalia was and he agreed that it was not enough for them to criticise the lack of evidence from those at PW and ABN AMRO nor to demonstrate that the "steps were taken as part of a single tax scheme" as set out in full above. At [33] he said he did not doubt there are some cases in which the evidence is so unsatisfactory that the only just course is to hold that the taxpayer has not discharged the burden of proof. However, there was no reason to think that was the case.

325. At [34], he agreed with Park J that the Commissioners' decision did not turn solely on their view that Mr and Mrs Wood had failed to discharge the burden of proof. He found Park J's analysis of the other points the Commissioners' made in [145] of their judgment "compelling" citing much of the passages set out at [64] to [70]. He concluded at [40] "the Judge [Park J] 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". In his view, the Special Commissioners made two findings of fact which lead necessarily to that conclusion, namely:

> "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*]. The second - implicit in the finding that "their representatives signed or executed the documents", but made explicit in the observation…. that "From the viewpoint of Eulalia we find nothing surprising in the fact that its directors accepted the agreement prepared by [PW]. . ." - was that [AA]…….did sign and execute the documents (including the purchase agreement); and so must, in fact, have decided to do so."

326. He continued at [41] to state that those two facts "make it impossible to treat this case as one in which [AA], as managing director of Eulalia, made no decision":

> "There was no evidence that [PW] (or anyone else) dictated the decision which [AA] was to make; although….[PW] intended and expected that [AA] would make the decisions which it did make. There was no basis for an inference that [PW] (or anyone else) dictated to [AA] 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 [AA] 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."

327. He said, at [42] and [43], that the "legal flaw" in the Commissioners' approach was to treat the decision that was made by AA as if it were not an "effective decision" by a constitutional organ exercising management and control because there was little to manage or because they were reached without proper information or consideration. He said, at [42]:

> "If – as the Special Commissioners found … "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 [AA] 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 [AA] as managing director. There was nothing else to manage."

328. He continued, at [43]:

> "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…….The decisions which were taken would have been no less "effective decisions" if (on the facts) different decisions would have been reached if [AA] had approached the decision making process with greater circumspection…."

Laerstate

329. HMRC consider that in fact this case is much more similar to the circumstances in *Laerstate*. In that case, the issue was the extent to which a Netherlands incorporated company was managed and controlled in the UK by its sole shareholder, Mr Bock, both during periods when he was a director, along with Mr Trapman and when he was not. Mr Bock was, when a director, based in the UK. Mr Trapman was based in the Netherlands. The activity undertaken by the company related to the acquisition and sale of shares in Lonhro.

330. At [16], as regards the period during which Mr Bock was a director, the tribunal found that Mr Bock himself conducted the business of the company. They noted that as director Mr Bock was, under the appellant's constitution, independently authorised to represent the appellant at law and otherwise. They accepted that on occasion he did so with the assistance, cooperation and concurrence of Mr Trapman and that acts of management took place in various locations, including in the Netherlands and Germany, but throughout the relevant period he carried out activities of a "strategic and policy nature" and managed its business and that he did so to a substantial extent in the UK. Although Mr Trapman was a director, the evidence showed that his

involvement was very much secondary to that of Mr Bock, who was responsible for all the negotiation and strategic decisions on matters affecting the appellant. For a considerable time during this period there were no board meetings, even though there were "significant management activities taking place" as undertaken by Mr Bock, "substantially in the UK."

331. The matters which lead to this conclusion (at [15]) included that Mr Bock was conducting relevant negotiations as regards options over Lonhro shares, there was no evidence that Mr Trapman was being kept informed, it appeared to the extent that Mr Trapman was signing papers he was not really taking part in the decision making process as opposed to signing documents that were sent to him, the lawyers advising on the option arrangements were looking to Mr Bock for instructions throughout and they sent him their bill with explanations that were not given to Mr Trapman.

332. As regards the CMC test, the tribunal referred to *De Beers* and noted that (at [27]) "there is no assumption that CMC must be found where the directors meet. It is entirely a question of fact where it is found. Where a company is managed by its directors in board meetings it will normally be where the board meetings are held. But if the management is carried out outside board meetings one needs to ask who was managing the company by making high level decisions and where, even where this is contrary to the company's constitution.

333. In referring to *De Beers* the tribunal said (at [28]) that they thought it was "significant" that Lord Loreburn referred to the test as being where CMC "abides":

> "This is a test that does not confine itself to a consideration of particular actions of the company, such as the signing of documents or the making of certain board resolutions outside the UK if, in a given case, a more general overview of the course of business and trading demonstrates that as a matter of fact [CMC] abides in the UK. As Lord Loreburn said (at page 458), the factual question must be considered "upon a scrutiny of the course of business and trading"."

334. They continued, at [29], that in their view such an approach is consistent with the analogy with individual residence which was the basis on which Lord Loreburn propounded the CMC test:

> "Just as for an individual, for example, where a temporary departure from the UK would not of itself give rise to a change of residence, the residence of a company will not fluctuate merely by reason of individual acts of management and control taking place in different territories. The whole picture must be considered in each case."

335. They said, at [30], that *Unit Construction* was relevant only to the periods during which Mr Bock was not a director; as it concerned whether the relevant companies could be UK resident as a result of acts of management and control taken by persons who were not authorised to do so. At [31], they noted that in *Unit Construction* Lord Cohen made the point that it would be exceptional for a parent company to usurp control of its subsidiary, as a parent company usually operates

through the boards of its subsidiaries and that this theme was picked by Park J in *Wood v Holden* [2005] STC 789 (at [23] (see above)). They described that case, at [32], as one "in which it was held that all decisions had been made at meetings in the Netherlands by the managing director of the company. Those meetings could not be dismissed as immaterial legal formalities. Without the decisions of the managing director in the Netherlands the relevant agreements would not have been made". On that basis, therefore, they considered that *Wood v Holden* was applicable also only to the periods during which Mr Bock was not a director.

336. They continued, at [33], that "it is clear that the mere physical acts of signing resolutions or documents do not suffice for actual management" as had been stated by the Special Commissioners in *Wood v Holden* and approved by Park J (citing his judgment at [66]). They drew a distinction, at [34], similarly to that drawn by Park J, between a case where the directors consider the wishes of a majority shareholder and make an informed decision to act on them and that where the directors simply make no decision at all:

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

337. They noted (at [35]) that "moving up the scale" from that where the directors simply mindlessly sign is the situation where "the directors know what they are signing, for example that it is an agreement for the sale of shares, and sign it without considering whether it would be better to sign it or not". In their view an objective way of testing whether this is the case is to ask "whether the directors have the *absolute minimum amount of information* that a person would need to have in order to be able to make a decision at all on whether to agree to follow the shareholder's wishes or to decide not to sign". In their example that would include such matters as "whether they had any knowledge of, or received any advice on, whether the price was sensible".

338. In that regard they thought that when the Special Commissions said in *Wood v Holden* that what is needed is an "effective decision …. and such decisions require some minimum level of information", they may have had in mind this requirement for "an absolute minimum of information". They noted, at [36], that the Court of Appeal in that case said that the reference by the Commissioners to an "effective decision" was an error of law but they thought the Court of Appeal may have had a different situation in mind being that "next up the scale" where:

> "the directors follow the wishes of the shareholder after considering whether or not to follow them and have at least the absolute minimum information referred to…..but less information than a reasonable director would require in order

sensibly to decide whether or not to follow the shareholder's wishes: "Ill-informed or ill-advised decisions taken in the management of a company remain management decisions" (*Wood v Holden* in the Court of Appeal at [43]). The distinction between this case and that in the previous paragraph is that in the latter there is no decision by the directors because nobody could have made a decision based on less than the absolute minimum of information necessary to make such a decision, while here there is at least such an absolute minimum of information and so there is a decision by the directors, although an ill-informed one".

339. Finally, on this they said, at [37], that "at the other extreme" is where the directors have sufficient information to make an informed decision. The relevance of whether the directors would have declined to do something improper or inadvisable, about which the parties were not in agreement is, in their view, merely an example of this category (and they referred to *Esquire Nominees* and *Untelrab*). They noted that "if the directors did follow the shareholder's wishes and did something inadvisable it would indicate that the decision was that of the shareholder and not of the directors".

340. At [40] they concluded that CMC was in the UK in relation to the period when Mr Bock was a director:

(1) They noted that the appellant's argument was that all acts of CMC took place outside the UK and whilst meetings with lawyers and other advisers might have taken place in the UK, such acts did not constitute acts of CMC. The appellant relied in support of this on the Special Commissioners' decision in *News Datacom Ltd and another v Atkinson (Inspector of Taxes)* [2006] STC (SCD) 732 at [63], where a meeting that was concerned only with ministerial matters and matters of good housekeeping and was not concerned with policy, strategic or management matters relating to the conduct of the business of a company was held not to be an exercise of CMC.

(2) The tribunal agreed with the principle in that case but thought that Mr Bock's activities as a director in the UK went much further than ministerial matters or matters of good housekeeping. They "were certainly concerned with policy, strategic and management matters" and "included decision-making" in relation to the appellant's business.

(3) They rejected the proposition that they should attempt to classify certain acts as "acts of [CMC]" (on that argument, the board resolutions, or the signing of documents) and have regard only to those acts. They thought that "runs counter to the factual exploration of the "course of business and trading" that Lord Loreburn in *de Beers* made clear is the proper test.

341. In relation to the time after Mr Bock ceased to be a director, at [42] to [45]:

(1) They noted that only the then director, Mr Trapman, could sign for the appellant in a way that would bind a third party. Under the principles the tribunal had set out, the issue was whether Mr Trapman acted on Mr Bock's instructions without considering the merits of them, or whether he considered

Mr Bock's wishes and made the decision himself while in possession of the minimum information necessary for anyone to be able to decide whether or not to follow them.

(2) The relevant acts in this period concerned various matters relating to the exercise of an option over the Lonhro shares including giving notice to exercise the option. The tribunal held that all relevant decisions were those of Mr Bock. When Mr Trapman signed relevant documents he did so dictated by Mr Bock. Mr Bock predominantly made those decisions in the UK. The tribunal noted that if Mr Bock had said that he discussed the matter fully with Mr Trapman, indicated to Mr Trapman that he wanted him to take the relevant action and why it needed to be given and if Mr Trapman had said that he considered the alternatives, they would have concluded that Mr Trapman made the decision.

Smallwood

342. In *Smallwood* the issue was the capital gains tax position on the sale of shares by the offshore trustees of a trust set up by Mr Smallwood. The intention was that no UK capital gains tax would be due under a complicated "round the world" scheme on which KPMG in Bristol advised. The relevant issue was whether the trust was resident in the UK or not at the relevant time which, under the residence tie breaker provision in the applicable double tax treaty between the UK and Mauritius, which depended on where it had its place of effective management ("**POEM**"). The appellant argued that the board of the trust company which acted as trustee ("**PIML**"), which was based in Mauritius, had taken the decisions necessary for the conduct of the company's business as trustee and therefore exercised effective management. He placed particular reliance on the decision of the Court of Appeal in *Wood v Holden.*

343. Mr Justice Patten gave the dissenting judgment in favour of the taxpayer. He noted, at [58], that in *Wood v Holden* Chadwick LJ said that it was difficult to draw any meaningful distinction between the tests for CMC and POEM but that even if they did in fact differ in substance, they were unlikely to lead to different results. He said, at [59], that "the importance" of that case "for present purposes lies in the analysis by Chadwick LJ of what is capable of constituting management and control of a company by persons who are not its directors" (citing [26] and [27] of the Court of Appeal decision). He noted, at [60], that the Special Commissioners in *Smallwood* said that *Wood v Holden* and the other authorities on residence did not ultimately assist on the POEM issue but, at [61], he thought the test was essentially the same as that formulated by Chadwick LJ:

> "….the terms of the test….. seem to me to lead inevitably to the question whether the effective decision by PMIL to implement the tax scheme and to sell the shares was taken by the board of directors of that company, albeit on the advice and at the request of KPMG Bristol, or whether the PMIL board effectively ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions. Given that the directors of PMIL remained in place and exercised their powers as directors to effect the sale, the approach to this issue suggested by Chadwick LJ in *Wood v Holden* must be the right test."

344. He continued at [62] that the conclusion of the Special Commissioners (in paragraph 140 of their decision) that "the key decisions were made in the UK where the realistic, positive management of the trusts remained" was said to be based on the facts surrounding the appointment of PMIL. The relevant findings were that they were appointed as part of a pre-existing scheme which involved choosing Mauritius as the situs of the trust because of its favourable treatment of capital gains, PMIL accepted the trusteeship on the basis that the shares would be sold as part of that tax planning exercise and that the shares were indeed sold in accordance with the scheme. But the Commissioners also accepted evidence that there was no agreement that PMIL would behave in a certain way or make certain decisions as a *quid pro quo* for the introduction of the trust and that, had the sale of the shares not been in the interests of the beneficiaries as at the date of the sale, then PMIL would not have agreed to sell.

345. At [63] he concluded that he could not accept that, on the basis of these findings, the Commissioners could properly have concluded that the POEM of the trustees at the relevant time lay in the UK rather than in Mauritius. The findings made do not go beyond saying that the trust company accepted the advice of KPMG to proceed with and implement the scheme in the interests of the beneficiaries. But they retained their right and duties as trustees to consider the matter at the time of alienation and did not (on the Commissioners' findings) agree merely to act on the instructions which they received from KPMG. The function of the directors was not therefore usurped in the sense described in *Wood v Holden*.

346. However, Hughes LJ and Ward LJ disagreed. Hughes LJ noted that the Commissioners' conclusion on the issue of POEM was one of fact. The taxpayers could succeed on that issue only if the Commissioners reached a conclusion of fact which was simply not available to them, and thus made an error of law: *Edwards v Bairstow* [1956] AC 12. He noted that, if the question were the POEM of the trust company trustee at the moment of disposal, namely PMIL, then it may be that the reasoning in *Wood v Holden* would justify the conclusion that the Commissioners fell into this kind of error. He agreed that their findings did not go so far as findings that the functions of PMIL were wholly usurped, and that *Wood v Holden* "reminds us that special vehicle companies (or, no doubt, special vehicle boards of trustees) which undertake very limited activities are not necessarily shorn of independent existence; indeed they would be ineffective for the purpose devised if they were".

347. He continued, however, that it seemed to him that to apply this reasoning to the present case was "to ask the wrong question, and indeed to return to the rejected snapshot approach". He noted that trustees are, by section 69(1) TCGA 1992, treated as a continuing body and the "POEM with which this case is concerned is, as it seems to me, the POEM <u>of the trust</u>, i.e. of the trustees as a continuing body. That is the question which the Special Commissioners addressed [at [140] and [145]".

348. On the primary facts which the Special Commissioners found (at [136] to [145]) he did not think that "it was possible to say that they were not entitled to find that the POEM of the trust was in the [UK] in the fiscal year in question". He continued that:

> "The scheme was devised in the [UK] by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were

> carefully orchestrated throughout from the [UK], both by KPMG and by Quilter. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary period only and then be returned, within the fiscal year, to the [UK], which occurred. Mr Smallwood remained throughout in the UK. There was a "scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the UK".

Dual residence cases

349. It is part of HMRC's case that there is at the very least sufficient evidence to support a finding that the Jersey companies were resident in both the UK and Jersey. HMRC point to the cases of *Swedish Central Railway Co* and *Union Corporation* as establishing that a company can have more than one residence and to *Unit Construction* as endorsing that view.

350. *Swedish Central Railway* concerned a Swedish company which, at the relevant time, had a passive business of leasing a railway to a Swedish concern for a rent. General meetings of the shareholders (of whom the majority were Swedish) and meetings of the board were held in Sweden, all dividends were declared there and no profits were transmitted to the UK except for dividends paid to the shareholders in the UK. The company had its registered office in London, the company secretary was based in London and there was a committee in London which dealt with share transfers (which were made and registered in London), attaching the company seal to share and stock certificates and signing cheques on the London banking account. The accounts were made up and audited in London. Dividends were paid to English shareholders and interest to English debenture holders from the registered office in London.

351. Viscount Cave said, at 372 to 373, that, looking at the analogy with an individual as Lord Loreburn had done in *De Beers*, a company may have two residences in the same way as an individual can. CMC of a company "may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one residence." He noted, at 375 and 376, that it was found by the Commissioners that, while the business of the company was controlled and managed from the head office at Stockholm, so that the company would under English law have a residence in Sweden, the company was resident in the UK; "and it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based". He concluded that he was "not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here"; that point did not arise. But he was satisfied that "the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding."

352. *Union Corporation* considered whether companies which were accepted to be resident in the UK were also resident in South Africa and Trinidad, where they were incorporated and carried out a number of activities. We note, however, that this case

was appealed to the House of Lords and decided by them on a different basis (such that they did not consider the dual residence issue). In summary, in a judgment given by Sir Raymond Evershed MR, the Court of Appeal held that a company may be dual resident and such a finding may be appropriate where at least some part of the controlling authority is based in the other country. They decided that on the facts the companies in these cases satisfied that test.

353. In deciding that was the correct approach Sir Raymond Evershed rejected, at page 270, the view of the Special Commissioners, that "as regards a company engaged in active business operations, residence in more than one country could only be found "if the supreme command, as it were, over the company's affairs, "the [CMC]", was in truth divided so as to be equally, or substantially equally, present in both countries".

354. He continued that it was clear that mere registration and the performance of acts which are required by law to maintain registration do not constitute such activities as are by analogy equivalent to the activities which, in the case of a natural person, establish residence nor did "the mere presence in a country of physical assets belonging to a company and the conduct of substantial productive or other business operations on the company's behalf" suffice "if the control of all those operations and of the general affairs of the company is elsewhere". Rather, at 271:

> "The company may be properly found to reside in a country where it "really does business", that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of (that power and authority, is to some substantial degree to be found)". In our judgment, the formula "where the central power and authority abides" does not demand that the Court should look, and look only, to the place where is found the final and supreme authority".

355. He then cited the following passage from the from the judgment of Sir Owen Dixon in the Australian case of *Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxati*on, 64 C.L.R. 15 and 241 as accurately stating that a company may be found to be resident in more than one country only if control of the company is to some extent divided between the relevant countries:

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

356. He referred, at 272 to 274, to the *Swedish Central Railway* case and clearly thought it was difficult to reconcile with the *De Beers* test and a later decision in *Todd*

v. The Egyptian Delta Land & Investment Co., Ltd., 14 T.C. 119. In that case a contrary conclusion was reached on similar facts (except that the business in that case consisted of active trading operations in Egypt and the residual activities of the company in England were confined to such purely "administrative" functions required to maintain registration in England). His view was, however, that in *Egyptian Delta* Lord Sumner (at 143) "restricted the effect and significance" of that case and having done so, in reviewing the authorities, gave "an unhesitating affirmation of the validity and authority" of the test in *De Beers* case such that (at page 274) :

> "…Lord Loreburn's test emerges supreme and authoritative, subject only to the rider or corollary that since a limited liability company can contemporaneously have more than one residence (a thing not contemplated by Lord Loreburn) his analogy to a natural person demands that [CMC] may be divided and that such division, being a matter of fact and degree in each case, is not denied by the circumstances that the supreme command, the power of final arbitrament, may be found to be, or to be predominantly, in one place. The *Swedish Central Railway* case emerges as a decision justified by its peculiar facts and an authority consequently limited; but at least it renders it no longer possible to satisfy the test of residence by reference only to the country where final control abides or to assert that when for that reason residence in one country is conceded residence elsewhere cannot co-exist".

357. He concluded, therefore, that :

> "there must, in order to constitute residence, be not only some substantial business operations in any given country but also present some part of the superior and directing authority……. the question of the extent of the superior or directing authority required (as well as of the business operations being performed) is one of fact to be determined by the Special Commissioners".

358. He concluded that as regards both the South African and Trinidad companies the facts clearly justified the conclusion that they were dual resident. In the South African case it was material that a minority of the board of directors resided in South Africa, meetings of the board, or of committees of the board, took place in South Africa, but on matters of policy or which otherwise generally affected the company's affairs the supremacy rested with the board in London. He said that "it follows that the real and ultimate control over the [appellant's] activities is to be found in London where the majority of the directors reside and act; and of the large revenue which the [appellant] enjoys more than one-half ….may fairly be taken to be earned in England or outside the Union".

359. In the Trinidad case, the company was incorporated in England, all eight directors and the secretary resided in England, where all formal board meetings and general meetings took place. The main business of the company was winning, refining and dealing in petroleum and other mineral oils in Trinidad such that it had in Trinidad "very considerable operations" which were in the charge of a manager who,

under a power of attorney from the board of directors, had "the widest powers and responsibility". But, although the supreme control was "undoubtedly exercised at the meetings of the company's directors in England, it was clear that in practice the chairman, managing director, and other directors paid frequent visits to Trinidad for the purpose of exercising their supervision and a large measure of control over the policy and general affairs of the company. It was found that "important decisions were taken in the course of these visits [to Trinidad]".

360. In *Bullock v Unit Construction* the House of Lords acknowledged that a company may be resident in two countries. Viscount Simmonds said, at page 735, that following *Swedish Central Railway* "it must now be regarded as clear law that an artificial person may, like a natural person, have more than one residence". He noted that the relevance of this was that it was admitted on behalf of the appellant that the African subsidiaries were resident in Africa but "it appears to me to have no weight, if it is conceded as a matter of law that a company may have two residences". He therefore did not find it necessary to consider the issue further. Lord Cohen also confirmed, at 742, that "it has been well established that…..a company can simultaneously have two residences in different countries".

361. Lord Radcliffe commented, at page 738, that the government could have laid down a statutory residence that might have taken a variety of forms (as set out above) but in fact the principle was adopted that a company is resident where its CMC abides as set out in *De Beers*. To him it seemed "impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting *the* test of residence". He considered that were only two qualifications which have since appeared which mar at all the "simplicity and generality" of this test.

362. The first was the decision in *Union Corporation* which he described in effect as being that "though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic" as the product of some peculiar necessity, political or otherwise. The facts in *Union Corporation* were not such as to allow of Lord Loreburn's test being applied, and therefore "some other basis of decision had to be selected", namely, that "residence arose in any country in which "to a substantial degree" acts of controlling power and authority were exercised".

363. He continued that it "may perhaps still be open to question whether, where the facts are such that Lord Loreburn's test cannot be applied as a whole, the correct way of determining residence is.....to fragmentate his principle and establish a residence for tax purposes wherever the exercise of some portion of controlling power and authority can be identified". However, as the point did not arise for decision in that case he said he expressed no view at all upon it. He only noted the decision in *Union Corporation* "as an instance of dual or multiple residence for tax purposes which has its origin in the fact that circumstances do not always make it feasible to apply the Loreburn formula".

364. The other potential qualification was the decision in the *Swedish Central Railway* case in that it appeared to decide that, although there was a residence in Sweden by virtue of CMC being exercised there, there was at the same time residence in England by virtue of incorporation and the performance of administrative duties. He also noted the contrary decision in *Todd v Egyptian Delta*. He thought that the

Swedish Central decision was an "unfortunate one, having regard to the course of authority both before and after its date".

365. He commented that while it is not difficult to see that the circumstances that make an individual resident "may reproduce themselves for him at one and the same time in more than one country", it was "much harder" as regards a company "to feel satisfied that two quite different tests, depending upon different sets of circumstances, can each be applied concurrently for the purpose of determining residence". He noted that the relevant question is whether the company is resident within the area of the taxing authority's jurisdiction or non-resident: it is not required to ascertain positively whether or not the company is also resident within another jurisdiction:

> "If the accepted test is that a company is resident in that country where its [CMC] abide and the facts are that at the material date that [CMC] do not abide in England, it seems that in such cases the nature of the test itself precludes the conclusion that the company is nevertheless resident here."

366. In his view the best way of treating this was to regard the two cases as if they were in effect one decision and the speech of Viscount Sumner in the later case as an authoritative commentary on the significance of the earlier. He took a similar view to that of Sir Raymond Evershed in *Union Corporation* that "much of the difficulty disappears" as it was clear that Lord Sumner wished it to be understood that the *Swedish* company's "business and administration were of such a nature that what managing and controlling had to be done was in fact done as much on English as on Swedish soil" (which he thought Viscount Sumner based on the words of Lord Cave as set out above). On this basis that case "was no more than a decision on that special class of case, such as the *Union Corporation* case, where the facts themselves are genuinely such as not to admit of a finding that [CMC] are exercised in or from any one country". He concluded that in fact "there will then be only one category of exception from the principle of the *De Beers* case and not an undefined second class".

367. He noted that whilst he thought it necessary, however, to make some attempt to deal with this issue as it was admitted that the companies were resident in Africa, "this case ought not to be regarded as in any sense an authority on the problems of double residence for companies". It deals only with what is a different point, whether:

> "assuming that all the acts which constitute [CMC] of the subsidiaries' affairs take place in England, an English residence arises despite the fact that the persons who performed those acts had no authority under the companies' regulations to do so nor could the meetings, if any, at which the decisions to act were taken validly be held in England. It is that point which has been argued before us".

Submissions

368. As noted, the appellant's position was that CMC of the Jersey companies was exercised by the board, comprising a majority of Jersey resident directors, at the meetings held in Jersey; the key decisions to enter into and exercise the options were

clearly taken by the board at those meetings. As in *Wood v Holden* this was not an unusual case where the function of the board was usurped; in making their decisions they were not dictated to by any party in the UK, including Mr Lanes. The fact that DS Plc and PwC may have influenced the board and that there was a plan which they fully expected the Jersey companies to enter into is irrelevant as is the fact that the companies had a limited purpose or remit. The directors were not mindlessly signing documents but did so having applied their minds to whether to sign; without those decisions the acquisition of the assets would not have happened. It is clear from *Wood v Holden* that there is no minimum information requirement as it was held that decisions are not ineffective simply because the directors do not have full information or even if they make ill-informed or ill-advised decisions. However, the directors were fully informed in any event. The Jersey board were not by passed nor did they stand aside and they signed the relevant documents themselves such that the only proper conclusion, as in *Wood v Holden* is that the company was resident outside the UK.

369. In HMRC's view CMC was exercised in the UK in effect by DS Plc on the basis that, similarly to the situation in *Smallwood*, there was a scheme of management in the UK or on the basis that the decisions of the board were in reality taken in the UK. HMRC noted that *De Beers* is the leading authority on residence principles and *Wood v Holden* is simply an example of the application of those principles to a particular set of facts. The use of the term "abides" by Lord Loreburn indicates that the CMC test is not a snapshot test. A company does not just spring to life when it makes decisions; as Lord Loreburn continued to say in *De Beers*, the question is to be determined "*upon a scrutiny of the course of* business and trading." They also noted that Lord Loreburn drew an analogy, which has become a recurrent theme in the cases, with the residence position of an individual.

370. HMRC pointed to the tribunal's decision in *Laerstate* as correctly recognising this. The tribunal was clear that there is no assumption that CMC must be found where the directors meet; it is entirely a question of fact. If management is carried out outside board meetings, the question is who is managing the company by making high level decisions. It was in that context that the tribunal considered it significant that Lord Loreburn referred to the test as being "where [CMC] abides." That was the source of their view that the test is not confined to consideration of particular actions of the company, such as the signing of documents or the making of board resolutions outside the UK, if in a given case a more general overview of the course of business and trading demonstrates that as a matter of fact, CMC abides in the UK. That would runs counter to the factual exploration of the course of business and trading. It is necessary to look at the entire relevant period, and ask whether looked at as a whole, cumulatively the activity constituted CMC in the UK. The tribunal said this is consistent with the analogy with individual residence. Just as for an individual, for example where a temporary departure from the UK would not of itself give rise to a change of residence, the residence of a company will not fluctuate merely by reason of individual acts of management and control taking place in different territories. The whole picture must be considered in each case.

371. HMRC asserted that this means that CMC has to be determined by looking at the full picture and not simply isolated acts taking place at the board meetings from

which it is clear that CMC was in the UK. In any event, if the tribunal does not find that the Jersey companies were solely resident in the UK, there were sufficient acts of CMC in the UK for them to be held to be dual resident.

372. Moreover, on that basis, if the Jersey companies were resident by any particular date in the given period such as 24 June 2004, even if the tribunal were to find that decisions were made in Jersey on 25 June 2004 and thereafter, that does not mean that the companies did not remain resident in the UK. Residence does not flip-flop in that way. It would mean only that the companies were dual resident.

373. HMRC argued that, having regard to the course of events in this case, and not just what occurred at the board meetings, the real or significant decisions appear to have been made by DSG, including Mr Lanes, and the implementation team in the UK. There are many similarities with the factors which the tribunal took into account in *Laerstate*. Although all board meetings took place outside the UK, the tribunal found that whilst he was a director Mr Bock exercised CMC within the UK because essentially he was carrying out negotiations on important transactions without keeping the other director informed, the lawyers were looking to Mr Bock for instructions throughout and they sent him their bill with explanations that were not given to Mr Trapman. Similarly, whilst all board meetings in this case took place outside the UK, Mr Lanes was throughout liaising with PwC/Landwell on the overall, strategic plan (the Jersey directors made contact with them on two occasions only) and making decisions on the actions required in the UK. Mr Lanes dealt with the issue of how both the Barclays and the Volaw fees were to be settled (and PwC's fees were paid by DS Plc).

374. HMRC considered that *Wood v Holden* is more limited in scope than the appellant argued. They said that, as in their view is supported by *Laerstate* and *Smallwood*, *Wood v Holden* is authority only as regards the question of whether an "outsider" (a non-board member) is exercising CMC by reference to the usurpation principle in *Unit Construction*. It is not authority as regards the position where an actual member of the board, such as Mr Lanes, may be said to be exercising CMC. The question of dual residence was not considered in that case because the findings made by the Special Commissioners were that there were only two acts of CMC both of which took place outside the UK. In view of that finding Park J found it extraordinary that the Special Commissioners formed the view that the company was resident in the UK. Both the High Court and the Court of Appeal thought that the Special Commissioners had not properly considered the burden of proof; the appellant had in their view satisfied the initial burden of proof such that it reverted to HMRC but HMRC made no positive case that residence was in the UK.

375. HMRC argued that the situation is very different here.

(1) This is not a case where, as in *Wood v Holden*, the company had an established history of residence outside the UK as the subsidiary of an overseas company. The onus is on appellant to show that the companies, as newly incorporated vehicles with a UK parent, were resident in Jersey.

(2) In this case HMRC are pointing to a number of facts in support of their positive case, in particular, as regards the role of Mr Lanes both at board meetings in Jersey and his activities in the UK outside board meetings. Mr

Lanes was not an "outsider", like PW, seeking to influence the board but a member of the board itself. The unusual feature is that he was put on the board as the spokesperson for DS Plc notwithstanding that Mr Marx did not regard him as an appropriate person to act as such due to Mr Marx' desire not to cede control over the Jersey companies (particularly due to the concern over the cash passing through them).

(3) In the context of examining the whole course of business, the acts of CMC were not confined to the decision to enter into and exercise the options. It is highly relevant that in conjunction with Mr Marx/the implementation team, Mr Lanes made a number of decisions in the UK outside of the board meetings, such as the choice of the bank, to appoint the advisers to act for the companies, to instruct counsel and to appoint DS Plc as the managing agent

(4) It is clear that Park J took issue with the Commissioners' decision that the only acts of CMC in that case were the decisions to buy and sell the relevant shares. He was saying that actually there was more involved and that included appointing PW as the advisers to Eulalia and taking advice from them. In this case, the evidence is that the board of directors did not appoint PwC or Landwell. Apart from the two calls made to them at the board meetings, the Jersey directors had no contact with PwC and Landwell. All contact with those advisers outside of those two dates was made by Mr Lanes.

(5) Park J noted in *Wood v Holden* that there were strong commercial reasons for Eulalia to agree to the proposed sale of its shares in Holdings; it acquired the shares at an undervalue and then made a good profit when they were sold. There were no such commercial reasons for the entering into and exercise of the option in this case given that the price paid was greatly in excess of market value. In that case the directors took advice from PW who made a positive recommendation they should sell the relevant shares. In this case the only advice taken was as to the legality of entering into the transaction. There was no exercise of discretion by the Jersey board.

376. The appellant countered that there is no authority for the proposition that the presence of a director in the UK takes the case out of the *Wood v Holden* guiding principles. On the contrary, it should be noted that in the *New Zealand Forest Products* case, the fact that Mr Wylie had been the director both of the parent company and of the subsidiary did not affect the conclusion that the subsidiary was not resident where the parent company was resident.

377. The appellant continued that the presence of Mr Lanes on the board of directors does not affect the fact that the companies were resident in Jersey. He participated in board meetings, as Mr Marx expected, in tandem with the other directors simply as a member of the board such that decisions reached were a consensus of the board. In his actions in between board meetings he was doing nothing more than facilitating and providing administrative assistance as regards matters for consideration at the board. There was no improper delegation of any authority to him to make decisions in the UK in breach of the provisions of the companies' articles. The discussions he had with DSG and/or the advisers were just that. Discussing and influencing is not the same as making decisions for another party. The parties clearly expected the

Jersey directors to act independently and that is what they did. The appellant did not consider that in any event many of the decisions HMRC was pointing to were an exercise of CMC; issues such as the identity of the bank and counsel are not key strategic matters.

378. Looking in detail at the judgements in *Wood v Holden* there is no support for HMRC's proposition that the courts were saying that the decision to appoint PW as advisers was a matter relevant to CMC. It is true that PwC and Landwell were the key advisers to DS Plc and that there would have been no good reason for the Jersey companies not to accept the advice that was being offered to them, particularly by PwC. But that fact and the fact that there was no formal appointment letter emanating from the Jersey companies does not affect that advice was given to the board by PwC and Landwell.

379. The appellant submitted that HMRC's case is effectively the same as that which was rejected in *Wood v Holden*. HMRC's argument that there was a scheme of management in the UK, on the basis that is where the strategic management policy decisions were being taken, is exactly the same as the case advanced by HMRC unsuccessfully in *Wood v Holden*. There is no hint in the High Court or Court of Appeal that it was the fact that Eulalia was originally incorporated in the Netherlands and was accepted to be resident there which determined the CMC issue in that case. The fact that the companies acquired the assets at an overvalue would be relevant only if the tribunal were to conclude that the board did not actually make a decision to acquire the assets but it is clear that they did. The appellant said that *Smallwood* is simply not applicable as it relates to a different issue, the place of effective management of a trust.

380. The appellant argued that, whether or not *Laerstate* was rightly decided, the facts are very different. Unlike Mr Bock, Mr Lanes was not making decisions in the UK and, unlike Mr Trapman, the Jersey directors were not merely passive non-participators in the decision making process who merely acquiesced in decisions and was not kept informed. If the tribunal was saying something different to the Court of Appeal in *Wood v Holden* in their view that there is an effective decision only if the directors have an absolute minimum of information, any such requirement was entirely satisfied in this case.

381. HMRC also argued that it is clear that a company may be dual resident if some part of CMC takes place in each country. In effect at least some part of the directing authority was present in and managing matters from the UK, as regards Mr Lanes and DS Plc's activities in the UK, (and that is the question for the tribunal as Lord Radcliffe notes in *Unit Construction*, it is not a case of establishing that the company was also resident in the overseas country). So even if the Jersey companies were not solely resident in the UK, the UK activities suffice for them to be regarded as resident in both places.

382. The appellant did not dispute that a company may have more than one residence for tax purposes but again considered that the facts are essentially different. In both *Swedish Central Railway* and *Union Corporation* at least some business and management took place in the UK; that is clearly not the case here. Moreover, in *Union Corporation* the case was actually decided on a different point and in the

subsequent House of Lords decision, their Lordships did not consider the dual residence issue.

383. The appellant also considered that there was nothing in the decisions as regards dual residence which is inconsistent with or detracts from the *Wood v Holden* principles that in all normal cases residence is to be determined by reference to the place where the board of directors meet to exercise their powers in accordance with the company's constitutional documents. On the contrary, in their view the judgment of Sir Raymond Evershed reinforces the importance of focusing on "the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority".

384. The appellant also pointed to Lord Cohen's judgment (at 744) in *Bullock v Unit Construction* where he said that what Sir Raymond Evershed was saying in *Union Corporation* was simply that "in almost every case, the articles of association of a limited company vest the control of the company in the board of directors". The appellant also noted that Lord Radcliffe observed (at page 739) of that case that it would be rare for the management and control of a company to be divided or peripatetic. It was only in that rare case that one could say that a company was resident in more than one country. Moreover *Unit Construction* itself is widely recognised to be a highly unusual case on the facts, where the functions of the board of directors were usurped by the parent company as Lord Cohen acknowledged at 744 (and as referred to by Park J in *Wood v Holden*). The appellant concluded that this case simply does not fall into that rare or unusual category.

385. HMRC note that it was stated by Viscount Sumner in *Unit Construction* that it must be accepted as clear law that a company may have more than one residence. As regards Lord Radcliffe's comment that circumstances such as those in *Union Corporation* must be rare, they asserted that, on any view, this not a normal case. This is a case involving tax planning but, moreover, for reasons of governance and because of the money that was involved, the unusual feature is that Mr Marx was not willing to cede control, and therefore put somebody on the board of the Jersey companies who he did not even think was capable of acting as a director. They noted that Lord Radcliffe cast some doubt on *Swedish Central* but in their view only as regards the suggestion in some of the judgements that administrative acts could constitute CMC.

Discussion

Case law

386. The issue is whether the Jersey companies were resident in the UK in the period from the date of their incorporation until 20 July 2004. As set out in full above, under Lord Loreburn's formulation, a company resides where the "real business" is carried on. The real business is carried on where the CMC "abides" as determined by the scrutiny of the course of business over the relevant period, as informed by what happened immediately prior to incorporation.

387. As applied in the later decisions this is an essentially factual enquiry as to who makes the strategic and management decisions regarding the company's business and

where those decisions are made. Such powers are generally, as a matter of corporate law, vested in the directors of the company to be exercised at board meetings and the directors generally do act in accordance with the authority vested in them. However, that cannot simply be assumed. As *Unit Construction* makes clear it is the actual position which is paramount. If as a matter of fact, as in that case, a parent company is making the relevant decisions for its subsidiaries, thereby by-passing their boards, it is the parent company which exercises CMC even if its actions are unlawful or unauthorised.

388. We accept, as HMRC argued, that given the reference to determining the position by the scrutiny of the course of business over the whole period, it is not simply a question of looking at what happened at the board meetings of the company. As a factual matter acts of CMC may take place outside board meetings, such as in *Laerstate*, where Mr Bock, a UK based director, was conducting all negotiations as regards strategic and management matters by himself without consultation with the overseas based director. We note that in *Wood v Holden* the focus was very much on what was decided at the board meetings of the company but that was because it was held that the only two acts of CMC in that case were the resolutions made at those meetings to acquire the relevant shares and to sell them.

389. We do not accept, however, that there is any basis for approaching the CMC test as a question of whether there is a "scheme of management" in the UK. To the extent that HMRC base this approach on the decision in *Smallwood*, we consider that case is inapplicable in these circumstances. *Smallwood* is a decision on where a different type of entity, a trust, was resident under the terms of a "tie breaker" test in a double tax agreement; the question was where the trust had its place of effective management under that test. Whether the POEM test may be held to be the same or similar to the CMC test or not, the case is not a binding precedent as regards the application of the CMC test to a company. Otherwise we see no basis in the other cases to which we were referred for approaching this otherwise than, following the principle in *De Beers*, as a question of where CMC, in terms of acts of "central management" of strategy, policy and overall management, "abides". As Lord Radcliffe said in *Unit Construction*, it is the principle established in that case which is "the test" (see [361] above). The other cases are but examples of the application of that principle.

390. When, as is usual, powers to act for the company are vested in the directors, there is a natural assumption that when they sign documents and pass resolutions at board meetings, they are in doing so taking decisions in exercise of their discretion on behalf of the company. It could be said that it is implicit in the very act of signing that the directors must have decided to take the actions provided for in the relevant document. The issue which has emerged in the cases is in identifying whether that really is the case in a number of circumstances, such as, in the current context, where the company has a limited or specific function whether as part of a group or, as here and in *Wood v Holden*, to fulfil a role in a tax plan, and the board act in accordance with that plan or role.

391. In *Wood v Holden* the courts rejected HMRC's argument that, on the facts of that case, the advisers, PW, or the ultimate owners of the relevant companies were in effect making the relevant decisions, to buy and sell shares, for the board of the overseas company, Eulalia. A distinction was drawn between the situation where an

"outsider", a non-board member, such as PW or the owner, merely influences and suggests a proposed course of action, which the board adopts, and that where the "outsider" actually takes control and makes the decisions or usurps the authority of the board.

392. In considering this in the High Court, Park J emphasised that a subsidiary within a group, formed to perform a particular group function and which acts in response to suggestions from its parent presented in the expectation they will be implemented, which function may not involve much regular activity, is not by virtue of those facts alone necessarily resident where the parent is resident. He said that there is a distinction between a case where the parent is merely influencing and suggesting but the board exercises its discretion to make the decision and that where the parent usurps the function of the board or dictates to the board, as occurred in the "unusual" circumstances of the *Unit Construction* case.

393. It followed from this reasoning that it did not suffice for Eulalia to be resident in the UK that its board acted in accordance with an overall tax plan put together by the advisers for the ultimate owners, which everyone involved expected them to implement. If as a factual matter the relevant decisions were made by the board in exercise of their discretion outside the UK, they remained decisions of the board.

394. Both Park J and Chadwick LJ focussed on the fact that the Special Commissioners had found that the only two acts of CMC were the agreement to buy and sell the relevant shares, both of which they said were undertaken in the Netherlands. Chadwick LJ said that on those findings and on the fact that the directors were not by passed (as in *Unit Construction*) and must have decided to undertake the two acts of CMC, the only conclusion open to the Commissioners was that the company was not UK tax resident. He noted there was no evidence PW or anyone else dictated those decisions (although they intended and expected they would be made). On a "true analysis" the position was that "there was no reason why [AA] 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.

395. Both Park J and Chadwick LJ thought that the Commissioners had erred in seeming to think that it affected the CMC issue that there was little for the board to decide or that the directors did not have full information or give full consideration to the critical decisions. Chadwick LJ cited Park J's comment that if directors of an overseas company sign documents "mindlessly, without even thinking what the documents are", it would be difficult to say that the jurisdiction in which that took place was where the company was resident but "if they apply their minds to whether or not to sign the documents, the authorities……indicate that it is a very different matter". However they both rejected the proposition that AA did not take decisions because, as Park J said, they were not informed decisions, or, as Chadwick LJ said, they could have been taken on fuller information; or even, "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".

396. In *Laerstate* the tribunal thought Chadwick LJ cannot have meant that agreeing to take an action without at least some "minimum information" as to the merits or otherwise of doing so is nevertheless the making of a decision. They said that he probably had in mind the scenario where the board does have at least that minimum level of information but could have delved more deeply. They thought that would suffice to evidence the directors had indeed made a decision albeit that it was an "ill advised and ill informed" decision.

397. We consider it implicit in Chadwick LJ's acceptance of Park J's comment as to the need for the directors to apply their minds that he thought that some form of engagement by the directors with an attempt to understand the consequences of what they were signing or agreeing to is required for them to make a decision. We understand him to be saying it is one thing to engage actively in the decision making process, albeit without seeking to obtain full information or even acting mistakenly or improperly, but another simply not to engage. The difficulty is in identifying, in the terms used by the courts in this case, precisely what level of engagement is required for the directors to be regarded as sufficiently "applying their minds" whilst acknowledging that a failure to fully engage does not mean no decision was made.

398. We note that in that case, Park J thought that the Special Commissioners in any event had no real basis for concluding that the decision by Eulalia to buy and sell the relevant shares was made without sufficient consideration or information. For example, as regards the sale of the shares, the Commissioners said that there was "no real consideration at all" as regards the acceptance of the terms of the sale as there was no evidence that the directors saw the accounts, the disclosure letter or the warranties. On the other hand, as Park J noted they considered that there were "strong commercial reasons" for the company to accept terms for the sale such that "to a considerable extent the decision made itself". As noted, Chadwick LJ considered that the true analysis was that AA had "ample reason" to enter into the sale of the shares. We understand him to be saying in effect that the fact that there were strong commercial reasons for the sale of the shares sufficiently evidenced that AA made the decision to sell in exercise of its discretion. It did not matter that the director did not enquire into the precise terms of the sale. What suffices will suffice will of course depend on all the facts and circumstances of the particular case.

399. It has been accepted that a company may in principle be resident in two countries where there is present in both countries "some part of the superior and directing authority", the question of the extent of the superior or directing authority required being one of fact for the tribunal, as stated in *Union Corporation*. This principle was acknowledged in *Unit Construction* although we note that Lord Radcliffe thought it may be open to question whether, "where the facts are such that Lord Loreburn's test cannot be applied as a whole", the correct way of determining residence is "to fragmentate his principle and establish a residence for tax purposes wherever the exercise of some portion of controlling power and authority can be identified". We have not found it necessary to consider this potentially difficult aspect any further, however, as we have made our decision on the basis that the Jersey companies were solely resident in the UK for the reasons set out below.

Application of CMC test in this case

400. We note that it is for the appellant to discharge the burden of demonstrating that the Jersey companies, as newly formed entities with no history of operating offshore, were resident outside the UK in the relevant period.

401. As is clear from *Wood v Holden*, no different principles are to be applied simply because the company in question was formed for a specific or limited purpose such as to play a role in a plan devised purely for tax purposes. Therefore, the fact that the Jersey companies had a limited function requiring relatively little in the way of "strategic and management" decisions and that the UK parent/its advisers set the policy and influenced and confidently expected that the board would take the steps provided for under the plan would not of itself, without more, necessarily render the companies resident in the UK. As set out in that case it does not necessarily follow that CMC of an overseas group company, which has been formed for a specific purpose (whether as part of a tax plan or otherwise), is in the UK if it falls in with the plan of the parent of the group and does what is expected, provided that proper consideration is given to the proposal and the directors are in fact exercising their discretion to exercise CMC of the company.

402. The particular tax planning in this case, however, gives rise to unusual features, which require further examination in the context of the factual enquiry required:

(1) The Jersey companies were set up on the basis that the only transaction to be undertaken whilst the Jersey board was intended to be exercising CMC over them was an inherently uncommercial one from their perspective, namely, that they would acquire assets standing at a loss for a substantial amount in excess of their market value.

(2) This gave rise to corporate law issues. We have not seen the corporate law advice (as this was privileged) but it is clear from the PwC paper (see [19(3)] above), information in the records of the board meetings and the directors' evidence, that this inherent lack of commerciality meant that the only basis on which it was valid as a matter of corporate law for the Jersey companies to enter into the transaction was (a) that their parent, DS Plc, specifically approved the transaction and (b) that they were adequately funded to overpay for the assets, as they were by DS Plc subscribing for shares and making a capital contribution, such that there was no prejudice to creditors.

(3) The Jersey companies were to become UK tax resident (assuming they were non UK tax resident in the first place) very shortly after the acquisition of the assets under the relevant option.

403. As planned, the companies were incorporated on 10 June 2004, the call options were entered into on 25 June 2004, they were exercised on 12 July 2004 and steps were taken to ensure the companies were UK tax resident from 20 July 2004. The Jersey companies were therefore, on the appellants' case, managed and controlled in Jersey for a period of a little less than 6 weeks during which the directors "decided" to undertake an inherently uncommercial transaction for the benefit of the wider group. Steps were taken shortly after 20 July 2004 to realise the desired capital losses.

What was the real business?

404. *De Beers* tells us that the test as to where a company is resident is where its real business is carried on, which is where the [CMC] actually abides, as determined on a "scrutiny of the course of business over the relevant period, informed by what had taken place immediately prior to incorporation". The first step in the analysis must be to identify what the "real business" of the Jersey companies was on that basis.

405. It is clear that, immediately prior to setting up the Jersey companies and appointing the board, the parent company, DS Plc, had decided to implement the tax planning transaction (subject to formal board approval). Mr Marx was the driving force behind that. The parent company's decision could only be carried into effect by the setting up of Jersey companies with a predominantly Jersey-based board which then had to acquire the relevant assets from the UK group companies under the option arrangements. The role of the Jersey board was, therefore, to play a very specific but limited role in entering into those options and exercising them. The board was to hand CMC back to the UK group more or less immediately after they had implemented the necessary transaction. The parent was, on the evidence of Mr Marx, indifferent to who the Jersey directors were, provided they could be relied on as being of appropriate "stature" to act as directors of group companies. Mr Marx relied on his advisers' recommendation of the firm Volaw in that regard. Neither he nor those involved at the advisers had any personal knowledge of the directors.

406. Under the parent's strategic plan, therefore, as decided upon immediately before their incorporation, the Jersey companies were required to act as holding companies to acquire and (after the Jersey directors ceased to be involved) sell properties or shares in companies which owned properties. However, this was not an ordinary property investment business to be operated on a commercial basis with a view to maximising returns from the assets held. The assets were to be acquired and sold in relatively short order with the sole purpose of realising enhanced capital losses for the benefit of other members of the group (albeit in the short period they were held appropriate steps had to be taken to manage the assets). In reality, therefore, the companies' real business was to undertake the parent's plan for the realisation of enhanced capital losses through the acquisition of assets at an overvalue under call option arrangements.

What were the acts of CMC?

407. The only decisions to be made by the Jersey board which can be described as of a strategic or management nature, in the context of that "real business", are those to implement the planning by acquiring the assets at an overvalue under the call option arrangements at a point when the companies were intended to be resident outside the UK and then to move the residence of the companies from Jersey to the UK. The other matters dealt with in the relevant period are largely consequent upon and flow from the acquisition of the relevant assets; these include dealing with the formalities of the asset transfer, share subscription and capital contribution, the banking arrangements as regards the mechanics for the receipt of funds from DS Plc and the payment of the price for the assets and property specific matters such as registration for UK VAT purposes and the application under the NRLS.

What were the Jersey board engaged to do?

408. We consider it is also necessary to determine what the professional Jersey directors were actually appointed to do. Although each situation will depend on the precise facts, we can see that generally where, for example, professional directors are appointed to operate a property investment holding company on an on-going basis, the appointment is to act as a director dealing with whatever issues arise and not an engagement to undertake a specific defined action. The question is then whether the board of directors, when particular actions are taken, are doing so in exercise of their discretion in managing the company.

409. In line with the comments in *Wood v Holden* we do not consider that the position would usually be likely to be otherwise where directors are appointed to run companies with a limited or particular function. That a company has a specific or limited purpose or is acting in accordance with an overall plan set by someone else, such as the tax plan in *Wood v Holden*, does not of itself necessarily mean that it is a foregone conclusion that directors will take the anticipated action. Decisions taken by a board which accord with any such plan may well be an active exercise of the board's discretion provided the board engages in the decision making process. It cannot simply be presumed that the board has abdicated its function because its actions accord with what is expected and planned.

410. However, we consider the rather unusual circumstances in this case evidence that from the outset, in the very act of agreeing to take on the engagement, the Jersey directors were in reality agreeing to implement what the parent had already at that point in effect decided to do, subject only to checking it was lawful for them to do so. The Jersey directors were presented with a very specific plan, to implement a set of steps for the acquisition of an asset at an overvalue (albeit with inbuilt conditionality), a transaction which made no commercial sense for the companies themselves, and, having done that, to resign within a matter of days, all within the space of a few weeks. We do not have any evidence as to precisely what the directors knew of the project at the time when work started as regards setting up on the companies on 9 June 2004 although it is reasonable to suppose they had some knowledge of what was involved (see [73])). In any event, on 10 June 2004, the day before the first board meeting, Mr Norman and Mr Christensen had received the package of papers from PwC, from which the nature of the project was very clear (see [72] to [75] above).

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

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

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

414. We note that Mr Marx emphasised that it was important to him that the Jersey directors acted independently and with integrity. Due to the advice on the importance of the board acting independently for the tax planning to work, he deliberately stepped back from contact with the Jersey directors to avoid any inference he was unduly influencing them. It seems that the advisers also kept in the background for the same reason. We also note that the Jersey directors all said that they were independent minded professionals who would not be dictated to or controlled by any person as regards decisions they were making for companies on whose boards they sat.

415. This does not, however, in our view impact on our conclusion. From DS Plc's and the advisers' perspective, it was simply part of the plan that the Jersey directors, having been engaged to undertake the project, were not to be spoken to by Mr Marx or the advisers in terms of they must do this or they must do that. But the deliberate lack of any direct communication between the individuals involved in the UK and Jersey does not to our minds affect the fact that in reality, having agreed to undertake the project, the Jersey board were agreeing to undertake the required steps subject to checking the legality.

416. We accept that the directors were serious in their concern to check the legality of the proposed actions and that they regarded it as their responsibility to do that to ensure that the Jersey companies and they themselves were not acting unlawfully. To that extent, within that limited ambit, we accept that they may well consider (and legitimately so) that they were acting independently and that they would not have taken orders from anyone else. But that is somewhat illusory as evidencing the Jersey board were exercising CMC. DS Plc was involved in taking the relevant advice from

UK counsel. They were fully aware before the Jersey companies were incorporated of the position in Jersey from the advice given by PwC (see [19(3)] above). We do not imagine that Mr Marx or anyone else in the UK would have wanted to go ahead had there been an issue on that score. It is wholly unrealistic that anyone involved would have sought themselves to act or to order the Jersey directors to act contrary to the corporate law advice received. It is reasonable to suppose that if there were a problem DS Plc would simply not have given the approval required for the transaction to go ahead.

417. In any event, in our view, in these circumstances, checking for no legal impediments to the proposed action does not amount to taking the decision for the proposed action otherwise to take place. Taking the view that the transactions could be carried out lawfully under Jersey law, having received advice to that effect, is not the same thing as deciding that the company should enter into the transaction (for whatever reason). In other words, whether an action is lawful or not is but one limited aspect of whether to undertake that action. The strategic decision is whether, assuming there is no legal bar, it was a good plan for the Jersey companies to implement the tax planning by acquiring assets at an overvalue. As set out below, the Jersey board clearly did not make that decision.

Who carried out the key acts of CMC?

418. Whatever the scope of the engagement at the outset, it is clear from the evidence of what occurred at the board meetings that, as regards the key matter of entering into the options and acquiring the assets on exercise, the Jersey directors were acting on the basis of what was, in effect, an instruction from the parent which included the parent's confirmation that the transaction was for the parent's benefit, subject only to checking there was no bar to them complying with the instruction as a matter of legality.

419. We accept this is not a case where the directors signed resolutions approving the acquisition "mindlessly", in the sense that they did not know what they were signing and/or had no appreciation of the effect of what they were signing. The directors were aware that they were being asked to approve the acquisition by the Jersey companies of assets at an overvalue because the parent expected this to generate a tax benefit. They clearly reviewed the option agreements before entering into them and checked that the conditions for exercise were satisfied before exercising the options. A noted, we accept that, although the taking of corporate law advice was to some extent lined up for them, they were concerned to check whether the proposal was lawful.

420. The written records and the directors' own evidence demonstrate that they reviewed the corporate law advice received and that there may have been some discussion around that advice. Otherwise it appears that there was no consideration or discussion on the merits (or otherwise) of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group.

(1) At the first board meeting the only relevant matters recorded relating to the substantive issue of the proposed acquisition of the assets were (a) the need to take UK and Jersey advice concerning the legality of the proposal, (b) the query

on the capital contribution which was required to fund the acquisition and (c) that "instruction" or "approval" from the parent was to be obtained with a letter from the parent confirming that the transactions were in its "best interests" and funds would be provided (see also the comments at [152] to [154] above).

(2) At the second meeting on 25 June 2004, when the companies entered into the options, the directors had received the corporate law advice and it appears that was the focus of the meeting. The issues recorded as emerging from those opinions were, as regards the UK advice, that the companies should have funds to cover the price for the assets, as regards the Jersey advice, that there was no impediment under Jersey law and that buying assets at an overvalue was fine provided the companies were solvent. Mr Christensen emphasised that the discussion was around these issues. The only other substantive issue recorded relating to the agreement to execute the call options was the passing of the resolution by the parent approving the transaction and confirming that the transaction was in the interests of the companies (it appears that the initial proposal for a letter making that confirmation was dropped in favour of including it in the resolution approving the transactions) (see also the comments at [215] above).

(3) At the meeting when the options were exercised on 12 July 2004, the board merely checked that the relevant conditions were met including that the parent had given approval to the exercise. As noted, we do not find it surprising that there was no consideration of whether to acquire the assets at this point. The more natural time for this to be considered was at the earlier meetings, prior to agreeing to enter into the options. As these were call options, the board did not of course have to exercise them but there would be no point in entering into the options if there was no intention to exercise them (subject to the relevant conditions being satisfied) (see [252] above).

421. There was some suggestion from Mr Perchard that there were other considerations by the board and he suggested that entering into the options had some benefit for the companies themselves although it was "just as much, if not more" for the benefit of the parent. He did not identify what those considerations or benefits were. Mr Christensen and Mr Norman were clear there was no benefit to the Jersey companies themselves but said that the options were approved on the basis of the benefit to the parent or wider group. This was legitimate provided that no other stakeholders (such as creditors) were disadvantaged (which was plainly the case as there were no material creditors of the new formed companies and the transactions were fully funded by the parent).

422. Overall for the reasons set out above in our observations on the board meetings (see [152] to [154] and [215]) we conclude that, as is clear from Ms Hembry's notes of the board meetings, in agreeing to execute the documents required to enter into the option arrangements and subsequently to exercise them, the Jersey directors were acting under what they considered was an "instruction" or "order" from the parent in the form of the resolution approving the transactions. The instruction in effect included a confirmation from the parent that the transaction was for the benefit of the companies and the group. The fact the resolution and typed minutes are framed in terms of an authorisation or approval from the parent does not affect this. From the

terminology used in Ms Hembry's notes of the meetings the approval resolution was viewed as an instruction for the directors to enter into the option. Moreover, this was not a case where, as in *Wood v Holden*, the directors were acting on a positive recommendation to enter into the transaction on the advice of advisers they had engaged. The directors did not take any advice on the merits of the tax planning proposal.

423. The Jersey board were not, therefore, actively engaging in a decision to implement the tax planning by acquiring the assets at an overvalue in exercise of their discretion as directors. That decision was made by DS Plc and the directors merely gave their formal approval (as we would say they had undertaken to do from the outset) as they were instructed to do. The directors did not consider for themselves whether the transaction was for the companies' or the parent's benefit as part of a decision making process. There is no evidence that there was any discussion of that at any of the board meetings. Any discussion was confined to the legality position. That there was a benefit was certified to them simply as part and parcel of the "instruction" given to the board. Acting on the basis of such a confirmation is not the same thing as the board considering the issue independently in exercise of their own discretion in active engagement with the substantive decision to be made.

424. In our view there is an essential distinction between this case and *Wood v Holden*. As here, the overseas company in question, Eulalia, was inserted in the structure, purely with a view to tax planning, in that case with the aim of reducing the capital gains tax bill for the ultimate owner on a sale of shares. However, Eulalia was presented with a rather different proposition to that facing directors here. Eulalia was expected to acquire shares through funding provided by the parent, at an undervalue, for onward sale to a third party purchaser for a commercial profit. The Court of Appeal held in effect that, as regards the key decision to sell the shares, the board of the overseas company made a commercial decision, albeit one influenced and expected by those involved. Lord Justice Chadwick considered that, given the strong commercial rationale for selling the shares, the "true analysis" was that the directors had "ample reason" to enter into the sale of the shares. In other words that there were commercial reasons for the sale to take place satisfactorily evidenced that the director in that case engaged in the decision making process. It did not matter that it had not gone further and delved more deeply into matters by looking at the actual terms of the transaction (the warranties, the disclosure letter and other terms).

425. In this case, the board of the Jersey companies were presented with a sole transaction which, by contrast with that in *Wood v Holden*, had no commercial merit from the companies' own perspective and thereby required instruction or approval from the parent for it to be lawful. There was no reason for the directors to enter into the transaction other than that the parent company wanted them to do so and told them to do so. The directors said that they were acting on the basis of the benefit to the parent/the wider group but the parent's confirmation that was the case was simply part of the instruction given to them.

426. Unlike *Wood v Holden*, therefore, this was not a case where the board considered a proposal and, having taken appropriate advice, decided that it was in the best interests of the companies to enter into it. Given that the transaction was clearly not in the interests of the companies and indeed could only take place with parental

approval, the inescapable conclusion is that the board was simply doing what the parent, DS Plc, wanted it to do and in effect instructed it to do. In the circumstances, the line was crossed from the parent influencing and giving strategic or policy direction to the parent giving an instruction. The Jersey board were simply administering a decision they were instructed to undertake by DS Plc, in checking the legality of the plan and then administering the other consequent actions prior to handing over completely to the UK group.

427. We do not suggest that the board was acting improperly. As noted, we accept that the Jersey directors were serious in their concern with the legality issues; they clearly did not want to do something unlawful. To act on the basis of a parent's instruction including a certification as to the benefit of the proposed transaction may well suffice for what is required under Jersey law. That does not amount, however, to the Jersey board making their own decision to enter into and exercise the options to maximise the group's capital losses. The Jersey directors were simply involved in checking that there was no bar to them carrying out the parent's instruction. Indeed we would question whether in reality even that limited role was theirs (see [416]). It is reasonable to suppose that DS Plc would simply not have given the instruction/approval for the transaction to go ahead if the advice from the corporate law counsel had not been positive.

428. Moreover, the evidence indicates that the board did not engage at all with the decision to move the CMC back to the UK (although we would say it was in any event always in the UK). The purported reason given of administrative convenience, as suggested by PwC as the reason the directors should give, lacks all credibility. Clearly it would have been administratively easier from day one for the companies to be managed in the UK rather than by newly appointed professional directors based in Jersey. It can hardly be said that, having set up a structure in Jersey, thereby creating the administrative inconvenience, the reason for the relocation to the UK, was administrative convenience. The Jersey directors resigned simply because they had fulfilled the function they were engaged to undertake in accordance with DS Plc's instructions. In the same way as they had no real engagement with the decision to acquire the assets, they had no engagement with why it was a good plan to move control back to the UK. It was DS Plc's decision that they should do so as it was necessary for the tax planning to work. The Jersey board simply agreed to take the formal actions required as the final part of what they were engaged to do from the outset, having acquired the relevant assets on the parent's instruction.

429. In fact at this stage it appears the Jersey directors were paying very little attention at all even to the formalities of what was thought necessary to ensure the Jersey companies were then UK tax resident. Hence the mistake in the board minutes recording that two procedures were taking place when only one was required (see [262] to [268]).

430. We conclude that the key decisions to acquire the assets at an overvalue and then to move the control of the Jersey companies back to the UK were taken by DS Plc in the UK. The Jersey board merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no

legal bar to them carrying out the instruction. In effect, the Jersey board merely rubber stamped the decision to move control back to the UK, having fulfilled the terms of their engagement.

Role of Mr Marx, Mr Lanes and the advisers

431. It is apparent from the above and, in particular, the discussion set out at [270] to [293] above that we are not basing our decision on Mr Marx personally (other than through the actions he authorised DS Plc to take), Mr Lanes, CC or the advisers making decisions for or dictating to the Jersey directors in terms of somehow issuing orders to that effect. Mr Lanes clearly was placed on the board with a view to ensuring the successful implementation of the proposal. He assumed it would happen and was no doubt doing what he could to ensure it did. However, whilst to some extent Mr Lanes took the lead at board meetings in presenting information as the representative of DS Plc, there is no evidence that he exerted any particular or dominant influence at board meetings. Indeed, given that the only matters they considered, and which anyone expected them to consider, was whether it was lawful or not to agree to the proposal, it is unrealistic to suppose that he or anyone else involved would have sought to instruct the directors to act contrary to the corporate law advice received or that the directors would have done so.

432. Otherwise Mr Lanes was acting primarily as a communicator, co-ordinator and facilitator in his largely administrative role. He was not a Mr Bock who was himself making decision of a strategic and management nature on behalf of the Jersey board in the UK.

433. We note that he and PwC/Landwell somewhat over engineered matters, for example, in terms of requesting that the board minutes were circulated from Jersey. PwC and Landwell determined the overall timetable and prompted the consideration of the relevant issues with their suggested agendas. As in *Wood v Holden* the scheme was implemented in accordance with their overall plan and to some extent under their guidance albeit they were somewhat in the background once implementation commenced. There is no evidence, however, that they were dictating to the directors as such. Indeed it seems that with a view to ensuring that as much was seen to be done in Jersey as possible, they stepped back from the implementation certainly as regards direct contact with the Jersey directors. We accept that Mr Marx similarly stepped back as he was conscious that his interference could prejudice the tax planning. The Jersey directors were, as part of the plan, to be seen to act independently. As set out above that does not affect our conclusion (see [414] to [416] above).

Other decisions

434. As noted, we do not consider that the other matters approved by the Jersey board were matters which affect the CMC issue. Although it does not affect our conclusion, we note that for all the reasons set out in the facts section, we consider that the Jersey board did in fact take those decisions in Jersey (subject to the fact that DS Plc was in overall control of the banking arrangements). The board were experienced professionals with real estate experience. From the evidence, there is no reason to doubt that, as in relation to checking the legality of the acquisition of the assets, they were serious in undertaking the legal, administrative and mechanical

matters required to effect the acquisition of the assets and necessary as a consequence of the acquisition in their short period of tenure as directors.

Dual residence

435. It follows that, as we have found that the only acts of CMC took place in the UK, we do not consider that the companies were dual resident in both the UK and Jersey. We have not, therefore, found it necessary to consider this issue.

Conclusion

436. For all the reasons set out above, we have concluded that the Jersey companies were resident in the UK in the relevant period. The appeal is, therefore, dismissed.

437. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE

HARRIET MORGAN

RELEASE DATE: 14 JULY 2017