TC05757

Tribunal refs: TC/2014/00397
TC/2014/00399

CAPITAL GAINS TAX — avoidance scheme — UK-Mauritius double taxation convention — whether trust resident in Mauritius — place of effective management — on facts, in UK — whether operation of DTC excluded when two contracting states tax different persons — no — appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD LEE
NIGEL BUNTER **Appellants**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 19 to 23 September 2016

Ms Amanda Hardy QC and Mr Oliver Marre, counsel, instructed by Bristows, for the appellants

Mr Timothy Brennan QC and Mr Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. The appellants, Mr Richard Lee and Mr Nigel Bunter, have appealed against closure notices, both dated 27 August 2013, by which HMRC amended their respective self-assessment returns for the year 2002-03. The amendment, in each case, had the effect of charging capital gains tax ("CGT"), or additional CGT, of about £11 million, a sum later adjusted following review and correspondence to about £5.5 million. I am not concerned at this stage with the correctness of the figures, though I shall nevertheless need to return to the topic at a later stage. The underlying dispute between the parties relates to the efficacy of a tax avoidance scheme, known colloquially as the "round the world scheme", which the appellants used in order to avoid United Kingdom taxation on their gains. The appellants have not formally conceded that the arrangements into which they entered had a tax avoidance purpose, but they do not seriously challenge the proposition. Their appeals were directed to be heard together because they are for all practical purposes factually identical.

2. The scheme is essentially simple: assets held within an off-shore trust become pregnant with gain and are migrated to a low-tax or no-tax jurisdiction, in this case Mauritius, with which the UK has a double taxation arrangement—here, the UK-Mauritius Double Taxation Convention ("the DTC"). The gain is realised; and because the effect (the appellants say) of the DTC is to confer the right to charge CGT on Mauritius alone, but Mauritius does not levy CGT or any equivalent, the gain suffers no tax. The trust is subsequently transferred to the UK where, if the scheme works as intended, the proceeds of sale may be enjoyed free of the burden of UK taxation. The respondents, HMRC, argue that the scheme, or at least the appellants' implementation of it, did not work as they intended, that the DTC does not assist them, and that they are liable to UK CGT on the gains. HMRC do not argue that the scheme fails for reasons of artificiality or abuse, or for any similar reason.

3. Those readers of this decision who are familiar with the judgments of the Court of Appeal in *Smallwood v Revenue and Customs Commissioners* [2010] EWCA Civ 778, [2010] STC 2045, 80 TC 536 ("*Smallwood*") and with the findings of fact of the Special Commissioners in that case will recognise the scheme as I have briefly described it. HMRC's position is that there is nothing to distinguish this case from *Smallwood*; the appellants, represented before me by Ms Amanda Hardy QC and Mr Oliver Marre, say that there are significant factual differences between them and that, properly understood, the judgments in the Court of Appeal show that the two cases are dissimilar. I shall need to analyse those judgments in some detail later.

4. HMRC, appearing by Mr Timothy Brennan QC and Mr Christopher Stone, raise a further argument, also resisted, which they say excludes the application of the DTC altogether; I describe that argument at para 21 below.

The core events

5. I was provided with a statement of agreed facts which set out the history of the appellants' business activities and their evolving interests in various corporate bodies and trusts in considerable detail. It was informative by way of background but the important features for the purposes of these appeals can, I think, be quite briefly summarised. The story began in September 1996, when the two appellants concluded heads of agreement with the Ford Motor Company Limited ("Ford") for the acquisition

of Ford's mobile telephone business. The appellants were at that time employed by Ford, and the acquisition was essentially a management buy-out. The transaction did not, however proceed immediately. In the same month the appellants became the directors of a recently formed UK off-the-shelf company, which later changed its name to Cellular Operations Limited ("COL"). Two further companies were subsequently incorporated in Guernsey: LeBunt Holdings Limited ("LeBunt") in October 1996 and FB Holdings Limited ("FB Holdings") in March 1997. The subscribers for the shares in each were two Guernsey nominee companies (together "the Nominee Companies"). In the meantime, in February 1997 the appellants established trusts, also in Guernsey: the N S Bunter 1997 Settlement and the R A Lee 1997 Settlement (together "the Settlements"). Mr Bunter was the settlor and among the beneficiaries (that is, he had an interest in possession) of the former, and Mr Lee was the settlor and among the beneficiaries, also with an interest in possession, of the latter. The initial trust fund was, in each case, cash of £2,500 injected by the settlor. The trustee of each of the Settlements was the Spread Trustee Company Limited ("STC"), also a Guernsey company, on whose behalf the Nominee Companies held the issued shares in LeBunt and FB Holdings: the beneficial owner of the LeBunt shares was the N S Bunter 1997 Settlement, and the beneficial owner of the FB Holdings shares was the R A Lee 1997 Settlement. The Settlements were, as is agreed, resident at that time in Guernsey.

6. On 27 March 1997 several transactions took place between the various companies, together with another company at arm's length to them, Telecom Securicor Cellular Radio Limited ("Cellnet"), the result of which was that of the issued shares in COL 30% were held by LeBunt, 30% by FB Holdings and the remaining 40% by Cellnet. On the same day COL completed the purchase of Ford's mobile telephone business for £5,185,093 together with the assumption of certain liabilities. The purchase was partially funded by a loan from Cellnet to COL of £4 million. COL thereafter traded, I understand very profitably, in the mobile telephony business.

7. There were no further developments of present significance until March 2000, when another off-the-shelf company was acquired; it changed its name to Cellops Limited ("Cellops"). LeBunt and FB Holdings each held 50% of the shares in Cellops, and the appellants were its directors. In June 2000 Cellnet sold its 40% stake in COL to Cellops for £4.5 million plus a further contingent sum, and Cellnet ceased to have any further involvement in the arrangements. Cellops' purchase was financed by a bank loan which was discharged immediately after the purchase had been completed by a corresponding loan from COL to Cellops. Cellops, too, became a profitable trader in the mobile telephony business. The position at this point—March 2000—was that the appellants, through their respective Settlements, were the beneficial owners of LeBunt and FB Holdings and, through those companies, of COL and Cellops, each of which had or was to acquire some trading subsidiaries.

8. In February 2001 STC, as trustee of the Settlements, entered into call option arrangements with Vodafone UK Limited ("Vodafone") for the possible sale to Vodafone of the entire shareholdings in LeBunt and FB Holdings: the real targets of the acquisition were, of course, COL and Cellops and their subsidiaries. The agreements provided for a corresponding put option which could be exercised by the Settlements if Vodafone failed to exercise the call option. I do not, I think, need to set out the detail of the arrangements, though I should mention that the consideration paid by Vodafone to each of the Settlements for the grant of the option was as much as £5 million, almost all of which was distributed to the appellants (from their respective Settlements) in early

2002; the consideration for the grant of the put options, by contrast, was only £1. The price to be paid for the shares, should one of the options be exercised, was not specified in advance but was to be determined by reference to a formula set out in the option agreement. The agreements assumed, absent specified contingencies for which they provided, that one or the other of the options would be exercised in April 2003. It is not seriously disputed, nor in my view could it be, that in the absence of some significant unforeseen event a sale would be certain to take place.

9. The deeds by which the Settlements had been established provided that the settlors—Mr Lee and Mr Bunter respectively—had the power to appoint a new trustee. On 28 March 2002 the powers were exercised: STC resigned and was replaced, in each case, by DTOS Limited ("DTOS"), the Mauritian equivalent of a trust corporation, of Port Louis, Mauritius. DTOS was owned by the Mauritius office of Deloitte & Touche, as it then was. On the same day a novation agreement transferred STC's rights and obligations under the option agreements with Vodafone to DTOS.

10. In late 2002 Vodafone indicated that, for commercial reasons of its own, it might wish to exercise its call option early, and that is what happened: on 12 March 2003 the parties entered into a variation agreement which advanced the possible date for the exercise of the option and replaced some parts of the formula for the calculation of the price with fixed figures. Vodafone gave notice of the exercise of the option on the same day, and completion of the transaction took place immediately. The consideration paid was about £55 million. The appellants also resigned, as was envisaged by the agreements, as directors of Cellops and COL.

11. Eight days later, on 20 March 2003, and at the appellants' instigation, DTOS retired as trustee of each of the Settlements, and the appellants appointed two new UK corporate trustees: Island Trustees Limited ("Island") and Walbrook Trustees Limited ("Walbrook"), also companies within the control of Deloitte & Touche, though in London. On 24 March a further novation agreement transferred DTOS' residual rights and obligations under the arrangements with Vodafone to Island and Walbrook.

The relevant law

12. It is appropriate to begin with s 69 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), which provides that the trustees of a settlement are treated in UK law as a single continuing body of persons. The same section contains rules determining the residence for the time being of trustees for the purposes of UK tax law. The place of residence of the trustees in this case, determined in accordance with s 69, was initially in Guernsey, moved to Mauritius as STC was replaced by DTOS, and moved again to the UK as DTOS was replaced by Island and Walbrook. Had the trustees remained resident in Guernsey or Mauritius throughout the whole year s 86 of TCGA would have rendered the appellants, as the UK-resident settlors, liable to CGT on the gains. In addition, by virtue of s 77, if "at any time during the year the settlor has an interest in the settlement" and "the settlor is, and the trustees are, either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year", any chargeable gains accruing to the trustees are instead to be treated as accruing to the settlor. None of that is in dispute, and I do not need to deal with those provisions in any greater detail (although s 69(1) is set out at para 70 below).

13. Taking the TCGA provisions alone, therefore, the appellants were liable for UK CGT on the gains arising on the disposal of the shares notwithstanding the overseas residence of their respective Settlements. The appellants' only possible avenue of

escape from the charge, and the purpose behind the move of the trusteeship to Mauritius and then to the UK, lies in their being able to demonstrate that the DTC had the effect of conferring the exclusive right to tax the gains on Mauritius.

14. The provision which authorised double taxation agreements at the material time was s 788 of the Income and Corporation Taxes Act 1988. So far as relevant it was as follows:

> "(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to—
>
> (a) income tax,
>
> (b) corporation tax in respect of income or chargeable gains, and
>
> (c) any taxes of a similar character to those taxes imposed by the laws of that territory,
>
> and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below.
>
> (2) …
>
> (3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide—
>
> (a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; or
>
> (b) for charging the income arising from sources, or chargeable gains accruing on the disposal of assets, in the United Kingdom to persons not resident in the United Kingdom; or
>
> (c) for determining the income or chargeable gains to be attributed—
>
> (i) to persons not resident in the United Kingdom and their agencies, branches or establishments in the United Kingdom; or
>
> (ii) to persons resident in the United Kingdom who have special relationships with persons not so resident; or
>
> (d) for conferring on persons not resident in the United Kingdom the right to a tax credit under section 231 in respect of qualifying distributions made to them by companies which are so resident."

15. In other words, the terms of arrangements the subject of such an Order override the corresponding UK domestic provision.

16. Article 1 of the DTC between the UK and Mauritius, brought into effect in UK law by the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981, SI 1981/1121, provides that it "shall apply to persons who are residents of one or both of the Contracting States", and it is common ground that, taking that article in isolation, the DTC is engaged in this case. Article 2, so far as relevant, is as follows:

> "(1) The existing taxes to which this Convention shall apply are:
>
> (a) in the United Kingdom of Great Britain and Northern Ireland:
>
> (i) the income tax;
>
> (ii) the corporation tax; and

(iii) the capital gains tax;

(hereinafter referred to as United Kingdom tax);

(b) in Mauritius:

(i) the income tax;

(ii) the capital gains tax (*morcellement*);

(hereinafter referred to as 'Mauritius tax').

(2) This Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes."

17. *Morcellement* is the division of a parcel of land into smaller lots and, at the relevant time, it was the only type of transaction which attracted the Mauritian equivalent of CGT. I understood from the expert evidence to which I come below that tax on *morcellement* has been abolished and that Mauritius does not now charge any form of CGT at all.

18. Article 4 deals with the meaning of "residence" for the purposes of the DTC. So far as material it is as follows:

"(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.

(2) [applies only to natural persons]

(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."

19. If the Settlements were resident throughout the year in Mauritius ss 77 and 86 of TCGA would, as I have explained, result in the imposition of UK CGT on the appellants. The key to the success of the round the world scheme lies, first, in ensuring that the relevant trust is resident in an overseas territory with which the UK has a DTC for part of the tax year, that the disposal takes place while it is so resident, and that it is resident in the UK for the remaining part of the tax year, thus engaging the DTC and overriding ss 77 and 86, and, second, in the exploitation of the "tie-breaker" of art 4(3) of the DTC in order to ensure that taxation rights are vested exclusively in the overseas territory. It follows that the identification of the place of effective management, or "POEM", of the Settlements, on which the application of the tie-breaker is dependent, is of fundamental importance in cases of this kind and I shall have a good deal more to say on the topic later.

20. Article 13 of the DTC provides by paras (1), (2) and (3) for the taxation of specific types of property, not including shares. I shall need to return to these paragraphs later, but for the moment can focus on para (4), on which the appellants rely for one of the arguments to which I come below, and which is as follows:

"Capital gains from the alienation of any property other than that mentioned in paragraphs (1), (2) and (3) of this Article shall be taxable only in the Contracting State of which the alienator is a resident."

The issues

21. HMRC's primary case in the closure notices was that the circumstances of this case were materially indistinguishable from those of *Smallwood* and that what the Court of Appeal decided in that case was of equal application here. The focus of the greater part of the evidence and argument before me, too, was on the judgments in *Smallwood* and on the location of the POEM of the Settlements, and in what follows I too have devoted the greater part of this decision to those matters. However, logically the first issue lies in HMRC's argument that the DTC does not apply at all. The argument was succinctly put in the closure notices as follows:

> "The resident of Mauritius for the purposes of the [DTC] is the Settlement itself (and not the trustees). The resident of the UK for the purposes of the DTC is the single and continuing body of persons constituting the UK resident trustees of the Settlement. The DTC does not prevent the UK from taxing the gain as the UK is not taxing a resident of Mauritius. It is taxing the UK trustees and there is nothing in the DTC that prevents the UK from taxing UK residents."

22. This argument, which can conveniently be called the "different persons" argument, was not raised in *Smallwood*, and there is accordingly no mention of it in the judgments. It was also put only as a second or "further technical reason" in the closure notices, and I too will come to it after I have dealt with the dispute about the Settlements' POEM. Ms Hardy raised a further argument, based on art 13(4) of the DTC, to the effect that the incidence of tax is determined at the moment of disposal. This, called the "snapshot" argument, was dismissed in *Smallwood* but I shall nevertheless need to say a little more about it later.

23. The fourth and final issue relates to the question how, if the appellants are chargeable to UK CGT at all, the amounts of their respective taxable gains are to be determined. I shall come, quite briefly, to this issue at the end of my decision.

The evidence

24. There was no material dispute about the various events I have related at paras 5 to 11 above, which are derived from the statement of agreed facts. There were, however, considerable differences between the parties about a number of other matters, on which I had the written and oral factual evidence of (in the order in which they gave evidence) Mr Paul Cooke, at the relevant time a partner in Bristows; Mr Chandra Gujadhur, a director of DTOS; and Mr Christopher Barnes, a chartered accountant who managed the UK trustees, Island and Walbrook, appointed when the trust was transferred to the UK. Bristows are the solicitors who have acted throughout for the appellants, as well as COL and Cellops, in the various transactions I have described but for part of the relevant period Mr Cooke advised DTOS, while other members of the firm continued to act for the appellants and the companies. In addition I had the reports and oral evidence of Mr Ryaad Owodally, a chartered certified accountant and chartered tax adviser practising in Mauritius, and of Mr Jamsheed Peroo, a barrister also practising in Mauritius, who were put forward as experts in Mauritian tax law, which I accept them to be. I did not have a joint report, but there was no significant area of disagreement between the experts.

25. It is convenient to describe Mr Gujadhur's evidence first. He was one of four directors of DTOS, and it was apparent from his evidence that he took the leading role in DTOS' participation in the relevant events, in that it was he who corresponded with solicitors and others in the UK and in Guernsey, while his fellow directors appear to have done no more than attend trustee meetings, which were chaired by Mr Gujadhur.

He described the manner in which DTOS had been approached by Bristows as a possible candidate for appointment as trustee of the Settlements; he later learnt that other candidates had also been considered. At the time DTOS undertook the administration of numerous companies, but very few trusts: it emerged that it had previously been involved with only seven trusts, all participating in round the world scheme arrangements, four of which had already been transferred from Mauritius, while the remaining three were shortly to be transferred. DTOS took advice before it agreed to its appointment. Initially the advice was provided by Bristows, including at a meeting in London when Mr Gujadhur met the two Bristows partners who were acting for the appellants, Mr Michael Rowles and Mr John Lace, the appellants themselves and a representative of STC. Later, when Mr Gujadhur became concerned that there might be a conflict, or potential conflict, between DTOS and the appellants, DTOS was directed by Bristows to another firm of solicitors, Speechly Bircham, who advised DTOS on various matters at the appellants' expense.

26. At para 26 of his witness statement Mr Gujadhur explained why DTOS took that advice:

> "The reason for seeking advice from Mervyn Couve [of Speechly Bircham] was that we wanted to understand better the agreements and contractual obligations entered into by the previous trustees. As DTOS always took its role with all [the] seriousness it deserved, we wanted to have an in depth knowledge of what we were about to take on to enable us professionally to discharge our duties as trustees. We were not willing to act just for the sake of acting and we could not afford to take on the assignment and then to subsequently realise that we should not have done so."

27. Consistently with that paragraph the evidence showed that the advice DTOS took at that time did indeed relate to (among other topics) the detail of the option agreements. As DTOS had already been engaged to act as Mauritian trustee in seven similar sets of arrangements Mr Gujadhur understood the mechanics of the round the world scheme and, he said, he realised when he was first approached that this was another proposed use of the scheme. He was insistent that DTOS was anxious to ensure that the detail of this iteration was properly understood so that it could perform its role properly, but he was also mindful of DTOS' own position, and the extent to which it might incur some liability should events not go according to plan—a risk which, as Mr Gujadhur's evidence indicated and the expert evidence confirmed, was greater in Mauritius than it might have been in the UK.

28. Immediately following its appointment DTOS opened an account with an international bank trading in Mauritius and undertook some regulatory tasks but, as Mr Gujadhur agreed, for the next few months there was little to do. The next development of significance, from DTOS' perspective, occurred on 13 February 2003 when Bristows sent Mr Gujadhur an email in which he was informed that the appellants, "as directors of COL", had been engaged in "preliminary discussions with Vodafone in relation to some possible changes to the Vodafone arrangements, and that they will wish to put these to DTOS Limited for consideration very shortly." The author of the email recognised that DTOS would need to take English law advice, and went on to invite Mr Gujadhur to instruct Mr Cooke. Mr Gujadhur agreed that DTOS had not previously been informed that the appellants had entered into further discussions with Vodafone. The email provided no detail of the discussions or of the possible changes to the arrangements, but Mr Gujadhur spoke to Mr Rowles by telephone and learnt that Vodafone had indicated that it might wish to exercise the call option early. The directors

of DTOS met the following day to record the limited detail of the discussions then known to Mr Gujadhur, and to resolve to take advice from Mr Cooke.

29. Mr Gujadhur was not able to explain, at least to my satisfaction, why he and his colleagues did not seek advice from Speechly Bircham if there was some perception of a potential conflict or, at least, before the risk of conflict had been eliminated, but instead simply followed Mr Rowles' suggestion. Bristows did erect a "Chinese wall", with Mr Cooke and DTOS nominally on one side and Mr Rowles, the appellants, COL and Cellops on the other. The remaining evidence showed that the Chinese wall was, to use Mr Brennan's words, somewhat permeable; in truth it was little more than a token. I shall return to this point when I deal with Mr Cooke's evidence.

30. DTOS was later to learn that the appellants had negotiated certain adjustments to the price to be paid by Vodafone, some of which were initially contentious, but that the appellants and Vodafone had come to terms; DTOS had played no part of any kind in the discussions. On 18 February 2003 Mr Lee sent to Mr Gujadhur a memorandum, prepared by both of the appellants, setting out some information about the progress of the negotiations. The memorandum ran to only two pages, was remarkably lacking in detail, and put forward (as it made clear) only indicative figures for the eventual price; it added that further details were expected in the near future. Despite the lack of detail and the absence of firm figures the memorandum invited the trustees to "consider the above numbers carefully, as we believe them to be a fair valuation and a reasonable conclusion to the deal". Mr Gujadhur had a discussion with Mr Lee by telephone, about which his witness statement made the following comments:

> "It was extremely helpful for me to speak to Richard Lee and to have the benefit of the background note. He understood matters not because he was the Settlor of one of the Settlements but because he was an active director of the relevant companies and had a commercial knowledge of the deal on which the Trustee wanted to draw. The information we were given as Trustees enabled us to exercise our judgment as Trustees properly in relation to the proposed changes to form a view on whether they were in the best interests of the beneficiaries."

31. The DTOS board met again, on 20 February, to consider the proposed sale price. The materially identical minutes of the meetings (one for each of the Settlements) set out what was in the memorandum, some of it verbatim, and recorded the trustee's decision to accept the recommendation of COL's directors—that is, the appellants. Mr Gujadhur's oral evidence was that the appellants were the best judges of a fair price for the companies (a view which reflected the advice Mr Cooke had given to him), and it was for that reason their recommendations were accepted. When pressed on the point he accepted that neither he nor his fellow directors had sufficient information or expertise to exercise independent judgment about the price and other terms which had been negotiated and that they were, in reality, wholly reliant on the appellants whose recommendation they had simply followed.

32. I need to set out at this point a further extract from Mr Gujadhur's witness statement. At para 36 he said:

> "Those on the committee of directors took DTOS's role as trustee and thus their duties as directors extremely seriously. No decisions were taken without proper consideration of the relevant facts and consequences. We only agreed to sign documents if we had considered them in detail, understood their contents, taking advice as necessary, and agreed that entering into the relevant document was in the best interests of the beneficiaries. Our procedure was rigorous and I certainly

> would not have signed off minutes unless they recorded our discussions accurately. I have reviewed them and note that I did sign them all. I am therefore confident that they are accurate."

33. Having heard Mr Gujadhur's oral evidence I am unable to accept that extract as a wholly fair description of DTOS' role. I have no doubt Mr Gujadhur and his colleagues took their duties seriously, and that they took decisions, in so far as they truly took them, which they perceived to be in the best interests of the beneficiaries. I have also no reason to suppose that the minutes did not accurately record the discussions, albeit the minutes often recited, verbatim, material supplied to DTOS by Bristows. I am, however, driven to the conclusion that the assertion that the directors considered the documents in detail and understood them materially overstates the reality. I deal with a particular misunderstanding on Mr Gujadhur's part below; it was, however, apparent from his oral evidence as a whole that although he understood the round the world scheme well, he had a limited grasp of the transaction with Vodafone despite the advice Speechly Bircham had provided, and that his purpose in speaking to Mr Lee, and in seeking advice from Bristows, was to secure the reassurance that the appellants were satisfied with the deal they had negotiated and that there could be no later criticism of DTOS for its having executed the documents necessary if the transaction was to proceed to completion.

34. On 25 February further meetings of DTOS, again one for each Settlement, took place. The minutes recorded that Vodafone wished to exercise the call option on 28 February (in fact, as I have indicated above, it was exercised on 12 March) but that "despite the tight schedule, [DTOS] will be able to give due and proper consideration to all the outstanding matters" by that date. The minutes also recorded the details of a draft variation agreement—details which, Mr Gujadhur accepted, had been supplied by Mr Cooke and simply recited—that Mr Cooke had been instructed to advise DTOS, and that he (Mr Cooke) was to attend a meeting with Vodafone on the following day. The minutes contain a rather odd reference to the proceeds to flow from the exercise of the put option and conclude with the statement that DTOS was to consider the appointment of investment advisers in order that the prudent investment of the proceeds of sale could be arranged. The minutes of further meetings on the following day record that DTOS had resolved to "authorise Paul Cooke to ensure that the Call Option by Vodafone is exercised by 28 February 2003".

35. On 27 February Mr Gujadhur sent an email to Mr Martin Shires of BDO Guernsey. BDO was associated with the former trustee, STC; although STC no longer had any connection with or interest in the Settlements it was required by Vodafone, it seems, to execute some documents in order that the sale could be completed. The email informed Mr Shires that DTOS had resolved to exercise the put option, with completion the following day. Mr Gujadhur apologised for the short notice, offering the explanation that "it was only this week that the Trustees resolved in the best interest of the Settlements to exercise their option rights".

36. Mr Gujadhur was asked by Mr Brennan to explain the reference in the minutes and in the email to the exercise by DTOS of the put option when, as the remainder of the evidence showed and is in any event not disputed, Vodafone had decided to exercise its call option and there was no realistic possibility that the Settlements' put options would ever become capable of exercise. It became apparent from his replies that Mr Gujadhur did not know what a put option was—he said it was a means by which the Settlements could escape from their contractual obligations but even that is difficult to

reconcile with his email to Mr Shires—and his understanding of a call option was, I regret to say, little better.

37. Mr Gujadhur agreed as he gave evidence that he was well aware when it was appointed that, if the tax purposes of the arrangements were to be achieved, DTOS would be required to resign in favour of UK trustees within a relatively short period after the intended sale took place. He was, nevertheless, unwilling to agree with the proposition that the timetable of future events was imposed on DTOS. The documentary evidence, however, shows unequivocally that it was impressed upon him in the period between the first approach to DTOS and its appointment that the need to adhere to a timetable dictated in advance was critical, and it is also clear from the documents that, once a timetable for the accelerated exercise of the call option had been agreed with Vodafone, Bristows went to some trouble to impress on Mr Gujadhur the importance of completing the transactions in accordance with that timetable, and of the need for DTOS to resign as trustee before the end of the tax year. I accept that Mr Gujadhur was concerned to ensure that DTOS was acting correctly, and the exchanges between him and Bristows reveal some resistance on his part to being hurried, but the same exchanges also show that DTOS did in fact take the relevant steps when asked to do so. Indeed, towards the end of his oral evidence Mr Gujadhur agreed that he and his colleagues knew they were expected to undertake the steps dictated by the appellants or Bristows on their behalf. In particular, as Mr Gujadhur conceded, he knew that any failure on the part of DTOS to complete the transaction on time and to resign before the end of the tax year would have serious consequences for the appellants.

38. As I have mentioned above, DTOS retired as trustee of the Settlements on 20 March, eight days after completion of the sale and three weeks after the recorded resolution to consider the appointment of investment advisers. Mr Gujadhur agreed that nothing had been done about appointing advisers, or even identifying possible candidates, and he accepted, after some prompting, that he and the other directors of DTOS knew, at the time of the meeting on 25 February at which the resolution is recorded to have been made, that if the sale took place and there were proceeds of sale, first, that they would remain in London, with Bristows, and second, that DTOS would be expected to resign within days, and certainly before the end of the tax year, and would have no realistic opportunity of implementing the resolution.

39. Mr Cooke explained in his witness statement that in February 2003 he had been asked by his partner Mr Rowles who, with other members of the firm, was acting for the appellants, to advise DTOS on the transactions leading to the sale of LeBunt and FB Holdings which by then were expected to take place in the near future; Vodafone had already made it clear that its earlier tentative indication had become a firm desire to bring forward its exercise of the call option. Mr Cooke is, or before his retirement was, a corporate lawyer able to advise on the transactions, whereas Mr Rowles was a trust and property practitioner. The negotiations between the appellants and Vodafone had reached an advanced stage but were still not complete, and it appears that Mr Rowles had concluded that it was necessary not only to inform DTOS of progress to date but to ensure that it was appropriately advised in the future. Mr Cooke knew that the appellants were clients of Bristows, but he had not himself acted for them or for COL or Cellops, and he had not had even any peripheral involvement in the relevant events before mid-February 2003. Although, as Mr Cooke accepted, he and DTOS were intended to be on one side of the Chinese wall to which I have referred and the appellants and their advisory team on the other, he was not able to explain, when asked

by Mr Brennan, why DTOS had been recommended to instruct him rather than, as before, Mr Couve. However, he did not, he said, perceive any real risk of conflict; it was because of the nature of his practice rather than for any other reason that he had been asked to advise DTOS. Mr Brennan asked Mr Cooke, at some length, to explain what, in those circumstances, was the purpose of the Chinese wall, and for more precision about the nature of the advice he was providing—that is, whether he was advising DTOS on the protection and advancement of the interests of the beneficiaries, or on DTOS' own position.

40. I found Mr Cooke's evidence on these points rather vague and, in parts, self-contradictory. I was left with no real understanding of the reason why the Chinese wall had been established, beyond a desire to provide DTOS with reassurance that it was being separately advised; it is understandable that DTOS wanted some guarantee that, once it had resigned as trustee, it would be fully indemnified against any liability it might have to Vodafone. But as Mr Cooke eventually accepted, with that caveat there was no real possibility of a conflict between the appellants and DTOS at this stage. Indeed, despite the presence, or nominal presence, of a Chinese wall intended to distance DTOS from the appellants and their companies, Mr Cooke spoke on several occasions to one or both of the appellants, and he based his advice to DTOS that the transaction, as negotiated by the appellants, was one into which DTOS could properly enter on what he was told by the appellants themselves. It also became apparent as he gave his evidence in respect of Mr Brennan's second line of questioning that Mr Cooke had not really drawn a distinction in his own mind between advice offered to DTOS in order that it could perform its role as trustee properly, and advice relating to DTOS' own, post-sale, position.

41. Mr Cooke provided his advice to DTOS by sending it, by fax or email, various documents requiring a decision with a memorandum of explanation, including a suggested course of action. He agreed, though rather reluctantly, that the terms of his advice were replicated, often verbatim, in the minutes of DTOS board meetings. It was, he said, very much in the appellants' interests that Vodafone should exercise the call option, which would lead to a sale by agreement, rather than that the appellants were left to exercise the put option following the expiry of the time for exercise of the call option, with the consequent risk of disagreement and even litigation; thus all the correspondence at the time was devoted to ensuring that Vodafone remained willing to exercise its option. In his witness statement he also mentioned Mr Gujadhur's concern that the transaction should be completed as quickly as possible, for fear that external factors such as the then imminent Iraq war might cause a change of mind on Vodafone's part. He suggested that Mr Gujadhur's reference to the exercise by DTOS of the put option was merely a typing mistake, but was unable to explain why the same mistake was repeated in the DTOS minutes (which he had not drafted) and appeared also in Mr Gujadhur's email to Mr Shires.

42. In his witness statement Mr Cooke said that on 14 March 2003 (two days after the sale was completed and six days before DTOS resigned) he "had conveyed to the Trustees by phone that day Counsel's view that it was likely to be in the interests of the beneficiaries, were the Trustees to decide to retire, that the retirement and appointment of new Trustees was completed before the 6 April 2003." The board of DTOS met the same day to discuss the suggestion, and agreed to it, subject to there being suitable safeguards to protect DTOS' own position. In anticipation of that agreement Mr Cooke contacted Mr Barnes in order to ascertain that Deloitte & Touche in London was able to

offer corporate trustee services. In fact, as the documentary evidence showed, Mr Rowles had already approached Mr Barnes, and it was at Mr Rowles' suggestion that Mr Cooke contacted him. The result was that Island and Walbrook were identified as suitable for appointment. Mr Cooke agreed that he knew from the outset of his involvement that DTOS was expected to resign in favour of UK trustees shortly after the sale was completed, and to do so before the end of the tax year. He explained that its doing so was necessary in the interests of the beneficiaries, but it is perfectly clear that he understood why it was in their interests, and that part of his role was to ensure that DTOS resigned and was replaced in good time.

43. Mr Barnes' evidence, little of which gave rise to any controversy, dealt with the appointment of Island and Walbrook as trustees following the retirement of DTOS, and with a number of events, not material to these appeals, which occurred after their appointment. The matters of present importance are that Mr Barnes agreed that the first approach to him was made by Mr Rowles, albeit followed up soon after by a discussion with Mr Cooke, and that the position of DTOS was put, in the first conversations, on the basis that it was "thinking of retiring". Mr Barnes explained that although DTOS, Island and Walbrook were all Deloitte & Touche companies, the organisational structure was such that the UK and Mauritius companies were at arm's length to each other, and until he was approached he knew nothing of or about DTOS' involvement. He did, however, realise when he was approached that the appellants were using the round the world scheme, and that it was necessary for DTOS to retire and Island and Walbrook to be appointed in its place before the end of the tax year.

44. The expert witnesses were each asked a number of questions, to which they gave substantially the same answers, and the propositions to be derived from their evidence can be summarised quite shortly. In Mauritian law a trust has the status of a "person" and is liable to income tax, tax on *morcellement* and, should it arise, value added tax, in its own name. Correspondingly, the trustees, whether that is taken to mean the trustees for the time being or the trustees as a continuing body, do not have any such liability. The Mauritius Income Tax Act 1995 treats the trustee as the trust's agent for the purpose of meeting the trust's tax obligations, but goes no further. A trust is resident in Mauritius for the purposes of Mauritian law if it is administered in Mauritius and a majority of the trustees are resident in Mauritius or (which is not the case here) the settlor was resident in Mauritius when the trust was created. A trust which is resident in Mauritius is, for that reason, liable to Mauritian tax on its worldwide income. The expert evidence was also relevant to the "different persons" argument; I shall explain that relevance when I deal with the parties' contentions.

45. Before leaving the evidence I should mention one matter which was the subject of comment during the hearing. Mr Brennan remarked that, although it was open to the appellants to put forward whatever evidence they thought necessary, it was conspicuous that there was no evidence before the tribunal, in particular from the appellants themselves or Mr Rowles, about the commercial considerations which led to the decision to sell the shares and the negotiation of the price. The absence of such evidence did not of itself show that the POEM of the Settlements was in the UK, but it might have gone some way to undermine the impression which, Mr Brennan said, I should have formed from his evidence that Mr Gujadhur and his fellow directors were not making the relevant decisions. For that proposition he relied on an Australian authority, *Australian Securities and Investments Commission v Rich* [2009] NSWC 1229 in which

it was said, at [451], that two possible consequences of an unexplained failure to tender a witness who could reasonably be supposed to be able to give relevant evidence were:

> "• the tribunal of fact might infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness;
>
> • the tribunal of fact might draw with greater confidence any inference unfavourable to the party who failed to call the witness, if that witness seems to be in a position to cast light on whether that inference should properly be drawn."

46. Mr Brennan's argument was that the absence of evidence from the appellants and Mr Rowles made it, at the least, more difficult for the appellants to demonstrate that the POEM of the Settlements, at the material time, was in Mauritius. It was, he said, strange that if the appellants' case was that management and control of the Settlements had been transferred to DTOS in Mauritius a deliberate choice had been made not to provide evidence on the fact of and reasons for that transfer from those most able to give it. This case was, he said, to be contrasted in that respect with *Smallwood*, where those involved in implementing the scheme did give evidence; thus it was a reasonable inference, he suggested, that those in a similar position had not done so here because their evidence would not have assisted the appellants' case. If it was correct, as the appellants' written reply asserted, that the appellants "took no part in the effective management of the Settlements at the relevant time" they could easily have given evidence to that effect.

47. Ms Hardy's response began with what was said by Lord Lowry, with whom the other members of the committee agreed, in *R v Inland Revenue Commissioners, ex p T C Coombs & Co* [1991] 2 AC 283 at 300:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

48. The simple explanation for the appellants' choice of evidence, said Ms Hardy, was that if the effective management of the Settlements at the relevant time was in Mauritius, it was by those involved in undertaking that management that evidence should be given. Patten LJ had made it clear in *Smallwood*, recording what was common ground between the parties in that case, that the focus was on the period while the trust was resident in Mauritius. Accordingly, the witnesses by whom factual evidence was given in this case—Mr Gujadhur, Mr Cooke and Mr Barnes—were those who could best speak of events relevant to the management and control of the Settlements while they were resident in Mauritius, and of their transfer to the UK, and it was not necessary for the appellants or Mr Rowles to give evidence since they could not cast any light, or at least additional light, on those matters.

49. I have mentioned this disagreement for completeness since, as will become apparent, I have been able to reach a conclusion about the location of the Settlements' POEM with confidence from the evidence which was before me and without regard to evidence which might have been but was not produced. I have not speculated about the evidence the appellants and Mr Rowles could have given had they chosen to do so, and

I have not found it necessary to draw any inference, adverse or otherwise, from the fact that they did not.

The appellants' case

50. The appellants put their case on two alternative grounds. Logically the first is the snapshot argument: that because the place of residence of the trustees at the moment of disposal was Mauritius, the DTC conferred the right to tax the gain on Mauritius alone. This argument is based on the proposition that art 13(4) (see para 20 above), properly interpreted, makes the moment of alienation determinative. The argument was rejected by the Special Commissioners but accepted by the High Court, but as I have mentioned was again rejected, unanimously, by the Court of Appeal in *Smallwood*. The essence of the reasoning leading to its rejection, echoing art 4(1), was that a taxpayer is resident in a state for the purposes of the DTC if he is liable under the law of that state to tax by reason of residence or some similar criterion, and such liability cannot be determined by reference only to one moment. As Ms Hardy, recognising that it could not succeed before me, did not pursue the argument but raised it in order to preserve it for future deployment I do not need to deal with it as a distinct ground of appeal, but I shall have to return to it later as it has some bearing on the "different persons" argument.

51. The appellants' second argument, and as I have said the focus of most of the debate before me, is based upon the tie-breaker provisions of art 4(3) of the DTC. Once the snapshot argument is set aside and it is accepted that both Mauritius and the UK have a claim to tax the gain (to use a neutral term for the moment, and disregarding the fact that Mauritius does not impose CGT) that provision is engaged; on that the parties agree. It was not suggested by either party that the absence of taxation in one state in some way precludes the operation of art 4(3). The outcome of the tie-breaker, as the DTC makes clear, is wholly dependent on the location of the POEM of the Settlements.

52. The meaning of POEM was examined in some detail by the Court of Appeal in *Smallwood*. There too the taxpayers, Mr and Mrs Smallwood, used the round the world scheme, moving a Jersey-resident trust to Mauritius where it realised a gain from the sale of shares before the trust was transferred to the UK. The Special Commissioners ([2008] STC (SCD) 629) found that the POEM of the trust, at the time of the disposal, was in the UK, a conclusion reversed on appeal by Mann J (2009] EWHC 777 (Ch), [2009] STC 1222), but restored by the majority in the Court of Appeal. After rejecting the snapshot argument the court went on to conclude, unanimously, that residence must be determined by reference to the domestic legislation of the relevant states. It is only when the application of that legislation leads to the conclusion that a taxpayer was resident in both states that the tie-breaker comes into play. The difference between the majority, Ward and Hughes LJJ, and the minority, Patten LJ, lay in the view of the former, not shared by the latter, that on the facts found by the Special Commissioners they were entitled to infer that the POEM of the trust remained in the UK. In essence, the reasoning of the majority was that, because the scheme had been conceived in the UK, and the replacement of the Jersey trustee by a Mauritian trustee prior to the sale and then, immediately after the sale, the replacement of the Mauritian trustee by UK trustees had been steps in a preconceived scheme which went above and beyond the day-to-day management of the trust by the trustees for the time being, it was open to the Special Commissioners to find that it was in the UK that the "top level" or "key" decisions were made, and that the POEM of the trust, too, was located in the UK. Patten LJ disagreed, taking the view that because (as the Special Commissioners had also found) there was no agreement that the Mauritian trustee would behave in a particular

way and it could have refused to sell had it thought it in the beneficiaries' interests to do so it was not open to the Special Commissioners to conclude that the POEM of the trust was elsewhere than in Mauritius.

53. Ms Hardy relied in particular on a passage in Patten LJ's judgment in which he discussed the meaning of POEM:

> "[48] POEM is not defined in the [DTC] but was interpreted by the Special Commissioners as meaning the place which is the centre of top-level management: ie where the key management and commercial decisions are actually made. 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. It was also taken to be the correct test by the Special Commissioner (Mr David Shirley) in *Wensleydale's Settlement Trustees v IRC* [1996] STC (SCD) 241. The Special Commissioners took as their formulation of the test a passage in the current commentary on art 4(3) of the model convention which is in these terms:
>
> > '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.'
>
> [49] [Counsel for the taxpayer] accepts that this is the test to be applied and that what has to be identified is the place where the real top-level management of the trustee *qua* trustee occurred rather than the day to day administration of the trust. But he submits 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 rubber-stamp the decisions which were taken. In this case there was, he says, no evidence or finding that KPMG Bristol or Mr Smallwood dictated the decision to sell the shares."

54. KPMG Bristol were Mr and Mrs Smallwood's advisers. The reference in the passage above to the OECD model convention is to the standard form of double-taxation agreement devised by the Organisation for Economic Cooperation and Development, and it is on that convention that the UK-Mauritius DTC is based. Mr Brennan agreed with Ms Hardy that the extract from the commentary quoted by Patten LJ contains useful guidance.

55. Patten LJ went on to identify the appropriate approach, said Ms Hardy, at [61]:

> "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 para 24 of the commentary quoted above at [48], seem to me to lead inevitably to the question whether the effective decision by [the Mauritian trustee] 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 [trustee] board effectively ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions. Given that the directors of [the trustee]

> 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."

56. That, said Ms Hardy, was the position in this case too: the decision to sell was taken by the directors of DTOS, albeit on advice, and was not ceded to anyone else.

57. The taxpayers in *Wood v Holden* [2006] EWCA Civ 26, [2006] STC 443 had not used the round the world scheme, but a different means of seeking to place the residence of their trust outside the UK. The issues in that case were more complicated than here, and the question was very slightly different, if only in its wording, since what was in issue was where the "central management and control" of a company incorporated outside the UK lay. The relevance of what was said in *Wood v Holden* to the circumstances of this case emerges from what Chadwick LJ (with whom Moore-Bick LJ and Sir Christopher Staughton agreed) said at [6]:

> "It is common ground that the question whether or not Eulalia [a Netherlands company] was resident in the United Kingdom on 23 July 1996 for the purposes of TCGA 1992 turns, in the first instance, on 'where its real business [was] carried on … where the central management and control actually abides'. That was the test adopted by the House of Lords in *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)* [1906] AC 455 at 458, 5 TC 198 at 213 (per Lord Loreburn LC). But if, on the application of that test, Eulalia were found to be resident in the United Kingdom, then the provisions of s 294(1) of the Finance Act 1994 would require that question to be determined by reference to the double tax convention of 7 November 1980 between the United Kingdom and the Netherlands (SI 1980/1961). Under art 4(3) of the double tax convention Eulalia would be deemed to be a resident of the state 'in which its place of effective management is situated'. It is not clear—at least, not clear to me—whether the art 4(3) test differs in substance from the *De Beers* test; and, if the two tests are not, in substance, the same, I find it very difficult to see how, in the circumstances which the Special Commissioners had to consider, they could lead to different answers."

58. The correct approach, said Ms Hardy, was identified by Chadwick LJ at [27]:

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

59. The Special Commissioners ([2004] STC (SCD) 416) had concluded that the central management and control of Eulalia (a company beneficially owned by the taxpayers) was undertaken in the UK, a conclusion reversed on appeal by Park J ([2005] EWHC 547 (Ch), [2005] STC 789). At [36] Chadwick LJ quoted Park J's observation that "If directors of an overseas company sign documents mindlessly, without even thinking what the documents are, I accept that it would be difficult to say that the

national jurisdiction in which the directors do that is the jurisdiction of residence of the company. But if they apply their minds to whether or not to sign the documents, the authorities … indicate that it is a very different matter …". At [43] Chadwick LJ went on to say:

> "A further flaw in the Special Commissioners' approach was to treat the decisions which were made by ABN AMRO [Eulalia's managing director] as not 'effective decisions' because they were reached without proper information or consideration. But a management decision does not cease to be a management decision because it might have been taken on fuller information; or even, as it seems to me, because it was taken in circumstances which might put the director at risk of an allegation of breach of duty. Ill-informed or ill-advised decisions taken in the management of a company remain management decisions. I should add (in fairness to ABN AMRO) that it is not said that, with fuller information, further consideration or independent professional advice, the decisions in the present case as to the purchase and sale of the … shares would have differed from the decisions actually taken; but nothing turns on that. The decisions which were taken would have been no less 'effective decisions' if (on the facts) different decisions would have been reached if ABN AMRO had approached the decision making process with greater circumspection."

60. It was important to remember, said Ms Hardy, what was the difference between Patten LJ and the majority in *Smallwood*. They did not disagree on the meaning of POEM, but on whether, on the facts as found by them, the Special Commissioners were entitled to conclude that the POEM was in the UK. In other words, they disagreed only about the question whether the decision was one with which an appellate court could legitimately interfere.

61. Ms Hardy directed me also to the analysis of the criteria to be derived from the authorities, and *Smallwood* in particular, conducted by Louw J in *Oceanic Trust Co Ltd v Commissioner for South African Revenue Service* (2011) 15 ITLR 172 at [54]:

> "1. The 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;
>
> 2. The POEM will *ordinarily* be the place where the most senior group of persons (eg a board of directors) makes its decision, where *the actions to be taken* by the entity as a whole are determined;
>
> 3. However, no definite rule can be given and all relevant facts and circumstances must be examined to determine the POEM of an entity;
>
> 4. There may be more than one place of management, but only one POEM at any one time;
>
> 5. The decision [in *Smallwood*] was based not only on the general test for POEM but also on the specific section of the UK legislation which provided that the trustees be treated as a single and continuing body of persons who shall be treated as resident in the UK unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or the majority of them for the time being are not resident or not ordinarily resident in the United Kingdom; and
>
> 6. The court undertook a painstaking analysis of the facts and the way the scheme was set up and was implemented in order to come to the conclusion on where the POEM of the trust in that case was." [original emphasis]

62. One should also remember, Ms Hardy continued, that the current version of the OECD commentary quoted by Patten LJ (see para 53 above) came into effect only in

2000. At the time the UK and Mauritius entered into the DTC, the corresponding wording was as follows:

> "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."

63. It followed that, at the time the DTC was entered into, the UK's position was that the POEM of an entity was determined by the place of management and control of the entity's business; this was how Patten LJ had approached the application of *Wood v Holden* to the facts in *Smallwood*. It also followed that in making that determination it is necessary to identify the entity in question—here, plainly, each of the Settlements. The question then is, where were the actions to be taken by the Settlements decided upon? It was perfectly clear from what Chadwick LJ said in *Wood v Holden* that the taking of advice was not an important factor; what mattered was the actual decision-making.

64. Ms Hardy argued that DTOS did not cede control of the settlements to anyone—indeed, she said, it was difficult to see to whom control might have been ceded. It took its own legal advice, not only about its own position, but in order that it was fully and properly informed of the commitments it was taking on for the benefit of the Settlements, and the DTOS board met to discuss and consider the advice which was given. It was the board, and no-one else, which took all of the relevant decisions. It was necessary to bear in mind that a sale of the shares was not a certainty when they were transferred into the Settlements; the call and put option agreements were entered into much later. As it happens Vodafone exercised its call option, and to that extent DTOS thereafter had limited freedom of movement; but the position would have been very different had Vodafone not done so, leaving DTOS to decide whether or not to exercise the put options. It was immaterial that DTOS knew that, in order to mitigate the tax charge, it had to resign shortly after the sale was completed; what mattered was what it did in the period leading up to and culminating in the sale. In *Smallwood* the prompt resignation of the Mauritian trustee was found not to be a contributory factor in determining the POEM, but was merely confirmatory of the impression the Special Commissioners had formed from the remaining evidence.

65. The appellants rely on the extensive nature of the advice taken by DTOS from Speechly Bircham, about the nature of the options and the assets to be sold and the agreements into which DTOS would be required to enter on its assumption of the trusteeship, and on the seriousness with which Mr Gujadhur took his and DTOS' responsibilities. It was not a case, Ms Hardy said, in which it could realistically be said that DTOS simply did what the appellants required of it; on the contrary it sought and acted upon comprehensive professional advice and it was clear from Mr Gujadhur's evidence and the meeting minutes that DTOS' board considered all the material placed before them with care. It was not in dispute that it did so at all times in Mauritius. In particular, the DTOS board met several times to consider the progress of the negotiations with Vodafone, and to consider whether acceptance of the terms, on which

they took their own advice from Bristows, would be in the interests of the beneficiaries. Altogether DTOS incurred legal fees of more than £80,000, an indication of the extent of the advice which it obtained.

66. The evidence should lead me, Ms Hardy said, to distinguish this case from *Smallwood*. There, the Special Commissioners found at [139] that "the whole point of the tax planning exercise was to sell the shares and realise the gain and to avoid tax on the gain", and the sale was arranged only after the Mauritian trustee used in that case had been appointed; here, the shares were already the subject of a commercially-driven arrangement for sale before DTOS was appointed. There, it was vital for the efficacy of the scheme that the shares be sold before the end of March; here, it was Vodafone, and not any tax-planning consideration, which brought the completion of the sale into March. There was accordingly little real resemblance between the two cases.

HMRC's case

67. The underlying theme of Mr Brennan's arguments was that there is, in reality, nothing to distinguish this case from *Smallwood*, and that the considerations which led the Special Commissioners and the majority of the Court of Appeal to their conclusions in that case are of equal force here. Indeed, he said, once one pays regard to the title of the DTC, making it clear that it is a convention "for the avoidance of double taxation and the prevention of fiscal evasion", and not a means by which non-taxation is to be achieved, the proper outcome of this appeal becomes obvious.

68. HMRC do not challenge the evidence that DTOS undertook some, even if limited, administrative tasks in its capacity as trustee of the Settlements, but it was perfectly plain from the evidence, said Mr Brennan, that the scheme utilised in this case had been devised before DTOS was appointed, and that it was appointed simply to carry it into effect. It was important to remember that although DTOS might conceivably have decided to sell on one day rather than another, and might (although it did not) have some input into the price, it was not in a position to reject the transaction altogether, since Vodafone had chosen to exercise a call option granted to it long before DTOS was even considered for appointment. The fact of a sale, as Bristows had made clear in correspondence, was almost inevitable; the only real uncertainty was the date on which it would happen. It was also conspicuous that DTOS agreed to the price negotiated with Vodafone by the appellants themselves on the strength of a very brief summary and a single telephone conversation. It was clear too that everyone including, as the correspondence showed, Vodafone knew in advance that there would be changes of trustees at the material time, as part of a tax planning scheme.

69. It was, Mr Brennan added, strange that Ms Hardy placed so much reliance on the dissenting judgment of Patten LJ in *Smallwood*. One should, instead, have regard to the Special Commissioners' reasoning about the POEM in that case, reasoning which was upheld by the majority in the Court of Appeal. There were many points of similarity. In *Smallwood* it was the taxpayers' accountants, here their solicitors, who suggested and secured the appointment of Mauritian trustees. In both cases the trustees had carried out relatively minor and routine administrative tasks, documenting what they did as they went along. In neither case was there an overt stipulation that the Mauritius trustee would sell the shares, and it was understood that it would act in accordance with the law and the terms of the trust deed, but there was, as the Special Commissioners put it, "a hope and a confident expectation" that it would complete the sale, unless there was a significant and unexpected change of circumstances. There was an understanding on

both sides, even if unspoken, that the trustee had been appointed for tax planning reasons, and that resignation and replacement shortly after the sale would be necessary if the planning were to work. In both cases the trustee was presented with a ready-made scheme into which it had no input.

70. In *Smallwood* the Special Commissioners reached the conclusion from the facts they found that, as they put it at [145], "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 [during the material time] was the United Kingdom." [original emphasis]. In the Court of Appeal Hughes LJ, agreeing on this point with Patten LJ, said that the Special Commissioners' findings

> "[68] … do not go so far as findings that the functions of [the trustee] 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.
>
> [69] 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 s 77 are the trustees. Trustees are, by s 69(1) TCGA 1992, treated as a continuing body:
>
> > 'In relation to settled property, the trustees of the settlement shall for the purposes of this Act 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 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.'
>
> The POEM with which this case is concerned is, as it seems to me, the POEM of the trust, *ie* of the trustees as a continuing body. That is the question which the Special Commissioners addressed."

71. Then, at [70], he made an observation which, Mr Brennan said, is equally apposite in this case:

> "The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by Quilter [a UK fund manager]. 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 United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom."

72. Thus Ms Hardy's argument, drawn from the judgment of Patten LJ, that DTOS had not ceded its discretion to anyone else—such as Bristows or the appellants—addressed the wrong question. The question to be asked is not whether effective control has been "wholly usurped", to borrow the words of Hughes LJ, but where was the effective control of the trust. It is beside the point that DTOS' directors may have applied their minds to the decisions which had to be taken, that they believed they were

acting in the best interests of the beneficiaries, and that they held properly documented meetings. All of those features were present in *Smallwood*, but that did not deflect the Special Commissioners from the finding, upheld by the majority in the Court of Appeal, that the POEM of the trust was in the UK.

Conclusions on POEM

73. I accept Ms Hardy's argument that, despite the close resemblance, this case is not on all fours with *Smallwood*, and that I cannot, as Mr Brennan urged me to do, simply apply the outcome in that case to the facts in this. I agree with Ms Hardy too that it is plain from the judgment of Hughes LJ (with whom Ward LJ agreed without elaboration) that he determined the appeal by reference, not to his own view of the arrangements, but to the criteria laid down in *Edwards v Bairstow* [1956] AC 14 and the long line of authority following it, which limit the ability of an appellate court to interfere with findings of fact. Indeed, although what he said at [70], quoted above, suggests he agreed with the Special Commissioners on the outcome he did not expressly say so and one cannot be wholly certain that he did agree with them.

74. Nevertheless, and despite Ms Hardy's strenuous efforts to persuade me otherwise, it does seem to me that a factual comparison of this case with *Smallwood* is informative, and I shall draw from such a comparison below. As *Smallwood* and the other authorities indicate, the essential question is, where were the most important decisions relating to the governance, or management, of the Settlements taken? The first step in the enquiry, as it seems to me, is to identify what were the most important decisions. Here, as in *Smallwood*, the Settlements were disposing of shares which represented all or virtually all of their assets. In neither case could the disposal be considered a matter of routine, or day to day, trust management; it was quite plainly of fundamental importance that the best price available was secured for the shares, that the sale was accomplished without adverse incident, and that the trust was transferred to the UK before the end of the tax year. I recognise that, because of the incidence of UK tax which I have described above, the transfer of the trust was undertaken for the benefit of the settlors rather than for the Settlements themselves, but I do not think this matters; DTOS, as trustee, had a duty to all of the beneficiaries including the settlors. I should mention at this point that I do not think there is anything in Ms Hardy's argument that it was Vodafone which brought forward the date of the sale; had it not done so it is plain that the scheme would still have been carried out, but in the following tax year.

75. At the purely formal level Ms Hardy is right: the decision to execute the relevant documents was taken by DTOS in Mauritius, in the sense that Mr Gujadhur and his colleagues could have declined to sign them, had they thought that their doing so would not have been in the interests of the beneficiaries of the Settlements. However, even leaving aside the fact that, once Vodafone had exercised the call option, DTOS had little choice but to sell, the evidence leads inexorably to the conclusion that it is a fanciful proposition that its directors would have declined to complete the transaction, contrary to the wishes of the appellants. I am left in no doubt, with one caveat, that DTOS knew what was required of it and, even though it was not recorded in writing, there was a clear understanding held by all its directors that they would do what was required of them, at a time determined by the appellants. The caveat is that I accept, as indeed did Mr Brennan, that DTOS would not have acted unlawfully or in a manner which would expose it to liability (though there was, as far as I can see, no risk of either). In other words, to adopt the phrase used by the Special Commissioner in *Wensleydale's Trustees*, "the shots were called" in the UK.

76. In examining the evidence it is, I think, necessary to step back to the beginning and ask oneself why DTOS was appointed as trustee of the Settlements. It plainly was not because DTOS, and Mr Gujadhur in particular, possessed some business acumen which could not be found elsewhere. I take Mr Gujadhur's knowledge to be the knowledge of his fellow-directors and of DTOS; I had no evidence, beyond what was recorded in the minutes of meetings, of the level of knowledge and understanding of the other directors, but there was no suggestion that they were better-informed than Mr Gujadhur, and it was he rather than they who sought advice and corresponded with Speechly Bircham and, later, Mr Cooke. That suggests, if no more, that he was more familiar with the agreements than his colleagues. Although I have not seen their letters to DTOS (some of their content, as I have indicated, is recited verbatim, some in truncated form in the minutes of meetings), I do not doubt that both Speechly Bircham and Mr Cooke provided Mr Gujadhur and his colleagues with adequate and appropriate advice on the relevant agreements. It is, however, plain from his evidence as I have described it above that Mr Gujadhur did not fully understand it. In particular, as I have already observed, he did not understand, or at least fully understand, one of the critical features of the arrangements, that is the consequences of Vodafone's exercise of its call option, and one has to ask how he and his colleagues could possibly have come to a truly informed view of the reasonableness of the price, and of the other conditions of sale, from the very limited information and in the short time available to them. I recognise that Mr Lee and Mr Bunter were the best judges of the price at which the shares in LeBunt and FB Holdings should be sold, and that even a trustee truly making an independent decision would attach great weight to their view, and I accept that, as Chadwick LJ said in *Wood v Holden*, it does not matter whether advice was taken or the relevant decisions were ill-informed, but I am driven to the conclusion in this case that the information provided to Mr Gujadhur by Mr Cooke and Mr Lee was not merely advice but crossed the threshold into instruction.

77. Ms Hardy made the point, as I have recorded, that had Vodafone not exercised its call option DTOS would have had to decide whether or not to exercise the put option. I accept that a decision would be necessary, but it is difficult if not impossible to understand how Mr Gujadhur, who did not understand what a put option was, could have made it. Again, he could (and no doubt would) have taken advice, but I have little doubt that here too that advice would be more properly characterised as instruction.

78. It became abundantly clear to me, as he gave his evidence, that although Mr Gujadhur understood the mechanics of the round the world scheme, even now he had almost no real understanding of the agreements with Vodafone. He was not in a position to exercise any judgment about the price, on which he was entirely reliant on what he was told by Mr Lee in particular, about the timing of the sale or about any similar factor which would enable him to reach a properly informed conclusion about the merits of the transaction from the beneficiaries' perspective. It became more and more apparent as Mr Gujadhur gave his evidence that the DTOS board held meetings and took advice because they knew it was necessary to do so if there was to be any prospect of establishing that the POEM of the Settlements was in Mauritius, but that in reality they were following instructions. They were not, in any meaningful sense, managing the Settlements in the sense of determining what should be done with their major assets. It is conspicuous, as Mr Brennan pointed out, that DTOS knew nothing of the discussions with Vodafone about the bringing forward of the exercise of the call option and the determination of the price until those negotiations had been almost concluded; one might think that those truly managing a trust would have been informed in advance of

so significant a development, and been asked for their agreement to the changes, at least in principle.

79. In this case, unlike in *Smallwood*, the probability of a sale was already known when DTOS was appointed and the Settlements moved to Mauritius. I agree with Mr Brennan that it is impossible to believe that the appellants would have placed the management of that sale in the hands of, as Mr Gujadhur at that time was, a stranger of unknown and untested skills. Rather, the only rational inference, in my judgment, is that DTOS was selected because it had some experience of the round-the-world scheme, and because Mr Gujadhur and his colleagues could be relied upon to keep to the necessary timetable. I agree also with Mr Brennan that it stretches credulity that DTOS could and would have resisted pressure from Mr Lee and Mr Bunter to sell on the terms they had negotiated, and particularly so when Vodafone had exercised its call option, leaving DTOS with little freedom of choice.

80. I am also driven, for much the same reasons, to reject Mr Gujadhur's evidence, recorded in his witness statement (see para 26 above), that DTOS was not willing to act for the sake of acting. I accept that he was anxious to ensure that DTOS did not take on a role that it would later regret, and that advice was taken in order to guard against that possibility. I also accept that DTOS undertook the day-to-day administration of the Settlements and, to that extent, that they were managed in Mauritius. However, as he agreed, DTOS' only experience of trusteeship was in the context of the use of the round the world scheme; it had already relinquished its trusteeship in four cases, and was about to do so in three more, in each case after only a short period. Mr Gujadhur knew, even without being told, that DTOS would hold office for only a limited period in this case as well, and that it had been engaged to act as trustee in order that it could be claimed that the Settlements were resident in Mauritius for that limited period. Acting "for the sake of acting" may introduce a tone which is undeserved, but the reality is that DTOS was engaged to perform one function in the scheme, and for that reason alone; had there been no need to export the Settlements to Mauritius it is unimaginable that DTOS (or any other Mauritius trustee) would have been appointed. There was no prospect, as I am satisfied Mr Gujadhur knew from the outset, that DTOS would be required to manage the proceeds of sale once the transactions had taken place. Mr Brennan put it to Mr Gujadhur that the reference in the 25 February minutes to the appointment of investment advisers was mere window-dressing. Mr Gujadhur resisted that description, but in my judgment it is entirely apposite—Mr Gujadhur knew by then that, if the transactions completed, DTOS would be expected to resign within days, as it did. That resignation was plainly not a last-minute decision; indeed, the minutes of one of the meetings at which resignation was considered refer to "the tax planning advice received from Counsel" and to Mr Cooke's advice "that it would be in the best interest of the Settlement for the trustees to retire well before 6 April 2003 in favour of UK resident Trustees".

81. It follows that I am satisfied that the decisions of real importance concerning the Settlements were taken in the UK and merely implemented in Mauritius, and that the POEM of the Settlements was therefore also in the UK. Accordingly, by operation of the tie-breaker provisions, the gains realised on the sale to Vodafone are taxable in the UK, and the appeals must be dismissed, subject to what I say below about the fourth issue.

82. Before leaving the POEM question I should mention, though only for completeness, a point which Mr Brennan made, namely that on any view the POEM of

the Settlements was in the UK for part of the tax year, albeit only a few days. That, he said, is a material consideration once the snapshot argument is discarded. I accept that different, and potentially difficult, considerations would arise if, for example, the POEM was in one jurisdiction for (say) three months of the tax year, during which the relevant disposal took place, and in another for the remaining nine months. That, however, is not this case and I do not think there is anything to be gained by examining a hypothetical issue.

The "different persons" argument

83. In the light of my conclusion about the POEM of the Settlements it is not, I think, necessary to deal with this issue at length. The essence of HMRC's argument is that the DTC does not apply in this case because the UK and Mauritius tax different persons: in the UK, the single and continuing body of trustees (albeit the settlors in a case of this kind ultimately bear the burden), in Mauritius (if there were to be tax at all) the trust. Thus, the argument continues, in imposing tax on UK trustees HMRC are not seeking to tax a Mauritius resident and there is no need to resort to the DTC.

84. The starting point of the argument is art 4(1) of the DTC which, for convenience, I repeat:

> "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."

85. It is necessary, Mr Brennan said, to construe that article consistently with the object and purpose of the DTC, identified in the DTC itself as "the avoidance of double taxation and the prevention of fiscal evasion": see *Bayfine UK v Revenue and Customs Commissioners* [2012] 1 WLR 1630, [2011] STC 717. It is also necessary to bear in mind what Patten LJ (with whom the other judges agreed on this point) said in *Smallwood* at [29]:

> "… the [DTC] 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 [DTC]."

86. The introduction to the OECD Model Convention, on which the DTC is based, makes it clear that the Convention has two categories of rules: those which determine the respective rights to tax of the states of source and of residence; and those which require a state of residence to give credit for tax levied in the source state. The purpose of art 4(3) is to identify which of two possible states is to be treated as the state of residence; but where there is no duality of residence it has no part to play.

87. In Mauritius, as the experts agreed, it is a trust which is, or would be, the taxable entity; in the UK, as is common ground, the taxable entity is the trustees as a continuing body. The Settlements in this case were not, however, resident in Mauritius *for the purposes of the DTC*, Mr Brennan continued, because they were not liable to tax there, and art 4(1) was accordingly not engaged. The trustees, however, were taxable in the UK and, by virtue of art 4(1), resident in the UK and only the UK. It was nothing to the

point, as the appellants argued, that art 13(4) (see para 20 above) permitted the imposition of tax on the alienator since in UK law the trustees were the alienator. Article 4(3) resolves issues of residence, but does not choose between two persons who might potentially be regarded as alienators.

88. Ms Hardy's response was that it is irrelevant to the operation of the DTC that Mauritius and the UK tax different persons. Mr Brennan's argument also disregarded what the Court of Appeal decided in *Smallwood*. At [40] Patten LJ, reflecting the unanimous view, said when explaining his reasons for dismissing the snapshot argument:

> "… art 13(4) must, I think, be construed as effective to deal with any liability to taxation for capital gains which either contracting state may impose regardless of the basis of that charge under the domestic legislation in question. It seems to me 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 art 4(1) reinforces this view by making 'liability to taxation' by reason of residence the criterion for the taxation of capital gains under art 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 art 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."

89. That observation is consistent, Ms Hardy continued, with the OECD Model Convention approach of operating by reference to categories of income or gains rather than by reference to categories of persons liable to tax. That approach is reflected in those provisions of the DTC which deal with specific kinds of income or gain, of which art 13, dealing with capital gains, is only one example. The argument that a DTC does not apply when the two contracting states tax different persons is quite novel, said Ms Hardy, and is inconsistent with authority. In *Padmore v IRC* [1989] STC 493 a UK-resident taxpayer was a partner in a Jersey partnership. He sought relief from UK income tax in respect of his share of the partnership profits. The Court of Appeal upheld his claim, irrespective of the fact that Jersey taxed the partnership while the UK taxed the individual partner; had that been a material factor, as HMRC now argue, the outcome of that case would have been quite different. HMRC were driven to legislative amendment in order to reverse what they perceived to be the wrong result. Similar questions, highlighting the importance of the category of income or gain rather than the identity of the recipient, arose in *Lord Strathalmond v IRC* (1972) 48 TC 537 and in *Bricom Holdings v IRC* [1997] STC 1179, in which Millett LJ observed that "relief from United Kingdom tax accorded by a double taxation agreement can enure for the benefit of a third party". The argument was, moreover, inconsistent with HMRC's published guidance about the operation of double taxation agreements, which quite clearly focused on categories of income and gains and not the identity of the person upon whom tax was imposed in an overseas jurisdiction.

90. Although I agree with Mr Brennan that the authorities in which Ms Hardy relied are not entirely analogous to this case, I am not persuaded by his argument. I am satisfied that Ms Hardy is correct in saying that the focus of the DTC is the category of income or gain, and not the identity of the person liable to tax. Article 8(1), to take only one albeit particularly clear example, is as follows:

> "Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated."

91. There is nothing in that provision which relates to the identity of the taxable person, and correspondingly nothing in it which dictates how the relevant Contracting State may tax the profits, or on whom the burden of the tax is to fall. The same is true of the first two paragraphs of art 13, which confer the right to tax, respectively, gains on the disposal of immovable property, and moveable property owned by businesses "of" one Contracting State with a permanent establishment in the other, but say nothing about the manner in which the gains are to be taxed, and in particular who is to be liable to the tax.

92. In my judgment Mr Brennan's argument attaches to the word "resident" a meaning the DTC does not intend it to bear. Article 4, when properly analysed, shows that the term is used as convenient shorthand, since a "resident" is one who is "liable to taxation in [a Contracting State] by reason of his domicile, residence, place of management or other criterion of a similar nature". In other words, the focus is on liability to tax, for various reasons of which residence in the ordinary sense is only one. The purpose of the DTC, as I see it, and indeed as Mr Brennan urged on me in another context, is to eliminate the risk of income or gains being taxed twice, and it does so by determining in which one of the two Contracting States tax may be imposed. It makes that determination in some cases by reference to the source of the income or gain (thus for example art 6 deals with income and art 13(1) with gains derived from immoveable property) and in others by reference to the residence, in its extended meaning, of the recipient; but it is nevertheless the income or gain which is the focus. Once the DTC has identified, by this means, the Contracting State in which tax may be levied it has no further part to play—it does not go further and dictate how or on whom tax is to be imposed. I would resolve this issue in the appellants' favour.

Apportionment

93. The fourth issue relates to the manner in which the extent of any business asset taper relief to which the appellants may be entitled is to be calculated. The point is important because the relief was available for some but not all of the period over which the relevant gains accrued, and there is little or no authority about the correct application of the relevant provisions, which were to be found at the time in paras 3 and 21 of Sch A1 to TCGA. They recognise that a "just and reasonable" apportionment is required, but say nothing about what that means and very little about how it is to be achieved. Ms Hardy was anxious that I should give some guidance in order that the appellants' advisers, armed with that guidance, could engage more effectively with HMRC; Mr Brennan was resistant to my dealing with the issue at all, arguing that it was not appropriate for the tribunal to give general guidance, as anything I might say would necessarily be, rather than a decision based on a particular set of facts.

94. Although I understand and to an extent sympathise with Ms Hardy's desire to secure some guidance I agree with Mr Brennan that it is not appropriate for me to give it, and it would be potentially dangerous to do so. I do not have any evidence relevant to the issue, and if I acceded to Ms Hardy's request I would be undertaking what would amount to an academic analysis of the relevant legislation. That is not the proper function of the tribunal.

Appeal rights

95. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 7 APRIL 2017