Neutral Citation Number: [2020] EWCA Civ 1705

Case No: A3/2019/1916

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Marcus Smith and Judge Guy Brannan
[2019] UKUT 0169 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
(1) DEVELOPMENT SECURITIES PLC **(2) DEVELOPMENT SECURITIES (NO 9) LIMITED** **(3) DEVELOPMENT SECURITIES (NO 18) LIMITED** **(4) DEVELOPMENT SECURITIES (NO 25) LIMITED** **(5) DS JERSEY (NO. 1) LIMITED** **(6) DS JERSEY (NO. 2) LIMITED** **(7) DS JERSEY (NO. 3) LIMITED**	**Respondents**

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Mr Akash Nawbatt QC and Miss Kate Balmer (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Mr Sam Grodzinski QC and Mr Julian Hickey (instructed by **Duane Morris**) for the **Respondents**

Hearing dates: 13-15 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Tuesday 15th December 2020 at 10:30am

Lord Justice Newey:

1. This appeal arises out of a tax planning scheme which PricewaterhouseCoopers ("PwC") devised in 2004. At the time, Development Securities plc ("DS plc") had a number of subsidiaries ("the L&R Companies") whose value was less than their acquisition cost while two other companies in the Development Securities group ("the Group") owned properties ("the Properties") which were not worth as much as had been spent on them. The Group wished to use the latent losses on the L&R Companies and Properties to offset gains elsewhere in the Group. Had, however, the L&R Companies and Properties simply been disposed of at their market value, the Group would not have had the benefit of the indexation relief that would have applied in the case of disposals at a profit, such relief being available to mitigate tax on gains but not to augment losses. The point of the PwC scheme was to enable the Group to take advantage of indexation relief.

2. To achieve this, three companies, DS Jersey (No. 1) Limited ("DS1"), DS Jersey (No. 2) Limited ("DS2") and DS Jersey (No. 3) Limited ("DS3") (together "the Jersey companies") were incorporated in Jersey as subsidiaries of DS plc and granted call options entitling them to buy the L&R Companies and Properties if certain conditions were satisfied. The options were then exercised. As the First-tier Tribunal ("the FTT") explained in paragraph 6 of its decision, "the price payable by the Jersey companies on exercise of the option was an amount equal to the relevant [Group] company's historic base cost in the relevant asset for capital gains purposes (broadly, being the amount originally paid for the asset) plus indexation accrued to that time" so that "the price was considerably in excess of the then market value of the asset". The Jersey-based directors of the Jersey companies were then replaced by individuals resident in the UK so that the companies would themselves be resident in the UK for tax purposes. Thereafter, the L&R Companies and Properties were transferred to other companies in the Group and steps were taken to crystallise the losses on them, the idea being that the losses should be calculated by reference to the sums which the Jersey companies had paid for them. The losses were treated as accruing to DS plc, where necessary by means of an election under section 179A of the Taxation of Chargeable Gains Act 1992 ("the TCGA"). That section allowed a loss to be treated as accruing to another company in the same group.

3. At one stage, HM Revenue and Customs ("HMRC") sought to challenge the efficacy of the exercise on the basis of the approach first introduced by *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, but they did not persist with that contention. By the time, therefore, that the matter came before the FTT, it was common ground that the scheme was effective provided that the Jersey companies were resident in Jersey when they exercised the call options in respect of the L&R Companies and Properties. The issue for the FTT, therefore, was whether the Jersey companies were indeed resident in Jersey at the relevant time (as the Group companies which are respondents to the present appeal maintained) or were instead resident in the UK (as HMRC claimed).

4. The FTT (Judge Harriet Morgan and Mrs Janet Wilkins) ruled in favour of HMRC, concluding that the Jersey companies were resident in the UK, but the Upper Tribunal ("the UT") (Marcus Smith J and Judge Guy Brannan) allowed an appeal, deciding that "central management and control" (or "CMC") was exercised in Jersey and so the

Jersey companies were resident there. HMRC now challenge that decision in this Court.

The law on residence

5. The leading authority on where companies are resident for tax purposes is *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455. That case concerned a South African company whose head office was formally in South Africa, whose general meetings were held in South Africa, whose profits stemmed from diamonds raised and sold for delivery in South Africa, some of whose directors and "life governors" lived in South Africa and some of whose board meetings were held in South Africa. On the other hand, as Lord Loreburn LC explained at 459:

> "But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has also always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may be spent by the directors at Kimberley."

In the circumstances, the Income Tax Commissioners concluded that the "head and seat and directing power of the affairs" of the company were in London and that the company was resident in the UK.

6. It was argued on behalf of the company that a company "resides where it is registered, and nowhere else" (see 458), but the House of Lords rejected that submission. Lord Loreburn LC summarised the law in these terms at 458:

> "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson*, now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those

> decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

Lord Loreburn proceeded to say at 458 that whether the case before the House of Lords fell within the rule was "a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading".

7. *Unit Construction Co Ltd v Bullock* [1960] AC 351, like the present case, concerned subsidiaries. In that case, the Commissioners found that the boards of directors of three Kenyan companies "were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control" and that "the real control and management were being exercised by the board of Alfred Booth & Co., Ltd. [i.e. the Kenyan companies' parent], in London". The House of Lords upheld a decision by the Commissioners that the Kenyan companies were resident in the UK. Viscount Simonds said at 362-363:

> "Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful.
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> The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. If, indeed, I must disregard the facts as they are, because they are irregular, I find a company without any central management at all. For, though I may disregard existing facts, I cannot invent facts which do not exist and say that the company's business is managed in Kenya. Yet it is the place of central management, which, however much or little weight ought to be given to other factors, essentially determines its residence. I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?"

Agreeing, Lord Radcliffe noted at 365 that the principle had been adopted that "a company is resident where its central control and management abide: words which, according to the decision of the House of Lords that finally propounded the test (*De Beers Consolidated Mines Ltd. v. Howe*) are equivalent to saying that a company's residence is where its 'real business' is carried on". The case before the House of Lords, Lord Radcliffe said at 364, was "a straightforward case of de facto control

being actively exercised in the United Kingdom, while the local directors 'stood aside' from their directorial duties and never purported to function as a board of management".

8. In *Wood v Holden*, the question was whether a company acquired to play a part in a scheme to avoid capital gains tax was resident in the UK. The company in question, Eulalia Holding BV ("Eulalia"), was incorporated in the Netherlands and became a subsidiary of Copsewood Investments Limited ("CIL"), which was registered in the British Virgin Islands. As had been planned, Eulalia bought shares in a company which was the ultimate owner of most of the shares in a card shop business for £23.7 million, plus, in the event of an onward sale within three years for more than £23.7 million, 95% of the excess, and re-sold the shares three months later to an outside purchaser for just below £30.8 million. The Special Commissioners concluded that CMC of Eulalia was exercised in the UK, but Park J allowed an appeal ([2005] EWHC 547 (Ch), [2005] STC 789) and his decision was affirmed by the Court of Appeal ([2006] EWCA Civ 26, [2006] 1 WLR 1393).

9. In the course of his judgment, Park J made, among others, these observations:

    i) *Unit Construction Co Ltd v Bullock* is "a highly exceptional case in terms of result" in which "the local boards stood aside altogether, and the parent company effectively usurped what in theory were the functions of the local boards" (paragraph 23);

    ii) "In the context of a group of companies where matters proceed in a normal way and not in an exceptional way it is to be expected that the parent company will have plans for what it wants its subsidiaries to do, and that the directors of the subsidiaries will ordinarily be willing to go along with the parent company's wishes. If in those circumstances the subsidiaries were resident for tax purposes wherever the parent company is resident the consequences would … be unsatisfactory, productive of double taxation clashes between different jurisdictions, and disruptive of national tax systems" (paragraph 24);

    iii) "There is a difference between, on the one hand, exercising management and control and, on the other hand, being able to influence those who exercise management and control. There is another difference, highlighted by *Unit Construction v Bullock*, between, on the one hand, usurping the power of a local board to take decisions concerning the company and, on the other hand, ensuring that the local board knows what the parent company desires the decisions to be. It is also necessary to keep in mind that … it is possible (and is common in modern international finance and commerce) for a company to be established which may have limited functions to perform, sometimes being functions which do not require the company to remain in existence for long. Such companies are sometimes referred to as vehicle companies or SPVs (special purpose vehicles). 'Vehicle' has a belittling sound to it, but such companies exist. They can and do fulfil important functions within international groups, and they are principals, not mere nominees or agents, in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why not is that in many cases the things which such companies do, though important, tend not to

involve much positive outward activity. So the companies do not need frequent and lengthy board meetings" (paragraph 25);

iv) The "essential ground of distinction" between *Unit Construction Co Ltd v Bullock* and four cases in which companies were held to be resident in the jurisdictions in which they were incorporated (namely, *Esquire Nominees Ltd v Comr of Taxation* (1971) 129 CLR 177, *Re Little Olympian Each Ways Ltd* [1995] 1 WLR 560, *New Zealand Forest Products Finance NV v Comr of Inland Revenue* [1995] 2 NZLR 357 and *Untelrab Ltd v McGregor (Inspector of Taxes)* [1996] STC (SCD) 1) is that, "whereas in *Unit Construction v Bullock* the parent company itself exercised central control and management of the African subsidiaries, effectively by-passing the local boards altogether, in the four cases the parent companies or their equivalents, while telling the local boards what they wished them to do, left it to the local boards to do it" (paragraph 27);

v) Although the "precise relevant time" was 23 July 1996, when the sale from CIL to Eulalia was effected, "it is plainly appropriate to look at the position leading up to that date and to the position after it down to the date (21 October 1996) when Eulalia sold the shareholding on to the outside purchaser" (paragraph 29) and "the nature of the relationship between Price Waterhouse and [ABN AMRO, the managing director of Eulalia] in September and October (one of professional advice being given, accepted and acted upon) is clearly indicative of the nature of the relationship two months earlier" (paragraph 42(iii));

vi) "It is of course possible for a company to be centrally controlled and managed in one jurisdiction and to carry out the legal formalities of a transaction in a different jurisdiction, but one would normally expect there to be some specific evidence that central control and management was in the first jurisdiction and not in the second one. Here there is none beyond the feature, to which I keep returning and which the authorities show not to be enough, that Eulalia was participating in accordance with the overall plan for a tax scheme devised and superintended by personnel in the Price Waterhouse Manchester office" (paragraph 43);

vii) "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. Further, in this case the Commissioners had the explicit evidence of Mr Wirix, in the light of which it is impossible to regard [ABN AMRO] as in the nature of a puppet manipulated by a puppet master in the United Kingdom" (paragraph 66); and

viii) "In this case there may or may not be grounds for saying that [ABN AMRO] could and should have gone into matters more deeply before it took the two critical decisions, but, given that it was [ABN AMRO] which took those decisions, it remains the case that Eulalia was resident in the Netherlands" (paragraph 68).

10. The main judgment in the Court of Appeal was given by Chadwick LJ, with whom Moore-Bick LJ and Sir Christopher Staughton expressed agreement. In paragraph 27, Chadwick LJ said that Park J "was correct in his analysis of the law" and continued:

> " 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."

11. Chadwick LJ's conclusions can be seen from paragraphs 40-43:

> "40. In my view the judge was correct to hold that the only conclusion open to the commissioners, on the facts which they had found, was that Eulalia was resident in the Netherlands. The commissioners made two findings of fact which, as it seems to me, lead necessarily to that conclusion. The first, at para 119 of their decision, was that 'the directors of Eulalia… were not by-passed nor did they stand aside since their representatives signed or executed the documents'. That finding takes this case outside the class exemplified by the facts in *Unit Construction Co Ltd v Bullock* [1960] AC 351. The second - implicit in the finding that 'their representatives signed or executed the documents', but made explicit in the observation, at para 134 of the commissioners' decision, that 'From the viewpoint of Eulalia we find nothing surprising in the fact that its directors accepted the agreement prepared by [Price Waterhouse]' - was that ABN AMRO (the managing director of Eulalia), through Mr Fricot and Mr Schmitz, did sign and execute the documents (including the purchase agreement); and so must, in fact, have decided to do so.
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> 41. Those two facts make it impossible to treat this case as one in which ABN AMRO, as managing director of Eulalia, made no decision. There was no evidence that Price Waterhouse (or anyone else) dictated the decision which ABN AMRO was to make; although, as the commissioners and the judge pointed out, Price Waterhouse intended and expected that ABN AMRO

would make the decisions which it did make. There was no basis for an inference that Price Waterhouse (or anyone else) dictated to ABN AMRO what decision it should take; and it is inherently improbable that a major bank (or its trust company) would allow its actions to be dictated by a client's professional advisers (however eminent). On a true analysis the position was that there was no reason why ABN AMRO should not decide to accept (on behalf of Eulalia) the terms upon which the Holdings shares were offered for sale by CIL; and ample reason why it should do as it was expected it would.

42. The legal flaw in the commissioners' approach, as it seems to me, was to treat the decision that was made by ABN AMRO, as managing director of Eulalia, as if it were not an 'effective decision' by a constitutional organ exercising management and control. If - as the commissioners found, at para 136 of their decision – 'the only activity of Eulalia between its acquisition by CIL and the sale of its shares in Holdings was the acquisition and sale of the shares in Holdings and the matters connected therewith' there was no basis for refusing to treat a decision that was made in connection with that activity as an 'effective decision' on the ground that ABN AMRO made no other decisions. As the judge pointed out, there were two critical decisions for Eulalia to make - the decision to purchase the Holdings shares in July 1996 and the decision to sell those shares in October 1996 - and both decisions were, in fact, made by ABN AMRO as managing director. There was nothing else to manage.

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

12. *Wood v Holden* was the subject of consideration by the High Court of Australia in *Bywater Investments Ltd v Commissioner of Taxation* [2016] HCA 45, where companies disputed that their place of CMC was in Australia. A Mr Borgas gave evidence that he was the ultimate owner of the companies, but the trial judge concluded that Mr Borgas' role was "fake", that the companies were in fact controlled by a Mr Gould, who lived in Sydney, and that the companies were resident in Australia. The High Court upheld the judge.

13. At paragraph 73 of their judgment, French CJ, Kiefel, Bell and Nettle JJ noted that in *Wood v Holden* Park J had spoken of a difference between "exercising management and control" and "being able to influence those who exercise management and control" and of a difference between "on the one hand, usurping the power of a local board to take decisions concerning the company and, on the other hand, ensuring that the local board knows what the parent company desires the decision to be". "At its base," French CJ, Kiefel, Bell and Nettle JJ said, "that distinction appears to rest on whether the local board actually considers and makes a decision to adopt the parent company's recommendations as bona fide in the best interests of the subsidiary, or whether the local board just mechanically implements directions from the parent company because it is so directed". If, however, *Wood v Holden* were properly to be understood as holding that "it is sufficient, in order to locate central management and control of a company in a foreign jurisdiction, to set up there a board of directors that does no more than implement directions from outside without active consideration of the best interests of the company and without actually deciding on that basis that the directions should be implemented", then it should not be followed. Given, French CJ, Kiefel, Bell and Nettle JJ said in paragraph 75, that the fact that the constitution of a company requires that board meetings be held in a place is not enough of itself to locate CMC of the company in that place:

> "it cannot be enough to locate the residence of a company in a place for the directors of a company to meet in that place solely for the purpose of maintaining a charade of documenting decisions made elsewhere by others. No doubt, such meetings provide an appearance of order and regularity to the affairs of the company. But, if the making of decisions by an outsider constitutes 'usurpation' where there are no board meetings, why logically is there any less 'usurpation' where there are board meetings convened solely for the purpose of the directors acting out the pretence of making those decisions?"

14. For present purposes, I would draw the following points from the authorities:

    i) The overarching principle is that a company resides for tax purposes where its real business is carried on, and that is where CMC actually abides;

    ii) The principle applies in relation to subsidiaries, including special purpose vehicles;

    iii) It is the actual place of management, not that in which it ought to be managed, which fixes the residence of a company;

iv) A company may be resident in a jurisdiction other than that of its incorporation not only where a constitutional organ exercises management and control elsewhere, but if the functions of the company's constitutional organs are usurped, in the sense that management and control is exercised independently of, or without regard to, its constitutional organs, or if an outsider dictates decisions (as opposed to merely proposing, advising and influencing decisions);

v) On the other hand, CMC of a subsidiary will not be taken to be in a jurisdiction other than that of its incorporation just because it is following a tax planning scheme propounded by its parent. Nor need it matter that a company's board takes decisions without full information or even in breach of the directors' duties;

vi) Events before or after the particular date in question may be relevant as casting light on the position on that date; and

vii) Where a company is resident is essentially a question of fact.

The First-tier Tribunal decision

15. This section of this judgment is derived from the FTT's very full and conscientious decision. It seeks to summarise the relevant events and, in particular, to detail findings of fact and conclusions of the FTT. It is to be noted that the FTT's decision followed a 10-day trial with oral evidence.

16. PwC explained their plan in a paper dated 6 April 2004. They advised that latent capital losses on assets held within the Group could be used to reduce the tax on capital gains which the Group hoped to make. In the course of the paper, PwC said that, as there was "an absence of corporate benefit" to the Jersey companies in acquiring the assets, the directors would:

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

17. It was decided to pursue the tax planning. The driving force at the Group behind this decision was Mr Michael Marx, a member of the board of DS plc and other Group companies. The other personnel principally involved in the transaction in the Group were Mr Chris Christofi, who was the financial controller of the Group, and Mr Stephen Lanes, who was the Group's company secretary. Mr Marx, Mr Christofi and Mr Lanes were all UK tax resident. An implementation group was formed, made up

of Mr Marx, Mr Christofi, Mr Lanes and various persons at PwC and Landwell, the law firm that was associated with PwC at the time.

18. The Jersey companies were incorporated in Jersey on 10 June 2004 as subsidiaries of DS plc. The companies were set up by Volaw Trust and Corporate Services Limited ("Volaw"), a Jersey company associated with the Jersey law firm, Voisin & Co. The initial shareholders were nominees provided by Volaw, who held the shares for DS plc as the beneficial owner. The board of each of the Jersey companies comprised Mr Simon Perchard, Mr Trevor Norman and Mr Robert Christensen, all of whom were based in Jersey, and Mr Lanes.

19. Mr Marx acknowledged in evidence that the Group was concerned to have a degree of control over the transactions. He agreed that one reason to have a representative from the Group on the board of the Jersey companies was because they would be receiving not just assets but substantial sums of the Group's money although the corporate governance aspect was also important – "they were significant transactions and we felt it appropriate to have representation in the board of the subsidiary company that was going to undertake the transactions or … substantial sums of money".

20. On 10 June 2004, PwC circulated a pack of papers intended as a briefing for the Jersey directors. The pack included a short explanatory paper. This set out that the proposal was "to transfer the L&R Cos and the properties at Bexleyheath and Sheffield to Jersey companies (owned by [the Group]) at <u>more than market value</u> using call options. This will achieve a step up in base cost of the assets in the hands of the Jersey companies by the amount of the indexation, thus accessing the benefit of the indexation that would not otherwise be available". It was noted that "although the proposals have only marginal benefit for the Jersey companies, significant advantages could be achieved for the Jersey companies' shareholders – DS Group and its subsidiaries". There then followed an explanation of the steps involved, including that the Jersey companies would receive options to purchase the relevant assets at prices well above their present market value and that the options would not be exercisable unless the "FTSE condition" (as to which, see paragraph 26(i) below) was satisfied. It was noted that "if the Jersey directors are in a position to exercise the option (because all the conditions for exercise have been met) and if the directors decide to exercise, then DS plc may be willing to make a capital contribution to assist in the purchase of the assets. This would not be a contractual obligation of DS plc but a declaration of intent". If the conditions were met, the relevant Jersey company "needs to consider whether to exercise the option".

21. Mr Christensen and Mr Norman received the PwC pack on 10 June 2004. Commenting on the pack, the FTT said this in paragraph 75 of its decision:

> "From the content of those papers, those directors could not have failed to be aware, on 10 June 2004 or any rate prior to the first board meeting, that they were being asked to set up Jersey companies and to run them from Jersey for a short period only for the purpose of undertaking a specific sole transaction of acquiring assets at an overvalue, which was thereby wholly uncommercial for the companies themselves. We find it difficult to see that in reality, in accepting the appointment in effect to carry out such a limited and specific project, which

> could only lawfully take place with approval from the parent, the Jersey directors were doing anything other than thereby agreeing to implement the plan for their client, subject only to checking of the legality of it."

22. The Jersey companies held their first board meeting on 11 June 2004. It was attended by Mr Christensen, Mr Norman and Mr Lanes, with Ms Anne Hembry, who was an administrator at Volaw at the time, present as administrator and note taker. The meeting lasted from around 11 am to 4 pm, but with a break for lunch.

23. The proposal was put to the board, as outlined by Mr Lanes, that companies in the Group would grant call options which, if certain conditions were satisfied, would entitle DS1 to purchase shares in the L&R companies and DS2 and DS3 respectively to purchase properties in Sheffield and Bexleyheath (viz. the Properties). It was envisaged that, if the directors decided to exercise the options, DS plc might be willing to make a capital contribution to assist in the purchase of the assets.

24. The FTT made, among others, the following observations in relation to this meeting:

> "147. The above records indicate that Mr Lanes took the lead in setting out details of the plan, which accords with the evidence of his role as a facilitator and communicator. It seems to us that, given his role within [the Group], his very close involvement with the advisers and the [Group] implementation team and the complete lack of the Jersey directors' direct contact with those parties, Mr Lanes was in effect acting at this meeting on behalf of DS Plc, as the client of Volaw/the Jersey directors, in taking the lead and explaining the plan. Aside from Mr Lanes acting as the primary point of information, his role essentially as an administrator is apparent from the references to him dealing with various forms.
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> 148. Whilst Mr Christensen said in his witness statement that the directors were keen to know more of the tax aspects, the minutes and notes record that when they called PwC the only tax aspect recorded as discussed was stamp duty and whether the CMC issue was affected by the parent approving or giving instructions as regards the transaction. There is no record of any discussion with PwC (or any other adviser) as to the operation of or merits of the tax planning.
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> …
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> 150. The consistent evidence of the Jersey directors was that they did not object to the conference with UK counsel being pre-arranged; the important thing was that they needed the advice…. In the light of their consistent evidence on this point, we consider that the Jersey directors were serious in their concern to check the legality of what the Jersey companies were being asked to do.

> …
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> 152. The written records do not record that there was any discussion as to the merits of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group. The only relevant matters recorded relating to the substantive issue of the proposed acquisition of the assets were (a) as noted, the need to take UK and Jersey advice concerning the legality of the proposal, (b) the query on the capital contribution, which was required to fund the acquisition and (c) the notes suggesting instruction or approval from the parent was required and a letter would be provided by the parent that the transactions were in 'best interests' and funds would be provided.
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> 153. That DS Plc was to instruct the companies to enter into the option arrangements is evident from both Ms Hembry's notes and the typed minutes. Ms Hembry referred twice to the proposal that the shareholder would have to 'instruct' or give 'instruction' to the directors and, as regards the call with [Ms Rebecca Lewis of PwC] on which this point was raised as regards whether it affected the CMC issue, noted 'resident directors to get shareholders to approve a shareholder resolution – no problem…..parent gave orders to overseas cos – okay'. She also referred to a letter from DS Plc advising directors of [the Jersey companies] that transactions are 'in best interests and will pay funds'. The typed minutes refer to this in terms of 'instructions' from or 'authorisation' by the parent.
>
> 154. … Whoever raised [this issue], we consider it is clear from the wording of Ms Hembry's notes that it was envisaged that there was to be an instruction from DS Plc for the board to enter into the transaction on the basis that the parent was to confirm that it was in … the 'best interests' of the group to do so."

25. The "conference with UK counsel" mentioned in paragraph 150 of the FTT's decision took place by telephone on 15 June 2004. It was attended by Mr Lanes, Mr Christensen, Landwell and Advocate Strang of Voisin & Co. PwC then sent Mr Marx, Mr Christofi and Mr Lanes (copied to the implementation team) a draft report for the board of DS plc. Written Jersey legal advice was subsequently received from Advocate Strang (on or before 21 June 2004).

26. On 25 June 2004:

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

condition" was that the FTSE Real Estate Total Return Index closed at 2082 or above for at least five consecutive days in a specified period;

ii) Mr Marx wrote separately on behalf of DS plc to the board of each of the Jersey companies setting out that DS plc would consider making capital contributions to assist them to acquire the assets under the call options. It was noted this was not a contractual commitment to provide the specified funds;

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

iv) The nominee shareholders of the Jersey companies, in accordance with this instruction, approved written resolutions for each company that the proposed entry into the call option agreements by the company "was in the best interests of the [company] and to the corporate benefit of the [company] and its members and that it be and hereby is approved and that (for the purposes of Article 74(2)(a) of the [relevant Jersey law provisions]), the directors of the [company] are authorised to enter into, execute and deliver on the said call option agreement (with such amendments thereto as the directors may in their discretion think fit) in the name of and for the benefit of the [company]".

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

28. At 2.30pm on 25 June 2004, the board of the Jersey companies met and agreed to enter into the call options. The meeting was attended by Mr Christensen, Mr Perchard and Mr Lanes, with Miss Hembry in attendance. Later that day, the directors of the Jersey companies resolved to amend the articles of association to allow the share capital of each company to be increased.

29. The FTT made, among others, the following observations as regards this meeting in paragraph 215 of its decision:

> "(1) It is clear that the directors reviewed the option agreement from the fact that they picked up a discrepancy as regards the notice period and that they noticed a difference in the FTSE condition.
>
> (2) Again there is no written record of any discussion between the directors on the merits of entering into the option and acquiring the assets. The hand written notes refer, however,

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

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

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

(5) At the hearing Mr Perchard was not clear on why he thought that the board approved the options. He referred to the 'after consideration' wording in the minutes as demonstrating that consideration was given. We do not accept that formulaic wording sheds any material light on the extent of any consideration. He seemed to suggest that the directors considered the Jersey companies' position as well as the benefit to the parent (albeit there was more benefit to the parent) but did not identify what that benefit was.

(6) Mr Christensen was clear that there was no commercial benefit for the Jersey companies themselves but

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

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

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

30. On 28 June 2004, a further board meeting of the Jersey companies was held at which it was resolved to approve the transfer of shares in the companies from the initial holders, the two Volaw nominee companies, to the beneficial owner, DS plc.

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

    i) DS plc resolved: (a) in its capacity as sole shareholder of the Jersey companies to authorise the exercise by the Jersey companies of the call options; (b) to make non-recourse capital contributions to the Jersey companies (of around £9.55 million to DS1, £11.375 million to DS2 and £3.57 million to DS3); and (c) to subscribe for additional shares in the Jersey companies at £1 per share (£17,600,763 for DS1, £7,900,000 for DS2 and £11,600,000 for DS3);

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

    iii) DS plc had "since received written requests" from the Jersey companies requesting it to make the cash contributions.

32. The statement that DS plc had received written requests for cash contributions when the meeting was held is incorrect. The requests were in fact sent by the Jersey companies to DS plc later in the day.

33. Also on 12 July 2004, there was a fourth board meeting of the Jersey companies, attended by Mr Perchard, Mr Norman, Mr Lanes and Ms Hembry. The board resolved to exercise the options, noting that the relevant conditions had been met, and requested DS plc to provide the funding through capital contributions and share subscriptions, which it duly did. The board also resolved to make certain VAT and tax applications in respect of the Properties. The formalities to effect the acquisitions were completed on that day or shortly thereafter.

34. The FTT made, among others, the following observations in respect of this meeting in paragraph 252 of its decision:

> "(1) We accept on the basis of the directors' consistent evidence as to how they worked together that, although Mr Norman had not attended the board meeting of 25 June 2004, he would have been brought up to speed by the other directors….
>
> (2) The directors did not pick up the incorrect record in the resolution of DS Plc when that was presented to the meeting. This indicates that the directors were not thoroughly reviewing documents received. There are other such discrepancies which also indicate a lack of attention. However, we can see that on this occasion, from the directors' perspective, the important thing was that the parent had given approval to the option exercise.

> …
>
> (5) Again there is no written evidence of any discussion as to whether the option should be exercised. In this instance, we do not find that surprising. It seems to us that the critical decision was whether to enter into the options in the first place. In that respect the reference in the agenda to a two stage process of considering (a) whether the conditions were satisfied and (b) whether to exercise, is unrealistic. There would not have been any point in entering into the options if there was no intent to exercise, subject to the relevant conditions being satisfied. The more likely time, therefore, for consideration of whether to enter into the transaction, was the earlier time, when the option agreement was signed. At this meeting, as accords with the written records and evidence of the directors, the directors checked that the relevant conditions were satisfied and that the funding was in place. As Mr Norman said, once all the 'ducks were in a row' in terms of the approval from the parent and having obtained the legal advice, there was no reason not to exercise the options. Mr Perchard said that there was consideration of whether to exercise but did not in his written or oral evidence identify anything other than the review of the document and the satisfaction of the conditions.
>
> (6) We note Mr Norman's evidence that the directors authorised the acquisition of the assets for the benefit of the parent and the wider group. There is no record that this was discussed at this board meeting (and, as noted, we have concluded that it was not discussed at the previous meeting). We have commented on this further in our conclusions."

35. A further board meeting of the Jersey companies was held on 20 July 2004. The Jersey-resident directors resigned with effect from the close of the meeting, but Mr Marx and another UK-based individual were appointed as directors and Mr Lanes remained one. The minutes recorded that the directors discussed that, as the subsidiaries/assets of the companies were held in the UK, they would appoint UK directors of the companies "for administrative convenience".

36. Shortly afterwards, once it was considered that the Jersey companies were UK tax resident, steps were taken for the Jersey companies to sell or dispose of the relevant assets thereby triggering capital losses.

37. The FTT's understanding of the law can be seen from paragraph 397 of its decision, in which it said:

> "We consider it implicit in Chadwick LJ's acceptance of Park J's comment [in *Wood v Holden*] as to the need for the directors to apply their minds that he thought that some form of engagement by the directors with an attempt to understand the consequences of what they were signing or agreeing to is required for them to make a decision. We understand him to be

> saying it is one thing to engage actively in the decision making process, albeit without seeking to obtain full information or even acting mistakenly or improperly, but another simply not to engage."

38. In paragraph 401 of its decision, the FTT observed that "no different principles are to be applied simply because the company in question was formed for a specific or limited purpose such as to play a role in a plan devised purely for tax purposes". It ended the paragraph by saying:

> "it does not necessarily follow that CMC of an overseas group company, which has been formed for a specific purpose (whether as part of a tax plan or otherwise), is in the UK if it falls in with the plan of the parent of the group and does what is expected, provided that proper consideration is given to the proposal and the directors are in fact exercising their discretion to exercise CMC of the company".

39. Paragraphs 408-417 of the FTT decision are headed, "What were the Jersey board engaged to do?" In paragraph 409, the FTT noted that the fact that "a company has a specific or limited purpose or is acting in accordance with an overall plan set by someone else … does not of itself necessarily mean that it is a foregone conclusion that directors will take the anticipated action" and that "[i]t cannot simply be presumed that the board has abdicated its function because its actions accord with what is expected and planned". "Decisions taken by a board which accord with any such plan," the FTT said, "may well be an active exercise of the board's discretion provided the board engages in the decision making process."

40. The FTT went on to say the following, however:

> "410. However, we consider the rather unusual circumstances in this case evidence that from the outset, in the very act of agreeing to take on the engagement, the Jersey directors were in reality agreeing to implement what the parent had already at that point in effect decided to do, subject only to checking it was lawful for them to do so….
>
> 411. We find it difficult to see that, in reality, … in agreeing to act as directors as regards a very specific sole project which was inherently uncommercial for the Jersey companies themselves, the Jersey directors were doing anything other than thereby agreeing from the outset to implement the specific steps required to acquire the assets for their client, DS Plc, barring it being found there was any legal impediment for them to do so (although in that case, no doubt the parent would not have wanted to proceed). The question arises as to why directors of a company would agree to undertake a project which is not for the benefit of that company; in this case, the answer can only be that it was because the parent wanted them to do so. If they were not prepared from the outset to undertake the sole, inherently uncommercial act required of them, subject

to it being lawful for them to do so, it would be very odd to accept the appointment given the specificity of what was required.

412. The lines of distinction as regards who is controlling a subsidiary formed for a limited and/or specific purpose may be rather fine ones. But in our view there is a difference between, for example, engaging a board of directors to operate a company with a limited or group function, such as a finance function for the group, which responds to proposals put by the parent in the expectation they will be approved (because they make commercial sense) and engaging a board to perform a single act, which is wholly uncommercial from the companies' own perspective, on the basis control is then almost immediately handed back to the parent. It is inherent in the uncommercial nature of what was proposed or, in other words, that lack of any commercial benefit evidences that the board were undertaking to implement the necessary steps from the outset on the 'say so' of the parent (subject to the legality issue). We cannot see on what other basis the directors of a company would sign up to take on board such a project.

413. This evidences that it was DS Plc who, as the parent which decided to undertake the planning and engaged the board to perform these specific actions, was in effect exercising CMC of the Jersey companies. It was not a case of the Jersey board considering and exercising their discretion as directors at the board meetings of the company as and when the proposals for the option and exercise of the options were put to them. From the outset there was no prospect that the actions would not be taken, barring any legal impediment, because in reality that was what the Jersey board were engaged by DS Plc to do, namely, to enter into the formal approvals required subject to checking the legality. Checking the legality does not in these circumstances, for the reasons set out below, amount to exercising CMC."

41. In the concluding paragraph of this section of its decision, the FTT said this:

"417. In any event, in our view, in these circumstances, checking for no legal impediments to the proposed action does not amount to taking the decision for the proposed action otherwise to take place. Taking the view that the transactions could be carried out lawfully under Jersey law, having received advice to that effect, is not the same thing as deciding that the company should enter into the transaction (for whatever reason). In other words, whether an action is lawful or not is but one limited aspect of whether to undertake that action. The strategic decision is whether, assuming there is no legal bar, it was a good plan for the Jersey companies to implement the tax

> planning by acquiring assets at an overvalue. As set out below, the Jersey board clearly did not make that decision."

42. The next section of the FTT's decision, comprising paragraphs 418-430, is headed, "Who carried out the key acts of CMC?". The FTT stated as follows in paragraph 418:

> "Whatever the scope of the engagement at the outset, it is clear from the evidence of what occurred at the board meetings that, as regards the key matter of entering into the options and acquiring the assets on exercise, the Jersey directors were acting on the basis of what was, in effect, an instruction from the parent which included the parent's confirmation that the transaction was for the parent's benefit, subject only to checking there was no bar to them complying with the instruction as a matter of legality."

43. The FTT explained in paragraph 419 of its decision that it accepted that this was "not a case where the directors signed resolutions approving the acquisition 'mindlessly', in the sense that they did not know what they were signing and/or had no appreciation of the effect of what they were signing" and, in paragraph 420, that "[t]he written records and the directors' own evidence demonstrate that they reviewed the corporate law advice received and that there may have been some discussion around that advice". The FTT continued, however, in these terms in the remainder of paragraph 420:

> "Otherwise it appears that there was no consideration or discussion on the merits (or otherwise) of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group.
>
> (1) At the first board meeting the only relevant matters recorded relating to the substantive issue of the proposed acquisition of the assets were (a) the need to take UK and Jersey advice concerning the legality of the proposal, (b) the query on the capital contribution which was required to fund the acquisition and (c) that 'instruction' or 'approval' from the parent was to be obtained with a letter from the parent confirming that the transactions were in its 'best interests' and funds would be provided (see also the comments at [152] to [154] above).
>
> (2) At the second meeting on 25 June 2004, when the companies entered into the options, the directors had received the corporate law advice and it appears that was the focus of the meeting. The issues recorded as emerging from those opinions were, as regards the UK advice, that the companies should have funds to cover the price for the assets, as regards the Jersey advice, that there was no impediment under Jersey law and that buying assets at an overvalue was fine provided the companies

were solvent. Mr Christensen emphasised that the discussion was around these issues. The only other substantive issue recorded relating to the agreement to execute the call options was the passing of the resolution by the parent approving the transaction and confirming that the transaction was in the interests of the companies (it appears that the initial proposal for a letter making that confirmation was dropped in favour of including it in the resolution approving the transactions) (see also the comments at [215] above).

(3) At the meeting when the options were exercised on 12 July 2004, the board merely checked that the relevant conditions were met including that the parent had given approval to the exercise. As noted, we do not find it surprising that there was no consideration of whether to acquire the assets at this point. The more natural time for this to be considered was at the earlier meetings, prior to agreeing to enter into the options. As these were call options, the board did not of course have to exercise them but there would be no point in entering into the options if there was no intention to exercise them (subject to the relevant conditions being satisfied) (see [252] above)."

44. The FTT then said this:

"422. Overall for the reasons set out above in our observations on the board meetings (see [152] to [154] and [215]) we conclude that, as is clear from Ms Hembry's notes of the board meetings, in agreeing to execute the documents required to enter into the option arrangements and subsequently to exercise them, the Jersey directors were acting under what they considered was an 'instruction' or 'order' from the parent in the form of the resolution approving the transactions. The instruction in effect included a confirmation from the parent that the transaction was for the benefit of the companies and the group. The fact the resolution and typed minutes are framed in terms of an authorisation or approval from the parent does not affect this. From the terminology used in Ms Hembry's notes of the meetings the approval resolution was viewed as an instruction for the directors to enter into the option. Moreover, this was not a case where, as in *Wood v Holden*, the directors were acting on a positive recommendation to enter into the transaction on the advice of advisers they had engaged. The directors did not take any advice on the merits of the tax planning proposal.

423. The Jersey board were not, therefore, actively engaging in a decision to implement the tax planning by acquiring the assets at an overvalue in exercise of their discretion as directors. That decision was made by DS Plc and the directors merely gave their formal approval (as we would say they had undertaken to do from the outset) as they were

> instructed to do. The directors did not consider for themselves whether the transaction was for the companies' or the parent's benefit as part of a decision making process. There is no evidence that there was any discussion of that at any of the board meetings. Any discussion was confined to the legality position. That there was a benefit was certified to them simply as part and parcel of the 'instruction' given to the board. Acting on the basis of such a confirmation is not the same thing as the board considering the issue independently in exercise of their own discretion in active engagement with the substantive decision to be made."

45. Moving on to the replacement of the Jersey-based directors by directors based in the UK, the FTT said this:

> "428. Moreover, the evidence indicates that the board did not engage at all with the decision to move the CMC back to the UK (although we would say it was in any event always in the UK). The purported reason given of administrative convenience, as suggested by PwC as the reason the directors should give, lacks all credibility. Clearly it would have been administratively easier from day one for the companies to be managed in the UK rather than by newly appointed professional directors based in Jersey. It can hardly be said that, having set up a structure in Jersey, thereby creating the administrative inconvenience, the reason for the relocation to the UK, was administrative convenience. The Jersey directors resigned simply because they had fulfilled the function they were engaged to undertake in accordance with DS Plc's instructions. In the same way as they had no real engagement with the decision to acquire the assets, they had no engagement with why it was a good plan to move control back to the UK. It was DS Plc's decision that they should do so as it was necessary for the tax planning to work. The Jersey board simply agreed to take the formal actions required as the final part of what they were engaged to do from the outset, having acquired the relevant assets on the parent's instruction.
>
> 429. In fact at this stage it appears the Jersey directors were paying very little attention at all even to the formalities of what was thought necessary to ensure the Jersey companies were then UK tax resident. Hence the mistake in the board minutes recording that two procedures were taking place when only one was required (see [262] to [268])."

46. Distinguishing *Wood v Holden*, the FTT had said this in paragraph 426 of its decision:

> "Unlike *Wood v Holden*, therefore, this was not a case where the board considered a proposal and, having taken appropriate advice, decided that it was in the best interests of the companies to enter into it. Given that the transaction was clearly not in the

> interests of the companies and indeed could only take place with parental approval, the inescapable conclusion is that the board was simply doing what the parent, DS Plc, wanted it to do and in effect instructed it to do. In the circumstances, the line was crossed from the parent influencing and giving strategic or policy direction to the parent giving an instruction. The Jersey board were simply administering a decision they were instructed to undertake by DS Plc, in checking the legality of the plan and then administering the other consequent actions prior to handing over completely to the UK group."

47. The FTT disavowed any suggestion that the Jersey directors had acted improperly. It said in paragraph 427 of its decision:

> "We do not suggest that the board was acting improperly. As noted, we accept that the Jersey directors were serious in their concern with the legality issues; they clearly did not want to do something unlawful. To act on the basis of a parent's instruction including a certification as to the benefit of the proposed transaction may well suffice for what is required under Jersey law. That does not amount, however, to the Jersey board making their own decision to enter into and exercise the options to maximise the group's capital losses. The Jersey directors were simply involved in checking that there was no bar to them carrying out the parent's instruction. Indeed we would question whether in reality even that limited role was theirs (see [416]). It is reasonable to suppose that DS Plc would simply not have given the instruction/approval for the transaction to go ahead if the advice from the corporate law counsel had not been positive."

48. The FTT arrived at this conclusion in paragraph 430 of its decision:

> "We conclude that the key decisions to acquire the assets at an overvalue and then to move the control of the Jersey companies back to the UK were taken by DS Plc in the UK. The Jersey board merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction. In effect, the Jersey board merely rubber stamped the decision to move control back to the UK, having fulfilled the terms of their engagement."

49. So far as Mr Lanes' role is concerned, the FTT said:

> "286. As regards Mr Lanes' own position as a director of the Jersey companies, it is difficult to see him as anything other than a puppet of DS Plc/Mr Marx. Mr Marx was clear he did

> not trust him to make his own commercial decisions. He described him as making decisions in tandem with the Jersey directors. However, given the way Mr Lanes assumed events would happen and the way Mr Marx stepped in and sought to exercise control over him when he considered it necessary, we consider it more likely that Mr Lanes considered himself as acting on behalf of DS Plc to do what it wanted.
>
> 287. However, as regards his interaction with the Jersey directors, who were of course in the majority, whilst Mr Lanes was clearly placed on the board with a view to doing what he could to ensure that what was supposed to happen did happen, we cannot see he was somehow issuing 'orders' to the Jersey directors on behalf of DS Plc or indeed that he would have been in a position to do so (and as noted we consider any such orders would not have been necessary). Rather, he was facilitating communication and information and co-ordinating the required paperwork.
>
> 288. In our view it is inherent in the very act of taking on such a specific project, which was only lawful if the companies were instructed in effect to do the transaction by their parent, that in reality the Jersey directors were agreeing to administer the parent's plan subject to checking the legality. In that context, we accept that Mr Lanes had no particular influence over the only matters which it appears the board discussed, namely, the issues surrounding the legality of the acquisition at an overvalue. We also accept that the Jersey directors would not have agreed to the transaction if it was found to be unlawful thereby bringing them/their firm into disrepute. For clarity, nor do we imagine DS Plc would have tried to proceed in such circumstances. There is no suggestion here that anyone involved was acting in way other than in accordance with the advice received on the law. Our further views on this are set out in the discussion section."

50. Returning to the subject later in its decision, the FTT said:

> "431. … Mr Lanes clearly was placed on the board with a view to ensuring the successful implementation of the proposal. He assumed it would happen and was no doubt doing what he could to ensure it did. However, whilst to some extent Mr Lanes took the lead at board meetings in presenting information as the representative of DS Plc, there is no evidence that he exerted any particular or dominant influence at board meetings. Indeed, given that the only matters they considered, and which anyone expected them to consider, was whether it was lawful or not to agree to the proposal, it is unrealistic to suppose that he or anyone else involved would have sought to instruct the directors to act contrary to the corporate law advice received or that the directors would have done so.

> 432. Otherwise Mr Lanes was acting primarily as a communicator, co-ordinator and facilitator in his largely administrative role. He was not a Mr Bock who was himself making decision of a strategic and management nature on behalf of the Jersey board in the UK."

51. The amount of money the Group stood to save from the tax planning was around £8 million (although significantly less than that was saved in the end). The total price paid for the acquisition of the assets (as funded by DS plc) was put by the FTT at £24,495,000.

The Upper Tribunal decision

52. The UT allowed an appeal. It considered that the FTT's decision was incorrect as a matter of law and that it could determine the question of residence itself without remitting the matter to the FTT. The UT concluded in paragraph 75 of its decision that "the Jersey directors did properly consider the decisions they made on behalf of the Jersey Companies and that, in consequence, CMC was exercised in Jersey" and that "therefore the Jersey Companies are resident in Jersey and not in the United Kingdom".

53. The UT addressed the FTT's decision and, in particular, whether it was correct to conclude that the Jersey companies were resident in the UK in section D of its decision. The UT's approach, as it explained in paragraph 11(3), was "to describe – in somewhat broad terms – the essential facts (Section D(1)) and then (in Section D(2)) to identify the basis upon which the FTT reached its conclusion on the question of residence" before going on to "consider (in Section D(3)) whether the basis upon which the FTT reached its conclusion on residence is soundly based in law or whether this conclusion must be overturned because it is wrong in law".

54. At the beginning of section D(2) of its decision, in paragraph 38, the UT observed that the FTT "did not consider this to be a case of usurpation or sham" but rather "concluded that this was a case of abdication of CMC on the part of the Jersey directors, albeit abdication of a very particular sort". The UT then quoted paragraphs 410-413 of the FTT's decision before saying this in paragraph 39:

> "Thus, the FTT determined that CMC was exercised by the parent, Development Securities plc, in London for two reasons, one in our view primary and one in our view subsidiary:
>
> (1) The subsidiary reason was that the directors had a specific task entrusted to them by their parent, after which they were to resign – as they did.
>
> (2) The primary reason for the FTT's conclusion was their finding that the directors knew from the outset that they were – as an integral part of the specific task entrusted to them – to cause the Jersey Companies to act in a manner contrary to their commercial interests, and that the only possible inference that could be drawn from their agreement to serve on this basis was that (provided the transaction was legal) they would go through

> with it without question and without exercising their judgment as directors. In short, the inference that CMC vested elsewhere is based upon the Jersey directors' willingness to accept appointment knowing that this appointment involved causing the Jersey companies to enter into transactions that (in the FTT's judgment) could only be explained by an abdication of responsibility of the directors to exercise CMC. This theme runs throughout the paragraphs we have quoted above, and indeed, throughout the judgment (notably at [75], [100], [144(5)], [150], [153], [205], [206], [212], [215(7) and (8)], [288], [402(1) and (2)] and [417]-[424]). Although the FTT found that the directors considered the Scheme, that was from the narrow perspective of wanting to assure themselves that the Jersey Companies would not be breaking the law, rather than from the wider perspective of seeking to reach a view as to whether the Jersey Companies should enter into the transactions that the Scheme envisaged them entering into."

55. With respect to the "subsidiary" reason, the UT said in paragraph 40 of its decision, at the start of section D(3), that it did "not consider that the mere fact that the directors had a specific task entrusted to them by their parent, after which they were to resign, says anything about where CMC vested". "Had the FTT concluded that CMC vested in London simply on the basis that the Scheme was a short-term scheme which, once achieved, would involve the resignation of the Jersey directors," the UT said in paragraph 42, it "would have found this to be an error of law in the understanding of the CMC test".

56. As regards the "primary" reason, the UT expanded on this in paragraph 45 of its decision, in which it said:

> "The basis for the conclusion that the Jersey directors had abdicated responsibility for CMC was that the directors had failed to decline to do something that was improper or inadvisable, in that they had entered into so called uncommercial transactions by exercising the options. The FTT was making the sort of inference described in *Untelrab*:
>
> '…a significant factor is whether the directors would have declined to do something improper or inadvisable; if they would, then this would point towards the conclusion that there was no control by the parent.'"

57. In paragraph 46 of its decision, the UT said that the FTT's conclusion "rests on a fundamental misunderstanding of (i) the nature of the transactions entered into by the Jersey Companies and (ii) of the duties of the Jersey directors in relation to those transactions". As regards the former, the UT said this in paragraph 47:

> "it is wrong to say – as the FTT repeatedly does – that the relevant assets were acquired by the Jersey Companies on uncommercial terms, in the sense that they (the Jersey Companies) were economically disadvantaged. As we have

pointed out, it was envisaged that the acquisition of the relevant assets would be funded by Development Securities plc and that is what in fact occurred. Thus, whilst the relevant assets were acquired at an overvalue, the overpayment by the Jersey Companies was not funded by them. We therefore have grave doubts regarding the FTT's description of the Jersey Companies' participation in the Scheme and their acquisition of the relevant assets as being 'uncommercial' when considering only the position of the Jersey Companies."

58. So far as "the misunderstanding in relation to the duties imposed on the directors" is concerned, the UT said this in paragraph 50 of its decision:

> "Assuming, contrary to the conclusion that we have expressed in paragraph 47 above, that the FTT was right in holding that the relevant assets were acquired by the Jersey Companies on uncommercial terms, we nevertheless consider that the conclusion of the FTT regarding CMC was plainly wrong as a matter of law. Our grounds for reaching this conclusion are as follows:
>
> (1) Article 74 of the Companies (Jersey) Law 1991, as in force at the relevant time, provided:
>
> '**Duties of directors**
>
> (1) A director, in exercising the director's powers and discharging the director's duties, shall –
>
> (a) act honestly and in good faith with a view to the best interests of the company; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercising comparable circumstances.
>
> (2) Without prejudice to the operation of any rule of law empowering the members, or any of them, to authorize or ratify a breach of this Article, no act or omission of the director shall be treated as a breach of paragraph (1) if –
>
> all the members of the company authorize or ratify the act or omission; and
>
> after the act or omission the company is able to discharge its liabilities as they fall due and the realisable value of the company's assets is not less than its liabilities.'
>
> (2) This provision is similar but not identical to the equivalent English law provisions. The duty to act in the best interests of the company does not appear to be fully articulated in Article 74, but (like English law) requires

consideration of the interests of members (or shareholders), employees and creditors. In this case, given that the Jersey Companies had no employees and the transactions that the Jersey Companies were to enter into, pursuant to the Scheme, did not prejudice creditors, the primary consideration can only have been the interest of the shareholders. Beyond the interests of shareholders, creditors and employees it is extremely difficult to identify what other interests a board of directors might take into account. Significantly, the Decision identifies no interest beyond these three.

(3) The Jersey Companies were 100% subsidiaries of Development Securities plc. The primary regard of the Jersey directors ought to have been – and, as it seems to us, on the basis of the facts found in the Decision was – directed to what was in the best interests of Development Securities plc *qua* shareholder. The Decision considers the approach of the Jersey directors at various points, most significantly in [94]-[100] and [144]. It is clear that the Jersey directors had well in mind the duties they were subject to, and were seeking to act in accordance with those duties. They gave detailed consideration to the appropriateness of the Scheme – including the apparently uncommercial nature of the options and the acquisition by the Jersey Companies of the relevant assets – and concluded that the transactions were in the best interests of the shareholders and therefore in the best interests of the Jersey Companies, there being no prejudice to either employees or creditors of the Jersey Companies. The FTT, erroneously, took the view (which it expressed on multiple occasions throughout the Decision) that because the transactions were uncommercial, they had to be contrary to the interests of the Jersey Companies. That, with great respect to the FTT, is a *non sequitur* and it undermines the entire Decision.

(4) In these circumstances, given that the Scheme was actively being propounded by Development Securities plc, it would take a factor of some significance (for instance, a material risk that the Scheme was unlawful) for the Jersey directors properly to be in a position to refuse to enter into the transactions required by the Scheme.

(5) We stress that we reach this conclusion without the need to rely upon Article 74(2). Article 74(2) permits the shareholders to authorise or ratify what would otherwise have been a breach of Article 74(1). In this case, the directors had the benefit of an authorisation under Article 74(2) – no doubt for the avoidance of doubt – but we do not

consider that such an authorisation was in fact necessary in this case.

(6) The essential error committed by the FTT was to focus on the uncommerciality of the transactions to the individual Jersey Companies without having regard to the actual duties the directors owed to those companies. These duties, as we have noted, in this case principally involved consideration of the shareholders' interests and the FTT made no finding that the Scheme was not in the interests of the shareholders. Indeed, such a finding would have been fundamentally inconsistent with the FTT's view that the beneficial shareholder – Development Securities plc – wanted the Scheme to go ahead.

(7) The problem with the FTT's approach is that it confused an instruction from a parent company (which would be a matter the Jersey directors should take into account, but not be ruled by) with the authorisation or ratification of a course of conduct by the shareholders in the company, which conduct might be in breach of the duty of the directors. This is the very reverse of an instruction from an entity different from the company, telling it what to do. It is an authorisation or ratification from the appropriate organ within the company. In short, the FTT's references to the Jersey directors being 'instructed' by the parent entirely misunderstand the nature of the Article 74(2) authorisation or ratification.

(8) We are satisfied that, whatever the position as regards Mr Lanes (who may have been prepared to carry out the transactions no matter what), the Jersey directors *(i)* knew exactly what they were being asked to decide; *(ii)* did so understanding their duties; and *(iii)* complied with those duties. The FTT found that Mr Lanes did not influence the Jersey directors. More specifically:

(a) In [286] of the Decision, the FTT conclude that '[a]s regards Mr Lanes' own position as a director of the Jersey Companies, it is difficult to see him as anything other than a puppet of [Development Securities plc]/Mr Marx'. That amounts to a finding – as against Mr Lanes – that he abdicated responsibility and acted as a rubber stamp, and we accept that finding and proceed on that basis.

(b) If the FTT had found that the Jersey directors had similarly acted as puppets – either of Mr Marx or of Mr Lanes – then the outcome of this appeal might have been different. But they did not. At [287] of the Decision, the FTT found:

> ‘However, as regards his [Mr Lanes’] interaction with the Jersey directors, who were of course in the majority, whilst Mr Lanes was clearly placed on the board with a view to doing what he could to ensure that what was supposed to happen did happen, we cannot see he was somehow issuing “orders” to the Jersey directors on behalf of [Development Securities plc] or indeed that he would have been in a position to do so (and as noted we consider any such orders would not have been necessary). Rather, he was facilitating communication and information and coordinating the required paperwork.’”

59. The UT went on as follows in paragraph 51 of its decision:

> “It is fair to say that in its conclusions – at for example [423] to [426] of the Decision – the FTT suggests that the Scheme and the Jersey Companies’ participation in the transactions forming part of the Scheme did not receive proper consideration. These paragraphs, we find, are coloured by the erroneous conclusion the FTT drew from the ‘uncommercial’ nature of the transactions entered into and cannot be sustained in light of the findings of fact made earlier on in the Decision and referenced in paragraphs 52 and 74(3) below. Furthermore, we consider that the repeated findings of the FTT that the Jersey directors would not act illegally amounts in truth to a finding that the Jersey directors would not – as experienced directors – act in breach of their fiduciary duties.”

60. In paragraph 52 of its decision, to which reference was made in paragraph 51, the UT said this:

> “Moreover, the FTT’s conclusion that the Jersey directors did not give any or sufficient consideration to the merits of the transactions does not sit well with the facts it found. In addition to the points made above, we observe, for example, the following findings of fact by the FTT:
>
> (1) The first board meeting on 11 June 2004, at which the proposed transactions were considered, lasted from approximately 11a.m. until 4p.m., with a break for lunch (Decision [133]). This seems inconsistent with the notion that the Jersey directors were either acting ‘mindlessly’ or were simply going through the motions at the behest of Development Securities plc.
>
> (2) At the same board meeting, the Jersey directors queried the stamp duty position and took advice from PwC by telephone (Decision [135] and [136]). This is important because it shows that the Jersey directors were applying their minds to relevant issues arising from the proposed transactions – stamp duty is typically a liability which would potentially fall upon a

> transferee i.e. the Jersey Companies. They were not simply following instructions to implement the transactions 'come what may'. It is also inconsistent with the FTT's frequently stated view that the Jersey directors were agreeing to approve the proposed transactions, subject only to checking the legalities.
>
> (3) At the board meeting on 25 June 2004, the Jersey directors considered the terms of the call option. The directors noticed an inconsistency between the terms of the option and the drafting of the option notice. They sought clarification from Landwell by telephone. This shows, again, that the directors were applying their minds to the transactions before them and were not simply abdicating their responsibilities."

61. Paragraph 74(3) of the UT's decision, which it also cited in paragraph 51, reads as follows:

> "Furthermore, the Decision finds as fact that:
>
> (a) The Jersey directors knew and understood the Scheme, its operation and purpose.
>
> (b) The Jersey directors applied their minds to the Scheme, and positively concluded that they could lawfully cause the Jersey Companies to enter into the options to acquire the relevant assets and then acquire those assets pursuant to those options."

62. Reverting to section D(3) of the UT's decision, it said in paragraph 53 that "at certain points (Decision [148] and [422]) the FTT appears to suggest that the Jersey directors should have considered the taxation merits of the Scheme", but "it was wrong for it to do so" as there was "no need for the Jersey directors to take an independent view on the strengths or weaknesses of the United Kingdom tax planning being undertaken by [the Group]". In conclusion, the UT said this in paragraph 54:

> "In these circumstances, we find the conclusion of the FTT that the Jersey directors had abdicated their responsibilities such that CMC vested not in the Jersey boards but in Development Securities plc an impossible one. The fact that the Scheme envisaged the Jersey Companies entering into what the FTT regarded as uncommercial transactions says quite literally nothing about the Jersey directors' abdication or otherwise of their duties. Indeed, the approach of the FTT begs a very serious question. If, as we infer, the conclusion of the FTT was that the transactions were entered into by the Jersey directors in breach of their duties as directors, then this would have been an illegal act, which the Jersey directors would not have countenanced. The FTT never actually articulated what it meant by 'illegality', but such illegality is capable of embracing a breach of fiduciary duty. The FTT clearly regarded the entry into transactions at an over-value as somehow inconsistent with

> the Jersey directors' duties. We do not accept that. But the logical corollary of the FTT's position is that the Jersey directors – given their concern about legality – would never have entered into these transactions. Ergo, the directors must have been satisfied that they were legal. There is an essential incoherence in the FTT's reasoning."

The scope of the appeal

63. Mr Akash Nawbatt QC, who appeared for HMRC with Miss Kate Balmer, challenged the UT's decision on, among others, the ground that it had "mischaracterised and inaccurately paraphrased the basis upon which the FTT reached its conclusion on the question of residence". He further argued that the UT had erred in its approach in certain ways.

64. For his part, Mr Sam Grodzinski QC, who appeared for the respondents with Mr Julian Hickey, supported the UT's decision. He submitted, in particular, that the UT had been right to hold that the FTT's conclusion on CMC rested on a fundamental misunderstanding of both the nature of the transactions entered into by the Jersey companies and the duties owed by the Jersey directors in relation to those transactions.

65. As Mr Nawbatt pointed out in both opening and reply, there is no respondent's notice. The outcome of this appeal must therefore turn on the validity of the reasons which the UT gave for overturning the FTT's decision. It is immaterial whether or not that decision might have been open to challenge on some other ground.

Assessment of the UT decision

The basis of the FTT decision

66. The FTT summarised its view in paragraph 430 of its decision, which I have set out in paragraph 48 above. As it said, the FTT considered that the Jersey board "merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction". More specifically:

    i) The FTT saw *Wood v Holden* as showing that "it is one thing to engage actively in the decision making process, albeit without seeking to obtain full information or even acting mistakenly or improperly, but another simply not to engage" (see paragraph 397). In the present case, the Jersey directors had not acted "'mindlessly', in the sense that they did not know what they were signing and/or had no appreciation of what they were signing" (paragraph 419), and they had checked the legality of what they were doing. However, "[t]aking the view that the transaction could be carried out lawfully under Jersey law, having received advice to that effect, is not the same thing as deciding that the company should enter into the transaction (for whatever reason)" (paragraph 417);

ii) "[F]rom the outset, in the very act of agreeing to take on the engagement, the Jersey directors were in reality agreeing to implement what the parent had already at that point in effect decided to do, subject only to checking it was lawful for them to do so", the FTT said in paragraph 410. "Whatever," though, "the scope of the engagement at the outset, … as regards the key matter of entering into the options and acquiring the assets on exercise, the Jersey directors were acting on the basis of what was, in effect, an instruction from the parent which included the parent's confirmation that the transaction was for the parent's benefit, subject only to checking there was no bar to them complying with the instruction as a matter of legality" (paragraph 418);

iii) The Jersey board "were not … actively engaging in a decision to implement the tax planning by acquiring the assets at an overvalue in exercise of their discretion as directors" and "did not consider for themselves whether the transaction was for the companies' or the parent's benefit as part of a decision making process" (paragraph 423). The position was rather that, "in agreeing to execute the documents required to enter into the option arrangements and subsequently to exercise them, the Jersey directors were acting under what they considered was an 'instruction' or 'order' from the parent in the form of the resolution approving the transactions" (paragraph 422);

iv) While the Jersey directors had reviewed the corporate law advice, there was otherwise "no consideration or discussion on the merits (or otherwise) of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group" (paragraph 420). "The Jersey board were simply administering a decision they were instructed to undertake by DS Plc, in checking the legality of the plan and then administering the other consequent actions prior to handing over completely to the UK group" (paragraph 426). "To act on the basis of a parent's instruction including a certification as to the benefit of the proposed transaction may well suffice for what is required under Jersey law" but "does not amount to the Jersey board making their own decision to enter into and exercise the options to maximise the group's capital losses" (paragraph 427);

v) Further, "the board did not engage at all with the decision to move the CMC back to the UK", but "simply agreed to take the formal actions required as the final part of what they were engaged to do from the outset, having acquired the relevant assets on the parent's instruction" (paragraph 428).

67. It will be seen that the FTT found that "in agreeing to execute the documents required to enter into the option arrangements and subsequently to exercise them, the Jersey directors were acting under what they considered was an 'instruction' or 'order' from the parent in the form of the resolution approving the transactions". That reflected findings recorded earlier in the decision. The FTT had concluded in paragraph 154 that at the 11 June board meeting it was "envisaged that there was to be an instruction from DS Plc for the board to enter into the transaction on the basis that the parent was to confirm that it was in … the 'best interests' of the group to do so". Likewise, when addressing the 25 June meeting, the FTT explained in paragraph 215(8) that the evidence "indicates that the Jersey directors were acting on the basis of what was in effect an instruction from the parent to undertake a transaction which was wholly uncommercial from the Jersey companies' perspective on the basis that the parent in

effect certified, as part of that instruction, that the transaction was for their/the group's benefit". The FTT specifically considered, and discounted, the possibility that a reference in Ms Hembry's notes to "instruction" related only to what the nominee shareholder was to do: see paragraph 215(4), which is set out in paragraph 29 above.

The UT's analysis

68. The "Thus" at the beginning of paragraph 39 of the UT's decision indicates that it derived the two reasons which it identified as the basis of the FTT's decision from paragraphs 410-413 of the latter, which the UT had just set out. That of itself rings alarm bells since paragraphs 410-413 feature in the section of the FTT's decision headed "What were the Jersey board engaged to do?", not the more obviously in point section with the heading "Who carried out the key acts of CMC?" in which the FTT came to the conclusion that the Jersey board "merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction".

69. The "subsidiary" reason which the UT gave for the FTT's decision was that "the directors had a specific task entrusted to them by their parent, after which they were to resign – as they did". As I understand it, the UT did not found its ultimate decision on any error which it perceived in that "subsidiary" reason. It said that it *would* have found there to be an error of law *had* the FTT "concluded that CMC vested in London simply on the basis that the Scheme was a short-term scheme which, once achieved, would involve the resignation of the Jersey directors", not that the FTT had in fact so concluded. Moreover, it is abundantly clear that the FTT did not in fact hold that the CMC was in London "simply on the basis that the Scheme was a short-term scheme which, once achieved, would involve the resignation of the Jersey directors". It follows that the UT's approach to the "subsidiary" reason cannot be crucial to this appeal. In any case, it seems to me that the UT went too far when it stated emphatically that it did "not consider that the mere fact that the directors had a specific task entrusted to them by their parent, after which they were to resign, says anything about where CMC vested" (paragraph 40). The FTT itself recognised in paragraph 409 that the fact that "a company has a specific or limited purpose or is acting in accordance with an overall plan set by someone else … does not of itself necessarily mean that it is a foregone conclusion that directors will take the anticipated action" and that "[i]t cannot simply be presumed that the board has abdicated its function because its actions accord with what is expected and planned". I can see no reason, however, why the fact that, as the FTT found, "from the outset … the Jersey directors were in reality agreeing to implement what the parent had already at that point decided to do, subject only to checking that it was lawful for them to do so", should not have helped to inform the FTT's understanding of the approach which the Jersey directors took in the course of their "engagement".

70. Turning to the "primary" reason, the UT identified this as the FTT's "finding that the directors knew from the outset that they were – as an integral part of the specific task entrusted to them – to cause the Jersey Companies to act in a manner contrary to their commercial interests, and that the only possible inference that could be drawn from their agreement to serve on this basis was that (provided the transaction was legal) they would go through with it without question and without exercising their judgment

as directors" (paragraph 39(2)). The FTT's conclusion that CMC was not exercised in Jersey, the UT said, was founded on the directors having "failed to decline to do something that was improper or inadvisable, in that they had entered into so called uncommercial transactions by exercising the options" (paragraph 45) and, more specifically, on a "fundamental misunderstanding of (i) the nature of the transactions entered into by the Jersey Companies and (ii) of the duties of the Jersey directors in relation to those transactions" (paragraph 46). The FTT evidently considered that "the transactions were entered into by the Jersey directors in breach of their duties as directors" and "the entry into transactions at an over-value [to have been] somehow inconsistent with the Jersey directors' duties" (paragraph 54), but it was wrong to do so.

71. With respect, I cannot accept this analysis.

72. In the first place, the "primary" reason for the FTT's decision was not that given by the UT. As I have said, the FTT considered that the Jersey board "merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction". That conclusion did not depend on a finding that "the directors knew from the outset that they were – as an integral part of the specific task entrusted to them – to cause the Jersey Companies to act in a manner contrary to their commercial interests, and that the only possible inference that could be drawn from their agreement to serve on this basis was that (provided the transaction was legal) they would go through with it without question and without exercising their judgment as directors". It is true that the FTT considered that "in the very act of agreeing to take on the engagement, the Jersey directors were in reality agreeing to implement what the parent had already at that point in effect decided to do, subject only to checking it was lawful for them to do so" (paragraph 410), but it went on to find that "[w]hatever the scope of the engagement at the outset", "as regards the key matter of entering into the options and acquiring the assets on exercise, the Jersey directors were acting on the basis of what was, in effect, an instruction from the parent which included the parent's confirmation that the transaction was for the parent's benefit, subject only to checking there was no bar to them complying with the instruction as a matter of legality" (paragraph 418).

73. Secondly, the UT was mistaken in thinking that the FTT's decision was founded on the directors having "failed to decline to do something that was improper or inadvisable, in that they had entered into so called uncommercial transactions by exercising the options". In fact, not only did the FTT not say that the directors had "failed to decline to do something that was improper or inadvisable", but it did not even suggest that the transactions were "improper or inadvisable". It did speak of the transactions having been uncommercial *from the perspective of the Jersey companies themselves* (see e.g. paragraphs 402(1), 410, 411 and 412) and of DS plc's approval being required in consequence of the corporate law issues to which that feature gave rise, but that is a different matter from considering the transactions "improper or inadvisable".

74. Thirdly, there is no reason to suppose that the FTT misunderstood the nature of the transactions into which the Jersey companies entered. The UT cited in this respect paragraph 402(1) of the FTT's decision, in which it referred to the transaction which

the Jersey board was to undertake being "inherently uncommercial … from their [i.e. the Jersey companies'] perspective". That was an accurate statement of the position: the Jersey companies as such stood to gain nothing from the transaction. The Jersey companies were, however, to be funded by DS plc to overpay for the assets they were to buy, as the FTT recognised in, for example, paragraph 402(3). The point was, of course, to obtain a tax benefit for the Group, and the FTT understood that perfectly well: see, for instance, paragraphs 5, 6 and 403 (where the FTT referred to "an inherently uncommercial transaction" being undertaken "for the benefit of the wider group"). In paragraph 47 of its decision, the UT expressed "grave doubts regarding the FTT's description of the Jersey Companies' participation in the Scheme and their acquisition of the relevant assets as being 'uncommercial' when considering only the position of the Jersey Companies". My own view is that the FTT's language was apt, but in any case what matters is that it did not misunderstand what was going on.

75. Fourthly, the FTT did not consider that "the transactions were entered into by the Jersey directors in breach of their duties as directors" or that "the entry into transactions at an over-value [was] somehow inconsistent with the Jersey directors' duties". Neither expressly nor implicitly did the FTT say that the Jersey directors had committed any breach of duty. In fact, it said the opposite, stating in terms in paragraph 427, "We do not suggest that the board was acting improperly".

76. That leads to a fifth point: that the FTT's conclusion did not rest on "a fundamental misunderstanding of … the duties of the Jersey directors". The FTT concluded that, as a matter of fact, the Jersey directors acted "on the basis of the instruction/certifications received without any engagement with the substantive decision". It neither embarked on a detailed examination of the duties of the Jersey directors, nor needed to. Its focus was on what the directors did, not on their obligations, and, as I have already said, it eschewed any idea that there was a breach of duty.

77. It follows that the UT's discussion of the duties of the Jersey directors was beside the point. It does not matter whether the Jersey directors needed to rely on article 74(2) of the Companies (Jersey) Law 1991, as PwC evidently thought (see paragraph 16 above), or, as the UT considered, no authorisation under article 74(2) was necessary. It is in any event possible to take issue with some of the UT's comments on the company law position. One problem with them is there was no expert evidence as to Jersey law. The UT was therefore in no position to assess how, if at all, Jersey law might differ from its English equivalent. Further, while the UT said that the "primary regard of the Jersey directors ought to have been … directed to what was in the best interests of Development Securities plc *qua* shareholder", it did not consider whether the tax benefits which the Group was hoping to obtain were to accrue to DS plc in its capacity as shareholder. It is noteworthy in this context that DS plc did not need to be the Jersey companies' parent to take the benefit of the tax losses that were to be generated by the scheme.

78. A sixth – and important – point relates to paragraph 50(7) of the UT's decision, in which it said:

> "The problem with the FTT's approach is that it confused an instruction from a parent company (which would be a matter the Jersey directors should take into account, but not be ruled

> by) with the authorisation or ratification of a course of conduct by the shareholders in the company, which conduct might be in breach of the duty of the directors. This is the very reverse of an instruction from an entity different from the company, telling it what to do. It is an authorisation or ratification from the appropriate organ within the company. In short, the FTT's references to the Jersey directors being 'instructed' by the parent entirely misunderstand the nature of the Article 74(2) authorisation or ratification."

79. The FTT made repeated references to the Jersey directors having acted on the basis of what they saw as an "instruction" from DS plc. Thus, the FTT spoke, for example, of the Jersey directors "acting on the basis of what was, in effect, an instruction from the parent which included the parent's confirmation that the transaction was for the parent's benefit, subject only to checking there was no bar to them complying with the instruction as a matter of legality" (paragraph 418), of the Jersey directors "acting under what they considered was an 'instruction' or 'order' from the parent in the form of the resolution approving the transactions" (paragraph 422), of the directors "merely [giving] their formal approval … as they were instructed to do" (paragraph 423), of the parent company having "told" the directors to enter into the transaction (paragraph 425), of "the line [having been] crossed from the parent influencing and giving strategic or policy direction to the parent giving an instruction" (paragraph 426) and of the Jersey board having passed resolutions "on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction" (paragraph 430).

80. That the FTT was alive to the distinction between authorisation and instruction can be seen from paragraph 422 of its decision. Having said there that the Jersey directors were "acting under what they considered was an 'instruction' or 'order' from the parent in the form of the resolution approving the transactions", the FTT went on:

> "The instruction in effect included a confirmation from the parent that the transaction was for the benefit of the companies and the group. The fact the resolution and typed minutes are framed in terms of an authorisation or approval from the parent does not affect this. From the terminology used in Ms Hembry's notes of the meetings the approval resolution was viewed as an instruction for the directors to enter into the option."

The notes in question had been the subject of comment earlier in the FTT's decision, in paragraphs 136 and 215, which I have quoted in paragraph 29 above. In paragraph 215(4), when making observations on the evidence relating to the 25 June 2004 meeting, the FTT had considered whether a reference in Miss Hembry's notes to "instruction ex DS Plc" related to "that given by DS Plc to the nominees to execute the resolution giving the approval", but had concluded that it was more likely to relate to "DS Plc instructing the Jersey companies themselves".

81. In the circumstances, I do not think the UT was right to conclude that the FTT confused an instruction with authorisation or ratification. The true position is that the

FTT considered that the directors had acted under what they saw as an instruction as distinct from an authorisation or ratification. Whether the directors were right so to view things as a matter of law is unimportant. What matters is that the FTT made findings to the effect that the directors in fact proceeded on the basis of what they perceived as an instruction rather than just an authorisation or ratification.

82. Mr Grodzinski referred to the FTT having drawn *inferences*. However, a finding of fact is nonetheless a finding of fact if made on the basis of inference. In that connection, it is relevant to quote from the judgment of Leggatt LJ in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96. Leggatt LJ observed in paragraph 40:

> "It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts."

As regards that reluctance, Lord Reed noted in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at paragraph 67:

> " in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified".

83. Seventhly, some of the specific comments made by the UT tend to confirm that it had not appreciated the essential basis of the FTT's decision. For instance, the UT said in paragraph 52(1) of its decision that the length of the first board meeting seemed "inconsistent with the notion that the Jersey directors were either acting 'mindlessly' or were simply going through the motions at the behest of Development Securities plc", but the FTT did not say otherwise. To the contrary, it said in paragraph 419 of its decision that this was "not a case where the directors signed resolutions approving the acquisition 'mindlessly'" and that the directors "were concerned to check whether the proposal was lawful". Again, the fact that the Jersey directors queried the stamp duty position, as mentioned in paragraph 52(2) of the UT's decision, can readily be reconciled with the FTT's finding that the Jersey directors proceeded "without any engagement with the substantive decision albeit having checked … that there was no legal bar to them carrying out the instruction".

84. More generally, the UT did not recognise the significance of findings of fact which the FTT made. I have quoted some of these in paragraph 66 above. Thus, the FTT found, having considered the written and oral evidence in great detail, that, aside from reviewing the corporate law advice, there was "no consideration or discussion on the

merits (or otherwise) of the Jersey companies entering into the option arrangements whether from their own perspective or taking into account the wider benefit to the group", that "[t]he Jersey board were simply administering a decision they were instructed to undertake by DS Plc, in checking the legality of the plan and then administering the other consequent actions prior to handing over completely to the UK group" and that the Jersey board "merely passed the formal relevant resolution for the Jersey companies to enter into the options and subsequently to exercise them on the basis of the instruction/certifications received without any engagement with the substantive decision albeit having checked (in tandem with DS Plc) that there was no legal bar to them carrying out the instruction". In the face of such findings, it was not open to the UT simply to assert in paragraph 50(3) of its decision that the Jersey directors "gave detailed consideration to the appropriateness of the Scheme … and concluded that the transactions were in the best interests of the shareholders and therefore in the best interests of the Jersey Companies". Again, to say, as the UT did in paragraph 74(3)(b) of its decision, that the FTT found that "[t]he Jersey directors applied their minds to the Scheme, and positively concluded that they could lawfully cause the Jersey Companies to enter into the options to acquire the relevant assets and then acquire those assets pursuant to those options" takes no account of the fact that, while the FTT found the Jersey directors to have known, understood and considered the lawfulness of what they were doing, they had not engaged with the substantive decision.

85. In all the circumstances, I do not consider the UT's criticisms of the FTT to have been well-founded. In my view, the UT was not justified in setting aside the FTT decision for the reasons it gave.

Conclusion

86. I would allow the appeal.

87. Not having heard full argument on them, I would not myself wish to express a view on the reservations which Nugee LJ voices in his judgment.

Lord Justice Nugee:

88. I am very grateful to Newey LJ for setting out the position with such clarity. I agree with him that the UT's criticisms of the FTT's decision were not well-founded for the reasons that he gives at paragraphs 72 to 84 above.

89. As Newey LJ has explained, the UT's reasons for concluding that the FTT's decision was flawed and could not stand are found in section D(3) of the UT's decision (headed "Analysis" and consisting of paragraphs 40 to 55). The core of the reasoning is found in paragraph 45 (cited by Newey LJ at paragraph 56 above) where they refer to the basis for the FTT's conclusion as being that the directors had failed to decline to do something improper or inadvisable in that they had entered into uncommercial transactions; and at paragraph 46 (cited by Newey LJ at paragraph 57 above) where they say that this conclusion rests on a fundamental misunderstanding of both the nature of the transactions and the duties of Jersey directors. Most of the rest of the analysis explains the latter two points.

90. I agree with Newey LJ that the central flaw in this analysis is that it mischaracterised the basis of the FTT's decision. As he says in paragraph 73 above, although the FTT did frequently refer to the transactions as "uncommercial", they consistently qualified this as being "uncommercial for the companies themselves" (paragraph 75 of their decision), "uncommercial from the Jersey companies' perspective" (paragraph 215(8)), "which made no commercial sense for the companies themselves" (paragraph 410) and the like. What they meant by this is explained in paragraph 402(1), namely that the companies "would acquire assets standing at a loss for a substantial amount in excess of their market value".

91. We were not taken to the details of the transactions in argument although we were provided after the hearing with a copy of the PwC paper sent to the directors on 10 June 2004 (see paragraph 20 above). Although the precise figures may have changed, this is sufficient to show the scale of the overpayments involved. According to the PwC paper, the L&R Companies had a market value of c £17.6m, but a base cost for CGT purposes of c £21.5m, and it was proposed that "JerseyCo 1" should acquire them at a price of c £27.4m (the base cost plus indexation); in the case of the two Properties the corresponding figures were: market values of c £7m and c £10m, base costs of c £13.1m and c £12.6m, and proposed acquisition prices (base cost plus indexation) of c £20.1m and c £14.5m respectively. It seems to me that the FTT were entirely justified in describing these transactions as "uncommercial from the Jersey companies' perspective" in that they were being asked to acquire assets at well over their value; and the fact that DS plc was willing to fund the transactions did not mean that this characterisation by the FTT was based on a misunderstanding. The FTT understood that the transactions were to be funded by DS plc, but even with the overpayments being funded by DS plc, there was, as the FTT said, a "lack of any commercial benefit" to the Jersey companies themselves (paragraph 412 of their decision). That was entirely in line with what PwC had said at the outset, namely that there was an "absence of corporate benefit": see paragraph 16 above. It was also consistent with the oral evidence before the FTT: Mr Christensen said "I acknowledge that there was no commercial benefit for the Jersey companies per se" (paragraph 206 of the FTT decision). I do not think it betrays any misunderstanding by the FTT. And, as Newey LJ says (paragraph 74 above), the FTT understood perfectly well that the transactions were being undertaken for the benefit of the wider group.

92. The UT were therefore wrong to say that the FTT had fundamentally misunderstood whether the transactions were "uncommercial". This error led them to mischaracterise the basis for the FTT's conclusion as being that the directors of the Jersey companies had "failed to decline to do something that was improper or inadvisable". This was not the basis of the FTT's conclusion at all. The basis of the FTT's conclusion was that the directors had regarded themselves as in effect instructed to carry out the transactions, and, subject to checking their lawfulness, proceeded to do so without engaging with the substantive decision: see paragraphs 66 and 72 of Newey LJ's judgment above. The FTT went out of their way to say that they were not suggesting that the directors acted improperly: see paragraph 75 of Newey LJ's judgment above. Nor did they say that the transactions were somehow inadvisable. What they said was that the transactions, being uncommercial from the perspective of the Jersey companies, gave rise to corporate law issues (paragraph 402(2) of their decision). That they plainly did: this had been flagged up by PwC in their initial paper of 6 April 2004 (paragraph 16 above), and was what led to the

taking of corporate law advice both from UK counsel (Mr Michael Todd QC) and from Advocate Strang in Jersey (paragraph 25 above).

93. I agree therefore that the UT's decision cannot stand.

94. As Newey LJ has explained (paragraph 65 above) Mr Nawbatt relied on the fact that there was no Respondent's notice seeking to uphold the UT's decision on an alternative basis; he concludes that it logically follows that the appeal should be allowed and the decision of the FTT restored. I see the force of that (and I understand that David Richards LJ is of the same view), and I accept that that is indeed the consequence. But I have very considerable reservations about the FTT's reasoning and would not want this outcome to be seen as an endorsement by me of the FTT's reasoning.

95. Since it makes no difference to the result, I will set out the basis for my reservations relatively briefly.

96. The question is where the Jersey companies were resident at the relevant time. We were told that for CGT purposes the critical date was the date of acquisition by the Jersey companies which was on 12 July 2004 when they exercised the options (or possibly when the formalities were completed either that day or shortly thereafter – paragraph 33 above).

97. That turns on where CMC was being exercised at the relevant time. For this purpose I do not doubt that one can look at everything done by the Jersey companies between 10 June 2004 when they were incorporated and 20 July 2004 when the Jersey directors resigned (paragraphs 18 and 35 above).

98. There is no dispute that the test for where the CMC of a company is being exercised is that laid down by the House of Lords in *De Beers Consolidated Mines Ltd v Howe*, cited by Newey LJ in paragraph 6 above, namely where the company "really keeps house and does business". So the question is where the Jersey companies did business in the relevant period. That requires one to ask what their business was in that period. This is not a difficult question. They were incorporated for a single purpose, as the FTT rightly found, namely to play their part in implementing the tax planning devised by PwC. That required the Jersey companies to enter into and then exercise the options, and the Jersey directors then to resign so that the companies could acquire a UK residence.

99. There is no doubt that the Jersey companies did enter into the options and then exercise them. (There is also no doubt that the Jersey directors then resigned, although this is not to my mind actually relevant: those were acts of the directors rather than acts of the companies, and I would myself have thought that when a director resigns as director that would not normally be described as the exercise of management and control of the company, or as the company keeping house and doing business.) So the next question is where the Jersey companies decided to enter into and exercise the options; and that in turn leads to the question who, on behalf of the Jersey companies, decided to do so, it not being disputed that if the decision was made by the directors, it was made in Jersey.

100. One would normally expect a company's business to be managed by its board of directors. That is their function, to manage the company's business. In the present case, on the face of it, the companies' business was indeed managed by their boards of directors, who between their incorporation on 10 June 2004 and the resignation of the Jersey directors on 20 July 2004 held no less than four board meetings, on 11 June, 25 June, 28 June and 12 July 2004 (paragraphs 22, 28, 30 and 31 above). In the course of those meetings, each board of directors, among other things, (i) agreed to seek UK corporate law advice, picked up a point about stamp duty, telephoned PwC for advice on this, thought about the rental income and outgoings on the Properties, and dealt with banking arrangements (11 June) (FTT decision at paragraphs 136 and 147-154); (ii) reviewed the option agreement (in sufficient detail to pick up a discrepancy in the notice period), reviewed the UK and Jersey opinions, noting that buying assets at an overvalue was "fine" provided the companies were solvent, telephoned Landwell and spoke to Ms Chan about the discrepancy in the notice period, resolved to enter into the options, and resolved to amend the articles to allow an increase in share capital (25 June) (FTT decision at paragraphs 185(6), 193 and 215); (iii) resolved to approve the transfer of shares from the nominees to DS Plc (28 June) (FTT decision at paragraph 216); and (iv) noted that the conditions for the options to be exercised were satisfied, and resolved to exercise them (12 July) (FTT decision at paragraphs 237 and 252).

101. Mr Grodzinski said that the FTT's decision was the first time in any case where the local board of directors of a company had actually met, had understood what they were being asked to do, had understood why they were being asked to do it, had decided it was lawful, had reviewed for itself the transactional documents, had been found not to have acted mindlessly, but had nevertheless been found not to have exercised CMC. He submitted that that was a significant departure from the previous case law. That seems to me to be right.

102. In those circumstances it is worth asking why the FTT reached the conclusion it did. The answer they gave can be seen from their conclusions: see in particular paragraphs 423 and 430 (cited by Newey LJ at paragraphs 44 and 48 above). There they say that the Jersey directors "were not … actively engaging in a decision to implement the tax planning" or "merely passed the relevant resolution … without any engagement with the substantive decision". That picks up what they said in paragraph 397 about engaging actively in the decision making process and at paragraph 401 about the need for proper consideration to be given to the proposal: see paragraphs 37 and 38 above.

103. But I do not think the authorities establish that CMC can only be exercised by "actively engaging" with the decision if that means (as it appears the FTT meant) considering for themselves the merits and demerits of a proposal. The question is not why the directors made the decision they did, or how much thought they gave to it, or what they did or did not take, or should or should not have taken, into account. The question is a much simpler one, namely: did they make the decision? The authorities establish that in some cases it can indeed be said that the duly appointed board of directors is not exercising CMC: this is so where it has "stood aside" and "never purported to function as a board of management" (*Unit Construction Co Ltd v Bullock*: see paragraph 7 above); or if directors sign documents "mindlessly, without even thinking what the documents are" (*Wood v Holden*: see paragraph 9(vii) above); or where the local board goes through a "charade of documenting decisions made

elsewhere by others" and is "acting out the pretence of making those decisions" (*Bywater Investments Ltd v Commissioner of Taxation*: see paragraph 13 above).

104. The present case does not seem to me to be like that. On the FTT's findings, the directors regarded themselves as in effect instructed to enter into, and then exercise, the options by DS plc on the basis that DS plc certified that it was for the Group's benefit, and without discussing or considering the benefit for themselves. That seems to me to be an explanation of why they decided to enter into, and then exercise, the options; it does not to my mind justify a conclusion that they did not decide to do those things at all.

105. Given that it makes no difference to the outcome of this appeal, I do not think it necessary to elaborate any further, but I will add two short points. One is that the FTT said that the "strategic decision" was "whether, assuming there is no legal bar, it was a good plan for the Jersey companies to implement the tax planning by acquiring assets at an overvalue" and that the Jersey boards did not make that decision (paragraph 417 of their decision cited by Newey LJ in paragraph 41 above). I agree that DS plc did make that strategic decision; if they had not, nothing would have happened at all. But that does not seem to me to take away from the fact that the Jersey boards also made decisions for themselves on behalf of the companies, namely to enter into, and exercise, the options, having satisfied themselves that it was lawful to do so.

106. Second, there was some discussion in argument as to what the position would have been if DS plc had formally exercised its constitutional power as shareholder of the Jersey companies (or given directions to the nominees to do so) to make the relevant decisions. I can see that that would give rise to rather different considerations but we were told by Mr Grodzinski that the case had never been put on that basis by HMRC, and Mr Nawbatt did not suggest he was wrong. In those circumstances I do not propose to say any more about the point.

107. Those are the reasons why I have considerable reservations about the FTT's reasoning; as I have already indicated however I accept that this does not affect the outcome of this appeal which I agree should be allowed.

Lord Justice David Richards:

108. I agree that this appeal should be allowed, for the reasons given by Newey LJ in his judgment.

109. I do not have any concerns about the decision of the FTT or their reasons for coming to their decision.

110. The FTT was right, in my judgment, to say at [387] that the issue of the residence of Jersey companies for UK tax purposes was "an essentially factual enquiry as to who makes the strategic and management decisions regarding the company's business and where those decisions are made." It was, of course, the FTT's duty to hear and assess the evidence to enable that question to be answered. They did so in a conspicuously careful and thorough way, the length of their Decision no doubt reflecting the degree of detail in which the case was presented and argued by the parties.

111. The findings of fact have been recited and analysed in the judgments of Newey and Nugee LJJ. The clear conclusion to which the FTT came, on the evidence before them, was expressed in a number of different ways, all to the same effect. As it was put by the FTT at [422], "the Jersey directors were acting under what they considered was an 'instruction' or 'order' from the parent".

112. The inevitable conclusion from that finding was, in my judgment, that the decision to enter into the relevant transactions was taken by the parent in the UK, not by the directors in Jersey. They were, of course, concerned to ensure that what they were being instructed to do was lawful. If it was unlawful, the directors would themselves be acting unlawfully if they implemented the instruction and it would be no defence for them to say they were acting under orders from the parent company. Likewise, the directors were concerned to ensure that there were no unexpected liabilities for the Jersey companies, such as stamp duty, and to ensure that the documents were in proper order. None of that detracts from the FTT's finding as to who made the decision to enter into the transactions and where that decision was made.

113. None of this involved any breach of company law, assuming that in relevant respects there is no material difference between Jersey and English law. Provided a proposed transaction is lawful and the interests of creditors are not engaged, the directors commit no breach of duty in complying with an instruction from the parent company. No particular formality for such an instruction, such as a written resolution of the members or a resolution passed at a meeting, is required.

114. Even if it had involved a breach of Jersey company law, that would have been, as my Lords have said, nothing to the point. The relevant question for tax purposes is simply by whom and where was the decision taken. The UT's discussion of the duties of the directors of the Jersey companies, which as we understand it formed no part of any party's case, was with respect a distraction.

115. I will nonetheless add this. Once again assuming no material difference between Jersey and English law, the actions of the Jersey directors involved no breach of duty on their part. This was not because the transactions could be said to be entered into "with a view to the best interests" of the companies. The UT was right that in the case of a solvent company the primary concern of directors is the best interests of the shareholders in their capacity as such. That is because, if the company is solvent, the interests of the company and the shareholders are aligned, but it does not follow that a transaction that benefits the shareholders but not the company can be characterised as being in the best interests of the company. In those circumstances, the directors must rely on the instruction or (as the case may be) the approval of the parent. It appears to me, contrary to the view of the UT, that PwC were right in their advice that the directors had to rely on article 74(2) of the Companies (Jersey) Law 1991.