[2022] UKFTT 00034 (TC)

TC 08386

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/00446, TC/2017/04007 and TC/2017/02850

CAPITAL GAINS TAX — application of the UK/Mauritius double taxation treaty to a plan to avoid capital gains tax on the sale of shares - whether the trusts which sold the shares were resident in Mauritius at the relevant time - consideration of the "place of effective management" test – on the facts, the trusts were resident in the UK - whether the operation of the treaty is excluded on the basis that the two contracting states tax different persons - no - appeals dismissed

BETWEEN

MR GEOFFREY RICHARD HAWORTH
MR IAN FRANCIS LENAGAN
KLEINWORT BENSON TRUSTEES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HARRIET MORGAN

The hearing took place on 20 to 24 and 27 to 31 July 2020. With the consent of the parties, the form of the hearing was video on Tribunal Video Platform, due to Covid 19 restrictions. The hearing was held in private as due to the numbers of attendees by video and the capacity of the system it was not possible for representatives of the media or members of the public to be given the opportunity to attend. However, such persons are able to request receipt of a transcript or to attend a tribunal centre to hear the recording of the hearing, where appropriate, as redacted as regards any part of the hearing directed to be held fully in private without the ability for such persons to have such access.

Mr Giles Goodfellow QC and Mr Ben Elliott, counsel, instructed by BDO, for the Appellant

Mr Timothy Brennan QC and Mr Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

DECISION

PART A - INTRODUCTION

1. Mr Geoffrey Haworth, Mr Ian Lenagan and Kleinwort Benson Trustees Limited ("**KBTL**") have appealed against amendments made by HMRC to their tax returns for the tax year 2000/2001. By the amendments HMRC seek to impose capital gains tax ("**CGT**") on the appellants in respect of substantial capital gains ("**the gains**") which arose on the disposals of shares in TeleWork Group Plc ("**TeleWork**") made by the trustees of the following three trusts (together "**the family trusts**"):

(1) the Geoffrey Richard Haworth No. 2 Life Interest Settlement ("**the GH Trust**"), established by Mr Haworth; and

(2) The IFL 1991 Voluntary Settlement ("**the IFL Trust**") and the IFL 1991 S&A Settlement ("**the S&A Trust**"), established by Mr Lenagan. I refer to Mr Haworth and Mr Lenagan as "**the settlors**".

2. The trustees of the family trusts realised the gains on selling shares in TeleWork on their admission to the Official List of the UK Listing Authority and to trading on the London Stock Exchange between 3 and 8 August 2000 ("**the flotation**"). TeleWork was created shortly before the flotation as the head of a group formed by bringing together under its ownership two companies in which the settlors and the family trusts then had an interest, WorkPlace Group Ltd ("**Workplace**") and TeleWare plc ("**TeleWare**") ("**the merger**").

3. The trustees of the family trusts at the time of the merger and flotation were (a) Deloitte & Touche Offshore Services Ltd ("**DTOS**"), and (b) Mr Chandra Gujadhur (together "**the Mauritius trustees**"), each of whom was resident in Mauritius. The Mauritius trustees were appointed in place of the previous Jersey resident trustees, with effect from (i) 26 June 2000, in the case of the GH trust, and (ii) 30 June 2000, in the case of the IFL Trust and the S&A Trust. On 24 October 2000, KBTL and two individuals ("**the UK trustees**"), each of whom was resident in the UK for tax purposes, were appointed as trustees of each of the family trusts in place of the Mauritius trustees. It was common ground that from 24 October 2000, the family trusts were resident in the UK for CGT purposes.

4. The Mauritius trustees were put in place for this short period (from 26 or 30 June 2000 until 24 October 2000 ("**the relevant period**")) and were replaced with the UK trustees solely to enable the appellants to avoid CGT in respect of the gains for which they would otherwise be liable. This planning is known as a "round the world" scheme and its use has been examined by the Court of Appeal in *HM Revenue and Customs v Smallwood & Another* [2010] EWCA Civ 778, [2010] STC 2045 ("*Smallwood*"). It was held by the majority in that case that the Special Commissioners ("**the Commissioners**") had not erred in their decision (see [2008] UKSPC 00669 [2008] STC (SCD) 629) that the planning failed, and CGT was in fact due on the relevant sale of shares. At the heart of the dispute in this case is a disagreement on the scope and effect of that decision.

5. In summary, Mauritius was chosen as the location for the family trusts' administration whilst the gains were realised because:

(1) The United Kingdom ("**UK**") has in place with Mauritius a "double taxation agreement" ("**the Mauritius treaty**") which contains a provision which the appellants consider applies to exempt the capital gains from CGT as a result of the steps taken under the planning ("**article 13(4)**"):

(a) Article 13(4) provides that:

"Capital gains from the alienation of any property other than that mentioned in paragraphs (1), (2) and (3) of this Article [which apply to certain property

> (such as immovable property) and not shares] shall be taxable *only in the Contracting State of which the alienator is a resident*." (Emphasis added.)

(b) The appellants' view is that (a) for the purposes of article 13(4), the family trusts, as the "alienators" of the shares on which the gains arose, were residents of Mauritius at the relevant time, and (b) accordingly, article 13(4) applies with the effect that the gains are taxable only in Mauritius and not in the UK.

(2) Whilst, in order to benefit from article 13(4), the intention was that the family trusts were residents of Mauritius (at least during the relevant period), a resident trust is not subject to any tax charge in Mauritius on capital gains arising on the sale of shares.

Law

6. Before turning to the parties' arguments on article 13(4), I have set out the common ground as regards how the family trusts are taxed under relevant UK and Mauritius tax law. All references to legislation in this decision are to the Taxation of Capital Gains Act 1992 ("**TCGA**") unless stated otherwise.

CGT position

7. For CGT purposes, the family trusts are treated as "settlements" under TCGA. This is on the basis that they comprise "settled property" as defined under s 68 as "any property held in trust" other than property (a) held by a person as nominee for another person, or (b) as trustee for "another person absolutely entitled as against the trustee"; namely, where the other person has the exclusive right to direct how that property shall be dealt with, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the property for payment of duty, taxes, costs or other outgoings.

8. There is no further definition of a "trust" in TCGA but the meaning under English law is well known. Broadly, under English law a trust is a legal relationship created when a person (a settlor) puts assets into the ownership of one or more persons (the trustee(s)) to be held and managed by the trustee for the benefit of another person or persons (the beneficiary) (or for a specified purpose) usually subject to terms set out in a trust deed and subject to duties imposed by law. The reference in this decision to the trust relationships under consideration in these appeals as "the family trusts" is used by way of shorthand for convenience.

9. The family trusts, as "settlements", are treated as follows under TCGA as regards the tax year 2000/01 in which the gains arose:

(1) The Jersey trustees, the Mauritius trustees and the UK trustees are treated as "a single and continuing body of persons" (a "**deemed trustee body**") under s 69. This provides that:

> "*the trustees of a settlement shall for the purposes of the TCGA [i] be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees)* and [ii] *that body shall be treated as being resident and ordinarily resident in the United Kingdom* unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom." (Emphasis and numbering added.)

(2) Under s 69[ii], as regards each family trust, each deemed trustee body is treated as being resident in the UK from the time of the UK trustees' appointment on 24 October 2000 as, from that time, the general administration of the family trusts was carried on in the UK and the UK trustees were all resident in the UK.

(3) The trustees of each family trust are, as a deemed trustee body, chargeable to CGT in respect of gains accruing to them in the tax year 2000/01 under s 2 TCGA. This provides that:

"...a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him *in a year of assessment during any part of which he is resident in the United Kingdom....*" (Emphasis added.)

(4) The trustees of each family trust are accountable for CGT arising on the gains under s 65. This provides that:

(a) CGT "chargeable in respect of chargeable gains accruing to the trustees of a settlement....may be assessed and charged on and in the name of any one or more of the relevant trustees..." (under s 65(1)) (subject to specific provisions as to which trustees are liable when a "settlement" migrates (under s 65(3)).

(b) Subject to certain exceptions and express provision to the contrary, "chargeable gains accruing to the trustees of a settlement....and [CGT] chargeable on or in the name of such trustees....,shall not be regarded for the purposes of this Act as accruing to, or chargeable on, any other person, nor shall any trustee.....be regarded for the purposes of this Act as an individual".

10. As was considered to be important to the plan, the gains accruing to the trustees of the GH Trust and the IFL Trust are taxable in the tax year in which they arose under s 77 and not under s 86:

(1) Broadly, both of these provisions subject a "settlor" of a "settlement" to CGT on chargeable gains which accrue to the trustees of the "settlement" from the disposal of certain property in a particular tax year where, as is the case here, at any time during the year the "settlor" has an "interest" in the "settlement".

(2) Section 77 only applies where, the "settlor" and the trustees are resident in the UK "during any part of the year" (or ordinarily resident in the UK during the year) (under s 77(7)). On the other hand, one of the conditions for s 86 to apply is that the trustees are not resident or ordinarily resident in the UK during any part of the year (under s 86 (2)).

(3) Hence, it was considered to be essential that the trustees of the family trusts (in each case, as a deemed trustee body) were resident in the UK at some point during the 2000/01 tax year. As noted, it is accepted they became resident in the UK part way through that tax year due to the appointment of the UK trustees.

11. If the appellants are correct that article 13(4) applies, it is to be given effect under s 277:

(1) Section 277 provides that s 788 ICTA (which gives relief from UK income tax where applicable under a double tax agreement), applies to arrangements for the purposes of giving relief from CGT on capital gains in the same manner as it applies to arrangements for the purposes of giving relief from income tax.

(2) As regards the S&A Trust, pursuant to s 277, article 13(4) would apply to prevent there being any gain accruing to the trustees in respect of the shares which is chargeable under s 2.

(3) As regards the GH Trust and the IFL Trust:

(a) Where, as here, the conditions for s 77 to apply are met, that section provides that there shall be treated as accruing to the "settlor" "any remaining amount of the chargeable gains which accrue to the trustees" after deduction of certain sums (as provided for by s 2(2)) "on which the trustees would, disregarding s 3, be chargeable to tax for the year in respect of those gains" (see s 77(1)(b)).

(b) Pursuant to s 277, article 13(4) would apply to prevent there being any such "remaining amount of the chargeable gains...." within the meaning of s 77(1)(b) so that there is nothing which s 77(1) can treat as accruing to Mr Haworth and Mr Lenagan, as settlors of those trusts.

Income tax under Mauritius law

12. It was considered to be important to the success of the tax planning that during the relevant period income arose to the trustees of the family trusts which is liable to income tax under the Income Tax 1995 ("**ITA**") as in force in Mauritius at the relevant time. The thinking was that this is necessary to ensure that the family trusts were each "a resident of" Mauritius for the purposes of article 4(1) of the Mauritius treaty.

13. Ms Joanna Hague and Mr James Peroo, who both practice as tax barristers in Mauritius, gave expert evidence on Mauritius law. As set out in Part D, they did not agree in some material respects, but it was common ground that the family trusts are liable to income tax on income arising to the family trusts in the relevant period under ITA as follows:

(1) Under s 2 ITA, the family trusts are deemed to be "persons" for the purposes of ITA ("**a deemed trust body**"). Section 2 states that (i) a "person" "shall be deemed to include a trust", (ii) a "trust" is "any trust constituted under the laws of Mauritius", and (ii) the term "company" includes a "trust". The family trusts fall within this definition of a "trust" in s 2 ITA as they qualify as offshore trusts within the meaning of the Offshore Trust Act 1995 ("**OTA**").

(2) During the relevant period, as deemed trust bodies, the family trusts were resident in Mauritius and were liable to income tax "in their own names" on worldwide income arising to the trustees in their capacity as trustees of the relevant family trust (and not in their personal or any other capacity):

(a) A trust, as a deemed trust body, is resident in Mauritius in respect of an income year, if the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius (under s 73 ITA). This requirement was met when the Mauritius trustees were in place.

(b) Income tax is payable "by every person on all income, other than exempt income, derived by him during the preceding tax year" (s 4 ITA) and income is deemed to be derived by a person where "the income was derived at a time when the person was resident in Mauritius whether the income was derived from Mauritius or elsewhere" (s 5(1)(b)).

(c) Where the deemed trust body is resident under the test set out above, it is liable to income tax under ITA, by virtue of the deeming provision in s 2 ITA as though it were a separate legal person on its worldwide "chargeable income" at a specified rate (under s 46 (1) ITA) (which, where the trust is certified to be engaged in international business activity by the Mauritius Offshore Business Activities Authority ("**MOBAA**") is 15%). "Chargeable income" is the difference between net income derived by the trust and the aggregate amount distributed to the beneficiaries under the terms of the trust deed (under s 46(1) ITA).

(3) Each family trust, as a deemed trust body, had tax filing and payment obligations pursuant to s 116 ITA and s 119 ITA (which requires the declaration of distributions made by a resident trust during a tax year to its beneficiaries). However, each trustee of the family trusts is deemed to be "the agent of a trust in respect of income derived by that trust", under s 81(4) ITA, on the basis that, under s 78(1) ITA:

> "Nothing in this Act relating to an agent shall be construed so as to release the principal from liability to make returns and pay income tax, and the principal and agent shall be jointly and severally liable for the income tax".

(4) Under s 78(2) if there is more than one trustee, they are jointly and severally liable as between themselves. There are further provisions setting out the responsibilities of trustees as deemed agents in s 79 ITA.

14. The main point of disagreement between the experts was that Ms Hague considered that it is clear the family trusts do not constitute entities with separate legal personality under

Mauritius law but Mr Peroo said that is not established. That issue is relevant to HMRC's "different persons" argument (see [17] and Part D). As noted, the references to "the family trusts" in this decision are for convenience and are not to be taken as an acceptance that, for Mauritius law purposes, the trust relationships under consideration in these appeals constitute entities with separate legal personality (and I have decided that is not the case in Part D).

Issue – application of article 13(4)

Relevant provisions in the Mauritius treaty

15. The relevant provisions of the Mauritius treaty other than article 13(4), are as follows:

(1) Article 1 provides that the treaty "shall apply to persons who are residents of one or both of the Contracting States".

(2) Article 2 states that the tax to which the Mauritius treaty shall apply are (a) in the UK, income tax, corporation tax and CGT, and (b) in Mauritius, income tax and capital gains tax (morcellement).

(3) Article 3(1) defines:

(a) "a Contracting State" and "the other Contracting State" as the UK or Mauritius as the context requires (see (d)),

(b) the term "person" as comprising "an individual, company and any other body of persons, corporate or not corporate" (see (e)), and

(c) the term "company" as "any body corporate or any entity which is treated as a company or body corporate for tax purposes" (see (f)).

(4) Article 4 sets out the test for determining when "persons" qualify as a "resident of a Contracting State" for the purposes of the treaty:

> "(1) For the purposes of this Convention, the term 'resident of a Contracting State' means, subject to the provisions of paragraphs (2) and (3) of this Article, *any person who, under the law of that State, is liable to taxation therein by reason of his* domicile, *residence*, place of management or any other criterion of a similar nature. The terms 'resident of the United Kingdom' and 'resident of Mauritius' shall be construed accordingly. ….
>
> (3) Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is a resident of both Contracting States, then *it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.…*" (Emphasis added.)

I refer to the test in article 4(1) as "**the treaty residence test**" and the test in article 4(3) as "**the tie breaker**".

16. The parties' full submissions are set out in Parts C and D. In summary, the appellants' view is that article 13(4) applies to exempt the gains from CGT as follows:

(1) For the purposes of article 1 of the Mauritius treaty, each family trust qualifies as a "*person*" who, under the treaty residence test, was a "resident of" both the UK and Mauritius during the relevant period:

(a) Each family trust is a "person" on the basis that, for both CGT and Mauritian income tax purposes, either (i) it constitutes a "body of persons" (within article 3(1)(e)) or (ii) it is "treated as...a body corporate" (within article 3(1)(f)).

(b) Under the treaty residence test, during the relevant period:

(i) That person was, under the law of the UK, as a deemed trustee body, "liable to" CGT "by reason of...residence" in the UK (under ss 2 and 69).

Although each family trust/the trustees, as deemed trustee bodies, did not become resident in the UK under UK domestic law until 24 October 2000, it suffices for them to be regarded as "*liable to*" CGT "by reason of...residence"

during the relevant period that s 2 rendered them "*chargeable*" to CGT on gains arising in the whole of the 2000/01 tax year because they were resident in part of that year (from when the UK trustees were appointed). This is clear from the decision of the Court of Appeal in *Smallwood*.

(ii) That person was, under the law of Mauritius, as a deemed trust body, liable to income tax on income arising in the relevant period by reason of residence in Mauritius (under ITA as set out above).

(2) Accordingly, (a) as viewed from both a UK and a Mauritius tax law perspective, each family trust, as a "person" as described above, was the "alienator" of the relevant shares for the purposes of article 13(4), and (b) on the authority of *Smallwood*, whether it was a resident of the UK or Mauritius at the material time for the purposes of article 13(4) is to be determined under the tie-breaker (given it was "a resident of" both countries under their domestic laws for the purposes of the treaty residence test).

(3) Under the tie breaker, each family trust was a resident only of Mauritius at the material time on the basis that POEM of the family trusts was in Mauritius at that time. The appellants consider that they need to demonstrate that POEM of the family trusts was in Mauritius only at the point of alienation, when the disposal of the shares took place, or, at the most, during the relevant period and:

(a) The tribunal can find that POEM of the family trusts was in the UK at that time only if the evidence justifies the tribunal finding, as a factual matter, that the function of the Mauritius trustees in taking relevant decisions (such as to approve the merger and sell the shares on the flotation) was "usurped" by persons in the UK in that they were bypassed or they agreed to act on the instructions of, or were dictated to by, UK persons. However, on the evidence, that is plainly not the case.

(b) That is on the basis that determining where the POEM of a trust is located requires the same approach as that which the Court of Appeal took to determining where a company is resident under the "central management and control" test ("**the CMC test**") in *Wood v Holden* [2006] STC 443. Whilst in *Smallwood*, the majority of the Court of Appeal upheld the Commissioners' decision that, on the facts of that case, POEM of the relevant trust was located in the UK, nothing the majority said detracts from the fact that the approach set out in *Wood v Holden* is the correct one to adopt.

17. HMRC argued that article 13(4) applies to preserve the right of the UK and Mauritius to tax the gains (albeit, in practice, there is no charge in Mauritius) in the hands of the two different sets of "persons" who form the taxable entity under the laws of each country:

(1) HMRC said that the tribunal must assess how the Mauritius treaty applies by reference to how the UK and Mauritius impose the relevant taxes falling within its scope because (a) under article 1, the treaty only applies to "persons" (as defined in article 3(1)) who are "residents of one or both Contracting States" and (b) whether a person is so "resident" has to be assessed under the treaty residence test by reference to the specified taxes in each country.

(2) In that context, HMRC focussed on the different formulations in ITA and TCGA for deeming there to be a taxable entity for Mauritian income tax and CGT purposes respectively. In their view, for the purposes of article 1 and the treaty residence test:

(a) Viewing matters from a UK perspective, *the trustees* of each family trust, as a deemed trustee body, constitute a "person", as a deemed body of persons within article 3(1)(e), who is, under the treaty residence test, "a resident of" the UK at the relevant time (as HMRC agreed was the effect of ss 2 and 69).

(b) On the other hand, viewing matters from a Mauritian law perspective, each *family trust*, as a deemed trust body, constitutes a "person" as a deemed body corporate within article 3(1)(f) who is, under the treaty residence test, "a resident of" Mauritius at the relevant time (under the relevant provisions in ITA).

(3) In HMRC's view, therefore, it follows that, for the purposes of article 13(4):

(a) Viewing matters from a UK perspective, *the trustees* of each family trust, as a deemed trustee body was the "alienator" of the shares and whilst that "person" was "a resident of" the UK at least for some period of time it was not "a resident of" Mauritius at any time as Mauritius law does not recognise that "person" as a taxable person.

(b) Viewing matters from a Mauritius perspective, each *family trust*, as a deemed trust body, was the "alienator" of the shares and whilst that "person" was "a resident of" Mauritius at least for some period of time, it was not "a resident of" the UK at any relevant time as UK law does not recognise that "person" as a taxable person.

(4) HMRC concluded that, on that basis, the tie breaker is not relevant. Article 13(4) simply operates to preserve the right of both the UK and Mauritius to tax the capital gains in the hands of the two different sets of "person" they each view as the taxable entity. Had Mauritius chosen to tax the gains, this result could lead to economic double taxation but double tax treaties address juridical conflict of actual taxing rights over the same person, not theoretically possible economic double taxation of *different* persons.

18. The appellants' view is that the distinction HMRC seek to draw is one without a difference. They added that there is only a single person in point for the purposes of article 13(4) even if the persons holding office as trustees of the family trusts for the time being are viewed as "the person liable to taxation" as the legal or natural persons against whom an actual liability to tax is enforceable.

19. HMRC contend that if the tribunal finds that the appellants' analysis as summarised at [16] is correct, in any event, article 13(4) does not apply to exempt the gains from CGT. That is on the basis that (a) article 13(4) does not apply to give that result unless POEM of the family trusts was in Mauritius during the whole tax year; that is not the case given that POEM was in the UK once the UK trustees were appointed, and (b) even if that is not accepted, on the correct approach to the POEM test, POEM of the family trusts was not in Mauritius at any relevant time. In HMRC's view, the majority of the Court of Appeal decided in *Smallwood* that the approach in *Wood v Holden* is not to be adopted in a case such as this. Hence, the circumstances where a trust may be "effectively managed" by persons other than the trustees in place for the time being are not limited to those identified by the appellants. On the correct approach, the family trusts were "effectively managed" by persons in the UK throughout the relevant period.

Conclusion

20. I have concluded that:

(1) As set out in full in Part D, HMRC's "different persons" analysis is not correct.

(2) As set out in full Part C, (a) whether article 13(4) applies is to be assessed by asking whether each of the family trusts, as the "alienator" of the shares, was a "resident" of the UK or Mauritius for the purposes of article 13(4) at the material time (which I take to be during the relevant period), (b) that falls to be determined under the tie-breaker as each family trust was a "resident of" the UK and Mauritius at the material time under the treaty residence test, (c) under the tie-breaker, POEM of the family trusts was in the UK throughout the relevant period, and (d) therefore, each family trust, as the "alienator" of the shares was "a resident of" the UK at the material time for the purposes of article 13(4)

and, that article applies to preserve the UK's right to subject the gains arising on the disposal of the shares to CGT.

PART B – Evidence and facts

21. I have found the facts on the basis of the documents in the bundles and the evidence given by (a) Mr Haworth and Mr Lenagan and their respective advisers, Mr Maslen and Mr Pentelow, (b) Mr Binks and Ms Hoskin, who as solicitors at the law firm Pinsent Curtis ("**PC**") advised the Jersey trustees and the Mauritius trustees, (c) Mr Gujadhur, who acted as a trustee of the family trusts, (d) Mr Wailing, Mr Petch and Mr Herring, whose roles are described below, and (e) Mr Claypole of BDO. All of the witnesses other than Mr Claypole were cross-examined at the hearing. A number of applications for the admission of evidence were considered at the hearing as set out in Part E below.

22. My view formed at the time of the hearing is that the witnesses were essentially honest. However, I note that Mr Haworth, Mr Lenagan, Mr Maslen, Mr Pentelow, Mr Binks and Mr Gujadhur were evidently, as is not perhaps surprising, very conscious of the appellants' own case and (a), on occasions and to varying degrees, at the hearing had a tendency to put forward that case rather than focussing on the specific question they were asked, and (b) it seems in their desire to present the case in its best light, in their witness statements or at the hearing, made some statements that lack credibility in light of the overall evidence or which reflect how they view matters ought to have been rather than how they actually were.

Section 1– Overview

Establishment of the family trusts and of Workplace and TeleWare

23. All references in Part B to dates are to dates in the year 2000 unless specified otherwise.

24. The IFL Trust and the S&A Trusts were established by Mr Lenagan as settlor on 14 March 1991:

(1) Mr Lenagan was the life tenant and potential capital beneficiary of the IFL Trust and the other beneficiaries were his family.

(2) The beneficiaries of the S&A trust were Mr Lenagan's two sons and any future children and issue of Mr Lenagan and Mr Lenagan and any spouse of his were excluded from benefit.

(3) At the start of 2000 and until the Mauritian Trustees were appointed, the trustees of these trusts were Walbrook Trustees (Jersey) Ltd and two individuals each of whom were resident in Jersey (together "**the Walbrook trustees**")

25. The GH Trust was established on 11 August 1987 by Mr Haworth as the settlor. He was the life tenant and potential capital beneficiary and his family were the other beneficiaries in remainder. At the start of 2000, the trustees were The Royal Bank of Canada Trust Company (CI) Ltd ("**RBC**") and two individuals each of whom were resident in Jersey (together "**the RBC trustees**")

26. Mr Lenagan founded the Workplace business in1986. Workplace designed and sold standard application software for staff scheduling, time and attendance and work management and had become a market-leader in the workforce management application sector. At the start of 2000, Workplace had an issued share capital of 2,000 ordinary shares:

(1) Mr Lenagan and his family trusts together held 85% of these shares. Mr Lenagan held 900 shares (45%), the IFL Trust held 420 shares (21%) and the S&A Trust held 360 shares (18%).

(2) The remaining 15% of the shares were held by Mr Tim Westaway (a director of Workplace) who held 200 shares (10%) and the TMW 1991 Voluntary Settlement which held 120 shares (5%).

27. Mr Haworth and Mr Lenagan together founded TeleWare in 1991. The company developed and sold standard application software for the computer control of telephony, unified messaging, interactive voice response and other related applications. At the start of 2000, the issued share capital of this company was 1 million ordinary shares of which:

(1) Mr Haworth held 200,000 shares (20%) and the GH Trust held 300,000 shares (30%).

(2) Mr Lenagan held 60,000 shares (6%) and one of his family trusts, IFL Computer Investment Trust, held 440,000 (44%).

Advice on merger and flotation in late 1999 and early 2000

28. The proposal for the merger and flotation was considered in late 1999 and early 2000 following Workplace receiving an approach from two separate companies based in the USA who wished to acquire it. By that time, with the assistance of Mr Wailing, Mr Lenagan had been looking at the valuation of Workplace and TeleWare and the possibility of flotation, as against a trade sale, for a number of years and they had together developed expert knowledge on company valuations.

29. Mr Wailing was the finance director of both Workplace and TeleWare and after the merger, of TeleWork. Mr Lenagan regarded him as part of his core group of advisers and Mr Wailing confirmed that he was close to Mr Lenagan both personally and professionally. Over the years Mr Wailing acted as a sounding board for Mr Lenagan on commercial decisions. He agreed that Mr Lenagan and Mr Haworth were closely involved in the companies, with their "hands on the tiller"; they both knew their own minds and were not afraid to make commercial decisions.

30. Mr Lenagan and Mr Wailing had reached an agreement some years before 2000 that they would transfer 10% of the value of any businesses that either of them created to the other. The merger and flotation provided the opportunity for Mr Lenagan to make good on that agreement as regards TeleWare.

31. Mr Lenagan initially discussed the possibility of a merger and flotation with Mr Herring, a corporate finance specialist, who acted through GdeZ Capital, a boutique venture capital and corporate advisory entity. GdeZ Capital was then engaged by TeleWare and Workplace. Mr Herring initially made the suggestion to Mr Lenagan at a meeting in early November 1999 and then sent a letter to Mr Lenagan on 12 November 1999 in these terms:

(1) He suggested that the values being attributed to technology related companies by the stock market at that time were irrationally high and "unprecedented" (although he noted that they could fall).

(2) He advised that the value of Workplace and TeleWare as a combined unit would be equal to in excess of 50 times post-tax profits whereas on a "trade sale" their values would be equal only to 8 to 10 times post-tax profits.

(3) He explained a typical timeline for a flotation and outlined the necessary steps: the appointment of an investment bank as the sponsor who would orchestrate the whole process, the appointment of reporting accountants to prepare a long form report on the business/an in depth due diligence report to allow the investment bank to evaluate the business more thoroughly, the preparation of a prospectus, the conduct of legal due diligence, the preparation of a research report for investors and a roadshow to market the group to institutions, preceded by a press announcement.

(4) He noted that a minimum of 25% of the issued share capital post float would need to be in public hands.

(5) He explained the costs involved and noted that: "In the event that the flotation does not proceed, in practice the majority of the fees do not become payable. Most, if not all

the professionals would defer their fees to a subsequent corporate event such as flotation or sale". He also proposed his own fee on a "no float no fee basis" (unless it was decided to sell the business to a third party prior to floatation.

32. Mr Herring became an adviser to TeleWork and a non-executive director of the company. He saw his role as providing a "sense check" on advice received from other advisors. He said that initially he saw himself as an advisor to the individuals who later were on the board of directors of Telework, in particular, Mr Lenagan and Mr Haworth. He felt his role was "perhaps more a sounding board, a sort of non-exec director able to maybe touch the steering wheel if I think something may be going off track a bit" but the sponsor primarily orchestrated the whole flotation process.

33. Mr Lenagan said that, on the figures presented by Mr Herring, the proposal for a merger and flotation was very attractive for the reasons set out below. He added that (a) he was aware that the "P/E multiple" (the ratio for valuing a company that measures its current share price relative to its earnings per share) for an outright sale of Workplace and TeleWare individually was likely to be only12 and 15 times post-tax profits respectively, (b) the flotation was attractive to him personally because it could put the company in a more commanding position in the market place due to the additional capital it would raise thereby giving rise to acquisition opportunities, and (c) he understood, however, that the high valuation was not a certainty and that he was not in a position to pursue a flotation on his own; the other directors and shareholders would need to approve it.

34. Mr Haworth said that he first became aware of the proposal for a merger and flotation in December 1999 when Mr Lenagan and Mr Wailing suggested it to him following a board meeting over a pint at the pub. He agreed it should be considered further having regard to the benefits of additional working capital, acquisition and marketing opportunities and the return for the shareholders. He said that he consulted with the Jersey trustees before agreeing that this should be fully explored (as explained in further detail below). Mr Lenagan said that he and Mr Haworth agreed the approach in principle before discussing it with the other directors and shareholders once they had a firm proposal.

Presentation by DKB in February

35. The boards of TeleWare and Workplace attended meetings with various potential sponsors for the flotation, including Dresdner Kleinwort Benson ("**DKB**"). Mr Herring had worked at DKB and suggested that DKB could make a formal proposal. The DKB team included Mr Robert Petch, a director of DKB.

36. On 16 February, DKB gave a presentation to the boards of the two companies which, as Mr Petch explained, showed (a) a base case valuation of £294 to £322 million for the merged group (on a discounted cash flow basis) based on estimated net profits of £2.2 million and £3.4 million for the years ended 31 December 1999 and 31 December 2000 respectively (b) which, on a valuation of £294 million, represented "P/E multiples" of 133 and 86 times post-tax profits for the two companies respectively. Mr Petch said that typically, such multiples on a trade sale tend to be in the range of 6 to 12 times post-tax profits and whilst DKB had not tested the market as to what sort of exit multiples might be achievable and these figures could have been higher than the norm due to the companies' interesting position and growth in a "hot sector" it was felt that in all likelihood a trade sale would yield a much lower valuation and the merger and flotation proposal was clearly worth exploring.

37. Mr Wailing said, "we were all extremely surprised at the valuation", as the figures presented were "exceptional and significantly beyond what we believed could be achievable by way of a straight sale of either company". Mr Herring said that DKB's figures accorded with his own estimate of the multiples he provided in November 1999. Mr Lenagan and Mr Haworth also recorded that they were amazed by this valuation.

38. Mr Wailing said that the merger and floatation proposal then became the preferred approach of the directors of both companies and not just of Mr Haworth and Mr Lenagan. He thought that those two first made the decision to consider and pursue the idea and subsequent decisions were made by the directors and other shareholders where relevant.

39. On 18 February DBK wrote to Mr Lenagan stating they were delighted that he had provisionally decided to appoint DKB as sponsor for the floatation and enclosed a draft engagement letter.

Appointment of DKB in March and valuation of the two companies

40. DKB were appointed formally by the boards of the two companies, as the underwriter/sponsor to the flotation of TeleWork, on 29 March, on terms that: (a) if the flotation proceeded, DKB would be entitled to a commission of £450,000 if the company raised £20 million from the sale of new shares, and (b) if DKB's services were terminated by the company before completion of the project, DKB's normal rates would apply subject to a maximum charge of £250,000.

41. By March, it was proposed that, if the merger and flotation proceeded, on the basis of a valuation report prepared by Mr Petch's team at DKB, the overall value of the merged businesses would be attributed to TeleWare and Workplace in the ratio 60:40 respectively. It seems this was a firm proposal at the latest by 18 April. This valuation split was referred to in letters from Deloitte & Touche (UK) dated 20 March and 18 April (in which that firm applied to HMRC for certain tax clearances in respect of the merger) as the value based on the views or advice of the sponsor. The valuation split was, as Mr Wailing accepted, a "fundamental part of the merger process that had to be agreed at an early stage". Mr Petch could not recall exactly how the valuations were arrived at but said that such exercises are not always calculated in a scientific way and that the objective of the merger was to create value in the combined entity that was greater than the sum of the parts (as in fact happened).

42. Mr Wailing agreed that the decision to appoint DKB was an important one which committed the companies, DKB and other advisers to a lot of work. He said that both Mr Haworth and Mr Lenagan were experienced businessman and would have been aware of the process of how decisions are made in companies. Initially, however:

> "the main focus for the Directors was on whether a merger and flotation made sense from a commercial/business perspective and was achievable. Once a workable proposal had been prepared, the agreement of the other shareholders, who were not involved in running the business, would be sought."

43. He said that both Mr Lenagan and Mr Haworth were in touch with the other shareholders and had regular contact with the trustees of the family trusts to inform them what was going on. He did not have direct experience of Mr Haworth's relationship with his trust, but he did of Mr Lenagan and his trusts, and "there was an ongoing dialogue with the trustees about the progress of the business. They continually through...the1990s, expressed the fact that they were very pleased with the way that the businesses were forming and therefore the value of the investments that they were holding".

44. When it was put to Mr Herring that the decisions relating to the merger and flotation were made by Mr Lenagan and Mr Haworth, possibly in conjunction with Mr Wailing, he seemed to agree. He added, however, that they would have had to take notice of other shareholders if they felt that they were against the proposal and could prevent it happening. He thought they would have had a dialogue with the shareholders as to why they felt the proposal was in the companies' best interests. This comment appeared to be based on a general view as to what would happen in such circumstances. Mr Herring had no particular knowledge of the tax planning and did not consider that it was his role to liaise with non-director shareholders. The recipients of his input were Mr Lenagan and Mr Haworth.

45. Mr Wailing said that he did not consult with the trustee shareholders as regards the proposal but he imagined that there may have been contact between them and DKB who he said primarily managed and orchestrated the flotation process. He added, however, that it would not be unusual for DKB not to have direct contact with very small shareholders (in such cases, contact would not be necessary) as opposed to significant shareholders.

Advantages of the merger and floatation

46. As regards the advantages of the merger and flotation:

(1) Mr Herring said that the thinking was that the merger would create a larger business that would be viewed as a more attractive investment by the market; Workplace alone was too small to interest institutional investors. Mr Petch said that the merged entity had the prospect of achieving a flotation at a substantially higher price than the combined valuation of the constituent parts which could deliver significantly greater value to the shareholders and there was the prospect of achieving at least partial realisation of their interest subject to there being sufficient demand from new investors.

(2) Mr Wailing said that the view was that (a) a flotation could raise capital for the company (and ultimately £20 million was raised), (b) the value placed by DKB on the combined entity was exceptional, and (c) a flotation and partial sale better accorded with the wishes of Mr Lenagan and Mr Haworth that they and/or their respective family trusts should retain a substantial equity interest in the merged group and enable them to remain as managers of the business.

(3) Mr Herring said that from the perspective of minority shareholders (if shares were retained), becoming shareholders in a listed company meant that the shares would be freely saleable and would provide them with additional valuable protections. In his view, however, the potential "P/E multiple" of the combined entity if a flotation was successful was so high when compared with the likely multiple on an outright sale that the trustees of the various settlements ought to have seen it as too good an opportunity to pass over. The very significant proceeds the trustees would receive would then provide an opportunity to diversify the portfolio of investments (away from the minority shareholdings in two smaller separate companies).

Tax planning proposal – April

47. Mr Maslen was Mr Haworth's tax advisor and also acted for the Jersey trustees of the GH Trust for tax compliance purposes. He thought that he continued to act for the Mauritius trustees for tax compliance purposes even though he was never formally engaged by them on the basis that "there was in place a continuing authority to communicate with HMRC". Mr Pentelow, a tax partner in Mazars Neville Russell, was the tax advisor to Mr Lenagan and his family trusts.

48. Mr Maslen thought that Mr Haworth introduced him to Mr Pentelow sometime in March so that they could consider the tax implications of the proposed merger and floatation. On 3 April he and Mr Pentelow took advice from Mr Kevin Prosser QC ("**UK Counsel**") and there was another meeting with him on 2 May. As Mr Pentelow confirmed, the advice was that no CGT would be due on the gains if (a) they were realised whilst the Mauritius trustees were in place (on the basis that the family trusts/trustees would not be resident in the UK at that time, for the purposes of the Mauritius treaty), and (b) UK trustees were appointed within the same tax year. It is plain that, as Mr Maslen and Mr Pentelow in effect accepted, the sole purpose of appointing the Mauritius trustees (rather than simply leaving the Jersey trustees in place) was to achieve this tax result.

49. Mr Pentelow confirmed that the decision to proceed with the tax planning was taken by Mr Haworth and Mr Lenagan over the course of the weeks following the initial discussion with

UK Counsel. Mr Lenagan said "the tax planning came along later and was secondary compared with the value created by the merger and flotation". Mr Haworth said:

> "we went to Mauritius as part of a recommended tax planning from Kevin Prosser QC here in the UK, who inspected all the documents, approved all the documents and all the appointments, and we went to Mauritius and it was just another risk. It was a risk when we went. It was a risk to have trustees. Ian and I did not have command over the trustees, so they were all a risk. There were thousands of risks."

50. The planning required specified steps to be taken in a defined order: the retirement of the Jersey trustees, the appointment of the Mauritius trustees, the appointment of shares into discretionary trusts in order to ensure the family trusts/trustees were liable to income tax in Mauritius, the execution of the documentation required to effect the merger and of the placing agreement, the sale of the shares on the floatation, the retirement of the Mauritius trustees and the appointment of UK trustees in the same tax year as the disposal of the shares.

51. As set out in further detail below, prior to their appointment the Mauritius trustees were briefed on the tax planning in written correspondence in early June and by Mr Maslen and Mr Haworth at a meeting in Mauritius on 15 and 16 June. When they took the appointment on, therefore, they were plainly aware that they were to be appointed for the specific purpose of achieving a particular tax result and that, to do so, they needed to take the required actions in a particular order. It does not appear that they took any independent advice as to whether the tax planning was actually in the interests of the beneficiaries; Mr Gujadhur could not recall taking any such advice. Mr Gujadhur considered that the planning involved the legitimate exploitation of a loophole.

52. In a letter to Mr Pentelow dated 24 April, Mr Maslen said that:

(1) Mr Haworth and Mr Lenagan had decided that (a) Mr Lenagan would concentrate on the value and prospectus matters, and (b) Mr Haworth would be responsible for driving forward the shareholder planning issues (for them and their family trusts) and the arrangements for benefitting employees, including Mr Wailing.

(2) He understood that Mr Haworth and Mr Lenagan were both concerned about the person chosen as Mauritius trustees.

(3) Mr Haworth wished to retain a total holding of 15% in the business after floatation:

> "of which 10% will be held by him personally and 5% by the settlement. As the proposed measures anticipate the repatriation of the settlement after realisation of the gain in Mauritius, I envisage that the present trustees will appoint the shares to be realised on flotation to new trustees, either in Jersey or directly to trustees resident in Mauritius. UK trustees will then be appointed after the disposal in place of the trustees resident in Mauritius, so that the whole of the appointed fund will have been repatriated. This would leave the existing Jersey trustees holding the unrealised shares under the terms of the original settlement."

53. As explained below, a team from the law firm, PC, advised both the Jersey trustees and the Mauritius trustees on the transactions. Mr Maslen involved Mr Binks and Mr Wray of this team in the discussions on the tax planning at an early stage following the initial discussion with UK Counsel. In a fax to Mr Binks of 24 April Mr Maslen (a) referred to a previous meeting with Mr Binks and subsequent telephone conversations with Mr Wray, (b) set out details of the tax planning and enclosed notes of the meeting with UK Counsel which he said he would like to discuss with Mr Binks, (c) briefly explained his current view on how the proposal would work (in the same terms as in his fax to Mr Pentelow), and (d) noted that Mr Haworth intended to use some of his combined shareholdings to benefit employees and some-subcontractors and set out some details of how this could be achieved and tax issues relating to the shares Mr Haworth/the GH Trust may retain and Mr Haworth's plans for the proceeds

of sale. He said there was some urgency (as the flotation was then planned for mid-June) and that he would call Mr Binks later in the day to discuss how to proceed.

54. HMRC suggested that Mr Binks in fact acted for Mr Haworth and Mr Lenagan, and he was questioned on this at length (as were Mr Pentelow and Mr Maslen). He said the following when it was put to him that Mr Maslen's fax of 24 April demonstrated that, from this early stage, Mr Maslen was asking him to provide legal advice to Mr Haworth:

> "At no stage did I think I was advising Mr Haworth on the tax planning. My understanding...if this thing went ahead, there would need to be legal advice to the Mauritius trustees on the actions which they might have to consider.... my take on it was that Mr Maslen was just looking to me as a sounding board at that stage and I was merely being helpful in discussing it with him, but I had no intention to advise Mr Haworth.....I would have had an eye to the possibility of acting for the Mauritian trustees and that's why I would have been talking to Mr Maslen at that stage, but not advising Mr Haworth."

55. Mr Binks agreed that he knew at the outset the steps involved in the planning but said that there was no certainty that they would be carried out because they depended on a number of factors, in particular, whether the Jersey trustees would agree to retire (they might not have been comfortable with the plan to export the trust to Mauritius) and it could not be certain that the merger and flotation would go ahead. He confirmed that he understood that, if everything went according to plan, the order of events would be as set out above and that, from the perspective of the settlors, the tax saving, if the tax planning worked, would be substantial and it was, therefore, extremely important to them.

56. It appears that most if not all steps involved in the tax plan were discussed with UK Counsel and he (a) approved many of the documents required such as those relating to the retirement of the Jersey trustees and appointment of Mauritius trustees and the retirement of Mauritius trustees and appointment of the UK trustees, the appointment of the various funds, a waiver agreement, a deed of release (including specifying when it should be signed) and capital distributions from the UK trustees and (b) advised on the fiduciary powers of Mr Lenagan in respect of a new settlement, the proposed dates for the retirement of the Mauritius trustees, the proposals for appointment of various funds after the appointment of UK trustees and the proposed retention of a residual shareholding in the UK. There was no suggestion that UK Counsel acted for the Mauritius trustees (or the previous Jersey trustees).

Announcement of the floatation in June

57. A decision to pursue the merger and flotation proposal was taken by the board of directors of TeleWork on 23 June. In the minutes of the meeting of the board of directors it was recorded (amongst other things) that (a) the Chairman (Mr Lenagan) reported that the shareholders of TeleWare and Workplace "*had indicated their intention* to transfer their shares in those companies" to Telework in consideration for the issue of shares in Telework to them, (b) it was then intended to float Telework, (c) the latest drafts of the prospectus and of the intention to float announcement were produced, and (d) it was resolved that a committee of the board comprising Mr Lenagan and Mr Haworth be appointed and authorised to deal with all matters relating to this.

58. HMRC suggested that the statement in these board minutes regarding the intention of the shareholders was not accurate (and/or not complete) given that there is no written record of any agreement by the Jersey trustees of the family trusts (as shareholders) to the proposal and there was no mention of the fact that new Mauritius trustees were shortly to be appointed. However, in cross examination Mr Lenagan, Mr Haworth, Mr Herring and Mr Wailing all considered that the statement was intended to and did reflect the factual position as at 23 June, namely, that the Jersey trustees, as shareholders at that time, had indicated their intention to proceed with the merger:

(1) Mr Lenagan added that the directors were well aware that there were ongoing discussions due to the tax planning for new trustees in Mauritius to be appointed, and whilst the Jersey trustees had indicated their intention there was likely to be a new shareholder "who will come in and we will have to take time to see what their view is".

(2) Mr Haworth said that he thought the RBC trustees were happy with the proposal and were prepared to go ahead but he did not know what the Mauritius trustees would do as they had not yet been appointed and did not have all the documents; that was one of the uncertainties.

(3) Mr Wailing confirmed that (a), at this time, he was aware that the Jersey trustees were happy for the transaction to proceed as described to them and were supportive of it, (b) he was not shown any record of their agreement to the proposal but he thought that they would have given a verbal confirmation.

(4) Mr Herring noted that if the proposal was deemed to be in the interests of the shareholder in Jersey, it would be highly likely to be in the interests of anyone who may come to hold those shares.

59. On 29 June, TeleWork issued a document in which it announced the intention to float and produced a "research note entitled Telework – Call in, clock on". Mr Petch explained that:

(1) This was the first public announcement and it meant there was an "expectation" that the floatation would go ahead but "no commitment…by the company or indeed any shareholders to sell shares at this point…it's really the next stage in...affirming that this was an IPO that…had potential to be successful". The research note was circulated to potential investors and the "principal purpose" was "to gauge market appetite for the flotation and also to enable a roadshow to start being arranged".

(2) The research note contained information DKB believed potential investors needed in order to decide whether to consider investing on the floatation. In this case, DKB valued the company at £297 million before new money raised, on a discounted cash flow basis, and the note showed a "P/E multiple" of 126.5 for the year ended March 2000 and 62.5 for the year ended 31 March 1999.

(3) A roadshow is a very intense two to three-week marketing period where the management of the company meets with seven or eight, sometimes even ten, potential institutional investors per day. There is "a big logistical exercise to put in place a tight roadshow period". That constitutes the formal marketing which happens later in the process, after the publication of the prospectus.

(4) However, at the stage of the announcement:

> "it's an intention to float, to start gauging investor appetite, give them a chance to read the research, get some feedback as to what they think about the deal in general,.....the pricing that we've put forward in our research note. Bearing in mind that up until this point, all the advice...as regards valuation had been given to the company and its shareholders...as advice by DKB. There had been....reference to the actual people who are going to buy the stock. So it's a very important part of the exercise to actually ensure there was going to be sufficient interest and demand and that we weren't all sort of smoking something, if you like, internally…..
>
> [At this point, if there had been very negative feedback] we would have either adjusted our views on pricing, had another discussion with the company and its shareholders.....or we could have pulled the issue, said: actually, it's the wrong time for this reason, that reason. We might have missed something very fundamental about the business that made it unattractive to the market. So clearly, we could still pull back and it would be less embarrassing than if we had actually published a prospectus....at this juncture."

60. Mr Herring similarly said that the purpose of the announcement was to alert the market to the proposal and to allow the research note to be issued as a precursor to a formal marketing process and that: "No one is committed to proceeding with a flotation at that time. It's an intention." He agreed that (a) DKB were responsible for "orchestrating" the flotation process and "project managing" it in order to achieve the timetable outlined in their first presentation, and (b) by the time of the decision to announce the intention to float to the market a great deal of work had gone into the project by many people at great expense.

Resignation of trustees and appointment of Mauritian trustees

61. The RBC trustees resigned as trustees of the GH trust on 26 June, the Walbook trusts resigned as trustees of the IFL Trust and S&A Trust on 30 June and the Mauritius trustees accepted the appointment to act as trustees of those trusts on those dates. The Mauritius trustees indicated they would act as trustees of Mr Lenagan's family trusts on 27 June and signed the relevant documents on 28 June. The delay seemed to be due to some unpaid fees owed to the Walbrook trustees. The bundles contained a copy of minutes of the meeting at which DTOS approved the appointments to the family trusts which was attended by six directors of DTOS including Mr Gujadhur.

62. Mr Gujadhur explained that the Mauritius trustees' decisions in relation to these transactions were taken by a committee and said that he was sure that, as was his and DTOS' usual practice, detailed and meticulous notes and minutes were made of these meetings and placed on file. However, unfortunately the vast majority of these minutes are no longer available as they were misplaced on an office move.

63. As set out below, prior to their appointment to act as trustees for all of the family trusts, (a) PC sent the Mauritius trustees details of the proposed merger and of some of the appointments it was proposed they would make from the family trusts, and (b) Mr Gujadhur discussed the valuation of the businesses with Mr Wailing on a telephone call on 27 June.

Timing of flotation and overview of terms

64. Mr Petch explained that the normal time frame for achieving a flotation is three to five months. In this case, the original intention was to achieve the floatation in the early summer of 2000 but it did not in fact happen until early August which he described as pretty much the last possible date until the autumn due to the pending holiday season (as Mr Herring also said). Mr Herring, Mr Petch and Mr Lenagan said that the reason for the delay was volatile market conditions in the first six months of 2000 and stressed that, during this period, there was considerable uncertainty whether the proposal would go ahead:

(1) Mr Petch said that in this period DKB regularly monitored the market conditions and the research team provided regular "peer reviews" to the directors and advisors. These comprised an analysis of the average "P/E multiples" achieved by comparative companies which demonstrated the inflated market conditions at the time commonly known as the "tech bubble".

(2) He added that on any flotation there is always uncertainty, in particular, due to whether there will be sufficient investor demand to meet the funding requirements of the company at an acceptable price and the impact of the wider market conditions. The fact that the stock market was volatile during 2000 (the tech bubble burst after the floatation) caused DKB to consider whether to proceed and there was further uncertainty as regards whether the market was interested in the shares at all given the company's relatively small size and the disparate sectors it operated in. It was far from certain that investors would show sufficient interest in the shares of TeleWork, so the pricing of the shares was problematic.

(3) Mr Herring said that the market was rising from July 1999 through to March 2000 when it dropped markedly until July 2000 and increased again until November 2000. In

his view, the flotation was, in hindsight, achieved in a small window when the market conditions were very favourable. In a letter of 13 April 2000 to Mr Haworth, Mr Herring said that the issue to note on "the peer group review is the degree to which the share prices have fallen since DKB did their pitch to us….The stock market in 'high tech" stocks is "clearly undergoing a long forecast correction". Mr Herring also thought that there was further uncertainty in relation to market interest and the number of shares that might be sold by existing shareholders.

65. Mr Petch explained that:

(1) On a flotation, institutional investors like to see the founders retain a significant number of shares as a sign of their commitment to the company in the future. The usual way to deal with this is primarily to seek demand for new shares to be issued by the company (for its internal funding needs) and only to offer a relatively small number of existing shares but retain flexibility to increase or decrease this number depending on demand.

(2) It became evident during the marketing exercise that there might be sufficient demand to utilise a technique known as a "greenshoe option" whereby DKB could "call on additional shares" (either new shares or existing shares) if there was sufficient demand.

(3) At the end of the due diligence process and after the valuation exercise was carried out, the pricing of the shares was set by the corporate broking team at DKB under Mr Petch's remit. The "pricing range" was notified to the marketing team in time for the investor road show although the final price could increase or decrease dependent on market reaction and demand. In fact, demand was such that the pricing exceeded by some margin the original expectations and so presented DKB with an opportunity to release additional shares to the market under the "greenshoe option".

(4) DKB were responsible for determining the volume of shares to be placed which was then advised to existing shareholders for their agreement. Under stock market rules there is a requirement that the percentage of shares to be realised in a flotation must be at least 25% of those in issue. It was, therefore, for DKB, as the sponsor, to determine the number of existing shares to be released to the market.

(5) There was a closing meeting the day before the market listing at which all the legal documentation was signed. The sellers were committed to selling at this stage.

66. Mr Petch said that this flotation was very successful in that (a) due to the highly successful marketing, the pricing DKB was able to offer to shareholders was in line with the initial valuation provided in February so giving an obvious financial benefit to shareholders compared with a trade sale (or no sale), and (b) the volume of demand for the shares was considerably greater than expected which meant that the trustees had the opportunity to sell a larger proportion of their holdings than might have been anticipated. He noted that, as with any business, there were uncertainties as to whether the future performance of the business would justify the valuation that was offered on the flotation. In his opinion the trustees' decision to sell their shares was unquestionably in the best interests of the beneficiaries of the trusts. The trustees were able to sell their shares at the particularly high price at the time of the flotation and with hindsight the value of the shares declined rapidly afterwards.

67. Mr Petch was asked in cross-examination how confident he was that the selling shareholders would actually deliver the shares for sale on the flotation given he had no contact with the Jersey trustees or the Mauritius trustees. He initially said that his confidence ultimately came from the fact they signed the Placing Agreement. He seemed to agree that a lot of work was done prior to that point and that the flotation would not have gone ahead

without a high degree of confidence that the trustees were going to deliver but he added that there were lots of points that had to be delivered in the lead up to the flotation and:

> "the necessity to be able to place 25% of the company as a free float was also an obligation we had to fulfil. So we would have had numerous discussions through the build up to the announcement of intention to float….leading up to the placing agreement - to seek comfort….which, in all likelihood, would have required certain shareholders to sell some of their shares to get to that figure. That figure obviously includes the number of shares to be issued by the company to raise capital for the company and there was potential flexibility in what that figure was going to be….and that percentage…..would be dependent on the pricing of the issue itself…at the same time, we were taking instructions and representations all the way through from the management team of what became TeleWork that they were comfortable, that they were making information available to other shareholders in the group. They were feeding back information to us that there was general comfort with the way that the project was going and that there was no…. need for DKB to be concerned that there wouldn't be sufficient selling interest, provided we continued in the...way that we were going with the...indicative pricing that was being discussed at that time. So, in other words, the assurances from management here would have been very important."

68. He agreed that he meant that he had confidence that the selling shareholders would deliver the shares because the UK people with whom he was in contact were giving assurances, but he could not remember precisely what those assurances were. He noted that the directors also held shares in their own name and there were selling shareholders other than the trustees: "So it was not just related to the trustees….those trusts would also be selling as part of this process. It was for the management team to coordinate the selling interest across the shareholder base, or at least.....I believe that's how it worked in this case".

69. Mr Herring accepted that in order to effect the flotation, those involved had to be "confident … that they could actually deliver the number of shares and the value which was being offered to the public", and would "need comfort" that they could deliver on the flotation before pressing the button on the flotation.

Appointments from the family trusts

70. In the period from late June until early August, the Mauritian trustees were asked to make, and did make, various appointments of shares and cash from the family trusts into discretionary funds. This was largely because (as Mr Pentelow confirmed) UK Counsel had suggested a "slight restructuring" of the family trusts to create a discretionary interest in about 1% of the trust fund to ensure that they were resident in Mauritius by reason of liability to income tax. In addition, shares were appointed to a fund for Mr Wailing in order that Mr Lenagan could satisfy his moral obligation to him.

Reorganisation – 6 to 10 July

71. On 6 July:

(1) The shareholders of TeleWare exchanged each of their shares for one share in TeleWork and TeleWork thereby agreed to acquire the entire share capital of TeleWare. Accordingly, the GH Trust held 300,000 shares in TeleWork (which, at the time, constituted 30% of the total issued share capital).

(2) By a resolution of the members, an additional 664,667 shares in Workplace were issued to its shareholders in proportion to their existing shareholdings (as a bonus issue) so that the total issued share capital was 666,667 shares:

(a) the IFL Trust was issued with an additional 139,580 shares in Workplace (and held 140,000 in total); and

(b) the S&A Trust was issued with an additional 119,640 shares in Workplace (and held 120,000 in total).

(3) The Workplace shareholders did not immediately exchange their shares for TeleWork shares. TeleWork agreed to acquire the entire share capital of Workplace on issuing shares to the shareholders in Workplace subject to and conditional upon the offer price being agreed by DKB and TeleWork and the placing agreement not having been terminated 36 hours before admission to the London Stock Exchange.

72. On or shortly before 10 July, each shareholder agreed to enter into the Placing Agreement. Some shareholders (including the Mauritian trustees) signed powers of attorney to ensure that the final documents could be entered into at the relevant time (although the attorneys could exercise the powers conferred upon them only in accordance with the directions of the relevant shareholder).

Implementation of the flotation – 11 July to 3 August

73. On 11 July, TeleWork issued a Prospectus detailing the proposed listing of the company on the London Stock Exchange and the Placing Agreement was signed.

74. The Placing Agreement included the following provisions:

(1) The shareholders, including the Mauritius trustees as trustees of the family trusts, agreed to sell existing shares as specified in the schedule (and on appointing DKB as their agent) at the "Offer Price" which was to be set out in a "Pricing Memorandum" to be entered into between TeleWork, Mr Lenagan, Mr Haworth and DKB. Mr Lenagan and Mr Haworth agreed the Offer Price having been appointed as a subcommittee of the board of TeleWork at the board meeting on 23 June.

(2) The "greenshoe option" was described as an "Over-Allotment Option" and it was provided that "the Over-Allotment Selling Shareholders" (which included the Mauritius trustees of the GH Trust and S&A Trust) could be obliged by DKB to sell an additional 15% of their shares in TeleWork at the Offer Price. This option was exercisable by DKB (alone) within 30 days of admission of TeleWork's shares to the London Stock Exchange.

(3) The Offer Price was to be determined in two stages:

(a) The Prospectus specified a "Price Range "at which the offering was expected to be made of between 110p and 145p per share. DKB agreed to use all reasonable endeavours to procure purchasers at the Offer Price "upon and subject to the terms and conditions of the relevant Offering Documents and the Prospectus" (in other words at an Offer Price falling within the Price Range), so at a price within the Price Range.

(b) Following the roadshows and book-building exercise, the Offer Price was then fixed in the Pricing Memorandum agreed between the relevant parties by reference to the market interest in the offering. The parties were obliged to seek to place/sell the shares at an Offer Price within the Pricing Range.

(4) Therefore, when the Placing Agreement was signed it was effectively known (and anticipated by all parties) that the placing would be effected at a price between 110p and 145p (at a multiple of over 100 times the post-tax profits). Mr Petch gave evidence that there was a strong intent to price within the range in the Prospectus: "There clearly was a Pricing Range published. I can see we put in some weasel words saying: we reserve the right to change the Pricing Range in note 1., but nonetheless there was a range published clearly to go out with a strong intent to price within that range..." In fact, the Offer Price was set at the top of that range.

(5) It was put to Mr Haworth that his view that the price was put to the shareholders for their consideration was not right as in fact they were just told the price. He said that "the directors had considered it and then it went to everybody else ...Well, that's the process. The directors decide and then the shareholders make their minds up" and if they

did not like it they did not have to sign the Placing Agreement. He agreed that the shareholders were told the price later in the sense that on signing the Placing Agreement the shareholders agreed to sell at whatever price was agreed between him and Mr Lenagan.

75. On 24 July, Mr Gujadhur sent Mr Maslen a copy of draft letters addressed to MOBAA applying for a tax residence certificate. Mr Maslen sent Mr Binks a copy on 27 July and said his and Mr Pentelow's conclusion is that they should ask the Mauritius trustees to submit them and that they would ask if the trustees could indicate what steps are likely to follow and he asked Mr Binks for any comments before he responded. On 31 July, the Mauritian trustees submitted the application for a tax residence certificate.

76. On 31 July, the shareholders in Workplace exchanged each of their shares for 1 share in TeleWork and TeleWork thereby acquired Workplace. Following this, the total issued share capital of TeleWork was 1,666,667 held as follows:

(1) Mr Lenagan held 276,667 shares (16.6%), the IFL Trust held 140,000 shares (8.4%), the S&A Trust held 120,000 shares (7.2%) and the IFL Computer Investment Trust held 440,000 shares (26.4%).

(2) Mr Haworth held 200,000 shares (12%) and the GH Trust held 300,000 shares (18%).

(3) Tim Westaway held 66,667 shares (4%).

(4) 3i plc held 50,000 shares (3%).

(5) The I Lenagan 2000 Interest in Possession Trust held 73,333 shares (4.4%).

77. On 3 August, TeleWork issued 165,000,033 bonus shares to all of its existing shareholders on a 99:1 basis. Following this and immediately prior to the flotation, the total issued share capital of TeleWork was 166,666,700, which was held as follows:

(1) Mr Lenagan held 27,666,700 (16.6%), the IFL Trust held 14,000,000 (8.4%), the S&A Trust held 9,435,200 (5.7%) and the IFL Computer Investment Trust held 44,000,000 (26.4%).

(2) Mr Haworth held 20,000,000 (12%) and the GH Trust held 23,400,000 (14%).

(3) Tim Westaway held 6,666,700 (4%).

(4) 3i plc held 5,000,000 (3%).

(5) The I Lenagan 2000 Interest in Possession Trust– 7,333,300 (4.4%).

(6) The GRH 2000/1 Settlement held 3,300,000 (2%).

(7) The GRH 2000/2 Settlement held 3,300,000 (2%).

(8) The IFL 2000 S&A Trust held 2,564,800 (1.5%).

The trusts referred to at (5) to (8) were put in place as part of the exercise to make various appointments from the relevant trusts.

78. The flotation occurred on 3 August with the placing effected at a price of £1.45 and 13,793,103 new shares were issued and the "greenshoe option" was exercised on 8 August.

79. The total number of shares in TeleWork disposed of in the flotation was 62,433,121 (54,289,671 plus 8,143,450 pursuant to the "greenshoe option", being 29.2% of the existing share capital:

(1) The Mauritius trustees, as trustees of the GH Trust disposed of 16,663,439 shares plus 200,000 shares from a discretionary fund, and a further 4,071,725 shares pursuant to the "greenshoe option". Following this they held 2,464, 836 shares.

(2) The Mauritius trustees, as trustees of the IFL Trust, disposed of 11,366,700 plus 2,500,000 from Mr Wailing's fund and 133,300 from a discretionary fund (no shares were sold in the "greenshoe").

(3) The S&A Trust disposed of 5,230,139 plus 133,300 from a discretionary fund, and a further 4,071,725 pursuant to the "greenshoe option".

80. The "P/E multiple" achieved on the sale of the TeleWork shares was approximately 150.

"Greenshoe option" and pricing

81. Mr Petch explained that the number of shares to be issued on the flotation to raise the desired capital (in this case around £20 million) depended on the price at which the shares were in fact placed. He noted that new and existing shares were placed at the same price.

82. Mr Herring said that a "greenshoe option" is introduced when there is very strong demand for a company's shares such that the sponsor would take the view that: "we can absolutely place what we've planned to place at...a good price, but we've got so much demand out there that we would like to call on some more shares to meet that demand". Mr Petch gave a more detailed explanation as follows:

(1) It became common practice around this time, as "quite a clever device" to look to restrict the number of shares being to the market, "sort of supply and demand.... mechanics, because you don't want to...flood or frighten the market that there's a huge number of shares being sold". Rather "you want to..say: okay, this number of shares is what we're looking to sell and that would seem to be a successful flotation if we achieve that figure".

(2) The "greenshoe option" gives the sponsoring bank the ability to place additional shares in the "aftermarket" on behalf of selling shareholders, or possibly even the company to raise more money. This is attractive because, if the market is not sufficiently strong after the initial floatation, then the "greenshoe option" would not be exercised and "there would have been still no sense that the issue had somehow fallen short". But if the market is strong (and here the price rose quite strongly post the listing) it is "actually quite easy to place stock.."

(3) It enables the bank just to increase the size of the issue and earn "quite attractive commissions" so for the sponsoring bank, it is an attractive option for very little price (it cost a pound) and the selling shareholders have a chance to place additional shares if they are interested in doing so, at a time when the company has been very fully marketed and it is hoped that the pricing is still attractive.

83. In cross examination Mr Petch was asked why this was constructed as an option as presumably the shareholders could simply sell more shares. He said:

(1) The bank may argue that "they may need to move very quickly. If they see there is additional demand in the marketplace, they want to be able to place those shares" in a real-time dynamic price environment, without having to go back and get approvals. So that "might be an excuse for saying: you have got to give us the option. Give us the flexibility".

(2) Banks like to argue that they should look to assist in the "aftermarket price management". It is "slightly dangerous territory because clearly….you need to ensure you're not manipulating a market" (but lawyers would have been ensuring that was not the case) but "this.....gave greater flexibility to the bank".

(3) Shareholders, particularly those with larger holdings, are "locked up, following an IPO, for a period of time" and the bank would not want to see, say on the day after the launch, a larger shareholder "taking the opportunity to dump a load of shares into the marketplace in a free trading environment because that would...upset…people, the

whole...market, the early market trading, or could do". So it was important to ensure that everyone was "aligned in the same way, everyone had the same agreement that if the stock could be sold, it would be sold proportionately to each person's shareholdings. So it was a way of managing the existing shareholder base in an effective way."

84. In re-examination Mr Petch was asked to explain what he meant by a "lock-up" in the context of this case. He said "it cuts both ways" and:

(1) Existing shareholders do not want to feel that others may be trying to take advantage of a spike in the market to sell more shares and push the price down for others where everyone should be treated equally and fairly as a selling group.

(2) The market investors and new investors in the market want to know that there is going to be a chance for the market to develop and for the company to start delivering on the various indicative promises of its performance post-flotation before existing shareholders are allowed to sell more shares:

> "Because it's important for any investor to know what the overall….total free float in the company is….and if existing investors are indicating their otherwise support for the business for the longer term, you don't want to see them selling on day one after the flotation….you can see it makes sense for managing the aftermarket….post the flotation, that there should be restrictions on existing shareholders, unless DKB say....: we are entirely comfortable because there's so much demand, it makes sense. We're happy with the performance of the company. So, there's the ability for DKB to unlock the lock-ups
>
> …. Well, even more the case that if the directors -- would have been, I'm sure, making undertakings or representations at the time that they were very confident of the long-term growth potential of the business - investors would want to know if they were selling. If they were saying: we're not going to sell because we think there's more value to come, we're committing not to sell formally in these lock-up arrangements, that's a strong message for investors.
>
> …there are obligations on any company to report sales of stock by directors or indeed material large shareholders. So it would be very visible to the market if directors were selling and, of course, people would think: oh, why are they selling? So it would be a very negative inference in the marketplace in a still sensitive early trading for the stock."

Decision on which trusts would sell shares in the floatation

85. Mr Petch explained that the preference was for Mr Lenagan and Mr Haworth not to sell direct all they shares they held in order to achieve the required free float of 25% because, as he had explained, it would be more attractive for the market to see their direct holdings being retained. However, in extremis if, for some reason, other shareholders had decided not to sell, Mr Haworth and Mr Lenagan could have agreed to sell more of their shares and that might have been sufficient to get to the required 25%.

86. Mr Lenagan gave the following explanation of how it was decided which of his family trusts would sell their shares on the flotation:

(1) As he had a choice of three trusts, he had a long conversation with Walbrook in the run-up to this (before 23 May) as the chairman of the board of directors of Workplace and TeleWare, "about what their attitude would be to all of the aspects of the three trusts afterwards". He discussed with them that DKB had indicated to the board that it would be much better for the flotation if he and Mr Haworth retained some shares.

(2) It was quite clear that the minority shareholders of the proposed merged company would sell their shares because it would have been unfair otherwise. As there had to be a 25% free float and ideally up to a15% of shares would be sold under the "greenshoe" and, as he and Mr Haworth and their family trusts were the principal shareholders "we

had to take some shares among our shareholdings personally and among our trustee shareholdings".

(3) "DKB were clearly indicating that it was in the interests of the flotation that we held our personal shareholdings after the flotation and were locked in with them" so that left his three trusts and Mr Haworth's family trust, "and his would obviously be part of the tax planning aspect of this in terms of which trusts would sell their shares".

(4) Prior to flotation Mr Lenagan and his trusts had 60% of the combined shares and Mr Haworth had 30%. Mr Lenagan wanted "to keep more control" and "preferred to keep more of an involvement in the composite company afterwards". So it seemed reasonable, as both he and Mr Haworth wanted to stay within the businesses, but he had twice the shareholding of Mr Haworth/the GH Trust, for him to sell proportionally less, but sell in effect the same amount because that allowed him to stay as chairman and have a significant shareholding through his family trusts and through his personal shareholdings afterwards.

(5) So "with that decision taken, it then became a discussion between Walbrook as to which trusts should be exported if the tax planning were to be taken into account" and:

> "Well, there was little point exporting the Computer Investment Trusts with 26.4% because we couldn't have sold those, whereas the [IFL Trust] and the S&A Trust between them had 15.6% of the shares, which was about what I would have expected to sell or the shareholders and the trustees looking after the beneficiaries of my family would have expected to sell. I was perfectly content, and as board of directors chairman, as settlor and as beneficiary of the Computer Trust, that that stayed under Walbrook's control in Jersey and that they would hold those shares long-term, because I believed that TeleWork had a superb long-term future and wanted to continue with that and in fact proved that by staying on for another further 11 years and doing that successfully with the company."

(6) Mr Lenagan provided a letter of comfort to the 1991 Computer Investment Trust on this basis. Mr Pentelow said he could not remember who decided that the S&A Trust and the IFL Trust would sell their shares on the flotation but he imagined it was Mr Lenagan's decision.

Resignation of the Mauritius trustees

87. As noted, on 24 October, the Mauritius trustees resigned as trustees of each of the relevant trusts and the UK trustees, comprising KBTL and Mr Kevin Custis and Mr Roger Clark, were appointed as trustees in their place.

Section 2 - Overview of the relationship between the parties

88. A team at PC acted for Mr Haworth personally in relation to the corporate transactions. A different team at PC, comprising Mr Binks, Ms Hoskin and Mr Wray ("**the PC trusts team**") acted for:

(1) the Jersey trustees, as regards their retirement as trustees of the family trusts (and continued to act for Walbrook as trustees of the 1991 Computer Investment Trust), and

(2) the Mauritius trustees, as regards each family trust in relation to all appointments and corporate transactions which took place during the relevant period.

89. HMRC suggested that although there was no formal engagement, in practice, the PC trusts team also acted for Mr Lenagan and Mr Haworth personally and that, in effect, they were instructed by them, acting through Mr Maslen and Mr Pentelow.

90. Mr Lenagan gave the following evidence:

(1) In his witness statement he said that he was certain that the Mauritius trustees made their own decisions and he did not instruct them directly or indirectly at any point. His

advisers were fully aware of the trustees' powers and obligations, and Mr Pentelow explained to him that there could be no manipulation or direction of the trustees. Any correspondence that his advisers had on his behalf would have been to ensure that UK tax matters were being properly considered on his and his family's behalf. He thought that given the international nature of the arrangements it was important that experts such as Mr Pentelow were kept informed and provided their own views.

(2) When he was asked whether PC drafted a "letter of wishes" for him (which was sent to the Mauritius trustees shortly before they retired), he said they were not his advisors and he could think of no reason why they would draft it unless they did so for the trustees. He recalled at one stage he needed advice and, as PC were not his advisor, he used Eversheds (who advised the company) and they stated in a letter that PC did not act for him.

(3) When it was put to Mr Lenagan that Mr Binks/the PC trusts team acted for him when preparing documents that Mr Pentelow asked Mr Binks to produce (for example, as regards the trustees' retirement) he said:

> "No…I was not their client, so they were not seeking instructions from me as their client. They were the advisors to the trustees in Mauritius. We were about to make requests to the trustees in Mauritius. Whenever I had any letters or conversations, though in fact I never spoke to Mr Binks, but telecom conversations with them, I assumed that they were acting on behalf of the trustees in Mauritius because they clearly were not acting for me.....I had no ability to give them instructions. They were not my advisor."

(4) He was asked why it was then that Mr Pentelow asked Mr Binks to advise on his will. He said:

> "My understanding of the route for which requests would come from me or the beneficiaries - I think it's the settlor who make the request of the trustees in Mauritius.... Mr Pentelow on my behalf would make those requests. Those requests were likely to be passed down from Mauritius to Mr Binks and Pinsent Curtis to see his opinion of those....and Mr Pentelow presumably at this time is getting ready the requests to the trustees in Mauritius which Mr Binks, as the trustees' advisor, would advise the trustees in Mauritius about. But Mr Binks was never an advisor to me.
>
> I'm not sure how the context of my will came up.....Mr Pentelow was there to look after my interests and if anything needed to be changed in my will that would have been affected by a decision by the trustees, then we would have requested the trustees and Mr Binks would have advised the trustees."

(5) When asked why Mr Binks asked for his confirmation of various points he said Mr Binks was acting on behalf of the Mauritius trustees in anticipation of discussing with them the likely requests that would be put to them that Mr Binks would then advise them on.

(6) When Mr Binks asked him for "instructions" he assumed that Mr Binks knew that "we were making requests through Mr Pentelow to the trustees and that he would be asked to advise the trustees as to whether those requests were acceptable or not". He added that this was when time was very short:

> "I can only believe that in this context, because he knew that we were going to be making those requests, that he felt that the trustees would not want to be wasting their time on requests that he would then give an opinion to the trustees that they weren't acceptable or needed to be changed. It was a very clear relationship: we put requests to the trustees, Mr Binks advises the trustees as to whether those requests are sensible in structure and content."

91. Mr Lenagan was not taken to the correspondence in the bundles relating to the preparation of the letter of wishes or advice given by Mr Binks in relation to his will. As set out below, it is clear that the letter of wishes was prepared by the PC trusts team at the request of the Mauritius trustees and was sent to Mr Pentelow for comments. Mr Pentelow asked Mr Binks for advice on Mr Lenagan's will and he accepted that, on that occasion, Mr Binks was not acting on behalf of the Mauritius trustees. I do not consider that Mr Lenagan's lack of recollection of this advice of itself undermines his evidence on this point or his overall credibility as a witness given he was speaking in general terms about the relationship with the Mauritius trustees as regards events from twenty years ago and he was not taken to the relevant correspondence.

92. Mr Haworth gave the following evidence:

(1) He said in his witness statement that (a) he had no contact with the Mauritius trustees after the meeting with them in Mauritius in June apart from as regards a letter of wishes and when Mr Maslen assisted with the repatriation of the trusts to the UK. No one other than Mr Maslen (and then only with his express approval) was authorised to be in contact with them as trustees of the GH Trust and they operated totally independently; Mr Maslen was certainly not authorised or asked to attempt to instruct the trustees; and (b) he was aware of the PC trusts team but had no contact with them. He was away on a conference and then on holiday in the period from 7 July to around 22 or 23 July and his only contact during that period was with DKB to confirm they had all they needed and all was progressing.

(2) At the hearing he said that the PC trusts team first of all acted for the RBC trustees "at which time the team built a Chinese wall" and operated completely separately from the team who advised him on the corporate transactions. When it was put to him that they had contact on his behalf with the Mauritius trustees, he said:

> "No, no….there were two teams in Pinsent Curtis and from the time that team number 2, if you like, dealing with the trustees, etc, was appointed by RBC, that cut me off from that team. I had no further contact with that team or left them any wishes or anything. I was dealt with by Andrew and Andrew [the other Pinsent Curtis team as regards the corporate transaction] …when I was down in Kleinwort Benson ready to sign the…reorganisation agreement, I asked [Ms Hoskin]. I said: how is Chandra? She said: I'm not talking to you, that's not a proper question, ignored me and walked off. Now, I only asked the health of Mr Chandra, so there was obviously an iron curtain built somewhere that I wasn't going to get through, was I?"

(3) When asked if the PC team who dealt with the corporate transactions performed a similar function for Mr Lenagan, he said they did but not "officially" and that "Mr Lenagan and I had a discussion and I agreed that I would ask [PC] to take care of anything that came up that Ian had to sign that came to them. So it was not an official situation".

(4) When it was put to Mr Haworth that Mr Maslen in fact dealt with the Mauritius trustees on his behalf, he said Mr Maslen was not "conveying any wishes or anything at all to do with me. He was not under any instruction from me other than to answer and to help in the process". He did not ask Mr Maslen to do anything in that period of time, but he was aware that he was talking to the trustees and he was helping them. That is "why he is my advisor. He helps me and he helps me on the surrounding things as well". He agreed that Mr Maslen had what a professional person might call a general retainer to act in his interests and on his behalf.

93. Mr Pentelow, Mr Maslen and Mr Binks each gave an overview in their witness statement of how they saw their roles in relation to the implementation of the transactions under consideration in these appeals:

(1) Mr Pentelow said that:

(a) He acted as personal tax adviser to Mr Lenagan and provided advice with his and his family's best interests in mind as beneficiaries of the relevant trusts. He thought Mr Lenagan wanted him to be fully informed of the progress of the transactions to ensure that he was aware of the proposed course of action of different parties so that he could advise on the tax effects for Mr Lenagan personally should the transactions take place.

(b) He was not engaged by the Mauritius trustees. To his knowledge the trustees' advisers throughout the transactions were the PC tax team. He was never appointed adviser to the trustees and had no other engagement with PC. He liaised with the trustees to help them obtain the best outcome from a UK tax perspective for the beneficiaries of the trust and to make sure they were aware of the UK tax consequences of the different possible actions.

(c) He was fully aware that he had no power to direct the trustees to make a decision or follow a particular course of action. However, he had to ensure that the trustees were aware of the consequences of their actions if they sought to achieve the planning proposal which also had a direct effect on the trustees as any tax assessable on Mr Lenagan would be recoverable from the trustees.

(2) Mr Maslen said that he acted for tax compliance purposes for Mr Haworth's family trusts.

(a) In order to act in Mr Haworth's and the other beneficiaries' best interests he liaised with the trustees to clarify any UK tax issues on which he had expertise, including to ensure they were aware of the relevant facts to be able to make decisions on an informed basis.

(b) It has never been his practice to seek to influence the decision. If a client considers taking or decides to take a particular step, he advises the client as to the essentials to make sure that the chosen measure will work.

(3) Mr Binks said that he was a highly experienced trust solicitor and was very familiar with how trustees operate and their responsibilities as trustees:

(a) He did not give any instructions to the trustees in respect of any decisions or discretions they had and he did not have any capacity to do so. His normal approach is to set out the issues for his clients to consider and to leave it for them to decide whether to proceed. If he referred to a particular timeframe by when an event was scheduled to occur, he was merely making the client aware of this and not instructing the client in any way.

(b) He did not receive any instructions directly or indirectly in respect of any decisions or discretions of the trustees from the settlors of the trusts to pass on to the trustees. However, he was made aware of the settlors' wishes with regard to certain decisions and discretions which he passed on to the trustees but without seeking to direct the trustees as to how to act.

94. At the hearing Mr Pentelow objected to the description of his role as being, along with Mr Maslen, to coordinate the implementation of this scheme and work it through to its conclusion. However, he accepted that:

(1) His role was to ensure that a particular course of action chosen by his client would succeed and that it satisfies all of the technical requirements of the tax codes.

(2) There was certainly (a) co-ordination between him and Mr Maslen because their clients had similar interests and were in similar situations, and (b) discussion between him and Mr Lenagan and with the PC trusts team. Mr Maslen took a similar view.

95. Mr Pentelow stressed that he did not *instruct* the PC trusts team on behalf of Mr Lenagan or act as a "conduit" between that team and Mr Lenagan. Rather he gave them his view on things and informed them about elements of the planning which were discussed with UK Counsel. He accepted that there may be some element of him passing on to the team Mr Lenagan's *wishes* for things to be done (such as for documents to be drafted) but overall he advised them on some elements of the tax planning proposal because he had had the discussion on the tax issues with UK Counsel and they had not. Hence, he responded to questions that PC asked at various stages and helped them to understand what the tax planning proposal was. Whilst he may have given PC some advice on why a particular document was required or on the technical aspects of the proposal, he did not consider that he was acting as a conduit for Mr Lenagan as such (although he did later accept this was the case on one occasion).

96. I accept that, as regards the transactions under consideration in these appeals (a) the settlors and their respective advisors did not consider that they could instruct the Mauritius trustees in the sense that they could somehow make them take a particular action, and (c) PC were not engaged to act on behalf of Mr Lenagan generally in respect of the transactions under consideration although, as set out below, they did provide him with some limited advice. HMRC pointed to unsigned (undated) draft witness statements of Mr Binks and Ms Hoskin which state that Mr Lenagan was represented by PC. However, I attach no weight to these unsigned statements given that neither Mr Binks nor Ms Hoskin had any recollection of being involved in the drafting of these statements and in light of the other evidence referred to above.

97. However, the further evidence set out below demonstrates that the relationship and interaction between the various UK persons and the Mauritius trustees throughout the relevant period is not as straightforward as the witnesses suggested in the evidence set out above. This is discussed in further detail below but at this stage I note that, for example, it is apparent that:

(1) In practice, contrary to Mr Lenagan's view of how matters were or should have been conducted, usually Mr Pentelow did not raise Mr Lenagan's wishes or expectations as regards what actions the Mauritius trustees should take direct with them. Rather he contacted Mr Binks who, often without reference to the Mauritius trustees, put in motion the requested action by drafting the relevant documents required to give effect to the action which he then sent to the Mauritius trustees for their comments and approval only once the UK advisors were satisfied with them and/or they were settled by UK Counsel.

(2) The settlors were not, as Mr Haworth said, cut off entirely from the PC trusts team by an "iron curtain". That team had direct contact with the settlors on a number of occasions and, in effect, provided advice on matters impacting on the plan.

98. TeleWork paid PC's legal costs and the Mauritius trustees were told that the fees would be met by TeleWork. The fees were subsequently treated as provision of benefits in kind for the settlors. Mr Binks was asked how it was appropriate to bill TeleWork for the work done by the PC trusts team for the shareholders. He said that he had no idea on that. He could only assume that it was part of the arrangement on the flotation that the shareholders would have their fees paid, but he did not know.

Section 3 – Retirement of Jersey trustees and appointment of Mauritius trustees

Communication with the Jersey trustees until their retirement

99. In oral evidence in examination in chief Mr Lenagan said that:

(1) He had spoken to the Walbrook trustees on a number of occasions leading up to 23 June when the board approved the proposal, both in his role as chairman of the board of directors and in his role as settlor and beneficiary of his trusts.

(2) He spoke to the Walbrook trustees at least twice every year since their appointment in 1997 and had gone to Jersey before their appointment in 1997 to interview them to be absolutely clear that they were a competent, capable and good trustee for his family trusts. He and Mr Wailing made sure that they got the accounts every year and had a review with the trustees by telephone or on some limited occasions personally. He had a good relationship with the Walbrook trustees and recognised that, as a director and chairman of the company, he needed to account them as shareholders for the performance of the company. He noted the separate role he had in relation to the trusts in that he was the settlor and his family were beneficiaries.

(3) In January he spoke to the Walbrook trustees with some delight as regards the possible floatation which was then expected to occur in May or June. He described his discussion with them regarding the proposal as follows:

> "They were delighted at the prospect. They were very pleased. They asked me as the chairman what I thought on behalf of the board of directors. I told them it was a great opportunity to raise quite a lot of money for the advance development of the companies, because we had missed two opportunities the previous year for acquisition because we didn't have the cash and the prospect of a flotation that would allow us to raise money to buy other companies had a great attraction.
>
> .....They said very clearly to me that if they as a trustee had the possibility of public shares that were cashable, then that alone was a very good reason for a flotation.
>
> If, as looked to be the case, in addition there was a pretty phenomenal increase in value from the valuation as a private company to the valuation as a public company, then that was an additional benefit. I got a very clear indication....very clear indeed that they would support a flotation completely, a merger and a flotation of the two companies, because they were commercially very aware and well aware of the fact that merging the two companies gave you critical mass, somewhere approaching 17, 18 million of turnover, which was far more attractive on the market.
>
> So I spoke to them the first time about the whole issue of a potential merger and flotation as a significant shareholder because they held - if the companies were put together, they would have held a very large minority shareholding in that company. So it was my duty as chairman of the board of directors to speak to them about it and see what their thought was."

In cross examination, he confirmed that he personally had the discussion he described and emphasised that the Walbrook trustees said they would always much prefer to have liquid value than shares in a private company and they also discussed if the floatation "was at seven times the value, the sort of multipliers that Mr Herring was talking about, then that's an even stronger reason for merge and flotation to occur."

(4) He then spoke to them again with some bad news at the time that the flotation was pulled by DKB (around April time) and after it came back on after around a six week delay when he "validated with them again", both as a chairman of the board of directors and as beneficiary and settlor of the trust, that they were still happy with that approach. He noted that the fact that the valuation obtained by that time was very high compared with a private company sale, was very beneficial, obviously.

(5) By April or May he felt it was necessary to document what he had been talking about with the trustees and so he got Mr Pentelow "to write formally" to them to confirm the conversations and to make sure that they were still heading in the same direction". He referred to a letter of 25 May in which Mr Pentelow said to the Walbrook trustees that he was writing, as requested, to confirm his telephone conversation that day and that the present proposal was for the merger and flotation to take place either at the end of July, mid-September, or mid-November. Mr Lenagan said that the trustees were quite keen

that it was documented so that they had a clear understanding of what he had said to them verbally.

(6) He confirmed that he had spoken to the Walbrook trustees about the possibility of them retiring in favour of Mauritian trustees:

> "I did indeed……they were a very good advisor and sounding board, if you like; not an official advisor, but a sounding board for what trustees would do and was what was reasonable and how we should proceed forward. I found them very, very useful to me as the chairman of the board of directors, but also to me as a beneficiary and my family as beneficiaries. I found their comments and their advice extremely enlightening. I discussed with them what the trustees' attitude would be to a merger and flotation, for which they were very enthusiastic. Then I discussed with them the opportunity of some mitigation of tax by the appointment of a different trustee and I asked them whether or not they would be willing to consider the option of retiring, because, of course, I couldn't tell them what to do, particularly to retire. But I asked them the question that if I requested of them, as the settlor of the trusts, that they consider appointing another set of trustees in this way, they agreed that the tax planning option, if it were to come about, would be of benefit to the beneficiaries and they would certainly consider it."

(7) Mr Lenagan initially said he had raised the retirement issue "first of all in January when Mr Herring mooted the possibility [of the merger and flotation]" but he later corrected this and clarified that the discussion took place later:

> "my prime purpose in the conversation with Walbrook was to discuss the merger and flotation, because my prime focus was on the flotation. The tax planning was of no benefit if...the merger and the flotation, didn't go ahead. So the large part of my conversation with Walbrooks in both January and in early May was about the flotation. The secondary part of that conversation was about the possibility of tax planning, which had not been considered in January and was considered later. So in the conversation at the beginning of May, I did have a discussion with them about the possibility of the tax planning proposals and their attitude towards that."

100. Mr Haworth described how the RBC trustees were involved in the establishment of TeleWare and had supported the company though shareholder loans. In cross-examination he said that:

(1) He consulted with the RBC trustees (and with others) before agreeing that the floatation should be fully explored in January.

(2) He did not consider that, at that stage, he was already a long way down the road towards the flotation. It was only in December 1999 that he had any idea at all that there was the possibility of a flotation when Mr Wailing and Mr Lenagan raised it after a board meeting at the pub in Thirsk. As it was nearly Christmas, there was not a lot of time to do anything, but he talked to his business mentor and to Mr Maslen probably the following morning, and "we then consulted, and we would have spoken to RBC". He described the discussion as follows:

> "At that stage, it would just be the proposal had come forward, the idea was to have a flotation of two companies put together and floated. To be honest with you, that's all I know at the time, so I couldn't have a discussion on anything else, could I?.....
>
> They [the RBC trustees] were interested because (a) there was a potential good valuation and (b) they would end up with public shares."

101. After this Mr Maslen dealt with the RBC trustees. Mr Maslen confirmed that, as at the middle of April, he had not raised the issue of the appointment of new trustees with the RBC trustees and, as at 24 April, he had not had any discussion with the RBC trustees on the valuation of the combined group. However, it is apparent that he discussed the proposal for the merger and flotation and their retirement with the RBC trustees sometime in May:

(1) In a fax of 11 May to Ms Annette Stafford-Pearce at RBC Mr Maslen stated: "I will make sure that it is understood that you should see the share documentation in good time to give it proper consideration."

(2) On 12 May, Mr Maslen told Mr Binks in a fax in that he had spoken to Ms Stafford-Pearce and that she did not anticipate any issue with retiring.

102. On 9 June, Mr Wray wrote to Ms Stafford-Pearce on terms from which it is clear that the RBC trustees then had the documentation relating to the proposed merger and had raised queries on it:

(1) He noted that Mr Binks had asked him to reply to her fax of 7 June and in particular the queries she had raised in relation to reorganisation documentation. He advised that Mr Maslen would contact her direct in relation to the rationale behind the restructuring and said that if, however, she had any queries following this she should let PC know.

(2) He referred to and agreed with a number of comments that Ms Stafford-Pearce had made on the documentation (regarding (i) the fact that under the share agreement for TeleWare shares the trustees should only be required to give "Limited Title Guarantee", (ii) the nature of the proposed powers of attorney, and (iii) that the correct definitions of certain terms needed to be included in the final Memorandum and Articles for TeleWare).

Retirement of the Jersey trustees

103. Mr Maslen said that following the discussion with UK Counsel, it was decided by Mr Lenagan and Mr Haworth, as settlors of the family trusts, that the Jersey trustees would be invited to consider resigning in favour of trustees resident in Mauritius. He set out in his witness statement that:

(1) As settlor, Mr Haworth had power under the settlement deed to appoint new or additional trustees but the agreement of the existing trustees to retire was essential. He said that Mr Haworth was very clear on this aspect. I note that Mr Lenagan also had such a power in respect of his family trusts.

(2) He was confident through his dealings with the Jersey trustees that, in order to agree to resign, they would need to be satisfied as to the merits of moving the management of the trust to Mauritius and the suitability of the new trustees. This was particularly important as there was a real possibility of the trustees staying in Mauritius if the floatation did not happen.

(3) Mr Haworth was very clear that if the flotation proceeded it was for the trustees to make their own decisions on the transaction and also on whether to retire in favour of UK resident trustees. No-one had the ability to instruct the Jersey trustees to retire and no pressure was brought on them to do so. In his experience, if Mr Haworth hoped the trustees would do something, he would explain what he had in mind and ask them if they would be able to agree.

Evidence regarding the retirement of the RBC trustees

104. The following correspondence took place in relation to the retirement of the RBC trustees:

(1) In his fax of 12 May to Mr Binks, in addition to the comment noted above Mr Maslen said the following:

(a) There was to be a meeting with tax counsel on 19 May, counsel would draft or review documentation for the appointment of new non-resident trustees and it would be helpful if there could be available for comment at that meeting (i) documents for the retirement of the Jersey trustees and appointment of new Mauritius trustees together with drafts of the indemnities required (together

"**retirement documents**") and (ii) retirement documents as regards the retirement of the new Mauritius trustees in favour of UK trustees.

(b) "I am aware, as you have pointed out, that care will be required in the giving of instructions that the process could not be constructed as a series of pre-ordained transactions. I believe that you now have a full set of deeds for this settlement. However, if there is anything additional that you need that might be on my file, please let me know."

(c) He enclosed a copy of a note and said that the position had been complicated by a problem with options to be granted to employees and that it would be useful to know how practical it would be for the settlement to grant the options (although he thought that was unlikely) and "perhaps we can have a word when you have considered the note".

(2) On 17 May:

(a) Mr Binks responded to Mr Maslen and enclosed draft retirement documents as he had requested:

(i) He said that it "will obviously be fundamental to ensure that the Settlement is resident in Mauritius at the time the disposals take place and also that no tax liabilities will arise in Mauritius".

(ii) He asked who would advise on Mauritius tax rules and if Mr Maslen could clarify with counsel "the extent to which RBC can be informed of the intended tax planning" and seek his advice on the fact that appointments made from the GH Trust could give rise to CGT issues and his assessment of the chances of the Mauritius planning being successful.

(iii) He said that clearly it was also important that "we identify new Trustees as soon as possible so that we can agree the documentation with them". He also commented at some length on the question of whether the option shares for employees and shares for Mr Haworth's children's settlements should come from Mr Haworth's personal holding rather than the GH Trust.

(b) Mr Wray sent draft retirement documents to Ms Stafford-Pearce. He noted that Mr Haworth, wished to appoint new trustees resident in Mauritius and that they "will be professional trustees although it as yet to be decided who exactly will be appointed". He explained the purposes of the draft documents and noted that the "new trustees will be providing the retiring trustees with an indemnity for future liabilities under the settlement" and asked if the trustees could review their terms and let him have their comments and approval of them as soon as possible.

(3) On 18 May Mr Binks sent Ms Stafford-Pearce an engagement letter.

(4) On 21 June, Mr Wray asked Ms Stafford-Pearce to confirm, as a matter of urgency, the trustees' approval of the draft retirement documents. He noted that "we wish to start circulating these as soon as possible upon receiving your approval" and, said that "of course, if you have any comments in relation to them" to let him know.

(5) On 22 June, Ms Stafford-Pearce replied and said that the trustees had reviewed the documentation and had no queries on it but noted that, whilst Mr Maslen had sent some information regarding the restructuring, the RBC trustees "still would like a more detailed explanation as to the rationale behind the whole scheme and what benefit it has to the present Trustees".

(6) Mr Wray responded to Ms Stafford-Pearce on 23 June and said he would be grateful if the documents could be executed as a matter of urgency and:

> "You requested more detailed information in relation to the rationale behind the retirement of Trustees…as a result of the flotation of Teleware plc a significant capital gain will arise in the Settlement. We understand based on the advice of Chris Maslen, that the Settlement's liability to [CGT] will be significantly reduced by it being Mauritius resident at the time of the flotation and this is the primary reason for the change in Trustees. Obviously, it is for the benefit of the beneficiaries of the Settlement that potential taxation liabilities are mitigated as much as possible and therefore the change in trustees is taking place in their best interests".

105. On 23 June, Mr Gujadhur confirmed to Mr Binks that the Mauritius trustees had been advised that the retirement documents were in order and they therefore approved the drafts.

106. Mr Maslen and Mr Binks were cross-examined on their roles at this time:

(1) It was put to Mr Maslen that he asked Mr Binks to prepare retirement documents where the essence of the arrangement was that the new Mauritius trustees would retire when "required". He noted that the documents were only in draft and said that he did not think "required" is the right word; rather the new offshore trustees were to be asked to consider retiring if the flotation went ahead. He did not agree that it was fair to say that the trustees would be given instructions on retirement and said:

> "But in that case, as far as the Mauritius trustees are concerned, nobody was either considering or planning to give any instructions....It was simply agreeing with the point: that we'd have to be careful that nobody could construe what happened as having been preordained... it wasn't envisaged that anybody would be giving instructions."

(2) Mr Maslen noted that when the May correspondence took place there had been no meetings with any potential trustees although he was fairly sure that the Jersey trustees knew that there was a possibility of them being asked to retire.

(3) Mr Binks said that he did not advise Mr Maslen and indirectly Mr Haworth. He was acting as a "sounding board" and, as regards his comments on the tax position of the family trusts, was talking to Mr Maslen as a fellow professional. He was intellectually interested in the tax points and, at this point, he had an eye on being appointed to act for the trustees. He noted that the action taken at this time was all preparatory and:

> "...Deed of appointment trustee documents are usually quite straightforward, and I was slightly bemused that Mr Prosser wanted to see draft documents. But....I was hoping I might be appointed to act in this matter for the trustees and in that respect, I was quite happy to prepare these documents at this stage so that we'd get a second opinion on them. I was conscious that when this all happened, it was probably going to happen quite suddenly, so I was quite happy with the idea of doing a bit of preparatory work, and even better if Mr Prosser was going to check it for me… at that stage there was no - I was not acting for Mr Haworth. I was being helpful. I was being used as a sounding board and given the possibility that I might be appointed to act for the trustees, I was perfectly happy to prepare these documents."

(4) Mr Binks did not agree that in the comments he made regarding where the shares should come from, he was setting out his considered advice and noted that Mr Maslen ignored the comments he made. He added that there was a prospect of him being appointed to advise the Mauritius trustees and the personal interest of maybe picking up some know-how.

(5) He did not agree that he had a conflict of interest as regards acting for both the Jersey trustees and the Mauritius trustees. He noted that Mr Gujadhur took his own advice on the documents relating to the appointment of the Mauritius trustees. He said that he did not act for Mr Haworth or Mr Lenagan in drawing up the retirement documents in May but did so to use them if he was appointed to act for the retiring Jersey

trustees. He did not accept instructions from Mr Haworth and did not have an engagement with the Jersey trustees at that stage. He added that as the documents were prepared for UK Counsel to look at in advising Mr Haworth, if anyone was taking responsibility for those documents, it was UK Counsel.

(6) He said, in effect, that although his initial reaction at the time was that the steps in the scheme could be viewed as preordained in actual fact they were not; there was no guarantee that the Jersey trustees would agree to retire, that the relevant shareholders would agree to the proposal or that the flotation would take place. This was a point that Mr Prosser was advising Mr Haworth on and again he was acting as a "sounding board" in raising this. He would have been horrified if Mr Haworth had thought he was advising on this tax scheme because he did not look at it in any detail. Mr Maslen knew he was a very experienced trust and tax lawyer and talked to him to see if he had any views on what was being put forward. But he did not accept any responsibility. When it was put to him that on the basis the flotation went ahead, the steps required for the tax planning were preordained, he said there was still the point that the Jersey trustees could have decided that it was not suitable to retire.

(7) He did not agree that the fact that he raised a query on whether the RBC trustees could be informed of the tax planning demonstrated he had a conflict of interest as regards his work for the settlors and RBC. He said that he was clear that he would have to tell the trustees why the trust was going to Mauritius as part of his advice and his duty to them and:

> "it may be clumsily put, but…I could see that whoever was advising the Jersey trustees would have to advise them of the reason for going to….Mauritius….I knew in my own mind that I would have to explain it to them. I was flagging it up for Mr Maslen because it was a point for him in pursuing the scheme and…..I was suggesting it to him because there is no point in spending any more money on this scheme if the only way it could go ahead would be by keeping from the Jersey trustees the reason for going to Mauritius."

(8) Mr Binks said that he had in the past acted on Mr Haworth's settlements and done work for Mr Haworth and other clients with Mr Maslen. He thought Mr Maslen may have suggested him as an adviser for the trustees but the decision to appoint him "would be the trustees' one in the end". He did quite a lot of work with RBC over the years so he was someone they would be comfortable with.

Evidence regarding the retirement of the Walbrook trustees

107. There was the following correspondence regarding the retirement of the Walbrook trustees:

(1) In a note of 25 May, (following a telephone conversation on the same day) Mr Pentelow confirmed to the Walbrook trustees that it was likely that a request would be made for them to retire as part of the tax planning proposal and that "it is envisaged that the trustees *will dispose* of virtually whole of the holdings in TeleWork" (emphasis added).

(2) On 20 June, Mr Binks (a) sent draft retirement documents to the Walbrook trustees and said he was preparing engagement letters and (b) separately, sent them to Mr Pentelow and asked if he would send them on to Mr Prosser to settle. He noted that there was a possible issue under Isle of Man law to draw to UK Counsel's attention and that he was also seeking advice from an Isle of Man lawyer.

(3) On 21 June, Mr Wray wrote to the Walbrook trustees seeking to finalise the retirement documents.

(4) On 22 June, the Walbrook trustees confirmed that the retirement documents were suitable for their purposes.

108. On 21 June, Mr Lenagan wrote to Mr Wailing regarding his proposal to fulfil the obligation he had undertaken to give him a share of his business on the floatation.

109. Mr Pentelow and Mr Binks were questioned about the correspondence regarding the retirement of the Jersey trustees.

(1) It was put to Mr Pentelow that in the note of 25 May he used language of certainty that events would happen. He said that the note overall is full of provisional wording (such as that the relevant events were proposed" and the reference to the "hoped for migration"), it contains relatively informal language (as a summary of a previous conversation) and was clearly just an outline framework of an idea that was then being pursued. He said that the parties did not know at this stage, whether the transaction would happen or when it would happen (as there were a range of dates) or, if it did go ahead, where the new trustees might be resident as different locations were under consideration. It was "clearly a very general document expressing an idea which is currently being explored".

(2) Mr Binks did not accept that he was instructed by Mr Pentelow to draft retirement documents in effect on behalf of Mr Lenagan and that he was acting for Mr Pentelow and that he was not acting only as a "sounding board". He said:

> "No….I knew that Kevin Prosser was looking at the documentation on the arrangements and therefore dotting i's and crossing t' s…. I was wanting him to have a look at those deed of appointments, just as he'd had a look on the ones on the Haworth settlement….I will have drafted those deeds…..in preparation for advising the Jersey trustees on their retirement as trustees….there's this glitch in the previous appointment about Isle of Man law and I was following the process that we'd gone through with Mr Haworth's settlement and I was wanting Mr Prosser to settle those, as I say, as a precursor to acting for the Jersey trustees on their retirement."

(3) Mr Binks said that he never agreed to act for Mr Pentelow. This was all preparatory to being appointed to act for the Jersey trustees and he was aware that time was short, so was investing some time and money in trying to get things in order so that if the decision was taken to proceed with the Mauritius appointment, they could move forward rapidly. He noted that he sought advice from an Isle of Man lawyer on his initiative and that he would have billed the Jersey trustees on it if it had gone ahead, and if it had not gone ahead, then he suspected PC would have had to take the hit.

Comments on the evidence

110. I accept that:

(1) Mr Binks considered that (a) Mr Haworth and Mr Lenagan were not his clients, in the sense that, he had no formal professional engagement with them and did not think that he assumed any professional obligation towards them as regards whether the tax plan would succeed in avoiding CGT, (b) in preparing draft retirement documents and discussing elements of the tax plan with Mr Pentelow and Mr Maslen he was acting at least in part with a view to being appointed as adviser to the Jersey trustees and later the Mauritius trustees and was prepared to spend time (potentially at PC's cost) in order to secure the engagement, and (c) in looking at the proposal and commenting on certain tax aspects he thought he was contributing to a debate amongst the UK advisers on matters which may well be of potential relevance to the trustees of the family trusts as well as to the settlors/beneficiaries of the family trusts.

(2) (a) Mr Binks, Mr Pentelow and Mr Maslen did not consider that they were or would be giving instructions or orders to the Jersey trustees or the Mauritius trustees and

that, as professional advisors, they were not in a position to do so, and (b) they (and the settlors) expected the Mauritius trustees to act properly as trustees, in accordance with their obligations under the trust deeds and law, and duly to consider each action put to them. Indeed, it was perceived to be essential to the success of the tax plan that they did so.

111. The tone and nature of the correspondence demonstrate a number of emerging themes that, as explained below, are evident from the evidence relating to later events:

(1) From this early stage, the UK advisors' collective focus was on arranging, coordinating and facilitating the implementation of the steps required for the tax plan to succeed, in the expectation that (a) the Jersey trustees would retire and the Mauritius trustees would be appointed as new trustees of the family trusts; as set out below, by 23 June, when Mr Gujadhur said the retirement documents were in order, discussions with the Mauritius trustees were at an advanced stage, and (b) once appointed, the Mauritius trustees would, assuming the merger and flotation went ahead as planned (as by 23 June all fully expected (see section 1 and Mr Wailing's evidence below), fall in with that plan and play the part expected of them to achieve the desired result (namely, the tax efficient sale of the shares).

(2) That is not to say that the settlors or the UK advisers expected the Mauritius trustees to undertake the actions required to implement the plan regardless of the circumstances applicable at the time. Rather, underpinning this expectation, was the collective view (of which, as set out below, plainly the Mauritius trustees were aware when they were appointed) that, as things stood, it was in the interests of the beneficiaries of the family trusts for the relevant shares to be sold on the flotation and for the Mauritius trustees to seek to achieve the saving of CGT under the plan (see, for example, Mr Wray's fax of 23 June (at [104(6)]). On that basis, the thinking appears to have been that, once appointed, the Mauritius trustees would carry out each of the actions required to implement they plan as they would have every reason to do so barring some material change in circumstance. As examined in detail below, that this was the expectation of all of those closely involved in their appointment and that the Mauritius trustees were engaged on that basis is borne out by the circumstances surrounding their appointment and reinforced by what happened subsequently.

(3) The UK advisors, including the PC trusts team, were actively engaged in seeking to move matters along according to a timetable that they determined was necessary to achieve the settlors' objectives under the plan. On the other hand, the evidence set out below demonstrates that Mauritius trustees were generally passive participants who had no material active engagement in the formulation and refinement of the overall scheme of the tax plan on an on-going basis; they generally simply waited to be contacted with the next suite of documents or proposals for the particular step that had to be undertaken in the required order, as provided by the UK advisors, who coordinated and superintended the implementation of the plan at each stage.

(4) Mr Binks and the PC trusts team had something of a dual role given that (a) he/the PC trusts team were appointed to advise the Jersey trustees and, later, the Mauritius trustees but (b) the advisers to the settlors, acting in their capacity as such, sought Mr Binks' input and advice on certain aspects of the tax plan and/or issues affecting the settlors from the very outset when it was initially discussed with UK Counsel and, as demonstrated by the evidence in relation to subsequent events, on an on-going basis. Mr Binks may consider that he managed to keep a division in his mind between him acting as a "sounding board" to Mr Maslen and Mr Pentelow, as regards the tax plan from the settlors' perspective, and him acting with his "adviser to the trustees hat on", as regards

advising the trustees. However, as the language used in the correspondence and the mode of operation demonstrates and, as is reinforced by the evidence in relation to later events:

(a) Mr Binks acted on the basis that it was for him and the other members of the PC trusts team to assist the settlors/their advisers in what he appears to have considered was a common and desirable goal of ensuring that the tax plan was implemented in accordance with the settlors' wishes (as the persons who decided to effect the plan) (a) not only by making sure that the Mauritius trustees were in a position to approve and carry out the relevant actions required to implement the plan at the necessary time, (b) but also by providing advice and input into the plan, plainly acting with the settlors' interests in mind, both at the instigation of the settlors/their advisers and sometimes of his own initiative, albeit he regarded this as an informal arrangement.

(b) In doing so, Mr Binks appears to have acted, as explained as did the other UK advisers, on the highly confident expectation that the Mauritius trustees would play their intended part in the plan by approving each relevant action on the view, held in common with the other UK advisers, broadly, that it was a good thing and in accordance with the Mauritius trustees' fiduciary duties (as matters stood around the time when they were appointed) to give effect to the tax plan.

112. I note that the witnesses persistently emphasised that there were inherent uncertainties that meant that the commercial transaction to which the tax plan related may not in fact happen. It is accepted that, as set out in particular in the evidence of Mr Petch and Mr Herring, there were factors beyond the parties' control which could have affected the success of the merger and flotation or even resulted in it not taking place at all. However, the overall tenor of the correspondence and how matters were conducted, suggests that no-one involved had any real doubt that, in practice, once appointed, if the transactions did go ahead, the Mauritius trustees would take the steps necessary to implement the plan subject to any change in circumstance which would have meant that the basis on which it was assumed that it was in the interests of the beneficiaries of the family trusts for them to go ahead with the plan was no longer correct

Appointment of Mauritius trustees

113. It appears that the parties started to investigate appointing trustees in Mauritius soon after the receipt of advice from UK Counsel on the tax planning structure. In a fax of 20 April to Mr Maslen, Mr Haworth stated that he was assuming that "we'll be forming a trust each in Mauritius" and that he would contact HSBC to gain an introduction to HSBC Mauritius trustees.

Correspondence in May and June

114. Mr Maslen made the initial contact with DTOS in a letter of 22 May in which he asked if they offered trustee and tax advisory services. On the same day Mr Gujadhur confirmed that this was the case and sent Mr Maslen an information pack on offshore companies and trusts. Mr Maslen sent Mr Binks a copy of OTA on 25 May.

115. On 25 May, Mr Pentelow wrote to Mr Maslen and said that the next steps were (a) to decide on the new trustees to appoint which at present seemed likely to be DTOS, (b) if "we" are not comfortable with Mauritius, to explore the Canadian fallback position, (c) when "we" have made the selection, to get confirmation from them on certain points, (d) arrange for the retirement and appointment of new trustees, and (e) for "us each to take our separate steps for creating appointments etc in the trusts".

116. Mr Maslen wrote to DTOS on 1 June and made the following main points:

(1) It was proposed that some tax planning measures should be undertaken for the purpose, hopefully, of protecting anticipated capital gains arising to the settlements from UK taxation and this "will first entail the appointment of new trustees resident in a

jurisdiction which has negotiated suitable double taxation treaty terms with the UK. Mauritius has been suggested by Tax Counsel as a suitable jurisdiction in this respect".

(2) The new trustees "will be asked to undertake various steps" including the appointment of part of the funds on discretionary trusts and the disposal of some trust shareholdings and the onward appointment of UK trustees, probably at the end of October.

(3) In connection with the disposal of trust shareholdings it would be essential for the new trustees to be liable to tax in Mauritius and, as he understood that capital gains tax is only chargeable in Mauritius on certain gains relating to real property, it would be necessary for the trustees to be liable to tax in Mauritius on income.

(4) The trustees would require advice on tax and trust law in Mauritius both to ensure that they were liable to tax in Mauritius and the extent of such liability generally.

(5) He asked for confirmation that the organisation could provide the following services of acting as Mauritius resident trustees: Advising on the legal implications in Mauritius of appointing Mauritius resident trustees, advising on the steps required to ensure that the trustees would become liable to tax in Mauritius and advising on the type of investment required to produce income that would be taxable in Mauritius on the trustees.

(6) It was the intention to appoint new trustees in the very near future.

(7) "As you will appreciate, I have to be in a position to give my client reasonable reassurance on the security of the trust assets. For this purpose, could you please advise me as to the safeguards within your own organisation…or under the regulatory framework within Mauritius".

(8) He also asked for as much information on the organisation as could be provided:

> "e.g. range and location of clients, number of employees, experience and length of service of key employees and in particular those who will have responsibility for the settlements, accounts and ownership structure. I also wonder if you could provide details of two professional contact or clients in the UK who we may contact for reference purposes.
>
> It would be helpful to have comments on these points as a matter of priority."

117. Mr Haworth commented that "we wanted to know what DTOS was, how many people worked there, what they did, how they did it and just the whole professional situation where Chandra would be. I mean, to suggest that we didn't is off the planet, really."

118. Mr Maslen said that whilst he used what could be viewed as directive language in this fax (in the sense of telling the putative new trustees to take the relevant actions) he was not giving instructions and he had no power to force the trustees to do anything. He was simply articulating the steps he had been advised were necessary to implement the tax planning and meant that trustees would be asked to undertake or invited to consider taking the relevant steps. He considered such language entirely normal for tax advisers to use.

119. On 2 June, Mr Maslen informed Mr Haworth that Mr Pentelow suggested that they should identify and check the credentials of the Mauritius trustees but, on following up his letter to DTOS with a telephone call, he was informed that the director in charge of trustee matters (Mr Gujadhur) was out of the island until 5 June. He then mentioned the possibility of using Canadian trustees.

120. On 5 June, Mr Maslen sent a letter to KPMG Peat Marwick international Limited in Mauritius in the same terms as the letter of 1 June that he sent to DTOS and they replied on the same day.

121. On 6 June, Mr Maslen wrote to Mr Haworth to set out his "conclusions" on the planning following an earlier conversation on 3 June. These included that the existing Jersey trustees "will be asked to retire in favour of trustees resident in Mauritius" and, following the appointment of the new trustees, a proportion of the settlement "will be appointed on discretionary trusts.... to ensure that the settlement is liable to tax in Mauritius". He also set out detailed advice on appointments from the GH Trust for the benefit of Mr Haworth's children including the pros and cons of the appointments taking place before or after floatation. He noted that he was sending the note to Mr Binks and Mr Pentelow for discussion and so asked Mr Haworth to treat it as a draft.

122. It was put to Mr Maslen that he spoke in "pretty unconditional" terms on the basis that the specified event *will* happen and not that the new trustees would be invited to consider taking that action. He said that "the whole thing is based on a proposal", there were no new trustees appointed at this stage and there are "several "ifs" in there.

123. Mr Gujadhur responded to Mr Maslen on 8 June. In his email:

(1) He thanked Mr Maslen for the brief background information and noted that various steps "would need to be taken after the appointment of new trustees. We, therefore, assume that you have had an opportunity to examine the trust deed to ensure that implementation is feasible".

(2) He noted that: "Unlike the UK, tax assessments would be raised on the trust and not on the trustees. Therefore, it is a trust which is liable to tax and not the trustees".

(3) He said that to be able to benefit from the double tax treaty the trusts must be resident in Mauritius and that he/DTOS advised that they be registered with MOBAA, so that they qualified as offshore trusts and gave an overview of the tax treatment of the family trusts assuming they were so registered and resident in Mauritius.

(4) He gave the details of DTOS' legal adviser and noted that it was assumed that they would wish the trusts to be governed by the Offshore Trust Act 1992 and that he/DTOS could advise on the appropriate steps to be taken.

(5) He advised on the regulatory and professional liability position and provided details of referees. He said:

> "We have a presence of over 45 years in Mauritius and we are solidly established as a leading accounting and management consultancy practice. We have seven full-fledged departments, 175 staffs and 8 partners.
>
> The offshore department is headed by two partners and supported by a team of 8 professional staffs."

Meeting between Mr Haworth, Mr Maslen and the Mauritius trustees on 15 and 16 June

124. Mr Haworth and Mr Maslen held meetings with DTOS in Mauritius on 15 and 16 June. At the meetings they were provided with further information including that Deloitte & Touche in Mauritius were the auditor of Mauritius Telecom, they undertook extensive work for the government, they were the largest professional office in Mauritius, and they had "some 500 offshore clients" although there is no evidence of any specific reference to trusts. This was recorded in the note of the meeting, prepared by Mr Maslen which, on 18 June, was sent to DTOS for comments, and on 19 June, was circulated to Mr Haworth, Mr Pentelow, Mr Lenagan and Mr Binks. In his fax to Mr Gujadhur with which he attached the note, Mr Maslen noted that: "The primary purpose of our visit was, as you understand, to satisfy our clients as to the security and standing of their proposed trustees".

125. In his witness statement Mr Maslen noted that during the second meeting Mr Gujadhur referred him and Mr Haworth to OTA and supplied them with a copy to retain. He considered it was clear from the meetings that DTOS and Mr Gujadhur fully understood their responsibilities as independent trustees.

CVs and references

126. Mr Maslen received and, on 19 June, circulated the CVs of the relevant persons at DTOS including that of Mr Gujadhur and the office brochure and brochure for DTOS.:

(1) According to the CVs, the relevant personnel were chartered accountants, most of them were associates, members or fellows of the ICAEW and Mr Gujadhur had personal experience of corporate finance transactions, flotations and "extensive valuation experience". In re-examination, Mr Gujadhur said that he was involved in the preparation of all the relevant documents for the flotation of two companies: Gamma-Civic and the biggest bank on the island, State Bank of Mauritius.

(2) DTOS' brochure included details of their MOBAA licence to provide corporate and trustee services and stated that the team "is now led by a management team consisting of Chartered Accountants backed by a pool of professionals and graduates". The brochure also contained details of DTOS' "Corporate Finance Services" including experience in relation to flotations ("we have been involved in most of the flotations of companies on the Stock Exchange of Mauritius") and their "Fiscal Services". Otherwise, the brochure made no mention of trustee services. Mr Maslen sent a copy of the brochures to the Jersey trustees of the GH Trust.

127. In his letter to Mr Pentelow of 19 June Mr Maslen noted that "we found the partners we met professional in their approach and they were obviously trying to be as helpful as possible in introducing members of the tax department to discuss some technical points with us" and that from the information he and Mr Haworth were able to obtain (and he had then taken up telephone references) "we considered the firm suitable for appointment as trustees in Mauritius".

128. Mr Maslen contacted Citibank and Merrill Lynch for references and both of them provided positive views. In his note of the conversations he had with them, Mr Maslen recorded that both said that they were "very pleased" with the services or level of services (relating to offshore matters) delivered by Deloitte & Touche and that Merrill Lynch had said the office had also provided trustee services although mostly for in-house Merrill Lynch trustee matters. When it was put to Mr Maslen that it was fair to say that it was confirmed DTOS had acted as trustee for various Merrill Lynch trusts, he said:

> "That is correct. I took that at the time as additional comfort beyond the fact that, obviously…. in addition to the fact that DTOS directors and the organisation itself had been licensed by [MOBAA] to offer trustee services in Mauritius."

Correspondence following the meeting

129. On 19 June:

(1) Mr Binks wrote to Mr Gujadhur and noted that Mr Maslen had supplied copies of the trust documents and draft retirement documents and attached revised drafts with the Mauritius trustees' details inserted and asked for his approval of the drafts as a matter of urgency.

Mr Binks said that in doing this he was acting for the RBC trustees and it was "quite normal on a change of trustees" where he was acting for the retiring trustees to send the proposed new trustees the draft documents for their appointment and he expected that they would take their own advice on the documents as Mr Gujadhur did (as he wrote back to him saying that he had done so and approved the documents).

(2) Mr Wray wrote to Mr Gujadhur and (a) enclosed for his information a copy of the documents relating to the merger, (b) noted that they were hoping to complete the change of trustees on Monday 26 June, and (c) asked for confirmation of approval of the documents as a matter of urgency.

130. On 20 June, Mr Gujadhur wrote to Mr Maslen and noted he had perused his note of the meeting which "essentially cover all the main issues raised". He said that DTOS are "one of the largest firms of Chartered Accountants in Mauritius but rank second behind" one firm, that the level of professional indemnity cover was US dollars 5 million per claim and that the Commissioner of Income Tax in Mauritius must be notified when the trusts will be migrated. He also said:

> "We have not come across any case whereby trustees are being appointed for relatively short periods and therefore cannot say how the tax office in Mauritius will view the present case. We believe that eventually the tax office in Mauritius may liaise with the tax authorities in the UK."

131. On 22 June, Mr Pentelow wrote to Mr Gujadhur with a further explanation of some of the key tax points under the tax plan and a request for further advice. He said:

(1) The family trusts needed to be taxable in Mauritius on income received.

(2) He was aware of the advice that under Mauritius law it is the trust rather than the trustees who is subject to tax in Mauritius and he was seeking advice in the UK that this does not prejudice the planning.

(3) "..it is anticipated that the Mauritius trustees will be appointed around the end of the present month with their retirement in favour of UK trustees likely to occur toward the end of October". He asked for confirmation that this would not prevent the family trusts being resident in Mauritius during the period when the Mauritius trustees held office.

(4) It seems that income would arise to Mr Lenagan's family trusts only from the date of flotation which was then anticipated to occur in July through to the end of October. He asked if he could confirm that the lack of income prior to the end of June would not in any way prejudice the status of the trust as being liable to taxation by reason of residence in Mauritius.

(5) As he believed Mr Gujadhur was aware it was proposed that "the trusts be slightly restructured so as to create a discretionary interest in around 1% of the trust fund". This was to avoid any concern that, if the beneficiaries were absolutely entitled to all income (as was the case at that time) the trustees may not be taxable on any income. His understanding was that under Mauritius law this may not be an issue but he asked for confirmation and said that anyway it was still proposed to action this to avoid anyone raising the argument.

(6) He asked if it was possible to obtain a tax certificate that the family trusts are resident in Mauritius.

132. On 23 June:

(1) Mr Gujadhur notified Mr Binks that "we have been advised that the drafts in respect of the [retirement documents] are in order. We are, therefore, approving the draft deeds".

(2) Mr Gujadhur replied to Mr Pentelow's tax queries. His responses included that DTOS/he could not provide "assurance that the trust would be treated as resident in Mauritius for DTA purposes" but they could confirm that "the lack of income (or in the total absence of income) prior to the end of 30 June 2000 will not in any way affect the status of the trust as resident in Mauritius for tax purposes" and "the trust will become resident in Mauritius on the appointment of Mauritian trustees". In his evidence he said he would have taken advice from his tax team where necessary in preparing this response. He understood that Mauritian law was relevant to the taxation of the settlors and sought to provide assistance on this.

133. In the period from 19 to 27 June there was correspondence between the PC trusts team and Mr Gujadhur in relation to the merger and on 27 June Mr Gujadhur called Mr Wailing to discuss the proposal. The evidence on this is set out in section 4.

Evidence on the meeting of 15 and 16 June

134. Mr Maslen recorded the following in his note of the meetings on 15 and 16 June:

> "The office provides services in audit, tax, management, consultancy, information, technology and offshore services….
>
> CJM said that the level of investor protection needed to be understood [and an explanation was given]
>
> CJM and GRH explained to CKG and [Mr Pat Fong] the basic rational for the proposed tax planning for the existing Jersey settlements established for GRH and IFL. This was outlined in terms that Mauritius trustees would be appointed in the near future. The two companies in which GRH and IFL have interests would be formed in a group under a new holding company. It is expected that capital gains will arise subsequently from the placing of shares on the admission of the new holding company to a listing on the London Stock Exchange.
>
> After the disposal and before the end of the UK tax year, UK trustees would be appointed.
>
> If the proposed planning is successful, the gains will not be chargeable to tax in the UK by virtue of the Double Taxation Convention between the UK and Mauritius…[and there was an explanation of the UK tax rules]
>
> CKG emphasised that in Mauritius it is the trust which is the taxable person and not the trustees. He asked whether this distinction would affect the proposed tax planning. CJM said that this was not thought to be a problem but that the UK tax advisers intended to take advice from Counsel to confirm this.
>
> YPF asked whether the UK authorities would regard the migration of the trust to Mauritius and the subsequent transfer to the UK as a sham. CJM and GRF explained that the Mauritian trustees would carry out several transactions which would help to demonstrate that they were carrying out an active role in administering the trust. It was intended that they would appoint part of the trust funds on discretionary trusts, make appointments of some funds to new UK trusts on life interest terms and act as shareholders in the reorganisation and placing…
>
> CJM explained that for the purpose of the proposed tax planning it was necessary for the trust to be liable to tax in Mauritius. CKG and YPF confirmed that the trust would become liable following the appointment of a majority of trustees resident in Mauritius and notification to MOBAA and the Mauritian tax commissioner….
>
> CKG suggested that if practicable, it could be helpful if the trust had some taxable income in Mauritius in the income tax year ending on June 2000…..
>
> [On the second day] Mr Haworth and Mr Maslen had some questions including the deduction of income due to a life tenant if it was not distributed whilst the Mauritian trustees were in place.....CKG referred again to the Income Tax Act, which states that the amount to be deducted is the aggregate amount distributed. This clearly seemed to require an actual distribution.
>
> The second was the question of residence of the trustees, At this point Mr Ryaad Odawally...joined the meeting. CJM said ...They understood that there were precedents for Mauritian trustees being appointed for relatively short periods during which the trust were treated as resident in Mauritius.
>
> [RO explained the rules]
>
> RO also asked whether the UK authorities would regard the proposed tax planning as treaty shopping, CJM said it was hoped that the actual transactions carried out by the

> Mauritian trustees would be effective in countering this argument. It was, however, accepted that there was a risk.
>
> CKG explained that the taxation system in Mauritius is not very sophisticated. Consequently, it might be that returns made to the Tax Commissioner showing, for example, accrued distributable income as deductible would be acceptable in one case but questioned in another.
>
> Because of this, the proposal that had been made to appoint some of the trust fund on discretionary terms could be helpful since income could not be distributable before a decision had been made to exercise the discretion to distribute...."

135. Mr Haworth said in his witness statement that he thought that at the meeting the valuation of the combined business and "P/E multiples" were discussed and that he wanted to make provision for his children and wider family if the flotation was successful. He said those present said they could consider such requests but would only act as trustees if they had the right to act independently "and would, as Trustees, be considering the merits of both the merger and the IPO on behalf of the beneficiaries as well as any wishes from me as settlor". He said he confirmed that it would be for them to consider the IPO and form their view on whether to go ahead "as they saw fit" but he was confident they would see the IPO was beneficial to the beneficiaries due to the high values.

136. Mr Maslen was asked a number of questions about this note:

(1) He agreed that he explained the basic rationale for the tax planning at the meeting. When it was put to him that the steps involved in the plan were presented to Mr Gujadhur as something that was going to happen, not as something which he was invited to consider playing a part in bringing about, he said:

> "Well, this was in advance of any appointment as part of a meeting to decide who might be recommended....the point of the meeting was for Mr Haworth to be satisfied that Deloitte & Touche and Mr Gujadhur were suitable to be appointed as trustees and to be in a position, if he felt to be able to go back and make a recommendation to Mr Lenagan."

(2) He was asked why he had not said of course the proposed transaction was not a sham in response to Mr Pat Fong's comment. He said that (a) he thought this was said; the note records that he went on to explain that the trustees would be asked to do various things whilst they held office, (b) HMRC have specifically said that they do not consider there to be a sham, (c) he may not have recorded everything said. He wrote the note when he returned from Mauritius in a relatively short period between his return on 17 June and his departure on holiday on 20 June, and (d) in any case, he did not even know at the time what Mr Pat Fong meant by "sham".

(3) It was put to him that Mr Owadally was concerned that the UK authorities would regard the proposed tax planning as treaty shopping. Mr Maslen said that, as recorded in the note, it was hoped that the actual transactions carried out by the Mauritian trustees would be effective in countering this argument but it was accepted that there was a risk. He added that there is "no denying the fact that the proposals as they were initially described by Mr Prosser were for the purpose of taking advantage of the double taxation treaty" so for "using a double taxation treaty deliberately….I can't deny it, yes".

(4) He agreed that the note covers the points which were most important to him and Mr Pentelow and their respective clients.

(5) He said:

> "There was certainly an expectation that the trustees would approve the merger, would sell the shares and would subsequently retire in favour of UK trustees".

(6) He confirmed that he provided trust documents and the draft retirement documents to DTOS to Mr Gujadhur so that they would have the chance to consider in good time what they might be asked to do if they were appointed.

Evidence on criteria for and basis of the appointment of the Mauritius trustees

Evidence of Mr Haworth, Mr Maslen and Mr Gujadhur

137. In his witness statement Mr Haworth set out that:

(1) He had extensive experience of trustees, from when the GH Trust was established in 1987, and was fully aware of how they operate.

(2) Following the advice from Mr Prosser, he and Mr Lenagan (as advised by Mr Maslen and Mr Pentelow) decided to seek to appoint trustees in Mauritius provided they could find trustworthy and professional trustees who would act in the interests of the beneficiaries. It was key to him that the trustees could be trusted not to misappropriate funds from a successful flotation. He also wanted to have trustees he could work with successfully as he had with the RBC trustees given that, should the flotation not proceed (which he considered was a realistic possibility), he was quite prepared to have the trust remain in Mauritius.

(3) He was not looking for trustees who would do as he wanted and was fully aware that they would make their own decisions using their own discretion.

(4) It was important to both him and Mr Lenagan that the Mauritius trustees were "reliable, trustworthy and professional due to the nature of the IPO because they would be required to understand and consider the restructuring, the flotation process and the implications of public share ownership".

(5) The Mauritius trustees met this description of what he and Mr Lenagan were looking for and he was confident that they would act professionally and commercially as long-term shareholders if the flotation did not proceed. He thought that Mr Gujadhur was at the top of his profession and he and DTOS were in a different league to KPMG who he and Mr Maslen also met in Mauritius. The Mauritius trustees were chosen as opposed to KPMG because of the standing of Mr Gujadhur and because DTOS was not connected with any other advisors such as Deloitte & Touche in the UK.

138. Mr Maslen essentially gave the same reasons for the choice of the Mauritius trustees as trustees as opposed to KPMG in his witness statement and added that they came across as more professional and concerned to satisfy themselves they should accept the position. Mr Maslen said that if the flotation had not gone ahead (and he thought that was possible) the Mauritius trustees would have been in place "probably indefinitely, and they would have been in control of a significant bundle of shares in the company" so, in that case, there was "probably a long-term relationship to be established there and they would have a significant influence or significantly influencing shareholding in the company." He thought it was clear from the meeting that the Mauritius trustees fully understood their responsibilities as trustees.

139. Mr Maslen was cross examined about the parties' concerns in appointing the Mauritius trustees and, in particular, it was put to him that, as counsel considered is demonstrated by the correspondence, they were only concerned with security in the sense that they needed to be satisfied that the trustees were not going to disappear with the money. Mr Maslen did not accept that this was the only concern.

(1) He said that the aim was to make sure that whoever was put forward as a potential trustee was "equipped to carry out the...duties of trustee" and in other words was "reputable, sound, informed and, of course, duly licensed". He added that "security and ability to carry out what would be asked of them" was one of the aims and whilst "security was certainly one aspect" of concern the parties were also concerned the new trustees

"had the requisite experience and knowledge". When it was put to him that security and standing was the *primary* purpose of the visit he agreed that was "probably" the case but said it was not "the exclusive purpose" and:

> "Yes, it [the note of the meeting] covers the points about security and so on. But I would emphasise that during the course of the meetings with Mr Gujadhur and his colleagues,....we covered quite a lot of ground involving the treatment of trusts in Mauritius. They answered points for us. They gave us some background on their own experience in terms of commercial transactions and they demonstrated quite clear knowledge of the requirements and obligations of trustees.
>
> I would emphasise that the organisation and the individuals had been licensed by MOBAA for the purpose of offering trustee services….Not a licence lightly granted by the Authority, I would suggest.
>
> …….I mean, we were very satisfied from the conversations that we had with particularly Mr Gujadhur and Mr Konfortion. I would emphasise that at that time, Mr Gujadhur was a particularly impressive businessman, right at the top of his game. We came away extremely impressed with him and all the colleagues he'd introduced us to."

(2) He confirmed that he was concerned with the commercial experience of the Mauritius trustees which he derived from their CVs, which he considered were "frankly pretty impressive", and from his discussions with them. He said, in effect, that the Mauritius trustees' commercial experience came out clearly in the discussions and emphasised that the note of the meeting covered probably in all nearly a full day of meetings which he described as lengthy and discursive. He said that "we didn't have any doubt about Mr Gujadhur's commercial experience" and, when it was put to him that it was not necessary for him to consider that, he said: "It was appropriate for us to consider it", and Mr Gujadhur "certainly satisfied us on the point". Mr Maslen also noted Mr Gujadhur's knowledge of tax law and the fact that it was Mr Gujadhur who first identified the "different persons" issue.

140. In cross-examination, Mr Haworth rejected the suggestion that Mr Gudajhur was not appointed for his commercial experience and that there was no intention to use that experience. He said that of course he was appointed for that experience and that "he was at the top of his game in the leading financial advisory capacity on the island" and noted that there were plenty of professionals in DTOS.

141. Mr Gujadhur thought that Mr Maslen was evidently interested in ascertaining the professional experience of DTOS and its key employees and his understanding was that it was their commercial experience that was of particular interest. He thought that in "hindsight this is unsurprising since, if DTOS accepted appointment, it would be required to make a number of important commercial decisions in the lead up to the flotation". When cross examined on his trustee experience, Mr Gujadhur explained that he had received training:

> "Deloitte had decided that we should enter into the corporate services. Part of the services would have been trusteeship and I was entrusted with that assignment. One of the preconditions….for me was I will need training. I cannot do something I don't understand. It was agreed that I would go to Jersey and follow a course there.
>
> It was more practical than theoretical course. I was involved in day-to-day transactions of trusts, dealing with clients, dealing with beneficiaries."

142. When it was put to him that trustee work was not in practice a significant part of his business, he said, he would beg to differ and:

> "Early on, I was contacted by Citibank to take care of maybe three or four trusts, family trusts, and we handled -- these are the first trustees we handled, three or four trusts. Thereafter, we were

approached by Merrill Lynch to take over their trust. It could have been one or two trusts, but I don't recall. So I had experience of dealing with trusts over a period of time, yes."

143. Mr Gujadhur was not specific on the timing of when he gained his trusts experience and accepted that providing trustee services was not a large part of DTOS' business. In his witness statement he said it was a relatively new offering at the time of these transactions.

144. Mr Gujadhur explained his understanding of the basis on which the Mauritius trustees were appointed as follows in his witness statement:

(1) The decision to accept the appointment "was not based in any way on any intention that we would carry out the transactions relevant to the tax planning". He said that he was still in the process of researching and understanding those transactions and had no fixed or settled views at the time and, "we had given no assurance or undertaking to any person that we would enter into any of the transactions". Rather "if we were appointed, we would consider each decision at the time, taking advice if appropriate and considering all relevant information".

(2) He said that at the meeting in addition to providing some information on the tax position in Mauritius he and Mr Pat Fong, the tax partner, set out the role of trustees to ensure that their powers rights and duties if appointed were understood from the outset and would remain unfettered – as was the "overreaching mantras".

(3) He said that clearly the appointment of the Mauritian trustees was not a sham and was never intended to be; Mr Pat Fong did not have experience of planning such as this and was primarily a tax compliance specialist in Mauritius.

(4) He said it was clear from the meeting that Mr Maslen and Mr Haworth had a "proposal" which they wanted the appointed trustees to consider and it was useful for him to understand the rationale behind it and he thought it clear that the trustees were intended to have unfettered discretion. He was not under an obligation to enter into the transactions and did not feel bound to follow the plan if appointed but would decide on the basis of what DTOS and he felt was in the best interest of beneficiaries. He was aware that it was hoped the Mauritian trustees would retire by the end of the tax year but (a) this depended on there being a gain on the sale of the shares, and (b) Mr Haworth and Mr Maslen understood from discussions that ultimately this was the Mauritian trustees' decision. Moreover, any decisions in relation to selling the shales they owned as trustees were decisions over which "we had full control and discretion as part of our rights and duties as Trustees and shareholders." He thought the merger was also discussed briefly.

(5) He thought PC were appointed as advisers due to their knowledge of the family trusts' history and of English law matters on which advice may be needed and that they did not act for any other person involved in the transaction. He believed PC were cognisant of the Mauritius trustees' duties as trustees. Whilst he corresponded with the settlors' advisors, they were not the trustees' advisors. Discussions with them enabled the Mauritius trustees to consider how best to fulfil their fiduciary obligations and consider any UK tax implications which were relevant to the beneficiaries.

(6) He noted that each and every time the trustees made a decision, they made a note and recorded them formally in minutes. Many of these documents have not been retrieved but he could confirm that notes of discussions were taken contemporaneously and written up into formal board minutes by the administrators promptly after that.

145. It did not appear to be disputed that Mr Gujadhur understood the tax planning as seems apparent from the note of the meetings on 15 and 16 June. In cross-examination Mr Gujadhur summarised his understanding of the steps in the tax planning as follows:

"The first step was to consider the merger of the two companies, TeleWare and Workplace. Number 2 was to consider the listing of the shares; and number 3 was the Greenshoe

> option; and number 4, equally important, was to resign in favour of UK trustees. These were the four cardinal points which we were governed by."

146. It was put to Mr Haworth that by the time he had decided to recommend Mr Gujadhur for appointment, hundreds of thousands of pounds of irrecoverable fees had been spent on planning for the flotation. He said it was a considerable expense but it has to be borne in mind that:

> "there was a perception or estimation that we would be paying fees if that was terminated or stopped...if you add the earnings from TeleWare and Workplace, then we could cover those. So it was never thought about again. That was a decision we took to start with. You can't keep making these decisions every day, as you seem to imply. You make a decision and then you move on."

147. Mr Haworth was asked whether, if he had not been able to implement the tax planning, he would still have gone ahead with the flotation and just paid some more tax. He said that was "what we were doing until....Mr Prosser suggested we might gain by going through Mauritius" and "in all probability" the answer would have been "yes" but this is speculation as he did not know if something else would have happened. It was put to him that it is inconceivable that he would have allowed Mr Gujadhur to prevent the flotation going ahead. He said:

> "No... if I take you back to 1987 when my business mentor ....recommended trusts to me, one of the benefits of having a trust was always explained to me by Ken that if you had somebody else who was also experienced in your....or in business, then they may come up with something that you haven't seen. So if Mr Gujadhur came up with something that we'd missed, then it's not a matter of saying: no, it won't go ahead. It would come up and give a reason and we would then have a chance to put it right. These things don't happen forensically..."

148. Mr Haworth agreed, however, that he had confidence in the Mauritian trustees likely behaviour and said: "They would act in the beneficial interest of the trustees - of the beneficiaries. That's their job, isn't it ?".

Evidence of Mr Lenagan

149. In his witness statement Mr Lenagan also set out that he was fully aware how trustee relationships work and that he was not able to instruct trustees as to how they should act or what decisions they should make although he may express his wishes. He said that:

> "The Trustees were going to become shareholders in both companies and it was therefore important, regardless of whether there was a flotation, that the Trustees were competent and would have the ability and commercial knowledge to discharge their duties effectively both as Trustees and as shareholders for the future. This is a further example of how I utilised the core group of advisers I had appointed."

150. He also said in his witness statement that, had the flotation not gone ahead, he was perfectly content for the Mauritius trustees to remain in place because of the confidence Mr Haworth had in them. He noted that if the trustees had decided to sell less shares it would potentially have been possible for other shareholders such as him to sell more of their own.

151. In examination in chief, Mr Lenagan was asked for his reaction to the proposition that he was not the sort of businessman who would allow such an important decision, as that to merge and float, to be made by trustees that he had never met. He said:

(1) He had been dealing with trustees nearly all his business life and had quite a high regard on for them and knew exactly how trustees operated and the fact that once you have settled, the trustees are the owners, and they make the decisions.

(2) However, he was "equally sure" from his discussions with the Walbrook trustees, who were very impressive, that trustees made commercial decisions based on commercial facts.

(3) He recapped on what the Walbrook trustees had said about the proposal and concluded that given the high valuation/multiples and potential profit compared with a private sale, the Walbrook trustees were very clear that:

> "I could have a large degree of confidence in any commercially oriented and experienced trustee that a decision of that order of magnitude - and I hesitate to use the word "no- brainer", but it was millions to one against that they would not do that. So I had a simple view that said, and I'm used to making commercial judgments the whole of my life, that 320 million against 45 million was a very, very compelling argument for merger and flotation. I was supremely confident, without having met DTOS or Mr Gujadhur and without having to rely on anybody else' s representations, that the advice we clearly got from Walbrook, who were superb at their job, was that any trustee worth his salt would make that decision."

152. In cross examination, Mr Lenagan did not accept that he did not look to the Mauritius trustees to provide commercial advice about the merger and floatation and that their commercial experience was irrelevant to their appointment. He said that:

(1) At the time, he wanted to know, following the trip to Mauritius, (a) from Mr Maslen, whether DTOS and Mr Gujadhur were "a competent, capable and experienced trustee from a trustee's viewpoint" and (b) from Mr Haworth's viewpoint:

> "whether or not they had the commercial knowledge, expertise and acumen, particularly in the telecoms environment, because TeleWare was a very important part of this flotation, and whether or not their experience in terms of flotations and valuations of companies and knowledge of that particular market was of the calibre that we needed from a trustee who would be trusted with, if the flotation was successful, a large number of funds."

(2) He said that in the phone call he had with Mr Haworth at the end of the second day of the trip he was "very complimentary indeed on all of those aspects of the appointment of DTOS, reflecting Chris Maslen's views and his own views, subject to CVs and references". He saw the CVs later and I saw the references from Merrill Lynch in particular subsequently, and "they looked an excellent appointment".

(3) He said that the trustees were, as shareholders, people that the board of directors had to talk to but "the commercial judgment as to what the trustee does with his shares....is completely a decision for the trustee". He had no discussions whatsoever with the Mauritius trustees, he left them to be trustees and trusted them, because of their commercial judgment and their trustee judgment, to be good trustees. There were two concerns: namely, that the Mauritius trustees were "a good trustee with all that that means in terms of what a trustee has to do" and that they had "commercial experience and acumen of flotations and valuations and the fact that that included telecoms companies, Mauritius Telecom, was a bonus."

(4) He accepted that by the time the Mauritius trustees were appointed, it was highly likely that the flotation was going to go ahead but that was not guaranteed. He also accepted that it was considered very important, as it would be with the appointment of any trustees, that the Mauritius trustees, were competent, reliable, reputable, trustworthy and of high integrity but insisted that their commercial acumen and experience was equally important.

153. Mr Lenagan did not accept that, as the floatation as expected to go ahead, there was little for Mr Gujadhur and his team to do apart from keep the money safe. He thought that one of the key essential decisions the Mauritius trustees had to take was whether to approve the merger (as every shareholder had to agree) and whether the 60/40 valuation was the correct outcome for the trustees. The flotation could have gone ahead without necessarily a relatively small

shareholder such as Mauritian trustees agreeing to it, but the merger had to have 100% support by shareholders. So it was a crucial decision. They had lots to do and it was very important.

154. He agreed that the likelihood of the merger and flotation taking place was sufficiently high for him to use it as the basis for making good his moral obligation to Mr Wailing. It was put to him that he had no fear that it might be scuppered by some recalcitrant Mauritius trustees. He said the likelihood was more that it could be scuppered by commercial activity by either of the two companies or by the market or by other factors, including DKB's opinion. When pressed on whether he saw a risk as regards the trustees he said the concern was obtaining agreement from all of the shareholders not just the Mauritius trustees.

Evidence of Mr Binks and Mr Pentelow

155. In cross-examination Mr Binks was insistent that the Mauritius trustees had to make key decisions:

(1) It was put to him that assuming that once the Mauritius trustees had accepted the appointment, assuming that the market was receptive of the flotation, the steps that were required to implement the planning were preordained (being the term he had used). He said that there was still a need for the individual shareholders to approve the transactions. He agreed that at the time he understood that the Mauritius trustees were only appointed on the understanding and with full knowledge that there was planned to be a merger and a flotation and subsequently that they would retire. However, he thought that "the Mauritius trustees needed to be happy with the terms of the reorganisation and the terms of the flotation" and their decision as to whether the proposal was a good idea was "absolutely crucial". Whilst a commercial decision to pursue the proposal may have been made back in February when DKB were appointed, the trustees would still have had to look at it and agree it.

(2) It was put to him that Mauritius trustees had to decide only whether they would enter into the terms in the sense of formally signing on the dotted line given they were told on appointment that commercially it was a good idea to merge and then float. He said: "Yes, but as trustees, they would have a responsibility to check and to reassure themselves that the deal was an appropriate one".

(3) He said he could not comment, however, on how Mr Gujadhur reached his decision to go ahead with the merger and the flotation but it was Mr Gujadhur's responsibility to do that and he would have expected him, as a professional trustee to do that.

156. Mr Pentelow was asked a number of questions about the Mauritius trustees' decision making and the UK parties' interaction with them:

(1) In his witness statement he had said:

> "It was still entirely up to the Mauritius trustees [a] whether they continued to want to achieve a particular objective.....[b] to determine what the transaction looked like and whether the commercial transaction proceeded, did not proceed, or took an entirely different form." (Numbering added.)

(2) He did not accept that giving the Mauritian trustees objectives as regards what they were required to do in order to implement the scheme counted as giving instructions. He thought that the documents demonstrate that there was a tax planning *proposal* that was put forward; that is all that it was. When asked if he left the Mauritian trustees to get on with things, he said there were two things in particular, narrow technical points, he wanted to make sure that he could sign off as Mr Lenagan's tax advisor. His dialogue with the trustees, which was very limited, was directed entirely at those narrow tax technical issues. The series of decisions the trustees had to make were entirely the trustees' decisions.

(3) He said that in the comment in [a] above, he meant that it was up to the trustees:

> "to decide whether they wanted to pursue the tax planning proposal that they were aware of, that they understood, that had been set out to them, yes. It was entirely up to them to decide....what they were going to do. There was certainly an expectation that the trustees would approve the merger, would sell the shares and would subsequently retire in favour of UK trustees. There…. is no question about that and the reason is that the transaction was such a beneficial one to them in the terms of the flotation, in terms of the PE ratio. So there was an expectation, but the decision to do those things rested with the trustees…
>
> One would expect that they would implement it, yes, but it's ultimately their decision. They are independent trustees. They acted as independent trustees throughout…"

(4) It was put to Mr Pentelow that the only reason the transaction would not proceed was if the market turned and it was no longer a good idea to float. He said that he was not involved in the commercial detail and the commercial thinking of the flotation, so there may well have been other contingencies. He said, however, that broadly the proposition put to him is right in that, as far as he knew, "if the market had not turned against them, then they would almost certainly dispose of the shares because it was just….the PE ratios that were available at that time were extraordinary, so it would be very unusual, very strange, if the trustees for some reason decided not to take that opportunity".

(5) Mr Pentelow confirmed that he understood that the advice of Mr Herring and Mr Petch was that the merger was a good idea in order to make the flotation more attractive so that the merger was part and parcel of the whole idea.

(6) He said that in [b], he meant that:

> (a) it was at least a possibility that the trustees might have decided not to sell the entirety of their shareholding and sell a smaller amount, and
>
> (b) it was the trustees who decided whether they wanted to enter into the transactions and that they acted independently in taking their own independent decisions based on the advice that they obtained from various sources. In that sense, as far as he was aware, "they had a free hand".

He said that he personally had very limited contact with the trustees, so was simply basing this view on the documents that he had seen but he knew of "no reason why the trustees had anything other than complete independence in making those decisions. I was certainly not involved in any way in the trustees coming to those decisions and, as far as I'm aware, nobody else was".

(7) It was put to Mr Pentelow that he could not seriously be suggesting that, in reality rather than in form, Mr Lenagan put the ability to derail the entire flotation process in the hands of Mauritian trustees he had never met and just abdicated all responsibility for making any decisions about the corporate transactions and let the trustees have entirely free rein. He said that, so far as he knew, that is exactly what he did and exactly what happened and added that:

> "You need to make the distinction, I think, because you said abdicating responsibility in relation to the corporate transaction. Mr Lenagan was a director and obviously, as a director, was deeply involved in the transaction. But as far as I am aware, that is exactly what occurred; that the trustees had a completely free hand, as you describe it, in making those decisions…."

(8) Mr Pentelow agreed that there was:

> "an expectation that those were the decisions that the trustees would make because they were clearly in the interests of both the trustees and the beneficiaries. But there was no more than a rational expectation".

(9) It was put to him that he would have been rather horrified if Mauritius trustees had turned round and said "no" to the flotation. He said that in his own mind, he always thought that was something which could potentially happen and, if it had, the flotation would have to be pulled, but so far as he knew, the necessary shares for the flotation to take place could have come from other holdings. He thought it extremely unlikely the Mauritian trustees would not enter into the Placing Agreement because it was such an attractive opportunity for the trustees but "in the end, it was the trustees' decision".

Comments on the evidence

157. In my view, it is reasonable to infer from all the circumstances relating to the appointment of the Mauritius trustees as trustees of the family trusts (as reinforced by the further evidence on the subsequent events) that when the Mauritius trustees accepted the appointment, there was a common understanding and intention on the part of the settlors, the UK advisors and the Mauritius trustees that, provided that there was no external bar to the merger and flotation going ahead and the circumstances remained as they were then expected to be (namely, that the P/E multiples/valuation of the combined business remained high and there was no change in UK tax legislation):

(1) The appointment was for a short term only of sufficient time for the Mauritius trustees to administer the plan, which the settlors had already decided upon, for the tax efficient sale of shares held in the family trusts on the flotation.

(2) The Mauritius trustees would administer that plan by taking each of the actions required to implement it in the necessary order and, in particular, by agreeing (a) to approve the merger and sale of shares on the flotation, (b) to make the various appointments, (c) to take any steps necessary to ensure that the family trusts were liable to income tax in Mauritius during the relevant period, and (d) to retire in favour of UK trustees within the 2000/01 tax year.

158. Subject to the comment at [159(2)], I do not suggest that the Mauritius trustees were not expected by the settlors and the UK advisors to act in accordance with their fiduciary duties and, in particular, (a) to pay care and attention to considering whether they should take each individual action required to implement the plan, at least in the sense of checking that (i) the commercial merits of the merger and sale of shares on the flotation were as they were expected to be, and (ii) it was within their powers to take the relevant action, and (b) to check that the relevant documents were satisfactory from their perspective as trustees of the family trusts. Indeed, it was an essential and integral part of the plan that the Mauritius trustees were the persons who took the formal decisions to take the actions required to implement it and that they did so acting properly having regard to their duties as trustees of the family trusts.

159. However, it is plain from the evidence that, at the time of the appointment, as was no doubt evident to the Mauritius trustees, (a) the assumption of all those closely involved in the appointment of the Mauritius trustees was that, if circumstances were as they were then expected to be, it would be in the interests of the beneficiaries of the family trusts (i) for the Mauritius trustees to agree to the merger and to sell the shares on the flotation given the very high P/E multiples which DKB advised could be obtained, and (ii) to seek to do so in a manner which, on the advice UK Counsel gave to the settlors, could avoid the otherwise substantial CGT charge for the settlors, and (b) therefore, the Mauritius trustees were expected to agree to the relevant actions barring some material change in these expected circumstances:

(1) As regards the commercial transactions (a) Mr Pentelow said that there was "certainly an expectation", which he later descried as "a rational expectation" that the Mauritius trustees would agree to the merger and sale of shares on the flotation, on the basis of the predicted high value of the merged group and corresponding high returns for shareholders and that, if the market did not turn against them, it was almost certain they

would make that decision, (b) Mr Maslen similarly said there was certainly an expectation that the Mauritius trustees would take these actions and retire, (c) Mr Binks seemed to accept that the Mauritius trustees' role was confined to checking and reassuring themselves that the deal was an appropriate one, (d) Mr Haworth said that he had confidence in the Mauritian trustees likely behaviour on the basis that they would act in the interest of the beneficiaries, and (e) Mr Lenagan said the decision to agree to the sale of the shares was a "no- brainer", "it was millions to one against" that the Mauritius trustees would not do that.

(2) The expectations of the settlors and their advisers were underpinned by the knowledge not only that the predicted values were so high that plainly it made sense for shareholders, including the trustees, to agree to the merger and the sale of shares on the floatation but also that the settlors stood to save considerable sums of money if the tax plan advised upon by UK Counsel was successful. I note, however, that whilst, as set out above, the settlors and UK advisers expected the Mauritius trustees to check the relevant actions were commercially sound and that it was within their powers to take them it appears that no-one expected them to take any independent advice on the merits of the plan from a UK tax perspective and they did not do so; both they and the PC trusts team appear to have simply assumed that it was a good thing to seek to give effect to the advice UK Counsel gave to the settlors.

(3) The witnesses' general comments that the Mauritius trustees acted independently and that it was for them to make the relevant decisions have to be viewed against this backdrop and in the light of all the surrounding circumstances:

(a) Examples of such comments are those of (i) Mr Haworth that he was not looking for trustees who would do as he wanted and was fully aware that they would make their own decisions and that it was possible that the Mauritius trustees could "come up with something that we had missed" as regards the merger and flotation, (ii) Mr Lenagan that "the commercial judgment as to what the trustee does with his shares....is completely a decision for the trustee", and (iii) Mr Pentelow that "it was entirely up to" the Mauritius trustees to decide what they were going to do and that they had a "free hand" and "complete independence" and, in his mind, that the Mauritius trustees could say "no" to the transaction was something which could potentially happen (although he accepted it was extremely unlikely).

(b) It is of course true that the actions required to implement the plan could not take place without the Mauritius trustees agreeing to take them (as the persons in whom the relevant shares were vested subject to their fiduciary obligations) and they could have decided not to take them. As Mr Haworth said, there was a risk in putting the relevant assets into the hands of the Mauritius trustees. However, it is equally true that, in the actual circumstances applicable when the Mauritius trustees were appointed, this risk was highly theoretical (see section 1 and Mr Wailing's evidence below); barring any material change in circumstance of a kind beyond the parties' control, no-one expected that, in practice, the Mauritius trustees would have any reason to do anything other than what they were specifically appointed to do, namely, to agree to take the relevant actions required to implement the plan, in light of the compelling commercial reasons for them to do so and the prospect of achieving the substantial saving in CGT.

(4) These conclusions are reinforced by the fact that, in the correspondence relating to the appointment of the Mauritius trustees and the note of the meeting on 15 and 16 June (which Mr Maslen agreed at the hearing and Mr Gujadhur acknowledged at the time contained all the main points), (a) although Mr Haworth said that the commercial merits

of the proposed merger and flotation were explained to the Mauritius trustees at the meeting, there is no record of any discussion of the commercial merits, and (b) the only substantive queries raised, whether by the Mauritius trustees or the UK advisers, relate to the effectiveness of the plan from a tax perspective; see Mr Maslen's letter of 1 June (at [116]) and Mr Gujadhur's response of 8 June ([123]), Mr Gujadhur's letter of 20 June (at [130]) and the correspondence of 22 and 23 June (at [131] and [132]) and also the comments at [160] on this point. The fact that all those involved in the discussions on the appointment were so focussed on making sure that the tax plan would in fact work plainly indicates that they all recognised that the role of new trustees, if appointed, was to implement the plan and that it was simply assumed that they would do so for the reasons and on the basis already set out.

160. I do not accept Mr Gujadhur's broad comment in his witness statement that the decision to accept the appointment was not based "in any way on any intention that we would carry out the transactions relevant to the tax planning" (see [144]):

(1) This statement and the rest of his comments in the same passage have to be viewed in light of Mr Gujadhur's evidence at the hearing that the Mauritius trustees were governed by the need to carry out the four steps involved in the tax plan as their "mantra" (see [145]) and, his evidence regarding the Mauritius trustees' retirement set out below and of the fact that the contemporaneous documentary evidence demonstrates that, as already noted:

(a) When they took the appointments on, the Mauritius trustees were fully aware of the nature of the tax plan the expectations of those who appointed them.

(b) The only concerns the Mauritius trustees raised relating to their appointment in the correspondence or at the meeting in Mauritius (as recorded in Mr Maslen's note) were (i) points to do with how confident the UK advisors were that the tax plan would work (see the note of the meeting and Mr Gujadhur's letter of 20 June (at [130])), (ii) whether the UK persons had examined the tax deed "to ensure that implementation is feasible" (see Mr Gujadhur's letter of 8 June (at [123])), and (iii) points that the Mauritius trustees considered may assist with the success of the tax plan (see the note of the meeting and the correspondence of 22 and 23 June (at [131] and [132]).

(c) Moreover, Mr Gujadhur's comment in his letter of 20 June (see [130]) plainly indicate that he accepted that the appointment was for a short period only of sufficient time for the Mauritius trustees to implement the plan (on the basis of the assumptions set out above).

(2) It is wholly unrealistic to suppose that professional trustees, who were aware of the importance of the tax plan to those seeking to appoint them and of the role they were expected to play in implementing it, would accept an appointment of this kind, without even raising any query on the underlying transaction to which the tax plan related, if they did not fully intend to fulfil that role. In all the circumstances, it is reasonable to suppose that in fact they did fully intend to carry out the tax plan and, in effect, accepted the appointment on the basis that they would do so, on the basis of a shared assumption that, as matters stood when they were appointed, it would be in accordance with their fiduciary duties to implement the tax plan albeit, as those appointing them also expected, they may well have intended to check that assumption remained correct in the circumstances applicable, at least as regards the commercial merits of the transactions, and that it was within their powers to take the relevant action. I accept Mr Gujadhur's other comments at [144] above only to the extent that they reflect this.

161. I do not consider that it detracts from these conclusions that I accept that the evidence demonstrates that, in selecting new Mauritius trustees, at least part of the parties' concern was to put in place trustees who were not only unlikely, as counsel put it, to "run off with the money" but who also had appropriate commercial and professional experience. In my view, it is plausible that this was, at least to some extent, a concern:

(1) As noted, I do not dispute that the settlors and their UK advisors expected the Mauritius trustees to act diligently and properly in checking that it was appropriate for them, as trustees of the family trusts, to approve the relevant actions (albeit that, as noted, there was simply a common assumption that to seek to achieve the CGT saving was in the interests of the beneficiaries of the family trusts) and to satisfy themselves that the relevant documents were satisfactory from their perspective. Indeed, it was integral to the success of the plan that they did so. It is reasonable to suppose, therefore, that those involved in appointing the Mauritius trustees had at least some concern that they were capable of understanding the commercial transactions and other matters they were presented with.

(2) Although the appointment was fully expected to be short term if all went according to plan, there was a possibility that the transactions may not proceed due to events beyond the parties' control. It is credible that the settlors considered that, if that were to be the case, they may not want to go to the trouble of changing the location of the offshore trustees again.

(3) However, this does appear to be very much only a secondary concern. I note, in particular, that although the settlors said that they wanted to establish a similar relationship with the Mauritius trustees to that they had with the Jersey trustees, whereby, according to their other evidence, they valued their views and discussed important matters with them, in fact, once the Mauritius trustees were appointed, they did not communicate with them at all. Moreover, for the reasons set out below, I do not accept that any of the UK persons involved expected the Mauritius trustees to have any material input into the valuation of the relevant companies which Mr Lenagan, in particular, described as the key issue for them.

Section 4 – Events leading to the merger and floatation

Correspondence in relation to the merger in later June 2000

162. On 23 June:

(1) Mr Gujadhur responded to Mr Wray's fax of 19 June in which he had enclosed copies of the draft documents relating to the merger stating that:

> "Although the documentation is informative, as we have had no involvement in the group structuring, we have no comments to make thereon."

When cross-examined as to why he said this, Mr Gujadhur said that "DTOS had not been involved in the mechanics of the restructuring. With hindsight, it is possible that I should have probably worded it that I was referring to the mechanics of the restructuring". He said that there was a whole decision-making process that needed to happen before the restructuring was approved. There was a committee who would have debated it before the trustees approved it. He noted that Mr Konfortion was not an easy person to get approval from on any documents:

> "He had to be more than 100% satisfied before he would ever append his signature on anything. So all of us were aware of that and we had to be prepared to satisfy all his enquiries."

(2) Mr Gujadhur had a telephone conversation with Mr Wray, the content of which is summarised in a fax Mr Wray sent on 23 June:

(a) Mr Wray confirmed that the documentation provided was relevant to the trustees as, following, appointment, the Mauritius trustees will be shareholders in these companies and: "As shareholders you will have to consider and if though fit enter into the various Resolutions required in relation to the restructuring".

(b) He clarified that the documentation he had sent "references to the names of the retiring trustees but this will be changed to reflect the new trustees' ownership of shares in due course".

(c) He asked for any comments or queries as soon as possible.

(d) He also confirmed (in response to a query from Mr Gujadhur) that no deed of indemnity and release was required as regards Mr Lenagan's family trusts as regards the change of trustees.

163. Mr Gujadhur contacted Mr Wray by telephone on Monday 26 June, as referred to by Mr Wray in a fax he sent on that day and recorded in an attendance note prepared by Mr Wray. The note refers to the call as having taken place on 7 July but that appears to be incorrect as the content of the note relates to the share exchange which occurred on 6 July and the content of Mr Wray's fax is evidently responsive to the content of the call on 26 June:

(1) The attendance note records that Mr Gujadhur confirmed that he had now completed his review of the reorganisation documentation and had some queries that he wanted to go over:

> "The Trustees were concerned that the share for share exchange did not prejudice the Trustees' current holdings in Workplace or Teleware in any way. I said that I could not confirm this as we had not acted on behalf of the Company and could not give any precise details of the value of the new shares. What I could say however was that we would attempt to obtain more information and comfort for the Trustees and that due to the fact that the flotation was taking place this was for the benefit of the beneficiaries of the Settlements as a whole. CG agreed but said he would like written confirmation of this.
>
> CG then had some other minor points which I clarified...
>
> CG confirming that subject to this and my confirming that we had reviewed the documentation and were happy with it he would approve the documentation and fax formal confirmation back to me as soon as possible."

(2) In the fax, it was stated that:

> "I confirm that we have reviewed the documentation on the trustees' behalf and are happy with it. We do, however, need the Trustees' approval and I hope that our telephone conversation cleared up some of the outstanding points.
>
> I *confirm that we also act on behalf of Geoff Haworth personally* and on behalf of the Trustees of the 1991 Computer Investment Trust. We can confirm that we are obtaining the Computer Investment Trustees' approval of the documentation hopefully later today. They have not come back to me with any queries so far. In respect of Geoff Haworth, I confirm that he is happy to enter into the documentation. The purpose of the group reorganisation is to facilitate the flotation of Telework plc and this is obviously what Geoff (and Ian Lenagan) want.
>
> Finally, you asked for confirmation that the share for share exchanges.....will not be prejudicial to the Trustees. *We cannot provide investment advice to the Trustees and are unable to comment on whether the shares in Telework Group Limited will be of equal or higher value to those in the two individual companies.*
>
> We can, however, confirm that the flotation of the companies cannot take place without the Group reorganisation occurring. Provided that the flotation takes place the shares and these will then be able to be sold in the open market which obviously of benefit to the beneficiaries of the Settlements. I think that the trustees could

therefore properly conclude that the transaction as a whole is in the best interests of the beneficiaries of the Settlements.

I hope this is a satisfactory explanation but should you have further queries on this point please contact Mike Wailing at Workplace." (Emphasis added.)

(3) Mr Binks and Mr Haworth did not agree that the first passage highlighted above demonstrates that the PC trusts team were acting on behalf of Mr Haworth. They thought Mr Wray was here referring to the other team at PC who were acting for Mr Haworth. Mr Haworth noted that:

> "There were tens of people involved in this process. There were people meeting regularly down in Kleinwort Benson. There were loads of people and they all talked to one another. They learned to trust one another... It's a different atmosphere. People talk over the phone, etc...one of the Andrews might have said: well, Geoff's okay with that, at a meeting maybe. I wasn't there and I haven't conveyed it to them. My name's not on this piece of paper other than put there by somebody else."

I accept that in the fax Mr Wray was probably referring to the fact that another team at PC acted for Mr Haworth. However, this does demonstrate that, as Mr Haworth appeared to accept, there was not in practice, as Mr Haworth suggested in his earlier evidence, a total separation or as he put it, an iron curtain drawn, between the different teams at PC who were involved in advising on these arrangements.

(4) As regards the second highlighted passage, Mr Binks said in re-examination that it was not usual for him or other solicitors to give advice on the commercial merits of a transaction. That was not their job; they advised on the law. Hence, Mr Wray was acting in accordance with his expectations of a lawyer at PC in stating that he was not able to advise on commerciality of the transaction and to provide investment advice.

164. On 26 June, at the request of Mr Maslen, Mr Binks wrote to Mr Gujadhur to set out UK Counsel's advice on the "different persons" issue. On 27 June, Mr Pentelow wrote to Mr Rajahbalee, counsel in Mauritius for advice on the Mauritius tax issues.

165. On 27 June:

(1) Mr Wray responded to an email from Mr Gujadhur (which was not in the bundles).

(a) He thanked him for his email and said that he had asked (a) Eversheds, who were the solicitors acting on behalf of the companies in the group restructuring, to e-mail him copies of the restructuring documentation, and (b) Mr Wailing to give Mr Gujadhur a call to explain the purpose and rationale behind the restructuring.

(b) He said that provided "you are happy with the transaction and documentation, you will need to prepare Trustee Minutes for each Settlement...The minutes should record the fact that a Group Restructuring was proposed, that the Trustees considered it to be in the best interests of the beneficiaries of each settlement to agree to the restructuring and that following careful consideration of the proposal and associated documentation the Trustees resolved to enter into the resolutions and agreements required."

(c) He also asked for the executed retirement documents and said for the GH Trust "you will need to arrange a deposit to generate income by 30 June....We may need to do the same for the [Lenagan family trusts] but I will confirm this shortly" and that PC would send him further deeds by the end of the week "to enable each settlement to be appointed on discretionary trusts" (referring to the appointments the Mauritius trustees were asked to make as set out in more detail in section 5).

(2) Mr Gujadhur and Mr Wailing had a call on that day as recorded in a further fax from Mr Wray later on that day. Details of the call are set out below. In the fax Mr Wray

set out what the Mauritius trustees were expected to do and some key details of the relevant documentation:

> "I am writing to you to provide an overview of some of the steps that will be taking place over the course of the next couple of weeks which are relevant to the trustees as shareholders in [Workplace] and [TeleWare]. There are a number of things that we need you to do fairly quickly so if anything in this fax is unclear, please given me a call.
>
> The first transaction that will take place is the group reorganisation. This involves the shareholders of Workplace and Teleware agreeing to the formation of the new Teleware Group Plc.
>
> We have provided you with the documentation in relation to this and I believe Mike Wailing has also discussed the purpose of the reorganisation with you. If you have any further queries please let me know.
>
> Otherwise – please let me have the trustees' formal approval of the documentation, by return if possible. If further amendments are made to the documentation I will, of course, ensure you are brought into the picture.
>
> As a precaution, however, I think it would be worthwhile for the trustees to execute Powers of Attorney in favour of two Partners here at Pinsent Curtis who could sign if necessary on their behalf. You would of course have approved the documentation. I attach a draft Power of Attorney. Please confirm your approval of this by Monday 3 July or let me have any comments. I will then send a final version for execution.
>
> Following the group reorganisation the trustees will be asked to enter into the Placing Agreement [and he attached the latest draft].
>
> The purpose of the Agreement is broadly to facilitate the listing of the shares in [Teleware] on the London Stock Exchange which is anticipated to take place on 3 August. Once again I need the trustees' approval of this document as soon as possible. If you have any queries...can I suggest that you telephone Andrew Walker or Nigel Binks to discuss....
>
> As part of the commercial terms agreed the trustees will not be required under the Placing Agreement to give warranties. These warranties are detailed in Schedule 4. However, the settlors of each settlement (ie Geoff Haworth and Ian Lenagan) will be giving the warranties and their maximum liability will be determined not only by the amount that they personally receive on the placing but also by the amount received by their related trusts. They will therefore require an indemnity from the trustees covering that part of a potential liability which relates to the trustees' shareholding. I will send you a draft indemnity for approval very shortly.
>
> Finally, for your information I enclose a draft schedule of shareholdings prepared by Nigel for your information."

166. It was put to Mr Binks that in this correspondence Mr Wray was in effect instructing the Mauritius trustees such as when he said "You will need to arrange a deposit...". In Mr Bink's view that was not the case and Mr Wray meant that if the trustees decided to go ahead with the relevant appointment, which would generate income, it would be a good idea to do a deposit to generate income by 30 June.

167. Mr Petch said in his witness statement that Mr Gujadhur contacted him without notice at the point where he was considering the merger:

> "Prior to taking a decision on this he wished to understand the basis of the relative values placed on TeleWare and Workplace (60% /40% respectively), how this had been arrived at, and what advice had been given and by whom to support it. I explained I was not involved in that aspect and suggested he speak in the first instance with Mike Wailing who I felt might be able to answer his questions. I believe they subsequently spoke...."

168. Mr Binks was asked a number of other questions about the above correspondence:

(1) When it was put to him that Mr Wray provided advice on the corporate documentation before the PC trusts team were appointed to act for the trustees, Mr Binks initially said he did not know what the formal position was as regards the engagement but:

> "the whole thing was going to take place in a very short space of time. So a bit like my work on the deeds of appointment, they were trying to make some progress so that....Mr Gujadhur had as much time as possible to consider all this and reach a decision.....the understanding was that... if the Mauritius trustees were appointed and if they formally appointed us to advise them, we would be advising them on this documentation and this advice here was given in that context."

He clarified in re-examination that his understanding was that, as at 19 June, DTOS and Mr Gujadhur were very likely to be appointed as the trustees of the trusts. He also added that he thought it clear from the correspondence that the PC trusts team wanted Mr Gujadhur to review the documents and raise any queries that he may have because the time schedule was short for implementing the reorganisation and that Mr Wray expected Mr Gujadhur to get back to him and to run through the arrangements with him.

(2) It was put to him that when Mr Wray wrote to Mr Gujadhur on 27 June there was no uncertainty or conditionality in the language he used as regards the events he referred to. Mr Binks said that:

(a) Mr Wray should not have said the events he referred to "will" take place but rather that they "may" take place because whether they happened was dependent on the trustees and the other relevant parties agreeing to them. He thought that Mr Wray was just flagging up what "will" happen *if* these arrangements went forward, but that does not detract from the fact that "there's an awful lot for everybody to agree on there" and that:

> "nothing is guaranteed…The trustees are only one of a number of parties to this transaction…, he's just... setting out, which I think would be helpful to the trustees and anyone in this transaction, what will happen if all the steps...are agreed and goes to plan…he's not instructing or telling the trustees to do anything."

(b) He added that there was a timetable on this and "he's just setting out what needs...to be done. But it doesn't mean that the trustee is going to necessarily do it and it doesn't mean that the trustee is necessarily going to decide to do it".

(c) He said that conditionality is implicit. Mr Wray was not as qualified as Mr Binks, but he was sure he would have understood that he could not tell the trustees what to do:

> "We were advising the trustees…I think that is just a basic fundamental fact of advising trustees. If we're acting for trustees, we're advising them. We're not instructing them or telling them what to do."

(3) It was put to him that Mr Wray's language betrays the expectation of everybody that these transactions would go ahead as planned without being derailed by the trustees. He said that would be the hope, but that does not alter the fact that it was trustees' decision at the end to proceed with these things if they were happy with them and:

> "it couldn't have been more than a hope. There was a risk in appointing these trustees that…. they might suddenly find something which they weren't happy with…. the deal is a very good one, so one could have expected the trustees to make the decision, but at the end of the day, it was the decision of the trustees whether to go ahead or not. Of course, there would have been a hell of a problem if they'd said no, but who knows what they might have come up with…I mean, we go back to if we're now talking about the period before the trustees were appointed, a lot could

have happened in that week or two. There could have been a change of heart by Mr Lenagan, a change of heart by Mr Haworth on the group reorganisation….there could have been a crash on the market. So I think nothing was guaranteed….at the end of the day, it was the trustees who….needed to be satisfied that the documentation was correct, it didn't expose them to liabilities and that they were satisfied with the merits of what was being proposed."

(4) It was put to Mr Binks that Mr Wray was providing a detailed level of direction as to what the trustees should record in their own minutes. Mr Binks noted that the comment was prefaced with the assumption that it was for the trustees to approve the transaction and the documentation and that, as the appointment of the Mauritius trustees and the group reorganisation was in train at that stage, "it made sense for us to be advising the trustees and for the trustees to be considering the proposals".

169. It was put to Mr Lenagan that if the merger was the critical decision he would be horrified, if Mr Gujadhur, had said he had no comment on the merger documentation. He said that because of the discussion that Mr Wailing had with Mr Gujadhur on 27 June, he was aware that Mr Gujadhur clearly was "highly engaged" in the discussion about the merger, in particular, as regards the question of 60/40 % as a relative valuation of these two equally sized companies. He would have been extremely disappointed if a decision had been taken not to go with the merger, particularly having talked to the Walbrook trustees, as a highly experienced trustee, who had clearly said to him that such a merger and such a flotation would make sense.

Comments on the evidence

170. The evidence demonstrates that Mr Gujadhur had to be prompted into taking an active interest in the proposed merger and, it was only once he was prompted, that he sought comfort that the transaction was in the interests of the beneficiaries of the family trusts:

(1) Mr Gujadhur's suggestion as to why the Mauritius trustees did not propose to review the documents relating to the merger does not make sense to me. As the Mauritius trustees were involved in the merger, as shareholders of the relevant companies, it is reasonable to suppose that they would want to review and understand the documents, as part of deciding whether to approve the merger, whether or not they had any input on the "mechanics" of the merger. Whilst the documents contained the names of the Jersey trustees, it seems unlikely that Mr Gujadhur was unaware that the merger was yet to happen and that the Mauritius trustees' approval would be required given, in particular, that in his fax of 19 June Mr Wray asked for their approval of the documents.

(2) The reason why Mr Gujadhur initially considered that the merger documents were not of interest to the Mauritius trustees is unclear. Given the circumstances surrounding the Mauritius trustees' appointment, one plausible explanation is that Mr Gujadhur thought that (a) the decision for the family trusts to enter into the merger was, in effect, already made by someone else (the settlors and/or the Jersey trustees) and the Mauritius trustees' role was simply to provide formal approval, and/or (b) there was no scope for the Mauritius trustees to suggest or require changes to the terms of what he may have assumed were agreed documents.

(3) In any event, it is clear, that, whatever the precise reason for the initial lack of interest in the merger, Mr Gujadhur did not, of his own initiative, take a pro-active, questioning approach to whether the Mauritius trustees should approve the merger. It was only when Mr Wray explained to him (on 23 June) the need for the Mauritius trustees to review the documents that Mr Gujadhur then considered whether the share for share exchange prejudiced the trustees' holdings in Workplace or TeleWare. He raised the issue with Mr Wray (on 26 June) by simply asking for the PC trusts team's view and then initially indicated he/the Mauritius trustees were content to proceed if written confirmation was provided that there was no prejudice. Mr Wray then suggested he

should speak to Mr Wailing and, when Mr Gujadhur did not make contact with him, on 27 June, said that he would ask Mr Wailing to call Mr Gujadhur.

(4) The precise timing of Mr Gujadhur's call to Mr Petch is unclear. However, in light of the correspondence it seems that it took place only after Mr Wray had pointed out that he/the Mauritius trustees should review the documents probably on 26 or 27 June but earlier in the day than his call with Mr Wailing given that Mr Petch said that Mr Gujadhur had not yet spoken to Mr Wailing when he called Mr Petch.

171. I accept that, as Mr Binks said, the fact that Mr Wray assumed events would happen in accordance with the proposed timetable does not of itself indicate that he (or any other member of the PC trusts team) was seeking to dictate to the Mauritius trustees that they must enter into the relevant steps. Mr Wray was seeking comments and any input the Mauritius trustees may have when sending them documentation and it is plain that he and the other members of the PC trusts team understood that, as professional advisers, they were not in a position to require the Mauritius trustees to do anything,

172. However, the correspondence (and the correspondence which took place throughout the transaction) indicates the blurred nature of the role of the PC trusts team. When Mr Wray initially provided the Mauritius trustees with information on the merger and asked for their approval of the relevant documents (on 19 June) he can only have been acting on the instigation of the settlors/their advisers albeit in anticipation that the Mauritius trustees would be appointed shortly (as was highly likely at this point). Overall, the tone and nature of the correspondence indicates that, as is not surprising given the nature of the tax plan and the PC trusts team's involvement in the discussions on it right from the start, (a) Mr Wray was highly conscious of the settlors' objectives as regards the tax plan and their expectations of the Mauritius trustees in relation to it, (b) he seemed to view his/ the PC trusts team's role as being to further or facilitate the implementation of those objectives by making sure that the Mauritius trustees were fully aware of what the settlors expected of them and that they had what was needed from the PC trusts team (as advisers on English law) for them to take the relevant decisions as regards actions required to implement the plan at the right time, and (c) in doing so, he seemingly acted on the basis (as did Mr Binks, as explained elsewhere) that all parties were working towards the successful implementation of the tax plan on the assumption that was a common and desirable goal which, once appointed, the Mauritius trustees would play their expected part in achieving given that, as is inherent in the plan, that was the very purpose of their appointment and, as matters stood, it was assumed to be in the interests of beneficiaries for them to do so.

173. Overall, it is difficult to see that the PC trusts team were not at least in part acting on behalf of the settlors and/or at any rate with their interests in mind, albeit they were not formally appointed to do so and that they may have managed to keep a separation in their own minds between their inter-related roles, namely, (a) as regard the settlors, in inputting into the plan and facilitating its implementation on their behalf, and (b) as regards the Mauritius trustees, in providing them with advice on the English law position as regards the relevant steps and the required documentation. I form this view not only on the basis of the tone and nature of the on-going correspondence but also of the facts that (a) the tax plan was very much the settlors' plan which, as the PC trusts team (like the other UK advisers) were plainly aware, the Mauritius trustees were appointed simply to carry out or administer on the basis set out above, (b) in effect, from the start and on an on-going basis, the PC trusts team were involved by the settlors' UK advisers in providing input and advice in relation to the plan, and (c) as explained below, as in relation to the provision of merger documents and preparation of draft retirement documents, the PC trusts team often acted on the instigation of the settlors' advisers without any initial reference to the Mauritius trustees.

174. It does not detract from these conclusions that Mr Binks again stressed in his evidence that it was uncertain whether the merger and flotation would take place as planned. As noted,

I accept that, of course, the flotation may not have gone ahead due to the type of factors Mr Binks identifies. The fact remains that the expectation was that the Mauritius trustees would undertake the relevant steps assuming that there was no change in circumstance of the type Mr Binks referred to which would have derailed the merger and flotation or meant that the basis on which it was assumed that it was in the interests of the beneficiaries for them to effect the plan was no longer correct.

Call between Mr Gujadhur and Mr Wailing on 27 June

175. Mr Wailing said in his witness statement that, on the call on 27 June, Mr Gujadhur wanted to understand the rationale behind the reorganisation and, in particular, the 60:40 valuation attribution and that they discussed the "P/E multiples" that could be achieved on flotation. He thought he explained the benefits of the merger and floatation and the reasoning behind the valuation split and commented that:

> "From my recollections, Mr Gujadhur fully understood the information we discussed. He seemed very competent and fully capable of understanding the commercial rationale of the reorganisation and why the values of their shareholdings could increase subsequent to the merger…..In my view, Mr Gujadhur was a knowledgeable professional who fully understood the transaction that was being proposed and clearly understood the implications of that transaction for trusts of which he was the trustee."

176. In his witness statement, Mr Gujadhur gave a similar account of what he thought would have been discussed on the call, including that he wanted to understand the valuation split and that Mr Wailing shared details of the "P/E multiples" that DKB had produced. He said he would have known these were extraordinary and far in excess of those which might be achieved in an outright sale, and so it was obvious to him that it was in the best interests of the beneficiaries to agree to the merger to facilitate such a successful flotation. He noted that for a minority shareholder, a flotation provided an opportunity to maximise and liquidate the value of shareholdings at a much higher value than would otherwise be available such that this was an easy decision to make although the shareholding of each trust in the combined entity was slightly diluted.

177. He also said in his evidence that Mr Wailing was well placed to explain the valuations being attributed to the respective companies: "we talked to the CFO to understand the valuation method, why it was fair. It had to be fair to both set of beneficiaries, not just one set". I note, however, that it is clear from the evidence set out above that it was not Mr Gujadhur's/the Mauritius trustees' idea to speak to Mr Wailing.

178. In cross examination, Mr Gujadhur said that he did not simply accept the 60:40 ratio proposed by DKB when the Mauritius trustees were appointed. When it was put to him that the valuations had been agreed by the UK people he said:

> "I did question that. I….just didn't accept it like that, sir, with all due respect. I made enquiries. I called people. I had a long conversation with the CFO, Mr Wailing…. he was the CFO of both entities -- to understand the rationale and the basis on which that valuation had been reached."

179. In examination in chief Mr Wailing explained his recollection of the call as follows:

(1) He said that his feeling was that he had been able to answer the questions that Mr Gujadhur had asked him and Mr Gujadhur had understood his answers. He was not certain of his exact qualifications, but he was aware that his background had been checked out by Mr Haworth and Mr Maslen, and he felt that Gujadhur was happy with what he had said to him. He added that:

> "…..I didn't feel that he was waving any red flags about it (the float), and he was aware of the overall transaction, and I added some further detail to his understanding of the overall transaction and also an understanding of where the valuation had come from…Well, I remember it as a positive conversation….which he was

understanding what I was saying to him, I was understanding what he was asking me, and it was a positive conversation, and I have no reason to believe that he didn't understand what I was saying. I've been used to dealing with a lot of advisors in my career. I have been managing director of a public company in the '70s and '80s, had a lot of exposure to advisors. I think he would have been aware to me quite quickly if he hadn't been - if in any way he wasn't understanding what I was saying."

(2) He would have shared the substance of that conversation with other directors. He had the conversation from his office in the Milton Keynes office of Workplace. Mr Lenagan's office was next to his:

> "We were around the office all the time. It was a very informal set up, an open-door setup, if you like. I would have…realised and understood that this was an important call in the context of the way things were proceeding and I would have shared that, I would have thought, definitely on the same day with Mr Lenagan. I don't actually recall speaking directly to Mr Haworth, but Mr Lenagan and Mr Haworth were in constant contact at this time, so I would fully expect that Mr Lenagan would have advised Mr Haworth, given, of course, the fact that he had been to Mauritius and had met with Mr Gujadhur."

180. In cross examination:

(1) Mr Wailing said that he could not be certain as to who made the call on 27 June but it definitely took place. He could remember where he was at the time and the key parts of that conversation.

> "The basics of my recall is that Mr Gujadhur.....was aware of the overall flotation process and what was being attempted to be achieved. He was aware of....the proposed merger of the companies, he was aware of the 60/40 split and he was aware that DKB had indicated there was some high valuations. And to me, they are the key points that anybody should be looking at, and he went straight to those key points and asked me questions. In a way, he was drilling down on that general information that he clearly had. He was drilling down to get more detail to get a greater understanding of what was proposed."

(2) When it was put to him that Mr Gujadhuir was "obviously coming to the party late" (the valuations and the plan to merge and float had been decided upon some months previously and had been worked on up to the end of June), he said Mr Gujadhur "had an overall understanding that we were getting towards the end of the flotation process… A lot of work had been carried out" by the time that Mr Maslen and Mr Haworth went to Mauritius" and "we were a long way down the process, a long way down the road". He agreed that "everything, effectively, was in place at the point at which the Mauritian trustees were appointed for the flotation to go ahead if the market was receptive.

(3) It was put to him that Mr Gujadhur was seeking from him reassurance that the decisions that had been taken by others in the months leading up to the Mauritian trustees' appointment were in the interests of the beneficiaries. He said that:

> "He was testing out the information that he had. As I said, he was asking for more detailed information about the background to the merger, the background to the 60/40 split and the valuations. As I saw it at the time, that those were the sort of questions that a responsible and professional trustee would make, or would want to ask, before making a decision with regard to whether or not they were prepared to be appointed."

(4) It was put to him that it is a fair summation that Mr Gujadhur was seeking reassurance that decisions that he had had no involvement in were truly in the best interests of the beneficiaries. He said:

> "as I understand it that would be his job as a trustee: to ensure that any transaction that took place….which he was asked to support, would be beneficial to the beneficiaries of that particular trust …..
>
> I can't exactly say what he was doing. I can tell you how I was answering his questions. I believe that he was seeking more information around the background to the - to where we were at and making certain that it was a good deal."

(5) It was put to him that (a) in his witness statement he said that he understood the importance of the call, because regardless of the views of the directors, Mr Gujadhur, as trustee, was a significant shareholder in two companies and the merger could not realistically proceed without his support but (b) the call was not important enough for him to make any written note of it or to email anybody. He said he was not necessarily in the habit of making detailed notes of meeting and, as he had already said, when the call was complete, he would have informed his co-directors.

181. It appears that Mr Gujadhur also made a call to DKB as regards the flotation but there is no information on when this call took place:

(1) In his witness statement Mr Haworth said that Mr Gujadhur also called a member of the DKB team to enquire about the IPO to understand whether the proposal was a good opportunity. He was present at Kleinwort's offices when the DKB member joined after the call and:

> "It caused some amusement in the Kleinwort team because if the IPO could happen at the price the bankers thought possible it was without doubt a very good deal for all parties, including the Trustees. Nonetheless, I said to Kleinwort that I hoped they gave the information requested by the Trustees because *if CG or DTOS said "no" there would be no IPO*. I was assured that CG received all the information he sought. To my knowledge no one had asked CG to call Kleinwort and I took this as an indication that he was doing his job properly and investigating the benefits of the IPO." (Emphasis added.)

(2) It was put to Mr Haworth that the highlighted statement is incorrect because that there would be an IPO even if the Mauritius trustees did not approve it because they could simply be replaced. He said:

> "You don't just change trustees. You've got to have a good reason to ask one trustee to resign in favour of another and they've got to approve it....They have their own minds. They do their own thing."

Comments on the evidence

182. It appears that, having been prompted by the PC trusts team into taking an interest in the proposed merger and into speaking to Mr Wailing (it is unclear who initiated the call), Mr Gujadhur wanted to check that the commercial rationale for the proposed transactions made sense from the perspective of the beneficiaries of the family trusts. There is no reason to doubt that, once he was prompted that this is what was expected, he took the task seriously and that, as Mr Wailing said, he was aware of the relevant commercial points and asked pertinent questions and understood the responses he received. However, I note that his enquiries into the rationale for the merger and the valuation went no further than this call and one other call with DKB (the timing of which is unclear) and it appears that he was entirely satisfied with the content of that call and did not ask for any supporting written or other information.

183. I do not consider that Mr Haworth's comment at [180] detracts from the fact that he plainly had no basis to expect anything other than that the Mauritius trustees would approve the merger and sell their shares on the flotation assuming circumstances were as expected at the relevant time. This comment is another example of the witnesses emphasising that theoretically the Mauritius trustees (as the persons in whom the family trusts' assets were vested subject to their fiduciary obligations) could have decided not to agree to the merger and

flotation but, for the reasons already given, in reality no-one thought that would be the case (barring some material change in circumstance).

Announcement of intention to float

184. Mr Lenagan suggested that he was happy to give the go ahead for the announcement of the intention to float on 29 June only once the call with Mr Wailing had taken place and it was clear that Mr Gujadhur considered the valuation of the two companies was reasonable:

(1) This came up when Mr Lenagan was asked in examination in chief what the function was of the resolution made on 23 June that a committee of the board, comprising him and Mr Haworth would be authorised to act in relation to the flotation. He said that one of the reasons for this delegation of functions to him and Mr Haworth was that:

> "we were at that moment not certain that...the new trustees, would be appointed....albeit the intention was they were highly likely to accept that appointment, I felt slightly unsure to be issuing an announcement to float at that point until we had a much clearer indication that the new incoming trustees would have a positive view on the merger and flotation and certainly that they would at least have accepted appointment and that appointment only took place - and this was one of the reasons that we delayed at that stage the announcement to float."

(2) The announcement for float was originally intended to come out the following Tuesday and "we, with agreement from DKB, delayed that announcement to float until.... the trustees accepted on 26 June, a few days later, the appointment of the Haworth family trusts and indicated at the same time strongly that they would accept the appointment of the Lenagan Trusts". He noted that should have happened at the same time but was delayed for "two strange reasons, one was something to do with Manx law in the retirement of the 1991 trustees, that it was under the wrong law" and the second was that the Walbrook trustees had not been paid some fees and they refused to sign the retirement documents until that fee had been paid. He continued that as soon as these issues were dealt with and he knew the appointment was in train, on 29 June he and Mr Haworth:

> "felt by then on behalf of the board of directors that we were fine to issue the announcement of the intention to float. Even though it was only an intention, it was the start of a large amount of marketing process that was going to go on.
>
> We agreed that it should go out on the 29th because the trustees had been appointed for the Haworth Trusts and were about to be appointed on the 30th with the Lenagan Trusts and in between there had been conversations between Mike Wailing and Mr Gujadhur."

(3) He said that he was in the office next to Mr Wailing when he had the call with Mr Gujadhur and he and Mr Westaway who was on the other side of him:

> "were delighted to hear from Mike that the trustee in Mauritius had been on the phone and questioning certain aspects, particularly of the valuation, the 60/40 valuation, that originally had come from DKB and was confirmed in writing by Deloitte & Touche in April some time".

(4) He continued that on 27 June, "after that clear indication from the trustees that they felt that the 60/40 valuation was a reasonable valuation - and let us not forget that DTOS and Mr Gujadhur had acted for Mauritius Telecom, so TeleWare, as a telecom float, was in his distinctive area of competence commercially" he was "quite content by that point that...the flotation and the merger was likely to occur" and was happy to give the go-ahead with Mr Haworth on behalf of the board of directors that the announcement of the intention to float should happen.

185. In cross-examination, Mr Lenagan again said that he had spoken to Mr Wailing following his discussion with Mr Gujadhur on 27 June. Mr Wailing came out of his office immediately after the conversation to tell him and Mr Westaway, the contents of that conversation. He was

asked if Mr Wailing told him that he made that telephone call because Mr Gujadhur had earlier professed a lack of interest in the structure because he had not had anything to do with designing it. He said he had the impression that Mr Gujadhur had phoned Mr Wailing, but he could not be sure of that because he was not in Mr Wailing's his office at that time. However, he was sure that key issue that was discussed was the valuation:

> "Here we have two companies with exactly the same earnings, 1.445 million, together making up 2.9 million, so the companies were exactly the same size. So the only key decision was: is it 50/50 on the valuation or it is 60/40 or 70/30 or whatever it is. That was the only issue involved in the reorganisation: what was the relative valuation of TeleWare compared with Workplace. That is, as I understand it, precisely the conversation that Mr Wailing had with Mr Gujadhur and, according to Mr Wailing, had no red flags, had no further queries in terms of that valuation, which in terms of valuation, every advisor apart from Mr Gujadhur had also agreed. DKB had agreed it should be 60/40. Deloitte & Touche agreed it should be 60/40. Ian Lenagan and Geoff Haworth agreed it should be 60/40. The whole of the board of directors agreed with it."

186. It was put to Mr Lenagan, in effect, that at the time of the call there was nothing for the Mauritius trustees to decide on the valuation matter given, as he said, all were in agreement on it. He replied that the trustees had to make the decision themselves and "they would listen to the representations of DKB and Deloitte & Touche and everybody else. But they had to make the formal decision as shareholders, because one needed unanimity, that they agreed with the 60/40." He said that there was a strong possibility the flotation would not go ahead, "all of this was conditional and not definite" and "the valuation might have been challenged again later by any other shareholder". There were lots of reasons from March through until June why any of the shareholders could make a challenge. It was "a sensible valuation given by a bank and most of us thought it was right, but it had to be agreed by every shareholder".

187. It was put to him that he had no doubt whatsoever what the outcome of the Mauritius trustees' consideration of the matter would be. He said:

> "There's so much doubt involved in shareholders, in trustees, that no one could say that we had no doubt. I did have doubts that here, with a new trustee, he had to make, or they had to make their own decisions. It might be that that doubt was small, because I've said many times it's an absolute no-brainer that seven times the value from a merger and flotation makes commercial sense and trustee sense. But you can't say with 100% certainty it's going to occur."

188. Mr Haworth also noted that by 29 June the Mauritius trustees had been appointed to act for his trust and they had spoken to Mr Wailing and:

> "just generally they seemed to be getting on board. There were no red flags. Bad news travels faster than good news, I find. So as far as I was concerned, there were no red flags."

Comments on the evidence

189. HMRC suggested that it is not plausible in the light of all the evidence that the announcement of the intention to float was delayed to take into account the views of the Mauritius trustees. They noted that none of the other witnesses mentioned this and the view of many of the witnesses was that there was a confident expectation the Mauritius trustees would do what was required (as set out above and in Mr Wailing's evidence below).

190. In my view, it is plausible that there was a concern that there was as much certainty as possible as regards the circumstances surrounding the proposed transactions, including the precise identity of the shareholders in the relevant companies, when the announcement of the intention to float was made. Viewing this evidence in the context of the overall evidence, it appears that Mr Lenagan did not want the announcement to be made until he was as sure as he could be that the Mauritius trustees were going to accept the appointment to act as trustees of his family trusts on the basis that they would carry out the tax plan. Once they had accepted

the appointment to act for the GH Trust and Mr Gujadhur had spoken to Mr Wailing to check that the merger and sale of the shares on the flotation was in fact in the interests of the beneficiaries (as they had been told when the appointment was discussed in Mauritius), Mr Lenagan was highly confident that would be the case.

191. I do not accept that, as Mr Lenagan seemed to suggest, he (or anyone else) expected Mr Gujadhur/DTOS to have any material input into the valuation or that there was any realistic possibility that he/they would raise any "red flags" on that score given, in particular, (a) that DKB had advised on the valuation, the board had already agreed it and it had been included in the clearance letter sent to HMRC, and (b) Mr Lenagan and Mr Haworth readily accepted that a single telephone conversation with Mr Wailing (or that conversation and one other to DKB as regards the "P/E multiples") sufficed to satisfy Mr Gujadhur/DTOS that the Mauritius trustees should approve the merger and, in their view, suffices to demonstrate that the Mauritius trustees were doing what they should have been doing.

192. This evidence demonstrates that the parties may well have expected the Mauritius trustees to have sufficient commercial knowledge and expertise to understand the proposed commercial transactions, so that they could (a) check the transactions were in fact in the interests of the beneficiaries from a commercial perspective, and (b) consider the terms of the relevant documents from their perspective. However, for all the reasons already set out, that does not detract from the fact that the settlors and the UK advisers expected the Mauritius trustees to approve the merger and sell their shares on the flotation (as Mr Lenagan said was a "no brainer" in the circumstances at the time) and take the other steps necessary to implement the plan and subsequently retire in favour of UK trustees.

Evidence of Mr Wailing on the decision making

193. Mr Wailing confirmed that he was not aware of the detail of the tax planning but was aware the trusts would need to be repatriated to the UK.

Decision making prior to board approval on 23 June

194. He was asked a number of questions about who took the commercial decisions regarding the merger and flotation in the earlier stages of the process:

(1) It was put to him that the decision about which of the two routes to go down (either a trade sale or flotation) was effectively taken by Mr Lenagan and Mr Haworth. He said it would have started with them as they were "the driving forces in both businesses" but it would have involved all of the directors of the business and:

> "following the receipt of advice from Mr Herring and the values that were being placed on the combined businesses and the attraction of having a - commercially having a combined business to move forward with, it became an attractive option…..a very attractive - they were exceptional times, they were exceptional earning ratios and…..it was viewed as that was the better option…They could release part of their shareholdings and still remain involved in the businesses with a significant stake in the businesses."

(2) When it was put to him that Mr Lenagan would not have ceded commercial decision making to a set of offshore trustees that he had not met and who lacked his experience, he said that Mr Lenagan:

> "would have been concerned that he would be able to continue running the business in the future and he would be concerned that whoever was a shareholder in the business was supportive of the business and contributed in advice or whatever might be the appropriate way of helping the business move forward….They [Mr Lenagan and Mr Haworth] would be concerned to have….with the board of directors It wasn't just them. They were obviously powerful personalities and powerful voices on the board because of having started the business and were both driving the businesses forward. But they would have wanted….people alongside them, as it

> were, involved in the business, whether they be employees or directors or shareholders, that were supportive of the way that the business was moving forward.

(3) It was put to him that the focus for the directors on whether a merger and flotation made sense from a commercial business perspective and was achievable was informed really by the advice from Mr Herring and the presentation from DKB in February 2000. He said it would not necessarily have been - DKB were advising on the better method of getting value from the business. The commercial decision around the joining of the two companies together for the purposes of the flotation were matters that would have been discussed by Mr Lenagan and Mr Haworth and the rest of the board as to whether or not it made sense to have them together:

> "There was a synergy option that, whilst they are not in the same tech market or subdivision of the overall tech market, there were advantages to the businesses acting together in terms of growing the business and being able to make offerings to our customers."

(4) He said the merger option was advised on by Mr Herring as being necessary or important to have a business of a certain size, of a critical mass, that would be attractive to investors from the wide institutional investor base. If it was too small, it would not be attractive to them. Following the presentation from DKB in February 2000 there was "a collective view "that this was the right way to proceed" and:

> "we saw advantages to the businesses operating together, excluding the idea of floatation, but they were also important to the flotation, which of course offered other benefits because of the exceptional nature of the values that were being attributed to tech companies at that time".

(5) He agreed that the appointment of DKB in February meant that there were a lot of advisors who would have to do a lot of work to get the business ready to float and so that it was an important board decision as to whether to start along the process. He said that there was an enormous amount of due diligence work performed by DKB, the reporting accountants. It was put to him that after all the internal work had been done and the due diligence and the accountancy report were signed off, whether the flotation was achievable would depend upon whether the market conditions were right for a flotation. He said DKB closely followed market conditions:

> "They produced documents that showed how comparative companies were faring, whether they were already a publicly listed company, and you could see obviously every day from the stock market information as to whether the stock market was moving up or down. We were informed very early on that this was a significant matter that had to be taken into account by DKB as to whether or not they were able to continue to support the flotation and achieve the values that had been talked about."

(6) He agreed that the market conditions were the most important factor "as we got to the end of the process" and that, on the assumption that the market conditions were favourable, everything internally having been signed off, the flotation would go ahead, "as long as DKB were happy with it……we would move forward".

(7) He agreed that the valuation (as regards the 60/40 split) was a fundamental part of the merger process that had to be agreed at an early stage as to the relative values going into the merged company and as far as he was aware, there was no discussion with the Jersey trustees of the relevant trusts regarding this valuation split.

(8) He noted that for a period of time (from sometime in May and in early June) market conditions were unfavourable and "we had to slow the whole process down" but they improved towards the end of the flotation period: "But it was a volatile situation and we were being appraised by DKB, by Mr Bedford and Mr Petch, on a regular basis as to how

that might or might not affect the work that we were doing in the flotation that we were proceeding with". He said there was continual advice with regard to the timing because of the concern that was expressed on a regular basis about the volatility of the market:

> "There were varying windows of opportunity when we would be able to float. There was an opportunity in early August. I remember that DKB were concerned that if we went beyond that, in effectively the holiday period, then it wouldn't be possible and then we would have to wait until September, or later even, to do it. Because we'd seen a drop in the market in 11 May/June time, early June, then the advice from DKB was to get on with it."

(9) In re-examination he was asked what his perception was between May and the beginning of August as to the stability or otherwise of market conditions in the tech sector. He said:

> "I don't think they were stable. They were moving about and we were getting advice from DKB that there was an upturn from the downturn that had occurred around March time, the end of March, but meanwhile, I think to use their language, there could well be another correction in the market because of these very, very high multiples which were exceptional and….there was always the possibility that a market correction could come at any time, and we were concerned about that."

Expectations at 23 June

195. Mr Wailing was questioned on the significance of the board meeting on 23 June and what his expectations were at or around that time:

(1) It was put to him that the board approval marked a significant moment in the process because the proposal stopped being an internal confidential matter and became a market-facing event. He said that certainly within a short period of time, as part of the marketing programme, information was released by DKB to attract the interest of the potential shareholders. He agreed that at the meeting it was agreed to move the flotation process forward and that the decision to go to the market and announce it to the market was a highly important moment in this flotation journey. He said that was the case because, as he kept saying, "the volatility of the market at that time was of major concern, but "it was DKB's decision to - when to advise the best time to go to the market was....DKB would not have moved ahead if they didn't feel that all the pieces of the jigsaw were in place" .

(2) It was put to him that, as at that time, as all the shareholders were "signed up", all the internal work was signed off and the decision to go to the market had been made, the flotation would not have gone ahead only if there was some external matter such as the market conditions being adverse. He said that was the major matter that would have halted the process but there might have been other events that could not have been foreseen, but "certainly the market conditions were the primary matter that had they not been favourable, we would not have been able to go ahead".

(3) It was put to him that, at that time, there was no consideration given to the prospect that the imminent change of trustees could derail the plan and that it was never thought possible that the trustees might take a different commercial decision and might decide that the merger and flotation was not a good idea. He said in his view it was possible that was the case. The Mauritius trustees had made investigations (in talking to him) but, as far as he was aware, they had not made the final decision and until the final decision is made, then there can always be doubt. He did not think it was in his mind that the imminent change of trustee was a risk that would prevent the flotation from going ahead:

> "I think we were focused. The most important thing to do was to get the float away in a successful way, and our main focus was on that and that we could have done that where we were at the time of 23 June."

(4) It was put to him that realistically, as at 23 June, he expected the trustees to agree with the commercial decision that it was a good idea to go down the merger and flotation. He said:

> "There was - the case for - with the valuation was so good that it would have been surprising if any shareholder hadn't said: this is a good opportunity, and….in my recollection, there had been no red flags put up to say: we're worried about this, we don't want to do that. There was a working assumption that it would go ahead, that it hadn't - - obviously hadn't been signed at that time."

196. Finally, he was asked about the parties' expectations by the time the Mauritius trustees were appointed:

(1) He agreed that (a) by that time, the internal work was substantially completed and "we were a long way down the process, a long way down the road", (b) as it was completed to the satisfaction of all concerned (the directors and DKB) "we were able to proceed to the market at around that time", (c) the proposals for the merger were also very far advanced and the external documentation was sufficiently advanced that the directors were able to review it at the board meeting on 23 June, and (d) everything, effectively, was in place for the flotation to go ahead if the market was receptive.

(2) When it was put to him that if there was a realistic possibility of the new trustees derailing the process, he would not have gone ahead to announce to the market the intention to float, he said: "Well, if DKB were not happy with the situation that we were putting forward, they would not have moved forward to inform the market of the potential flotation".

(3) When it was put to him that whilst formally the new trustees had to sign up to the documents, he expected the trustees to do that, he said: "There had been no indications that they would not want to take advantage or become the trustees and take advantage of the deal that was on the table… attractive deal….I could see every reason why they would do that, yes".

(4) When it was put to him that he would have been surprised and disappointed had they scuppered the whole flotation process" he said that is hypothetical but:

> "I guess if it hadn't happened, I would have been very disappointed that I'd wasted six months of my life working really, really hard and nothing had come of it…..undoubtedly I think everybody connected with the process would have been disappointed. But at the time you were making decisions regularly about the confidence that all parties had in the process that we were doing, and DKB....would not have allowed us to move forward unless they were happy that all the pieces of the jigsaw were in place or very close to being in place."

(5) He agreed that as a general summation everybody was confident that, barring market issues, they were able to move ahead and complete the flotation. He confirmed that he had no direct contact with Mr Gujadhur other than on the call on 27 June. That was a factor that gave him an understanding that that he had understood the call and was happy with what he was told and he proceeded accordingly.

197. Mr Wailing confirmed that he had no contact with the Mauritius trustees other than as set out above. He said that he could not recall any calls between him and Mr Gujadhur in his capacity as beneficiary of one of the trusts about how many shares to sell on the flotation or how to invest the proceeds of sale thereafter. He had conversations with Mr Wimble about how to invest the proceeds of sale but no other discussions with anyone, whether in the Channel Islands (where the funds were eventually held) or otherwise.

Comment on the evidence

198. Mr Wailing's evidence confirms that when the Mauritius trustees were appointed everybody involved was confident that the Mauritius trustees would agree to the proposed transactions, assuming they went ahead as planned (as they were fully expected to by that stage) on the basis that the working assumption was that, in the circumstances then applicable, it was in the interests of the beneficiaries and so in accordance with their fiduciary duties for them to do so.

Further correspondence on the merger and floatation from late June to early August

199. On 29 June, Mr Wray wrote to the legal adviser to the Mauritius trustees and explained that "the trustees, as shareholders, will be required to enter into a number of written resolutions and agreements to facilitate the reorganisation" and that he had been asked by TeleWare's lawyers to obtain an opinion letter that the trustees had capacity under Mauritius law to do so. He noted also that there was urgency as the transactions were expected to take place on 5 and 6 July.

200. On or around 3 July, Mr Gujadhur telephoned Mr Wray with comments on the powers of attorney as recorded in Mr Wray's fax of that date. It appears that Mr Gujadhur had queried the trustees' power to appoint attorneys as Mr Wray provided further detail on this and the relevant English law (and sent a copy of the relevant legislation). The powers of attorney were executed on 6 July.

201. On 3 July, Mr Garnett of Eversheds, who acted for the companies, explained to Mr Pentelow that he had been talking to Mr Lenagan about a "Deed of Contribution" which PC had produced on behalf of Mr Haworth relating to the allocation of liability between the directors as regards claims under the Placing Agreement. He noted that the deed required Mr Lenagan to give a specific indemnity if claims arose in respect of Workplace and enclosed a copy of a fax of 26 June to Mr Lenagan in which he enclosed the deed and noted that PC said they only acted for Mr Haworth.

202. On 4 July, Mr Pentelow wrote to Ms Hoskin and explained that (a) it had been decided (following discussions with UK Counsel and with Mr Garnett) that a deed should be drafted whereby Mr Lenagan would give up any right to be reimbursed from the S&A Trust as regards any payment he had to make under the indemnity in the Placing Agreement, and (b) Mr Garnett had asked if PC could draft the necessary document and settle it with UK Counsel. Ms Hoskin sent the draft deed to UK Counsel that day and, on 5 July, sent Mr Pentelow a copy of it as settled by him. She also enclosed the deeds of indemnity which were being considered by the Mauritius trustees in respect of the other settlements for Mr Lenagan and Mr Wailing.

203. On 5 July, Mr Wray sent a further fax to Mr Gujadhur in relation to the merger and on 6 July:

(1) Mr Gujadhur confirmed in a telephone call to Mr Wray that he/DTOS would provide formal written confirmation of approval of the transaction and documentation.

(2) In the formal written confirmation provided later in the day it was stated that: "As trustees... we have reviewed the group draft re-organisation documents and have received your firm's advice thereon. We confirm our approval of the draft documents in so far as they relate to the trust as shareholder." The fax was signed by Mr Konfortion and Mr Venpin on behalf of DTOS and by Mr Gujadhur.

(3) The reorganisation documents were then executed.

204. On 6 July Mr Wray sent Mr Gujadhur two faxes regarding the Placing Agreement:

(1) In one fax he attached powers of attorney for the purpose of signing the Placing Agreement and noted that it was to be entered into on 10 July. He said:

> "The Placing Agreement is still being negotiated but we do need the trustees' approval and comments on the Agreement in its current form, as sent to you with my fax of 27

June at some point on Friday. As previously discussed, I would be grateful if you could direct your comments on this towards myself or Janet Hoskin."

(2) In another fax he referred to a phone conversation and said that it was now necessary to consider the next stage - entering into the Placing Agreement and related documentation. He set out an explanation of the position regarding warranties under the Placing Agreement (as he had in his fax of 27 June) and noted that (a) "it has been necessary to consider whether Mr Lenagan and Mr Haworth should receive an indemnity from the trustees", (b) under trust law and tax provisions it was acceptable for each of them to receive an indemnity from the trustees of the settlement of which he was a beneficiary on the basis he explained, and (c) UK Counsel had advised that no indemnity should be given to Mr Lenagan as regards the S&A Trust and that he should specifically give up any rights to make a claim against the trustees. He attached the indemnities and deed of release and asked for comments.

205. On 7 July, Mr Wray wrote to Mr Gujadhur and confirmed that the merger completed the previous day. He provided a copy of the latest draft of the Placing Agreement and a summary of "key terms of the Placing Agreement relevant to the Trustees". The summary includes:

(1) Confirmation that the Mauritius trustees were only required to give limited warranties.

(2) A summary of the fact that, under the Placing Agreement, the trustees would give DKB the authority to sell the "Sale Shares": "the selling shareholders (which includes the Trustees) are giving Kleinwort Benson the authority to sell the shares, execute stock transfer forms on their behalf and generally attend to those matters necessary to enable sale. You will note at Clause 2(G) the Trustee Sellers have confirmed that that they have the right to sell the Sale Shares." Mr Wray said: "If you have any queries please do not hesitate to contact me". I note that the "Sale Shares" was defined to include shares sold under the "greenshoe" but Mr Wray made no explicit reference to the "greenshoe".

(3) "The number of shares that the Trustees sell will depend on a number of factors. These include the number of people wishing to buy shares as well as the price (which will be determined on 27 July)."

206. In cross examination Ms Hoskin said that, with the benefit of hindsight, perhaps Mr Wray should have spelt out that the "greenshoe" was provided for in the Placing Agreement but she thought that when Mr Wray wrote this "he thought that that was sufficient information: that the selling of the shares would be a matter for [DKB] and that the trustees, in entering into this, were handing over that decision -making part of it". She thought that the sponsor usually makes that decision.

207. On 7 July, Ms Hoskin sent Mr Pentelow a letter of comfort to be sent by Mr Lenagan to the trustees of the IFL Computer Trust in which he stated that he was happy for the Jersey trustees of that trust to retain their shares and not to sell them on the flotation. She said: "Please let me have any comments and if you speak to Ian before I do I would be grateful if you could explain the letter to him and ask him to sign and return the letter."

208. On 10 July, there was a call between Ms Hoskin and Mr Gujadhur and, as recorded in the attendance note:

(1) "JSH went through with CG explaining to him the various queries he had on the Placing Agreement".

(2) The note records that: "He [Mr Gujadhur] had raised an outstanding query as to the good title to transfer the shares" as he had not seen the stock transfer forms in favour of the trustees. Ms Hoskins said she had just faxed over the new stock transfer forms to him and explained that the important point was that they were liable if they did not have

good title however all other liability was being taken on by the warrantors – Mr Haworth and Mr Lenagan.

(3) Subject to receiving a revised schedule with the share details, "the trustees are in agreement with [Ms Hoskins] executing the Placing Agreement under the Power of Attorney". The revised schedule was provided on 10 July and the documents were signed under power of attorney on 11 July.

209. In cross-examination:

(1) Ms Hoskin said that she had no independent recollection of this telephone call but she could explain the basis upon which she usually prepared an attendance note. On that basis she could confirm that, from the terms of the note, she must have discussed with Mr Gujadhur either the fax that was sent through to him or the actual Placing Agreement, just to run him through it again.

(2) Ms Hoskin also confirmed that she would "never exercise anything under a power of attorney" unless she was sure that the person understood what she was signing on their behalf. She said that when she had the call she would either have had the fax or the actual Placing Agreement to hand. In her view, there were only about three clauses in there that have any relevance to the trustees and it was not a complex document to go through or understand (for example, compared with share sale agreements, which are incredibly complicated):

> "I don't think it's going too far to say that I wouldn't execute it unless I was sure he understood it, but it's evident to me from this document that we must have had enough of a discussion for me to be clear that he did understand it. Otherwise, I would have gone on and explained it, because it's quite a short document to explain. I think he [Mr Wray] covered all the principal clauses, didn't he?..."

210. Mr Binks said that his understanding was that the PC trusts team's role as regards the Placing Agreement, was to make sure that the Mauritius trustees understood it and that it was satisfactory from the trustees' point of view and to advise them generally on it. He confirmed that he communicated with the trustees in exactly the same way as he would normally communicate with trustees.

211. On 10 July, Ms Hoskin sent Mr Lenagan an indemnity which she noted that she had been through with him in draft on Thursday. She explained that this was the document by which the trustees agreed to give him an indemnity, they had now approved it and the effect of it was that, if a claim was made against him under any of the warranties contained in the Placing Agreement, the trustees agreed to make a payment to him out of the relevant fund in the settlement so he could meet that liability.

212. Following the signing of the Placing Agreement:

(1) On 12 July, Mr Pentelow wrote to Ms Hoskin with an update on the likely number of shares to be sold on the floatation and the residue of shares likely to be left in Mr Lenagan's family trusts (as copied to Mr Binks, Mr Lenagan, Mr Wailing and Mr Garnett).

(2) On 20 July, Mr Wray wrote to Mr Gujadhur and, amongst other things, noted that the number of shares to be sold by the trustees of each trust should be known by 27 July and "as we have previously discussed this will depend on the number of available purchasers and the price". He said that should the take up of shares not be sufficient for both of Mr Lenagan's family trusts to immediately sell shares, the proposal was the IFL Trust would sell first followed by the S&A Trust and, if only a minimum number of shares were sold, then no shares would be sold by the S&A trust. He believed this was discussed with Mr Pentelow at an early stage but asked Mr Gujadhur to call him if he had any queries.

(3) On 28 July (the day after the Offer Price had been set) (a) PC confirmed the total number of shares to be sold by the trustees of each of the family trusts including those to be sold under the "greenshoe": "The Green Shoe options related to the option for [DKB] to sell additional shares. The offer has proved extremely attractive, and it is therefore likely that all of the Green Shoe option shares will be sold. The figures however cannot be finalised until next week", and (b) Mr Maslen informed Mr Gujadhur that Mr Wimble of Kleinwort Benson Private Bank ("**KBPB**") "will be contacting you with a view to making arrangements for the opening of bank accounts" for the family trusts and he provided Mr Wimble's contact details.

(4) On 1 August:

(a) Mr Gujadhur telephoned Mr Wray who recorded in his file note that he "updated Chandra in relation to the flotation saying that it had been highly successful and was probable that the Greenshoe options would have to be exercised and this would probably take place on 3 or 4 August".

(b) Mr Maslen set out in a note to Mr Binks and Mr Wray, Mr Gujadhur, Mr Pentelow and Mr Wimble some concerns with the proposals for dealing with the proceeds of sale of the shares. He noted that (a) it was intended that bank accounts in Jersey should be used, and (b) he thought "we are all agreed that it would not be advisable for the trustees to hold a UK bank account" but "Chandra, Nigel and John feel that funds should be remitted direct to Mauritius". He set out his views at some length and concluded that it did not seem essential for the funds to be remitted to Mauritius rather than to accounts in Jersey or that there would be a problem if they were remitted via Jersey but if there were any reservations they would need to be discussed and appropriate arrangements made on 2 August so that the sponsors could be given clear instructions. He added that he understood that Mr Wimble would speak to Mr Gujadhur on the morning of 2 August and "we will all need to liaise in order to address any reservations in relation to the tax planning".

(c) In the note of a call he had with Mr Gujadhur on that day, Mr Wray recorded that Mr Gujadhur said that he had received a letter from Mr Maslen which he thought indicated that a bank account should be set up in the UK but he was unclear whether this was appropriate and it was the trustees preference to remit the proceeds directly to the bank accounts in Mauritius. Mr Wray said that on the face of it this seemed logical and asked Mr Gujadhur to send him the letter so he could advise him further on the thinking behind it. Mr Wray then faxed Mr Haworth, Mr Maslen and Mr Pentelow noting that he understood that the settlors were considering instructing DKB to remit their trusts shares of the sales proceed to a Jersey bank account rather than to Mauritius and questioning whether it might be better to remit the sales proceeds direct to Mauritius.

(d) Mr Gujadhur sent a fax to Mr Maslen in which he said: "From a tax planning viewpoint, it is our view that funds from the disposal of shares should be remitted directly to the Trust account in Mauritius and it is not desirable at this stage to open a bank account in the UK".

(5) On 2 August, Mr Gujadhur informed Mr Wimble: "I have already advised Chris [Maslen] that from a tax point of view, all funds of the trusts should be routed initially through the trusts' accounts in Mauritius".

(6) On 8 August, in a fax sent at 6.45pm UK time (9.45pm Mauritius time) Mr Maslen informed Mr Gujadhur that:

> "In case the information has not reached you from any other quarter, the "greenshoe" was activated and as a result a further payment....was paid to BNP for each of the

above trusts....If you can secure the best overnight rate possible I believe Andrew Wimble of DKB will contact you shortly to suggest some deposit or investment terms for the funds in the three settlements".

(7) On 9 August:

(a) Mr Gujadhur wrote to Mr Wimble stating that he had "endeavoured to reach" him over the telephone yesterday and had secured an overnight interest rate of 5.3%. and that he sought advice on whether he could improve this return while guaranteeing no erosion of capital.

(b) He acknowledged Mr Maslen's fax of 8 August and said that he had secured an overnight rate of 5.3% with Banque National de Paris and advised that he had not managed to speak to Mr Wimble but had spoken to his colleague Iona Sinclair.

213. Around this time KBPB were in contact with Mr Lenagan regarding the provision of UK trustee services. On 10 August Mr Custis of KBPB wrote to Mr Lenagan referring to a meeting with him on the previous Tuesday to set out how he could be of assistance to him and his family regarding his trust structures.

Evidence on decision to merge and float

214. Mr Gujadhur said this in his witness statement as regards his general approach to the approval of the transactions:

> "As set out above, the purpose of the merger was to enable the flotation of the combined company, TeleWork, on the London Stock Exchange. When considering the restructuring I had therefore also been considering the flotation and whether it was in the interests of the beneficiaries and, for this purpose, had discussed [DKB's] valuation of TeleWork with Mr Wailing. From the information previously provided and the investigations that I carried out, I was already of the view that the flotation was clearly going to be in the interests of the beneficiaries, and I had conveyed this to [PC]."

215. He said that an important factor was that the flotation was taking place on the London Stock Exchange (one of the best exchanges in the world) and he thought he agreed to it because of the benefits to TeleWork and the shareholders. For example, a successful flotation would provide liquidity to the company and investors and, from what he thought Mr Wailing told him on the call, TeleWork could use the proceeds received to expand the company by way of acquisitions and, from the beneficiaries' perspective, the shares would be sold at an extremely attractive price so providing them with access to a large amount of funds. As regards the "greenshoe" he thought the more shares that could be sold the better the position would be for the beneficiaries so he was content to follow normal practice and give DKB the authority to decide if and when to sell the "greenshoe" shares.

216. At the hearing, as regards the reorganisation, Mr Gujadhur said:

> "we had reviewed the documents and we were satisfied subsequently and we made such enquiries as we considered necessary.....we talked to the CFO to understand the valuation method, why it was fair. It had to be fair to both set of beneficiaries, not just one set ..."

217. When it was put him that there was no way he was going to prevent this restructure and flotation going ahead because the major shareholders had all already agreed, he said:

> "...Well, it was a decision of the trustees in the end to take the call forward. I wasn't the only one. As I mentioned, there was a committee of directors. I'd like you to have a look at the CVs of Mr Eric Venpin and Robert Konfortion. They were both chartered accountants, highly qualified, highly experienced. I don't believe partners at Deloitte were rubber-stampers. I would refer you again.......please have a look at our fee note and the number of hours spent. Somewhere we must have been doing something to be spending so many hours."

218. When asked if he considered entering into the Placing Agreement as trustee of the three settlements to be in the best interests of the beneficiaries, he said:

> "Absolutely so, without doubt, given the price and ratio they were floating around, and it was an excellent opportunity for the beneficiaries.
>
> But we did make a lot of - before we took the final decision, a lot of enquiries had been made, a lot of information had been called for.....we were diligent in our duties…
>
> ….. once we heard multiples being talked about, you know, I have dealt with multiples 10, 15, 25, 50 times. This one was in three digits. Frankly, it became a no-brainer – to the trustees. The PE was so high, 100 plus, could have been 102, 103x. Magical figure……It had to...be sold with that multiple of 103 times. It was in the region of 103/105. I can't recall exactly, but it was a large P/E."

219. It was put to Mr Gujadhur that, in his witness statement, he said that "options were not something we used in business transactions and whilst I had covered the different types of options in my studies then some years earlier, I wasn't familiar with them at the time, hence the confusion in my email." He suggested that he meant something different in referring to an option in his witness statement than a "greenshoe":

> "A greenshoe is not an option. Maybe I'm using the wrong term. I'm using it loosely. A greenshoe is when an underwriter agrees to underwrite a scrip and if there's a demand for that scrip, he would be given the option – we're not talking about a call or put option here; we are talking about "option" in a wider definition. He would be given the right or the option to put more shares on the market. That's what I meant by "option" here. I wasn't talking about a trading option. I'm sorry if I made that confusion. I was not talking about trading option. The option to exercise the greenshoe or not, it depended on the market…..
>
> It was one of the important matters, yes. That was because the underwriter would have insisted on having that option if there was demand for the shares to be put on the market."

220. When asked at what stage he agreed to the "greenshoe", he said he did not recall but he thought that:

> "it would have been in the contract with the underwriter that it would have discretion to exercise that right. I'm being careful not to use the word "option" in case it creates more confusion. It would have a discretion to put more shares of the company on the market to investors."

221. When asked what there was for him to do about the "greenshoe", he said:

> "As I said, in the underwriting contract it could have been there already that if there was demand for it: Mr Underwriter, which was the bank at the time, DKB I believe, please go ahead and put the shares up. It would have been money in the pocket of the shareholders, of the beneficiaries…I had signed the contract with the underwriter. I don't recall asking them to exercise that option….It was part of the contract with the underwriter that they have a discretion to trigger the greenshoe option should there be a demand from the market. I think that was standard practice in those days…We had given him the discretion. Therefore, there was nothing for me to do. If I give you the discretion to exercise it and you exercise it, I don't have anything to do. We have given you the power."

222. When asked about the decision to appoint KBPB as investment adviser, Mr Gujadhur said:

> "Well, they were a reputable bank. They were also the underwriters and it made a lot of sense for the trustees to appoint them, and we did so. I tried desperately to get hold of him [Mr Wimble] on several occasions, as I say here, and he was tardy coming back."

223. It was put to him that the fact that they were the underwriters in a corporate flotation provides no reason whatsoever to appoint them as investment advisors for a very large trust fund. He said:

> "No, it's a big bank. They had plenty of strings to the bow, a bit like Deloitte who - we were tax advisors, we're auditors, we did offshore work. So they were big. They were offering these services."

224. Mr Maslen said that the decision about how the proceeds were to be invested was made by Mr Gujadhur and confirmed that he did not put Mr Wimble in touch with Mr Gujadhur. He did not know how the suggestion to make contact with Mr Wimble first came about and whether it was made by Mr Haworth or DKB. I note that Mr Wimble was in touch with Mr Haworth on 12 July regarding personal investment advice and his colleague was in touch with Mr Lenagan in August.

Comments on the evidence

225. I accept that Mr Gujadhur was aware of points of relevance to the Mauritius trustees in the Placing Agreement, that he understood those points and that the Mauritius trustees decided to enter into the Placing Agreement for the reasons he set out. Again, there is no reason to doubt that he/DTOS took their role, of administering the tax plan in accordance with the UK settlor's wishes and expectations, seriously and were reasonably diligent in carrying it out, as the UK settlors and their advisors expected them to be. I note, however, that whilst Mr Gujadhur referred to making a lot of enquiries and calling for a lot of information before the final decision was taken by the Mauritius trustees to enter into the Placing Agreement, in fact, the evidence establishes that he made only the telephone calls to Mr Wailing and to DKB. There is no written evidence and none of the other witnesses suggested that the Mauritius trustees asked for any other information, whether in support of what Mr Gujadhur was told in these calls or otherwise. As set out above, Mr Wailing said he had no contact with Mr Gujadhur other than on the call of 27 June.

226. It is likely that Mr Haworth and/or Mr Lenagan suggested that KBPB should be appointed as investment adviser given that they were receiving personal investment advice from them at the time or in the course of engaging them to do so. I accept that the Mauritius trustees considered that this made sense for the reasons Mr Gujadhur gave but note that they did not appear to have given any consideration to any alternative or to have made their own investigations into or made advance contact with the relevant persons at KBPB. I note that Mr Gujadhur raised the concern that the monies should be paid direct to the bank account in Mauritius.

Section 5 - Appointments by Mauritius Trustees

227. The Mauritius trustees were asked to make, and did make, various appointments of shares and cash from the family trusts into discretionary and other funds. As the Mauritius trustees were aware the reason for many of the appointments was to address a tax concern. Mr Pentelow agreed that, as leading counsel advised that this was a good thing for the tax planning, clearly the expectation was that the Mauritius trustees would carry out those appointments. Mr Maslen agreed that the various appointments were suggested to the Mauritius trustees in order to ensure that there was taxable income in Mauritius and that was brought about at the request from the UK.

228. Mr Maslen was asked why he did not just leave this issue to the Mauritius trustees to sort out. He said that "essentially, we did....they advised on liability to tax in Mauritius. They....were in turn advised at some level, although I do not have details, by Maître George Robert...as far as.....we, were concerned, the Mauritius trustees were the experts on Mauritius tax legislation and compliance."

229. On 28 June, in a fax copied to Mr Pentelow, Mr Binks informed Mr Lenagan that it was hoped that the appointment of the Mauritius trustees would be completed that day (the only outstanding point was the question of fees which Mike Wailing was sorting out) and then "we will deal with the appointment of part of the trust funds on discretionary trusts". He explained

this "is necessary to ensure that there is a liability to tax in Mauritius", noted that Mr Lenagan had already seen copies of deeds of appointment settled by UK Counsel (but he enclosed further copies), said he had altered them to omit his former wife as a potential beneficiary under the discretionary trusts and asked for confirmation of the following.:

> "1. The shares in [Workplace] to be appointed. Lindsay Pentelow's briefing notes indicate that 1% of each trust fund should be appointed on discretionary trusts which would imply that four shares from each trust should be appointed....
>
> 2. Whether any cash is to be added to the settlement so that this can be invested to produce a tax liability in Mauritius prior to 30 June. An immediate decision needs to be taken on this so that funds can be transferred to the trustees in Mauritius and invested by them to produce an interest receipt no later than 30 June."
>
> I look forward to receiving your confirmation on the above points as a matter of urgency so that the necessary appointments can be completed."

230. On 29 June, Mr Pentelow responded to a query from Mr Lenagan as to whether, following the floatation, capital appointments could be made to UK beneficiaries prior to the Mauritius trustees retiring, without prejudicing the planning. He said:

> "We had left the point slightly open when we discussed it with Kevin Prosser. However, I have now checked it out and discussed it with him and the advice is that capital payments could be made to beneficiaries whilst the trustees are resident in Mauritius without prejudicing or impairing the UK tax planning
>
> Clearly when we get to that position we will need to go through the various formalities, Deeds of Appointment etc, but that is the position in principle."

231. It was put to Mr Pentelow that, by the time he sent this letter, he knew that getting the Mauritius trustees to make any such appointment, should Mr Lenagan want them to do so would be a mere formality. He said: "Absolutely not. Mr Lenagan, like any settlor, can make requests of the trustees, but it is entirely up to the trustees to decide whether to take those actions". In his reference to "going through various formalities", he was simply stating the obvious; capital appointments could not be made without the legal formalities being undertaken.

Appointments from GH Trust

232. On 30 June, 2,000 shares in Teleware and £29,000 were appointed to a sub-fund within the GH trust to be held on discretionary trusts for the benefit of Mr Haworth and his family:

(1) On 28 June, Mr Binks wrote to the Mauritian trustees and enclosed a deed of appointment settled by UK Counsel:

(a) He explained that (i) the trustees had power under the discretionary trusts to apply income for the benefit of the beneficiaries and to accumulate income, (ii) the appointment would give the trustees flexibility to apply income for the benefit of the settlor's family, (iii) his understanding was that the appointment would give rise to a tax liability in Mauritius in respect of income which is not distributed, (iv) in connection with the tax planning, the intention was that the appointment should be completed and some income generated in Mauritius prior to 30 June so that there would be a tax liability during the current year.

(b) He also advised on the UK inheritance tax position following the appointment.

(c) He then asked "if the Trustees would please consider the appointment and, if they are happy with the proposal and the wording, please execute it as soon as possible" and noted that the decision should be set out in a minute to record that the trustees had considered the appointment, regarded it as in the interests of the beneficiaries and had resolved to execute it.

(2) On 30 June, Mr Gujadhur sent a fax confirming that the deed had been executed and that the relevant funds had been placed on fixed deposit with a specific condition that interest to 30 June must be credited to the account.

233. On 11 July, 66,000 shares in TeleWork were appointed to a sub-fund within the GH Trust to be held on discretionary trusts for the benefit of the children and remoter issue of Mr Haworth:

(1) On 30 June, Mr Binks informed Mr Gujadhur that, (a) as part of the settlor's inheritance tax planning, the settlor wished the trustees to consider, prior to flotation, an appointment of the shares for the benefit of his adult children to make substantial provision for them, and (b) there was also a major tax benefit in that it would avoid inheritance tax on the value of the shares if the settlor lived for seven years and the appointment conferred wide powers of appointment on the trustees which "will allow flexibility in the future and so permit the transfer of the appointed assets to new trusts". He asked if Mr Gujadhur would consider the deed and let him know if there were any points which he wished to clarify and if he could confirm that the proposed appointment would not give rise to any tax liabilities in Mauritius.

(2) On 11 July, Mr Binks informed Mr Gujadhur that the settlor had requested that appointment be completed immediately and asked for the deed to be executed on that day and for confirmation that the appointment would not give rise to any tax liabilities in Mauritius.

(3) On 12 July, the deed was faxed by Mr Gujadhur to PC and he made the requested confirmation.

234. On 27 July, the 66,000 shares which were appointed into a sub-fund as set out above were appointed in equal amounts to two new settlements, the G R Haworth 2000/1 Settlement and the G R Haworth 2000/2 Settlement (which had been settled by Mr Haworth on the 13 and 14 July respectively). Mr Binks had explained the rationale for this in a fax of 14 July and on 20 July Mr Wray chased for approval. In the covering fax attaching the signed documents and minutes of the meeting of the trustees, Mr Gujadhur stated that the trustees had "favourably considered the wishes of the Settlor" and had exercised the powers conferred by the deed of appointment dated 11 July to appoint the shares to the new settlements and he confirmed that this would not give rise to any tax liabilities in Mauritius.

235. On 30 June, Mr Binks sent all the documentation relating to the above appointments to Mr Haworth and summarised their effect and his understanding of the timing and asked if they could speak in order to confirm the timing.

236. On 25 July, Ms Hoskin and Mr Maslen discussed how many shares were to be subject to the appointments as shown in a note of the call. It is recorded (amongst other matters) that Mr Maslen explained that it was a requirement of DKB that Mr Haworth retained a 15% shareholding after the placing and that was only possible if more than 66,000 shares were retained to be transferred to the new settlements so that at least this number should be available for transfer. Ms Hoskin explained that there was going to be a supplemental prospectus but she did not anticipate that a fundamental change was likely to be made and it was agreed that it would be sensible to involve Mr Maslen in discussions over the figures should this become necessary.

Appointments from S&A Trusts

237. On 5 July, 4 shares in Workplace and £1,056.40 were appointed from the S&A Trust to be held for the benefit of the children and remoter issue of Mr Lenagan and their respective spouses:

(1) In a fax of 3 July (as copied to Mr Lenagan and Mr Pentelow), Mr Binks said that the deed of appointment had been settled by UK Counsel and explained the appointment to Mr Gujadhur as follows:

> "Under the discretionary trusts the Trustees will have power to apply income for the benefit of the beneficiaries and also will have power to accumulate income during the accumulation period (21 years from the date of the settlement).
>
> Under the present terms of the Settlement the Settlor's two adult sons have interest in possession and the appointment will give the Trustees flexibility to apply income for the benefit of other members of the Settlor's family. It will also allow the Trustees to accumulate income and reinvest it as part of the capital of the Trust Fund.
>
> We also understand that the appointment will give rise to a tax liability in Mauritius in respect of income which is not distributed, and this will be important in the context of the UK CGT status of the trust."

He asked for confirmation that the appointment would not give rise to other tax liabilities in Mauritius and set out the inheritance tax position. He asked for the Mauritius trustees to consider the appointment and, "if they are happy with the proposal and the wording", to execute is as soon as possible. He noted that a bonus issue of shares in Workplace was scheduled to take place on 6 July and the deed should be completed before that date; otherwise the number of shares appointed would need to be adjusted to reflect the bonus issue. He added that (a) a minute should be made to record that the trustees had considered the appointment, regard it to be in the interest of the beneficiaries and had resolved to execute it, and (b) the cash when received from Jersey should be placed on deposit so that interest was received during July and he asked for confirmation that Mr Gujadhur would make arrangements for this.

(2) On 6 July, Mr Gujadhur raised questions about whether the discretionary fund created a new settlement and telephoned Mr Wray to discuss this. The attendance note Mr Wray made of the call records that Mr Gujadhur was satisfied with the responses to his queries and dated the deed. Mr Wray followed up with a fax setting out the advice.

238. On 1 August, 26,648 shares in Telework were appointed from the S& A Trust to the IFL 2000 S&A Trust, a trust settled by Mr Lenagan on 27 July.

(1) On 3 July 2000 Mr Binks wrote to Mr Gujadhur (as copied to Mr Lenagan and Mr Pentelow) to explain this appointment as follows:

> "The Settlor wishes the Trustees to consider, prior to floatation, an appointment of...shares to a new UK interests in Possession Settlement...for the benefit of his adult sons...*The number of shares represents the balance of the Trust's holding which will not be sold on floatation and has been calculated on the basis that the appointment will be completed after the bonus issue which is being made as part of the pre-float reorganisation.*
>
> The appointment will confer the substantial benefit of rebasing the shares for [CGT]...purposes provided that the appointment is completed whilst the Settlement is resident in Mauritius assuming that the double tax treaty planning works. If the planning does not work it should be possible to defer CGT on the appointment by claiming hold-over relief provided that the appointment is completed before the shares are admitted to the Stock Exchange.
>
> The documents have been settled by Counsel and we are attaching copies in draft together with a copy of our instructions to Counsel and his Opinion for your consideration....
>
> We are awaiting instructions from Ian Lenagan on the identity of the Trustees of the new 2000 Settlement Trustees....

In the meantime we should be grateful if the Trustees would please consider the proposal and let us know if there are any points which they wish to clarify. We should also be grateful if you could please confirm that the proposed appointments will not give rise to any tax liability in Mauritius."

(2) On 19 July, Mr Binks wrote to Mr Gujadhur with an explanation of the reason for this appointment. He again noted that Mr Lenagan was yet to select trustees of the new settlement and that:

> "You will see that the 2000 Settlement confers interests in possession for [Mr Lenagan's sons'] benefit with gifts over to their respective children
>
> ...the Settlor would like the Trustees to consider exercising the powers...to transfer shares in Telework Group plc to the 2000 Settlement [and he enclosed draft documents.]
>
> *The number of shares to be transferred...will depend on the number of shares sold under the Placing Agreement, the intention being that the Trustees' residual holding (ie the shares not sold on the flotation) should be transferred to the new Settlement to rebase the shares in the hands of the Transferee Trustees.* [He explained the CGT position as in his earlier letter and noted that the trustees of the new settlement would provide indemnities to the existing trustees and the Jersey trustees]....
>
> The shares in Teleware are due to be admitted to the Stock Exchange on 3 August and the intention is that the appointment to the new Trust should be completed and dated on 2 August. *We will advise you in due course of the number of shares to be included in the appointment."*

He asked the Mauritius trustees to consider the documentation and confirm that they were happy with the proposals and that the appointment would not give rise to any tax liabilities in Mauritius and noted that the trustees should prepare a minute to record their decision.

(3) On 20 July, Mr Gujadhur asked Mr Binks if he could advise if the Mauritius trustees would be acting within their powers when executing the proposed documents for the new settlement. On 24 July Mr Binks confirmed they will be acting within their powers.

(4) On 26 July, Mr Wray wrote to Mr Gujadhur noting that he would recall that "*once it was known how many shares are being sold by the [S&A] trust any remaining shares are to be appointed over into a new 2000 S&A Trust*". He said it was intended that this will happen on 2 August and asked him to sign the documents so it could be dated and the number of shares included once this information is available. There was a call between Mr Wray and Mr Gujadhur on 1 August 2000 regarding the number of shares to be appointed.

Appointments from the IFL Trust

239. On 5 July, 4 shares in Workplace and £1,000.71 were appointed from the IFL Trust to be held in a sub-fund on discretionary trusts for the children and remoter issue of Mr Lenagan. Following the initial request and explanation from Mr Binks on 3 July (essentially in the same terms as the letter referred to in 237(1) above), on 6 July Mr Gujadhur raised with Mr Wray questions about whether the discretionary fund created a new settlement (on the same call as referred to above).

240. On 6 July, the Mauritius trustees added Mr Wailing and his family to the class of beneficiaries of the IFL Trust and appointed 25,000 shares in Workplace to be held as part of a discretionary sub-fund for their benefit. The purpose of this appointment was, as Mr Wailing explained, to satisfy a moral obligation Mr Lenagan owed to him:

(1) On 21 June, Mr Lenagan wrote to Mr Wailing explaining the proposal.

(2) On 3 July, Mr Binks sent Mr Gujadhur a fax in which he said that the settlor would like the trustees to consider appointing shares for the benefit of Mr Wailing and his family and:

> "*The number of shares has been calculated on the basis that the appointment will be completed after the bonus issue which is scheduled for this week as part of the pre-float reorganisation. It is intended that the shares will be sold along with the remainder of the Trust's holding on the floatation*.
>
> This is in part fulfilment of the Settlor's personal obligations to Mike Wailing and I am enclosing a copy of a draft letter from the Settlor to Mr Wailing setting out the background to this.....
>
> [He enclosed the deed as settled by UK Counsel together with a copy of "our Instructions to Counsel and his Opinion".] I should be grateful if the Trustees would please consider the proposal and let me know if they have any queries
>
> We are awaiting instructions on the class of beneficiaries for the purposes of the new trusts and I would let you have a final copy of the deed for execution when I have instructions on this point. In the meantime I should be grateful if you would please confirm that the appointment will not give rise to any tax liabilities in Mauritius."

(3) This deed of appointment was also discussed on the call of 6 July between Mr Gujadhur and Mr Wray, following which Mr Wray sent a further explanation to Mr Gujadhur.

241. Mr Binks and Ms Hoskin had correspondence with Mr Lenagan and Mr Pentelow as regards these appointments as follows:

(1) On 3 July, Mr Binks wrote to Mr Lenagan enclosing "for his information" a copy of faxes he had sent to the Mauritius trustees "*to instruct them to complete*" the deeds of appointment on discretionary trusts. He noted that he had asked the trustees to complete the appointment before 6 July when the bonus issue of shares in Workplace was scheduled to take place."

(2) On 4 July, Mr Binks notified Mr Lenagan (in a letter copied to Mr Pentelow) that Counsel had settled the documents dealing with the relevant appointments and he enclosed copies of the instructions to UK Counsel, his opinion and the documents and letters to the Mauritius trustees briefing them on the proposals. He said that:

> "*We are therefore now in a position to proceed with the various changes and I have discussed the timing with Lindsay Pentelow and our recommendation is that the documentation should be completed as follows....*
>
> 1. Appointments of trusts in favour of Mike Wailing ([IFL Trust]) and IFL 2000 Trust - after the bonus issue of shares in [Workplace] and before 27 July.
>
> 2. Transfer of shares to the new UK interest in possession settlement for [Mr Lenagan's sons] from the [S&A Trust] – between 27 July and the admission of the shares to the Stock Exchange. By leaving the transfer until after 27 July we should minimise any discount on the valuation of the shares which will maximise the tax saving assuming the double tax treaty planning is effective."

He added that before circulating the documents for signature, he needed answers to questions he then set out as regards identity of the trustees and of the beneficiaries of the new UK settlements. He also wrote to Mr Wailing in similar terms.

(3) On 4 July, Mr Binks wrote to Mr Pentelow enclosing copies of the letters he had sent to Mr Lenagan, Mr Wailing and the Mauritius trustees regarding the appointments in favour of Mr Wailing and the transfer of shares to the new UK settlement for Mr Lenagan's sons from the S&A Trust noting that he had suggested a timetable to Mr Lenagan and asking for confirmation Mr Pentelow was happy with the proposal.

(4) On 5 July, Mr Binks informed Mr Pentelow (in a letter copied to Mr Lenagan and Mr Wailing) that the reason for the suggested timing as regards Mr Wailing was simply convenience having regard to the logistics of completing the documentation with the Mauritius trustees and noted that he required instructions from Mr Wailing on the beneficiaries and trustees. He said he also still needed Mr Prosser's confirmation of the position with respect to the fiduciary powers Mr Lenagan held in respect of the new UK settlement which he had been chasing.

(5) On 7 July, Ms Hoskin wrote to Mr Pentelow regarding the "Ian Lenagan 2000 Settlement and the Appointment for Mike Wailing".

(6) On 11 July, Ms Hoskin wrote to Mr Pentelow asking for "confirmation of the outstanding points which needed to be dealt with prior to the next stage in the trust planning". She said that she understood that the intention was that the "transfer from Ian Lenagan's existing [S&A Trust] to the new 2000 S&A Settlement should occur on 2 August". She asked for the following:

> (a) Confirmation from Mr Lenagan of the trustees of the "S&A 2000 Settlement" noting that:
>
> > "We have drafted the settlement in the basis that this would not include Ian Lenagan as in our opinion it is preferable if he is not a trustee. This avoids any question of indirect benefit to him, for example, from his remuneration as a director of the company. Please could you therefore let us have details of two or three individuals who are to be the trustees."
>
> (b) Confirmation from Mr Lenagan that "the number of shares to be transferred to the new settlement is 51,666 as I believe has previously been discussed between you and Nigel".
>
> (c) Details from Mr Wailing as to who should be appointed as a trustee to act together with him as trustee of the 2000 Settlement: "We have previously explained to Mike that it would be preferable if it was not his wife but a more independent person..."

(7) On 12 July, Mr Binks wrote to Mr Lenagan regarding appointments from the S&A Trust and said:

> "*The next stage in the reorganisation of the above Settlement is to complete the transfer of shares to the new UK Settlement for [Mr Lenagan's sons].*
>
> I understand that it has been agreed that the transfer should take place on 2 August....
>
> The transfer involves the completion of the following documents....
>
> To ensure that all the documents are executed by 2 August I should like to collect the necessary signatures now but before doing so I need your instructions on the Trustees for the new UK Settlement.
>
> *There must be a minimum of two Trustees and from the tax angle it would be safer if you were not a Trustee.*
>
> We will also need instructions on the number of shares to be transferred to the new Settlement and I should be grateful if you would please advise me of the time scale for a decision on this so that I can sort out the completion arrangements with the Trustees. The number of shares will need to be specified in the Deed of Appointment when it is completed on 2 August."

(8) On 13 July, Mr Pentelow wrote to Mr Lenagan and Mr Wailing regarding what should happen to any residue of shares held in Mr Lenagan's family trusts if they were not sold on the floatation. He noted that the present minimum/maximum number of shares to be sold is very broad brush but it gave rise to a number of issues. His comments include that the "overwhelming likelihood" was that all of the shares held by the IFL

Trust and a substantial proportion of the shares held by the S &A Trust would be sold, "which is as we have planned" and the only question was the number of shares which represent the residue and which will be transferred into the new trust for Mr Lenagan's children and the figures should be known by 27 July. However, he wanted to plan for the possibility that the number of shares to be sold may be nearer the "minimum" and set out some options. He noted that the other issue which would arise if the S&A Trust did not in the end sell any of its shares would be the need to ensure that one way or another those trustees had some taxable income in Mauritius.

242. When it was put to Mr Wailing that he expected the trustees to make those appointments in accordance with what he had agreed with Mr Pentelow and Mr Lenagan, he said that he had no reason to believe otherwise. It was put to him that he would have been very disappointed and surprised had the trustees not done so. He said: "I guess I would, yes.".

243. Mr Gujadhur said that he did not consider any of the requests to be instructions:

> "Pinsent Curtis as the Trustees' advisors, on each occasion wrote to me setting out the proposal, but made it clear I was being asked to consider the settlors' wishes. This was not however an instruction and I did not regard it as such."

Evidence of Mr Binks

244. Mr Binks was taken to his fax to Mr Gujadhur of 28 June relating to the GH Trust. He agreed that the real reason for the relevant appointment was the tax planning, but the appointment did have the other benefit of providing a bit of flexibility in the trust. It was put to Mr Binks that in this fax he was telling the trustees (a) matters that were completely irrelevant to them (such as the ability to accumulate income and reinvest it as part of the capital of the trust fund) given they were going to retire within a short period, and (b) which did not reflect the real reason they were asked to make the appointments. He said that he was just explaining what the deed did and, if the float had not gone ahead, the Mauritius trustees might have continued as a trustee and he thought:

> "all these appointments were justified on their merits. There....were good reasons for making them all and quite a lot of the good reasons were to do with the tax planning, but there were also other good reasons, for example the appointment on Mr Haworth's settlement in favour of his children."

245. It was put to Mr Binks that it is apparent from the correspondence in relation to the appointments made from Mr Lenagan's family trusts (see in particular the passages highlighted above) that the decision about which family trusts would sell shares on the flotation and what percentage of their shareholdings were to be sold were decisions made in the UK that Mr Gujadhur was told of. He said that he was not involved in the corporate side of things but, in the relevant correspondence, he was not communicating what will and will not be sold on the floatation:

(1) He noted that there was a likelihood that a portion of the shares owned by the S&A Trust would not be sold on the flotation and "the actual number of shares would depend on how the flotation went and how the greenshoe went and all that". The correspondence was concerned with an exercise "to re-base" the shares that were not going to be sold for CGT purposes.

(2) But the number of shares was not fixed in stone and the final decision was made on the number of shares probably on 2 August, immediately prior to the flotation but at this point the Placing Agreement had yet to be agreed and there was "a long way to go before we knew how the shares would be allocated between the trusts and the other shareholders". So:

> "...These documents were preparatory to cover the position if we found we were left with some shares which weren't being sold from this settlement…The actual

> allocation of the shares would have been something which Mr Gujadhur and trustees would have agreed with the other shareholders, presumably under the Placing Agreement…"

(3) He made a similar point about the appointment made to benefit Mr Wailing. He noted that it was intended that these shares would be sold on the flotation but it may well have been that the sale of shares in Mr Lenagan's portion of the trust might have been reduced if there was a problem on the allocation of the sale shares between the various vendor shareholders.

(4) He added that Mr Gujadhur had to sign up to the Placing Agreement and, whilst Mr Binks did not know precisely how such agreements work, he thought there would no doubt have been an allocation of shares and Mr Gujadhur would have decided on that in that he would have agreed or not with the allocation.

246. Mr Binks was questioned in cross-examination about the scope of his professional relationship with Mr Lenagan and with the Mauritius trustees in the light of the correspondence set out above in which he had corresponded with Mr Lenagan direct:

(1) Mr Binks was adamant that Mr Lenagan was not his client and said that he wrote direct to Mr Lenagan:

> "Because I wanted to make sure that the references to the shares were correct and that the number of shares to go into this discretionary fund was in accordance with his wishes… Well, my letter to the trustees will say that Mr Lenagan wants the trustees to consider making an appointment of these shares.... onto the discretionary trust…..I just wanted to double-check that I wasn't making a mess of it."

(2) When asked why he wrote direct to Mr Lenagan rather than to Mr Pentelow, he noted that he copied Mr Pentelow in, Mr Lenagan clearly wanted to be informed of what the trustees were proposing to do, and, as he was the settlor of the relevant trusts, he did not have a problem in informing him, particularly as the proposal to the trustees was prefaced on the fact that Mr Lenagan wanted the trustees to enter into the particular transaction. It was not because Mr Lenagan was his de facto client.

(3) He said that the reference in his fax to Mr Lenagan of 3 July to him having written to the Mauritius trustees to "instruct" them to complete the relevant documents was "a slip of the pen" because in fact he was asking the trustees to consider the appointment and he was just trying to tell Mr Lenagan what had taken place. He added that he listed the shares and the cash sum to make sure that somewhere along the line there had not been a slip up and said: "No, I never instructed the trustees to complete - I asked them to consider making the appointment. I wasn't in a position to instruct the trustees to do anything. They were my clients". He concluded that using the word "instruct" was a mistake. It was not what he meant.

(4) He said in his fax of 4 July he wrote to Mr Lenagan as advisor to the Mauritius trustees and he was "just keeping him informed":

> "…. I've never met Mr Lenagan. I've never acted for him before. I had no involvement at all. I wanted to make sure that…these were very important transactions. I wanted to make sure that he was au fait. I was writing to the trustees expressing his wishes that the trustees should make these appointments and I was making sure that he and Mr Pentelow knew what I was doing and that I hadn't - that somewhere along the line - we were dealing with these things under immense pressure. I wanted to make sure that we were getting it right."

(5) He said that he was wearing his "advisor to the trustees' hat" when, in his fax of 4 July, he made a recommendation on timing of the relevant appointments and did not agree that he was giving tax advice to Mr Lenagan about timing. Rather, as advisor to the trustees, it was his duty to make sure that "what we did would be effective for the

beneficiaries and hopefully produce the best possible result". He described this as just a summary of the conclusions he and Mr Pentelow came to as a joint recommendation on timing; his recommendation was for the trustees and Mr Pentelow's recommendation was for Mr Lenagan. He repeated that he did not advise Mr Lenagan on these trust arrangements or on the transaction generally.

(6) He said that he informed Mr Lenagan on 12 July of "the next stage in the reorganisation" in his capacity as an advisor to the trustees; this related to a transfer of shares to a new UK trust and so the Mauritius trustees needed to know who the trustees of the new trust were. He agreed that in stating to Mr Lenagan that it would be safer if he was not a trustee that he was not giving advice to the Mauritius trustees but said that he was just trying to be helpful. He noted that the fax was copied to Mr Pentelow and said that he thought he was aware of the point, namely: "We needed to know who the trustees of the pilot settlement were going to be and I was just flagging up that it might not be a good idea for Mr Lenagan to be appointed as a trustee. I was just trying to be helpful".

(7) In re-examination, Mr Binks said that the matters he asked Mr Lenagan and Mr Wailing about were ones which the Mauritius trustees needed clarity on in order to carry out the proposed appointments (such as the identity of the trustees of the new settlements and how the beneficial class should be defined as regards the appointment for Mr Wailing's benefit). He needed to get these things sorted out because of the timescale: "We had to do that appointment by 2 August. Otherwise, it would have been too late."

247. In cross examination it was put to Mr Binks that there was no doubt that if the Mauritius trustees were asked to make certain appointments to the beneficiaries that they would do so. He said:

> "the Mauritian trustees were acting independently as independent trustees and whilst requests could be made of them, that is all that could be done. We might have a reasonable expectation that, if those requests were reasonable, then the Mauritian trustees would accede to them, but the Mauritian trustees, in my experience, throughout the transaction were acting independently. They were very independently minded. They were very experienced and they were very professional…. on the basis of my experience throughout the transaction..."

248. He commented that the fact that Mr Gujadhur was the one who raised the issue of "different persons" for the first time when nobody else had raised that suggests to me that "they were highly competent, he was highly competent and highly professional".

249. Mr Binks was shown a letter from Mr Wray to Mr Haworth in which he said that he did not expect the Mauritius trustees to want any amendment to certain documents. He agreed that the Mauritius trustees did not in fact require amendment of any documents that were provided to them but noted that the documents were very carefully drafted and that the bulk of them were settled by UK Counsel. The documents Mr Wray referred to were carefully drafted and his expectation was they were in order but, if they were not, the trustees would no doubt have queried them and they did ask questions about some of the deeds of appointment.

Comments on evidence

250. HMRC submitted that the above evidence demonstrates that the UK settlors and the UK advisors decided how many shares were to be sold on the flotation. In my view, that is not entirely apparent from the correspondence relating to the appointments. As Mr Binks said, the correspondence demonstrates that the UK advisors were working on how to deal with any residue of shares which were not sold, as that residue was to be determined under the processes relating to the flotation. In any event, it is clear from the evidence set out above that Mr Lenagan and Mr Haworth decided which family trusts would sell shares on the flotation and in what desired proportions albeit that the precise number of shares to be sold by each family

trusts was then set under the processes relating to the flotation as provided for in the Placing Agreement (see section 1 and, in particular, [52], [85] and [86]). The Mauritius trustees, therefore, formally agreed to this, in effect, when they signed the Placing Agreement but it is plain that they had no involvement in any discussions on this whether with the settlors, their advisors or DKB.

251. As already noted, Mr Binks was consistent in his evidence, and I accept, that he did not consider the settlors to be his clients in the sense that he did not think he adopted any professional responsibility towards them as regards the success of the tax plan. However, this does not detract from the fact that, overall, the evidence relating to the appointments reinforces the view that, notwithstanding that the PC trusts team were not formally engaged by the settlors, in practice, they had something of a dual role. Throughout the appointments exercise their focus appears to have been on furthering the objectives of the settlors in that they (a) acted on their/their advisers' direction in drafting the relevant documents and settling them with UK Counsel without any prior consultation with the Mauritius trustees; in doing so they can only have been acting on behalf of the settlors given there is no suggestion UK Counsel was engaged by or on behalf of the Mauritius trustees, and (b) provided their advice and input into matters affecting the plan/the settlors, sometimes at the request of the settlors/their advisors and sometimes of their own initiative. I note that:

(1) The PC trust team took these actions in the knowledge that it was their job to explain the settlors' wishes and expectations to the Mauritius trustees, provide them with the documentation and seek their approval and answer any queries (as they duly did) on the basis that the relevant actions could not take place without the Mauritius trustees approving them.

(2) However, in common with the settlors and the other UK advisers, they did not appear to regard it as necessary or important to keep the Mauritius trustees in the loop as regards the overall plan or involve them in discussions as regards the appointments until matters were largely settled amongst the UK persons and the relevant documents were approved by UK Counsel.

(3) The tone of the correspondence (such as the references to having instructions from the settlors) and manner of their operation (such as writing direct to the settlors to confirm their wishes or provide advice) plainly indicates that they regarded (a) the settlors/their advisers as setting the direction of and timetable for the plan, and (b) their own role as being, at least in part, to contribute towards bringing to a successful conclusion what they seemed to view as a common and desirable goal of achieving the settlors' objectives. In doing so, they were plainly acting on the basis that the Mauritius trustees would administer the plan as they were expected to do, given that was the very purpose of their appointment as trustees and the working assumption was that it was in the interests of the beneficiaries of the family trusts for the Mauritius trustees to seek to achieve the CGT saving.

(4) In that context, it is notable that PC trusts team did not advise the Mauritius trustees on the merits of the plan from a UK tax perspective (and Mr Binks emphasised that he did not assume any responsibility to the settlors as regards the success of the plan), the Mauritius trustees did not seek any independent advice on that and no-one appears to have expected them to do so.

252. The Mauritius trustees appeared to accept that they should make the appointments, on the basis of the brief explanations provided by the PC trusts team, without asking any questions except that they raised a couple of queries, in effect, on the mechanics in the sense of checking that it was within their powers to do what they were asked to do. Their role was, therefore, essentially passive in that they reacted, as and when they were approached, to approve

documents/appointments and were seemingly content simply to fall in with the plan, as formulated and shaped by those in the UK on an on-going basis, without having any active engagement in that process except the opportunity, after the UK advisors and UK Counsel were content with the proposal and related documents, to raise queries.

253. I appreciate that the Mauritius trustees were reliant on advice from the UK as regards the English law issues and UK tax matters under consideration when deciding upon the nature and form of the appointments. However, trustees who are actively engaged in managing a trust may be expected to take a pro-active interest in the taking of advice and formulation of each aspect of a plan, such as this, which they are plainly expected to implement. Like the UK advisers, the Mauritius trustees seemed to view their role as being confined to administering the plan by simply checking it was within their powers to do what was asked of them on the on-going assumption that, overall, it was in the interests of the beneficiaries for them to implement the plan.

Section 6 – Mauritius tax advice and retirement of the Mauritius trustees

Correspondence in June regarding Mauritius tax advice

254. In late June and then in August, Mr Pentelow took steps to obtain advice on Mauritian tax law:

(1) On 26 June, Mr Binks informed Mr Gujadhur (in a fax which was copied to Mr Pentelow) that Counsel's advice had been obtained that in Mauritius the taxable person is the trust and not the persons who are trustees. He said that this was surprising and an important point and asked Mr Gujadhur to ask the Mauritius advisers to confirm that the trustees would be liable to tax, the "trust itself not being a legal person and so having no liability".

(2) On 27 June, Mr Pentelow wrote to counsel in Mauritius, Mr Iqbal Rajahbalee (as copied to the settlors, Mr Wailing, Mr Maslen and Mr Binks), as regards the "different persons" issue. Mr Pentelow said at the hearing it was his responsibility to understand this given Mr Gujadhur had raised the point. Mr Pentelow informed Mr Lenagan of the tax issues and what he was doing about them in a fax of the same day as copied to Mr Haworth, Mr Wailing, Mr Maslen and Mr Binks. Mr Pentelow had initially consulted Mr Philip Baker, tax counsel in the UK, who drafted the Mauritian tax code, and he had recommended Mr Rajahbalee.

(3) Mr Rajahbalee responded to Mr Pentelow on 30 June and it seems there was no further correspondence on the "different persons" issue.

(4) On 2 August:

(a) Mr Pentelow wrote to Mr Rajhabalee again, as Mr Maslen explained, as regards whether income arising to trustees on call or deposit accounts is to be classified as "exempt income" (within the meaning of schedule 2 ITA). The concern was that for the family trusts to be "residents of" Mauritius for the purposes of the Mauritius treaty they needed to be liable to tax in Mauritius on income which is not "exempt income".

(b) Mr Pentelow sent a draft of his fax to Mr Rajhabalee to Mr Wray and Mr Maslen for comments.

(5) On 3 August, Mr Binks responded and his comments included that: "It may be worth seeking confirmation that nothing turns on the Mauritius trustees receiving income either on or before 30 June or on or before 2 August (being the first disposal date)". Mr Pentelow had already sent his fax but passed Mr Binks comments on to Mr Rajahbalee on 4 August.

255. Mr Pentelow said that this tax advice was not sought on behalf of the Mauritius trustees and he was conscious that neither he nor Mr Maslen were experts in Mauritian tax law. Both he and Mr Maslen said the fact that they took this advice was no reflection of the impression they had about the Mauritius trustees' competence. Mr Maslen noted that UK counsel had suggested it was wise to obtain a second opinion.

Correspondence in August regarding Mauritius tax advice and retirement

256. In August (a) Mr Rajahbalee provided his detailed advice which included a recommendation that a ruling should be obtained from the Commissioner of Tax in Mauritius on the outstanding tax issues ("**a ruling**"), (b) steps were taken regarding obtaining a ruling and the retirement of the Mauritius trustees and appointment of new UK trustees, and (c) there was correspondence regarding the investment of the proceeds from the sale of the shares:

(1) On 9 August Mr Pentelow wrote to Mr Binks regarding the retirement of the Mauritius trustees as follows:

> "I have agreed with Ian Lenagan that we should draft at an early stage documentation for the retirement of the Mauritius trustees and the appointment of UK trustees. As you know, it's broadly anticipated that the trust will be repatriated at the end of October, although it is conceivable that the timing could differ. However, we need the documentation ready so that when a decision is made, it can happen without any delay.
>
> Could you and your team please draft that documentation and presumably also get it settled with Kevin Prosser? It seems likely that KB trust will be appointed as successor UK trustees, but I will confirm that."

Mr Pentelow noted that, once the family trusts were repatriated, Mr Lenagan wanted the trustees of the S&A Trust to make appointments to his children and to benefit his ex-wife and asked Mr Binks for advice on this. He also enclosed a copy of Mr Lenagan's will and asked for advice on whether it was effective.

(2) On 10 August:

(a) Mr Binks confirmed to Mr Pentelow that "we have put in hand the preparation of draft documents" for the repatriation of Mr Lenagan's family trusts. He also set out in some detail his thoughts on how Mr Lenagan could benefit his ex-wife (including advice on the tax position) and said that he had checked Mr Lenagan's home made will and it appeared to be valid and made suggestions on its terms. (Mr Pentelow later set out his views on these issues in a fax of 10 October and asked if Mr Binks agreed.)

(b) KBPB wrote to Mr Lenagan to outline the services KBTL could perform as trustees in which they recorded their understanding that:

> "In broad terms the Trustees in Mauritius will need to retire in favour of Trustees who are resident in the [UK] between now and the end of the year at a time that Lindsay Pentelow will identify for strategic reasons..."

The letter was copied to Mr Pentelow and Mr Wimble of KBPB. Mr Wimble sent Mr Haworth a similar letter on 3 September in which he noted that "Mr Maslen will identify the retirement date [of the Mauritius trustees] for strategic reasons".

(3) On 11 August:

(a) Mr Rajahbalee provided his detailed advice on the Mauritius tax issues.

(b) Mr Pentelow summarised the advice from Mr Rajhabalee in a fax to Mr Maslen. His comments included that (i) it was confirmed that (A) there should be no problem in principle with Jersey bank accounts being opened if that gave a better rate of return but, for the income to be taxable, it had to be remitted to Mauritius, (B) for the family trusts to be taxable in Mauritius by reason of residence, they

must derive income which is not exempt income and it may be that income arising on call and deposit accounts may be exempt, and (ii) Counsel recommended applying for a ruling on the last point. As he was going to be away, he asked Mr Maslen to liaise with Mr Gujadhur on this to ensure that that they got the ruling or were clear how to generate some income which was taxable in Mauritius.

(c) Mr Pentelow wrote to Iona Sinclair of KBPB and attached a copy of Mr Rajabahlee's advice (and of his fax to Mr Maslen) and asked for these to be forwarded to Mr Wimble.

(d) Mr Maslen sent the advice to Mr Haworth and set out details of the funds held in the GH Trust which he thought should be transferred to Jersey (all the proceeds less sums relating to the shares held on discretionary trusts).

(4) On 14 August, Mr Maslen asked Mr Gujadhur to arrange for an application for a ruling, gave him Mr Rajahbalee's contact details and offered to send a letter of introduction if he thought it would be helpful for them to be in contact.

(5) On 23 August:

(a) Mr Wray wrote to Mr Gujadhur "to confirm the steps that the trustees should take in relation to immediate investment decisions". He noted that (i) the Mauritius trustees were receiving various requests from the settlors and DKB regarding the funds held in the family trusts, (ii) it was proper for the trustees to take advice from professionals such as DKB on how to manage the funds and to consult with the beneficiaries, (iii) DBK had been involved in the floatation as sponsor and were now advising Mr Haworth personally, and (iv) the trustees could, if thought appropriate, appoint DKB to act for them and, if so, they should obtain a letter of engagement for each family trust and should ensure that they were happy with suggested investments.

(b) Mr Gujadhur informed Mr Maslen that Kleinwort Benson (Jersey) Limited had been appointed as custodians for the GH Trust.

(6) On 24 August Mr Pentelow wrote to Mr Clark of KBPB:

(a) He confirmed advice given on a telephone call about the rules for determining if the family trusts were resident in the UK.

(b) He concluded that his analysis:

> "does support the notion that if KBPB are asked to give investment advice they can do so without prejudicing the planning. However, I am slightly uncomfortable about some of the Revenue's comments....Since we are looking to close off or at least absolutely minimise any avenue for the Revenue to make a challenge, it would be best if the trustees could seek their investment advice from someone outside the UK."

(c) He noted it was suggested there might be problems with another part of the KBPB organisation outside the UK providing advice and since "we are in the business of being risk adverse, because of the size of the tax liabilities potentially at stake" he would like to explore this further with Mr Clark and he asked for a call.

(7) On 24 August, Mr Pentelow wrote to Mr Maslen (as copied to Mr Lenagan and Mr Wailing) and asked him to check what would happen if the Commissioner came back with an adverse ruling. He said that if "that is our only crack at it and there is no possibility of discussion after an initial ruling" he would suggest running the letter past Mr Rajhabalee to get his input for a "second authoritative opinion".

(8) On 25 August, Mr Pentelow wrote to Mr Lenagan and Mr Wailing (as copied to Mr Maslen, Mr Clark and Mr Wimble) and explained that Mr Clark had raised a concern

which he gathered "was prompted by the Mauritius trustees asking for a formal investment advice agreement with KB. He had evidently spoken to Chris [Maslen] about it also." He attached a copy of his fax to Mr Clark and said that, having spoken to him again:

> "it seems possible for KB in the Channel Islands to be the party providing investment advice to the Mauritius trustees and so I have said we should adopt this solution...KB will therefore arrange for any advice that the trustees are seeking on investment to be provided outside the UK."

(9) On 31 August, Mr Maslen informed Mr Rajhabalee that he had asked the Mauritius trustees to draft a request for a ruling, which he enclosed, and asked for any comments. He noted the Mauritius trustees had recommended that the application for a ruling should not be submitted until certificates of tax residence had been issued but that it was intended to submit the application at an early date after that. He also wrote to Mr Gujadhur and asked him what the position would be if the ruling was not favourable and whether the ruling would be final or whether there was scope for discussion.

(10) On 1 September, Mr Pentelow wrote to Mr Maslen that "we are anticipating the trusts only being resident in Mauritius for a couple more months." He said that he wondered if Mr Gujadhur had received the certificate of tax residence and, therefore, whether the application for a ruling could be made on the taxability of the income so far received, and how long Mr Gujadhur anticipated it would take to get a ruling. He said: "We obviously do not want to be half way through October and find that all of the income that has been generated to that point is exempt from tax in Mauritius" and asked if Mr Maslen could "speak with Chandra again and make sure that the likely timetable to achieving these things fits in with what we need".

257. Mr Binks and Mr Lenagan were questioned by reference to the letters of 9 and 10 August in relation to the preparation of retirement documents:

(1) Mr Pentelow agreed that in the letter of 9 August he passed on Mr Lenagan's instruction to draft the retirement documents or, in other words, that on this occasion (contrary to his earlier evidence) he acted as a conduit through which Mr Lenagan's instructions for Mr Binks were conveyed.

(2) He confirmed that he had not discussed a precise retirement date with the Mauritius trustees before this but there was an "expectation" that they would retire toward the end of October. As far as he knew, the suggestion came from Mr Lenagan and he noted that, as a general matter, in his experience it is "completely commonplace" to draft documents well in advance when anticipated they will be used.

(3) In re-examination he noted that (i) typically it takes quite a time for legal documents to be drafted, (ii) he is very risk averse, and (iii) since Mr Prosser had given the original advice, he was keen that he should advise on points as they arose throughout the transaction.

(4) Mr Binks did not agree that he was in effect instructed by Mr Pentelow/Mr Lenagan to draft the retirement documents; rather he regarded this as a sensible suggestion. He said that the reality of the situation was that once the shares were sold on the flotation, the family trusts would be brought back to the UK. Otherwise, the idea of going to Mauritius would have been a waste of time. So:

> "it was considered that the appointment of UK trustees would take place and there was also a conscious worry that there might be legislation in the Autumn Statement which would impact adversely on what had been done. So the suggestion was made to the advisors to the trustees that we might get on with drafting some deed of

retirement documents, and that seemed perfectly sensible to me…..I think we all understood the planning."

(5) Mr Binks did not agree that his reply of 10 August shows that, without consulting the Mauritius trustees, he proceeded with the settlor's instruction to draft the retirement documents. He said that:

(a) He was continuing his work for the Mauritius trustees. He knew that the tax planning hinged on them appointing UK trustees. It would be difficult to imagine circumstances where they would decide not to appoint UK trustees, assuming they were satisfied with those selected and with the liabilities and the indemnities to be provided.

(b) So he knew that the requirement to produce the retirement documents was going to happen and he was quite happy to get on with that, because he had been:

"under an awful lot of pressure trying to produce all these documents during the reorganisation of the trusts and it was quite helpful to be able to slightly get ahead of the game…Even these documents were not straightforward because there were predecessor trustees who had to be joined into them and a lot of signatures were required and the actual drafting of the documents was not all that easy. So I was quite happy to get on with it on the trustees' behalf. I was advising the trustees."

(c) He did not know that the Mauritius trustees would agree to retire but there was a very strong probability that they would do so. Otherwise, the potential tax saving, which runs into millions of pounds, would have been lost. He did not think he was doing anything that was wrong for the trustees in producing these documents; he was just trying to get ahead of the game. He did not take the settlor's instructions. It was a decision he took on his part as advisor to the trustees to get on and prepare these documents.

258. It was put to Mr Binks that the correspondence showed that he was providing advice to Mr Lenagan about (a) the most tax efficient way of benefitting his ex-wife and (b) his will:

(1) He said that he was wearing his advisor to the trustees' hat in examining (a) but agreed that was not the case as regards the will. He said he probably "strays off the path" and, if he is asked a question, he will try answer it as fully as possible. However, he did not intend to provide advice to Mr Lenagan; he was just trying to be helpful to Mr Pentelow. Mr Pentelow agreed that Mr Binks was giving tax advice to Mr Lenagan in these respects.

(2) In re-examination, Mr Binks said the tax issues of concern in relation to benefitting Mr Lenegan's ex-wife were of relevance to the trustees because if there was a tax liability on the inheritance tax side, the trustees would have been liable for it. He said that the issues he would have addressed if Mr Pentelow's proposal had been put direct to the trustees would have been similar.

259. Mr Pentelow was questioned at length about his role at this stage:

(1) He did not accept the proposition put to him in general terms that the correspondence demonstrates that (a) he did not just leave the Mauritius trustees alone to get on with it and he set them objectives about what they were required to do to implement the planning, and (b) where he had an element of doubt that they were implementing the planning correctly, he stepped in. He said that the trustees had to make a series of decisions which were entirely theirs to make. The tax planning proposal was put to the Mauritian trustees, and it was their decision whether the transaction even occurred and, once it did in fact happen, whether to retire. There were some areas of very narrow detail which, in his capacity as an advisor to Mr Lenagan, he needed to be

able to sign off on, namely, the Mauritius tax issues. He confirmed that Mr Lenagan was very keen to ensure that the planning was implemented correctly and would work.

(2) He explained the rationale for him seeking tax advice initially from UK counsel and then on his recommendation from Mr Rajahbalee as follows:

(a) Since Mr Gujadhur had raised the "different persons" point in the first place, it was his responsibility to understand that point, take his own advice and to bottom it out.

(b) The correspondence after about the beginning of August was so that he and Mr Maslen could understand the answer to the core technical tax question as to how the trustees were subject to income tax in Mauritius. It was their responsibility to know the answer to that question because otherwise they would be in breach of their duty of care to their clients. Neither of them has any Mauritius tax expertise and therefore they needed to get that advice from Mauritius and to have that advice documented:

> "That is the sole content, in practice, of this correspondence….quite simply… certainly long before there is any suggestion of the trustees retiring, then we need to understand how the trustees are subject to income tax in Mauritius. It is, in that sense, a very narrow technical question, but a really important one as well."

(c) He agreed that it was fair to say that he and Mr Maslen needed to ensure that the family trusts were liable to income tax because, otherwise, the planning would not work and they needed to understand this so that they could ensure that the advice was implemented such that the trusts were "liable for taxation" in Mauritius and so resident in Mauritius. He said that the correspondence set out above demonstrates that he was worrying that he did not sufficiently understand how the Mauritius trustees had actually ensured that this was the case. By the time he got that information from the Mauritius trustees, "it is absolutely clear that they have already sorted it, so my frustration is that it [whether the family trusts were liable to taxation in Mauritius] was something that I didn't understand".

(3) In response to questions on the role of Mr Wimble and why he copied the advice of Mr Rajahbalee to him and others at DKB/KBPB but not to Mr Gujadhur, Mr Pentelow said:

(a) He thought that Mr Wimble must have been involved by Mr Lenagan or Mr Haworth. He did not remember the exact time when he became involved.

(b) He did not send the advice of Mr Rajahbalee to Mr Gujadhur because he asked Mr Rajahbalee for the advice on his own behalf so that he could understand the technical framework under Mauritius tax law to ensure that the trustees actually had income that was taxable in Mauritius. He emphasised again that neither he nor Mr Maslen have any expertise in Mauritius law:

> "but it is equally obviously a really important part of the advice that we've given to our UK clients, and so I think it is our responsibility to make sure that we understand that point and that we have on our file advice from people who are expert in that area so that we can demonstrate that we have, as it were, discharged our duty of care to our clients."

(c) The advice was passed on to Mr Wimble simply so that he was aware of it given he was another adviser (in a different capacity) to Mr Lenagan (and he thought Mr Haworth). There was no mystery, as to why it was not copied to the Mauritius trustees. It was simply a piece of advice that "we have sought for

ourselves in order to understand something that we felt we needed to understand in order to discharge our duty of care to our client".

(4) It was also put to Mr Pentelow that the correspondence demonstrates that the Mauritius trustees were told to apply for a ruling. He said that he was not sure that the Mauritius trustees were told to do that by him and Mr Maslen at this point. He added that what they were seeing from Mr Rajahbalee was "how you actually, under Mauritius law, get income that is taxable in Mauritius", so it was a request for detail around that point. He had left this with Mr Maslen to deal with as he was going on holiday.

(5) Mr Pentelow did not agree that, in his fax of 25 August, he was coordinating among the UK advisors regarding the choice of investment advisors and that that choice was effectively made in the UK by the UK advisors rather than by the Mauritius trustees. He said that he was not communicating with the Mauritius trustees or seeking to tell them what to do but was simply providing an answer to a question which Mr Clark asked him. He assumed that Mr Clark must have gone back to the Mauritius trustees and told them what his advice was and that they decided to follow it. He speculated that the question was prompted by the Mauritius trustees although he agreed that was not apparent from the correspondence. In re-examination he said that Mr Clark's question seemed to him an entirely reasonable one to ask and he gave him his technical view in response. He had no recollection of taking any further action in relation to the choice of investment advisor.

Correspondence in September on Mauritius tax advice and retirement

260. In September the UK advisors became increasingly anxious as to whether all the necessary matters were being put in hand in Mauritius to facilitate the retirement of the Mauritius trustees within the timescale they considered appropriate. In particular, they were concerned about what was being done in Mauritius to resolve the Mauritius tax issues and sought clarity on what would count as non-exempt taxable income in Mauritius:

(1) In a letter of 3 September, Mr Maslen said to Mr Gujadhur that (a) he had had a conversation with Mr Rajahbalee and it was suggested he would contact Mr Gujadhur direct, (b) he would be grateful for news about the tax certificates, and (c) he thought it would be prudent to consider what investment could be made that would generate income that was not exempt income in case the Commissioners ruling was not favourable and it could be advisable to make some clearly non-exempt investments with the funds held on discretionary trusts and he would give him a call to discuss this.

(2) On 4 September:

(a) Mr Maslen informed Mr Haworth that (a) Mr Wray had been tasked with preparing the documentation for the repatriation, (b) Mr Binks was aware Mr Lenagan wanted the documentation ready by 30 September, and (c) he would keep in touch with him and Mr Wray on this. He updated him on other timing issues (regarding the residence certificates and ruling) and said he had spoken to Mr Gujadhur to ask for suggestions of investments that could be made that would produce some non-exempt income.

(b) Mr Maslen also wrote to Mr Pentelow (as copied to Mr Haworth, Mr Lenagan and Mr Wailing) and set out his discussions with Mr Rajahbalee on the ruling, what Mr Gujadhur had said in response to his queries on the ruling and that he had suggested to him that it would be prudent to consider investing at least the funds held on discretionary trusts in a way that the income earned would not constitute exempt income. He and Mr Pat Phong were considering this and he expected them to advise shortly.

(c) He also wrote to Mr Rajhabelee to inform his that he had made Mr Gujadhur aware that he would be contacting him to comment on the draft request for a ruling.

(3) On 5 September, Mr Gujadhur asked Mr Maslen (a) to remind DKB that following their appointment as investment advisers, the Mauritius trustees were awaiting a proposal on appropriate investments, and (b) if he could help in obtaining a letter of wishes from the settlors as Mr Gujadhur had suggested should be provided at the initial meeting in Mauritius. In a separate fax, he sent Mr Maslen his response to the queries raised in his fax of 31 August as regards the ruling.

(4) On 8 September, Mr Maslen wrote to Mr Binks and Mr Wray regarding the preparation of a letter of wishes.

(5) On 14 September, Mr Pentelow said in a fax to Mr Maslen (as copied to Mr Haworth, Mr Lenagan and Mr Wailing) that perhaps it would be better if Mr Rajhabalee took any meeting with the Commissioner of Income Taxes as he is a more experienced advocate but he would leave that with Mr Maslen "...you can best decide whether it is something that we should encourage him [Mr Gujadhur] to think about or something that we should more positively suggest or require". He said he was concerned about the way that time was slipping and:

> "Could you please do everything you can to inject some more urgency into the position. I would think that at the time of retirement of the Mauritius trustees which we anticipate at the end of October, it may well be necessary for you to visit again to make sure that all the necessary arrangements happen. We can of course assess that nearer the time".

He asked for an update on what progress was being made regarding the ruling.

(6) On 18 September, Mr Binks informed Mr Pentelow that retirement documents were ready to be circulated subject to confirmation of the identity of the new UK trustees of Mr Lenagan's family trusts and noted that Mr Haworth would be using KTBL as trustees of the GH Trust.

(7) On 19 September, Mr Maslen wrote to Mr Pentelow (as copied to Mr Haworth, Mr Lenagan and Mr Wailing) with an update on what was happening as regards the outstanding tax issues as follows:

> "I confirm that I had already spoken to Chandra to discuss among other points the way in which he would make an approach to the Tax Commissioner for a ruling. He was quite amenable to the suggestion that it might be helpful if [Mr Rajahbalee] took the meeting.
>
> .....he said that he had not yet received the certificate of tax residence. He had spoken again with the Commissioner who had indicated that he would now be able to issue the certificates....
>
> I understand that Chandra and Iqbal have been in discussion about the possibility of generating some non-exempt income before we apply for a ruling, in case the ruling when it comes is not favourable...
>
> In my conversation with Chandra, he said that he and Iqbal were having difficulty in making a suggestion of an income source on which tax would be payable if tax was not payable on income being received from the existing interests."

(8) On 19 September, Mr Gujadhur wrote separately to Mr Haworth and Mr Lenagan and (a) noted that the Mauritius trustees had appointed a Kleinwort Benson vehicle in the Channel Island as investment advisor and custodian to the GH Trust and that they were considering doing so for Mr Lenagan's family trusts, and (b) in each case, asked for (i) their wishes and needs as settlor and beneficiary and (ii) details of the other beneficiaries so the Mauritius trustees could also obtain their wishes and needs, in order to inform the investment advisor of this.

(9) On 20 September, Mr Maslen wrote to Mr Gujadhur to ask (a) if it was possible to press for the certificates of residence as time was now very short especially if a ruling

had to be requested, (b) whether income received in relation to the GH Trust before 30 June 2000 could now be returned by the trustees for the payment of tax in respect of the Mauritius income tax year to that date, and (c) whether the return had to await the issue of a certificate of tax and/or a ruling from the Tax Commissioner. He referred again to the point about generating income that would not be exempt income and said:

> "As we have discussed before, it would be helpful if at least the funds held on discretionary trusts could be invested in such a way as to produce income that would be charged to tax in Mauritius in the event of the Tax Commissioner ruling that the interest being received in respect of the trustees' present deposit constitutes exempt income.
>
> I think that you intended to have a further discussion on this point with Iqbal and that it was your intention to send a summary of conclusion. You did mention that on reflection you had considered the possibility of filing returns and paying the tax in Mauritius without applying for a ruling. As time is passing, we would welcome some thoughts and conclusions, as soon as possible."

(10) The tax residence certificates were issued on 21 September, but they had the wrong date on them.

(11) On 22 September:

(a) Mr Binks sent Mr Gujadhur the draft retirement documents relating to the GH Trust and asked for approval as soon as possible so that the engrossments could be circulated for execution and noted that the "intention is to complete matters as soon as the outstanding issues on Mauritius tax have been settled" and that it was "important that the appointment of UK Trustees is completed as soon as possible now to minimise the risk of any adverse changes in the UK tax regime."

(b) Mr Binks sent Mr Maslen a copy of a letter of wishes incorporating his amendments which he said he had now sent to Mr Haworth.

(12) On 25 September:

(a) Mr Maslen informed Mr Pentelow that Mr Binks had drafted a letter of wishes for the GH Trust and sent it to Mr Haworth and Mr Gujadhur for comments and that he was going to do the same for Mr Lenagan's family trusts. He noted the draft was based on a sample provided by Mr Gujadhur and provided a copy of that.

(b) Mr Binks sent Mr Gujadhur the draft retirement documents regarding the IFL and S&A Trusts and said:

> "We now have instructions to complete the appointment of UK resident Trustees when the outstanding tax issues in Mauritius have been settled and I am enclosing for your approval copies of the draft deeds....and I should be grateful if you would kindly let me have your approval of the draft documents as soon as possible....".

(c) Mr Pentelow wrote to Mr Maslen that he was concerned by reports that the UK Chancellor's autumn statement may be brought forward to October and so that there was less time to repatriate the trusts. He said the key outstanding point was to ensure that they had met the key requirement to ensure the family trusts were liable to tax in Mauritius by reason of residence. He asked Mr Maslen to ask Mr Gujadhur and Mr Rajhabalee for their firm advice on what action they recommend to make the position "as secure as possible if we found we were looking at a short period to repatriation up to, say, 20 October".

(13) On 26 September, Mr Maslen explained to Mr Gujadhur that there was a concern that the UK Chancellor might bring forward the date of his autumn statement which might include measures to restrict the effectiveness of the tax planning. He said that as

a result the matters which "we have been discussing for some time have become urgent". He summarised the issue and said:

> "For the trust to be liable to tax in Mauritius by reason of its residence in Mauritius, we understand that it must be deriving some income which is not exempt income.
>
> From previous correspondence, it is apparently not entirely clear that the deposit interest received by the trustees from deposits in Mauritius and in Jersey does not constitute exempt income, When we spoke on 4 September, I understood that you intended to write to me with regard to the advisability of and procedure for obtaining a ruling from the Tax Commissioner as to whether the deposit interest would constitute exempt income and to give the views of Mr Pat Phong and your colleagues as to how non-exempt income could be generated and the approach to the Tax Commissioner for a ruling.
>
> I believe that you were considering with Iqbal Rajahbalee whether it might be better to file returns on the basis that the income received by the trustees did not constitute exempt income and to pay tax on that basis when filing the returns, without applying for a ruling from the Tax Commissioner.
>
> For tax planning purposes, it is essential that the trust is liable to tax in Mauritius. In this respect, we will depend upon advice from yourselves and where appropriate Iqbal Rajahbalee as to the best course of action. We would be grateful if you could write to us in this respect as a matter of some urgency."

Mr Maslen sent Mr Rajahbalee a copy of this letter and said: "We would be glad to have advice on the Mauritius tax position as soon as possible."

(14) On 26 September, Mr Maslen sent Mr Pentelow copies of the above correspondence and noted he had tried to speak to Mr Gujadhur but was unable to get through and that Mr Binks intended to draft letters of wishes for Mr Lenagan's family trusts and would send them through.

(15) On 27 September, Mr Wimble wrote to Mr Pentelow summarising the amount he intended to place with Jersey in respect of Mr Lenagan's family trusts and said that, unless he had any comments, he would give Mr Gujadhur the instructions the following day.

(16) On 28 September, Mr Pentelow wrote to Mr Gujadhur (as copied to Mr Maslen) and made the following main points:

(a) He and Mr Maslen needed to liaise with Mr Gujadhur "closely in securing the tax objectives of our mutual clients" and that there may now be "only around 20 days before the trusts may be repatriated" and:

> "It would be prudent to ensure that everything is in place by the 20 October for the trust' repatriation, due to the possibility that the UK Chancellor's Autumn Statement may be brought forward. Broadly, one of your objectives has been to ensure that you as trustees are liable to taxation in Mauritius by reason of your residence there. There is now only 20 days in which to ensure that you are able to securely achieve that. The purpose of this fax is to help Chris and I understand the arrangements in place by which the trustees can make swift progress toward achieving your objective.
>
> I understand that you have been liaising with Iqbal Rajahbalee ...and Chris and I endorse on behalf of our mutual clients that the trustees should seek his advice and work closely with him."

(b) He asked for (i) clarification of a number of specific matters, (ii) for the trustees to keep him and Mr Maslen informed on the process and timing of the steps to be taken in achieving the "objectives" of the next 20 days, and (iii) if Mr

Gujadhur or Mr Rajahbalee could advise on the following (in summary of the detailed points he had made):

(i) whether the wrong date on the residence certificate matters,

(ii) if so, whether it delays the seeking of clearance, and

(iii) if it creates a delay, how long that would be,

(iv) whether they could give specific dates for the likely timing of arrangements for securing the clearance, and

(v) whether they could provide detail on the specific proposal for the "failsafe arrangements" so that they could check the UK perspective.

(c) He said:

> "What we would most like to see is a timetable covering the action, which the trustees together with Mr Rajahbalee will take in the first half of October in order to secure your objectives. That will introduce some further clarity to the position which we and our clients would appreciate."

(d) He noted he had sent a similar fax to Mr Rajahbalee and that they were not concerned with whether the trustees themselves gave this information or whether they decided to delegate its provision to Mr Rajahbalee as part of his role of advising the trustees on those issues:

> "The important point of course is that the trustees together with Mr Rajahbalee bring all the matters which you have discussed in particular with Chris Maslen over the last three months, and which are cited above, to a satisfactory conclusion within the available timeframe."

(17) On 28 September, Mr Pentelow also:

(a) Wrote directly to Mr Rajhabalee on similar terms.

(b) Sent Mr Maslen the fax to Mr Rajhabalee and a draft of his fax to Mr Gujadhur and said this was for either or both of them to send to "Chandra so as to ensure that Iqbal and Chandra are absolutely clear on what will happen and that the way is clear for Iqbal to work with Chandra to secure what we need".

(c) Wrote to Mr Lenagan with an update on the situation in Mauritius. He noted that he was suggesting a deadline of 20 October which "frankly is earlier than should be necessary" even if the Autumn Statement was brought forward to 30 October but "having seen the thing apparently drifting a bit so far, we need to inject some real urgency into it now." He said he had already discussed with Mr Maslen that he may need to visit Mauritius to make absolutely certain that all the documents that needed to be signed by the Mauritius trustees were in fact signed and he gathered Mr Haworth and Mr Maslen were looking at flights from 15 to 28 October.

(18) On 29 September, Mr Gujadhur replied to Mr Pentelow that he was tied up as it was the last day for the submission of tax returns for 2000 and would be able to deal with his queries only next week but he was "aware of the revised schedule for the reimmigration of the Trusts. I have, thus, given a commitment to Chris that I shall remain in the country until all the major issues have been put to bed".

(19) Mr Pentelow coordinated with Mr Lenagan and Mr Haworth and agreed an "approach" in principle to the issues in Mauritius, and subsequently informed Mr Maslen, and (b) Mr Wray sent Mr Pentelow draft letters of wishes and noted that the contents were very much a matter for Mr Lenagan to decide upon as settlor and that Mr Pentelow should therefore discuss this with him before coming back with instructions as to what he would like to see in the letter.

261. In cross-examination on the above correspondence:

(1) Mr Binks said that when, in his fax of 25 September, he referred to having "instructions" from the settlors, he meant that he had been advised that the settlors would like the Mauritius trustees to proceed with their retirement. As a very experienced trust lawyer and advisor to trustees, he knew that there was no way that he would be in a position (a) to accept instructions from Mr Lenagan and Mr Haworth when he was acting for the Mauritius trustees, or (b) to give instructions to the Mauritius trustees. In this fax he was trying to advise the Mauritius trustees that the settlors would like them to proceed with their retirement when they had sorted out the tax issues which were being investigated in Mauritius.

(2) When it was put to Mr Pentelow that during September he was concerned about how long it was taking to confirm the residence position in Mauritius, he said that he had expected that they would have had clarity on that long before and he was worrying that he did not sufficiently understand how the Mauritian trustees had actually ensured that they were subject to tax in Mauritius. By the time he got that information from the Mauritius trustees, "it is absolutely clear that they have already sorted it, so my frustration is that it [the tax issue] was something that I didn't understand".

(3) Mr Pentelow disagreed that his use of the word "require" reflects that his understanding was that in reality he could direct Mr Gujadhur to act in a certain way when the interests of the tax planning required it. He said it was "an odd word to use, but there is simply…no way that even if we had wanted to require something hypothetically that we could do that" and

> "reading it through after these many years, it is an odd word to use because all that we were in a position to do was to suggest, to request, and so that makes no sense…..Whether I was simply trying to suggest that we would strongly request it or something like that, that would be…..the maximum that we could possibly do in those circumstances anyway….I'm not suggesting that I understand why I used that word. It is not a word that actually reflected the range of possibilities that we had at the time and I don't frankly know why I used the word, but it is 20 years ago and I don't know……we had no way, even if we had wanted to, of requiring that a trustee do anything….That is the basic fact of the matter."

(4) As regards his faxes of 28 September:

(a) It was put to Mr Pentelow that these demonstrate that he was not just letting the Mauritius trustees get on with things but was telling them what to do in the next 20 days to ensure they were tax resident in Mauritius and that the date of the Mauritius trustees' retirement was set by him and the other UK advisors. He said that he was suggesting a timeframe for the repatriation as (i) he was anxious that he did not understand how the trustees were subject to income tax in Mauritius, it was taking longer than he expected for him to understand that point and he was trying to ensure that he got a prompt response, and (ii) that the Autumn Statement was brought forward created a timing issue as well. He agreed, however, that the reality was that the trustees had an objective, which was to be resident at the time of the disposal, and he wanted to ensure that they met that objective.

(b) He said that the question of a "failsafe arrangement" first came up in a conversation that he had with Mr Rajahbalee, and he was aware that he and Mr Gujadhur had subsequently discussed it. He noted that he said in the fax that the purpose was to assist him and Mr Maslen in understanding the arrangements in place which he considered was "an entirely legitimate preoccupation for Mr Maslen and myself to have in discharging our duty of care to our client".

(c) He agreed that his duty of care to his client involved "doing everything that we should in order to ensure that the tax planning could succeed" but said that he and Mr Maslen were not "requiring anything and were not in a position to do so". In the correspondence he was setting out what "we would like to see. That is completely different to requiring."

(d) He thought that he had only suggested that "maybe we should think of a target date of 20 October because of the Autumn Statement". He agreed that by this time he was getting anxious about the resolution of the tax issue. He said this was hugely important in the context of the planning and throughout this correspondence his concern was "for us to be able to get into the position where we can answer that question". He agreed that he thought he needed to get into a position where he was satisfied that the trustees were liable to tax in Mauritius and had done everything required to achieve that objective.

(e) As regards the comment that he/Mr Maslen would like to see a timetable, he said they needed to understand how the trustees are subject to income tax in Mauritius and he was just requesting some indication of what the timeframe for giving us that advice was.

Correspondence in October

262. In October, the tax issues were resolved and, on 24 October, the Mauritius trustees retired and new UK trustees were appointed:

(1) On 1 October, Mr Maslen sent Mr Gujadhur a fax with a note extracted from the MOBAA website which he said seemed to confirm that, if an offshore trust has not elected to be non-resident, it will be taxed on its income less distributions. He also sent a copy to Mr Haworth and Mr Pentelow.

(2) On 2 October:

(a) Mr Pentelow wrote "… in the UK we now are seriously questioning whether any formal clearance application should be made...since we would not have time to do anything about the restructuring of the funds currently held on deposit in Jersey, if the view is negative. I said that the important thing was to put in place our fail-safe plan B if one is clearly available".

(b) Mr Gujadhur received a copy of the amended tax residence certificate whereby the Commissioner for Income Tax certified that the family trusts were resident in Mauritius for income tax purposes.

(3) On 5 October, Mr Gujadhur informed Mr Wray that the Mauritius trustees had approved the retirement document in respect of the GH Trust.

(4) On 6 October, Mr Binks informed Mr Pentelow that he had received approval from all parties of the retirement documents relating to Mr Lenagan's family trusts and Mr Pentelow confirmed this to Mr Lenagan and Mr Wailing on 9 October.

(5) On 9 October, Mr Pentelow wrote to Mr Binks and said that the repatriation was likely to take place around 25 October. He said he was told by the Mauritius advisers that the tax issues "are likely to now be sorted out" and he hoped to confirm this by the middle of next week but was cautious of over promising "due to the experience we have has hitherto". He then discussed proposed appointments of funds to be made once UK trustees were appointed and asked Mr Binks to draft the documentation and agree it with the parties. He said he would run this past UK Counsel and asked if Mr Binks had any comments.

(6) On 11 October, Mr Pentelow confirmed to Mr Binks that (a) he had heard from Mr Maslen that Mr Gujadhur was happy with the letter of wishes for the GH Trust, (b) he

was happy with the letter for Mr Lenagan's family trusts except that the reference to his ex-wife would need to be amended and he asked Mr Binks to do that.

(7) On 12 October, Mr Gujadhur replied to Mr Pentelow's fax of 28 September. He said that he was "acutely aware" of his "objective" and forwarded to Mr Maslen for information a draft letter addressed to Mr Rajahbalee in which he said: "However, we can confirm that interest received from outside of Mauritius would be liable to tax in Mauritius." In re-examination Mr Pentelow confirmed that it was when he saw this "simple point" that he was able to understand how the trustees in Mauritius had a liability to income tax.

(8) On 15 October, Mr Maslen visited Mauritius. He prepared a note of the meetings which he sent to Mr Gujadhur on 16 November.

(9) On 17 October, Mr Pentelow wrote to Mr Gujadhur:

(a) He said that he understood that it was his and Iqbal's unequivocal advice that the Mauritius trustees were liable to taxation in Mauritius by reason of residence on the interest income arising from the deposit with DKB in Jersey and remitted to the trustees in Mauritius and asked if he could confirm this to Mr Maslen when he met him.

(b) He asked for confirmation that the 1% discretionary funds will also over the period give rise to a taxation liability on the trustees by reason of their residence in Mauritius.

(c) "As you know, it is intended that the Mauritius trustees will retire and UK trustees be appointed on or around 20 October /25 October but we can only do that confidently, if we are certain that the trustees have satisfied all necessary conditions for being resident of Mauritius.."

(10) On 17 October, Mr Pentelow:

(a) Wrote to UK Counsel attaching the draft advice from the Mauritius trustees. He said we have not found any of the advisers in Mauritius have quite the sense of urgency one would have hoped and noted that the advice was still headed draft. He noted that the Mauritius trustees had applied for a ruling but they had not yet received a reply "which is somewhat unsatisfactory, since we will have to make the decision to repatriate the trust on the basis of their advice alone. Chris Maslen is in Mauritius at the moment to try to facilitate the tying up of that side of things."

(b) Faxed Mr Maslen to ask him to check with Chandra that "we are happy with all of these points tomorrow. It is on that basis that we can hopefully take the decision to appoint UK trustees. We need taxable income to have arisen on the 1% as well as the IIP funds of course. I will leave those points with you to come to a final assurance on."

(c) Wrote to Mr Binks noting he had spoken to UK Counsel who had made a number of points. One was that there was no particular difficulty with the timing of the repatriation around 20 to 25 October and:

> "I understand that everything is in place to achieve this. All we need is for Chris to give the work that he is as satisfied as possible that the trustees in Mauritius are taxable by reason of their residence there."
>
> He also noted that Mr Maslen had asked whether it would be best to make distributions prior to the Autumn Statement and that Mr Prosser had said there was no downside and therefor he asked Mr Binks to prepare the documents for the distributions to take place on 27 October."

(11) On 19 October (a) Mr Gujadhur replied to confirm that Mr Pentelow's understanding was correct as regards his own advice and that the Mauritius trustees understanding was that this was also the view of Iqbal, and (b) Mr Pentelow wrote to Mr Lenagan and Mr Wailing with an update.

(12) On 23 October, Mr Maslen sent Mr Pentelow a fax noting that Chandra had confirmed that interest earned outside Mauritius would be liable to tax in Mauritius and that he had a meeting arranged with Iqbal on 24 October but he understood that he concurred with the view. Mr Rajhabalee sent an opinion confirming his view on this topic on 25 October.

263. In cross-examination:

(1) It was put to Mr Pentelow that in his fax of 2 October to Mr Maslen, he was taking a view as to what the trustees should do. He said that he certainly did not understand the benefit at this stage of making a formal clearance application, but a formal clearance application was, in the end, made because that was the trustees' decision.

(2) It was put to Mr Pentelow that the correspondence with Mr Prosser demonstrates that the decision about when the trust would be repatriated was made in the UK on the basis of UK considerations. He did not accept this. As regards the use of the word "we" he said this fax, was an informal, loosely worded fax between him and Mr Prosser and "we" is everyone who is affected by the advice that he has given, so in a very generalised, non-specific way which he considered is a very normal way for advisors who have been working together on a transaction to speak.

264. In re-examination Mr Pentelow said that as far as he was aware in October, the Mauritius trustees were not unwilling to retire in favour of UK resident trustees and again noted that the main focus of the correspondence in this period was on the need to understand that the trustees were taxable in Mauritius on their income and to have that advice from someone in Mauritius who was qualified to give that advice so that he could discharge his duty of care to his client:

> "Secondly…there was a completely reasonable expectation that the trustees would retire and UK trustees be appointed. It would be my responsibility to file the transaction certificate with the Revenue, which subsequently I did, and so understanding…. that point about why the Mauritius trustees were taxable in Mauritius and being able to articulate point and being confident about that point was foundational to being able to file the transactions correctly….one might have easily anticipated that there would be questions raised by the Revenue about the transaction and which I would have to deal with. Therefore, I needed to be fully aware of that technical basis of the transaction…When the trustees did come back to me, which I think.....was around 12 October, they…had already dealt with the point and dealt with the point satisfactorily, and so that enabled me to have that comfort that that particular requirement was satisfied."

265. HMRC suggested that Mr Maslen went to Mauritius in October in order to persuade the Mauritius trustees to retire:

(1) In his witness statement Mr Maslen said:

> "On 15 October 2000, I visited Mr Gujadhur and DTOS in Mauritius in my capacity as tax adviser to Mr Haworth and in connection with UK tax compliance for the [GH Trust]. The purpose of this visit was to explain the requirements for several forms and returns that would be required for the [UK] tax authorities; to discuss and receive advice on the taxation of income in Mauritius with regard to the liability of the trust to tax in the Republic and to receive from the trustees reconciled summaries of the receipts and payments of capital and income."

(2) The contemporary meeting note was in the bundle and, whilst it is a full note setting out the matters covered, none of it relates to the retirement of the Mauritius trustees.

(3) When he was asked about the purpose of the trip in cross examination, Mr Maslen said the following:

> "…..there were two main purposes, really, the first being to deliver and explain some UK tax documentation which I took with me, both for Mr Haworth's trusts and for Mr Lenagan's, and secondly, on behalf of Mr Haworth as beneficiary of the trust to receive the summaries of receipts and payments from Mr Gujadhur. Again, I collected those for all three settlements……I know we spent some time in the Deloitte & Touche office reconciling receipts and payments. So, anyway, that was the main purpose of the visit: first of all, not to ask them to sign documentation which hadn't been properly introduced to them and, secondly, to receive summaries of the receipts and payments which I anticipated either Mr Haworth, Mr Lenagan, Mr Pentelow or I, as appropriate, would need in due course for preparing tax returns, assuming that… my involvement with the trust was continued."

(4) Mr Maslen acknowledged that the Mauritius trustees were not his client but said it seemed appropriate for him to perform this task:

> "as a messenger, I suppose....From Mr Haworth....it wasn't a matter of making sure they did it right. I was collecting the receipts and payment summaries eventually to bring back for incorporation into the summaries for the year and.... It seemed like the appropriate way to deal with this scenario, and in fact, Mr Haworth and I were the only two people who had met Mr Gujadhur. I had a reasonable ongoing dialogue with him."

(5) When asked if he went to Mauritius in order to sit over Mr Gujadhur to make sure he did things right and as there was "a bit of a sense of urgency lacking" he said: "Certainly not....I would emphasise that Mr Gujadhur and, for that matter, Mr Konfortion were not people that one could sit over and encourage to sign documents" and he repeated that his main purpose was as he had already set out. He added that he saw himself "at that time as some sort of courier or....facilitator". When Counsel said: "So you were acting as a highly paid courier of documents, he said:

> "I suppose I was, in a way... in terms of analysing or sitting with Mr Gujadhur to go through the receipts and payments. We dealt with both the Haworth Trusts and the Lenagan Trusts where I was not engaged to act for Mr Lenagan at all or for his trusts. So, as you say, I suppose I was a....relatively highly paid courier.

(6) He did not agree that this was an absurd characterisation of why he went to Mauritius. He said:

> "I don't think so because there were documents there which really it would be unfair to simply pop into the post to someone when part of them...relate to a period when the Mauritius trustees were not in place......It would be unfair for whoever wanted the documents signing just to put them in the -- or that's my view, anyway. It's not the way I would do things. And I was the person who was sent......Well, I wasn't there to make sure the trustee signed documents....I was there to deliver them, and if there were any questions on them, I did my best to answer them."

(7) In re-examination he was asked if in his dealings with the Mauritius trustees, he ever sought to direct them as to what the trustees should do if they were appointed. He said: "No, I would have considered it improper to do so. It was not my position to give instructions to anybody". He said that Mr Haworth also did not seek to direct the trustees as to how they should act if they were appointed: "No. I mean, I can remember saying: would you be prepared to act as shareholders in a flotation.....But he would only have asked a question..."

(8) When it was put to Mr Pentelow that Mr Maslen went to Mauritius to ensure that the Mauritius trustees were resident prior to their repatriation, he said:

> "Mr Maslen was in Mauritius, as he had said, for a whole series of reasons, but one of the things that took place during that time in Mauritius was a discussion which involved Chandra and Iqbal on answering this question of how the trustees are subject to income tax in Mauritius."

(9) He added that Mr Maslen gave an account of his visit to Mauritius and he is the one who went to Mauritius and so is best qualified to say why he went to Mauritius and "I didn't send Mr Maslen to Mauritius. Mr Maslen decided to go to Mauritius."

(10) Mr Haworth said that he suggested to Mr Maslen that he should go to Mauritius to find out what took place and to clear up all the accounting that Mr Maslen was worried he would have to do afterwards to account to HMRC. As part of that, he booked him into his favourite five-star hotel on the Indian Ocean. He noted that Mr Maslen could take his secretary with him, who happened to be his partner at the time, and they could have a few days in a nice hotel with nice food and he asked him to entertain Mr Gujadhur.

Comments on the evidence

266. In summary, this evidence further demonstrates that (a) the UK settlors were, through their UK advisors, where relevant as assisted by the PC trusts team, the parties who drove forward the tax plan as regards each necessary step and its timing, and (b) the Mauritius trustees did not have a proactive role as regards the successful implementation of the plan; essentially they were passive participants who merely reacted to what was put to them. Each element involved in the plan was devised, on an on-going basis refined where considered necessary, and orchestrated, by persons in the UK. The Mauritius trustees were involved by the UK advisers only once they had already discussed amongst themselves any issue they considered impacted on the plan and worked out what they considered to be the necessary action which was then put to the Mauritius trustees for their approval or implementation.

267. As regards the tax issues in Mauritius:

(1) Mr Pentelow and Mr Maslen took the initial steps to obtain comfort from counsel in Mauritius (Mr Rajhabalee) on whether the family trusts/trustees were subject to income tax in Mauritius, as was perceived to be critical to the success of the tax plan, or how that could be ensured, without any direct reference to the Mauritius trustees at all. Mr Pentelow asked Mr Binks for comments on his fax to Mr Rajhabalee on 2 August but Mr Binks does not appeared to have passed any information on to the Mauritius trustees about what the UK advisers were doing.

(2) The UK advisors took the lead in deciding what to do once advice was received from Mr Rajhabalee:

(a) The UK advisers sent Mr Rajhabalee's advice to the other UK advisers (including DKB/KBPB) but not to the Mauritius trustees. They involved Mr Gujadhur only when they had decided that they wished to follow the recommendation to obtain a ruling which, evidently, the Mauritius trustees would have to submit (as the ruling related to the tax position of the family trusts in Mauritius).

(b) When the UK advisors then asked Mr Gujadhur to obtain a ruling, they provided him with the contact details for Mr Rajhabalee but rather than leaving it to Mr Gujadhur to liaise with Mr Rajhabalee as he felt necessary, they took it upon themselves to seek Mr Rajhabalee's input on the draft request for a ruling and continued to correspond with him direct.

(c) It seems that the UK advisors also prompted Mr Gujadhur to consider what non-exempt income could be generated (if it was held that the existing income arising to the family trusts was exempt) and suggested what steps could be taken to generate such income (such as investing the funds held on discretionary trusts)

and, on a number of occasions, prompted or urged Mr Gujadhur to provide his input on resolving this issue with increasing impatience.

(d) They informed UK Counsel of what action was being taken to resolve this tax issue without involving or copying in the Mauritius trustees.

(e) The UK advisors essentially set the timetable for the resolution of this issue (and for the retirement of the Mauritius trustees) as Mr Gujadhur seemed to accept was appropriate.

(3) Mr Pentelow said that the initial lack of contact with the Mauritius trustees as regards this issue was because he and Mr Maslen took advice from Mr Rajhabalee on their own account, so that they could properly discharge their duty of care to their clients. However:

(a) I find that an odd explanation given that in the contemporaneous correspondence, Mr Pentelow described ensuring that "you as trustees are liable to taxation in Mauritius by reason of your residence there" as one of the Mauritius trustees' "objectives" and referred to Mr Rajhabalee as having a role of advising the Mauritius trustees on that. He was plainly of the view, therefore, that ultimately this was a matter for the Mauritius trustees to take forward. One might have thought, therefore, that Mr Rajhabalee's views were of as much interest to the Mauritius trustees as to the UK advisors.

(b) Overall the evidence indicates (in combination with the evidence set out above) that the UK advisers did not consider it important or necessary to involve the Mauritius trustees in them obtaining tax advice in Mauritius on the basis that (a) the tax plan was the settlors' plan and any on-going shaping or refinement of that plan was a matter for the settlors and the UK advisers, and (b) the Mauritius trustees essentially had what may be described as a secondary role only in that they were the persons who were, in effect, engaged to administer that plan as so decided upon, shaped and refined by persons in the UK on an on-going basis. Hence, Mr Pentelow and the other UK advisers involved them only once they had taken their own advice and decided on what they considered to be the best way forward in order to ensure the success of the plan.

268. That the Mauritius trustees had a secondary role, in administering the settlors' plan, is further reinforced by the fact that:

(1) It appears that (a) whether a Jersey entity within the DKB group should be appointed to act as investment adviser was suggested by someone in the UK (probably DKB/KBPB), (b) the merits of the proposal was discussed amongst the UK advisers without the Mauritius trustees being involved, and (c) the Mauritius trustees adopted the proposal without considering any other option.

(2) Mr Pentelow accepted that, acting through him, Mr Lenagan gave the instruction for the PC trusts team to start work on the documents for the retirement of the Mauritius trustees and to settle them with UK Counsel. Whilst Mr Binks did not consider he was acting for Mr Lenagan in accepting what he described as a sensible suggestion for him to get on with this, the fact is that, as on a number of occasions, he took action at the instigation of the settlor/the settlors' advisors without feeling the need for any communication with or provision of any explanation to or obtaining of any input from the Mauritius trustees.

(3) It is apparent throughout the correspondence that the UK persons involved considered that it was for them to set the timetable for the Mauritius trustees' retirement and appointment of new UK trustees by reference to when it was considered necessary

for them to do so to ensure the success of the plan, and the Mauritius trustees seemed to share that view:

(a) The UK advisors repeatedly prompted and urged the Mauritius trustees to take the relevant required action within their timetable with increasing urgency as time wore on and they became concerned that the law would be changed. I note that (a) KBPB referred to the UK advisors identifying the retirement date for strategic reasons, (b) the UK advisers made a number of references seemingly to their/the settlors' intentions on timing, (c) the UK advisers commented that they needed to ensure that the likely timetable fitted with what they needed, that they would "most like to see...a timetable covering the action" to be taken to secure the Mauritius trustees' objectives and that the outstanding points should be brought together within the available timeframe, and (d) the UK advisers sought advice from UK Counsel on the timing without involving the Mauritius trustees.

(b) Mr Gujadhur seemed to accept that the Mauritius trustees were to act within the timetable set by the UK advisors when he referred to them setting a revised schedule and said that he would arrange matters to comply with it.

269. I accept that in referring to having instructions for the appointment of the UK trustees to go ahead (once the tax issues were resolved) Mr Binks did not mean that the Mauritius trustees were being directed or instructed to approve the retirement documents. It is clear that throughout his dealings with the Mauritius trustees, he presented them with documents on the basis that they would review them and raise any queries that they had. I also accept that, although he referred to the possibility of requiring the Mauritius trustees to take action, Mr Pentelow understood that he was not in a position to direct or require them to do anything as such. However, that does not detract from my conclusions above. Moreover, the use of such language in this correspondence (and elsewhere) reinforces the conclusion that Mr Binks was in part acting for the settlors in the sense already explained and that he and Mr Pentelow (and the other UK advisers) regarded the Mauritius trustees as having a secondary role in simply administering a plan decided upon by the settlors.

270. I do not consider that it casts any material further light on the relationship between the various parties that Mr Binks provided some advice on Mr Lenagan's personal tax issues and as regards his will. He evidently wanted to be helpful in assisting Mr Pentelow with these issues and the issues were potentially of relevance to the trustees of the family trusts.

271. Mr Gujadhur appears to have taken the initiative in asking for the settlors and other beneficiaries of the family trusts to provide letters of wishes as regards how the sales proceeds should be invested (which it seems they did). However, in my view, this isolated act does not of itself detract from the points made above about the secondary nature of the role the Mauritius trustees had in managing the family trusts. I note that it is odd that the Mauritius trustees considered these letters were required to be provided to the Jersey vehicle which was to act as investment adviser. It is for the trustees to decide how to deal with the funds in the trust where appropriate taking into account the wishes of the beneficiaries and any advice received from the investment adviser.

272. It is plain from the correspondence leading up to Mr Maslen's visit to Mauritius in October that the UK advisors had become increasingly frustrated with what they perceived to be the slow response from the Mauritius trustees on the outstanding issues regarding the tax position in Mauritius. As Mr Maslen accepted in his witness statement, when he went to Mauritius in October, the intention was that he would certainly discuss those issues with them and receive their finalised advice. I accept Mr Maslen's oral evidence that he did not intend to and did not sit over the Mauritius trustees and encourage them to sign documents and it was rather the case that he was there to answer any questions (as well as to deal with the other

matters he identified). Indeed, it seems to me that, given the circumstances surrounding the Mauritius trustees' appointment and the subsequent events whereby the Mauritius trustees had, as expected, approved the merger and sold the shares on the floatation and made the relevant appointments, no one can have been in any doubt that the Mauritius trustees would retire in favour of UK trustees. It was not necessary for Mr Maslen (or anyone else) to seek to persuade the Mauritius trustees to retire; the concern was simply that all remaining issues perceived to be essential to the success of the tax plan were tied up within the UK advisers' desired timescale. I have commented further on the evidence relating to the Mauritius trustees' retirement below.

Evidence on decision to retire

273. In his witness statement Mr Gujadhur said the Mauritius trustees decided to retire in favour of UK trustees because (a) they understood that for the tax planning to be effective, they had to do so before the end of the UK tax year, (b) mitigating potential tax liabilities is part of the duty of a trustee and whilst some of the liabilities would fall on other persons, he was aware that they could recover the tax from the family trusts' assets, and (c) it therefore seemed the right action to take, given the substantial gains realised and the perceived risk of some legislative change. He said he would not have retired without appropriate successors.

274. Mr Gujadhur gave the following evidence when cross examined on the decision to retire:

(1) When it was put to him that the planning would not work unless as the trustees were willing to retire when the time came, he said:

> "One of the primary duties of the trustees was to take care of the - they owed a duty of care to the beneficiaries. If it was in the best interests of the beneficiaries to do so, yes, why not, so long it was within the law?"

(2) He agreed that it was correct that when Mr Maslen and Mr Haworth explained the planning, it was necessarily going to involve his retirement after the flotation on the assumption that took place. He added that "the decision had to be taken by the trustees. When it was put to him that if the flotation took place, it was impossible that he would not take that decision, he said: "If it was in the best interests of the beneficiaries to take that decision, why not?

(3) When asked in what circumstances they would have decided not to retire, he said "if the flotation was a complete flop, there would have been no necessity for us to retire". He agreed that if the flotation had not been successful, the underwriters would have had to buy the shares but he did not recall at what price they were going to buy the shares, whether it would have been the same benefit to the beneficiaries or not and said "I think we're just speculating here....It never happened. I don't know what would have happened then."

(4) He did not recall taking independent tax advice to decide whether it was in the interests of the beneficiaries to enter into the tax planning. When it was put to him that he simply took it on trust from Mr Maslen that if the flotation went ahead, his retirement in favour of UK trustees would necessarily be in the beneficiaries' interests, he said:

> "I was not acting alone. There were other trustees....There was a committee of directors who decided on the way forward. It was not my decision. It was a collective decision. They had to take their views, independent views. I had to take mine.... Notes would be taken, matters would be discussed at length. Where needed, we would call our tax partner to participate.....the fee note we rendered....was about $55 or $60,000 of time we had spent. That works out at about 200 hours of 3 partners' time we had spent in administering those trusts. We did our work. There was a lot of groundwork, and our fees were duly paid."

(5) When asked if he considered retiring in favour of the UK resident beneficiaries to be in the best interests of the beneficiaries, Mr Gujadhur said:

> "As I mentioned earlier on, this is the advice we had got, and the trustees discussed that at the committee of directors and we had resolved we had to do so. It was in the best interests of the beneficiaries... there was huge tax savings to be made from the tax planning."

275. Mr Binks gave the following evidence:

(1) It was put to him that "on the basis that the market was receptive and the shares were sold" he knew that the trustees wanted to assist the settlors with implementing the planning. He said:

> "Well, the trustees, if they're looking after the beneficiaries, the beneficiaries' best interests were dependent on them retiring as trustees before the end of the tax year. So to that extent, you know, in reality, providing the trustees were satisfied with the arrangements which were proposed to them for their retirement, ie the successor trustees and the indemnities which were given by the successor trustees, then one would have expected them to retire, yes."

(2) He agreed that he knew that there was tax planning, Mr Lenagan and Mr Haworth wanted it to go through, the trustees had accepted the appointment as trustees in awareness of the tax planning although he did not think they had signed up to it as such; they knew "what the sort of plan of action would be if everything went as one might have hoped" and, therefore, knew each of the steps in the planning that might be taken. He did not agree that at the time that everybody involved was signed up to the same planning noting that they all had different parts to play and there were decisions to be taken by them. He noted that the Mauritian trustees' retirement, in practical terms was very dependent on whether the flotation went ahead and succeeded and, if that was not the case, the trust could well have remained in Mauritius. He added that the beneficiaries' best interests were dependent on the Mauritius trustees retiring as trustees before the end of the tax year so, in reality, providing the trustees were satisfied with the proposed retirement arrangements (the successor trustees and the indemnities which were given by them) then one would have expected them to retire.

(3) Mr Binks did not accept that he did not draw an appropriate distinction between the trustees and the beneficiaries. He said that whilst there is a distinction there is an alignment as trustees have a duty to act in the best interests of the beneficiaries as a whole. He seemed to acknowledge that because of the tax planning there was a very strong incentive for the Mauritius trustees to appoint UK resident trustees before the end of the tax year but said that there were other issues for the trustees to consider; they would want to know that the successor trustees were going to be sensible trustees and there would be security for the trust funds. He did not agree that, at the time, in reality, due to the commonality of interest, he felt able to write to Mr Lenagan as if he were his client and accept instructions from him and Mr Haworth to act for them. He emphasised that he was acting for the trustees when he dealt with their retirement and not for Mr Lenagan or Mr Haworth. He did not see any perceived conflict but would have to analyse that question in detail

276. Mr Maslen said that he never had any understanding of anything other than that the trustees could be asked to consider retiring and the decision would be up to them. He did not agree that given the circumstances in which they were appointed, he knew that they would agree to do so. He said he knew they were "likely" to do so and noted that they might not have if the successor trustees proposed were not acceptable to them. That was the only circumstance he could imagine where they might demur. He considered it is reasonable to expect that they would see it as being in the interests of the beneficiaries to accept the suggestion of retirement.

It was put to him that if initially unsuitable successor trustees were proposed, suitable ones would be found so that, once the flotation had taken place, it was unimaginable that the Mauritius trustees could not be induced to retire. He said it "certainly was reasonably to be expected" that they would retire. He accepted the paraphrase that it was unimaginable that they would not retire if suitable replacement trustees were available.

277. Mr Pentelow accepted that, on the basis of the note Mr Maslen prepared of the initial meeting, when the Mauritian trustees took the appointment on, they did so in the knowledge of all the things they would have to do during the next few months. It was put to him that, therefore, he knew that if the flotation went ahead, they would retire in favour of UK trustees after the flotation and within the same tax year:

(1) Initially he said that he certainly knew that was "very likely" or that "in all probability" that would occur but, in his view, it was the Mauritius trustees' decision to take and there were events which could have meant they did not retire (such as if the tax legislation changed in such that there would have been no point in their retiring).

(2) He later agreed that there was an expectation that the trustees would approve the merger, sell the shares and retire in favour of UK trustees given that the flotation was so beneficial to them "in terms of the PE ratio" and that, if the planning was successful, it would save many millions of pounds of tax for the beneficiaries of the trusts (to whom the Mauritian trustees had a responsibility) and, in effect, for the trustees themselves because the liability would in part become theirs. However, the decision to do those things rested with the trustees who he again said acted as independent trustees throughout.

(3) He said the Mauritian trustees were very well informed about tax and about tax planning (for example Mr Gujadhur first raised the different persons issue). In his view, they understood the proposal from the beginning and, therefore, he expected that if the transaction proceeded, they would retire in favour of UK trustees.

(4) He added that there was every expectation that the Mauritius trustees would dispose of their shares and would subsequently retire: "That was....the tax planning proposal. There's no question about that and there was the legitimate expectation that that is what would happen".

278. As regards the appointment of new UK trustees:

(1) Mr Pentelow said that he was not involved on behalf of Mr Lenagan in the decision as to who to appoint as trustees when the Mauritian trustees retired. It was not his practice to be involved in that way but if a client had already decided who to appoint as trustees, then he would be involved in the consequences of that.

(2) He agreed that, as shown in the correspondence, he instructed the PC trusts team to draft documents for the new UK trustees to make distributions before they had been appointed. He considered it is very normal to draft documents before a transaction takes place. He did not accept that he knew that the UK trustees would make those appointments but said that it was certainly suggested that the UK trustees would be requested to make those appointments. He emphasised that in his view, it is absolutely commonplace, that documents are drafted before there is necessarily any certainty about a transaction taking place, because it is usually important that if a decision is taken, there is no delay in executing it because documents then need to be drafted. He noted that at that stage there was a completely rational expectation that the new trustees would be appointed.

279. In my view this evidence confirms, in effect, that the Mauritius trustees were appointed by the settlors to administer the plan devised for and adopted by the settlors for the tax efficient sale of the shares and they accepted the appointment on that basis. The witnesses accepted, in

effect, that that was the expectation from the outset (assuming the flotation went ahead). As Mr Maslen accepted it was "unimaginable" that the Mauritius trustees would not retire if suitable replacement trustees were available. Whilst Mr Gujadhur indicated in general terms that DTOS and he would have had extensive discussions, he did not explain what those discussions would have related to. He referred to receiving advice that it was in the interests of the beneficiaries for the Mauritius trustees to retire but it is evident that the Mauritius trustees did not take any independent advice on that. From the outset, Mr Gujadhur (and the PC trusts team) appear to have simply accepted that the tax plan was something that the Mauritius trustees should implement given the potential substantial saving in CGT but without taking any independent advice on how likely the plan was to succeed or any potential downside. Moreover, although the witnesses stressed that the Mauritius trustees' retirement was dependent on them being satisfied with the proposed new UK trustees, given the evidence on the events leading up to this, it is wholly unrealistic to suppose that the Mauritius trustees would not have accepted the settlors' choice of replacement UK trustees.

PART C – POEM issue

280. I deal first with the POEM issue on the basis that, as explained below, I accept that how the Mauritius treaty is to be applied largely accords with the appellants' approach and, as set out in Part D, I have rejected HMRC's "different persons" argument. On that basis, (a) there was a period of dual residence, in which each family trust was "a resident of" both Mauritius and the UK under the treaty residence tests, (b) the tie breaker is, therefore, in point so that it is necessary for the tribunal to determine where the POEM of each family trust was at the relevant time, and (c) if, under the tie-breaker, each family trust was "a resident of" only Mauritius, article 13(4) applies to prevent there being any CGT charge on the gains or if it was "a resident of" only the UK, CGT applies to the gains.

Approach to the interpretation of the Mauritius treaty

281. It was common ground that the tribunal should interpret the Mauritius treaty according to the summary of the principles to be applied in interpreting treaties set out by Mummery J in *IRC v Commerzbank* 63 TC 218 ("*Commerzbank*") (as based on the approach laid down by the House of Lords in *Fothergill v Monarch Airlines* Ltd [1981] AC 251). His summary was later approved by the Court of Appeal in *Memec v IRC* [1998] STC 754 at 766g) and in *Smallwood* (see [26] to [29]) and more recently by the Supreme Court in *Fowler v HMRC* [2020] 1 WLR 2227 at [19]. The full passage from *Commerzbank* is as follows:

> "(1) It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that 'consideration of the purpose of an enactment is always a legitimate part of the process of interpretation': per Lord Wilberforce (at 272) and Lord Scarman (at 294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at 285) and Lord Scarman (at 290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at 279)
>
> (2) The process of interpretation should take account of the fact that -
>
>> 'The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd v. Babco Forwarding & Shipping* (*UK*) *Limited*, [1987] AC 141 at 152, "unconstrained by technical rules

of English law, or by English legal precedent, but on broad principles of general acceptation': per Lord Diplock (at 281–282) and Lord Scarman (at 293).".

(3) Among those principles is the general principle of international law, now embodied in article 31(1) of the Vienna Convention on the Law of Treaties, that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. A similar principle is expressed in slightly different terms in McNair's *The Law of Treaties* (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is 'the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances'. It is also stated in that work (p 366) that references to the primary necessity of giving effect to 'the plain terms' of a treaty or construing words according to their 'general and ordinary meaning' or their 'natural signification' are to be a starting point or prima facie guide and 'cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them'.

(4) If the adoption of this approach to the article leaves the meaning of the relevant provision unclear or ambiguous or leads to a result which is manifestly absurd or unreasonable recourse may be had to 'supplementary means of interpretation' including *travaux préparatoires:* per Lord Diplock (at 282) referring to article 32 of the Vienna Convention, which came into force after the conclusion of this double taxation convention, but codified an already existing principle of public international law. See also Lord Fraser (at 287) and Lord Scarman (at 294).

(5) Subsequent commentaries on a convention or treaty have persuasive value only, depending on the cogency of their reasoning. Similarly, decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question: per Lord Diplock (at 283–284) and per Lord Scarman (at 295).

(6) Aids to the interpretation of a treaty such as *travaux préparatoires*, international case law and the writings of jurists are not a substitute for study of the terms of the convention. Their use is discretionary, not mandatory, depending, for example, on the relevance of such material and the weight to be attached to it: per Lord Scarman (at 294)."

282. At set out [95] of the decision of the Commissioners in *Smallwood*, article 31 of the Vienna Convention on the Law of Treaties referred to in this quotation from *Commerzbank* provides as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

283. Mr Goodfellow submitted that:

(1) The tribunal should be mindful that, in interpreting a double tax agreement, one is construing a bargain between two countries and, prima facie, the meaning of the bargain is to be ascertained by reference to circumstances known to the parties at the time of the bargain. He referred to the following comments of Lord Reed in giving the leading judgement in *Anson v Revenue and Customs Commissioners* [2015] STC 1777 ("*Anson*") at [56] where he said that, put shortly:

> "the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

(2) If the agreement adopts the Model Convention, OECD Commentaries in place at the time are clearly likely to be in the mind of the parties and, therefore, are admissible and useful as an aid to interpretation. On the other hand, subsequent Commentaries are not in the mind of the parties at the time and so are of less more limited value. This difference is recognised in *Irish Bank Resolution Corp Ltd (In Special Liquidation) v Revenue and Customs Commissioners* [2019] UKUT 277 (TCC); [2019] STC 2286 ("*IRC*") where the UT said this at [34] and [35], and the appellants relied in particular on the highlighted text:

> ".... given the fact that the Convention closely tracks the then-published OECD draft, it [is] impossible to conclude that the Contracting States would not have taken the OECD publications into account. We proceed on the basis that the OECD material pre-dating the Convention should be treated like travaux préparatoires.
>
> *The same cannot be the case as regards OECD publications post-dating the Convention. Ex hypothesi, such material cannot have been taken into account by the Contracting States and cannot amount to travaux préparatoires. At most, such materials are to be treated as text books and articles elucidating the meaning of the Convention. Of course, we recognise that the further removed, both in terms of time and in terms of subject matter (the OECD draft conventions and - more particularly - the commentaries evolved), the less helpful such materials are likely to be in terms of elucidating the Convention*." (Emphasis in italics added.)

284. I did not understand HMRC to dispute the first of the appellants' submissions above. However, they said that the decision of Supreme Court in *Fowler* demonstrates that the comments in *Irish Bank Resolution Corporation Ltd v HMRC* set out above are not good law. HMRC referred to [18] of that decision where Lord Briggs said this:

> "*The OECD Commentaries are updated from time to time, so that they may (and do in the present case) post-date a particular double taxation treaty. Nonetheless they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves*: see *Revenue and Customs Comrs v Smallwood* (2010) 80 TC 536, para 26(5) per Patten LJ [the citation from *Commerzbank* that: Subsequent commentaries on a convention or treaty have persuasive value only, depending on the cogency of their reasoning]....." (Emphasis added.)

285. It seems to me that the comments of the UT in *Irish Resolution* are something of a gloss on the principles set out in *Commerzbank* and, in any event, to the extent that there is any

inconsistency between those comments and those of the Supreme Court in *Fowler*, the guidance set out by the Supreme Court, of course, takes precedence.

286. I note that Lord Briggs continued, at [18] to refer with approval to the guidance given on the interpretation of double taxation treaties in *Anson*, where in considering the UK/USA double tax agreement, at [110] to [111], Lord Reed said:

> "Article 31(1) of the Vienna Convention requires a treaty to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. *It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in Memec [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty should be construed in a manner which is 'international, not exclusively English'.*
>
> That approach reflects the fact that a treaty is a text agreed upon by negotiation between the contracting governments. The terms of the 1975 Convention reflect the intentions of the US as much as those of the UK. They are intended to impose reciprocal obligations, as the background to the UK/US agreements from 1945 onwards makes clear....... (Emphasis added.)

287. HMRC also referred to Lord Briggs' comments at [19] that, at [26] to [29] of *Smallwood*, Patten LJ "provided a useful summary of the correct approach to interpretation, largely based on dicta of Mummery J" in *Commerzbank* and that the whole passage repays reading and [29] is worth quoting in full. In the cited passages in *Smallwood*:

(1) At [26] Patten LJ set out the passages from *Commerzbank* set out above (and para 31 of the Vienna Convention). He then set out general guidance on how the treaty is intended to operate.

(2) He said, at [28], that the 1977 Model Convention adopted in the treaty eliminates the possibility of double taxation by (a) allocating the right to tax by reference to the situs or source of the taxable income or gain or the place where the person in receipt of the profit is treated as resident for tax purposes, or (b) when that set of rules leaves both Contracting States eligible to tax the same gain, by allowing tax payable in one Contracting State to be credited against the taxpayers' liabilities in the other (under article 24).

(3) He noted, at [29], that the provisions of the treaty are given statutory effect in relation to the taxpayers concerned by s 788 TA 1988 as a form of relief against what would otherwise be the relevant tax liability under UK law. But:

> "the DTA is not concerned to alter the basis of taxation adopted in each of the Contracting States as such or to dictate to each Contracting State how it should tax particular forms of receipts. Its purpose is to set out rules for resolving issues of double taxation which arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the Contracting States under the DTA. The criteria adopted in these tests are not necessarily related to the test of liability under the relevant national laws and are certainly not intended to resolve these domestic issues."

Dispute between the parties

288. The dispute centred on the effect of the decision of the Court of Appeal in *Smallwood* in which (a) Patten LJ, with whom Hughes LJ and Ward LJ agreed on this point, set out the correct interpretation of article 13(4) in the context of the "round the world" scheme utilised in that case and, (b) Hughes LJ and Ward LJ held that the Special Commissioners had not erred in their conclusion that the POEM of the trust in question was in the UK; Patten LJ took the contrary view. The parties disagree on (a) the duration of the period over which, for the purposes of assessing whether article 13(4) applies, POEM is to be assessed; the appellants said the relevant time is when the shares were disposed or (or, at most, the relevant period)

whereas HMRC said it is the whole of the relevant tax year, and (b) the nature of the POEM test and what the decision of the majority of the Court of Appeal in *Smallwood* means.

289. On the nature of the POEM test, Mr Goodfellow made the following main points:

(1) As the taxpayers argued in *Smallwood* (a) for practical purposes the POEM test is the same as the CMC test which applies for determining where a company is tax resident as that test has been interpreted by the Court of Appeal in W*ood v Holden* [2006] STC 443. In brief, he argued that, as it was put by the taxpayers in *Smallwood*, that case establishes that the central or "top-level" management of a company is carried out by its board of directors, as the persons authorised to make decisions on its behalf, unless it can be shown that the control of the company's affairs was effectively "usurped "and exercised by some third party, and (b) that this is also the correct approach to establishing POEM of a relevant person, such as a trust, by reference to where the trustees takes decisions is supported by the comments in para 23 of the OECD commentary in place when the Mauritius treaty was agreed regarding how treaties allocate taxing rights by reference to residence ("**the 1977 Commentary**"). The full text is as follows and the appellants rely on the final sentence where the UK had a declared position at the time (which they say has not changed) that the CMC test is materially the same as the POEM test:

> "23. The formulation of the preference criterion in the case of persons other than individuals was considered in particular in connection with the taxation of income from shipping, inland waterways transport and air transport. A number of conventions for the avoidance of double taxation on such income accord the taxing power to the State in which the 'place of management' of the enterprise is situated; other conventions attach importance to its 'place of effective management', others again to the 'fiscal domicile of the operator'. *Concerning conventions concluded by the United Kingdom which provide that a company shall be regarded as resident in the State in which 'its business is managed and controlled', it has been made clear, on the United Kingdom side, that this expression means the 'effective management' of the enterprise.*" (Emphasis added.)

(2) In their decision in *Smallwood*, the Court of Appeal acted on the basis that the Commissioners were correct to approach the POEM issue by asking where the "top level management" was (as was not challenged by the parties). However, in adopting that approach they did not cast doubt on the fact that POEM test is to be interpreted in line with the approach set out in *Wood v Holden*.

(3) Applying the correct *Wood v Holden* approach, on the facts, the central or "top level" management of the family trusts was not carried out by anyone other than the Mauritius trustees during the relevant period. In making all relevant decisions, including the key decisions to approve the merger and floatation, their functions were plainly not "usurped" in the sense in which that term is used in *Wood v Holden*; they were not by-passed or dictated to, they did not agree to act on the instructions of the settlors or any other person and did not abdicate responsibility for making all relevant decisions.

290. HMRC argued, as they had also put forward in *Smallwood*, that:

(1) In deciding on the correct interpretation of the POEM test the tribunal should have regard to the later Commentary to the OECD Model ("**the later Commentary**") where it was stated, at para 24, that:

> "24 As a result of these considerations, the 'place of effective management' has been adopted as the preference criterion for persons other than individuals. *The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made*. The place of effective management will ordinarily be the place where the most

senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time." (Emphasis added.)

This was the commentary which the Commissioners and the Court of Appeal took into account in their decisions in *Smallwood*.

(2) Effective management implies "realistic positive management" as set out in *Wensleydale's Settlement Trustees v IRC* [1996] STC (SCD) 241 ("*WST*"). In that case the Commissioners decided that POEM of a trust was not in Ireland despite the appointment of a trustee in Ireland and meetings of the trustees in Ireland. Mr Brennan argued that the reasons given for the decision, as listed below, apply equally in this case to demonstrate that POEM of the family trusts was not in Mauritius:

(a) The Commissioners held that (i) despite resolutions of trustees, the disposal of shares was being arranged in England, (ii) it was unreal to suggest that the trustees could reject the offer made for the shares, and (iii) there was no input from actors in the Republic of Ireland and the trustee, although she signed documents placed before her, tried simply to fall in with the settlor's wishes.

(b) Mr Brennan said that in this case (i) the merger and flotation were being project-managed at great time and expense in the UK, (ii) it was unreal to suggest that a merger and flotation which had been the subject of specialist City advice, agreed upon by the majority shareholders and boards of the merging companies and announced to the market by the date of the Share Exchange Agreement was going to be interfered with by the Mauritius trustees, and (iii) the Mauritius trustees knew from the outset the steps required for the scheme to work and the wish of Mr Haworth and Mr Lenagan that there would be a merger and flotation followed by repatriation of the family trusts.

(3) This was the test for determining POEM which the Special Commissioners adopted in *Smallwood* and the majority in the Court of Appeal in *Smallwood* plainly accepted that is the correct test, it is not akin to the approach taken to the CMC test in *Wood v Holden* and that approach is simply not in point.

291. Mr Goodfellow noted that in *Smallwood* the taxpayers did not challenge the correctness of the fact that the Commissioners had referred to the later Commentary in the Court of Appeal. In his view, hence, that court simply acted on the assumption that the gloss put on the POEM test by the Commissioners was the correct standard to be applied. He said that, in any event, the later Commentary is no more than a summary of or an expansion upon the CMC test.

CMC test and decision in Wood v Holden

292. The heart of the dispute is (a) whether the POEM test is to be applied, in effect, in the same manner as the CMC test was applied in *Wood v Holden*, and (b), given that issue was also fully aired and considered in *Smallwood*, what the majority in the Court of Appeal decided on that score. It is helpful, therefore, to have in mind the principles set out in *Wood v Holden* before considering the decision in *Smallwood*.

293. Before turning to the decision in *Wood v Holden*, I note that, as was common ground in that case, the starting point for determining the residence of a company is always the often-quoted formulation of the CMC test set out in *De Beers Consolidated Mines, Ltd v Howe* [1907] UKHL 626 ("*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… 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 central management and control actually abides*." (Emphasis added.)

294. I note also that in *Wood v Holden*, reliance was placed on the decision in *Bullock (H M Inspector of Taxes) v The Unit Construction Co, Ltd* [1959] UKHL TC 38 712) ("*Unit Construction*"). This 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 CMC "actually abides" and the company's "real business is carried on".

295. 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 UK parent taking over control and management of the subsidiaries or, as Lord Cohen put it, "usurping" the functions of the subsidiaries' board of directors, notwithstanding that was prohibited under the subsidiaries' constitution. As set out by Park J in *Wood v Holden* (as taken from para 5 of the Case Stated at 38 TC 715) the managing director of the parent company formed the view that:

> "the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of [the parent company] in London.' The board of directors of the parent company 'decided that … they were forced to take over management and control."

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:

(1) 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".

(2) 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". 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 as it was put 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."

(3) Lord Cohen, at 744, in effect, endorsed the view (taken by a Judge in a different case 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 said, however, that the Judge plainly did not have 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" and 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 that was not the case).

297. It seems to me important to bear in mind that as Lord Radcliffe said in *Unit Construction*, it is the principle established *De Beers* which is “the test”. Therefore, cases such as *Unit Construction* itself and *Wood v Holden* are simply illustrations of the application of that test on the particular facts in question.

298. I note that when, as is usual, powers to act for a 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 on CMC is in identifying whether that really is the case in a number of circumstances, such as where the company has a limited or specific function whether as part of a group or, as in *Wood v Holden*, to fulfil a role in a tax plan, and the board act in accordance with that plan or role.

299. *Wood v Holden* 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 CGT on part of the gain arising on the sale of a group of trading companies. Under the original plan, an overseas company, CIL was to sell its 49% holding in the UK holding company of the group, Holdings, direct to the outside purchaser. However, due to a change in law, this would have lead to CGT and 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. It seems to have been accepted that Eulalia was at the relevant time resident for tax purposes in the Netherlands under Netherlands law.

(2) A few days later CIL entered into a contract with Eulalia for it to buy CIL’s 49% shareholding in Holdings.

(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.

300. For the planning to work, under domestic law, both CIL and Eulalia had to be resident for tax purposes outside the UK when the above steps took place but HMRC did not accept this as regards Eulalia. Essentially HMRC’s case was that AA did not exercise CMC outside the UK because it did not in fact take the relevant decisions but did what it was told to do by Mr Wood or by PW acting on his behalf. If they were wrong on that, HMRC’s further argument was that, under s 249 of the Finance Act 1993 where Eulalia was resident for the relevant UK tax purposes was to be determined under the tie-breaker in the double tax agreement between the UK and the Netherlands and, under that test, POEM of Eulalia was not in the UK. On appeal the Commissioners decided for HMRC but the High Court and the Court of Appeal decided in favour of the taxpayers.

301. In the Court of Appeal Chadwick LJ gave the judgement with which the other members of the panel agreed. Some of his discussion (and that of Park J in the High Court) related to issues regarding the burden of proof. I have not set out details of this as it is not relevant to the present case.

302. He set out, at [19], what he considered was a fair summary of the Commissioners’ reasoning as follows:

> "(1) From 18 July 1996 responsibility for the day to day management of Eulalia lay in [AA], as managing director. [AA] had assumed that office and that responsibility at the instigation of [PW].
>
> (2) On 23 July 1996, Eulalia – a company with "minimal cash resources" – had agreed to purchase the Holdings shares from CIL at a price of £23.7 million, with provision for uplift. There was no evidence that any consideration was given by [AA] to the question whether that was a proper price for Eulalia to pay for the Holdings shares. In particular, no explanation was given as to the basis upon which that price was fixed; and no advice was received upon which [AA] could have relied.
>
> (3) Nevertheless, Eulalia was purchasing the shares from the company (CIL) of which it was a wholly-owned subsidiary; and the purchase was funded by an interest free loan from CIL equal to the full amount of the purchase price. So, the purchase itself did not necessarily give rise to the conclusion that Eulalia had ceded central management and control to CIL. As the special commissioners put it (at paragraph 134): "It would be a far-reaching proposition to state that any subsidiary entering into a contract to acquire property from its parent on such a basis without independent consideration of the terms is necessary ceding its central management and control to the parent".
>
> (4) But there were two other factors to be taken into account. First, Eulalia had no business other than the acquisition, holding and sale of the shares in Holdings: ". . . the only activity of Eulalia between its acquisition by CIL and the sale of its shares in Holdings was the acquisition and sale of the shares in Holdings and the matters connected therewith. There was nothing else to manage".
>
> (5) Second, although there were "strong commercial reasons" for Eulalia to accept the offer to sell the shares in Holdings (in October 1996), no "real consideration" was given by [AA] to the terms of that sale. [AA] "simply fell in with the wishes of Mr Wood expressed by his advisers".
>
> (6) The failure of [AA] to give any, or any sufficient "real" or "informed" consideration to the terms upon which the shares in Holdings were acquired by Eulalia on 23 July 1996 – or sold on to Birthdays Group Ltd in October 1996 – had the effect that "the actual effective decision that the documents be signed and executed" was not taken by [AA] in Amsterdam."

303. Chadwick LJ noted, at [20], that in finding that CMC of Eulalia was in the UK the Commissioners did not find it necessary to say where, or by whom, the "actual effective decision" was taken; but the inference is that they thought the decision was taken by one or other (or both) of PW and Mr Wood. He recorded, at [21], that on the POEM issue, the Commissioners decided that:

> "in the present context there is no difference between central management and control and the place of effective management. In our judgment the place of effective management must be the place where effective management decisions are taken. There is no indication that any effective management decisions were taken in the Netherlands."

304. Chadwick LJ explained, at [22], that it is important to keep in mind that an appeal of this kind is limited to cases in which the appellant is "dissatisfied in point of law" with the decision. The court's task is to examine the decision "having regard to its knowledge of the relevant law" and as explained by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14 ("*Edwards v Bairstow*"), at [36]:

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

305. In his view, in the High Court, Park J plainly approached his task with that guidance in mind. He noted that, at [37] of his judgment ([2005] EWHC 547 (Ch), [2005] STC 789, 833c), he concluded that on a proper application of the law to the facts the only tenable conclusion was that, under the common law of corporate residence, Eulalia was resident in the Netherlands and accepted HMRC's submission that:

> "the Commissioners must either have applied the wrong test, or that, if they applied the right test, they came to a conclusion which could not properly be reached on an application of it, so as to exhibit an error of law on familiar *Edwards v Bairstow* principles ([1956] AC 14). "

306. At [24] to [26] Chadwick LJ set out much of Park J's commentary on the law. In the relevant passages:

(1) At [21], having set out the *De Beers* test, Park J acknowledged 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".

(2) He explained, 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.* He commented that in that case:

> "Thereafter [once the UK parent took over control] the representative of the parent company in East Africa effectively usurped the functions of the local boards, which still existed but stood aside, and controlled the subsidiaries in accordance with the requirements of the parent. Much of that may have been irregular, or even unconstitutional, but it was what happened. It was held that the African subsidiaries had become resident in the [UK]."

(3) 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".

(4) 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."

(5) In his view, at [24], 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."

(6) 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".

(7) He added, at [25], 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."

(8) He then referred, at [26], to four cases which he thought illustrated the principles he had set out (*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)). At [27], he said although not identical these cases had some "common features" which he thought were relevant to the present case:

> "They all involved persons based in one jurisdiction (commonly a high tax jurisdiction) causing companies to be established in other jurisdictions (commonly low or no tax jurisdictions)…. 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]."

(9) He continued in the same passage to note that in all of these cases *Unit Construction* was expressly distinguished on the basis that,

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

307. Chadwick LJ concluded, at [27], that Park J was "correct in his analysis of the law" and he summarised the correct approach to determining where CMC of a company is as follows:

> "...it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are 'usurped'—in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an 'outsider' in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an 'outsider' is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function."

308. I note that in *Smallwood*, Patten LJ drew particular attention to Chadwick LJ's comments at [27] and the preceding passage at [26] where Chadwick LJ set out Park J's comments on the four cases he had referred to at [26] of his judgement.

309. In the High Court, Park J made a number of criticisms of the Commissioners' findings which plainly demonstrate that he did not consider that it sufficed to demonstrate that CMC of Eulalia was in the UK that (a) AA, as director of Eulalia fell in with the tax plan devised on the UK by UK advisors acting on behalf of Mr Wood, (b) the UK advisors superintended the plan,

(c) there was a confident expectation that AA would decide to take the steps involved in the plan, and/or (d) Eulalia had no role other than to buy and sell the shares in Holdings for the purposes of the plan:

(1) In commenting, at [42], on HMRC's case 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 said that whilst "[PW] obviously expected that [AA] would do the things which they proposed to it" and likewise "[AA] obviously expected that it would do the things proposed, provided that it saw nothing objectionable in them" PW (a) "did not propose things in the style of telling [AA] what to do". Moreover, he seemed to consider it unfeasible that as professional adviser, such as PW, could dictate to AA: He said: "Professional advisers…are in no position to give orders to major banks and trust companies". He thought that the nature of the relationship between them as one of professional advice being given, accepted and acted upon was borne out by the evidence.

(2) At [43], he said, in effect, that it did not suffice to demonstrate that CMC of Eulalia was in a different place to the country where the legal formalities took place 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 [48] and [49] he said that the Commissioners findings as to the lack of Eulalia's activity, had no real bearing but, in any event, he did not agree with their comments as Eulalia purchased the shares with a view to reselling them (and entered into an agreement with PW for them to advise on this). What it did was a big transaction in terms of the amounts involved, but "if it did not require frequent or intensive control and management, and if all the evidence that there is shows that such decisions as were needed were made in the Netherlands", the conclusion must be that it was resident in the Netherlands.

(4) At [51], 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."

(5) On the last point he noted, at [52], that in *Esquire Nominees* it was held that the relevant company was resident in Norfolk Island notwithstanding that the local directors followed the guidance of a firm of Australian accountants. 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 UK parent company, the Commissioners rejected the argument that the subsidiary was resident in the UK.

(6) He said, at [57], 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 resolved to enter into the agreement to acquire the shareholding in Holdings

and where it later decided to accept PW's advice to sell those shares. He commented that the only likely candidates in the UK were Manchester (where the PW advisers were) or Bury (where the taxpayers were) but neither could be right, as at [58]:

> "In and from Manchester [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." (Emphasis added.)

(7) At [60], 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]. At [62], he noted that 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."

310. Chadwick LJ did not set out the above passages but referred to Park J as having come to his conclusion after "a full and careful analysis" of the Commissioners' decision. He did, however, set out much of Park J's comments on the Commissioners' conclusions at [145] of their decision. First, Chadwick LJ noted, at [34], that Park J highlighted the following from [145]:

> [i] "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."
>
> [ii] "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."
>
> [iii] "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."
>
> [iv] "Merely going through the motions of passing or making resolutions and signing documents does not suffice. Where the geographical location of the physical acts of signing and executing documents is different from the place where the actual effective decision that the documents be signed and executed is taken . . . the latter place is where 'the central management and control actually abides.'"

311. Chadwick LJ then set out, at [35] and [36], much of Park J's comments on these observations, as set out at [63] to [69] of Park J's decision, which lead Park J to conclude, at [70] of his decision, that in the circumstances he set out he could not agree with the Commissioners that AA's participation was "merely going through the motions of passing and signing documents". In summary, in these passages, Park J made the following main points:

(1) As regards the Commissioners' observations at [i], given the Commissioners had only identified only the two acts of buying and selling the share, their conclusion was "extraordinary" (see [64]). What they 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, at [65]:

> "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."

(2) As regards the Commissioners' observations at [ii], at [66]:

(a) "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

(b) "if they apply their minds to whether or not to sign the documents, the authorities……indicate that it is a very different matter".

(c) 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]". This evidence showed that:

> "...[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."

(3) As regards the Commissioners' observations at [iii] at [67]:

(a) 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" but, at [68]:

> "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."

(b) In any case, at [69], the Commissioners "overstate their criticisms of [AA] in these respects"; some of their findings of fact were inconsistent with the finding that the decision was insufficiently informed to be an effective decision:

(i) The Commissioners were critical that [AA] did not have enough information about the basis for the price to be paid for the shares in Holdings. However, they answered that in noting (i) that Eulalia was a wholly-owned subsidiary of CIL, and that the price was left outstanding interest free, and (ii) "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 (iii) that there was "nothing surprising in the fact that [Eulalia's] directors accepted the agreement".

(ii) At, [70], the Commissioners accepted, at [140], 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 but disregarded several substantially undisputed facts (such as that AA had engaged PW to advise and represent it on negotiations for a sale, PW twice reported in writing to AA about its negotiations and there was at least one telephone conversation between them; PW recommended AA to accept the offer for the shares; that the normal practice within AA was for its personnel 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 confirmed in writing that AA agreed with the draft agreements and would execute them on behalf of Eulalia).

312. Chadwick LJ had said, at [35], that he found Park J's analysis "compelling" and concluded, at [40], that Park J's conclusion was correct. In his view, the 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*."

313. 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."

314. 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 (a) there was little to manage, and/or (b) they were reached without proper information or consideration. He said, at [42] and [43]:

> "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."
>
> "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. I should add (in fairness to [AA]) that it is not said that, with fuller information, further consideration or independent professional advice, the decisions in the

present case as to the purchase and sale of the Holdings shares would have differed from the decisions actually taken; but nothing turns on that. The decisions which were taken would have been no less "effective decisions" if (on the facts) different decisions would have been reached if [AA] had approached the decision-making process with greater circumspection…."

315. Given this conclusion it was not necessary to consider where POEM was located for the purposes of the UK/Netherland treaty. However, Chadwick LJ said, at [44], that he found "it very difficult to see how, in the circumstances of this case, the two tests could lead to different answers".

Decision of the Special Commissioners in Smallwood

316. In *Smallwood*, the parties used a "round the world" scheme to seek to avoid CGT on the sale, in the early part of 2001, of two sets of shares ("**the FG shares**" and "**the B shares**") owned by a trust established by Mr Smallwood ("**S**"). As in this case, the previous Jersey trustees of the trust were replaced with a trustee resident in Mauritius shortly before the shares were sold and that trustee was replaced with UK resident trustees (S and Mrs Smallwood) before the end of the 2000/01 tax year.

317. The circumstances in *Smallwood* (and in this case) bear some similarity to those in *Wood v Holden*. In outline, in each case, (a) tax advisers in the UK formulated a plan to avoid CGT on gains expected to arise on a proposed sale of shares by ensuring that the seller was, at the time of the sale, a vehicle or person resident in a suitable jurisdiction outside the UK and not in the UK, (b) an offshore vehicle and/or offshore director or trustee was put in place for this specific purpose, and (c) the tax saving plan was, as Park J put it in *Wood v Holden*, "superintended" from the UK.

318. In *Wood v Holden* the issue was the application of the English common law CMC test for determining where a company is resident whereas in *Smallwood*, as in this case, the issue was the POEM of a trust under the tie-breaker in the Mauritius treaty. However, it is hard to discern any material difference between the two tests (as was the view of Chadwick LJ in *Wood v Holden*):

(1) *De Beers* tells us that the common law CMC test requires an assessment of where the "real business" of a company is carried on and the real business is carried on where CMC "actually abides". *Unit Construction* confirms that whilst often CMC will be located where a company's board of directors takes decisions, as the persons authorised to take decisions on its behalf, that may not be the case; it is paramount, as is implicit in the *De Beers* test, to examine the factual position as to who actually makes relevant decisions and where those decisions are made.

(2) The later Commentary tells us that POEM is "the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made" and that place "will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined" but "no definitive rule can be given and all relevant facts and circumstances must be examined".

319. I note that, as explained below, in *Smallwood* the Commissioners considered the 1977 Commentary was not relevant and the Court of Appeal referred only to the later Commentary. However, so far as the 1997 Commentary is relevant, it does not, in my view, tell us anything more than that, when that Commentary was in place, the UK viewed "effective management" as commensurate with CMC in the *De Beers* sense given that has consistently been held to be *the* test.

Facts

320. I have set out the facts of *Smallwood* in some detail given HMRC's argument that the facts of this case are very similar to those in *Smallwood* and in order to assist with understanding how the Commissioners and the Court of Appeal viewed the POEM test.

321. *Proposal for the sale of the shares and tax planning in May to October 2000*:

(1) Around mid-2000, Mr Bazzone ("**B**") of Quilter, the investment adviser to the trust (who was introduced by KPMG Bristol in early 2000) considered it was prudent to reduce the trust's exposure to its large holding of FG shares (see [18]). The trust also held a portfolio of shares managed by Merchant which included the B shares (see [19]). In September 1999 Mr Smallwood ("**S**") had become free of previous stock-exchange restrictions on the sale of the shares (see [17]).

(2) As it was appreciated that a sale of the shares would give rise to a substantial gain, Mr Turbervill ("**T**") of KPMG's Bristol office advised on a tax planning exercise (see 20). He and his colleague, Mr Gadd ("**G**"), had advised S and the trust for some years prior to the period in question (see [15] and [16]).

(3) On 10 August, G wrote to S setting out the steps in the plan ([21]) and said, if he wanted to proceed, the advice of Tax Counsel would be sought and there would be discussions with the existing Jersey trustee, Lutea, who would have to be convinced that there was a good chance of success before retiring as trustee (see [22]).

(4) In October, Lutea instructed KPMG Bristol to instruct Counsel to advise on CGT and, on 15 November, wrote to S about the preparation of the papers for it to retire in favour of Mauritius trustees ([23]). On 20 November, S replied that the shares had remained flat for some time and that it would be sensible to consider their sale and that he felt that the Jersey trustee "should consider that Mauritius was a sensible route to progress" (see [23]).

322. *Contact with PIML in November 2000*:

(1) In November, T made contact with PMIL, a trustee company wholly owned by KPMG Mauritius, who acted "under the same umbrella" as KPMG Bristol. PIML had four directors including Mr Jingree, its managing director, who had primary responsibility for the trust. Ms Taher and Mr Shah were the members of staff at PMIL who undertook work for the trust (see [24] and [25]).

(2) On 24 November, T informed PIML of the tax planning in an email as follows and asked if PIML "was prepared to act as trustee on this basis:

> "After taking Counsel's opinion it had been decided in principle that the Jersey trustee will resign in favour of Mauritius trustees, so that the trust becomes tax resident in Mauritius. Provided that the new trustees agree that it is sensible to sell the [FG] shares they will do so at some time within the next 3-4 months. If they sell the shares before 5 April 2001 they would then retire in favour of [UK] resident trustees, also before that date. If this course of action is followed, it is hoped that no [UK] tax liability will arise upon the sale as a result of the [UK]/Mauritius treaty."

At the hearing T said that he meant to make it clear that he was offering PMIL an assignment which could potentially last for only three or four months.The Commissioners commented that there was no stipulation that the shares had to be sold before 5 April 2001 although it was clear from this email that "there was a hope and a confident expectation that the shares would be sold" (see [27] and [28].)

(3) On 27 November, Mr Jingree said that, in principle, PMIL was agreeable but the usual acceptance procedures would have to be satisfied and he explained what needed to be done to obtain the benefit of the Mauritius treaty (see [29] and [30]).

(4) On 5 December, G informed S that the Jersey trustee had confirmed it was willing to retire, KPMG Bristol would comment on the deeds of retirement and appointment,

PMIL would act as the new trustee and, once the assets had been transferred, it would be in a position to consider a disposal of FG shares and it was hoped that this would be "within the next 2-3 weeks" (see [31]).

323. *Informing Quilter of the planning in December 2000*:

(1) Towards the end of 2000, G told B about the tax planning and noted that, once PIML was appointed, the FG shares would be transferred to Quilter who would be asked to dispose of the holding (see [32]).

(2) On 18 December (a) Quilter came to hold the FG shares as nominee holder and confirmed with the Jersey trustee and G that they should be held in the trust account pending further instructions (see [33]), and (b) T spoke to Mr Shah of PMIL who confirmed that he had all the relevant documents. T noted that PMIL would ask for advice from Quilter about the sale of the FG shares (see [34]).

324. *Appointment of PIML on 19 December 2000*:

(1) On 19 December (a) Lutea retired and PIML was appointed as the new trustee (see [35]), and (b) G informed S about this (see [36]):

> "*We have agreed with all parties* that the [FG] shares will be transferred to the Quilter nominee account already in place. As you know they already hold the share portfolio for the offshore trust in this way. When the appointment of new trustees has been completed the new trustee will advise Quilters to change their nominee records accordingly. …
>
> The new trustees have confirmed that they intend to take advice from Quilters as to the appropriate time or price to sell the [FG] shares. We can also review the position regarding the other shareholdings in the trust as there may be tax benefits in realising any gains that exist on these shares. It is of course the new trustees that will give instructions to Quilters for the disposal of any shares." (Emphasis added.)

G said that the "all parties" he referred to were primarily the Jersey trustee and possibly also PIML (see [37]).

325. *Actions leading to the sale of FG shares in January 2001*:

(1) On 3 January, B sent S some performance information about the share portfolios and explained that Quilter held the FG shares to the account of the trust "pending further instructions from the trustees" (see [41]).

(2) On 4 January (see [42] to [44]):

(a) B told G that he had not received any notification from PIML, the shares were showing a price of £2.60 but instructions were needed from PIML, he thought it would be difficult to sell all the shares in one go but they could possibly be disposed of in tranches, and he would await instructions from PIML.

(b) Following G asking him to find out what was going on in Mauritius, T telephoned Mauritius "to find out what was happening and to prompt them to get on with anything that they should be doing or that he thought they should be doing". He spoke to Mr Shah, "asked for an update" and said that B thought that the share price was very favourable and that he advised that they should all be sold. Mr Shah said that Mr Jingree was out but if an email were sent outlining the advice it would be dealt with more quickly. T made a note that it was advisable for Quilter to have an engagement letter with PMIL.

Mr Jingree was in India from 29 December 2000 to 12 January 2001 but was in touch with Ms Taher and Mr Shah and they dealt with correspondence sent to him (see [40]).

The Commissioners accepted B's evidence that at no time did he recommend that all the shares should be sold and noted that T said that he interpreted what B had said as that all the shares should be sold which fitted in with the original tax planning.

(3) On 5 January, Lutea gave written instructions to B to hold the existing account to the order of PMIL as new trustee (see [45]).

(4) On 6 January, B asked Mr Jingree for certain documents so that the account relating to the FG shares could be put in PIML's name and commented that the trustees may want to consider realising some of the shares held in the account as they were performing very well (at 265p compared to about 210p in October) and, if so, they needed to instruct Quilter in writing (see [46]).

(5) On 8 January (see [47] to [50]):

(a) Mr Shah asked T about the procedure for selling the shares. He said that he foresaw that the trustee would consider the advice and, if it chose to accept it, would give instructions for the sale; it was entirely their decision. Mr Shah said that they were still waiting for Lutea to fax them the deed of indemnity whereby the new trustee indemnified the outgoing trustee.

(b) PMIL informed B by email (as copied to T) that they were awaiting the duly executed deed of indemnity, they would complete the account opening application form but needed assistance in providing certain information from T.

(c) T sent an email to PMIL, Lutea and B saying:

> "It is essential as part of the tax planning exercise that the [FG] shares are not sold until after KPMG Mauritius have validly become the trustees.
>
> To avoid any suggestion that Lutea may remain the trustees until the deed of indemnity has been executed and forwarded to KPMG Mauritius please may we all agree that no instructions to sell the shares are given until the signed deed has been received."

At the hearing (a) T said that he did not regard this as an instruction not to sell the shares; he was just requesting the recipients to satisfy themselves that the deed of indemnity had been signed before any action was taken, and (b) Mr Jingree said that this should be signed and in place before any decision was taken to sell the shares.

(6) On 9 January 2001 (see [52] to [57]):

(a) PMIL passed a resolution for a bank account to be opened in the name of the trust.

(b) Ms Taher sent B an account application booklet only part of which was completed. She copied in T because it was the practice at that time to continue dealing with whoever had introduced a client and to inform him that she was having difficulties in completing the form. She later asked him for help including in completing the parts dealing with the investment objective and attitude to risk and said that on receipt of his reply PIML would immediately fax the completed signed documents to Quilter and: "We trust the instructions for the sale of the shares would be given tomorrow should the selling price still be up."

(c) T replied that the decision regarding the trustees' investment policy was theirs but, from his knowledge of the client, he would suggest that capital growth was of prime importance and that the attitude to risk was medium. There should be no restrictions. In oral evidence, he said he was merely making suggestions and Mr

Jingree accepted that PMIL, as trustees, should decide for themselves their attitude to risk based on the provisions of the trust deed and the powers given to them.

(d) Mr Shah notified Ms Taher that he had spoken to B, the current price of FG shares was between 285 and 290 pence per share and, as the price was on the upward trend, the trustees "may consider disposal now for the total holding". Mr Shah noted that B would send an email requesting the various documents for effecting the sale.

(e) Ms Taher and Mr Shah prepared a briefing note for the directors of PMIL which stated that the deed of indemnity had been received, the trustee was empowered to act for the trust, due diligence had been carried out on Quilter and the trustees were recommended to retain Quilter as the fund manager of the trust, Quilter had advised that the trustees might wish to dispose of the shares as the price was rising and the trustees were recommended to sell the entire shareholding in the hope that all the shares would be disposed of by at least 31 March 2001 to avail of tax planning benefits.

326. *Sale of FG shares on 10 January 2001* (see [58] to [65]):

(1) (a) Ms Taher notified Lutea by fax, (as copied to T and B) of receipt of the duly executed deed of indemnity, (b) B informed Ms Taher precisely what was needed to action the sale of the shares, and (c) Ms Taher and Mr Shah told a director of PIML (Mr Koon) that a decision had to be taken about the sale of the shares for tax planning reasons and, following advice from Quilter, that the price was going up.

(2) Mr Koon called a directors' meeting (as attended by Mr Jingree by telephone) at which (a) the decision was made to sell the shares on the basis that the sale was in the interests of the beneficiaries of the trust as that would maximise the trust fund by the proceeds not attracting CGT, and (b) it was resolved to appoint Quilter as fund manager. It was recited in the resolutions that the price of the shares had been going up and that Quilter had recommended that the shares be sold "now".

(3) B sold all the shares and informed the trustee this had taken place.

327. *Sale of B shares and appointment of UK trustees in January to March 2001*:

(1) On 25 January, G wrote to S and (a) summarised what had happened so far, (b) set out what remained to be done as regards the B shares and appointment of new UK trustees and proposed a timetable and said he would oversee the changeover (see [66]).

(2) On 26 January (a) Merchant sent Mr Jingree account opening forms and said, in effect, that they needed an authorisation to sell the B shares that day, and (b) PMIL resolved to retain Merchant as fund manager and sign;ed the forms and returned them with authorisation to sell the B shares at the best possible price (see [67]).

(3) Early in February, G reminded T to complete the tax planning for the trust and, on 14 February, he informed PMIL that: "We would now like to proceed urgently with the appointment of [UK] trustees, which must take place, subject to your approval, before 7 March" (see [69]). On 15 February, PMIL replied and summarised the matters which needed to be finalised for this to take place (see [70]).

(4) On 1 March, there was correspondence between T and PMIL regarding what was required to effect the resignation and appointment of the UK trustees which took place on 2 March (see [71] and [72]).

Parties' submissions

328. The parties' contentions, as set out at [85] to [92], were as follows:

(1) Essentially both parties' primary cases rested on the view that:

(a) Article 13(4) is to be applied by reference to the residence status of the trustees as "alienator" either, (i) as was the taxpayers' main contention, at the time of alienation (as they considered was supported by article 13(5)) or, (ii) as was the taxpayers' alternative position and HMRC's stance, during the period when the Mauritius trustees held office ("**the Mauritius Period**").

(b) Under the treaty residence test, at the date of alienation or during the Mauritius Period, the trustees were "a resident of" Mauritius but were not also "a resident of" the UK so that there was no period of dual residence and the tie breaker was not in point:

(i) The view was that the trustees were not, *at the time of alientation or during the Mauritius Period* "*liable to* taxation", under the laws of the UK "by reason of....residence" due to them being "*chargeable to*" CGT on gains accruing to them in the Mauritius Period on becoming resident in the UK *at a later time* in the 2000/01 tax year (as is the effect of s 2 and s 69).

(ii) As the taxpayers put it, "at that time [the date of alienation or during the Mauritius Period] the trustee has not resided in the [UK]", as the trustees (as a continuing body) became UK tax resident only later when UK trustees were appointed and "one cannot use hindsight to say that residing" in the UK in the later period "means that the trustees are liable to tax in the Mauritius Period by reason of residence".

(2) However, the parties took a different view of the effect which article 13(4) has where the alienator is "a resident of" only Mauritius at the material time:

(a) The taxpayer said that article 13(4) applies with the effect that "the gains are taxable only in Mauritius; the [UK] is prevented from taxing them, whatever is the basis for that charge".

(b) In HMRC's view, on the contrary, article 13(4) does not prevent the UK from charging CGT in such circumstances as that article "is concerned only with relief from tax in the source state and says nothing about preventing chargeability to tax *in a subsequent residence period within the same tax year*" (emphasis added):

(i) In other words, HMRC considered that article 13(4) does not prevent the UK imposing CGT on gains accruing to trustees which are "chargeable" to CGT in their hands as a result of becoming resident in the UK *from a later time in the relevant tax year*, after the date of disposal/the Mauritius Period (as is the case under s 2 and 69).

(ii) HMRC acknowledged that, in principle, that means the gains were potentially subject to tax in both jurisdictions but, in their view, that issue is to be dealt with by credit under article 24 (and, of course, in practice there was no issue as Mauritius does not tax such gains).

(3) If, the parties' primary submissions were rejected and it was held that there was a period of dual residence, the parties agreed that the tie breaker applies to determine where POEM of the trust was situated (and that the tie-breaker should be applied separately to each period).

329. The Commissioners decided that there was a period of dual residence so that the POEM issue had to be addressed:

(1) In their view, the trustees were a resident of the UK at the material time as well as a resident of Mauritius. The UK domestic law distinction between residence and chargeability under s 2 (whereby "if one is resident for part of a year one is chargeable for the whole of the year"), "is too subtle a distinction to be made when interpreting the

Treaty” (see [100]). Article 4(1) equates the two by defining treaty residence in terms of *liability* to tax, which is “the same as chargeability” so that, as long as the liability to tax is by reason of one of the listed items, such as residence, (meaning, “in the context the act of residing”), the treaty test is met (see [100] to [101]).

(2) In effect they adopted the taxpayers’ view of the effect of article 13(4). They noted, at [103], that, as HRMC said, article 13 in general deals with a conflict between taxation on the basis of source and on the basis of residence. However, article 13(4) relates to gains on all other property (including therefore property in a third state) and is “more general and does not contain any reference to source” but states that “if the alienator is Treaty Resident in one state the gains are taxable *only* in that state”. In their view:

> “dual residence, which we have equated with chargeability, should have been solved by the tie-breaker determining the Treaty Residence before one arrives at article 13. The result would be that if the state other than that of Treaty Residence taxed by its domestic law on any basis other than Treaty Residence the Treaty would prevent it. There would be no scope for any basis of taxation in the non-Treaty Residence state to continue. The plain words "taxable only" in the Treaty Residence state mean what they say.”

Decision on POEM

330. The Commissioners set out, at [109] to [110], the taxpayers’ arguments on the POEM test which, as noted above, are essentially the same as the arguments the parties made in this case. At [111], the Commissioners said that the debate between the parties on whether and to what extent POEM differs from CMC “misses the point; the two concepts serve entirely different purposes”:

(1) CMC is essentially a one-country test for determining whether or not a company is resident in the UK. They noted that there is nothing impossible in finding CMC in two countries, in spite of the word “central.” (See [111]).

(2) POEM is concerned with “what happens in both states since its purpose is to resolve residence under domestic law in both states, caused for whatever reason” so that “one must necessarily weigh up what happens in both states and according to the ordinary meaning to be given to the terms of the treaty in their context......decide in which state the place of effective management is found.” (See [112]).

331. They then set out their view of the POEM test, on its ordinary meaning as viewed in context and in light of the object and purpose of the treaty, as follows:

(1) As set out at [112], “effective” should be understood in the sense of the French *effective* (*siège de direction effective*) which connotes “real” (French being the other official version of the Model, though not of the Mauritius treaty) and accordingly, determining POEM requires consideration of “in which state the real management of the trustee qua trustee is found”.

(2) At [113] and [114] they adopted the reference to “realistic, positive management” in *WST*, which they considered to be the most useful UK authority on the meaning of POEM and cited the following comment at 250j of *WST*:

> “I emphasise the adjective 'effective'. In my opinion it is not sufficient that some sort of management was carried on in the Republic of Ireland such as operating a bank account in the name of the trustees. *'Effective' implies realistic, positive management*. The place of effective management is where the shots are called, to adopt a vivid transatlantic colloquialism.”

(3) They did not consider the decision in *Wood v Holden* to be relevant it seems, in particular, given their comments above and because the issue of dual residence and POEM did not in fact arise in that case.

332. Earlier in their judgment the Commissioners had referred to the guidance on the correct approach to interpretation in *Commerzbank* (and the relevant part of the Vienna Convention). They commented on the relevance of the 1977 Commentary and the later Commentary as follows:

(1) They said, at [98], that the negotiators on both sides could be expected to have the 1977 Commentary in front of them and to have intended (a) that the meaning in that Commentary should be applied in interpreting the Mauritius treaty as regards identical wording to that in the relevant Model Convention, and (b) if it had "a clear explanation" of the meaning of POEM, that such explanation should be more important than the ordinary meaning" but, as set out below, they did not consider that the 1997 Commentary contained a clear explanation.

(2) At [99], they said that the relevance of Commentaries adopted later than the Mauritius treaty is more problematic because the parties cannot have intended the new Commentary to apply at the time of making the treaty but it would not be right to ignore them as that would mean:

> "that one would be shutting one's eyes to advances in international tax thinking...
>
> The safer option is to read the later Commentary and then decide in the light of its content what weight should be given to it."

333. At [119] to [121] the Commissioners said that para 23 of the 1997 Commentary does not contain useful guidance on the POEM test:

(1) In their view, at [121], the 1997 Commentary was saying that, at the time, (a) POEM was already used in treaties in connection with shipping and air transport, or in some countries, as the domestic law and treaty definition of residence, and (b) in that context, assessing where POEM is located is the same as assessing where a business is "managed and controlled", the expression then used in UK treaties. They said, however, that "such treaties have nothing to do with the meaning of POEM in a tie-breaker". Moreover, the former Mauritian treaty defined residence by reference to "management and control" but for the purposes of a test (which they set out in full at [120]) that was "the opposite of a tie breaker" in that it "specifically says that the treaty applies only to a person resident in one and not the other party" and "assumes that management and control can be in only one of the parties". They concluded that:

> "the most one can read into this passage [seemingly, the passage in the 1977 Commentary] is that if dual residence was caused by different levels of management in each country then POEM looked at the same level of management as the [UK's] managed and controlled, or CMC."

(2) They said, at [122], that the last sentence of the 1977 Commentary was deleted in 1992 and that they thought that HMRC had revised their view that the two expressions were the same so: "Naturally, they were obliged to ask the OECD to remove the passage saying that they were the same".

(3) At [124] they added that they saw no reason why the approach set out in the later Commentary should not be adopted even though it was issued after the Mauritius treaty. They said:

> "It is not significantly different from the earlier Commentary saying that POEM was the same as the reference to management and control in old [UK] treaties, which meant CMC, or the top level of management. But it is really aimed at a different

> situation, that of different levels of corporate management, which is not relevant here."

Conclusions on POEM

334. At [131], the Commissioners turned to determining "in which state the real top level management, or the realistic, positive management of the Trust, was found" during the Mauritius Period. They made the following observations before setting out their conclusions:

(1) "...there was no doubt that all the actions of PMIL in Mauritius were carried out correctly and were well documented" and all the administrative matters were well attended to (see [132]).

(2) But "during the Mauritius Period the influence of [S] who was the settlor and who alone had the power to appoint new trustees, and the guiding hands of [G and T] of KPMG Bristol, were evident throughout" (see [133]).

(3) KPMG Bristol saw themselves as tax advisers to the trustees of the trust. There was no formal appointment by PMIL but that was not regarded as necessary as KPMG Bristol and KPMG Mauritius were "under the KPMG umbrella" (see [137]):

(a) G's evidence, as set out at [134], was that KPMG Bristol were purely acting in the capacity of tax advisers and they were not able to tell the trustees what to do and:

> ".....although there was no formal engagement letter with PMIL as at the time....KPMG Bristol were providing tax advice throughout the tax planning exercise. Any contact that KPMG Bristol had with Mauritius was to make sure that what was going on fitted within the tax planning exercise. The purpose of the exercise was to sell the shares without paying capital gains tax and there were particular aspects of the exercise that he needed to ensure happened in the right order so as to fit in with the plan."

(b) T's evidence similarly was, at [135], that:

> "his role was to give UK tax advice to the trustees which he did but what the trustees did with the advice was a matter for them. Once the Mauritius trustee had been appointed..... his..only role was to maintain a watching brief in the background. *There was an expectation that the tax planning scheme would be followed through but it was no more than an expectation, albeit a confident expectation*. The Mauritius trustees could have decided not to sell the shares and there would have been nothing that he or anyone could have done to make them sell them. [T] accepted that on occasion he prompted the Mauritius trustees to take certain actions but these were primarily of an administrative nature." (Emphasis added.)

(c) Ms Taher's evidence was that whilst there was no formal appointment of KPMG Bristol to act for PIML "they were all part of the KPMG network, and they had introduced the [Trust] client to us, so it was normal practice for us to deal with another KPMG office" and "to take some advice from the other KPMG offices who were dealing with the particular company or trust". Mr Jingree said that it was normal practice within his firm to get in touch with the person who had introduced a client and to keep the introducer briefed about progress. (See [136].)

335. The Commissioners then summarised the relevant facts (as taken from the earlier lengthier description of the facts), in making their key findings, at [138] to [145], as broken down into three areas: facts surrounding the appointment of PIML, facts leading up to the sale of the shares, and events after the sale of the shares.

336. *Facts surrounding the appointment of PIML*:

(1) At [140], they made the key finding that "the facts surrounding the appointment of PIML" lead them to the view that:

> "the real top level management, or the realistic, positive management of the Trust, remained in the [UK]. We accept that the administration of the Trust moved to Mauritius but in our view the "key" decisions were made in the [UK]"

(2) They based the finding at [140] on the preceding summary of the facts surrounding the appointment of PIML, at [138] and [139]:

> "138. [a] The tax planning scheme was devised by KPMG Bristol as tax advisers to Lutea, the previous trustee of the Trust. [S] had retired as Chairman of [FG] and any restrictions on the sale of the [FG] shares had been lifted. A tax efficient way of diversifying the portfolio of investments held for the Trust was needed. The appointment of trustees in Mauritius had been the idea of [T] and the details were described to [S] as early as August 2000.
>
> [b] [S] had the power to appoint new trustees.
>
> [c] It was [T] who approached PMIL and told them about the tax planning proposals and set out the basis of their appointment in the email of 24 November 2000. That made it clear that the confident expectation was that the shares would be sold before 5 April 2001.
>
> 139. [a] We accept the evidence of Ms Taher that she did not understand "the basis" referred to in the email of 24 November 2000 as to mean that the sale of the shares was a condition for PMIL to accept the appointment as trustee; her evidence was that the trustees would wish to receive appropriate advice and recommendations.
>
> [b] However, she accepted that eventually as part of the tax planning exercise the shares would be sold at some time.
>
> [b] We accept the evidence of Mr Jingree 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. PMIL's duties as trustee were laid down in legislation and in the trust deed and PMIL would only act within the context of what it was allowed to do.
>
> [c] We also accept the evidence of Mr Jingree that the whole point of the tax planning exercise was to sell the shares and to realise the gain and to avoid tax on the gain." (Numbering in square brackets added.)

(3) The Commissioners attached significance, therefore to the facts that (a) by the summer of 2000, (i) S had an intent to sell the shares and (ii) there a plan to do so by avoiding a tax charge on S devised by the UK advisors to the Jersey trustee, (b) it was within the power of the person who stood to benefit from the sale of the shares under the tax plan, S, as UK settlor of the trust, to put the plan in motion by appointing a new Mauritius trustee, and (c) PIML accepted the appointment to act as trustee with knowledge of the tax plan and that its point was to avoid CGT on the sale of the shares (and so of the intended limited duration and specific purpose of its appointment, namely, in order to realise the CGT saving, to sell the shares and retire by the end of the tax year in favour of UK trustees) and that there was *a confident expectation* that the shares would be sold in the 2000/01 tax year.

(4) It seems that the significance of the point that PIML's employee accepted that the shares would eventually be sold under the tax plan and of its managing director's evidence that the whole point of the tax plan was to sell the shares is that it reinforces the point that there was a "confident expectation" that PIML would carry out the plan. I do not see that it can be put higher than that given that the Commissioners accepted that PIML's appointment was not made subject to any condition or agreement that PIML would sell the shares or behave in a particular way and that PIML would want to take advice and would act subject to its duties as trustee.

337. *Events leading to the sale of the shares*:

(1) The Commissioners continued, at [141], that their conclusion at [140] was confirmed by subsequent events which they described as follows:

> 141. [a] The sale of the [FG] shares was not an isolated decision taken by PMIL on 10 January 2001. It had been carefully arranged beforehand by the transfer of the shares to Quilter to be held in their nominee account.
>
> [b] Further, [B] of Quilter had been told of the tax planning exercise and that Quilter would be asked to dispose of the holding of [FG] shares after PMIL had been appointed.
>
> [c] It was when [B] of Quilter told [G] on 4 January 2001 that he needed instructions from the new trustees that [T] prompted PMIL to get on with what they should be doing.
>
> [d] At no time did [B] recommend the sale of all the shares but the sale of all the shares fitted in with the tax planning scheme.
>
> [e] When [B] wrote on 6 January to PMIL about the sale of the shares Mr Jingree was away from the office and Mr Shah asked [T] for advice. There was then a delay in PMIL receiving the deed of indemnity and [T] sent his email of 8 January to PMIL, Lutea and [B] that no instructions to sell the shares should be given until the deed had been received.
>
> [f] PMIL also asked [T] to help with the opening of the account with Quilter and [T] suggested an investment objective of capital growth with medium risk.
>
> [g] Even on the date of the decision to sell [B] had to remind PMIL how many [FG] shares were to be sold....Merchant took the initiative in obtaining a set of account opening forms for Merchant.."

(2) The points the Commissioners seem to be making are that:

(a) The UK advisors took steps to facilitate the sale of the shares without involving PIML (see [a] and [b]), orchestrated the tax plan (see [c] and [e]), on occasions, when they perceived it as necessary for the tax plan, prompted PIML to take action and intervened where they perceived it necessary to ensure the success of the tax plan (see [c], [e] and [f]).

(b) As follows from these points, PIML did not actively take the lead in bringing the plan to fruition (hence, why it had to be prompted and KPMG Bristol intervened). Rather it sought guidance from KPMG Bristol (see [e] and [f]) and fell in with the tax plan, in particular, in that it sold all the shares although the investment manager had not recommended they should all be sold (see [d] and the further points made below).

(c) I note, however, that, as recorded at [328], the Commissioners accepted that all the actions of PMIL in Mauritius were carried out correctly and that KPMG Bristol acted only in an advisory role. Hence, the Commissioners referred only to "the influence" of the UK settlor and "guiding hands of" G and T as being "evident throughout".

(3) At [142] the Commissioners set out further evidence in relation to the sale of the shares:

(a) They accepted the evidence of Mr Jingree that:

> "The purpose of selling all the shares was to ensure that the tax planning which had been put in place worked to the best advantage of the Trust and it was vital that all of the shares were sold prior to the end of March in order to achieve this. The decision to sell all the shares was made in the hope that all the shares could be sold before the end of March."

(b) They recorded Mr Jingree's evidence that "if it had not been in the interests of the beneficiaries and the Trust, the trustees would not have sold the shares:

> "if the funds which had been realised had to go away in taxes then it would not have been in the best interests of the beneficiaries. Also, if the share price dropped dramatically, and if the fund manager had advised against a sale, then the trustees would not have decided to sell."

(c) They accepted the evidence of Ms Taher that:

> "the decision to sell all the shares was based upon tax planning and the need for the shares to be sold by a particular date. The fact that the share price had gone up was not the "driver" for the sale of the shares."

(4) They concluded, at [143], that they fully accepted "that the decision to sell the shares that day was taken by the directors of PMIL at the telephone meeting and "if, for example, the price of the shares had fallen to a level that meant that no gain would be realised on their disposal, the shares would not have been sold but would have been retained and perhaps sold later". They then made another key finding that nevertheless, in their view:

> "[a] *this was a lower level management decision as there was no doubt that the shares would be sold; [b] the real top level management decisions, or the realistic, positive management decisions of the Trust, to dispose of all the shares in a tax efficient way, had already been, and continued to be, taken in the [UK].* The "key" decisions were made in the [UK]." (Emphasis added.)

338. *Events after the sale*: At [144] they said that the events after the sale of the shares confirmed their view in that: "The tax planning exercise was completed by the appointment of [UK] trustees. We remark that PMIL's fee note was approved by [T]."

339. The Commissioners set out their overall conclusion at [145], seemingly in summary of the points they had already made, as follows:

> "the state in which the real top level management, or the realistic, positive management of the Trust, or the place where key management and commercial decisions that were necessary for the conduct of the Trust's business were in substance made, and the place where the actions to be taken by the entity as a whole were, *in fact*, determined between 19 December 2000 and 2 March 2001 was the [UK]."

340. Viewing the statement in the key passage at [143] in context and in light of the Commissioners other findings, I note the following:

(1) I take the statement in [143][a] that there was "no doubt" that the shares would be sold to mean that there was "no doubt" that PIML would sell the shares at some point, albeit PIML may have decided not to sell on 10 January 2001. The implication seems to be that PIML's decision to sell on that date was a "lower level management decision" because it was a decision only on the precise timing of the sale.

(2) The Commissioners appear to consider that they were providing the reason why there was "no doubt" that the shares would be sold at some point in the explanation in [143][b], that the "key" decisions "to dispose of all the shares in a tax efficient way had already been, and continued to be, taken in the UK". I refer to these "key" decisions as the higher-level decisions.

(3) Whilst the Commissioners do not identify who had and continued to take these higher-level decisions in the UK, the only likely candidate is the UK settlor, for whose benefit KPMG devised the tax plan, and who, as settlor, had the legal ability to appoint new Mauritius trustees and who was described as having an influence throughout the Mauritius Period. The findings made in relation to the facts surrounding PIML's appointment certainly indicate that, by the summer of 2000, S had formed an intent to

sell the shares and, in order to save CGT, an intent for this to happen before the end of 2000/01 under the plan devised by KPMG Bristol.

(4) The Commissioners did not expand on precisely what decisions fall within the ambit of "decisions to dispose of all the shares in a tax efficient way" and in what sense those decisions amount to "top-level" or "realistic positive" management *of the trust*. Whilst S can be described as having made a "decision" to effect the tax plan, as the shares were held in the trust, S was not in a position to give direct legal effect to the proposed sale of the shares. However:

> (a) as seems to be the point the Commissioners focussed on in their emphasis on the facts surrounding PIML's appointment, the settlor could put the tax plan in motion by (i) as he did, appointing a new Mauritius trustee in place of the previous Jersey trustee, and (ii) expressing the wish or expectation (as settlor and a beneficiary of the trust) that the new Mauritius trustee would carry out the plan (by selling the shares and retiring before the end of 2000/01), as he did, in effect, through the communications which KPMG Bristol had with PIML when it was appointed (in particular, in the letter of 24 November 2000); and
>
> (b) as the Commissioners also emphasised, in particular, as regards events running up to the decision to sell the shares, through the medium of the UK advisors, on an on-going basis seek to exert influence over PIML and, in effect, guide, oversee, superintend and, where necessary, take action to facilitate the implementation of the plan by PIML.

(5) Therefore, I take the Commissioners' reference to the higher-level decisions, which they viewed as "the *real* top level or the "*realistic*, positive "management decisions" of the trust to be to S's decisions in this regard.

(6) However, the fact that the Commissioners viewed S as exercising "top-level" management in this sense, does not explain fully their comment that there was "*no doubt*" that the sale of the shares would occur, in particular, in light of their other findings that (a) PIML was not appointed expressly on condition it would do so and 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, (b) PIML would take advice and act in accordance with its fiduciary duties and, had the sale of the shares not been in the interests of the beneficiaries as at the date of the sale, PMIL would not have agreed to sell, (c) KPMG Bristol had an advisory role only and provided guidance, and (d) S had only influence.

(7) Given these findings, I think that in stating that there was "no doubt" that the shares would be sold the Commissioners must mean that, in all the circumstances, it is reasonable to infer that (a) in agreeing to take the appointment as trustee with full knowledge of the tax plan, PIML accepted that it would do what S (and the UK advisers) expected it to do under that plan provided that, in the circumstances applicable at the relevant time, it was in accordance with its fiduciary duties to do so, (b) all parties involved acted on the assumption that achieving the tax saving was, as things stood at the time of the appointment, in the interests of the beneficiaries, and, (c) accordingly, there was no real prospect that PIML would decide not to take the planned actions unless there were some material change in circumstances which meant that was no longer the case (such that it would not be in accordance with its fiduciary duties).

(8) The plain implication is that the Commissioners considered that PIML did not, during its brief appointment, exercise "top level" or "realistic, positive" management of the trust by "deciding" to take the actions required to give effect to a tax plan which another person, the UK settlor, in effect, commissioned, adopted, decided to implement

and superintended or guided to fruition, when it was appointed specifically to take these actions and everyone involved expected it to do so subject to there being any material change in circumstance which would have meant that, contrary to expectations, it was not in accordance with its fiduciary duties to do so.

341. It is readily apparent, therefore, that the Commissioners viewed the POEM test in a very different way to the way the Court of Appeal viewed the CMC test in *Wood v Holden*:

(1) To recap, in *Wood v Holden* the courts acted on the basis (as the Commissioners had found) that the only acts of CMC of relevance were the decisions by AA, the director of Eulalia, to acquire the relevant shares and then sell them to the third party:

(a) In the Court of Appeal Chadwick LJ essentially followed the approach taken by Park J and held that the Commissioners' conclusion that the decisions by AA to acquire the shares and sell them were not "effective" was not a permissible conclusion given that (a) it was found that A, was not by passed, (b) there was no evidence that the UK advisors or the ultimate owner of the shares or anyone else (an outsider) dictated those decisions (although all involved intended and expected they would be made) and, even if AA's decisions were not made on full information that did not prevent them being effective (although I take Chadwick LJ to endorse the view that the position may be different if a director has not applied his mind at all to the consequences of what he is signing).

(b) In the High Court, Park J specifically rejected the view that it detracted from the fact that those decisions were made by AA that the ultimate owners of the shares, Mr and Mrs Wood, decided to instruct PW to advise on the tax plan and to go ahead and seek to put the plan into effect; that, in his view, was not at all the same thing as the owners taking the individual decisions which were necessary before each specific stage in the scheme could take place.

(c) Park J also rejected the view that it sufficed to demonstrate that CMC of Eulalia was exercised in the UK that (a) the relevant steps (to acquire and sell the relevant shares) were taken as part of the overall tax plan devised by PW who, acting from the UK showed "guidance and influence" in superintending the carrying out of it, and advising the participants about the steps which it was appropriate for them to take next if the scheme was to proceed, (b) PW and all involved, expected the parties to accept the advice and to carry out the steps, and (c) it was largely true 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". It is implicit in Chadwick LJ's finding that he also thought these factors did not suffice.

(2) In *Smallwood,* by contrast, the Commissioners based their decision that POEM of the trust was in the UK on the types of factors which Park J and Chadwick LJ considered did not demonstrate that CMC of Eulalia was exercised in the UK:

(a) The Commissioners made no express finding or any finding from which it could reasonably be inferred, that the decisions made by PIML to sell the shares and to retire as trustee were not "effective decisions" because PIML was by-passed, dictated to, agreed to act on instructions or did not give sufficient consideration to the decisions.

(b) The Commissioners held, in effect, that the critical acts of effective or top-level management were the UK settlor's initial decision to put the tax plan devised by KPMG Bristol into effect by the appointment of a new Mauritius trustee (in the expectation it would carry out the remaining steps) and the on-going decision to carry out the tax plan by superintending, facilitating, and/or overseeing its

implementation (such that the UK settlor influenced the trustee's actions, through the guiding hands of the UK advisors).

(c) Accordingly, the decisions made by PIML to sell the shares and to retire as trustee did not constitute effective or top-level management but "lower level" decisions given that (a) the overall plan to sell the shares in a tax efficient manner had already been made by UK persons who continued to superintend, advise on and facilitate the implementation of that plan throughout, and (b) PIML had, in effect, accepted it would take these steps, as required for the plan to succeed, when it took on the appointment as trustee in full knowledge of the plan, subject to it checking that, in the circumstances applicable when it was required to make the relevant decision, it was in accordance with its fiduciary duties to do so (as it duly did).

Decision of the Court of Appeal in Smallwood

Decision on parties' primary submissions

342. The parties essentially made the same points on the correct interpretation of article 13(4) as they had made before the Commissioners and Patten LJ's conclusion (with which the rest of the panel agreed) was similar to theirs. Having made general comments on the correct approach to the interpretation of the Mauritius treaty, Patten LJ made the following main points:

(1) In commenting in general terms on article 13(4) he said that:

(a) Its focus is "on specifying the basis of taxation of gains for the residual category of property specified therein and nothing else" and it is not concerned with:

> "how each of the Contracting States chooses to tax gains on the basis of residence. The issue of whether the taxpayer should be resident in the State at the time of disposal or at some other point in time are matters for the State in question to decide as part of its own taxation regime." (See [36]).

(b) The treaty must be assumed to have been drafted in a way which "comprehends any tax treatment of capital gains based on residence or similar criteria" as that is what article 4(1) says and "any narrower construction of it would defeat the obvious purpose of the Model Convention". It, therefore, covers legislation such as s 2 under which a gain is made taxable in the UK by virtue of residence in a period after the gain has occurred. (See [37]).

(2) He thought, as set out at [37], that the question is how the treaty "is intended to resolve residence/residence-based conflicts when the liability under the relevant domestic legislation does not depend upon concurrent periods of residence":

(a) He noted that the taxpayers' solution to this problem, which he described as the snapshot argument (see [39]), is that article 13(4) "has to be read as fixing the date of disposal as the reference point for the determination of residence" and "by looking at the factual position as at the date of disposal and nothing more".

(b) He said that if that were correct, it must follow that the tie-breaker in article 4(3) would only apply:

> "to concurrent physical residence at the date of disposal and no Contracting State.....can tax capital gains under Article 13(4) other than by reference to residence at the time. Provisions such as s.2 TCGA can never trump taxation based on residence at the time of the gain." (see [38]).

(c) He noted that in the High Court the Judge accepted the taxpayers' argument that it is necessary to import into article 13(4) a reference to the date of disposal because otherwise the provision is unworkable. But:

> "the snapshot argument is not sufficient in itself to avoid a charge to capital gains tax under the scheme. It also depends (as the judge accepted) on construing "resident" in Article 13(4) as meaning no more than resident for tax purposes in the s.2 sense at that time rather than chargeable to tax in respect of the gain by virtue of a later period of UK tax residence"" (See [39]).

(d) He said that he was unconvinced by the Judge's approach and, in light of his earlier comments (at [37]) it was:

> "unlikely that the draftsman of the Model Convention intended that capital gains which are to be taxable only on the basis of residence should depend exclusively on residence at the date of disposal and so exclude the rights of a Contracting State to tax gains by reference to residence within the same tax year. The definition of "resident of a Contracting State" in Article 4(1) re-inforces this view by making "liability to taxation" by reason of residence the criterion for the taxation of capital gains under Article 13(4). This, I think, must denote what the Special Commissioners described as chargeability and not simply physical residence. That view is, I think, consistent with the purpose of Article 13(4) and avoids descending into whether the UK or Mauritian requirements for residence are satisfied. The definition assumes that they are and allocates the right to tax on the basis that there is liability."

(e) At [41], he rejected the taxpayers' submission that article 13(5) supports the taxpayers' approach essentially for the reasons he had already set out. He said, at [42], that he could see no justification in the terms of the treaty for the view that one considers the question of "liability" as at the date of the disposal and not with the benefit of hindsight:

> "If the provisions of Article 4 (and therefore Article 13(4)) are to cover every form of capital gains tax based on residence then the issue of liability has to be looked at retrospectively having regard to which of the Contracting States seek to make the taxpayer liable for the gain. It seems to me both artificial and self-defeating to ask that question at the date of disposal without regard to the full tax consequences which flow from the gain. That would lead (as it has in this case) to a situation in which the DTA fails to regulate all the tax consequences of the disposal and leads to tax relief being granted even when no double taxation in fact exists."

(3) At [43], he said that, whilst he accepted HMRCs stance that the provisions of article 13(4) are not to be read as incorporating a reference to the date of disposal, he did not agree that "one can construe Article 4(1) as meaning no more than tax resident and so avoid any application of the tie-breaker provisions in Article 4(3)":

> "The definition of "resident" in Article 4(1) is critical to the meaning of Article 13(4) and Article 4, once applied by the wording of Article 13(4), has to operate in its entirety. The definition of "resident" in Article 4(1) is expressly subject to Article 4(3) which therefore applies whenever the alienator is liable to taxation in both Contracting States in respect of the gain. Article 4(3), as I have explained, is focused on liability for tax regardless of the period of residence under national law which creates that liability. Looked at in this way it becomes meaningless and impermissible to draw a distinction between consecutive and concurrent periods of "residence". The DTA is concerned only with the possibility of a double tax charge on the same gain and not with the period of residence which gives rise to it. If that situation occurs then Article 4(3) operates to resolve the matter as part of Article 13(4) which incorporates it."

(4) He also, at [45], rejected HMRC's view that article 24 provides the means of resolving any issues of double taxation which arises on their interpretation of article 13(4).

Minority dissenting decision on POEM

343. I have set out details of Patten LJ's judgement that the Commissioners had erred in their decision that POEM of the trust was in the UK at the material time, as, in my view, it assists in understanding the short judgement of Hughes LJ who took the contrary view. At [47], Patten LJ noted that both sides approached the POEM issue by reference to the Mauritius Period as the period in which the trustees were chargeable to tax in both Contracting States and so the Commissioners were not asked to consider the issue of POEM over any longer period of time and made no findings of fact in respect of that.

344. At [48] and [49], he noted that:

(1) the Commissioners interpreted POEM as meaning "the place which is the centre of top-level management": "i.e. where the key management and commercial decisions are actually made",

(2) this is the test propounded by Professor Dr Klaus Vogel in his Commentary on the OECD Model Convention and has been adopted in German case law as well as being taken to be the correct test in *WST*, and

(3) the taxpayers accepted that this is the test to be applied but argued that "the top-level management of a company is usually carried out by its board of directors (as the Commentary suggests) unless it can be shown that the control of the company's affairs was effectively usurped and exercised by some third party and that the directors were content merely to rubberstamp the decisions which were taken". In this case there was, the taxpayer said, "no evidence or finding that KPMG Bristol or Mr Smallwood dictated the decision to sell the shares".

345. At [50], he explained that the taxpayer had to establish that the decision of the Commissioners on this point contained an error of law of the kind recognised by the House of Lords in *Edwards v Bairstow* and that the taxpayer argued that:

> "it was not open to the [Commissioners] to find that the POEM of the trustee (PMIL) was anywhere but in Mauritius at the relevant time and, to have reached the conclusion which they did on the evidence, the [Commissioners] must therefore have applied the wrong test."

346. He set out, at [51] to [53], a summary of the facts and findings the Commissioners relied on in making their decision at [136] and set out [138] to [145] in full. He noted, at [54], that the taxpayer said that:

> "none of these findings amounts to or includes one to the effect that KPMG or Mr Smallwood dictated or usurped the decision of PMIL to implement the scheme by selling the shares. Although the sales took place in accordance with the scheme devised and recommended by KPMG, the decision to sell remained that of PMIL acting through its own directors."

347. At [55] to [56], he referred to the facts set out by the Commissioners, at [42] to [44] of their decision, regarding the period leading to the sale of the FG shares, and concluded, at [57], that:

> "The findings of the Special Commissioners are to the effect that the tax scheme recommended by KPMG Bristol was implemented by PMIL in accordance with their advice. The impetus to comply with the scheme and to sell the shares with sufficient time to allow the Smallwoods to be appointed as trustees before 5 April 2001 came from KPMG Bristol who, naturally enough, were concerned to ensure that their advice was followed. The assumption by the Special Commissioners that the trustees had an ultimate right to decline to sell the shares was a factor to be weighed in the balance against that."

348. At [58], he explained that the taxpayer placed particular reliance on the decision of the Court of Appeal in *Wood v Holden* and said, at [59], that the importance of that case lies in the analysis by Chadwick LJ of what is capable of constituting CMC of a company by persons who

are not its directors (and cited [26] to [27] of his judgement). At [61], he disagreed with the Commissioners' view that this decision and the other authorities on CMC provided no assistance:

> "Although the purpose of the POEM test is effectively to decide between two rival claims to tax based on residence, the terms of the test, as set out in paragraph 24 of the [later]Commentary quoted above, 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*." (Emphasis added.)

349. He then concluded that the Commissioners had erred in law in their conclusions on the facts:

(1) He noted, at [62], that their conclusion was said to be based on the facts surrounding the appointment of PIML. As regards those facts he considered it was clear that (a) PIML was 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 and (b) 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 the 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."

(2) He concluded, at [63], that he could not accept that on the basis of these findings the Commissioners could properly have concluded that the POEM of the trustees up to March 2001 lay in the UK rather than in Mauritius:

> "*The findings made do not go beyond saying that PMIL 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 Special 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.* It seems to me to follow that the Special Commissioners' conclusions are not ones which were therefore open to them on the evidence or on the findings of fact which they made."

Majority decision on POEM

350. Lord Justice Hughes and Ward LJ agreed with Patten LJ as regards the correct approach to article 13(4) (see [65]). However, they disagreed with Patten LJ's views on the POEM issue, for the reasons set out by Hughes LJ at [67] to [70]:

(1) At [67], Hughes LJ noted that the issue of POEM is one of fact and that the taxpayers could succeed:

> "only if the Special 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."

(2) He continued, at [68], to reject Patten LJ's view that the reasoning in *Wood v Holden* applies and that the Commissioners had erred on the basis that their findings did not amount to findings that the functions of PIML were wholly usurped:

"If the question were the POEM of the particular trust company trustee for the time being at the moment of disposal, namely PMIL, then it may be that the reasoning in *Wood v Holden* [2006] EWCA Civ 26 would justify the conclusion that the Commissioners fell into this kind of error. I agree that their findings do not go so far as findings that the functions of PMIL were wholly usurped, and I agree 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."

(3) He set out, at [69], why he considered that to apply the reasoning in *Wood v Holden* was wrong and what the right question was:

"But it seems to me that to apply this reasoning to the present case is to ask the wrong question, and indeed to return to the rejected snapshot approach. The taxpayers with whom we are concerned under section 77 are the trustees. Trustees are, by section 69(1) TCGA 1992, treated as a continuing body:

....[He set out the text of s 69]

The POEM with which this case is concerned is, as it seems to me, the POEM of the trust, i.e. of the trustees as a continuing body. That is the question which the Special Commissioners addressed: see their paragraphs 140 and 145." (Emphasis added)

(4) He concluded, at [70], that:

"On the primary facts which the Special Commissioners found at paragraphs 136-145, which are set out in the judgment of Patten LJ, I do not think that it is 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".

(5) In the same passage, he then noted the following facts (which I have subdivided to highlight the individual points) which are a summary of the some of the findings made by the Commissioners:

"[a] The scheme was devised in the [UK] by [S]on the advice of KPMG Bristol.

[b] The steps taken in the scheme were carefully orchestrated throughout from the [UK], both by KPMG and by Quilter.

[c] 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.

[d] [S] remained throughout in the UK.

[e] 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]."

Decision on POEM

351. It is clear that, for the purpose of applying article 13(4), whether the family trusts are "a resident of" the UK or Mauritius is to be determined under the tie breaker on the basis that:

(1) The parties appeared to agree that, under Mauritius law, the family trusts were "a resident of" Mauritius during the relevant Mauritius income period as they were liable to tax on income accruing to the trustees under ITA.

(2) It is clear from Patten LJ's judgement in *Smallwood* (with which the rest of the panel agreed on this point) that, for the purposes of the treaty residence test, as applied for the purposes of article 13(4):

(a) it suffices for the family trusts to be "a resident of" the UK that, under the law of the UK, they were (as deemed trustee bodies) "chargeable" to CGT during the 2000/01 tax year in which the relevant period falls by reason of them becoming resident in the UK when the UK trustees were appointed (under ss 2 and 69); and

(b) given the family trusts are resident in each of the UK and Mauritius for the purposes of the treaty residence test, the tie breaker is to be applied to determine which country the trust is a resident of for the purposes of article 13(4).

352. The appellants argued that the Court of Appeal did not expressly consider and decide over what period POEM is to be assessed for the purposes of determining in which state a taxpayer is resident for the purposes of article 13(4). Patten LJ assessed POEM of the trust on the basis that the relevant period was that during which the Mauritius trustees held office. He noted that both parties approached the POEM issue by reference to that period as the period in which the trustees were chargeable to tax in both Contracting States and that the Commissioners were not asked to consider the issue of POEM over any longer period of time. Hughes LJ also did not appear to challenge that this was the correct period to consider.

353. The appellants said that it is necessary for them to demonstrate only that POEM of the family trusts was in Mauritius when the disposal of shares took place (albeit they accept that determining that issue may require an examination of the facts over a longer period of time). HMRC suggested that it is necessary for the appellants to demonstrate that was the case throughout the relevant tax year. However, given that, for the reasons set out below, I have decided that POEM of the family trusts (or of the trustees of those trusts, as a deemed trustee body) was in the UK throughout the period during which the Mauritius trustees held office (including when the disposals took place), I do not need to decide this point.

354. Turning to the POEM test, the parties disagreed on precisely what Hughes LJ decided. Mr Goodfellow submitted that:

(1) Hughes LJ merely held that, applying the *Edwards v Bairstow* test with regard to the facts they found, the Commissioners did not reach a legally unreasonable or impossible conclusion. In reaching this conclusion he did not formulate a test for determining POEM which in any way casts doubt on the reasoning in *Wood v Holden*. In referring to the "scheme of administration" he was merely giving a précis of the particular facts rather than a formulation of a different test.

(2) The Commissioners found, in effect, that the key decision to sell the shares was made before PIML was appointed and all that was left for it to decide was the date of the sale and whether to proceed in the highly unlikely event that the share value plummeted. This seems to be what Hughes LJ had in mind when he said that PIML was not "wholly usurped"; he was focussing on this key finding and meant that its functions were partially usurped because the key decision had already been made; it was left only with the "lower-level" operational decision.

(3) In his comment, at [69], that to apply the reasoning in *Wood v Holden* to the present case "is to ask the wrong question, and indeed to return to the rejected snapshot approach" he simply meant that (a) the focus is on the POEM of the trust/trustees as a continuing body, and (b) in the particular circumstances, if the focus were solely on the position at the time of the disposal of the shares, as would be the case on the snapshot approach, that would require consideration only of the position at that time ignoring the fact that the key decision to sell the shares had already been taken away from PIML (so that its function was partially usurped).

355. Mr Brennan said that Hughes LJ's comments cannot be viewed as anything other than a rejection of the view that the CMC test, as interpreted in *Wood v Holden*, was in point and an acceptance of the Commissioners' formulation of the POEM test as different to that test. Whilst his reasoning is shorter than that of the Commissioners, his view is plainly essentially the same. In his comment, at [69], he meant that, (a) the approach in *Wood v Holden*, of looking at whether PIML's function was usurped solely as regards the individual decision to sell the shares, would a return to the snapshot approach, and (b) in fact POEM has to be considered

over the whole of the relevant period when the trustees were in place as a single continuing body; on that basis, considering usurpation of just a single set of office holder's functions is meaningless.

356. Mr Brennan added that (a) in stating that there was a scheme of administration that went "above and beyond" the day to day administration Hughes LJ echoed the Commissioners' analysis of the different levels of management, and therefore, (b) in effect, endorsed their view that the decision to sell the shares on a particular day was a lower level, operational decision whereas the decision to set up the scheme in order to sell the shares in a tax efficient way by the appointment of trustees in Mauritius was a "real top level" or "key" management decision. He said that whilst Hughes LJ use the term "scheme of management" as a convenient phrase he did not propound that as a separate test for determining POEM. The point was that the "scheme of management" meant that the "real top-level management" of the trust was in the UK. Mr Brennan emphasised that all the features which Hughes LJ set out as demonstrating that there was "a scheme of management" of the trust are present in this case.

Decision on meaning of majority judgement in Smallwood

357. In my view, Hughes LJ's comments have to be viewed in light of the fact that he was commenting on and disagreeing with the approach Patten LJ had taken to the POEM issue. In summary, he drew a distinction between (a) the wrong question, that he considered Patten LJ had addressed, namely, POEM of PIML, as the trustee for the time being, at the moment of disposal of the shares, and (b) the correct question which he considered the Commissioners had addressed, namely, POEM *of the trust ie the trustees as a continuing body*.

358. I note the following:

(1) When Hughes LJ said, in effect, that if Patten LJ's question were the right one, then it may be the reasoning in *Wood v Holden* would justify the conclusion that the Commissioners had erred, I take him to mean that:

(a) if (contrary to Hughes LJ's view) it is correct to apply Patten LJ's reasoning, as formulated by reference to *Wood v Holden*, that POEM was in the UK only if the PMIL board effectively ceded any discretion as regards the decision to implement the tax scheme and to sell the shares to KPMG Bristol, by agreeing to act in accordance with their instructions, so that their function was "usurped", in the sense in which that term is used in *Wood v Holden*;

(b) the Commissioners may well have erred (in an *Edwards v* Bairstow sense) because Hughes LJ agreed with Patten LJ that the Commissioners findings do not amount to "findings that the functions of PIML were wholly usurped".

(2) I do not take Hughes LJ to mean, as Mr Goodfellow suggested, that the Commissioners' findings amount to findings that PIML's functions were *partially* "usurped" given that:

(a) Patten LJ plainly used the term "usurped" in the sense he considered it is used in *Wood v Holden*, as requiring the board of PIML to have been bypassed or dictated to or to have agreed to act on another's instructions. I cannot see that, on that meaning, a person's discretion to sell shares can somehow be *partially* "usurped".

(b) Given that Hughes LJ was agreeing with Patten LJ on this particular point, it is reasonable to suppose he was using the term "usurped" in the same sense as Patten LJ used it. Moreover, Hughes LJ's comment is framed in broad and unqualified terms.

(c) As set out above, it is difficult to see that, on any view, the Commissioners' decision can be read as meaning that they viewed PIML's functions as having been

"usurped" in any way that accords with the approach in *Wood v Holden*; for the reasons set out in full above, I consider it plain that the Commissioners took a very different approach to determining POEM of the trust to that taken by the High Court and Court of Appeal in *Wood v Holden* to determining CMC of the relevant company.

(3) In continuing to state that "to apply this reasoning was to ask the wrong question and to return to the rejected snapshot approach", I take Hughes LJ to mean that:

(a) In applying the reasoning in *Wood v Holden* to determine the tie breaker, Patten LJ asked the wrong question, namely, where PIML itself, as the trustee for the time being, was effectively managed at the moment of disposal of the shares, on the basis that (as is integral to Patten LJ's analysis) (i) the only act of "effective management" of relevance, at that time, was the decision to implement the tax scheme and to sell the shares, and (ii) the only relevant question was whether the discretion to take that action was "usurped" in a *Wood v Holden* sense or whether the effective decision by PMIL to implement the tax scheme and to sell the shares" was taken by its directors, "albeit on the advice and at the request of KPMG Bristol".

(b) To ask this wrong question marked a return to the taxpayers' rejected approach of assessing whether and how article 13(4) applies by determining residence (under the tie breaker) at the date of disposal "by looking at the factual position as at the date of disposal and nothing more". It is reasonable to suppose that this is what Hughes LJ had in mind given that is what Patten LJ described as the snapshot approach in the part of his judgement with which Hughes LJ agreed.

(4) As noted, Hughes LJ then identified the correct question as involving the identification of POEM of "the trust ie the trustees *as a continuing body*" (as based on the terms of s 69) and not of the particular trustee who held office at the time of the disposal of the shares.

(5) In my view, it is inherent in the contrast he drew and his comments on the *Wood v Holden* approach, that Hughes LJ considered that determining POEM of the trustees as a deemed *continuing* body involves applying a different test to the test which Patten LJ applied by reference to the reasoning in *Wood v Holden*. Whilst Hughes LJ gave little express guidance on what the POEM test does involve in this context, the clear implication is that:

(a) Given his emphasis on the continuing nature of the deemed trustee body and the rejection of the snapshot approach, determining where that body is located involves assessing what constitutes "effective management" and who exercises it by reference to all facts and circumstances over a period of time beyond those applicable when the relevant disposal is made and possibly beyond the period during which the trustee who made the disposal held office.

(b) On that basis, the tie-breaker cannot properly be applied by taking a "snapshot" approach and assessing who "effectively" manages the particular trustee who makes the disposal, as at the moment of disposal, by (i) looking at the decision to implement the plan by selling the shares in isolation, on the assumption that it was an act of "effective management" and that it was the only such act of relevance (on the basis that only the factual position at the time of disposal is relevant), and (ii) asking whether the discretion to take that isolated action was "usurped" in a *Wood v Holden* sense.

(c) Hughes LJ, therefore, plainly rejected the taxpayers' view, as adopted by Patten LJ, that, in circumstances such as these, someone other than the trustee for

the time being may be held to exercise effective management of a trust only if that trustee's discretion to take the essential steps required for it to implement the tax plan has been "usurped" in the sense set out in *Wood v Holden*.

(6) He then said that the correct question he had identified was the question that the Commissioners had addressed, and referred to the passages where (a) they said that the "real top-level of management" of the trust was in the UK due to the facts surrounding PIML's appointment as trustee, and (b) they set out their overall conclusion (in summary of their preceding findings) that the place where the key commercial decisions were "in substance" made and "where the actions to be taken by the entity as a whole were, in fact, determined" in the Mauritius Period was the UK.

(7) Hughes LJ concluded, at [70], that the Commissioners had not erred and provided a summary of some of the Commissioners' findings at [136] to [145]. In light of the findings in those passages and the points he highlighted, I take Hughes LJ's final comment, that 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 that control of it was in the UK, to mean that he took the Commissioners' findings, taken as whole, to mean, broadly, that:

(a) there was an overall single plan devised, decided upon, facilitated, orchestrated and superintended in the UK by the UK settlor and the UK advisors to which it was integral that PIML would be in place as trustee for a brief period only,

(b) the decisions involved in initiating and orchestrating this plan on an on-going basis constituted effective or, as the Commissioners put it, the real "top-level" management of the trust during the relevant period, and

(c) the decisions made by PIML, as the trustee for the time being (who was intended to be in office only temporarily for the purpose of the plan), to effect the individual actions required to implement the single overall plan (such as the sale of the shares and their retirement in favour of UK trustees) constituted merely "day to day" management by the trustee for the time being in administering the plan or, as the Commissioners put it, lower level decisions.

(8) I note that Hughes LJ set out a short form description of the test for determining whether there is an error of law in a tribunal or court's judgement set out in *Edwards v Bairstow*. Lord Radcliffe said in that case that in addition to cases where there is an obvious error of law "it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal". Patten LJ essentially agreed with the taxpayers that there was an error of law of this kind on the basis that to have reached the conclusion which they did on the evidence, the Commissioners must have applied the wrong test for determining POEM. With that context in mind and in light of the detailed analysis set out above, I take Hughes LJ to have held essentially that:

(a) the facts found by the Commissioners (in particular, at [136] to [145]), are not such that no person acting judicially and properly instructed as to the relevant law could have come to the determination that POEM of the trust was in the UK or, as the taxpayers put it, the evidence does not demonstrate that the Commissioners applied the wrong test,

(b) on the basis that POEM of the trust is to be determined not by looking at where PIML itself was "effectively managed" as at the date of disposal by reference to whether its discretion to decide to implement the plan and to sell the shares was

"usurped" but by looking at where "the trust ie the trustees as a continuing body" was effectively managed as explained above.

Conclusion

359. It is evident from Hughes LJ's judgement, therefore, that for the purposes of applying article 13(4) of the Mauritius treaty in these circumstances, the tribunal is not confined to finding that POEM of the family trusts (ie the trustees of the family trusts as a continuing body) was in a place other than that where the Mauritius trustees made their formal decisions, only if the evidence supports a finding that their discretion to take the individual actions required to implement the scheme was "usurped" in the sense set out in *Wood v Holden*. Moreover, whilst Hughes LJ held, in effect, that the Commissioners' decision is within the scope of what a judge acting judicially and properly instructed may decide, Hughes LJ did appear to endorse the overall approach taken by the Commissioners when he said that they had addressed the right question and cited the passages from their judgement containing their key conclusions.

360. It is apparent from my comments on these two cases that I consider that the decision of the Commissioners in *Smallwood* and that of the High Court and Court of Appeal in *Wood v Holden* are not easily reconcilable (at any rate given the interpretation of *Wood v Holden* which the Court of Appeal took). In *Smallwood,* the Commissioners and Hughes LJ gave different reasons as to why it is not appropriate to seek to assess the POEM of a trust, as the place where the "top-level management" is carried out, by adopting a similar approach to that taken in *Wood v Holden* to the very similarly formulated test for assessing where CMC of a company is located, as the place where "the real business" is carried on (being where CMC "actually abides"). I do not find it easy to understand the basis for the distinction which either the Commissioners or Hughes LJ made.

361. However, my own views on that score are not relevant. Whatever the basis for the distinction, I consider that (a) it is plain from the decision of the majority of the Court of Appeal in *Smallwood* that in determining where the POEM of the trustees of the family trusts, as a deemed trustee body, is located it is appropriate to have regard to the general approach set out by the Commissioners in *Smallwood* and not to the reasoning in *Wood v Holden* (as the relevance and applicability of that reasoning is interpreted by the Court of Appeal in *Smallwood*) and (b) on that basis, on the evidence set out in Part B, the POEM of the trustees of the family trusts as a deemed trustee body was in the UK during the relevant period.

362. The evidence demonstrates that:

(1) There was an overall single plan for the sale of the shares in a tax efficient manner which was devised, decided upon, facilitated, orchestrated and superintended in the UK by the settlors and their UK advisors, as assisted by the PC trusts team (who I regard as having a dual role, for the reasons already given) on an on-going basis throughout the relevant period.

(2) It was integral to the plan that the Mauritius trustees would be in place as trustees of the family trusts for a brief period only for the purpose of implementing the plan as was in fact the case.

(3) The Mauritius trustees were appointed by the settlors as trustees of the family trusts in the confident expectation that they would implement the plan by taking all the actions considered to be necessary for it to succeed (namely, their agreement to the merger and sale of the shares on the flotation, their approval of the various appointments, their approval of actions considered necessary to ensure the family trusts were resident in Mauritius, and their retirement in favour of UK trustees).

(4) The decisions involved in initiating, orchestrating, superintending and refining this plan on an on-going basis, taken by the UK settlors and their UK advisors (as to some extent assisted by the PC trusts team), constituted effective or, as the Commissioners put

it in *Smallwood*, the "top-level" management of the family trusts during the relevant period.

(5) The decisions made by the Mauritius trustees to effect the individual actions required to implement the overall single plan constituted merely "day to day" management of or administration of this plan or, as the Commissioners put it in *Smallwood*, lower level decisions by, the Mauritius trustees, as the trustee for the time being appointed specifically to effect these actions.

363. It is key to the above findings that it is evident from the facts surrounding the Mauritius trustees' appointment as trustees of the family trusts that, as set out in full in section 3 of Part B (see, in particular, [110] to [112] and [157] to [161] above):

(1) By the time the appointments took place, the settlors had decided (a) to implement the plan for the tax efficient sale of the shares, as devised by UK Counsel in discussion with their advisers for the benefit of them/their families, by exercising their powers to appoint new trustees in Mauritius to carry out the plan, and (b) subject to the merger and floatation going ahead, as the settlors and their advisers at that stage expected (but, of course, could not be guaranteed), they wanted the new trustees to sell the shares held by them, as trustees of each family trust, in the proportions they had already decided (subject to the process for determining how many shares would be sold on the floatation) and take the other steps considered necessary to ensure that the disposals of shares would not be subject to CGT.

(2) Accordingly, the Mauritius trustees were appointed to act as trustees of the family trusts and agreed to act as such on the basis of a common intention and understanding between them, the settlors and their advisers and the PC trusts team and of their common confident expectation that they would carry out each of the action involved in the plan provided that:

(a) as, in the circumstances at the time of the appointment all the UK persons involved expected to be the case, the merger and floatation was not prevented going ahead by external factors beyond the parties' control, and

(b) the Mauritius trustees were expected (i) to check that (A) in the circumstances applicable when they were required to take each action necessary to implement the plan, the commercial merits of the transactions were as favourable for the beneficiaries of the family trusts as they were expected to be when they took the appointment on, and (B) it was within their powers to take the relevant action and there was no impediment to them doing so, and (ii) to review the relevant documents and ensure it was in order from their perspective. I note that all the relevant UK persons acted on the on-going assumption that it was in the interests of the beneficiaries of the trusts (i) for the merger to take place and for shares to be sold on the floatation (in particular, given the predicted high P/E multiples), and (ii) for the trustees to seek to achieve the tax saving under the plan.

364. That this is the basis on which the Mauritius trustees were appointed and accepted their appointment is reinforced by the fact that, as appears to accord with the expectation of both the settlors' advisers and their own advisers, the Mauritius trustees largely took a passive or secondary role throughout the relevant period, as the persons who were engaged to administer a plan which was decided upon, where necessary refined, facilitated and orchestrated and superintended by persons in the UK.

(1) The settlors were, through their advisors, where relevant as assisted by the PC trusts team, the parties who drove forward the settlors' plan, as regards its ongoing formulation, refinement and the implementation of each necessary step under a timetable set by them in the UK.

(2) The Mauritius trustees did not have a proactive role as regards the successful implementation of the plan; essentially, they were passive participants in the plan who largely merely reacted to what was put to them. That accords with the facts that:

(a) The Mauritius trustees did not take any independent advice on whether the plan was likely to achieve the desired tax saving or what the tax risks were nor did anyone appear to expect them to do so.

(b) Moreover, the Mauritius trustees were not involved in the on-going discussions and correspondence which the settlors/their advisers and the PC trusts team had with UK Counsel regarding the tax plan and the documentation required to implement the various steps and did not seek any such involvement.

(c) Although the PC trusts team were involved in some of these discussions, they did not regard themselves as responsible for giving tax advice on the prospect of success of the plan. They appeared simply to accept, as the Mauritius trustees themselves did, that it was in the interests of the beneficiaries of the family trusts for the Mauritius trustees to seek to achieve the CGT saving and acted on the basis that it was their role to seek to facilitate the implementation of the plan in the confident expectation the Mauritius trustees would adopt each required action (barring some material change in circumstance).

(d) On several occasions the Mauritius trustees had to be prompted to act as the UK advisers and PC trusts team considered they should and it seems they were prepared to take steps which was necessary for the implementation of the plan with minimal active investigation or input of their own.

(e) The UK advisers, including the PC trusts team, often only put the need for a particular action to the Mauritius trustees once they had already discussed amongst themselves (and, where relevant, with UK Counsel) any issue they considered impacted on the tax plan and worked out what they considered to be the necessary action which was then put to the Mauritius trustees for their approval or implementation. As accords with the secondary role the Mauritius trustees had, the UK persons involved, including their own advisers, did not appear to consider it necessary or important for the Mauritius trustees to be involved in the on-going processes for refining the plan and checking that the relevant documents and actions fitted with what UK Counsel considered was needed for the tax plan to work.

365. There are examples of these general points throughout the evidence set out in Part B. I note here, without limitation, the following:

(1) As set out in full in section 4 of Part B (see, in particular, [162] to [173], [181], [182], [188] to [190], [197], [225] and [226]), the evidence in relation to the Mauritius trustees' approval of the merger and sale of shares on the flotation demonstrates that the Mauritius trustees saw their role as being confined to checking that what they had been told about the commercial merits of merger and floatation when they were appointed was correct and that the documentation was in order from their perspective as trustees of the family trusts. Moreover, Mr Gujadhur had to be prompted into taking any active interest at all in the merger, as the first action the Mauritius trustees were required to consider.

(2) As set out in section 5 of Part B (see in particular, [250] to [253]), the evidence relating to the appointments demonstrates that (a) the PC trust team drafted documents at the request or instigation of the settlors/their advisors, provided advice to the settlors when they considered it would facilitate the plan (albeit they considered they were doing so informally) and usually presented the Mauritius trustees with the relevant documents only once they were approved by UK Counsel with a brief description of the supposed

rationale for the appointment, and (b) the Mauritius trustees approved the appointments, therefore, without having had any involvement in the on-going correspondence and discussion in the UK with little or no queries and although, of course, it was open to them to seek greater involvement they did not do so.

(3) As set out in section 5 of Part B (see, in particular, [266] to [273]):

(a) Mr Pentelow and Mr Maslen took steps to obtain comfort from counsel in Mauritius on the relevant Mauritian tax issues without initially involving the Mauritius trustees at all, took the lead in deciding what to do once advice was obtained and continued to intervene even after they asked Mr Gujadhur to obtain a ruling and again consulted with UK Counsel without the Mauritius trustees being involved. The UK advisors essentially set the timetable for the resolution of this issue as Mr Gujadhur seemed to accept was appropriate.

(b) It appears that (a) whether a Jersey entity within the DKB group should be appointed to act as investment adviser was suggested by someone in the UK, (b) the merits of the proposal was discussed amongst the UK advisers without the Mauritius trustees being involved at all, and (c) the Mauritius trustees adopted the proposal without considering any other option.

(c) As on other occasions, Mr Binks took action at the instigation of the settlors/the settlors' advisors as regards preparing the documents for the retirement of the Mauritius trustees and appointment of the UK trustees, without feeling the need for any communication with or provision of any explanation to or obtaining of any input from the Mauritius trustees.

(d) It is apparent throughout the relevant correspondence set out in section 5 that the UK persons involved considered that it was for them to set the timetable for the Mauritius trustees' retirement and appointment of new UK trustees by reference to when it was considered necessary for them to do so to ensure the success of the plan, and the Mauritius trustees seemed to share the view it was appropriate for them to do so.

(4) As set out in section 6 of Part B (see, in particular [279]), the evidence in relation to the retirement of the Mauritius trustees confirms that from the outset there was no realistic prospect that the Mauritius trustees would not retire in favour of UK trustees of the settlors' choice assuming the rest of the plan went ahead as expected (as it did).

Part D – "Different persons" issue

366. As set out in Part A, on HMRC's analysis, the tie breaker test is not in point at all. In their view, the Mauritius treaty operates to preserve the right of both the UK and Mauritius to tax the gains under the relevant domestic law. On HMRC's analysis, this issue hinges on the application of the CGT rules and the Mauritius income tax rules to the family trusts.

Expert evidence on Mauritius law

367. It is common ground that the family trusts fall within the definition of a "trust", in s 2 ITA, as "any trust constituted under the laws of Mauritius" on the basis that they are regarded as constituted under OTA. The main point of difference between the experts who gave evidence on Mauritius law is (a) whether such trusts constitute entities with a separate legal personality and (b) the scope of the trustees' responsibilities and liabilities as a deemed agent under ITA. The main provisions of relevance in ITA are set out in Part A. In addition:

(1) Ms Hague referred to the following provisions in OTA*:*

(a) Section 4 which provides that an offshore trust exists:

> "if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate –
>
> (a) for the benefit of any person (a "beneficiary") whether or not yet ascertained or in existence;
>
> (b) for a charitable purpose or for any other purpose which is not for the benefit only of the settlor or the trustee, including....the trust property with a fiduciary obligation to hold, use, deal or dispose of it or the benefit of person for a purpose (or a combination of both)."

(b) Section 5(3) states that, "notwithstanding subsection 1(c)", which generally prohibits offshore trusts from holding property in Mauritius, "the trustee of an offshore trust may, with the approval of the Authority and subject to any other enactment...Own such immovable property as may be required for the office accommodation of the trustee" and "invest in securities and hold other investments in Mauritius".

(c) Section 5(4) states that a "trustee may open and maintain with a domestic bank an account in Mauritian rupees out of which all payments required for the administration and operation of the offshore trust may be effected".

(d) Sections 28, 33, 35 state the following respectively, in each case, subject to OTA and the terms of the trust:

(i) "....a trustee shall (a) ensure that trust property is held by or vested in him, or held by a nominee on his behalf, or is otherwise under his control; and (b) preserve and enhance so far as is reasonable, the value of the trust property" (s 28)

(ii) "All the trustees of a trust shall, subject to the terms of the trust, join in the execution of the trust....no function conferred on trustees shall be exercised unless all the trustees agree on its exercise" (See s 33(1) and (2).)

(iii) "....a trustee has, in relation to the trust property, all the powers of a beneficial owner" and "A trustee shall exercise his powers only in the interests of the beneficiaries or for the purpose and in accordance with the terms of the trust" (s 35).

(e) Under s 36: "A trustee may sue and be sued as trustee".

(2) Both experts referred to s 79 ITA which states that every agent shall:

> (a) be answerable for the doing of all such things as are required to be done under this Act in respect of the income derived by him in his representative capacity, or derived by the principal by virtue of the agency, and for the payment of income tax on it;
>
> (b) in respect of that income, make returns and be liable on that income but in his representative capacity only, and each return and tax liability shall be separate and distinct from any other;
>
> (c) be authorised and required to retain out of any or other property received by him in his representative capacity so much as is sufficient to pay the income tax which is or will become payable in respect of that income;
>
> (d) not make any payment of income to a non-resident....unless and until arrangements have been made to the satisfaction of the Commissioner for the payment of any income tax which is or will become payable in respect of that income;

(e) be personally liable for the income tax payable in respect of the income to the extent of any amount that he has retained, or should have retained under paragraphs (c) and (d);

(f) be indemnified for all payments which he makes under this Act or for any requirement of the Commissioner;

(g) where another agent pays an amount for which they are jointly liable, be liable to pay to that agent his proportionate share of the amount so paid;

(h) for the purpose of ensuring the payment of income tax, be liable to the extent provided in paragraph (e), in respect of attachable property of any kind vested in him or under his control or management or in his possession to the same measures which the Commissioner may enforce against the property or any taxpayer in respect of income tax.

368. Ms Hague considered that it is entirely clear that a trust (of the type of the family trusts) does not have separate legal personality under Mauritius law:

(1) In her report, she gave a description of the history of the Mauritius legal system and, in particular, of the introduction of the concept of "trust" or "fiducie". She said in cross examination that to understand the extent of a trust's liability under tax law and the extent of a trustee's liabilities as agent, it is fundamental and important to understand its characterisation under Mauritius law generally:

(a) Before 1962, the concept of "trust" was unknown in the Mauritian legal system particularly because the Civil Code has well entrenched forced heirship principles which are matters of public policy and cannot be transgressed.

(b) In 1962 in the well-known case of *Austin v Bailey* (1962) MR 113 the courts recognised the validity of the English trust in Mauritius although the court emphasised that such a trust cannot be permitted to transgress the forced heirship rules and must comply with the Mauritian principles in the Civil Code.

(c) Following this, the Unit Trust Act 1989 and the Trust Act 1989 were adopted and then OTA (with effect from 13 July 1992) which was aimed at attracting non-residents to set up trusts in Mauritius. An offshore trust had to be registered with the regulator, the Mauritius Offshore Business Activities Authority in accordance with the Offshore Business Activities Act 1992.

(d) Subsequently it was found that it was not convenient to differentiate between residents and non-residents and the Trust Act 2001 was adopted as a consolidating measure and the Civil Code was amended by the introduction of the concept of a trust ("fiducie" in French) in articles 1100-1 to 1100-6.

(2) She considered that, the provisions in OTA set out above make it very clear that a trust is not a separate legal person for Mauritius law purposes. OTA provides a legislative framework for offshore trusts which can be defined broadly as trusts in respect of which the settlor is a non-resident, at least one of the trustees is resident in Mauritius and hold assets or property located outside Mauritius except in limited circumstances or with the approval of MOBAA. In OTA a trust is not identified as a separate legal person but is conceptually identified (in particular in s 4 and the other provisions set out above) as a group of rights and obligations organised around the trust property rather than attached to a legal person (as is the case for a company). She emphasised that, under OTA, the trustee or trustees are legally and beneficially entitled to the trust's assets subject to their fiduciary duties and the trust does not and cannot hold any property in its own name. The position is unlike that for a company, therefore, where the director is simply an agent of the company and is not legally and beneficially entitled to the assets of the company.

(3) That this is the nature of a trust was recognised in the Civil Code when it was amended in 2001 and the term "fiducie" was defined as:

> "the set of rights and obligations organised around certain assets ("the trust property") which are settled in the interests of beneficiaries or for a particular purpose and which a person ("the trustee") is obligated to hold, manage and administer in accordance with the settlement."

The above is Ms Hague's own translation into English of the original text in French. Mr Peroo accepted this is an accurate translation.

(4) Section 2 of the Trusts Act 1989 states that a person includes "any association, partnership, trust, societe or organisation, whether incorporated or not". However, it also defines a trust as "a device whereby one person (the settlor) transfers property to another person (the trustee), to be held and dealt with by him for the benefit of a third person (the beneficiary), or for a charitable purpose or for any other purpose permitted by law". It is clear, therefore, that notwithstanding the definition of "person", the trust property is vested in and held by the trustee rather than the trust as an entity. Where a separate legal personality is created under Mauritian law, this is normally expressly provided in the relevant legislation (for example in the case of a company or a societe formed and registered pursuant to the Civil Code Mauricien (see article 1841)).

(5) It is also clear in the Hansard debates when the relevant bills went through Parliament that the concept of "fiducie" or trust was derived from English law and that it would follow the same sort of construct and that it constitutes a set of rights and obligations rather than a separate legal person.

(6) Hence, ITA deems a trust to be a person, with legal personality, for the purposes of that Act precisely because it is not such person under the general law of Mauritius. It is notable that the residence of a trust for the purposes of ITA is determined by the residence of the person or persons holding office as trustees of the settlor whereas a company's place of residence is determined by its place of incorporation or by the central management and control of the business of the company.

(7) It is also notable that, in the absence of a deeming provision, only the trustees are liable to tax on morcellement (the parcelling out of land unto smaller portions or lots) pursuant to s 9 of the Land (Duties and Taxes Act) 1984. The person who is liable to pay tax under this act "the owner" defined as "including a lessee" under s 8. On the ordinary dictionary meaning of the term, the "owner" is the person who has the legal title to the land (as registered at the Land Registry). In the context of a trust, that can only be the trustee. As set out above, s 5(3) OTA expressly refers to the ownership of immoveable property by a trustee of an offshore trust (not by the trust itself). The fact that the trustee owns the trust property on trust for the beneficiaries or for a particular purpose and that its own assets are segregated from the trust property does not affect that it is the legal owner for the purposes of s 9.

369. Ms Hague made the following comments on how ITA operates as regards a trust within its scope:

(1) Whilst by virtue of the deeming provisions pursuant to ITA a trust is treated as being liable to tax as a separate legal person and so tax filing and payment obligations (under ss 116 and 119), it is the trustees who compute and file the tax returns. As a trust does not have a separate legal personality, as a matter of a Mauritius law it cannot hold assets or bank accounts and is incapable of paying taxes. Hence, the trustees compute and file tax returns and hold the trust property and so are responsible for any payment of taxes. It is not like the situation in respect of a company which has bank accounts in its own name and therefore pays tax in its own name.

(2) While in its strictest sense a trust is "subject to" income tax by virtue of the deeming provisions in ITA it is in fact the trustees who are legally able and obliged to discharge any tax liabilities. On that basis, given that a trust cannot hold property in its own name, despite the deeming provisions in ITA, tax can only be recovered from the trustee as the trustee is the legal holder of the trust property and any enforcement action by the Mauritius Revenue Authority over the trust property to recover income tax would need to be taken against the trustee; it is simply not possible to recover tax from the trust which cannot hold property in its own name (and see s 36 OTA).

(3) The effect of the provisions in s 79 is to limit the liability of an individual trustee to the income coming into his hands (and in respect of which he has retained or should have retained money to pay any taxes due) rather than making him personally liable. She considered that the obligations and liabilities of a trustee are broader than the general duties of an agent (such as an agent for a company) given the nature of a trust under Mauritius law generally and the fact that a trust cannot hold assets or money in its own name (and so cannot pay tax).

370. Mr Peroo said that the question of whether a trust has separate legal personality under Mauritius law is unclear and has not been decided upon by the Mauritius courts:

(1) In his view, the definition of a trust in the Trust Act 1989 and the Trusts Act 2001 do not assist in determining whether Mauritius statute grants or denies the legal personality of a trust for general purposes nor does the fact that a trustee is deemed to be an agent under ITA:

(a) The definition in s 2 of the Trust Act 1989 of a trust as "a device" (see above) and the similar definition in the Trusts Act 2001 simply explains the mechanism for and reason for the creation of a trust.

(b) Section 81(4) ITA contains a comparable provision to that applicable to trustees which deems every "every secretary, manager or other principal officer of a company, societe or other body of persons" to be the agent of the relevant entity "in respect of income derived by it". It seems that the main purpose behind these provisions is to place a burden on relevant parties involved with the specified entities to ensure that taxes will be paid.

(2) It is unlikely that a trustee could be viewed as "the owner" of land for the purposes of morcellement and so be personally liable to pay capital gains tax under s 9 because:

(a) Section 3 of the Trusts Act 2001 provides that "a trust exists where a person (known as a "trustee") holds or has vested in him or is deemed to hold or have vested in him property of which he is not the owner in his own rights, with a fiduciary obligation to...."

(b) Under the Trusts Act 1989 property held on trust could not be freely disposed of by the trustee as an owner would be able to (see the provisions referred to above, in particular, the words "to be held and dealt with by him for...").

(c) Section 72(1)(f) of the 2001 Act inserted a new article 1100-4 in the Civil Code the first para of which provides that property held on trust is autonomous from the estate of the settlor, trustee or beneficiary and that none of them have any property rights in it.

371. Mr Peroo made the following other main points in his report:

(1) The effect of provisions relating to the trustee's responsibilities as agent is that:

(a) A trustee is treated as an agent who is obliged to carry out the tax obligations of the trust.

(b) The trustee has a duty to retain the amount of tax payable by the trust and to pay that amount to the Mauritian Revenue Authority in the capacity of a representative of the trust.

(c) Where a trustee has not paid that amount or has not retained the amount of tax payable by the trust, then that trustee becomes personally liable and that amount can be recovered from the trustee in his personal capacity.

(d) On a literal interpretation of s 79(b) a trustee is liable in his representative capacity only and ss 79 (e) and (h) are exceptions to this principle as they only make the trustee personally liable where he has already retained the amount to be paid as to tax as a person in relation to the income of income tax by the trust or where he should have done so. This reading of s 79 may also be seen as supported by the decision in *Chiniah v The Commissioner of Income Tax* [2004] SCJ 336 and by s 79(f) whereby the trustee is to be indemnified for all payments he makes under ITA.

(e) It can be concluded that under Mauritian law the trustee is liable to tax as a person in relation to the income of the trust only where he fails in his duties under ss 79 (c) and (d).

(2) The Director General of the MRA has wide powers under Part XI of ITA to recover tax such as by attachment against a bank account and a variety of other methods which often operate against assets or property directly rather than against an individual or entity. Therefore, tax can be recovered from a trust separately from the trustee.

372. Mr Peroo was cross-examined at some length on his report:

(1) Mr Peroo agreed that the family trusts fall within OTA and that there is nothing in OTA which deals with whether a trust is a separate legal person. He had not specifically considered the provisions of OTA in his report because he did not think it was relevant. He did not consider that the provisions in OTA which Ms Hague referred to support the view that a trust does not have legal personality:

(a) He considered that s 5(3) OTA is meant simply to allow a foreign trustee of an offshore trust the possibility to set up his office in Mauritius as a very limited derogation from the general rule that prohibits a non-citizen from owning property in Mauritius as part of the desire to make Mauritius a centre for corporate services. He thought that the provision about bank accounts in Mauritius had a similar purpose.

(b) He said that the provision that a trustee can sue and be sued is simply saying that the trust can be represented by the trustee in legal proceedings.

(c) It was put to Mr Peroo that the powers in s 35 OTA are not given to the trust but to the trustee because the trust is not a person under general law and that the trustee does not have a principal to whom he is accountable or from whom he can take instruction. He said that the trustee will simply comply with the trust deed and agreed the trustee does not get instructions from anybody. He did not agree with the general proposition that, in that sense, a trustee is unlike an agent and is his own principal; he noted that some agents have wide powers and that is a question under agency laws in Mauritius which he would have to investigate.

(2) It was put to him that the description of a trust as a "device" in the Trust Act 1989 as set out above describes a legal relationship upon which property is held by one person with an obligation either to deal with it for the benefit of another person or for a charitable or other permitted purpose. He agreed that there is no indication in this section that a trust has separate legal personality but said that there are serious arguments that could be

put to show that may be the case. He added that under the Civil Code, there are a number of fictitious legal persons, such as a sociéte (which is probably comparable to a partnership) and companies. The approach taken by the legislator in Mauritius, is to express which entity has a legal personality and which entity does not have a personality. So, for example, a sociéte en participation is stated not to have separate legal personality. But there is no legislation expressly stating that a trust does not have legal personality so that it is an unsettled question under Mauritian law.

(3) He agreed that the recovery actions available to the MRA which he referred to are all actions against the property of the person liable for payment of the relevant tax charge and usually the trust property is held in the name of the trustee. It was put to him that, in practice, the trustee is the only person against whom such remedies can be pursued given that the trustee owns the trust property. He said that these are actions "on property" rather than against the person who owns property, and, in effect, if the MRA were to take action naming the trustees they would still have to identify the trust so it is clear the action is in respect of trust property. He agreed, in effect, that the trustee is the only person with standing to dispute such actions in the same of the trust and would make the relevant decisions.

(4) He agreed, in effect, that under Mauritius tax law a trust is treated as a continuing body as he accepted that (a) the MRA "will look at the income during the tax year of the trust held by whoever it may be and calculate tax on that", and (b) that the purpose of the provisions in ITA, which deem a trust to be a person, is to create an on-going entity to which the income from the trust's activities (whether profit or loss making) can be allocated.

(5) He agreed that the trust's actions are those of the trustee or any agent who the trustees may have appointed.

(6) It was put to him repeatedly in a number of ways essentially that under s 79(c) to (e) the trustee is directly liable to the Mauritius tax authorities for the full amount of income tax due in respect of the trust's activities (as a deemed person) whether or not the trust assets are sufficient to cover the tax charge (and whatever the reason for any insufficiency) because the trustee *is required* to retain sufficient sums to meet the income tax liability (under s 79(c)). He said that the trustee is liable if the relevant sums should have been retained and there is no defence for not retaining them. He could not say without further research what the position would be if the trust's assets went down in value or agree that s 79(c) imposes a strict liability on the trustee to retain sufficient sums. He agreed that the exceptions in (e) and (h) to the principle that the trustee is only liable in his representative capacity are very wide. He noted that the trustee has a duty to retain the money needed to meet the tax liability of the trust. "But......the extreme limits of the scope of the liability of the trustee should be researched properly and I would hesitate before giving an answer on the borders of the scope of liability". In the course of this questioning Mr Peroo confirmed that he had advised on trust issues only twice and not on this particular issue.

(7) He did not agree that article 1100-1 confirms that under Mauritian law a trust is not a legal person given that it recognises that it is a set of rights upon which assets are held, subject to certain obligations. He said that is "simply the description of the setup". He agreed that the article is not saying that a trust is legal person but it is not saying it is merely a set of rights but rather maybe amongst other things, it is a set of rights. But I don't think this is......an exclusive description of trusts under Mauritian law." There are other descriptions such as under s 2 OTA.

373. In her oral evidence:

(1) Ms Hague disagreed with Mr Peroo's suggestion that the MRA can seek to recover tax from a trust separately from the trustee. She noted that all the methods of enforcement action that Mr Peroo described involve action against trust property (such as a bank account or immovable property). However, as the trust does not have legal personality, the legal title to the trust property is held by the trustee and the MRA have to seek to obtain the beneficial interests in the funds/asset through that legal title. She noted that if she were to get really technical, strictly under the Trusts Act, the trustee has all the powers of a beneficial owner subject to his fiduciary duties.

(2) When questioned about who is the taxable person for the purposes of ITA, Ms Hague said that, in the strictest sense, the trust is liable to income tax because of the deeming provision in ITA and the trustee is liable as an agent. However, if the taxable person is interpreted as meaning the person who the MRA can recover the tax from, then it is the trustee as the person with the obligation to discharge the tax liabilities. When it was put to her that nothing relating to the trustee, as agent, releases the trust from liability, she said that is correct in that "in a technical sense of who is liable, the trust, as a separate person for tax purposes, will always remain liable. It is just because of the quirk of the fact that it has no separate legal personality as a matter of law generally and it does not actually hold any assets".

(3) She agreed that if the trust is liable to income tax but the funds have been improperly dissipated by the trustees so that they do not have sufficient trust funds to meet the liability, the trustees are nevertheless still liable to meet the relevant income tax liability.

(4) In re-examination she agreed that if the trustee wanted to dispute any enforcement action brought by HMRC, the trustee would have to be made a party to any such proceedings simply because there is no legal entity whom the Mauritius revenue authority could go against as a matter of general law.

374. I accept in full the evidence of Ms Hague including as regards the points of difference between her and Mr Peroo. Ms Hague's views make sense in the context of the legislation she referred to and her account of the history of the taxation of trusts in Mauritius. It is apparent from the materials she referred to that, as a matter of Mauritius general law, a trust does not have a separate legal personality and, therefore, it is the trustee that is legally obliged to discharge any tax liabilities in relation to the trust and from whom tax can be recovered. Mr Peroo simply stated that the position is unclear under Mauritian laws and has not been decided by Mauritian courts and could not put forward any convincing reason as to why Ms Hague's view is not correct. Mr Peroo accepted that there is nothing in the legislation that deems offshore trusts to have legal personality. He could not identify who the trustees' principal would be and agreed that trustees are essentially a single continuous body and that trusts only act through the trustees. He had very limited experience in advising trusts.

375. I note that HMRC accepted that Ms Hague is an entirely professional and admirably neutral expert witness. They considered that it is not necessary for the tribunal to resolve the issue of contention between the experts and that both views are tenable. However, it seems to me that an understanding of Mauritius law on this point is critical to the analysis on the "different persons" issue.

Submissions

376. Mr Brennan said that HMRC's analysis is based on the plain words of the Mauritius treaty but this interpretation also supports one of the main purposes of the treaty - preventing fiscal evasion - which is an apt description of the appellants' actions in seeking to avoid a charge to CGT:

(1) It is clear from *Bayfine UK v HMRC* [2012] 1 WLR 1630, 1637H (Arden LJ)), in applying a purposive construction of the treaty (a) the tribunal must interpret the words of the treaty in light of its "object and purpose", and (b) purpose of the treaty may be gleaned from the preamble, which records the desire of the parties to "conclude a Convention *for the avoidance of double taxation and the prevention of fiscal evasion*". The facts of *Bayfine* are different from those of the current appeal but Arden LJ remarked (at [4]) that it is "not uncommon" for different persons to be liable for tax in different jurisdictions in respect of the same stream of income and gave trusts as one such example.

(2) Similarly, the Commentary on the OECD Model Tax Convention (2017) states (at 16 and 16.1 of the Introduction) that the purposes of the Convention are not limited to the elimination of double taxation and "*the Contracting States do not intend the provisions of the Convention to create opportunities for non-taxation or reduced taxation through tax evasion and avoidance*".

377. Mr Brennan said that HMRC recognise that had Mauritius chosen to tax the trust on the gain, this analysis could lead to economic double taxation. However, treaties do not generally address "economic" double taxation, where two Contracting States tax *different persons* upon the same income or gains. Rather treaties address "juridical" double taxation, which arises from the imposition of comparable taxes in two states on the *same taxpayer* in respect of the same subject-matter and for identical periods.

378. Finally, Mr Brennan added that:

(1) HMRC's analysis is consistent with the position of Mr Mosafeer of the MRA who provided, under international mutual assistance arrangements, some uncontroversial detail and added that the (Mauritius) trustees are outside the purview of the treaty for treaty benefits.

(2) In *Lee and Another v Revenue and Customs* [2017] UKFTT 279 (TC) (*"Lee"*) the UT accepted the premise of the argument, that there are different persons but misunderstood the proper basis of the argument and made a very significant error in deciding this point against HMRC (see [87]).

379. Mr Goodfellow noted that the Commentary to the 1977 Model Convention in place at the relevant time stated the following as regards the definition of "person":

> "The definition... is not exhaustive and should be read as indicating that the term 'person' is used in a very wide sense...The definition explicitly mentions individuals, companies *and other bodies of persons*. From the meaning assigned to the term 'company' by the definition contained in subparagraph b) it follows that, in addition, the term 'person' includes any entity that, although not incorporated, is *treated as a body corporate for tax purposes*. Thus, e.g. a foundation (fondation, Stiftung) may fall within the meaning of the term 'person.....

380. He said that it is plain from this guidance that a body of persons or an entity is not required to have separate legal personality as a matter of general law in order to be a "person" for treaty purposes. He noted that in *Padmore v Inland Revenue Commissioners* [1989] STC 493, the Court of Appeal regarded a Jersey proper law partnership as a "body of persons" for the purposes of the then Jersey/UK Double Tax Agreement, even though the partnership had no separate legal personality. The Court of Appeal agreed with Gibson J that, in deciding whether a partnership is a person: "The UK domestic law definition is not applicable. The draftsman of the arrangement was giving a comprehensive definition of the word 'person'."

381. Mr Goodfellow stressed that the purpose and effect of the CGT rules and the Mauritius income tax rules, as they apply to trusts such as the family trusts, is essentially the same.

(1) In the UK:

(a) It is apparent from the scheme of the relevant provisions that the purpose of treating a settlement as a UK deemed body under s 69 is to ensure that (a) gains

and losses arising out of a settlement' activities are computed for CGT purposes on the basis it is a continuing single taxable entity, and (b) the trustees from time, as the representatives of that entity, are accountable for any resulting CGT charge and can be sued for the tax.

(b) Hence, s 69 (a) creates a fictional body of persons, so that the actions of all the trustees of the settlement can be looked at together and the tax position in respect of relevant sums arising to the trustees acting in their capacity as such can be looked at on an on-going basis, and (b) deems that body to be resident in the UK (where the relevant conditions are satisfied). Under s 65(2), chargeable gains accruing to the UK deemed body are deemed not to accrue to any other person.

(c) It is notable that:

(i) Where the UK deemed body is treated as "resident" in the UK, it is all and any of persons who have held the office of trustees during the year of assessment (and not merely the UK resident persons (if any)) who are assessable to CGT and from whom CGT is recoverable.

(ii) The representative nature of the liability is emphasised by ss 65(2) and (4) which makes all or any subsequent holders of the office of trustee assessable in respect of past CGT (again whether they are UK resident or not).

(iii) The trustees have an equitable right of indemnity against trust assets for CGT they pay on behalf of the deemed UK body so that the tax is normally be borne by the trust's assets. Even where the legislation attributes the chargeable gain arising to the settlement to another person (such as a settlor), that person is entitled to recover CGT paid from the trustees and so from the trust's assets.

(2) It is plain that, as in the UK, under the general law of Mauritius, the family trusts are not treated as entities with separate legal personality. Moreover, the scheme of the legislation in ITA operates in substantially the same way as the UK CGT rules in that it is the deemed Mauritius body, as a continuing entity, who is liable to tax but the trustees who, as deemed agents of the deemed Mauritius body, are answerable for doing all the things required to be done under ITA such as making returns and discharging any income tax liability. Whilst the experts did not agree on all aspects of how ITA applies to trusts such as the family trusts, Mr Peroo accepted that, under ITA, the trust is liable to income tax as a single continuous body and that, in effect, trusts can only act through the trustees.

382. Mr Goodfellow added that, if the term "person liable to taxation" is interpreted as limited to the legal or natural person against whom an actual liability to tax is enforceable, so that the focus is on the person or persons holding office as trustees, those persons are "liable to taxation" both in the UK and Mauritius:

(1) As indicated above, any person who holds office as trustee during the relevant tax year or subsequently is accountable for the CGT. Consequently, any CGT due could be enforced against the Mauritius trustees as well as against KBTL.

(2) Under Mauritian law, the Mauritian trustees were accountable for any Mauritian tax on income or gains arising to the relevant family trusts (whether alone or in addition to the relevant trusts itself) and such tax could be enforced against them.

383. Mr Goodfellow said that HMRC's argument is entirely inconsistent with the purposes of the Mauritius treaty:

(1) There would be an anomalous lacuna if the Mauritius treaty does not apply in relation to trusts in the same way as it does to individuals and companies (and other entities) and there would be juridical double taxation. The suggestion that those negotiating this treaty did not have in mind trusts is absurd. Trusts have been a part of the English landscape for years and in article 22(3) the draftsmen acknowledge that income sometimes comes from trusts.

(2) The UT was correct in *Lee* (or certainly the UT was not clearly wrong) in holding that the different persons argument is incorrect on the basis that the focus of the treaty is the category of income or gain and the liability to tax, and not the identity of the person who is liable to tax (see [87]).

384. Mr Brennan responded that:

(1) Mr Goodfellow's argument that it is "the trust" which is the taxable person in both the UK and Mauritius is inconsistent with the operation of a treaty in UK law. The treaty is simply given effect in respect of CGT (under s 277) as a relieving measure from the CGT which would otherwise apply as the position is analysed under UK rules in TCGA. It does not enable the tribunal to re-write the CGT rules as to who is the taxable person in UK law. In effect, the appellants' approach requires the trustees to be ignored in favour of consideration of an additional non-statutory taxpayer, the "trust", the legal foundation of which is presumably to be assumed to be relevantly congruent with the concept of a trust in Mauritius. This has no foundation in statute and is wrong in principle.

(2) Although in submissions, Mr Goodfellow seemed to use the terms interchangeably, the concepts of "trust" and of "settlement" are not the same in UK law. That is illustrated by the decision in *Roome v Edwardes* [1982] AC 279 in which the House of Lords considered whether trustees were trustees of a single settlement or of separate settlements and concluded that separate "trusts" may arise in a single "settlement" (see Lord Wilberforce at 292B, G-H and at 292H-293B, 293G and 295E-F). It is not good enough to say that because there is "a trust" in Mauritius, and "trustees of a settlement" in the UK, the former must be treated, for the purposes of UK law, as if it were exactly the same as the latter (or vice versa).

(3) The solution to the economic double taxation issue is found in domestic law via unilateral credit relief (at the time in s 790 ICTA and now in s18 of the Taxation (International and Other Provisions) Act 2010) provided the tax paid under the law of the relevant Contracting State is calculated by reference to any gain accruing in that State and that it corresponds to UK tax.

Decision

385. For all the reasons set out below, I have concluded that, on the natural meaning of the relevant provisions in the Mauritius treaty and in light of its intended purpose (namely, to avoid double taxation), for the purposes of the Mauritius treaty, the trustees of the family trusts constitute a "person" for the purposes of article 1, as "body of persons" within the meaning of article 3(1)(e) and, at least during the relevant period, under the laws of both Mauritius and the UK, that "person" was "liable to taxation by reason of....residence" in each of those countries.

386. As set out in *Commerzbank*, in interpreting the treaty the tribunal must apply (in the first instance) a purposive approach it seems, broadly, adopting the same approach as is used to construe a UK statute but on the basis that (a) as an international convention is addressed to a much wider and more varied judicial audience than purely domestic law, it should be interpreted, as "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation", and (b) those principles include the general principle of international law (in article 31(1) of the Vienna Convention on the Law of Treaties)

that a treaty should be interpreted "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

387. With those principles in mind, in my view, it is appropriate, at least in the first instance to examine, as the first step in the analysis, who qualifies as a "person" for the purposes of the Mauritius treaty in a trust context "unconstrained" by technical rules of domestic law and "on broad principles of general acceptance":

(1) To recap, as set out in Part A, the Mauritius treaty applies to individuals, companies and "any other body of persons" who are "a resident of one or both Contracting States". Under the treaty residence test, a person is a resident of a Contracting State if, under the law of that State, the person is "liable to taxation" in that State by reason of (amongst other things) residence.

(2) The term "any other *body of* persons", on its ordinary meaning as used in the context of determining who comes within the scope of the Mauritius treaty, in broad terms and without wishing to give an exhaustive definition, appears to be aimed at capturing those who (a) otherwise individually qualify as "persons" (such as individuals or companies), and (b) are somehow affiliated or connected in the sense that they act together for some common purpose and/or are subject to the same legal arrangement.

(3) In my view, the term "any other body of persons" is certainly apt to include the trustees of the family trusts, as persons who are collectively subject to a legal arrangement whereby they hold and manage property for the benefit of others, according to a range of obligations as set out in the trust deed creating the relationship and as set out in statute.

388. It is uncontroversial that viewing the relevant "person" for treaty purposes as the trustees, as a "body of persons" within the meaning of article 3(1)(e) that "person" was liable to CGT (under ss 2 and 69) and so was "a resident of" the UK at the relevant time. On this analysis, the dispute is whether that same "person" was also "a resident of" Mauritius at the relevant time:

(1) HMRC place much emphasis on the fact that the deeming provision in s 2 ITA is formulated differently to s 69; s 2 ITA states that the "*trust*" shall be treated as a "person" (specifically a corporate person, given that the term "company" in ITA is defined to include a trust) and the trustees are simply deemed to act as the agents of the deemed trust body.

(2) There is no dispute that, under ITA, each family trust is to be treated as such a deemed trust body (as a deemed corporate) and that, within the meaning of the treaty residence test, that body was "liable to" income tax "by reason of...residence". However, HMRC's stance is that s 2 ITA renders a different "person" a "resident of" Mauritius than the person who is a "resident of" the UK under TCGA: The "person" who is liable to income tax under Mauritius law by reason of residence is the trust as an entity treated as body corporate within article 3(1)(f) (and not the trustees as a deemed body of persons within article 3(1)(e)).

389. My view is that this is a distinction without any material difference for present purposes. In particular, in light of the need identified in *Commerzbank* to interpret a treaty unconstrained by technical rules of domestic law and on broad principles of general acceptance, it is important not to lose sight of the fact that the purpose and effect of the deeming provisions in ITA and TCGA is essentially the same. They each operate in substantially the same way to subject to tax relevant sums accruing to trustees of trusts/settlements acting in their capacity as such. I note the following:

(1) In each country, the family trusts are viewed as a legal arrangement under which the trustees hold and manage the trust property subject to arrangements for the benefit of

beneficiaries as set out in the trust deeds establishing the trusts (albeit that the trustees may have differing statutory obligations under the statutory provisions of each country).

(2) With that legal background in mind and having regard to the overall scheme of the relevant legislation, it is plain that the purpose of the relevant rules in TCGA and ITA is:

(a) to capture within the tax net gains and income arising in respect of the trustees' activities, as carried out in their fiduciary capacity, as computed under the usual rules; but

(b) to do so in a way which, in effect, takes account of the fact that that the trustees do not hold the assets vested in them under the trust arrangement for their own account, as absolute legal and beneficial owners, but subject to a suite of on-going fiduciary legal responsibilities to the beneficiaries that usually remain in place notwithstanding any changes in the persons holding office as trustees from time to time.

(3) Hence, the tax rules in each jurisdiction operate:

(a) By deeming there to be a taxable hypothetical entity of an enduring nature which remains in deemed existence despite any changes in the persons holding office as trustees of the trust from time to time and which is separate from them.

(b) By treating the trustees from time to time, as the actual persons in whom the trust property is vested, as the parties accountable for the CGT or income tax due on any gains or income which are computed as arising to the deemed separate entity.

(4) It is plain that the fact that the UK legislature and Mauritius legislature have chosen to depict the taxable hypothetical entity (a) on the one hand, as the embodiment specifically of "the trustees" (under s 69) and (b) on the other hand as the embodiment of "the trust" (under s 2 ITA) does not give rise to any substantive difference in tax treatment of the trust relationship. In each case:

(a) The essential nature of the deemed entity, as a person separate from the trustees as individual office holders, is the same. That is explicitly stated in the UK rules (see s 69) and, under the Mauritian rules, necessarily follows from the fact that the deemed trust body is regarded as a company and the trustees are deemed to act on its behalf as agents (see ss 79 to 81 ITA).

(b) The effect of the creation of the deemed entity is that income and gains accruing to the trustees (as the persons who hold the trust property) is computed by reference to the on-going activity, expenditure and receipts of the trustees under the on-going trust arrangements without regard to any change in their composition.

(5) Finally, I note that the trustees are an inherent part of what is deemed to be a "person" under ITA:

(a) To recap, (i) s 2 treats "any trust constituted under the laws of Mauritius" as a "person", and (ii) the family trusts are regarded as constituted under OTA which applies (under s 4) where "a person (a "trustee") holds or has vested in him....property which does not form, or which has ceased to form, part of his own estate – (a) for the benefit of any person...."

(b) Given that, under Mauritian law, a "trust" has no independent legal existence from the relevant legal relationship under which the trustees hold trust property on fiduciary terms (in this case as set out in OTA), a "trust" is the subject of the deeming provision in s 2 ITA simply in the sense of the existence of a fiduciary legal relationship. In effect, therefore, the trustees, as actual persons with

a key role in that legal relationship, are an essential part of what is deemed to be a "person".

390. With that context in mind, in my view, (a) there is nothing in the relevant Mauritian law which detracts from my conclusion that, on the natural interpretation, the relevant "person" for the purposes of the Mauritius treaty, is the trustees of each family trust "as a body of persons", and (b), contrary to HMRC's view, *that person* was a "resident of" Mauritius:

(1) For the reasons set out above, the effect of the relevant rules in ITA, like the relevant rules in TCGA, is (a) to tax relevant sums accruing to the trustees of trusts falling within the scope of the rules, as realised by them acting in their capacity as such, (b) to do so on the fiction that the sums are realised by an entity which is treated as separate from the trustees but which, in effect represents the trustees or, at least, the legal fiduciary relationship to which the trustees are central.

(2) This suffices for the trustees of each family trust, as a body of persons, to be viewed as, under the law of Mauritius, "liable to" income tax "by reason of...residence" in Mauritius. It would be out of kilter with the principles of interpretation set out in *Commerzbank* to interpret the relevant provisions in the Mauritius treaty, as is the effect of HMRC's argument, according to narrow technical differences in precisely how, under their respective domestic law, the UK and Mauritius achieve the same result in taxing sums arising to the same persons under a legal relationship which is viewed in the same way under the law of both countries.

Part E – Applications for the admission of evidence

391. At the hearing I decided to admit as evidence in the proceedings a witness statement of Mr Gujadhur dated 19 April 2020 which the appellants applied to admit on 20 May 2020. In this statement, Mr Gujadhur exhibited heavily redacted versions of minutes of a trust for which DTOS acted as trustee in 2003 which BDO had obtained from a client only in April 2020. In outline, Mr Gujadhur's main points in this statement were that (a) these minutes are typical of the style and format of minutes that DTOS prepared to record the decisions DTOS made for all clients, and (b) the system for recording decisions and minutes was the same in 2000 and minutes recording the decisions made by DTOS in this case would have been prepared in a similar manner. I note that the witness statement and application were made promptly after BDO obtained the minutes. In my view, HMRC had sufficient time to deal with this evidence given its limited nature and would not be prejudiced by its admission. Their objections related to the fact that in their view no or little weight is to be given to this evidence but I did not regard that as a reason for not admitting the evidence in the first place.

392. At the hearing I refused HMRC's application to produce as evidence in the proceedings the transcript of the oral evidence which Mr Gujadhur gave in the *Lee* case which was heard in 2016. This was first raised by HMRC with the appellants on 18 May 2020 and directly with the tribunal in mid-June in the form of an application for the tribunal to make a direction for the transcript to be included in the bundles. Mr Brennan emphasised that he would not be saying that admissions by Mr Gujadhur in *Lee* are to be taken as admissions by the appellants in these proceedings; plainly Mr Gujadhur did not have their authority in those proceedings to make admissions on their behalf. Therefore, in his view, the application was not for the transcript to be admitted as evidence; it was simply for the transcript to be included in the bundle so that, should it become relevant, he could ask Mr Gujadhur questions relating to it in cross-examination. He said the use of the transcript in this way is a completely conventional use of an alleged inconsistent previous statement. The appellants submitted that the admission of this document at this late stage would be unfair and cause them prejudice.

393. Overall, I concluded that the application was made too late for the appellants to be able to prepare to deal with the production of the transcript adequately and it would be unfair to

admit it. In my view, whatever label is put upon the application, it plainly constitutes a request for HMRC to be able to rely on a document in these proceedings. The tribunal had directed the parties to produce a list of documents they intended to rely on in these proceedings by 21 December 2017, some fifteen months after *Lee* was heard. HMRC have not provided an explanation as to why they did not include the transcript in their list of documents they produced in response to that direction or make an application for it to be included in their list of documents at a much earlier stage. It is not a satisfactory response that HMRC are not seeking to introduce the transcript as evidence. Even if HMRC use it only in the course of cross-examination of Mr Gujadhur, in doing so, they would plainly be seeking to attribute some probative value to it whether as regards Mr Gujadhur's credibility or otherwise. Moreover, I note that in the correspondence, HMRC cited a number of substantive matters in respect of which they regard this document as having probative value (the extent of Mr Gujadhur's trustee duties, his/DTOS' practice for accepting minutes drafted by UK advisors and allowing decisions to be made by UK advisors, his practice of approving transactions he did not understand and his willingness to take actions without undertaking any practical responsibility for them). It is also no answer to the lateness issue that, as Mr Brennan emphasised, Mr Gujadhur is aware of the evidence he gave in *Lee* and so are the appellants (as apparently, their representatives attended the hearing of that case). The fact is the appellants were not notified by HMRC of their intention to rely on this document in these proceedings until 18 May 2020 and they did not know that HMRC intended to pursue this formally until the application was made to the tribunal in June 2020. I note also that the appellants submitted, in my view not unreasonably, that if this document were to be admitted, they would want to seek access to other documentation and information relating to the *Lee* proceedings.

394. I note that, in any event, I had serious reservations about the use of the transcript in these proceedings. The tribunal's task is to decide the legal and factual issues before it according to the evidence presented as regards the facts applicable in the particular circumstances of this case. In my view, it is not a useful, fair or proportionate part of that task for the tribunal to seek to assess a witness' evidence by conducting a retrial of evidence the witness gave in an entirely different set of proceedings heard by a different tribunal Judge (albeit that both sets of proceedings relate to the same tax planning).

395. Finally, I also decided at the hearing to admit as evidence in these proceedings, a third witness statement of Mr Gujadhur and related exhibit and a second witness statement of Mr Claypole. HMRC did not oppose the admission of Mr Gujadhur's third statement. The part of the hearing relating to the admission of these documents was held fully in private and, therefore, I have not included here details of the contents of these statements. I note that I have concluded that the evidence in these statements is not relevant to the findings and conclusions set out above.

Conclusion and right to apply for permission to appeal

396. For all the reasons set out above, the appeals are dismissed.

397. 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.

HARRIET MORGAN

TRIBUNAL JUDGE

Release date: 02 FEBRUARY 2022