[2015] UKFTT 0401 (TC)

TC04578

Tribunal ref: TC/2009/11831

CORPORATION TAX — writing-down allowances — ships — Capital Allowances Act 2001 s 123(4) — whether obtaining of allowance "main object, or one of the main objects" of the relevant transactions — yes — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LLOYDS BANK LEASING (NO 1) LIMITED **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp
Judge Rachel Short

Sitting in public in London on 26 and 27 February 2015

Mr Jonathan Peacock QC and Mr Michael Ripley, counsel, instructed by Norton Rose Fulbright, for the appellant

Mr David Ewart QC, Mr Raymond Hill and Ms Stephanie Barrett, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. The issue in this appeal is whether the appellant, now known as Lloyds Bank Leasing (No 1) Ltd but formerly known as Lloyds TSB Equipment Leasing (No 1) Ltd and to which, like others before us, we shall refer as LEL, is entitled to writing-down capital allowances in respect of the expenditure of £198,226,884 which it incurred in the purchase of two ships, the Arctic Voyager and the Arctic Discoverer, for which it contracted in 2002 and which were delivered in 2006. LEL is a UK-registered company carrying on the business of finance leasing. It paid instalments towards the price of the ships in 2002, 2003, 2004 and 2005, and claimed allowances for the amount paid in its corporation tax returns for the period ending on 30 September in each of those years; the claims were not challenged at the time. It made a further claim in respect of the balance of the price, which was paid in 2006. On this occasion the respondents, HMRC, challenged the claim, and made an amendment to the relevant return which had the effect of denying the claim for 2006 and, by means of a balancing charge, of recovering the allowances which had been claimed in the earlier years.

2. LEL appealed to this tribunal against that amendment. Its appeal was heard in September 2011 by a panel composed of Judges Sadler and Shipwright ("the FTT"). There were four issues before the FTT, to the detail of which we shall come. They decided issues 1, 2 and 4 in favour of LEL, and issue 3 in favour of HMRC but, as success on issues 1, 2 and 4 was sufficient, the appeal was determined in LEL's favour: see [2012] UK FTT 47(TC), [2012] SFTD 572.

3. HMRC sought and obtained permission to appeal to the Upper Tribunal, and their appeal came before a panel of Newey J and Judge Nowlan in 2013. They agreed with the FTT on issues 1, 2 and 3, but whereas Newey J also agreed with the FTT on issue 4, Judge Nowlan did not. However, as Newey J had a casting vote, the FTT's decision was upheld: see [2013] UKUT 0368 (TCC), [2014] STC 191.

4. The matter then proceeded to the Court of Appeal in June 2014. By this stage, HMRC challenged only the decision on issue 4, while LEL, by respondent's notice, appealed against the decision on issue 3 (which was whether issue 4 arose for consideration at all). Rimer LJ (with whom Patten and Kitchin LJJ agreed) rejected LEL's appeal, but allowed HMRC's appeal in respect of issue 4, by setting aside the FTT's decision on the point and remitting the appeal to the same panel for the issue to be reconsidered: see [2014] EWCA Civ 1062, [2014] STC 2770. Unfortunately, by then both Judge Sadler and Judge Shipwright had retired and, with the agreement of the parties, it was decided that the remitted appeal should come before a differently constituted panel.

5. The terms of issue 4 have changed as the appeal has progressed, and it is, we think, helpful to explain something of the background before we reach the formulation we are required to consider, which is set out at para 23 below. We have endeavoured in what follows to make our decision comprehensible without recourse to the decisions and judgments which have preceded it, and have therefore engaged in rather more explanation and quotation than those familiar with the case might require.

The core facts

6. We shall need later to examine in detail some of the evidence before the FTT and the findings of fact they made from that evidence but we cannot do better, by way of setting the scene, than repeat the summary of the core facts set out in the judgment of Rimer LJ and which he derived from the FTT's findings:

> "[8] The Snøhvit project is a joint venture set up to extract, process and deliver to market LNG [liquefied natural gas] from the gas fields in the Barents Sea off the north-west coast of Norway. There were originally seven partners ('the Snøhvit Sellers') in the consortium, of which the lead member was Statoil SA, although since the relevant transactions were entered into the Snøhvit Sellers now consist only of Statoil. The Sellers required a fleet of dedicated, purpose-built vessels to ship the LNG to its long-term customers. Because of the location of the gas field in the high north, the vessels required were 'winterised' ones with design features capable of coping with the severe weather features they would encounter. The vessels were required to meet high standards.
>
> [9] Statoil led the tender process to select a counterparty for the provision of the vessels. That process commenced in January 2001. Some 55 companies were invited to participate in a pre-qualification process. Statoil also sought an owner and operator of the vessels which would hire them to the Snøhvit Sellers on a long-term time charter on commercial terms that they specified. Those terms were to reflect, over the time charter period, a return of the capital cost of the vessels and a finance charge on such cost, plus the expenses (or an estimate) of operating the vessels. It was a further requirement of the Snøhvit Sellers that, as the vessels would operate only within the Atlantic Basin, the commercial and technical management of the vessels in the course of their operation should be located in the European time zone.
>
> [10] The mandate to own and operate the vessels was, after a tender process, awarded to Kawasaki Kisen Kaisha Limited ('K-Line') [a Japanese company]. K-Line already had a subsidiary company incorporated in England and Wales, K-Line (Europe) Limited ('K-Euro'). K-Euro had an established shipping trade and K-Line intended that, however the vessels might be financed, K-Euro would be the company by which it met the requirements of the Snøhvit Sellers for the commercial and technical management of the vessels.
>
> [11] In the summer of 2001, Statoil recommended to the Snøhvit management committee the award of the contract for the vessels to K-Line, as was later approved by the Norwegian Parliament. On 19 December 2001, there took place what the FTT called 'the preliminary stage', which included the following: (a) the entry by K-Line into a shipbuilding contract with Mitsui Engineering & Shipbuilding Co, Ltd in respect of the first vessel, the Arctic Discoverer; (b) a shipbuilding contract with Kawasaki Heavy Industries, Ltd in respect of the second vessel, the Arctic Voyager; (c) two time charterparties with Statoil, on behalf of the Snøhvit Sellers; and (d) a Memorandum of Understanding ('MOU') with Statoil. This preliminary stage did not include any financing in respect of the vessels: the MOU recorded the parties' intentions to seek such financing. K-Line reserved the right to introduce other parties as co-owners and to restructure the ownership rights and arrangements.

[12] K-Line had, during the course of the tender process, sought indicative pricing for the vessels: it needed to do so in order for a time charter day rate to be calculated. K-Line met several institutions in order to discuss financing. The forms of financing it discussed with such institutions were debt financing, lease financing and securitisation of the project cash flows. One of the prospective lessor banks was Lloyds TSB Leasing Ltd ('Lloyds Leasing'). On 16 April 2002, heads of terms for the financing of the vessels were entered into with Lloyds Leasing by what the FTT called Northern LNG and the Snøhvit Sponsors. Each of Northern LNG Transport Co, I, Ltd and Northern LNG Transport Co, II, Ltd (severally or together, 'Northern LNG') became in due course the lessee of one of the two vessels from LEL. They are Cayman Island joint venture companies, whose shares were owned in different proportions (the difference is not material) by K-Line, Statoil, Mitsui and Iino Kaiun Kaisha ('the Snøhvit Sponsors').

[13] The following key transactions were entered into on 19 September 2002:

(1) Novation agreements between the shipbuilders, K-Line, LEL and Northern LNG under which certain of K-Line's obligations under the shipbuilding contracts were assumed by LEL and some by Northern LNG and K-Line; the substance was that LEL became the purchaser of the vessels.

(2) Headleases in respect of each vessel granted by LEL to Northern LNG under which each vessel was leased on finance terms for a primary period of 30 years from delivery, with a right for the lessees to renew the leases for one-year secondary periods. The effect of these leases was to vest the equity reversionary value in the vessels in Northern LNG.

(3) Bareboat charters in respect of each vessel granted by Northern LNG to K-Euro under which K-Euro was entitled to possession and use of the vessels over the 20-year bareboat charter period. That period could, under options exercisable by K-Euro, be extended for a term of five years. The hire payable by K-Euro was fixed for the first 12 years and was expressed to be a fair commercial rate.

(4) Time charter novation agreements between K-Line, the Snøhvit Sellers and K-Euro, under which the time charters entered into in respect of the vessels on 19 December 2001 were novated by K-Line to K-Euro, which became the disponent owner.

(5) Detailed and complex security arrangements were put in place in order to safeguard the interests of the different parties and the flow of payments under the lease and ancillary arrangements.

[14] K-Euro's business was expanded from 2002 onwards, in particular by the establishment of a bulk and gas carrier division. K-Euro took on charter, or undertook the management of, a number of LNG and bulk carriers.

[15] With effect from 1 January 2006, K-Euro's business was reorganised, in a way involving the following steps:

(1) The K-Euro LNG business, apart from the leases in respect of the two vessels, was transferred to K-Line LNG Shipping (UK) Ltd, a fellow subsidiary ('K LNG').

(2) The Bulk shipping business was transferred to K-Line Bulk Shipping (UK) Ltd.

(3) A new company, K-Line (Europe) Ltd, was incorporated.

(4) The agency business in respect of the car carrier and container vessels was transferred to the new K-Euro company.

[16] The effect of this was that whilst K-Euro retained its interest in the vessels under the bareboat and time charters, it contracted out the management of the vessels to K LNG and also transferred all other parts of its business to other fellow subsidiaries. In addition, the hire payable by K-Euro under the bareboat charters was, for a specified period, reduced. As a further part of this re-organisation, but not until October 2006, K-Euro's share capital was re-organised so that its shareholders (and their respective interests) corresponded with those of Northern LNG, and its shareholders contributed further share capital. The reason for this re-organisation was because it was expected that, contrary to original expectations, K-Euro would make a substantial loss in operating the vessels and because certain of the security arrangements with respect to the lease structure through which K-Euro held its interest in the vessels were proving to be a commercial restraint upon the management and development of K-Euro's other business interests.

[17] The Arctic Discoverer was delivered to LEL in February 2006; the Arctic Voyager in July 2006. The leasing arrangements in respect of each vessel took effect upon their respective delivery. K-Euro changed its name on 3 February 2006 to Polar LNG Shipping (UK) Ltd, but I shall stick to its original name." [We shall do likewise.]

The relevant law

7. A writing-down allowance at the rate of 25% on a reducing balance basis is generally available to a person who is carrying on a trade and who incurs capital expenditure on the provision of plant or machinery for the purposes of that trade. That general rule is set out in s 11 of the Capital Allowances Act 2001 ("CAA"). It is the opening section of Part 2 of the Act, which deals with "Plant and machinery allowances". It was and is undisputed that, taken alone, s 11 conferred the benefit of a writing-down allowance on LEL. However, sub-s (5) provides that "the general rule is affected by other provisions of this Act …".

8. The provisions which are relevant in this case are to be found in Chapter 11 of Part 2, which deals with "overseas leasing", identified by s 105(2) in this way:

> "Plant or machinery is used for overseas leasing if it is used for the purpose of being leased to a person who—
>
> (a) is not resident in the United Kingdom, and
>
> (b) does not use the plant or machinery exclusively for earning profits chargeable to tax."

9. The end users in this case, the Snøhvit Sellers, were not resident in the United Kingdom and their profits were not subject to UK tax, and accordingly the ships were to be used for overseas leasing within the meaning of that subsection. Further provisions of Chapter 11 have the effect, depending on the circumstances, of restricting the writing-down allowance applicable to plant and machinery used

for overseas leasing to 10% (s 109, which is not applicable in this case) or of eliminating it altogether (s 110). The latter section applies when the plant or machinery is used for overseas leasing which is not "protected leasing". That term is defined, so far as relevant here, by s 105(5)(b) to include

> "if the plant or machinery is a ship, aircraft or transport container, the use of the ship, aircraft or transport container for a qualifying purpose under section 123…."

10. Section 123 was central to the issues before the FTT, and is central to issue 4 as we must now determine it. It provides as follows:

> "(1) A ship is used for a qualifying purpose at any time when it is let on charter in the course of a trade which consists of or includes operating ships by a person who is—
>
> (a) resident in the United Kingdom or carries on the trade there, and
>
> (b) responsible for navigating and managing the ship throughout the period of the charter and for defraying—
>
> (i) all expenses in connection with the ship throughout that period, or
>
> (ii) substantially all such expenses other than those directly incidental to a particular voyage or to the employment of the ship during that period.
>
> (2) Subsection (1) applies, with the necessary modifications, in relation to aircraft as it applies in relation to ships.
>
> (3) For the purposes of subsection (1)(b) a person is responsible for something if he—
>
> (a) is responsible as principal, or
>
> (b) appoints another person to be responsible in his place.
>
> (4) Subsections (1) and (2) do not apply if the main object, or one of the main objects—
>
> (a) of the letting of the ship … on charter,
>
> (b) of a series of transactions of which the letting of the ship … on charter was one, or
>
> (c) of any of the transactions in such series,
>
> was to obtain a writing-down allowance determined without regard to section 109 (writing-down allowances at 10%) in respect of expenditure incurred by any person on the provision of the ship or aircraft."

11. Issues 1 and 2 before the FTT related to the requirements of s 123(1). As we have said, they were determined in LEL's favour, and accordingly we proceed for the purposes of this decision upon the basis that the use made of the ships by K-Euro was a "qualifying purpose", provided that it was not excluded by s 123(4), which was the subject of issues 3 and 4. Although issues 1 and 2 are not before us, it is necessary to bear in mind, in what follows, the requirements of sub-s (1): that the management of the ship is undertaken by a UK-resident who is engaged in the shipping trade, and who bears the expenses incurred in respect of the ship.

12. LEL's argument in respect of issue 3 was that the subsection was not engaged because (as was common ground) it could never come within CAA s 109 and be eligible for a reduced, 10%, allowance: if it failed to meet the necessary requirements it would instead fall within s 110 and would be entitled to no allowance at all. Therefore it could not be said to have a main object of obtaining an allowance "without regard to section 109". Section 123(4) is aimed, the argument continued, at a taxpayer seeking to escape from s 110 by bringing himself within s 109, but as this was not a possibility in LEL's case the subsection did not apply to it. As we have said, LEL's argument was unsuccessful before the FTT, the Upper Tribunal and the Court of Appeal.

13. Issue 4 was therefore whether, on the facts as found by the FTT, s 123(4) operated to disqualify LEL from the benefit of the allowances. As we have said, the formulation of issue 4 has changed over time and we need to explain a little more of that process.

The FTT's decision

14. The FTT's decision sets out, in much greater detail than we have given above, the evidence they heard and their conclusions about the commercial drivers for the transactions, the reasons why they were structured as they were, and various other matters. We will explore some of that detail shortly; much of the remainder can now be disregarded as it relates only to issues 1 and 2. The FTT also undertook an examination of the legislative purpose behind s 123, accepting LEL's argument—which is also advanced before us—that the aim is to exclude the benefit of writing-down allowances from chartering companies with no more than a "brass plate" presence in the UK, while not penalising those carrying on a genuine shipping business and paying UK tax on their profits. The FTT also observed, at [386], that "Section 123(4) CAA 2001 cannot have been intended to emasculate the incentives available through the capital allowances legislation by reason of s 123(1) CAA 2001". As we see it, the view taken by the FTT of the intention behind s 123(4) may have coloured their approach to the question before them; we shall return to this point at para 34.

15. After their extensive analysis of the evidence the FTT said this:

> "[420] We conclude therefore that a main object of the letting of the vessels on charter, and of the grant of the bareboat charter to K-Euro and the novation of the time charter to K-Euro, was to secure for K-Euro a commercial benefit, that commercial benefit accruing from operating the vessels on charter with the intention of realising a profit for K-Euro. We also conclude that K-Euro entered into those transactions as part of, and in order to achieve, a wider commercial objective, namely the development of its business, in pursuance of the business strategy of the K-Line group, of operating and managing ships transporting bulk and gas products within, or to and from, the Atlantic Basin.
>
> [421] The question then is whether it was also a main object of the transactions to obtain the writing-down allowances.…"

16. At [422] to [426] the FTT discussed the tax advice which K-Line had obtained, concluding at [426] that:

> "… We would characterise K-Line's attitude in seeking advice as being one of due diligence—the course of action was decided upon, but it needed to be as certain as it could before approaching prospective lessors that the arrangements it intended should be implemented would indeed secure the benefits to be derived from the capital allowances."

17. They then set out their conclusion about the application of s 123(4) at [427]:

> "The objective of obtaining capital allowances was not a main objective of the transactions for the letting of the vessels on charter. In our judgment the commercial objective we have identified above was paramount. Each transaction in the series of transactions relating to the letting of the vessels on charter had a commercial purpose: it created an economic interest, transferred or shared a commercial risk, or was in pursuance of a genuine business endeavour. Overall, it is the case that the main objective of the transactions whereby, in September 2002, K-Euro took on the rights and obligations which would, on delivery of the vessels, make it the disponent owner of the vessels, was to achieve a commercial benefit distinct from, and not dependent upon, obtaining capital allowances. The capital allowances were a route to reduced cost of funds for the financing of transactions already decided upon. The parties knew this to be the case if the capital allowances proved to be available, and they wanted to obtain the benefit of such allowances, by ensuring that, in carrying out their commercial objectives, they would comply with the necessary conditions upon which the capital allowances were dependant. In terms of priority or hierarchy, that was subservient to, or of lesser importance than, achieving the commercial purposes of the relevant transactions."

18. They accordingly allowed LEL's appeal.

The onward appeals

19. In the Upper Tribunal, Newey J took the view that the FTT had applied the correct test and that their conclusion was sufficiently supported by the evidence. Judge Nowlan, however, considered that although the FTT had identified the right test, they had not applied it correctly by evaluating the object (which LEL admitted it to be) of obtaining the allowances. He was not persuaded that the description of the seeking of advice as due diligence was realistic; as he put it at [130], summarising a section of the Upper Tribunal's decision in which they had examined the extensive correspondence and email traffic between the various parties during 2001,

> "… tax and financial advice were being sought for structural, and not due diligence, reasons; great attention was being paid to the UK tax sensitivities and to selecting the right vehicle that would perform the role of the 'UK lessee' and disponent owner, and that to describe any of this financial and planning advice as mere due diligence was simply untenable. There is also no indication in any of this correspondence that tax advice was being sought to ensure that the tax implications would be acceptable for a structure dictated by, and preferred for, commercial reasons. The tax and financial structuring appears to have been the dominant subject at least of all the relevant email traffic in this early period."

20. He also considered that the FTT had been misled by their interpretation of one of the authorities to which they referred, *Barclays Mercantile Industrial Finance Ltd v Melluish (Inspector of Taxes)* [1990] STC 314. He also considered

that the absence of any explanation of the conclusion at [427] demonstrated the unsoundness of the reasoning. We interpose that neither party relied before us on the *Melluish* case, implicitly recognising that it offers little assistance, and we shall not need to deal with it.

21. Judge Nowlan's view found favour with Rimer LJ when the case reached the Court of Appeal. He put his conclusions in this way:

> "[64] I have come to the conclusion that, putting it at its lowest, there is a very real concern that the FTT misdirected itself in its approach to the s 123(4) inquiry and that its decision is too unsafe to be allowed to stand. The most striking feature of the FTT's decision is that whilst it is, on its face, as painstakingly meticulous and comprehensive as they come, when the decision comes down to an assessment of whether or not the obtaining of the capital allowances was a s 123(4) 'main object', it is virtually unreasoned. The FTT opened its crucial [427] by asserting that the objective of obtaining capital allowances was not a main objective. It does not, however, then explain *why* it made that assessment save by explaining that the commercial objectives of the transactions were paramount, with each transaction in the relevant series having a commercial purpose. The thrust of [427] was that the achieving of each of those commercial purposes was the primary objective, and that obtaining the capital allowances was, in terms of priority, subservient to or of lesser importance than achieving such commercial purposes. The FTT also said in [427] that '[t]he capital allowances were a route to reduced cost of funds for the financing of transactions already decided upon.' If, however, that was intended to suggest (and it may be that it was not) that the leasing arrangements that would enable the obtaining of the capital allowances were decided upon before it was realised that such allowances would be obtainable, that is inconsistent with the course of events that the FTT had explained in [218] to [230], which I have earlier set out.
>
> [65] The apparent deficiency in [427] is, in my judgment, that although the FTT was no doubt entitled to find that each transaction in the relevant series served a genuine commercial purpose, it does not follow that the obtaining of the capital allowances was incapable of also being *a* main object of the transactions, even if it was not *the* main object of the transactions. The FTT does not explain why it was not such a main object. In my view, the likely explanation for this omission is, as Judge Nowlan concluded, that the FTT was wrongly influenced by *Melluish* into the assessment that, provided all the transactions were entered into for genuine commercial reasons, the obtaining of the capital allowances was necessarily an immaterial, subservient consideration. In my view, however, that does not follow. Even if each of the transactions was entered into for a genuine commercial purpose, it may still be the case that a main object of structuring them in the way they were was to obtain the capital allowances; and the FTT's findings in [218] to [230] might be said to provide a factual basis for a finding that it was." [original emphasis]

22. The matter was therefore remitted to the FTT in order that they could reconsider their conclusions about issue 4. For the reasons we have given, that has not proved possible.

The issue before us

23. The parties recognise that we have not heard the evidence ourselves and that it is not practical for us to re-hear it. They do, however, agree that the FTT's decision sets out accurately and in detail the extensive evidence which was before them, including the oral testimony of four witnesses of fact. We had, moreover, a transcript of the hearing before the FTT, as well as all of the documentation which was available to them. The parties also agree that, with the exception of those recorded at [426] and [427], which we have set out above, the FTT's findings of fact are to be taken as they stand. In those circumstances the formulation of the issue which we must now decide is also agreed, as follows:

> "In the light of the Court of Appeal's judgment, the evidence before the FTT and the findings of fact in the FTT's first decision at paragraphs 1 to 257, 287 to 311 and 321 to 338, was it the main object or one of the main objects of any transaction or series of transactions which includes the letting of the vessels on charter to obtain writing-down allowances at 25%?"

24. Before going further we should mention what we consider to be a point which introduces a caveat, even if only a precautionary one, to that formulation. Whatever the deficiencies in the FTT's reasoning about the obtaining of capital allowances might be, it is plain that they found, at [427] and implicitly if not expressly elsewhere, that the paramount purpose of the transactions, at least taken as a whole, was commercial, namely the operation of the vessels by K-Euro with the objective of earning a profit and expanding its Atlantic basin business. We do not see anything in Rimer LJ's judgment which calls into question the soundness of that finding; rather, the criticism was of the FTT's failure to explain why the obtaining of capital allowances was not also a main object, even if not the paramount object, of the transactions or any of them. Although, as we understand it, HMRC at one time took the view that the finding of paramountcy might be challenged, they now accept that it is correct, or at least is a finding supported by the evidence.

25. It is also agreed that the transactions on which it is necessary to focus are the grant of the bareboat charters by Northern LNG to K-Euro (step (3) of those identified by Rimer LJ at [13]) and the novation of the time charter to K-Euro (step (4)). The effect of those steps was to insert K-Euro into the leasing chain as disponent owner—that is, the party with the responsibility for the commercial and technical management of the vessels, and exposure to the risks of operating them, including the possibility of a shortfall between the time charter fees received and the bareboat hire charge to be paid. HMRC's case is no more than that one of the main purposes of these steps was to secure writing-down allowances; they do not now argue that the FTT was wrong to conclude that they also had a commercial purpose.

26. The question divides into three elements: the identification of the correct test, in the light of the Court of Appeal's conclusions; the extraction of the evidence and findings relevant to this issue from the FTT's decision; and the application of the test to the facts. We should add, in case there should be any doubt about it, that we are not required to review the FTT's decision on issue 4, for example by determining whether it was supported by the evidence, but to reach our own conclusion on the re-formulated question set out above.

27. Nevertheless, LEL, represented before us by Mr Jonathan Peacock QC leading Mr Michael Ripley, argued that the FTT came to the right answer for the right reasons and we should ourselves adopt the same reasons. Mr Peacock added that although the Court of Appeal had set aside the FTT's decision on issue 4, they had done so not because it was plainly wrong but because it was inadequately explained. In particular, Rimer LJ said, at [64] (quoted above) that the FTT might have wrongly thought that if all of the transactions were entered into for genuine commercial reasons it necessarily followed that the obtaining of capital allowances was a subservient condition. That statement, however, seemed to disregard what the FTT said in the opening sentence of [421] (also quoted above) which made it clear that they had well in mind the possibility that there could be more than one main object, and that the question they had to address was whether, on the facts as they had found them, the gaining of the allowances was such an object. Viewed in that light, it could be seen that the reasoning was in fact sound, and that it should lead us to the same conclusion.

28. HMRC, represented by Mr David Ewart QC leading Mr Raymond Hill and Ms Stephanie Barrett, initially argued that the FTT's conclusion that securing the allowances was not a main object of the transactions or any of them was a finding which it was not open to them to make. That argument was not pursued before the Court of Appeal, and HMRC do not now say that it is an impossible conclusion. Their position (which in reality may not be very different) is that, when they are properly analysed, the findings of fact the FTT made do not support any conclusion other than that the obtaining of the allowances was a main object of the transactions.

The test of a main object

29. At [41] Rimer LJ said "that I do not regard section 123(4) as a cleverly drafted piece of legislation", a proposition with which we respectfully agree. As he also indicated at [64], it is implicit in the wording of the subsection that a series of transactions, or one transaction of a series, may have more than one main object. In addition, the possibility that one of those objects might be more important than the other or others, yet that all are properly to be regarded as main objects, is left open; if it were otherwise the FTT's finding that the commercial objectives were paramount would represent the end of the enquiry, but as the Court of Appeal has said, that is not what the subsection provides. What it also does not do is offer any guide to the boundary between an object which is a main object and one which, though necessarily still an object, is not a main object.

30. At [370] of their decision the FTT said:

> "The question we have to determine is whether the main object, or one of the main objects, of the letting of the Vessels on charter, or of a series of transactions of which the letting of the Vessels on charter was one, or of any of the transactions in such a series, was to obtain the 25 per cent writing-down allowances claimed by the Appellant in respect of its expenditure on the provision of the Vessels. If that is the case, the writing-down allowances cannot be claimed."

31. At [51] Rimer LJ agreed with that straightforward summary, but with a rider:

> "I make it clear that there is no doubt that, at [370], the FTT had earlier correctly summarised the effect of section 123(4), and, therefore, the question they had to determine. At [386], however, which was the second paragraph of their discussion of the rival arguments, they expressly adopted the submission of Mr Peacock for LEL that section 123(4) 'cannot have been intended to emasculate the incentives available through the capital allowances legislation by reason of section 123(1) …'. I would respectfully question the soundness of that observation, which perhaps carries with it what I would regard as an unwarranted suggestion that the ordinary interpretation and application of the inquiry mandated by section 123(4) must in some manner be diluted, whereas it would appear to me that, difficult though its determination may be in any particular case, the inquiry required by section 123(4) is clear."

32. Mr Ewart referred us to the more expansive observations of the Upper Tribunal, in a part of their decision reflecting their unanimous view:

> "[77] In the course of the Decision, the FTT observed (in paragraph 386) that the relevant statutory regime (of capital allowances) is designed 'to encourage taxpayers to make capital expenditure on certain assets (including ships)', so that 'section 123(4) ... cannot have been intended to emasculate the incentives available through the capital allowance legislation by reason of section 123(1)'. Furthermore the 'main object' test should be distinguished from others that addressed 'the main object of obtaining some form of tax advantage'.
>
> [78] Mr Ewart took issue with these remarks, and in our view he was justified in doing so. In the first place, while the capital allowance legislation is in general terms designed to provide an incentive for the acquisition of various assets (by accelerating tax depreciation as against the normal basis of depreciating assets for accounting purposes), section 123 appears in a group of sections designed to reduce, or in the present context to deny, capital allowances for acquisitions of assets that are ultimately leased to non-UK residents, *ie* for 'overseas leasing'. We accept that section 123 itself is designed to provide a qualification to that policy objective (*ie* still to concede 25% allowances to the parties intended to benefit from section 123), but when the 'main object' test clearly qualifies the ambit of the 'let-out', and reinstates the clear policy of reducing or denying allowances for overseas leasing, it would be wrong to proceed on the basis that the main object test should be construed narrowly so as not to conflict with the policy objective of the capital allowance legislation in general.
>
> [79] A second point concerns the reference to 'emasculat[ing] incentives available through the capital allowance legislation by reason of section 123(1)'. There would have been no risk of HMRC's contentions in this case undermining the claim for 25% allowances in the situation most obviously designed to benefit from the protection afforded by section 123, *viz* that of a UK resident shipping company (whether in a UK or a non-UK group) purchasing a ship outright with a view to time chartering it to an overseas customer. In a case of that kind, 25% allowances would plainly have been available. There would have been no question of a ship being bought without capital allowances being available, so that it could never have been said that any main object of the purchase (or any other related transaction) was to secure such allowances."

33. Those observations make it clear that the draftsman did not intend to confine the application of sub-s (4) to those who enter into artificial or contrived arrangements, or transactions with no other purpose than the securing of an allowance. Rather, the aim was to limit the availability of allowances to established UK ship operators undertaking overseas leasing, while excluding those who take steps to bring themselves into a position to satisfy the conditions imposed by sub-s (1), even if they do so for parallel commercial reasons; indeed, what Rimer LJ said at [64] makes it clear that even a paramount commercial purpose does not exclude the operation of sub-s (4). The Upper Tribunal's comments show that the circumstances in which writing-down allowances should be available in the case of overseas leasing are intentionally limited.

34. Mr Peacock nevertheless argued that such an interpretation, if taken literally, would make it virtually impossible in any case of overseas leasing to avoid the effect of the subsection since the availability or non-availability of an allowance has so great an effect on the economics of transactions such as those in issue here that no sensible businessman would leave the incidence of the allowances out of account when deciding on the form his transactions should take. Despite what Rimer LJ and the Upper Tribunal said, he argued, it cannot have been the intention that an allowance should be available only if the relevant transactions were structured in such a way as to satisfy s 123(1) by accident rather than by design—in other words, it could not have been intended that any conscious attempt to meet the requirements of sub-s (1) necessarily engaged sub-s (4). We shall have more to say about this point later.

35. Although Rimer LJ said that that the enquiry required by s 123(4) was "clear", he did not go on to offer an explanation of the correct approach to that enquiry as he saw it. There is, however, some earlier case law, on which the parties made submissions, and assistance can also be drawn from some further observations Rimer LJ made about how, as he saw it, the FTT had fallen into error.

36. Mr Peacock's starting point was to refer to what he described as the leading authority on the test for determining what constitutes a main object, *IRC v Brebner* [1967] 2 AC 18. The statutory provision in issue in that case was s 28(1) of the Finance Act 1960, an anti-avoidance provision relating to transactions in securities which also used the phrase "main object, or one of [the] main objects". The question was whether it applied to a group of shareholders of a company who had bought out the other shareholders using borrowed money. About two years later they extracted cash from the company by capitalising distributable reserves and then returning those reserves to themselves by way of capital reduction; the money so returned, which was not liable to tax, was used to repay the borrowings. Lord Pearce, at p 26C, said that the Special Commissioners (who had concluded that s 28(1) was not engaged) had "rightly approached the transaction as a whole from a broad common-sense view", and at p 27D added that: "The 'object' which has to be considered is a subjective matter of intention." Mr Peacock also drew our attention to what Lord Upjohn said, at p 30E:

> "… when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out — one by paying the maximum amount of tax, the other by paying no, or much less, tax — it would be quite wrong, as a necessary consequence, to draw the

> inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can."

37. Mr Peacock relied, too, on the analysis of the appropriate approach undertaken by Judges Berner and Brannan, in this tribunal, in *Versteegh Ltd v Revenue and Customs Commissioners* [2013] UKFTT 642 (TC), [2014] SFTD 547 at [139] to [160] (an analysis which was not challenged in the appeal to the Upper Tribunal: see *Spritebeam Ltd and others v Revenue and Customs Commissioners* [2015] UKUT 75 (TCC), [2015] STC 1222). In summary, the fact that a tax advantage is an inevitable consequence of a certain step, even if the taxpayer is aware of the advantage, does not carry with it the implication that obtaining the advantage is the taxpayer's purpose; therefore while the existence of a commercial purpose does not always override a tax purpose, the fact that the tax consequences inform a transaction does not necessarily mean that obtaining an advantage was a main object. In other words, purpose cannot be inferred from effect—thus the tax consequences of a transaction cannot be considered in isolation and it is necessary to examine all of the taxpayer's reasons for entering into the transactions. While "main" clearly means more than "important", the determination of whether a purpose is a main purpose is a question of degree. Mr Peacock accepted, however, that the significance of the tax advantage to the taxpayer, by comparison to the other advantages of the transaction, is a factor in the assessment.

38. Mr Ewart's argument began with an analysis of Rimer LJ's criticism of the manner in which the FTT dealt with the identification of the test. The starting point was what the FTT said at [387] and [388]:

> "[387] An incentive, by its nature, is designed to influence behaviour – to encourage a person to choose a particular course of action he might otherwise not have chosen to take. To an extent (and that extent will vary according to the circumstances of the person concerned) the obtaining of that incentive will be a motive for the course of action chosen. In some situations the incentive will be the prime motive, as where a taxpayer would not have made a particular capital investment without the benefits provided by capital allowances. In other situations the incentive will shape a transaction, rather than bring it about, as where a taxpayer intends, entirely for commercial reasons, to make a capital investment, and chooses to structure it one way rather than another so that capital allowances are available to him or to another person who can take the immediate benefit of those allowances. In yet other situations a taxpayer will make a capital investment entirely for commercial reasons, and the capital allowances will be a welcome, but incidental, benefit, perhaps influencing marginally the timing of the investment, but nothing more. There is a wide spectrum here, and every taxpayer's circumstances will place him at a particular point in that spectrum. Section 123(4) CAA 2001 must be applied with these factors in mind.
>
> [388] We consider, therefore, that it is not fatal to a taxpayer's claim to capital allowances, where that claim is based on section 123(1) CAA 2001, that the taxpayer has taken steps which seek to secure or bolster his likelihood of obtaining those allowances. The question which has to be answered is whether a main object of the relevant transactions was the

> obtaining of those allowances, and this envisages that there may be a range of objectives motivating the transactions, and that they must be assessed in some sort of priority or hierarchy and then some basis applied to separate those which are of sufficient significance to count as 'main' from those which are not. The issue is then which side of the line falls any objective of obtaining the allowances."

39. Rimer LJ did not criticise that proposition:

> "[52] As it seems to me, the alternative situations that the FTT was describing in the third, fourth and fifth sentences of [387] covered respectively: (i) a case in which the obtaining of the allowance was a main object; (ii) a case in which it may, or may not, have been a main object; and (iii) a case in which it will not be a main object. In [388], the FTT then explained that in any particular case there may be a hierarchy of objectives motivating the transaction, including the obtaining of a capital allowance, and that the inquiry must then be as to which of them are 'main' and which are not. I would not disagree with that approach".

40. What he did criticise, at [65] (see para 21 above), was the FTT's failure to heed their own guidance. They had, in substance, treated the existence of a commercial purpose as one which necessarily implied that any tax purpose was subservient when the two could co-exist as main purposes. So much was clear, said Mr Ewart, from what was said by Judge Short, in this tribunal, in *A H Field (Holdings) Ltd v HMRC* [2012] UKFTT 104 (TC) at [172]: "there are cases where tax, while not the only component, is a substantial component of the decision and therefore cannot be ignored".

41. HMRC did not disagree, Mr Ewart continued, that the object of the transaction must be determined from subjective intention. However, the manner in which s 123 is worded leads to two riders. First, the focus is not on the object of an individual taxpayer, but on "the letting of the ship" or on a "series of transactions" of which the letting of the ship was one, or on any individual transaction within the series. Thus what must be examined is the subjective intention of all of the parties to the transaction or series of transactions. Second, the fact (which HMRC accept in this case) that the transactions, taken as a whole, have an overall or primary commercial object is relevant but not determinative; and even if the obtaining of a writing down allowance was not a main object of the transactions taken as a whole, sub-s (4) is engaged if it was a main object of any one of them.

42. HMRC also do not disagree with the statement in *Versteegh* that the fact that tax consequences have informed the choice of transaction does not always carry with it the implication that obtaining an advantage was a main object. The approach to this part of the enquiry was spelt out by Lightman J in *IRC v Trustees of the Sema Group Pension Scheme* [2002] EWHC 94 (Ch), [2002] STC 276 (in a passage later approved by the Court of Appeal: see [2002] EWCA Civ 1857, [2003] STC 95). At [53] Lightman J drew attention to the need

> "to consider with care the significance to the taxpayer of the tax advantage. The tax advantage may not be a relevant factor in the decision to purchase or sell or in the decision to purchase or sell at a particular price. Obviously if the tax advantage is mere 'icing on the cake' it will not constitute a main object. Nor will it necessarily do so merely because it is a feature of the

> transaction or a relevant factor in the decision to buy or sell. The statutory criterion is that the tax advantage shall be more than relevant or indeed an object; it must be a main object. The question whether it is so is a question of fact … in every case."

43. Although the primary focus must be on the facts at the time at which the parties entered into the transactions subsequent events could not be ignored if they threw light on the parties' motives. Judge Nowlan had dealt with this point at [137] to [141]. He made various observations about a letter sent in January 2003 by a senior official of K-Line to the Snøhvit Sponsors, in which he wrote of K-Euro's becoming a participant, in a manner which suggested, if not more, that additional costs had been incurred when "[i]n accordance with the K-Euro Business Plan, K-Euro strengthened its organisation to be regarded as a UK bona fide company which was not considered in Original Understanding", meaning the arrangements entered into in December 2001. Judge Nowlan went on to say, at [140],

> "This letter seems to be suggesting, almost exactly as HMRC contended in its most extreme contention against Lloyds Leasing, that K-Euro's role was driven by the need and the desire to fulfil a tax role and that the company's business was built up to support that objective. At the very least it is suggesting that at least one of the reasons for inserting K-Euro into the structure was to support the tax objectives."

44. Judge Nowlan then turned to the 2006 reorganisation described by Rimer LJ at [15] and [16]. At [141] he said

> "The related terms of the 2006 reorganisation were similarly significant. The FTT agreed that a later transaction might throw light on the relevant objectives back in 2002, principally when the later transaction was contemplated in 2002. It is clear that the 2006 reorganisation was not so contemplated. It is still however highly significant that the 2006 reorganisation involved the abandonment of every feature of the 2002 structure of any commercial significance, but it carefully preserved the technical ability to claim the allowances. K-Euro, through its alphabet share rights, ceased to be a K-Line company, its A shares being under common control with Northern LNG I, and its B shares with Northern LNG II. All the 'other activities' inserted into K-Euro were removed, and because K-Line and not the Northern LNG companies were obviously meant to be responsible for maintenance and manning, those functions, while alone left in K-Euro, were sub-contracted to a different K-Line UK company. The feature, therefore, that every commercial objective was then abandoned, and the tax objective hopefully preserved in the changed conditions appears to throw some light, in retrospect, on the significance of the tax objective, if not indeed on the whole issue of primacy."

45. Those observations, said Mr Ewart, were entirely correct, and although the Court of Appeal did not adopt them in terms, it is plain from what Rimer LJ said at [64] that he considered that there was substance in them.

46. Mr Peacock did not accept the proposition that the enquiry must be into the subjective intentions of all the parties. It had been accepted by HMRC before the FTT, he said, that the requisite examination was into the subjective intention of the party or parties who actually made the decisions, which this case was K-Line alone; what the other parties hoped to achieve was a factor influencing K-Line's

decisions, and relevant in that sense, but no further. HMRC had argued before the Upper Tribunal and the Court of Appeal, he said, that the FTT should have considered the intentions of others, but had been unsuccessful. The argument was rejected by Newey J at [107] and [108] (Judge Nowlan did not deal with it as an issue) and by Rimer LJ at [63]. We interpose that although Newey J did indeed reject the argument, he did so in the light of the FTT's finding of fact that the decisions had all been taken by K-Line, a finding with which, he said, the Upper Tribunal could not interfere. We observe also that although Rimer LJ mentioned the argument at [63] he did not refer to it again and we are not persuaded in those circumstances that he did reject it, even impliedly.

47. It is convenient to deal with this area of disagreement now, and upon the assumption that we are not bound by what Newey J said and that the Court of Appeal was neutral on the point, or did not decide it. We recognise, following *Brebner*, that the test is subjective intention, but it is important to remember, as Mr Ewart said, that sub-s 123(4) focusses not on the parties to the transactions but on the transactions themselves. If one party to the transaction under examination is indifferent to its form, because he is unaffected by the tax consequence or because he can simply pass any tax burden on to another party, it is unlikely that, from his perspective, the transaction has the object of obtaining a tax advantage such as the allowances in issue here. But from the perspective of a party who is affected by the availability of a tax advantage, the shaping in a case such as this of a transaction, or series of transactions, in one way which meets the s 123(1) requirements rather than in another which does not must mean that from his perspective one of the objects (though not necessarily a main object) of the transaction or transactions is the obtaining of that allowance. If the legislation is to be interpreted sensibly, it must be the perspective of the shaper of the transaction which is to be examined in order to answer the statutory question.

48. We can therefore accept Mr Peacock's argument, to the extent of agreeing that the primary focus must be on the intentions of the person or persons who took the decision to enter into a particular transaction, or into one form of transaction or structure rather than another. But we do not think that in the circumstances of this case the argument takes us very far. We are not persuaded that Mr Peacock is right to say that the intentions or aims of others are relevant only to the extent that they influenced the decision-maker. It is plain—indeed Mr Peacock made the point himself—that the tax consequences of transactions such as these affect their economics, and it is in our view unrealistic to proceed from the proposition that, save for K-Line, the parties to the relevant transactions were unconcerned about the incidence of tax: on the contrary, they were all affected by it to a greater or lesser extent. In other words, it does not seem to us to matter much whether one looks directly at the intentions of the parties other than K-Line, or examines them through K-Line's eyes; K-Line must have been well aware that the incidence of tax was a consideration for all the parties.

49. Mr Peacock argued too that one should not be deflected by Lightman J's reference to "icing on the cake" to the view that when the benefit was greater there was an implication that securing the benefit was a main object. That was not what he had said; he had used the phrase as no more than an example of a result following from something plainly less than a main object, leaving room between such a case and one in which it is clear that the obtaining of the tax advantage was

a main object. In addition, HMRC's reliance on *A H Field* was misplaced; the point being made in the passage quoted was that tax and commercial objects can co-exist, but that is not in issue. As Lightman J made clear, the question is one of fact and it is to be determined by examining the relative importance to the decision-maker of the various factors leading to the decision to enter into the particular transaction or transactions.

50. The much more difficult question, on which we heard a good deal of urging rather than argument from authority, is the identification of the dividing line between an object which, though not paramount, is a main object and an object which, even if it is rather more than the icing on the cake, is nevertheless a subsidiary rather than main object. Before addressing this question we need to identify the FTT's relevant findings of fact.

The material facts extracted from the FTT's decision

51. Paragraphs [8] to [17] of the judgment of Rimer LJ, which we have set out above, deal with the relevant events but touch only incidentally and briefly on the reasons why the transactions were structured as they were. In this section of our decision therefore we examine the evidence relevant to that question and the FTT's various findings of fact about it, at the same time identifying those particular points on which the parties rely. As we have already observed, much of the FTT's decision relates to issues 1 and 2, and is of only incidental relevance to issue 4; and the greater part of what remains is now uncontroversial. For that reason we propose in the main to summarise the material findings and the evidence which led to them, while adding a reference to the relevant paragraph or paragraphs in the decision. We shall need, however, to quote some passages.

52. The material before the FTT consisted, as we have said, of the relevant documentation and the evidence of four witnesses: Mr Stennar Thomassen, until December 2007 the manager of the LNG shipping division of Statoil; Mr Hiromichi Aoki, a managing executive officer of K-Line; Mr Akira Misaki, general manager of K-Line's LNG division; and Mr Richard Williams, of the Lloyds Banking Group. They had all made witness statements and the first three gave oral evidence in addition; Mr Williams did not as his witness statement was unchallenged. As Mr Peacock emphasised, not only had Mr Williams' evidence not been challenged, the evidence of the three witnesses who were called by LEL at the hearing was said by the FTT to be "impressive and convincing". Statements of fact which appear below, unless otherwise indicated, are drawn from the FTT's findings.

53. The FTT related, at [58] to [102], some of the history of K-Line's involvement in the LNG market, and of its and K-Euro's engagement in the Snøhvit project. Much of the relevant information was repeated by Rimer LJ in the passage we have quoted, but we need to add that, by the early part of the present century, the Japanese LNG market was mature and K-Line, which is a long established company with global interests in various kinds of shipping, was a major participant in that market, operating more than 10% of the world's LNG carrier fleet. By contrast the LNG market in Europe was relatively immature. K-Line had established its first UK subsidiary in 1927, though not in the LNG market, but by about 2000 it had become clear that the European LNG market represented an attractive investment opportunity for it.

54. Perhaps a little oddly, the FTT dealt (from [120] to [192]) with the provisions of the various agreements before coming to the circumstances in which the parties entered into them. Little now turns on the detail of the agreements and we do not need to add to the summary provided by Rimer LJ. From [193] to [198] the FTT made some observations about the manner in which LNG is transported, either by pipeline or ship, including in particular the fact that it is market practice for LNG to be sold on long-term contracts, and that in consequence the time charters of the ships used for its transport are also long-term. This point, too, is not controversial, but it does highlight the fact that the agreements into which the parties entered represented long-term commitments for all of them.

55. It was necessary to bear in mind when considering the relevant events, said Mr Peacock, that the Snøhvit project was novel, in that it represented the first occasion in the European market on which LNG was to be exported by ship rather than by pipeline. None of the parties with licences to extract the LNG—the Snøhvit Sellers—had any experience in shipping. As Rimer LJ indicated, it was necessary to secure Norwegian parliamentary approval of the project following a tender process which dealt with both the construction of the specialised ships and their operation and management after they were delivered. As he mentioned, as many as 55 owners and operators of ships were invited to participate at the preliminary stage of the second of those tenders.

56. The FTT dealt with the tendering process, leading to K-Line's selection and the signing of the various agreements in December 2001, between [199] and [203]. They recorded that although K-Line dealt with the tender, it made it clear from the outset that it would undertake the project, if it was the successful bidder, in a joint venture with others; its wishes in that respect were agreed and recorded, among other things such as a range of possible financing structures, in the memorandum of understanding ("MOU") to which Rimer LJ referred at [11] of his judgment. K-Euro was mentioned as a possible manager of the ships as early as February 2001 although, as we explain below, its participation was at that time a long way from agreement. In fact, a good deal of the detail of the project remained to be resolved when the MOU, the contracts for the construction of the two ships and the time charters with the Snøhvit Sellers were signed on 19 December 2001. Rimer LJ mentioned that there was at that stage no agreement about the manner in which the acquisition of the ships was to be financed, and still no agreement, or even understanding, that K-Euro would become a participant in the project. Judge Nowlan again dealt with the position in December 2001 in more detail:

> "[128] When the MoU was entered into on 19 December 2001, the only parties at that stage were K-Line and Statoil, K-Line committing to time charter the vessels to Statoil on behalf of the Snøhvit Sponsors. The MoU did, however, clearly evidence the intention that UK lease financing would be adopted and it recorded the parties' intention that the building contracts would be novated to a UK lessor, leases of the two vessels would be granted to 'special purpose companies', and those SPCs would grant bareboat charters 'to a company or companies incorporated and carrying on business as ship operators in the UK … to whom the time charters would be novated'. The MoU then noted that 'if UK lease arrangements are not found to be economically and or legally viable by the parties, the parties shall arrange

new financial scheme(s) and [K-Line] shall novate the [building contracts] and the [time charters] directly to the SPCs'.

[129] The significance of that last quotation from the MoU, after all the first structure document actually entered into by the parties, was not only that the MoU was indicating the likely introduction of the transactions presently in contention, but that it was suggested that if the capital allowances were eventually considered not to be available, the likelihood is that the SPCs, and not the envisaged UK company, would take the novation of the time charters. Notwithstanding the obvious temptation to refer to commercial considerations, there was no indication that commercial considerations would still require the interposition of K-Euro, albeit that the UK finance lessor might be omitted at the head of the chain of leases. The role to be performed by K-Euro appears to have been ignored in the scenario that there might be no attempt to claim UK allowances."

57. Mr Peacock argued that this view of events disregarded the FTT's express finding at [201] and [202] that the Snøhvit Sellers had included in the tender documentation requirements, first, that the ships be operated by a disponent owner rather than a manager, as a disponent owner would take greater care of them, and, second, that the disponent owner should be based in a European time zone because Statoil had had an unfortunate earlier experience when a time zone difference had caused unacceptable delays. Those paragraphs are as follows; for completeness we need to add [203]:

"[201] It was an essential requirement of the Snøhvit Sellers that all aspects of the management of the Vessels (technical and commercial) should be carried out from a base in a European time zone: this requirement was in consequence of previous experience of Statoil where loss had been incurred because the operator/manager of a vessel delayed responding to a problem because of time zone differences.

[202] Further, based on its experience with shuttle tankers in the North Sea, Statoil included a requirement that the shipowner should also be the operator of the ship, so that there would be a sense of responsibility for the ship as an asset, its operation and its performance. It was not acceptable that the counterparty should simply be a manager of a ship.

[203] The K-Line bid was attractive to the Snøhvit Sellers not simply by reason of its commercial terms, but because K-Line met the requirements that it could, within its group, both own and operate the Vessels and ensure that the Vessels were operated and managed in a European time zone. As early in the tender process as February 2001 K-Line had stated to Statoil that, in view of the proposed operation of the Vessels in the Atlantic Basin, the 'management office for Snøhvit LNG Project is intended to be located in [K-Euro], a subsidiary established in London. Representatives in the [K-Euro] office will act as an interface between Charterers and K-Line Head Office'. Statoil's principal concern was for the efficient, reliable and safe operation of the Vessels by a competent entity within the European time zone. The structure by which K-Line achieved that was not of particular interest to Statoil."

58. We confess that we have not found it easy to determine from these paragraphs precisely what the FTT did decide. It is certainly clear that the Snøhvit Sellers required European management of the vessels, and that they required management and ownership to be within the same group. But if [202] is to be

taken as a finding that the ownership and management of the ships be within the same entity, such a finding is inconsistent, as we see it, with what the FTT said at [203], which focusses on European management but does not rule out the possibility—indeed suggests—that ownership of the vessels by K-Line itself would be acceptable. In our view what Judge Nowlan said in the passage just quoted fairly reflects the position, as we see it, that in December 2001 contractual structures which did not include K-Euro (or a company in a fundamentally similar position) as a participant were still in contemplation.

59. That interpretation is also consistent with what the FTT said at [226], in a section of their decision dealing with the manner in which the lease financing of the ships was decided upon. They mentioned that K-Line had considered entering into a joint venture with an independent shipping company with LNG experience, but that possibility was rejected as it did not fit with K-Line's aim of establishing its own LNG business in the Atlantic basin, and "might not be acceptable to Statoil". Despite what the FTT said at [202] we do not find that "might not be acceptable" supports the proposition that Statoil had imposed a requirement that ownership and management should reside in the same company, even if that might have been its preference.

60. Between [204] and [217] the FTT described, in some detail, the K-Line group's European strategy, and more particularly the development and expansion of K-Euro's business; Mr Peacock emphasised that K-Line has continued to develop its European interests in the same manner to date. The material findings for present purposes are that after its incorporation in 1987 K-Euro acted initially as K-Line's European agent, particularly in container shipping. It seems that it was K-Line's intention that K-Euro should not confine itself to acting as its agent but should instead carry on business in its own right, and it began to do so in 1995. The FTT's description of the extended activities suggest that they were limited to management and to the operation of chartered vessels, but in May 2002 K-Euro decided to establish a bulk and gas carrier division. It appears from what the FTT said at [208] and [212] that the Snøhvit project, which had a high profile and was commercially very attractive to the group, was the immediate catalyst for the decision, although it was not the intention that K-Euro should confine its gas carrying activities to the project; rather, it was to be the vehicle by which the K-Line group extended its wider European and Atlantic basin presence. There was a significant volume of evidence before the FTT showing how K-Euro had taken steps to expand its business, in particular by developing its LNG expertise and capacity, between 2002 and 2004.

61. At [215] the FTT described various other projects in which K-Euro became involved, after the Snøhvit project, and which included the ownership of ships. Mr Peacock argued that the FTT had accepted, at [238] and [239], that it was K-Line's policy that a group member should be the disponent owner of any vessel operated by the group, because (as the FTT explained at [410]) that status enabled it to establish closer relationships with its customers, and also increased the potential profit, albeit with increased risk: it would receive no income during periods when the ship was not chartered, and it would be responsible for unforeseen costs. However, as Mr Peacock again emphasised, that was the business model K-Line had chosen, not only in the context of the European market and the Snøhvit project but also in other parts of the world. We agree that

the FTT did accept that evidence, though it did observe, at [239], that "K-Euro has not acted as disponent owner of any other LNG vessels", albeit the company which succeeded to its business has done so.

62. Mr Peacock's argument was that the conclusions which the FTT reached about the K-Line group's business preferences entirely supported their further observations at [420] (quoted at para 15 above) about the reasons why K-Euro became involved in the contractual arrangements: what the FTT said in that paragraph amounted to a clear finding that K-Euro became involved in the contractual structure as a means of advancing its broader commercial aims, and that this, rather than any other factor, was the driver for the two transactions with which we are concerned.

63. The FTT dealt more fully with the obtaining of finance for the ships and K-Euro's involvement in the project between [218] and [239]. K-Line had been seeking advice about the financing of the ships throughout 2001, and had entered into discussions with several financial institutions. At [218] to [220] the FTT recorded that K-Line considered various possibilities, ultimately instructing a leasing arranger to secure appropriate funding; London solicitors with a large shipping practice were instructed to provide legal advice. At [220] the FTT found that K-Line had no experience of UK finance leases and was dependent on the advice it received about their consequences, including tax consequences. At [221] the FTT mentioned that in the autumn of 2001 the solicitors provided advice about s 123 and the conditions which K-Line would have to satisfy if it were to benefit from writing-down allowances. The FTT then said, at [222], that although in the early stages, it was thought that K-Euro might have no more than a management role in the arrangements,

> "[f]rom the discussions between K-Line and its advisers K-Line was aware that for capital allowances to be available it was necessary that K-Euro should operate (and not merely manage) the Vessels in the UK finance lease structure."

64. Mr Ewart argued that this passage showed clearly that the reason why K-Euro was required to become the disponent owner was not solely because of any insistence on the part of the Snøhvit Sellers upon a European operator; even by this relatively early stage the availability of capital allowances had become a material consideration in the planning of the arrangements. At [223] the FTT said:

> "In the course of email exchanges between K-Line and its UK advisers in relation to these matters and the role of K-Euro, K-Line sought advice as to the 'proper profit level' of K-Euro if it were to act as ship operator, and whether there was any UK tax requirement in this respect – a concern which K-Line had was that, given the limited LNG carrier market, there was little by way of example to judge levels of profitability for a ship operator (as against a ship manager). Based on that advice, it was anticipated that K-Euro would make a profit margin of about 10 per cent of the Operating Cost Element of the hire received under the time charter."

65. That paragraph too, said Mr Ewart, showed the importance of the allowances to the structure of the arrangements: the size of the allowances (the overall amount of the tax which will be saved if the appeal succeeds will, we were told, be about £20 million), made it impossible to conclude that they were not a material factor in determining what K-Euro should charge the Snøhvit Sellers if

the hoped-for profit was to be achieved. It fed in to what Judge Nowlan said at [130] (see para 19 above), and clearly showed that the tax consequences of the structure were a material factor in shaping their form. Mr Peacock suggested that at this stage, as the FTT recorded at [226] (with which we dealt at para 59 above), there was still uncertainty about whether K-Euro would be involved at all, and that the parties were dong no more than consider the possible consequences of different courses of action: it was, he said, no more than the business-like approach to which Lord Upjohn had referred in *Brebner*.

66. It is, however, apparent from what the FTT said at [228] that by January 2002 K-Line at least was working on the assumption that the structure of the arrangements would include a UK-based disponent owner, that K-Euro would take on that role, and that writing-down allowances would be available:

> "In January 2002 prospective UK lessor banks were approached, including the Lloyds TSB group. They were advised of the shipbuilding and time charter arrangements in place and of the leasing structure which was proposed should the financing of the Vessels be effected by a UK finance lease. Prospective lessors were informed that the Vessels would be used for a 'qualifying purpose' by reason of K-Euro, as ship operator, satisfying the requirements of section 123 CAA 2001."

67. Although the FTT did not say so expressly, we read this paragraph as a finding that prospective lessors were told that K-Euro's participation meant that the requirements of s 123(1) would be met, and that s 123(4) would not be engaged.

68. It is evident from the F-tT's findings that K-Line was keen that K-Euro should participate in the project and, indeed, that it intimated to others that K-Euro, as a European-based company already engaged in the shipping trade, would be a participant. It is, however, also apparent that K-Euro was initially reluctant to become involved. The FTT explained how that reluctance was overcome at [232]:

> "K-Euro was involved in the discussions concerning the Snøhvit project and the possible UK finance lease financing of the Vessels in the autumn of 2001, and in November 2001 a director of K-Euro expressed the view that at that time K-Euro had no intention either to own any LNG vessel or to charter such a vessel on bareboat terms. At that time, although K-Euro had experience of operating container vessels, it had no experience of operating or managing LNG carriers, and would not have been credible to the Snøhvit Sellers as operator of the Vessels. K-Euro had to be persuaded by K-Line that it should expand its business so that it would be in a position to act as operator of the Vessels on their delivery."

69. We interpose that the FTT returned to this point at [331], accepting that K-Euro which, despite its being a subsidiary of K-Line, had its own directors and its own, quite substantial, business activities, had agreed to become the disponent owner of the vessels only when K-Line had in turn agreed to its equipping itself with the necessary expertise and resources to be able to take on that role. This was, said Mr Peacock, a clear recognition by the FTT that K-Euro became involved in the arrangements not as a means of securing the allowances, but because, and only because, it made commercial sense both in the context of the Snøhvit project and in the context of K-Line's wider strategy.

70. The development and expansion of K-Euro's business activities was a topic with which the FTT dealt in some detail, and it was a topic on which Mr Peacock laid some emphasis: it was, he said, plain from the FTT's findings that it was the mechanism by which K-Line could establish a group presence in the Atlantic basin, and the primary reason why it was important to it that K-Euro, a subsidiary which already had a European presence, should become, and be seen to be, involved in the Snøhvit project. The FTT dealt with the relevant evidence in this way:

> "[233] At a board meeting of K-Euro on 22 February 2002 there was discussion of the plan to expand K-Euro's business by the establishment of bulk and LNG carrier divisions for operation in Europe, with the intention that K-Euro would operate and manage the vessels employed in those divisions. That meeting also reviewed the shipbuilding contracts and the time charters in respect of the Vessels entered into on 19 December 2001 and the proposed finance leasing arrangements were also discussed, including K-Euro's intended part in those proposals. It was noted that if the proposals were implemented with K-Euro's participation, K-Euro would be disponent owner of the Vessels, having responsibility for the commercial and technical management of the Vessels but without the economic risks of ownership. It was also noted that if K-Euro operated the Vessels its aim would be to earn an operator's profit, and that the question of K-Euro's profit margin had not yet been agreed. It was agreed that one of the directors would continue to review the proposals on K-Euro's behalf and to negotiate any documents involving K-Euro, with that director reporting back informally to the remaining directors.
>
> [234] Directors of K-Euro (including the chief executive officer) were subsequently involved in discussions as to the basis on which K-Euro would act as disponent owner, and in particular as to the rate of hire under the proposed bareboat charter (the terms of the time charter having been agreed in the December 2001 transaction, the amount of the bareboat hire was a critical factor in determining the likely profitability of the venture for K-Euro).
>
> [235] At a board meeting of K-Euro on 12 September 2002 the directors were presented with the terms of the lease financing of the Vessels and with the documents to which it was proposed that K-Euro should become a party. It was noted that K-Euro would become responsible for operating and managing the Vessels as disponent owner, assuming obligations under the bareboat charter and having responsibility for the commercial and technical management of the Vessels. It was also noted that K-Euro could expect to make a profit from such operation.
>
> [236] At that board meeting there was also produced to the directors a copy of the business plan, dated July 2002, for the bulk and gas division of K-Euro. It was noted that that division had been established on 1 July 2002 (following a board resolution to that effect on 31 May 2002) in order for K-Euro actively to develop its bulk and LNG carrier business in Europe by establishing bulk and LNG fleets. It was also noted that the proposals whereby K-Euro became disponent owner of the Vessels were in furtherance of the business plan. Resolutions were passed approving the bulk and gas division business plan and authorising K-Euro to enter into the relevant documents by way of implementation of the lease financing arrangements."

71. This passage in the FTT's decision must be taken, we think, to represent the foundation of the finding at [427] that the primary object of the transactions was commercial.

72. The FTT dealt with the reorganisation of K-Euro's business at [240] to [251]. We do not, we think, need to go into the detail; there is sufficient in what was said by Rimer LJ at [15] and [16], set out above. Mr Peacock argued, notwithstanding Judge Nowlan's comments, that the reorganisation was irrelevant because, even if it occurred when the ships were yet to be delivered, it took place long after the relevant agreements had been entered into and it was an event not in contemplation at that time; for that reason alone it could shed very little light on the objects of the transactions when the parties entered into them. In addition, the reorganisation was driven by commercial considerations including, as Rimer LJ recorded, the likelihood that K-Euro would suffer a significant loss from its participation in the Snøhvit project. In fact, it had been apparent from an early stage, though after the September 2002 transactions, when crewing costs increased that a loss was probable. The FTT had accepted, at [412], that "subsequent events may shed light on motives at an earlier time" but dismissed the notion that the need for a reorganisation was, or could have been, foreseen in September 2002, and accepted, rightly said Mr Peacock, that it was driven by the need to react to adverse unexpected developments, in particular the exposure of K-Euro to a loss.

73. Mr Ewart's argument was not that the re-structuring was foreseeable, still less planned, in 2002, but that what was revealing was the action taken: as Judge Nowlan observed, although K-Euro transferred its LNG business to K LNG, it did not novate the bareboat and time charters, a step which would have considerably simplified the contractual relationships between the relevant parties. Instead, K-Euro remained the disponent owner of the vessels because it was essential that it should do so if the availability of the allowances was to be preserved, but it was left with no other role at all. He added the argument that Judge Nowlan was entirely correct in what he said of this development, that it shed considerable light on the true reason why it was so important for the project that K-Euro should become involved as it did.

The parties' submissions

74. We have set out much of what Mr Peacock and Mr Ewart argued already, but there are some further points with which we have yet to deal. Some of their submissions amounted to arguments about why the FTT were right, or wrong, and that is understandable given the unusual manner in which the matter has reached us; but we repeat, in case it is forgotten, that the question before us is not whether the FTT's conclusion was supported by the evidence, but whether the evidence and FTT's findings about it lead us to conclude that s 123(4) is engaged.

75. Mr Peacock's essential point was that the structure adopted was necessary if the parties' objectives were to be met: the Snøhvit Sellers' requirement that the vessels be operated by a European disponent owner, K-Line's desire to establish a substantial European presence for the group, and K-Euro's desire, once it had been persuaded to do so, to expand and develop its own business. Although it would have been possible for K-Euro to be no more than the manager of the ships there were accordingly sound commercial, rather than tax, reasons for it to take on

the role of disponent owner. It is, moreover, necessary to set the Snøhvit project in its context, as merely one part of the substantial expansion of K-Euro's business which took place between 2002 and 2006.

76. It was quite correct that tax advice had been sought, and that the incidence of tax was a factor in the pricing structure which was adopted. As the authorities with which we have already dealt show, the fact that tax advice has been taken is not an indication that a tax saving is the object, or one of the main objects, of the transaction entered into; it is no more than a prudent step which any sensible businessman would take as a matter of course.

77. It was significant, Mr Peacock added, that even though the involvement of K-Euro was in the contemplation of K-Line when the first agreements were signed in December 2001 K-Euro had yet to be persuaded that it should participate, and in consequence it was not a party to any of those agreements. The only way in which it could become the disponent owner of the ships, and meet the commercial requirements the Snøhvit Sellers had set and the commercial aims of the K-Line group (of European expansion), at a later date was by entering into the bareboat charter and granting the time charter; that the transactions carried a tax benefit with them was merely incidental. The same benefit would have been the consequence if K-Euro had been a participant from the outset; thus nothing of significance could be read into the fact that it was introduced to the arrangements later.

78. HMRC's argument that the transactions could have been differently structured—for example by Northern NLG becoming the time charter owner and K-Euro the manager—was, he added, unrealistic. It did not satisfy the parties' commercial requirements and it also did not address the statutory question, which was not whether the transactions could have been ordered in a different and (for the argument to make sense) less tax-advantageous manner but whether the transactions actually entered into had the securing of the allowances as one of their main objects. What was apparent from the FTT's findings was that tax considerations, though not irrelevant to the structure as a whole, were not the main object, or one of the main objects, of the two transactions which had to be considered for the purposes of this appeal. The FTT were therefore right to conclude not only that the predominant purpose of the two transactions was commercial, but that the tax advantage was subservient to the extent that obtaining the allowances could not properly be regarded as one of their main objects. We should come to the same conclusion.

79. Mr Ewart argued that a recurrent theme throughout the negotiation of the arrangements was the need to ensure that K-Euro satisfied the requirements of s 123(1) because the benefit of the allowances was a factor influencing the decisions of all of the participants. In the Upper Tribunal Judge Nowlan had correctly identified several features: that the tax advice was sought for structural rather than due diligence reasons; that the parties spent a good deal of time identifying the best financial structure; that the availability of the allowances (worth about 10% of the capital cost of the vessels) was a material factor in the determination of the rental costs, which in turn had an impact on the financial exposure of all of the parties; and, as we have already mentioned, the fact that care

was taken to ensure that K-Euro remained the disponent owner after the 2006 reorganisation.

80. He also placed considerable emphasis on the argument he had advanced before the FTT, and which they recorded at [383]:

> "Mr Ewart submitted that, in ascertaining the main objects of the relevant transactions it is necessary to look individually at the objects or purposes of the parties entering into those transactions. In the case of Northern LNG (looking to its shareholders, the Snøhvit Sponsors), their objective in entering into the bareboat charter could only have been to secure cheaper finance for the Vessels through a tax-based lease, that is, to ensure that the requirements of section 123(1) CAA 2001 were satisfied: they could show no commercial objective beyond that. In the case of K-Euro itself, it acted upon the direction of K-Line and therefore had little or no independent objective, but in so far as it had, it was aligned with the objectives of K-Line, and for the reasons given, those objectives were substantially to ensure that the requirements of section 123(1) CAA 2001 were satisfied. As for the Snøhvit Sellers, their only objective in accepting the novation of the time charter to K-Euro was to maintain the commercial terms of the time charter which they had negotiated in 2001."

81. The only later allusion by the FTT to that argument appeared in the sentence, within [427], that "The capital allowances were a route to reduced cost of funds for the financing of transactions already decided upon." In the remainder of [427] the FTT had, wrongly, dismissed the obtaining of the allowances as a main object because they were subservient to the commercial objectives the FTT had identified; but it was plain from what the Court of Appeal said that that was the wrong approach. The only reasonable conclusion to be drawn from the FTT's own findings was that the obtaining of the allowances was a main object of the transactions, even if it was not the paramount object.

Conclusions

82. As we have already mentioned at para 34 above, Mr Peacock argued, despite what had been said on the topic by the Upper Tribunal and Rimer LJ, that it cannot have been the legislative intention that capital allowances should be available only to those who satisfy the requirements of s 123(1) by accident or good fortune. We accept, too, the force of Mr Peacock's argument that the draftsman must be taken to have been aware that the availability or otherwise of allowances would inevitably represent a factor shaping commercial transactions; as Lord Upjohn said in *Brebner*, no sensible businessman would leave out of account the tax consequences of a transaction into which he was about to enter.

83. Superficially, these are beguiling arguments, but in our view there is nothing in them. The reason lies in what the Upper Tribunal said at [79]: in the paradigm case s 123(1) is intended to apply to a ship purchased outright by an established UK shipping company and leased to an overseas customer. In such circumstances the writing-down allowance will follow without more. The purpose of sub-s (4), as the Upper Tribunal explained it, is to exclude from the benefit of the allowance those transactions which do not fall within the paradigm. It is not a case, as Mr Peacock suggested, in which the draftsman has unwittingly created an unintended obstacle, but one in which he has set out to restrict the availability of the

allowance to a limited class. Indeed, sub-s (4), as we read it, is aimed precisely at the person who has an eye to the tax advantage which might be gained.

84. We would accept, even if we were not required to do so, that the FTT were right to conclude that the paramount objects of the transactions were commercial. Although there is no finding by the FTT to this effect we can also accept that K-Line had committed itself in December 2001 to enter into the arrangements whether or not the allowances were available, albeit the financial terms on which it did so would be different. However, as Judge Nowlan indicated at [129], it is rather less likely that K-Euro would have participated in that case; indeed, his impression was clearly that, absent the allowances, K-Euro's participation was far from certain. We detect no finding within the FTT's decision contrary to Judge Nowlan's view, and certainly none from which we could conclude with any confidence that it would have assumed the role which it did regardless of the availability of the allowances. As we observed above (see para 59), we are not persuaded that the FTT did decide that Statoil insisted that K-Euro should become the disponent owner of the vessels.

85. However, even if we were satisfied that K-Euro would have entered into the bareboat charters and the time charter novation agreements whether or not the allowances were available, we would not find it possible to agree with Mr Peacock that the availability of the allowances was no more than a subsidiary consideration, however much headroom one allows above the icing on the cake. On the contrary, we are persuaded that the FTT's findings can lead only to the conclusion that the agreements were structured as they were not only for commercial reasons but also in order that the requirements of s 123(1) should be met, and that correspondingly the securing of the allowances was a main object of the transactions, or at least some of them. By that we mean that although the transactions would have gone ahead in some form driven by their paramount commercial purpose, regardless of the availability of the allowances, we think it unlikely that they would have taken the form they did but for the possibility that allowances would be available.

86. The FTT recorded, as we have indicated above, that K-Line was not familiar with UK financing structures and that it sought advice about the available means of finance and on their tax consequences. One can accept, as did the FTT, that seeking such advice is no more than good practice, and to that extent a form of due diligence; but, as Judge Nowlan said, the advice K-Line received went beyond due diligence and led it into, first, seeking finance on the premise that allowances would be available and, when finance became available, into structuring the transactions in such a way that (as it thought) they would indeed be available. In other words, once terms had been agreed in principle on the assumption that allowances would be available, it was necessary to structure the agreements so that the statutory requirements were met, and that is what the parties did. We can place no other meaning on the concluding part of [427] of the FTT's decision which, for convenience, we repeat:

> "The capital allowances were a route to reduced cost of funds for the financing of transactions already decided upon. The parties knew this to be the case if the capital allowances proved to be available, and they wanted to obtain the benefit of such allowances, by ensuring that, in carrying out their commercial objectives, they would comply with the necessary conditions

> upon which the capital allowances were dependant. In terms of priority or hierarchy, that was subservient to, or of lesser importance than, achieving the commercial purposes of the relevant transactions."

87. The first sentence of that extract is consistent, at first sight, with what the FTT said at [233] (quoted at para 70 above) but is in our view plainly inconsistent with what they had said before. At [218] they mentioned K-Line's preliminary enquiries, and at [220] that K-Line was advised "of the benefits of a UK finance lease where capital allowances are available to the lessor". At [222] (see para 63) they added that K-Euro was expected at that stage to play a role in the arrangements as manager of the vessels, but that it had still not been decided precisely how it would do so. Then at [223] (see para 64 above) they made it clear that it was the possibility that allowances would be available which shaped the decisions which followed. Even then, as the FTT said at [226] (see the comments at para 59), there was some doubt whether K-Euro would participate but it is quite clear from that paragraph that K-Line was seeking an operator, rather than manager, of the ships. The purpose of its doing so, in the context of that part of the FTT's decision, can only have been in order to satisfy the s 123(1) requirements. With that background in mind it is in our view quite clear that it was the availability, or assumed availability of the allowances, which led to the board meeting to which the FTT referred at [233], a meeting which, as we have already said, followed K-Line's efforts to persuade K-Euro to participate in the Snøhvit project. The only conclusion we feel able to reach from this part of the FTT's decision is that, even if commercial considerations were paramount, the aim of securing the allowances had become a material factor.

88. The second sentence of the extract from [427] we have set out above is also, in our view, quite impossible to reconcile with the proposition that the availability of the allowances was of mere incidental interest to the various participants. The FTT may well have been right to say in the third sentence that it was of secondary importance; but the second sentence can, in our view, mean only that the parties recognised that they needed to structure the arrangements into which they entered in a manner which, while securing their commercial objectives, also secured the benefit of the allowances because of their impact on the cost of the project. That is, in essence, the thrust of Mr Ewart's argument recorded by the FTT at [383] but on which they barely touched thereafter.

89. At the risk of excessive repetition we observe again that the test is not whether the primary object of the transaction or transactions is to obtain a writing-down allowance, but whether any one of a series of transactions has that object. In our view the only realistic answer to that question is that it was. It seems to us that the FTT's findings show very clearly that, once K-Line learnt that writing-down allowances might be available, it took steps to ensure that the statutory requirements on which the availability of allowances were predicated, as it understood them, were met. In particular, it made considerable efforts to persuade K-Euro to participate (and, as K-Euro was a subsidiary, could have forced it to do so) not merely for commercial reasons, genuine though we accept them to be, but also as a means of obtaining the allowances. It is clear from what the FTT itself said at [203], and from Judge Nowlan's analysis at [129], that even if there were sound commercial reasons for the novation to K-Euro of the time charters once it was decided that it should become the manager of the vessels, the commercial

necessity for the bareboat charters is much less clear, yet this step was essential if the requirements of s 123(1) were to be met.

90. Mr Peacock argued, as we have mentioned, that the parties to a transaction have the freedom (artificiality and contrivance aside) to structure that transaction in a manner which attracts less tax rather than in a manner which attracts more, and that correspondingly it is not open to HMRC to argue that because the parties to these transactions could have ordered them differently, they should be treated as if they had done so. In other circumstances he might be right; but in this case, as we have indicated, the legislative aim is to exclude from the benefit of writing-down allowances those who take steps to obtain them when otherwise they would not be available. Similarly, we accept that he is right to say that it is immaterial that K-Euro came into the project only in September 2002, since the position would be the same had it participated from December 2001, but that fact does not seem to us to have any impact on the reasons why it participated. One would, of course, be considering a different set of transactions had it participated in 2001; but the statutory question is directed at the objects of the transactions actually entered into. In any event, it does not seem to us to be an arguable proposition that, had K-Euro participated from 2001, the reasons for its doing so—and the main objects of the hypothetical transactions—would differ.

91. For the reasons we have given we are satisfied, from the FTT's findings of fact as we have described them, and in the light of what was said by the Court of Appeal, that the obtaining of writing-down allowances at 25% was a main object, or one of the main objects, of the transactions into which the various parties entered in September 2002, and particularly but not exclusively of the bareboat charters, and that the appeal must therefore be dismissed.

92. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

COLIN BISHOPP
TRIBUNAL JUDGE

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 14 AUGUST 2015