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Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Heard on: 30 November and 1 December 2023
Judgment date: 04 March 2024

Capital gains tax – treaty relief pursuant to the UK/Mauritius double taxation treaty – identifying the place of effective management of a trust for the purposes of Article 4(3) – whether the FTT applied the right test – HM Revenue and Customs v Smallwood [2010] EWCA Civ 778 applied

Before

Mr Justice Edwin Johnson
Judge Jonathan Cannan

Between

GEOFFREY RICHARD HAWORTH
IAN FRANCIS LENAGAN
SG KLEINWORT HAMBROS TRUST COMPANY (UK) LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: James Rivett KC and Ben Elliott, counsel instructed by BDO LLP

For the Respondent: Christopher Stone and Hitesh Dhorajiwala, counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) released on 2 February 2022 ("the Decision"). The first and second appellants ("Mr Haworth" and "Mr Lenagan") are the settlors of separate family trusts which engaged in a tax planning arrangement known as the "round the world" scheme. They hoped that the trustees of the family trusts would avoid capital gains tax on disposals of shares on the flotation of a company called TeleWork Group Plc. It is now common ground that the scheme was effective to achieve the capital gains tax savings if, amongst other things, the family trusts became resident in Mauritius by the time of disposal. The scheme would only be effective if the place of effective management (the "POEM") of the trusts was in Mauritius.

2. A scheme of the same kind was considered by the Special Commissioners, High Court and ultimately the Court of Appeal in *HM Revenue and Customs v Smallwood* [2010] EWCA Civ 778. It was ineffective on the facts of that case because the Court of Appeal by a majority upheld the Special Commissioners' decision that the POEM of the trust at the material time was the UK and not Mauritius. We shall have to consider the judgments in *Smallwood* in detail in due course.

3. The scheme was also relevant in the context of a claim for judicial review brought by Mr Haworth, in which he challenged HMRC's decision to issue a follower notice and an accelerated payment notice based on the Court of Appeal's decision in *Smallwood*. The judicial review went to the Supreme Court in *R (otao Haworth) v HM Revenue and Customs* [2021] UKSC 25 which upheld the decision to quash the follower notice and the accelerated payment notice.

4. The FTT in the present appeals held that the POEM of the trusts at the material time was the UK. As a result of that finding, together with its findings on other issues which are not subject to appeal, the FTT dismissed the appeals. The appellants appeal against the Decision with permission from the FTT.

5. The present appeals turn on a single point of law. The appellants say that the FTT applied the wrong test to identify the POEM of the trusts. It ought to have applied a test derived from the Court of Appeal decision in *Wood v Holden* 78 TC 1. The context of *Wood v Holden* concerned identifying the location of the central management and control of a company. However, there are statements in the judgment of Chadwick LJ that the test for identifying the location of central management and control of a company is in substance the same test as that for identifying the POEM of a company.

6. The Court of Appeal in *Smallwood* considered the POEM of a trust and it will be necessary for us to closely consider both these judgments. Essentially, the appellants say that the FTT failed to apply the test in *Wood v Holden* and misconstrued the reasoning of the Court of Appeal in *Smallwood*. If that is right, the appellants say that the only conclusion open to the FTT on the facts as found was that the POEM of the trusts at the material time was Mauritius. We should therefore set aside the decision of the FTT and re-make it so as to allow the appeals against HMRC's closure notices.

7. The FTT dealt with a number of issues which are no longer in dispute. The Decision stretches to 163 pages, much of which involves an analysis of the evidence and the FTT's findings of fact. Fortunately, for present purposes we can state the facts relatively briefly. Before doing so it will be helpful to describe the context in which the issue arises and the legal framework which underpinned the avoidance scheme.

8. Both parties acknowledged that if the FTT applied the wrong test for POEM, then the appeal should be allowed and we should re-make the decision, identifying the POEM of the trusts based on the FTT's findings of fact. Neither party suggested that the matter should be remitted to the FTT to make a further determination. We are content to proceed on that basis. At one stage Mr Rivett KC for the appellants, submitted that even if the correct test was not that derived from *Wood v Holden* then the FTT ought to have found that the POEM was in Mauritius. He did not pursue that argument, and accepted that if we were to find that the FTT applied the right test, then the appeals should be dismissed.

9. We are grateful to all counsel for their clear and helpful submissions, written and oral, and to those instructing them. Mr Stone appeared as lead counsel for HMRC following the sad death of Mr Timothy Brennan KC, who had appeared before the FTT.

The context in which the issue arises

10. The issue arises in the context of three separate family trusts. One family trust was established by Mr Haworth as settlor in 1987 ("the GRH Trust"). Two family trusts were established by Mr Lenagan as settlor in 1991 ("the IFL Trust" and the "S & A Trust").

11. At the beginning of tax year 2000-01, the trustees of Mr Haworth's GRH Trust and the separate trustees of Mr Lenagan's IFL Trust and S & A Trust were resident in Jersey. The trusts had been established for many years. The GRH Trust held shares in Teleware Plc ("Teleware"). The IFL Trust and the S & A Trust held shares in Workplace Systems Limited ("Workplace"). A proposal was being considered whereby the businesses of Teleware and Workplace would be merged as TeleWork Group Plc ("TeleWork") and floated on the London Stock Exchange. The purpose of the tax planning was to avoid capital gains tax on disposals of shares by the family trusts in connection with the flotation.

12. By way of brief summary, if the merger and flotation went ahead the scheme was intended to operate by way of the following steps, each taking place in the tax year 2000-01:

(1) The Jersey trustees would retire and be replaced by trustees resident in Mauritius.

(2) Shares would be disposed of by the Mauritius trustees as part of the flotation.

(3) The Mauritius trustees would retire and be replaced by English trustees.

13. There were of course various decisions to be taken in connection with these steps, in particular in relation to the merger, the flotation of TeleWork and the disposal by the family trusts of shares in TeleWork. There was also the possibility of a disposal of the shares without a merger and flotation. We consider the FTT's findings in relation to the decision-making in more detail below.

14. There was no dispute as to the legal framework which underpinned the scheme and we can describe it quite briefly. The following description is of the relevant provisions in 2000-2001. The provisions were subsequently amended to prevent avoidance of tax using the round the world scheme.

15. At all material times, the effect of section 2 Taxation of Chargeable Gains Act 1992 ("TCGA 1992") was that chargeable gains accruing to the trustees of a settlement who were UK resident for capital gains tax ("CGT") purposes during any part of a tax year were chargeable to tax on the trustees directly in that year:

> 2(1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of

> assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom.

16. Section 69 TCGA 1992 provided that the trustees of a settlement were at all material times treated as a single continuous person distinct from the persons who were the trustees from time to time. It also defined the place of residence of trustees for the purposes of CGT:

> 69(1) In relation to settled property, the trustees of a settlement shall for the purposes of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the trustees) and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom.

17. Section 77 TCGA 1992 had the effect that chargeable gains accruing to the trustees of a settlement in which a settlor had an interest in the settlement were treated as accruing to the settlor. It applied where the settlor and the trustees were UK resident for CGT purposes during any part of the tax year:

> 77(1) Where in a year of assessment –
>
> (a) chargeable gains accrue to the trustees of a settlement from the disposal of any or all of the settled property,
>
> (b) …there remains an amount on which the trustees would, disregarding section 3, be chargeable to tax for the year in respect of those gains, and
>
> (c) at any time during the year the settlor has an interest in the settlement
>
> The trustees shall not be chargeable to tax in respect of those but instead chargeable gains of an amount equal to that referred to in paragraph (b) shall be treated as accruing to the settlor in that year.
>
> (7) This section does not apply unless the settlor is, and the trustees are, either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year.

18. Where tax was chargeable on a settlor pursuant to section 77, the settlor had a right of recovery against the trustees pursuant to section 78.

19. In tax year 2000-01, Mr Haworth as settlor of the GRH Trust and Mr Lenagan as settlor of the IFL Trust were each deemed to have an interest in their respective settlements. Hence, chargeable gains realised by the trustees of those settlements would in principle be treated as accruing to Mr Haworth and Mr Lenagan pursuant to section 77. Mr Lenagan did not have an interest in the S & A Trust for the purposes of section 77. Hence any chargeable gains realised by the trustees of that settlement would in principle be chargeable on the trustees directly pursuant to section 2.

20. In the events which happened, it is common ground that during tax year 2000-01, the ‘general administration’ of the trusts was located in Jersey for the period 6 April 2000 to 26 June 2000 (in the case of the GRH Trust) and 6 April 2000 to 30 June 2000 (in the case of the IFL Trust and the S & A Trust); in Mauritius for the period 26 June 2000 to 24 October 2000 (in the case of the GRH Trust) and 30 June 2000 to 24 October 2000 (in the case of the IFL Trust and the S & A Trust); and in the UK for the period 24 October 2000 to 5 April 2001. Each trust was therefore UK resident and non-UK resident for part of the tax year. Subject to any double taxation relief, Mr Haworth and Mr Lenagan would be taxable on chargeable gains of the GRH Trust and the IFL trust respectively,

with a right of recovery against the trustees. Chargeable gains realised by the S & A Trust would be taxable directly on the trustees of that trust.

21. The effect of double taxation relief and the mechanics of the scheme as it operated in *Smallwood* were succinctly summarised by Lady Rose JSC in *R (otao Haworth) v HM Revenue & Customs* [2021] UKSC 25 at [16] and [17] which was Mr Haworth's judicial review claim:

> 16. Liability for capital gains tax depends upon residence in the United Kingdom and applies to chargeable gains accruing to the taxpayer in a year of assessment during any part of which he is resident here. Where the trustees of a settlement are non-resident throughout the fiscal year, but the settlor himself retains an interest in the settlement and is himself UK resident in the fiscal year, any gains made by the trust are attributed to the settlor by section 86 TCGA and he is chargeable to tax on them. Where the trustees of the settlement are resident in the UK at any time during the fiscal year, then any gains which are chargeable to tax in the trustees' hands in the UK are also attributed to the settlor by section 77 TCGA.
>
> 17. The arrangements entered into by Mr Smallwood were aimed at avoiding a charge to capital gains tax on the disposal of shares held by a settlement of which he was a trustee at the time he completed his tax returns and in which he retained an interest. He hoped to avoid the application of a charge under either of those sections of the TCGA by relying on the application of a double taxation treaty between the UK and a state which would not impose a tax on the gain made on the disposal under its own taxing provisions. Mauritius is such a state. Mauritius only imposes capital gains tax on disposals in very limited circumstances which do not apply here. The efficacy of the arrangements depended on the Convention having the effect that the trust was not liable to capital gains tax because the only Contracting State entitled under the Convention to tax the gain was Mauritius and not the UK.

22. Section 277 TCGA 1992 and Part XVIII Income and Corporation Taxes Act 1988 together provided that a taxpayer was entitled to relief from UK CGT in circumstances where relief or exemption from tax was available to the taxpayer under the terms of a relevant double taxation treaty agreed between the UK and another state or territory.

23. At all material times the provisions of the Double Taxation Relief (Taxes on Income) Mauritius Order 1981/1121 gave effect in UK law to the UK/Mauritius Treaty ("the Treaty"). The Treaty applied to CGT as well as to income tax. It applied to persons who were residents of one or both of the Contracting States.

24. Article 3 of the Treaty contained various relevant definitions as follows:

> Article 3: General definitions
>
> …
>
> (d) the terms "a Contracting State" and "the other Contracting State" mean the United Kingdom or Mauritius as the context requires;
>
> (e) the term "person" comprises an individual, a company and any other body of persons, corporate or not corporate …

25. Article 13 of the Treaty concerned the taxation of capital gains. Article 13(4) applied to the disposal of the shares held by the family trusts. It provided as follows:

> 13(4) Capital gains from the alienation of any property other than that mentioned in paragraphs (1), (2) and (3) of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

26. Article 4 of the Treaty defined a "*resident*" of each Contracting State for the purposes of the Treaty. In circumstances where a person was a resident of both Contracting States, the person was deemed to be a resident of the Contracting State in which its POEM was situated:

> Article 4: Residence
>
> (1) For the purposes of this Convention, the term 'resident of a Contracting State' means, subject to the provisions of paragraphs (2) and (3) of this Article, any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. The terms 'resident of the United Kingdom' and 'resident of Mauritius' shall be construed accordingly.
>
> …
>
> (3) Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated…

27. It is now common ground that the trustees of each of the three settlements were resident in both the UK and Mauritius during tax year 2000-01 pursuant to the domestic laws of both the UK and Mauritius. Hence, the availability of exemption from UK CGT pursuant to Article 13 of the Treaty turned on the question of whether, for the purposes of Article 4(3) of the Treaty, the POEM of the settlements was in the UK or Mauritius in the relevant period. We will need to consider what is the relevant period over which the POEM of a trust is to be determined in due course. If the POEM was the UK, gains realised by the trustees would be chargeable to CGT. If it was Mauritius, gains realised by the trustees would be taxable only in Mauritius. Mauritius at this time chose not to tax capital gains which meant that the gains realised by the trustees would be free of tax if the scheme was implemented effectively.

The FTT's findings of fact

28. The FTT recited the evidence and made findings of fact in various sections of the Decision between [21] and [279]. We shall refer to specific findings of the FTT when we come to consider the issues. For present purposes we can summarise the FTT's material findings of fact as follows.

29. Mr Lenagan founded Workplace in 1986. It was a market leader in the design and sale of software for staff scheduling and time, attendance and work management. By the year 2000, Mr Lenagan held 45% of the shares. The IFL Trust and the S & A Trust together held 39%. The remaining 16% was held by another director and a trust set up by that director.

30. In 1991, Mr Lenagan and Mr Haworth founded Teleware. It developed and sold software for the computer control of telephony, messaging and voice response applications. By the year 2000, Mr Haworth held 20% of the shares and the GRH Trust held 30%. Mr Lenagan held 6% and another trust set up by Mr Lenagan held 44%.

31. In late 1999, there was a possibility that Workplace would be sold, with interest from two US companies. However, the directors received advice that a merger and flotation of Workplace and Teleware would result in an increased valuation. Dresdner Kleinwort Benson ("DKB") suggested that a base case valuation of between £294 million and £322 million might be achieved. This would represent price earnings multiples of 133 and 86 times post-tax profits of the two companies.

32. On 29 March 2000, DKB were appointed as underwriter/sponsor for a proposed flotation of the merged companies by the directors of Teleware and Workplace, which included Mr Lenagan and

Mr Haworth. This did not commit the companies to the merger or the flotation but it did involve a heavy work commitment. DKB proposed that the value attributable to Teleware and Workplace would be in the ratio 60:40 respectively. It was a "*firm proposal*" but certainly not binding.

33. There were significant and obvious advantages to a merger and flotation, both for the businesses and for the shareholders. In particular the shares would become freely saleable and the shareholders would be provided with additional valuable protections.

34. Mr Lenagan and Mr Haworth were in contact with the trustees of their respective family trusts and informed them of the proposals being explored.

35. Mr Maslen was an adviser to Mr Haworth and the GRH Trust. Mr Pentelow was an adviser to Mr Lenagan. They took advice from counsel that CGT would not be due on any gains accruing to trustees resident in Mauritius if UK trustees were subsequently appointed within the same tax year. This was the round the world scheme. The advice was conveyed to Mr Lenagan and Mr Haworth. The effect of the UK CGT regime was such that the tax planning, if successful, would result in savings of tax which would otherwise be borne by the trusts.

36. Given the possibility of a disposal of shares by the trustees in the course of a flotation, Mr Maslen made contact with potential trustees in Mauritius, including Deloitte & Touche Offshore Services Limited ("DTOS"). Mr Haworth and Mr Maslen visited Mauritius and met with potential trustees on 15 and 16 June 2000.

37. TeleWork was incorporated, and on 23 June 2000 the directors of TeleWork decided to pursue the merger and flotation proposal. A board minute recorded that the shareholders of Teleware and Workplace, including the Jersey trustees, had indicated their intention to proceed with the merger.

38. The Jersey trustees of the GRH Trust resigned on 26 June 2000. The Jersey trustees of the IFL Trust and the S & A Trust resigned on 30 June 2000. DTOS and a Mr Gujadhur, who was a director of DTOS, accepted appointment to act as trustees of all three trusts on 28 June 2000. DTOS and Mr Gujadhur were both resident in Mauritius.

39. The merger and flotation proposal was put to the shareholders of Teleware and Workplace, including the Mauritius trustees in their capacity as trustees of the family trusts. Once the Mauritius trustees had agreed to accept appointment, they took steps to consider the commercial rationale of the proposed transactions. This included speaking to Mr Wailing, who was the finance director of both Workplace and Teleware. The Jersey trustees and the Mauritius trustees had all been advised on the transactions by Pinsent Curtis solicitors ("PC"). The FTT found as follows at [182]:

> It appears that, having been prompted by the PC trusts team into taking an interest in the proposed merger and into speaking to Mr Wailing (it is unclear who initiated the call), Mr Gujadhur wanted to check that the commercial rationale for the proposed transactions made sense from the perspective of the beneficiaries of the family trusts. There is no reason to doubt that, once he was prompted that this is what was expected, he took the task seriously and that, as Mr Wailing said, he was aware of the relevant commercial points and asked pertinent questions and understood the responses he received.

40. The first public announcement of a possible merger and flotation was made on 29 June 2000 and a "roadshow" was organised. The process was managed by DKB as sponsor.

41. The following transactions took place on 6 July 2000:

(1) The shareholders of Teleware exchanged each of their shares for one share in TeleWork. TeleWork thereby acquired the entire share capital of Teleware. As a result, the GRH Trust at that time held 30% of the total issued share capital of TeleWork.

(2) By a resolution of the members, additional shares in Workplace were issued by way of bonus to its shareholders in proportion to their existing shareholdings.

42. The Workplace shareholders did not immediately exchange their shares for TeleWork shares. That exchange of shares was conditional upon the flotation offer price being agreed by DKB and TeleWork and a placing agreement being entered into for a placing of shares on the London Stock Exchange.

43. On or shortly before 10 July 2000, the shareholders in TeleWork and Workplace, including the Mauritius trustees, agreed to enter into a placing agreement. Some shareholders, including the Mauritius Trustees, signed powers of attorney to ensure that the final documents could be executed at the relevant time. The attorneys could exercise the powers conferred upon them only in accordance with the directions of the relevant shareholder. The placing agreement committed the shareholders to the flotation. The shareholders agreed to sell the number of TeleWork shares specified in a schedule to the agreement within a specified price range, which was between 110p-145p. This was equivalent to a multiple of over 100 times post-tax profits. In due course the price was set at 145p.

44. Some shareholders, including the GRH Trust and the S & A Trust agreed to sell further shares at the offer price. This was at the discretion of DKB, if DKB decided to exercise an "*Over-Allotment Option*". This was referred to as the "*greenshoe option*" and was common practice on a flotation.

45. On 31 July 2000, the Workplace shareholders exchanged each of their shares for one share in TeleWork. TeleWork thereby acquired the entire share capital of Workplace. Following this share exchange, the issued share capital of TeleWork was held as follows:

Shareholder	**%**
Mr Lenagan	16.6
Mr Haworth	12.0
The GRH Trust	18.0
The IFL Trust	8.4
The S & A Trust	7.2
Other trusts of Mr Lenagan	30.8
Others	7.0

46. Between late June and early August 2000, the Mauritius trustees were asked by Mr Haworth and Mr Lenagan to consider some relatively small appointments of shares and cash from the family trusts into various sub-funds of the trusts and to certain new settlements. This was on the advice of UK leading counsel with a view to ensuring that the Mauritius trustees were resident in Mauritius by reason of a liability to income tax. In each case the trustees took advice from the PC trusts team, to check that the request was within their powers and in the interests of the beneficiaries. Each trust made various appointments between 30 June 2000 and 1 August 2000.

47. Immediately prior to the flotation Teleware had 166,666,700 issued shares. The flotation occurred on 3 August 2000 with the placing effected at a price of 145p. The greenshoe option was exercised on 8 August 2000. In total, 29.2% of the issued share capital was disposed of in the flotation. The three trusts disposed of the following shares, including via the greenshoe option:

GRH Trust – 20,935,164 shares

IFL Trust – 14,000,000 shares

S & A Trust – 9,435,164 shares

48. On 24 October 2000, the Mauritius trustees resigned as trustees of each of the family trusts. Kleinwort Benson Trustees Limited and two individual trustees were appointed at which stage the trusts all became UK resident for CGT purposes.

The test for POEM applied by the FTT

49. The FTT considered the test to be applied in identifying the POEM of the trusts at [280] – [350] of the Decision. It considered the relevant case law in considerable detail, including the Court of Appeal in *Wood v Holden* and in *Smallwood*. It also analysed the Special Commissioners' ("the SpC") decision in *Smallwood* in order to give full context to the decision of the Court of Appeal. We shall consider the judgments in *Wood v Holden* and *Smallwood* in due course. For present purposes, to explain the test for POEM applied by the FTT, we shall give a very brief overview.

50. As we mentioned in our introduction, *Wood v Holden* involved identifying the location of the central management and control of a company. However, there are statements in the judgment of Chadwick LJ (with whom Moore-Bick and Christopher Staughton LJJ agreed) that the test for identifying the location of central management and control of a company is in substance the same test as that for identifying the POEM of a company. Indeed, for reasons which will become apparent, the appellants say that this is part of the ratio of the judgment of Chadwick LJ and therefore it is binding on us.

51. In determining where the central management and control of a company lies, Chadwick LJ distinguished cases where it is exercised by a constitutional organ such as the board of directors, and those where the functions of that constitutional organ have been usurped, in the sense of being exercised independently of the constitutional organ.

52. In *Smallwood*, which also concerned the round the world scheme, a majority of the Court of Appeal (Hughes and Ward LJJ) upheld the decision of the Special Commissioners that the POEM of the trust was in the UK. Patten LJ was in a minority and held that the Special Commissioners had wrongly failed to apply the test of usurpation derived from *Wood v Holden*.

53. The FTT's decision on POEM was at [351] – [365]. Its conclusion on the relevant test to be applied is at [359] – [361]:

> 359. It is evident from Hughes LJ's judgement [in *Smallwood*], therefore, that for the purposes of applying article 13(4) of the Mauritius treaty in these circumstances, the tribunal is not confined to finding that POEM of the family trusts (ie the trustees of the family trusts as a continuing body) was in a place other than that where the Mauritius trustees made their formal decisions, only if the evidence supports a finding that their discretion to take the individual actions required to implement the scheme was "usurped" in the sense set out in *Wood v Holden*. Moreover, whilst Hughes LJ held, in effect, that the Commissioners' decision is within the scope of what a judge acting judicially and properly instructed may decide, Hughes LJ did appear to endorse the overall approach taken by the

Commissioners when he said that they had addressed the right question and cited the passages from their judgement containing their key conclusions.

360. It is apparent from my comments on these two cases that I consider that the decision of the Commissioners in *Smallwood* and that of the High Court and Court of Appeal in *Wood v Holden* are not easily reconcilable (at any rate given the interpretation of *Wood v Holden* which the Court of Appeal took). In *Smallwood,* the Commissioners and Hughes LJ gave different reasons as to why it is not appropriate to seek to assess the POEM of a trust, as the place where the "top-level management" is carried out, by adopting a similar approach to that taken in *Wood v Holden* to the very similarly formulated test for assessing where CMC of a company is located, as the place where "the real business" is carried on (being where CMC "actually abides"). I do not find it easy to understand the basis for the distinction which either the Commissioners or Hughes LJ made.

361. However, my own views on that score are not relevant. Whatever the basis for the distinction, I consider that (a) it is plain from the decision of the majority of the Court of Appeal in *Smallwood* that in determining where the POEM of the trustees of the family trusts, as a deemed trustee body, is located it is appropriate to have regard to the general approach set out by the Commissioners in *Smallwood* and not to the reasoning in *Wood v Holden* (as the relevance and applicability of that reasoning is interpreted by the Court of Appeal in *Smallwood*) and (b) on that basis, on the evidence set out in Part B, the POEM of the trustees of the family trusts as a deemed trustee body was in the UK during the relevant period.

54. In short, the FTT was applying a test for POEM based on the approach of the SpC in *Smallwood* and without regard to *Wood v Holden*. We must decide in due course exactly what that test was.

55. The FTT went on to say at [362] why in its view the evidence demonstrated that the POEM of the trusts was in the UK:

362. The evidence demonstrates that:

(1) There was an overall single plan for the sale of the shares in a tax efficient manner which was devised, decided upon, facilitated, orchestrated and superintended in the UK by the settlors and their UK advisors, as assisted by the PC trusts team (who I regard as having a dual role, for the reasons already given) on an on-going basis throughout the relevant period.

(2) It was integral to the plan that the Mauritius trustees would be in place as trustees of the family trusts for a brief period only for the purpose of implementing the plan as was in fact the case.

(3) The Mauritius trustees were appointed by the settlors as trustees of the family trusts in the confident expectation that they would implement the plan by taking all the actions considered to be necessary for it to succeed (namely, their agreement to the merger and sale of the shares on the flotation, their approval of the various appointments, their approval of actions considered necessary to ensure the family trusts were resident in Mauritius, and their retirement in favour of UK trustees).

(4) The decisions involved in initiating, orchestrating, superintending and refining this plan on an on-going basis, taken by the UK settlors and their UK advisors (as to some extent assisted by the PC trusts team), constituted effective or, as the Commissioners put it in *Smallwood*, the "top-level" management of the family trusts during the relevant period.

(5) The decisions made by the Mauritius trustees to effect the individual actions required to implement the overall single plan constituted merely "day to day" management of or administration of this plan or, as the Commissioners put it in *Smallwood*, lower level decisions by, the Mauritius trustees, as the trustee for the time being appointed specifically to effect these actions.

56. The FTT then described at [363] – [365] specific aspects of its findings of fact which supported the broad findings stated at [362].

The grounds of appeal and the parties' submissions in outline

57. The appellants have permission to appeal on two grounds:

> (1) The Appellants' primary ground of appeal is that the FTT made an error of law in its approach to POEM. In particular, the FTT erred in holding that Hughes LJ in *Smallwood* was rejecting the *Wood v Holden* test and applying a different legal test (specifically the approach of the Special Commissioners).
>
> (2) The Appellants also challenge the FTT's decision on the further ground that the Tribunal erred in its application of the law to the facts. In particular, the FTT erred in holding that the 'decisions' to devise the plan and the desire and expectation that the trustees would agree to that plan constituted the "top-level" management of the trusts, whereas the actual decisions of the Mauritius trustees to enter into the various individual transactions which implemented that plan constituted lower level decisions.

58. The appellants' arguments on both grounds were summarised at [55] of their skeleton argument:

> 55. The proper test by which to identify the POEM for the purposes of Article 4(3) of the UK/Mauritian Treaty is that articulated in *Wood v Holden* 78 TC 1 which identifies the place of effective management as being the place in which the binding decisions are made by the authorised decision-making body (in this case the trustees of the various trusts) unless that decision-making function has been 'usurped'. In this regard, the fact that certain decisions involve adopting a plan or proposals devised and superintended by someone else is not sufficient to conclude that decision-making has been 'usurped' such as to displace the location of the effective management from that place in which actual decisions are taken.

59. The appellants contend that the FTT failed to properly articulate the test it was applying to determine the POEM of the trusts. Whatever test it did apply was derived from a misreading of the Court of Appeal decision in *Smallwood*. The appellants say that the correct test is identical to that described in *Wood v Holden* in the context of identifying the location of the central management and control of a company. It is the place where binding decisions are made by the authorised decision-making body, unless that decision-making function has been "*usurped*". The fact that certain decisions of the trustees in this case involved adopting a plan or proposal devised and superintended by someone else in the UK is not sufficient to conclude that the decision-making function of the Mauritius trustees had been usurped. The FTT was therefore wrong to find that the POEM of the trusts was the UK.

60. Mr Rivett submitted that we are bound by the reasoning of the Court of Appeal in *Smallwood*, which endorsed the test set out in *Wood v Holden*. He relied on the following statements of principle derived from *Wood v Holden*:

> (1) The approach to identifying the location of central management and control of an entity involves the same enquiry as identifying the location of the POEM of an entity.
>
> (2) The enquiry requires identifying the location where high-level decisions are made, which is normally where the authorised decision-making body meets.
>
> (3) That will be the POEM, unless the decision-making functions have been usurped.
>
> (4) The relevant high-level decisions must be identified with care and do not include decisions which fall to other parties.

(5) There is no usurpation where a body accepts a proposal or advice which it considers is in the best interests of the entity.

(6) The fact that the issue arises in the context of tax planning arrangements does not affect the enquiry.

61. Save as to (1) and the reference to POEM in (3), HMRC broadly accept these propositions in the context of identifying the location of central management and control of a company. They say those principles do not apply in the context of identifying the POEM of a trust.

62. If Mr Rivett is right about the proper test to be applied, he says that the only conclusion available on the facts is that the POEM of the trusts during the "Mauritius Period" was in Mauritius. In particular, he says that there were multiple layers of decision-making involved in implementing the scheme. The scheme involved a number of different decisions, as follows:

(1) the decision of the Jersey trustees to retire and of the settlors to appoint Mauritius trustees;

(2) the decision to make various appointments of shares and cash from the family trusts into discretionary and other sub-funds and for the benefit of beneficiaries;

(3) the decision of the shareholders to merge the companies, through the share-for-share exchanges;

(4) the decision to sell shares through the flotation by entering into the placing agreement, including a decision to give DKB authority to sell additional shares through the greenshoe option;

(5) the decision of the Mauritius trustees to retire as trustees of the family trusts in October 2000 in order to give effect the tax planning;

63. Mr Rivett observed that it was a matter for the board of directors of Teleware and Workplace to decide whether to consider and pursue the merger and flotation. As minority shareholders, the trustees were not concerned in that decision, unless and until the directors formulated a proposal which required the consideration of shareholders. The "relevant" decisions of the trustees in testing the POEM of the trusts during the period when the Mauritius trustees were in place from 28 June 2000 to 24 October 2000 ("the Mauritius Period") were the decisions at (2) – (5). Those were the decisions which the trustees were empowered to make and the question was whether their functions had been usurped in relation to those decisions. The fact that those decisions might be part of a plan devised by someone else is not sufficient to conclude that the decision-maker has been usurped.

64. Mr Rivett relied on various findings of the FTT to the effect that the Mauritius trustees were appointed on the basis that they were expected to act diligently and properly, and it was understood that the proposed transactions were in the interests of the beneficiaries. The trustees had not agreed to take the relevant decisions at the time of appointment, unlike the trustees in *Smallwood*. They were free not to take the relevant decisions and the reason it was expected that they would take the decisions was only because there were cogent commercial and tax advantages in doing so. The FTT found that the relevant decisions were taken by the Mauritius trustees and not by anyone else. They were not instructed or directed to take those decisions and there was no finding that their functions as trustees had been usurped. Mr Rivett submitted that none of the findings of the FTT come close to finding that their functions were usurped. If the FTT had applied the correct test based on *Wood v Holden*, it could only have found that the POEM of the trusts was in Mauritius during the Mauritius Period.

65. Mr Stone's case was relatively straightforward. He says that the test for POEM is not based on *Wood v Holden* but is the test applied by the SpC in *Smallwood*, which was endorsed by the majority of the Court of Appeal. We shall consider his detailed submissions in that regard in the discussion which follows.

Discussion

66. We should say at the outset that we accept a submission of Mr Rivett that the test for POEM applies generally and cannot be construed in a different way simply because the context here involves a tax avoidance scheme. Mr Stone did not suggest otherwise.

67. Mr Rivett submitted that the test derived from *Wood v Holden* was consistent with an orthodox approach to the construction of treaties generally and could be supported as a matter of principle. There were three strands to Mr Rivett's arguments:

(1) The position as a matter of authority,

(2) The construction of the Treaty, and

(3) The position as matter of principle.

68. Mr Rivett made submissions as to the test to identify the POEM by reference to each of these arguments. He submitted that as a matter of authority we were bound by *Wood v Holden* which was itself endorsed by the Court of Appeal in *Smallwood*. In relation to construing the Treaty, he made submissions based on the generally accepted approach to construing treaties and reliance on OECD Commentaries, both at the time the Treaty was negotiated and subsequent Commentaries. Some of the Commentaries were referred to by the SpC and the Court of Appeal in *Smallwood*. Indeed, the reliance placed on the Commentaries by Patten LJ was subsequently endorsed by Lord Briggs JSC in *Fowler v HM Revenue & Customs* [2020] UKSC 22 at [18]. Mr Rivett also submitted that as a matter of principle there were a number of juridical and practical concerns if HMRC are right about the interpretation of POEM. With an element of hyperbole, he described the prospect of trusts being resident in the UK based on the facts of this case as "*terrifying*".

69. We set out below our findings on the position as a matter of authority. In the light of those findings it is not necessary for us to embark on our own analysis as to the true construction of the Treaty or to consider the position as a matter of principle.

Wood v Holden

70. In *Wood v Holden*, the Court of Appeal was concerned in the first instance to identify the place where the central management and control of a company was located. There was a complex corporate and trust structure. The issue arose in the context of capital gains tax on an intra-group disposal of shares to Eulalia Holdings BV ("Eulalia"), a company incorporated in the Netherlands. The issue was whether or not Eulalia was resident in the UK. Chadwick LJ described the issues as follows:

> 6. It is common ground that the question whether or not Eulalia was resident in the United Kingdom on 23 July 1996 for the purposes of TCGA 1992 turns, in the first instance, on "where its real business [was] carried on . . . where the central management and control actually abides". That was the test adopted by the House of Lords in *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)* [1906] AC 455 (*per* Lord Loreburn, Lord Chancellor, at 458). But if, on the application of that test, Eulalia were found to be resident in the United Kingdom, then … under article 4(3) of the double tax convention Eulalia would be deemed to be a resident of the state "in which its place of effective management is situated".

71. The approach to determine where central management and control abided was described by Chadwick LJ at [27]:

> 27. In seeking to determine where "central management and control" of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are "usurped" - in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an "outsider" in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an "outsider" is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function.

72. The Court of Appeal upheld the finding of Park J that the only conclusion open on the facts was that Eulalia was not resident in the UK. It did not therefore need to address the question posed by the double taxation convention of the location of Eulalia's POEM. Chadwick LJ went on to say at [44]:

> 44. For those reasons I would uphold the judge's decision to reverse the special commissioners' finding as to the residence of Eulalia on the basis of the central management and control test. That makes it unnecessary for me to consider what the position would have been if the effective place of management test posed by the double tax convention had become relevant. I have already indicated that I find it very difficult to see how, in the circumstances of this case, the two tests could lead to different answers.

73. Chadwick LJ had previously stated by way of introduction at [6]:

> 6. … It is not clear – at least, not clear to me – whether the article 4(3) test differs in substance from the *De Beers* test; and, if the two tests are not, in substance, the same, I find it very difficult to see how, in the circumstances which the special commissioners had to consider, they could lead to different answers.

74. Mr Rivett described *Wood v Holden* as a "dual ratio" case, maintaining that the reasoning on both central management and control and POEM were part of the ratio of the decision and that we are bound by that reasoning. We do not accept that is the case. The decision on central management and control formed part of the ratio for the decision. What was said about POEM was not a necessary part of the reasoning by reference to which the Court of Appeal dismissed the appeal against the judgment of Park J. Even then, what was said about the relationship between central management and control and POEM was couched in terms which indicated the view of the Court of Appeal on the facts of that case, but which did not purport to decide the issue.

75. Mr Rivett also relied on the findings of Park J in the High Court on POEM. Park J held at [72] that the central management and control of Eulalia was in the Netherlands. He went on to say at [81] that if he was wrong on that, the POEM of Eulalia was in Amsterdam. Again, that latter finding did not form part of his reasoning for allowing the taxpayer's appeal against the decision of the Special Commissioners. In any event, it is not clear to us that Park J was applying the same test for POEM as for central management and control, although on the facts he found that both gave the result that Eulalia was resident in the Netherlands. It is notable that Park J records at [75] the submission of counsel for the Inland Revenue that if central management and control was in the UK then so too was POEM. It appears that Park J rejects that submission at [76].

76. Clearly, in the absence of binding authority, what was said by the Court of Appeal and by Park J in *Wood v Holden* would be highly persuasive as to the test for POEM.

77. In the context of corporate residence and central management and control, we were referred to a recent summary of the test by Newey LJ in *Development Securities Limited v HM Revenue and Customs* [2020] EWCA Civ 1705. Having reviewed the authorities he stated at [14]:

> 14. For present purposes, I would draw the following points from the authorities:
>
> i) The overarching principle is that a company resides for tax purposes where its real business is carried on, and that is where CMC actually abides;
>
> ii) The principle applies in relation to subsidiaries, including special purpose vehicles;
>
> iii) It is the actual place of management, not that in which it ought to be managed, which fixes the residence of a company;
>
> iv) A company may be resident in a jurisdiction other than that of its incorporation not only where a constitutional organ exercises management and control elsewhere, but if the functions of the company's constitutional organs are usurped, in the sense that management and control is exercised independently of, or without regard to, its constitutional organs, or if an outsider dictates decisions (as opposed to merely proposing, advising and influencing decisions);
>
> v) On the other hand, CMC of a subsidiary will not be taken to be in a jurisdiction other than that of its incorporation just because it is following a tax planning scheme propounded by its parent. Nor need it matter that a company's board takes decisions without full information or even in breach of the directors' duties;
>
> vi) Events before or after the particular date in question may be relevant as casting light on the position on that date; and
>
> vii) Where a company is resident is essentially a question of fact.

78. Neither party takes any issue with that summary of the test for corporate residence and central management and control. The FTT in *Development Securities*, coincidentally the same FTT Judge as in the present appeal, found that a subsidiary company was UK resident. It found that the UK parent was exercising central management and control in that the directors of the subsidiary company acted on instruction from the parent company. The facts of the case were very different from the present facts. However, we note in passing that the Upper Tribunal, which overturned the FTT and was itself overturned by the Court of Appeal, rejected at [66] and [67] a submission of HMRC that the test for POEM elucidated the test of central management and control.

Smallwood

79. The decision in *Smallwood* is fundamental to both parties' submissions. The case was concerned with the same tax avoidance scheme as that which Mr Haworth and Mr Lenagan have sought to utilise. In order to understand the reasoning of the majority of the Court of Appeal, it is necessary to look in detail at the decision of the SpC. It is also important to consider the judgment of Patten LJ who was in the minority. We need not consider the decision of the High Court in any detail. We bear in mind when looking at these decisions that they should not be construed as if they were pieces of legislation.

80. Mr Rivett argued that the SpC applied the test in *Wood v Holden* and found that the decision-making function of the trustees had been usurped, although they did not use that word. He says that the majority of the Court of Appeal did nothing more than find that the SpC had been entitled to make that finding on the facts.

81. We note that at [109] the SpC recorded the taxpayer's submission that the test of central management and control and POEM were for practical purposes the same. The taxpayer submitted that the SpC should take the same view as Chadwick LJ in *Wood v Holden*, whilst accepting that it was not binding. The SpC were invited to adopt the distinction drawn by Chadwick LJ between directors being dictated to by an outsider and directors taking decisions pursuant to a tax scheme devised by an outsider giving advice and influencing the directors.

82. We start by looking to see whether there was any finding by the SpC of usurpation of the trustees, in the sense of the trustees being instructed how to make their decisions or their decisions being dictated by others. Mr Rivett relied in particular on [27] and [28] which he described as the central finding of fact on which the case turned. In those paragraphs, the SpC describe an email sent by Mr Turbervill, who was Mr Smallwood's tax adviser, to a representative of the proposed trust company in Mauritius ("PMIL"), which was part of KPMG:

> 27. …The email continued:
>
> > "After taking Counsel's opinion it had been decided in principle that the Jersey trustee will resign in favour of Mauritius trustees, so that the trust becomes tax resident in Mauritius. Provided that the new trustees agree that it is sensible to sell the FG [FirstGroup] shares they will do so at some time within the next 3-4 months. If they sell the shares before 5 April 2001 they would then retire in favour of United Kingdom resident trustees, also before that date. If this course of action is followed, it is hoped that no United Kingdom tax liability will arise upon the sale as a result of the United Kingdom/Mauritius treaty."
>
> 28. The email went on to ask if PMIL was "prepared to act as trustee on this basis" and asked for some advice on the tax implications and an indication of costs. In oral evidence which we accept Mr Turbervill told us that by those words he thought he meant that he was making it clear that he was offering PMIL an assignment which could potentially last for only three or four months. There was no stipulation that the shares had to be sold before 5 April 2001 although it was clear from the email that there was a hope and a confident expectation that the shares would be sold.

83. The question which arises is whether the SpC, based on all the evidence, made any finding that the decision-making powers of PMIL had been usurped? The SpC recited the evidence of Mr Turbervill, who was also acting as a tax adviser to the trustees for the time being:

> 49. On 8 January 2001 at 12.21 pm Mr Turbervill sent an email to PMIL, Lutea, and Mr Bazzone saying:
>
> 'It is essential as part of the tax planning exercise that the FirstGroup shares are not sold until after KPMG Mauritius have validly become the trustees.
>
> To avoid any suggestion that Lutea may remain the trustees until the deed of indemnity has been executed and forwarded to KPMG Mauritius please may we all agree that no instructions to sell the shares are given until the signed deed has been received.'

50. Mr Turbervill told us that he did not regard this email as an instruction not to sell the shares but was just requesting the recipients to satisfy themselves that the deed of indemnity had been signed before any action was taken.

84. At [61], the SpC record the evidence of Mr Jingree, who was the managing director of PMIL, as to a telephone conversation he had with his colleagues after PMIL had been appointed as trustee:

61. During the telephone meeting Mr Jingree reminded those present that the Trust had migrated to Mauritius within the context of a tax planning exercise and that the shares, if the trustees decided to sell them, had to be sold before the end of March or the beginning of April. He briefed Mr Koon and Mr Purgus that it was to the advantage of the beneficiaries that they should take a decision to sell the shares. As it was in the interest of the Trust and the beneficiaries the trustees thought it best to dispose of all the shares well before the end of the tax year. The price of the shares was also discussed. The meeting also discussed the appointment of the investment manager. The meeting agreed to proceed with the sale of all the FirstGroup shares. We accept the evidence of Mr Koon that the reason for that decision was because the sale was in the interests of the beneficiaries of the trust to maximise the trust fund by the proceeds not attracting tax in the United Kingdom. Following the telephone meeting Ms Taher and Mr Shah were instructed to proceed with the administrative matters relating to the sale, and the giving of the instructions for the sale, of all the FirstGroup shares.

85. The SpC considered the law on POEM for the purposes of Article 4(3) at [109] – [112]. At [109] they record the taxpayer's submission that POEM meant the same as central management and control and at [110] they record HMRC's submission that it was not correct to ask where central management and control was situated. The SpC then state at [111]:

111. There was thus some debate about whether, or to what extent, POEM differed from CMC. We consider that this misses the point; the two concepts serve entirely different purposes. CMC determines whether a company is resident in the United Kingdom or not; POEM is a tie-breaker the purpose of which is to resolve cases of dual residence by determining in which of two states it is to be found. CMC is essentially a one-country test; the purpose is not to decide where residence is situated, but whether or not it is situated in the United Kingdom, even though courts do sometimes express their decisions in terms of a company being resident in a particular foreign jurisdiction, as was the case in *Wood v Holden.*

112. POEM, on the other hand, must be concerned with what happens in both states since its purpose is to resolve residence under domestic law in both states, caused for whatever reason, which could include incorporation in one state and management in the other, or different meanings of management applied in each state, or different interpretations of the same meaning of management applied in each state, or divided management. One must necessarily weigh up what happens in both states and according to the ordinary meaning to be given to the terms of the treaty in their context … decide in which state the place of effective management is found… Accordingly, having regard to the ordinary meaning of the words in their context and in the light of their object and purpose we approach the issue of POEM as considering in which state the real management of the trustee qua trustee is found.

86. The SpC then go on to consider guidance in UK case law as to the POEM of a trust:

113. We turn to guidance from United Kingdom cases where the issue of POEM has arisen. First in time is *Wensleydale's Settlement Trustees* in which Special Commissioner David Shirley said of POEM in the ordinary meaning of language at 250j:

> "I emphasise the adjective 'effective'. In my opinion it is not sufficient that some sort of management was carried on in the Republic of Ireland such as operating a bank account in the name of the trustees. 'Effective' implies realistic, positive management. The place of effective management is where the shots are called, to adopt a vivid transatlantic colloquialism."

87. The SpC then referred to *Wood v Holden*, noting at [115] that on the basis of the Court of Appeal's decision, the issue of POEM did not arise and also what Chadwick LJ had said at [44]. The SpC concluded at [118]:

> 118. …We do not therefore obtain much assistance from these authorities apart from the "realistic, positive management" principle from *Wensleydale*.

88. The SpC went on to consider guidance in the OECD Commentaries on the model treaties, including the 1977 Commentary which was in place at the time the Treaty was negotiated, and the current Commentary from 2000 in place at the time of the hearing. The 1977 Commentary stated as follows:

> 23. The formulation of the preference criterion in the case of persons other than individuals was considered in particular in connection with the taxation of income from shipping, inland waterways transport and air transport. A number of conventions for the avoidance of double taxation on such income accord the taxing power to the State in which the 'place of management' of the enterprise is situated; other conventions attach importance to its 'place of effective management', others again to the 'fiscal domicile of the operator'. Concerning conventions concluded by the United Kingdom which provide that a company shall be regarded as resident in the State in which 'its business is managed and controlled', it has been made clear, on the United Kingdom side, that this expression means the 'effective management' of the enterprise.

89. The 2000 Commentary stated as follows:

> 24 As a result of these considerations, the 'place of effective management' has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made…

90. The SpC adopted this later guidance as the test for POEM at [124]:

> 124. We see no reason why this approach should not be adopted even though it is in the Commentary issued after the Treaty. It is not significantly different from the earlier Commentary saying that POEM was the same as the reference to management and control in old United Kingdom treaties, which meant CMC, or the top level of management. But it is really aimed at a different situation, that of different levels of corporate management, which is not relevant here.

91. The SpC then noted the existence of an OECD discussion draft on the tie-breaker provision, but conclude at [130]:

> 130. Accordingly, there is nothing in this additional material that changes our initial view that, having regard to the ordinary meaning of the words in their context and in the light of their object and purpose, we should approach the issue of POEM as considering in which state the real top level management (or the realistic, positive management) of the trustee qua trustee is found.

92. It is clear to us on a reading of the decision as a whole that the SpC obtained no assistance from *Wood v Holden* on the meaning of POEM. The test for POEM applied by the SpC in *Smallwood* was summarised at [130] and it was a test derived from the 2000 Commentary and *Wensleydale*.

93. The SpC then applied that test to the facts:

> 131. We now turn to apply that principle to the facts we have found and ask in which state the real top level management, or the realistic, positive management of the Trust, was found between 19 December 2000 and 2 March 2001.

94. It is notable that the SpC were looking at the period during which the Mauritius trustees were appointed. However, they did not confine their factual enquiry to that period. The key facts taken into account by the SpC and their conclusions on POEM are set out at [138] – [145] under a heading "*The relevant facts*". These passages are quoted in full by Patten LJ in the Court of Appeal and are important when we come to consider how the Court of Appeal determined the appeal:

> The relevant facts
>
> 138. The tax planning scheme was devised by KPMG Bristol as tax advisers to Lutea, the previous trustee of the Trust. Mr Smallwood had retired as Chairman of FirstGroup and any restrictions on the sale of the FirstGroup shares had been lifted. A tax efficient way of diversifying the portfolio of investments held for the Trust was needed. The appointment of trustees in Mauritius had been the idea of Mr Turbervill and the details were described to Mr Smallwood as early as August 2000. Mr Smallwood had the power to appoint new trustees. It was Mr Turbervill who approached PMIL and told them about the tax planning proposals and set out the basis of their appointment in the email of 24 November 2000. That made it clear that the confident expectation was that the shares would be sold before 5 April 2001.
>
> 139. We accept the evidence of Ms Taher that she did not understand "the basis" referred to in the email of 24 November 2000 as to mean that the sale of the shares was a condition for PMIL to accept the appointment as trustee; her evidence was that the trustees would wish to receive appropriate advice and recommendations. However, she accepted that eventually as part of the tax planning exercise the shares would be sold at some time. We accept the evidence of Mr Jingree that there was no agreement that PMIL would behave in a certain way or make certain decisions as a quid pro quo for the introduction of the Trust. PMIL's duties as trustee were laid down in legislation and in the trust deed and PMIL would only act within the context of what it was allowed to do. We also accept the evidence of Mr Jingree that the whole point of the tax planning exercise was to sell the shares and to realise the gain and to avoid tax on the gain.
>
> 140. The facts surrounding the appointment of PMIL lead us to the view that the real top level management, or the realistic, positive management of the Trust, remained in the United Kingdom. We accept that the administration of the Trust moved to Mauritius but in our view the "key" decisions were made in the United Kingdom.
>
> 141. This view is confirmed by subsequent events. The sale of the FirstGroup shares was not an isolated decision taken by PMIL on 10 January 2001. It had been carefully arranged beforehand by the transfer of the shares to Quilter to be held in their nominee account. Further, Mr Bazzone of Quilter had been told of the tax planning exercise and that Quilter would be asked to dispose of the holding of FirstGroup shares after PMIL had been appointed. It was when Mr Bazzone of Quilter told Mr Gadd on 4 January 2001 that he needed instructions from the new trustees that Mr Turbervill prompted PMIL to get on with what they should be doing. At no time did Mr Bazzone recommend the sale of all the shares but the sale of all the shares fitted in with the tax planning scheme. When Mr Bazzone wrote on 6 January to PMIL about the sale of the shares Mr Jingree was away from the office and Mr Shah asked Mr Turbervill for advice. There was then a delay in PMIL receiving the deed of indemnity and Mr Turbervill sent his email of 8 January to PMIL, Lutea and Mr Bazzone that no instructions to sell the shares should be given until the deed had been received. PMIL also asked Mr Turbervill to help with the opening of the account with Quilter and Mr Turbervill suggested an investment objective of capital growth with medium risk. Even on the date of the decision to sell Mr Bazzone had to remind PMIL how many FirstGroup shares were to be sold. Mr James Baxter of Merchant took the initiative in obtaining a set of account opening forms for Merchant.

> 142. We accept the evidence of Mr Jingree that the sale of the shares was motivated by United Kingdom tax planning reasons. The purpose of selling all the shares was to ensure that the tax planning which had been put in place worked to the best advantage of the Trust and it was vital that all of the shares were sold prior to the end of March in order to achieve this. The decision to sell all the shares was made in the hope that all the shares could be sold before the end of March. However, if it had not been in the interests of the beneficiaries and the Trust, the trustees would not have sold the shares; "if the funds which had been realised had to go away in taxes then it would not have been in the best interests of the beneficiaries". Also, if the share price dropped dramatically, and if the fund manager had advised against a sale, then the trustees would not have decided to sell. We also accept the evidence of Ms Taher that the decision to sell all the shares was based upon tax planning and the need for the shares to be sold by a particular date. The fact that the share price had gone up was not the "driver" for the sale of the shares.
>
> 143. We fully accept that the decision to sell the shares that day was taken by the directors of PMIL at the telephone meeting on 10 January 2001. We also accept that if, for example, the price of the shares had fallen to a level that meant that no gain would be realised on their disposal, the shares would not have been sold but would have been retained and perhaps sold later. Nevertheless, in our view this was a lower level management decision as there was no doubt that the shares would be sold; the real top level management decisions, or the realistic, positive management decisions of the Trust, to dispose of all the shares in a tax efficient way, had already been, and continued to be, taken in the United Kingdom. The "key" decisions were made in the United Kingdom.
>
> 144. Finally the events after the sale of the shares confirm our view. The tax planning exercise was completed by the appointment of United Kingdom trustees. We remark that PMIL's fee note was approved by Mr Turbervill.
>
> 145. We conclude that the state in which the real top level management, or the realistic, positive management of the Trust, or the place where key management and commercial decisions that were necessary for the conduct of the Trust's business were in substance made, and the place where the actions to be taken by the entity as a whole were, *in fact*, determined between 19 December 2000 and 2 March 2001 was the United Kingdom.

95. It is notable that in applying the test identified at [130] to the facts, there is no suggestion that the SpC find any instruction, direction or dictation to PMIL, or any usurpation of PMIL. Despite the absence of such a finding, the SpC reach their first conclusion at [140] that the facts surrounding the appointment of PMIL lead to the view that the real top level management and the realistic, positive management of the trust, remained in the United Kingdom. The administration of the trust moved to Mauritius but the "key" decisions were made in the United Kingdom. The SpC consider that this conclusion is confirmed by subsequent events and the conclusion is restated at [145].

96. Mr Rivett submitted that at [143], the decision of PMIL being referred to by the SpC was not the decision to sell the shares, but the decision to sell the shares "*that day*". The decision to sell the shares was made in the UK and was imposed on PMIL. The fact that the SpC endorsed a test which involved looking at the decisions of the trustee as trustee indicates that it was not rejecting the approach in *Wood v Holden*. The only decision that PMIL took was the date on which to sell. The real top-level management decision was the decision to dispose of the shares, which had been taken in the UK.

97. Mr Stone submitted that the key decisions referred to by the SpC were the decisions to enter into the scheme as a vehicle to sell the shares in a tax-efficient way, to appoint PMIL as trustee in place of the Jersey trustee and for PMIL to then resign as trustee in favour of English trustees. He submitted that those are the decisions which Hughes LJ (as he then was) subsequently describes as the primary facts which supported the SpC decision. The reference of the SpC to considering the

decisions of a trustee "*qua trustee*" make sense when one is considering the trustees as a single continuing body of persons which was the approach taken by Hughes LJ.

98. We shall consider these submissions once we have looked at the judgments in the Court of Appeal.

99. In the High Court, Mann J allowed an appeal on the taxpayer's primary ground of appeal. He held that the relevant time to determine where the trust was resident for the purposes of Article 13(4) was the date on which the chargeable gains accrued. The trust was resident only in Mauritius at that time and therefore the tie-breaker in Article 4(3) was not engaged. This was referred to as the "*snapshot*" argument. Having accepted the snapshot argument, he did not need to consider where the POEM of the trust was located at any time.

100.HMRC appealed to the Court of Appeal (Ward, Hughes and Patten LJJ) which unanimously rejected the snapshot argument. It held that in Article 4(1), "*resident of a Contacting State*" meant chargeable to tax in that State on account of residence, taking into account the tax treatment of the gain under the domestic law of both Contracting States, regardless of the period of residence which gives rise to the liability. Article 4(3) was therefore engaged in every case in which there was "*liability to taxation*" in both Contracting States.

101. The Court of Appeal then considered the taxpayer's cross-appeal against the decision of the SpC on the POEM of the trust. Mr Rivett described this as "*the Hamlet of the piece*" in the context of our appeal. It is helpful to look first at the judgment of Patten LJ who was in the minority on this issue. The circumstances in which the POEM issue arose were described by Patten LJ at [47]:

> 47. …Both sides approached this issue by reference to what the Special Commissioners described as the Mauritius period: i.e. the period up to and including the sale of the shares during which PMIL remained the trustee. This was on the basis that it is in respect of the Mauritius period that the trustees are chargeable to tax in both Contracting States. The Special Commissioners were not asked to consider the issue of POEM over any longer period of time and made no findings of fact in respect of that. The result of adopting the same approach is that the Revenue's appeal will be allowed unless the trustees succeed in upholding their right to double taxation relief on the ground that the Special Commissioners erred in law on the issue of POEM. This is the additional point (not decided by Mann J) which is raised in the respondents' notice.

102. Patten LJ recorded at [48] the test applied by the SpC:

> 48. POEM is not defined in the DTA but was interpreted by the Special Commissioners as meaning the place which is the centre of top-level management: i.e. where the key management and commercial decisions are actually made. This is the test propounded by Professor Dr Klaus Vogel in his Commentary on the OECD Model Convention and has been adopted in German case law. It was also taken to be the correct test by the special commissioner (Mr David Shirley) in *Wensleydale's Settlement Trustees v IRC* [1996] STC 241.

103. Patten LJ recorded that the taxpayer's counsel, Mr Prosser QC accepted that the SpC had applied the right test and set out what the taxpayer had to establish to succeed on the cross-appeal:

> 49. Mr Prosser accepts that this is the test to be applied and that what has to be identified is the place where the real top-level management of the trustee qua trustee occurred rather than the day-to-day administration of the trust. But he submits that the top-level management of a company is usually carried out by its board of directors (as the Commentary suggests) unless it can be shown that the control of the company's affairs was effectively usurped and exercised by some third party and that the directors were content merely to rubberstamp the decisions which were taken. In this case there was, he

says, no evidence or finding that KPMG Bristol or Mr Smallwood dictated the decision to sell the shares.

> 50. It goes almost without saying that, to succeed on the cross-appeal, the taxpayers must establish that the decision of the Special Commissioners on this point contained an error of law of the kind recognised by the House of Lords in *Edwards v Bairstow* [1956] AC 12. Mr Prosser therefore contends that it was not open to the Special Commissioners to find that the POEM of the trustee (PMIL) was anywhere but in Mauritius at the relevant time and, to have reached the conclusion which they did on the evidence, the Special Commissioners must therefore have applied the wrong test.

104. The approach of Patten LJ recognises that the SpC applied the right test, and treats the cross-appeal as a challenge to the application of that test to the facts found by the SpC. The issue being determined by Patten LJ was how the test for POEM should be applied to the facts of a particular case. He noted that the SpC concentrated on the Mauritius period. He then refers to the SpC findings of fact, noting specifically that there was a confident expectation on the part of Mr Turbervill that the scheme would be followed through but no more than an expectation. He sets out the relevant findings of fact made by the SpC, including the findings at [138] – [145] set out above.

105. Patten LJ records the submission of Mr Prosser at [54] as follows:

> 54. Mr Prosser says that none of these findings amounts to or includes one to the effect that KPMG or Mr Smallwood dictated or usurped the decision of PMIL to implement the scheme by selling the shares. Although the sales took place in accordance with the scheme devised and recommended by KPMG, the decision to sell remained that of PMIL acting through its own directors.

106. He then summarised the findings of the SpC as follows:

> 57. The findings of the Special Commissioners are to the effect that the tax scheme recommended by KPMG Bristol was implemented by PMIL in accordance with their advice. The impetus to comply with the scheme and to sell the shares with sufficient time to allow the Smallwoods to be appointed as trustees before 5th April 2001 came from KPMG Bristol who, naturally enough, were concerned to ensure that their advice was followed. The assumption by the Special Commissioners that the trustees had an ultimate right to decline to sell the shares was a factor to be weighed in the balance against that.

107. The first reference to *Wood v Holden* is at [58] in the context of Mr Prosser's submissions, and what the SpC said about *Wood Holden*:

> 58. Mr Prosser submitted that, on the findings of fact made by the Special Commissioners, the board of PMIL had itself taken the decisions necessary for the conduct of the company's business as trustee and therefore exercised effective management. He places particular reliance on the decision of the Court of Appeal in *Wood v Holden* [2006] EWCA Civ 26 where the issue was whether a company which disposed of shares as part of a tax scheme was resident in the UK. It was common ground that this question fell to be answered by applying the test set out by the House of Lords in *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455 which is that a company resides where the central management and control actually abides. A finding on this basis that the company was resident in the UK would have led to a consideration in that case of the DTA between The Netherlands and the UK which contains the tie-breaking provisions of Article 4(3). Chadwick LJ expressed the view that it was difficult to draw any meaningful distinction between the two tests but that even if they did in fact differ in substance, they were unlikely to lead to different results.
>
> 59. The importance of the case for present purposes lies in the analysis by Chadwick LJ of what is capable of constituting management and control of a company by persons who are not its directors…:
>
> > "…

> [27] In my view the judge was correct in his analysis of the law. In seeking to determine where 'central management and control' of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are 'usurped'—in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an 'outsider' in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an 'outsider' is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function."

> 60. The Special Commissioners said that *Wood v Holden* and the other authorities on residence did not ultimately assist on the question of where the POEM of PMIL was situated. They pointed out that the purpose of the Article 4(3) test is to allocate the right to tax between Contracting States, each of which regards the company as resident for tax purposes…

108. Patten LJ set out his conclusion on the cross-appeal at [61] – [63]:

> 61. Although the purpose of the POEM test is effectively to decide between two rival claims to tax based on residence, the terms of the test, as set out in paragraph 24 of the Commentary quoted above, seem to me to lead inevitably to the question whether the effective decision by PMIL to implement the tax scheme and to sell the shares was taken by the board of directors of that company, albeit on the advice and at the request of KPMG Bristol, or whether the PMIL board effectively ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions. Given that the directors of PMIL remained in place and exercised their powers as directors to effect the sale, the approach to this issue suggested by Chadwick LJ in *Wood v Holden* must be the right test.
>
> 62. The conclusion of the Special Commissioners (in paragraph 140 of their Decision) that the key decisions were made in the UK where the realistic, positive management of the trusts remained is said to be based on the facts surrounding the appointment of PMIL. It is clear that they were appointed as part of a pre-existing scheme which involved choosing Mauritius as the situs of the trust because of its favourable treatment of capital gains. It is equally clear that PMIL accepted the trusteeship on the basis that the shares would be sold as part of that tax planning exercise and that the shares were indeed sold in accordance with the scheme. But the Special Commissioners also accepted Mr Jingree's evidence that there was no agreement that PMIL would behave in a certain way or make certain decisions as a *quid pro quo* for the introduction of the trust and that had the sale of the shares not been in the interests of the beneficiaries as at the date of the sale then PMIL would not have agreed to sell.
>
> 63. I find it difficult to accept that on the basis of these findings the Special Commissioners could properly have concluded that the POEM of the trustees up to March 2001 lay in the UK rather than in Mauritius. The findings made do not go beyond saying that PMIL accepted the advice of KPMG to proceed with and implement the scheme in the interests of the beneficiaries. But they retained their right and duties as trustees to consider the matter at the time of alienation and did not (on the Special Commissioners' findings) agree merely to act on the instructions which they received from KPMG. The function of the directors was not therefore usurped in the sense described in *Wood v Holden*. It seems to me to follow that the Special Commissioners' conclusions are not ones which were therefore open to them on the evidence or on the findings of fact which they made.

109. It is clear that Patten LJ was applying the approach in *Wood v Holden* and his finding that the conclusions of the SpC were not open to them on the facts was because the decision-making functions of the directors of PMIL had not been usurped. In other words, he considered it is

necessary to use *Wood v Holden* as the tool to determine whether the test for POEM is satisfied. There was no issue as to the right test, which was that stated at [48] and which was applied by the SpC. He therefore held that the *Edwards v Bairstow* challenge succeeded because in applying that test the SpC had failed to use the tool of *Wood v Holden* and found UK residence without any usurpation of PMIL's decision-making functions.

110. We respectfully consider that Patten LJ was entirely right in his analysis of how the SpC reached the decision they did on the facts of that case. There was no finding of usurpation in the sense described in *Wood v Holden*. We do not accept Mr Rivett's submission that the SpC were not rejecting the approach in *Wood v Holden*. They expressly rejected *Wood v Holden* at [118] and said that it provided no assistance. They found at [139] that PMIL would wish to receive appropriate advice and recommendations but that there was no agreement that PMIL would make certain decisions as a quid pro quo for the introduction of the trust.

111. The key question which then arises concerns the nature of the disagreement between Patten LJ and the majority of the Court of Appeal.

112. Hughes LJ gave a short judgment, with which Ward LJ agreed. The relevant parts of his judgment for present purposes are as follows:

> 66. On the issue of POEM, with suitable hesitation, I respectfully differ from Patten LJ.
>
> 67. The Special Commissioners' conclusion on the issue of POEM was one of fact. The taxpayers can succeed on their cross-appeal only if the Special Commissioners reached a conclusion of fact which was simply not available to them, and thus made an error of law: *Edwards v Bairstow* [1956] AC 12.
>
> 68. If the question were the POEM of the particular trust company trustee for the time being at the moment of disposal, namely PMIL, then it may be that the reasoning in *Wood v Holden* [2006] EWCA Civ 26 would justify the conclusion that the Commissioners fell into this kind of error. I agree that their findings do not go so far as findings that the functions of PMIL were wholly usurped, and I agree that *Wood v Holden* reminds us that special vehicle companies (or, no doubt, special vehicle boards of trustees) which undertake very limited activities are not necessarily shorn of independent existence; indeed they would be ineffective for the purpose devised if they were.
>
> 69. But it seems to me that to apply this reasoning to the present case is to ask the wrong question, and indeed to return to the rejected snapshot approach. The taxpayers with whom we are concerned under section 77 are the trustees. Trustees are, by section 69(1) TCGA 1992, treated as a continuing body:
>
>> "In relation to settled property the trustees of the settlement shall for the purpose of this Act be treated as being a single and continuing body of persons (distinct from the person who may from time to time be the trustees) and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom."
>
> The POEM with which this case is concerned is, as it seems to me, the POEM *of the trust*, i.e. of the trustees as a continuing body. That is the question which the Special Commissioners addressed: see their paragraphs 140 and 145.
>
> 70. On the primary facts which the Special Commissioners found at paragraphs 136-145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps

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

113. Mr Rivett submitted that Hughes LJ was not approving a different legal test to that of *Wood v Holden* which was endorsed by Patten LJ. His decision was simply to the effect that on an *Edwards v Bairstow* approach, the SpC had been entitled to reach the conclusion they did on the facts as found. He was saying that if you look at the question of POEM at the moment of disposal, then *Wood v Holden* would justify overturning the SpC. His disagreement with Patten LJ at [68] was with the period over which you apply the *Wood v Holden* test. Mr Rivett submitted that use of the word "*wholly*" usurped indicated that Hughes LJ considered that the SpC found that there was some usurpation. He was recognising that PMIL had made some decisions, including as to the date and number of shares to be sold. Hence the reference in [143] to the decision to sell the shares "*that day*". However, their function had been usurped in relation to the higher-level decision to sell when looking at the wider Mauritius period rather than simply the date of disposal.

114. We do not accept those submissions. The disagreement between Patten LJ and Hughes LJ was not a disagreement on the facts of the case, or as to the findings of the SpC. At [68], Hughes LJ was agreeing with Patten LJ that the SpC had made no finding that the functions of PMIL were *"wholly usurped"*. In context, it is difficult to see that Hughes LJ was saying that the SpC found that the functions of PMIL had been usurped, but not wholly usurped and that this was his point of disagreement. There is no indication that Hughes LJ was intending to draw such a fine distinction. For the reasons given above, we too consider that the SpC in *Smallwood* did not make any findings of usurpation. If Hughes LJ had thought that the Special Commissioners had made any findings of usurpation, it is reasonable to assume that he would have said so in terms where that was the nature of the disagreement.

115. We consider that the disagreement between Patten LJ and Hughes LJ was on how the test for POEM was to be applied. Patten LJ considered that one had to focus on the decision to sell the shares. He refers at [63] to PMIL retaining its right as trustee to consider the matter at the time of alienation. In doing so he applied the approach in *Wood v Holden*. It appears from [69] that Hughes LJ considered that this approach was a return to the discredited snapshot argument, and a wider inquiry was required.

116. We do not accept that Hughes LJ was applying *Wood v Holden*. He says in terms at [68] that if the test of POEM looked solely at the particular trustee at the moment of disposal, then the reasoning in *Wood v Holden* would justify a conclusion that the SpC fell into error. In other words, when one is looking at the trustees as a continuing body of persons and over a wider period, the SpC were right not to apply the approach in *Wood v Holden*. It is perhaps surprising that Hughes LJ did not reject the *Wood v Holden* approach in clearer terms when it had been endorsed by Patten LJ. However, in our view that must have been, and was the disagreement between them.

117. Hughes LJ did not specifically identify the period over which this wider inquiry should be conducted. He focused at [69] on the trustees as a continuing body of persons and his reference to the POEM "*of the trust, ie of the trustees as a continuing body"* suggests that he considered the inquiry could extend beyond the period when PMIL was the trustee. That is supported by the primary facts described in [70] which he considered justified the SpC conclusion that the POEM of the trust was in the UK. Whilst Patten LJ said at [47] that the SpC made no findings of fact in

respect of any period longer than the Mauritius period, it seems to us that they did make such findings, and those findings are summarised at [138] – [140]. We acknowledge that the SpC focused on the Mauritius period in determining the POEM of the trust, but they also took into account the context in which the trust came to be resident in Mauritius. Their findings of fact clearly encompass the circumstances leading up to the appointment of PMIL as trustees. Indeed, on Mr Rivett's case that appointment is not one of the key decisions of the trustees qua trustees because it was made by the settlor. However, Hughes LJ identifies at [70] that the SpC were entitled to reach their conclusion on POEM by reference to the following facts:

(1) The scheme was devised in the UK by Mr Smallwood on the advice of KPMG Bristol.

(2) The scheme was carefully orchestrated throughout from the UK.

(3) It was integral to the scheme that the trust should be exported to Mauritius for a brief period and then return to the UK, which occurred.

(4) Mr Smallwood remained throughout in the UK.

(5) The scheme of management of the trust went above and beyond the day to day management exercised by the trustees and was controlled from the United Kingdom.

118. Overall, we accept Mr Stone's submissions, which we have incorporated into our analysis, that *Smallwood* was a case where there was no usurpation of the trustees and the majority of the Court of Appeal endorsed a test for POEM which involved looking at the circumstances in which the scheme was devised and implemented. It was not necessary to apply the tool of *Wood v Holden*.

Decisions subsequent to Smallwood

119. The decision of the Court of Appeal in *Smallwood* has been the subject of judicial consideration in the Court of Appeal and the Supreme Court in the following cases:

(1) *R (otao Haworth) v HM Revenue and Customs* [2019] EWCA Civ 747; [2021] UKSC 25 in the Court of Appeal and the Supreme Court, and

(2) *HM Revenue and Customs v Development Securities Plc* [2020] EWCA Civ 1705 in the Court of Appeal.

120. Mr Rivett relied on what was said in *Haworth* by the Court of Appeal and the Supreme Court as supporting his analysis that *Smallwood* was simply an application of *Edwards v Bairstow* and otherwise endorses *Wood v Holden* as the correct approach to determine the POEM of a trust.

121. We have already mentioned that Mr Haworth commenced a judicial review claim against HMRC's decision to issue him with a follower notice and an accelerated payment notice. The notices were given on the basis that for the purposes of section 204(4) Finance Act 2014 the "*principles laid down or reasoning given*" in the ruling of the Court of Appeal in *Smallwood* would deny the tax advantage that Mr Haworth was claiming from the arrangements. The High Court dismissed the claim on the basis that the principles and reasoning contained in the judgment of Hughes LJ in *Smallwood* were capable of application to other similar schemes entered into by other taxpayers. On appeal, it was contended that the legislation was not engaged because *Smallwood* was simply an application of the principles in *Edwards v Bairstow*. HMRC had misdirected themselves in two material respects. Firstly, because they had misunderstood and overstated the significance of the judgment of Hughes LJ. Secondly, because they proceeded on the basis that a follower notice could be given where HMRC was of the opinion that it was more likely than not that the principles and reasoning in *Smallwood* would deny the tax advantage.

122. Newey LJ (with whom Sir Timothy Lloyd and Gross LJ agreed) referred to the decision of the Court of Appeal in *Smallwood*, stating at [9] and [10]:

> 9. … Patten LJ noted in paragraph 49 of his judgment that counsel for Mr and Mrs Smallwood "accepts that this is the test to be applied and that what has to be identified is the place where the real top-level management of the trustee qua trustee occurred rather than the day to day administration of the trust".
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> 10. Where the members of the Court of Appeal parted company was on the application of the test.

123. It is the first misdirection described above which is relevant for present purposes. Newey LJ found that HMRC had misdirected themselves:

> 41. Mr Goodfellow's criticism was essentially that HMRC proceeded on the basis that Hughes LJ had held in *Smallwood* that the POEM was in the UK when he had actually been saying no more than that the Special Commissioners had been *entitled* to arrive at that conclusion.
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> 42. I have referred in paragraphs 14 and 15 above to the submissions that were before [HMRC's Workflow Governing Group] when they decided to approve the follower notice given to Mr Haworth. It will be seen that those submissions stated that in *Smallwood* the Court of Appeal found that "the need to ensure that the share sales took place during the Mauritius trusteeship and then that the UK trustees took their place … meant that the POEM of the trust was not Mauritius but *necessarily* in the UK" and that Hughes LJ "found that the POEM was necessarily in the UK as the inevitable consequence of the tax scheme".
>
> 43. Hughes LJ did not in fact go that far. It can be seen from his judgment, from which I have quoted in paragraph 10 above, that he had *Edwards v Bairstow* well in mind. He explained that the taxpayer could succeed "only if the Special Commissioners reached a conclusion of fact which was simply not available to them, and thus made an error of law" (paragraph 67) and that he did "not think that it is possible to say that [the Special Commissioners] were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question" (paragraph 70). Shorn of context, the final sentence of paragraph 70 ("There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom") could be taken to represent Hughes LJ's *own* view of the position, but Mr Brennan fairly accepted that, in the light of what had been said earlier, Hughes LJ is better understood as having meant no more than that it was open to the Special Commissioners to make such a finding.

124. Gross LJ agreed with Newey LJ, but added some observations of his own, in particular at [67]:

> 67. … [I]n the present case, HMRC misdirected themselves by placing more weight on the decision in *Smallwood v R&C Comrs* [2010] EWCA Civ 778; [2010] STC 2045, than it can bear. Correctly understood, the judgment of Hughes LJ (as he then was), especially at [67] and [70], went no further than holding that the Special Commissioners had been entitled to conclude that the POEM of the trust there in issue was in the United Kingdom. On that footing, however, the "principles laid down, or reasoning given" (FA 2014, s.205(3)(b)) in *Smallwood* do not suffice to assist HMRC here.

125. The Court of Appeal in *Haworth* was dealing with a specific allegation of misdirection by HMRC. It found that HMRC had overstated the significance of the judgment of Hughes LJ because HMRC proceeded on the basis that as a consequence of entering into the scheme, the POEM of the trust was "*necessarily*" in the UK. The Court of Appeal was not seeking to identify the precise nature of the disagreement between Patten LJ and Hughes LJ. It is clear from the decision of Patten LJ that the parties in *Smallwood* were agreed as to the nature of the test for POEM. The issue we

have to determine is how that test fell to be applied and whether it was necessary to have regard to *Wood v Holden* in applying the test. The Court of Appeal in *Haworth* was not called upon to address that issue.

126. In the Supreme Court, Lady Rose gave a judgment with which the other Justices agreed. She addressed the disagreement between Patten LJ and Hughes LJ at [24] – [26] when describing the ruling in *Smallwood*:

> 24. Patten LJ held that the Special Commissioners' findings did not support a conclusion that effective management of the trust took place in the UK. He adopted the test set out in *Wood v Holden* [2006] EWCA Civ 26; [2006] 1 WLR 1393 so that the POEM of the trust turned on whether the critical decisions of the Mauritian trustee company were taken by its board of directors, albeit on the advice and at the request of KPMG, or whether that board had ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions: para 61.
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> 25. Patten LJ did not accept, applying that test, that the Special Commissioners could properly have concluded that the POEM of the corporate trustee lay in the UK rather than in Mauritius. The trustee's functions had not been "usurped" in the sense described in *Wood v Holden*. The Special Commissioners' conclusions were not ones which were open to them on the evidence or on the findings of fact which they made. He would have dismissed the appeal.
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> 26. Patten LJ was however in the minority on the POEM issue. Hughes LJ also prefaced his conclusions by reiterating that the Special Commissioners' finding on the issue of the POEM was one of fact so that the Smallwoods could only succeed on *Edwards v Bairstow* grounds. He agreed that the Special Commissioners' findings did not go so far as to establish that the functions of the corporate trustee had been wholly usurped in the sense described in *Wood v Holden*. If that were the test, then there may well have been an *Edwards v Bairstow* error. But he held that the test was the POEM of the trustees as a single and continuous body of persons as distinct from any particular corporate trustee at any particular time. On that basis, he said:
>
> > "70. On the primary facts which the Special Commissioners found at paras 136-145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by Quilter *[the nominee shareholder]*. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary period only and then be returned, within the fiscal year, to the United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom."

127. It seems to us that Lady Rose was recognising that Hughes LJ was applying a different test to Patten LJ. Whilst this was not part of the reasoning for the decision of the Supreme Court on whether there had been a misdirection by HMRC, it is consistent with our own view as to the nature of the disagreement. Lady Rose addresses the question of misdirection at [71] – [76] of her judgment. She notes at [74] that HMRC proceeded on the basis that if the pointers identified by Hughes LJ at [70] were present in a subsequent case then that would justify the issue of a follower notice. Her conclusion is at [75]:

> 75. That does overstate the conclusion of the Court in *Smallwood*. Hughes LJ did not decide that it was an inevitable consequence of a scheme which shared the *Smallwood* pointers that its POEM would be the UK and not Mauritius. All the members of the Court of Appeal accepted that the test was that set out in the Commentary on article 4(3) of the Model Convention. That Commentary states that "no definitive rule can be given and all relevant facts and circumstances must be examined to

> determine the place of effective management". Although Hughes LJ summarised the findings of the Special Commissioners in para 70 of his judgment, he was not, in my view, listing those pointers as being necessary and sufficient to establish in any other case that the POEM of the trust is the UK. On the contrary, he referred to the full description of the primary facts found by the Special Commissioners as set out in the judgement of Patten LJ as supporting their finding that in Mr Smallwood's case, the POEM of their trust had been the UK.

128. It was not necessary for the Court of Appeal or the Supreme Court in *Haworth* to engage in the detailed analysis of the various decisions and judgments in *Smallwood* which have been the subject of submissions in this appeal. Their decisions were concerned with a particular misdirection alleged against HMRC which they found was established.

129. We should add that Mr Stone also relied on a decision of the High Court of Australia in *Bywater Investments v Commissioner of Taxation* [2016] HCA 45. He did not place great emphasis on the decision and in our view it does not add anything to his detailed submissions on *Wood v Holden* and *Smallwood*.

130. There have also been at least two decisions of the FTT which have considered the test for POEM in the light of the decision of the Court of Appeal in *Smallwood*. Firstly, a decision of Judge Bishopp, then President of the FTT, in *Lee and Bunter v HM Revenue and Customs* [2017] UKFTT 279 (TC). Secondly a decision of Judge Dean in *Wesley v HM Revenue and Customs.*

131. *Lee and Bunter* concerned use of the round the world scheme and the POEM of the relevant trusts. The FTT considered *Smallwood* and *Wood v Holden*. It held on the facts that there was instruction given to the trustees and the POEM was in the UK. Again, Mr Stone did not place much reliance on the decision and in our view it does not add anything to his detailed submissions on *Smallwood*.

132. HMRC's reliance on *Wesley* proved to be problematical. That is because at the date of the hearing before us, the decision had not been published. We now know that it had been released to the parties in that case on 15 February 2021. Mr Rivett on behalf of the appellants took issue with HMRC seeking to rely on an unpublished decision of the FTT. We decided not to have regard to the decision and indicated, at the hearing, that we would give our reasons in this decision. For the sake of clarity, we do so as an annex to this decision which should be treated as forming part of the decision.

The FTT's approach in the present case

133. We have described above the test for POEM applied by the FTT. The FTT stated that it was applying the general approach of the SpC in *Smallwood*, without reference to the test for central management and control described in *Wood v Holden*. We are satisfied that the FTT applied the test for POEM described by the SpC at [130]. It considered "*in which state the real top level management (or the realistic, positive management) of the trustee qua trustee is found*". In applying that test the FTT did not use the tool of *Wood v Holden* and in light of the judgment of Hughes LJ in *Smallwood* it was entitled to take that approach.

134. We are satisfied therefore that the FTT made no error of law in the test it applied. The FTT at [361] found that the POEM of the trusts was the UK in the relevant period. It based that conclusion on its findings of fact summarised at [362]. Those findings mirror the findings which Hughes LJ held entitled the SpC in *Smallwood* to find that the POEM of the trust in that case was the UK.

135. Mr Rivett accepted that if the FTT did apply the right test then the appeal must be dismissed. The application of the test is acutely fact sensitive and there was no *Edwards v Bairstow* challenge on this appeal.

Conclusion

136. For the reasons given above we are satisfied that the FTT made no error of law in the test it applied to identify the POEM of the trusts. The appeals must therefore be dismissed.

MR JUSTICE EDWIN JOHNSON
JUDGE JONATHAN CANNAN

RELEASE DATE:

04 March 2024

ANNEX

HMRC'S RELIANCE ON AN UNPUBLISHED FTT DECISION

1. HMRC's skeleton argument for this appeal included reference to what was then an unpublished decision of the FTT in *Wesley v HM Revenue and Customs*. The decision in *Wesley* had been released to the parties in that case on 15 February 2021 but for some reason it had not been published. Mr Rivett objected to HMRC relying on *Wesley* because it was an unpublished decision. During the hearing, we declined the opportunity to look at the decision but heard oral submissions from the parties as to whether we should have regard to the decision. We informed the parties at the hearing that we would not have regard to *Wesley* in reaching our decision, and said that we would give written reasons in this decision.

2. The hearing concluded on 1 December 2023. On 8 January 2024 we were informed by HMRC that it had come to HMRC's attention that the decision in *Wesley* had now been published with neutral citation [2023] UKFTT 1041 (TC). It seems that on 6 December 2023, HMRC drew the attention of the FTT's administrative office to the fact that *Wesley* had not been published and requested that it be published at the earliest opportunity. That appears to have prompted the FTT to publish the decision.

3. In the circumstances, we invited the parties to provide short written submissions on the relevance of *Wesley*, which we received from HMRC on 11 January 2024 and from the appellants on 18 January 2024.

4. We do not criticise HMRC for drawing the attention of the FTT to the fact that the decision in *Wesley* had not been published. We question why that did not happen until after the hearing in this appeal, when we had already refused permission for HMRC to rely on the decision. It was also somewhat ill-judged for HMRC to write to the FTT without copying in the appellants' representative.

5. Be that as it may, we shall first explain why we refused HMRC permission to rely on what was then an unpublished decision of the FTT.

6. We were taken to two cases in the FTT where HMRC have been refused permission to rely on unpublished decisions of the Special Commissioners or the FTT.

7. The first was the decision in *Ardmore Construction Limited v HM Revenue and Customs* [2014] UKFTT 453 (TC). In that case, the FTT refused permission on grounds that it would be unfair for HMRC to rely on an unpublished decision of the Special Commissioners. In fact, the position in that case was one step removed, because the decision which HMRC wished to rely on was a published decision of the FTT which itself referred to an unpublished decision of the Special Commissioners.

8. The second was the decision of the FTT in *Fastklean Limited v HM Revenue and Customs* [2020] UKFTT 0289 (TC) in which HMRC sought to rely on an unpublished decision of the FTT. The FTT cited *Ardmore* and refused permission.

9. The Upper Tribunal is of course in a slightly different position to the FTT in these circumstances. Decisions of the FTT are not authoritative although they can certainly be persuasive. In such cases it is not uncommon for the Upper Tribunal to be referred to and to cite

such decisions, drawing on the FTT's reasoning in reaching its own conclusion on a point of law.

10. For present purposes, in refusing permission for HMRC to rely on *Wesley* we had regard to the overriding objective of dealing with cases fairly and justly. There is no rule of law which prohibits a party from relying on an unpublished decision in another tribunal. Each case must be considered on its own merits and it is a matter for the discretion and judgment of the particular tribunal. We took into account the following factors:

    (1) As we understand it, most written decisions of the FTT on substantive appeals are published on the FTT's website, on the National Archive and on BAILII. Some basic cases are not published and there may be certain circumstances, including oversight, where a decision is not published. HMRC will be aware of all unpublished decisions of the FTT whereas most taxpayers and their representatives will have no knowledge of unpublished decisions. HMRC might therefore be perceived as having an unfair advantage over the general body of taxpayers. There is potential for HMRC, even if only by inadvertence, to refer to favourable unpublished decisions but not to refer to unfavourable decisions. Indeed, we note that in *Ardmore*, counsel for HMRC gave an assurance that no-one connected with the appeal including HMRC's policy leads, were aware of any other relevant, unpublished FTT decision.

    (2) We agree with the FTT in *Ardmore* that elementary justice demands that rules which bind a citizen should be ascertainable by the citizen by reference to identifiable sources which are publicly accessible (see *Fothergill v Monarch Airlines Limited* [1981] AC 251 at 279, per Lord Diplock, albeit in a different context).

    (3) We accept that in this case there was no specific prejudice to the appellants. The appellants are well represented and were given notice prior to the hearing that HMRC intended to rely on *Wesley* and were provided with a copy of the decision. We should add that, in his submissions on the issue of whether we should have looked at *Wesley* (in its unpublished state), Mr Rivett made it quite clear that he was not claiming any specific prejudice to the appellants. His position, quite properly, was that he was making his submissions in the interests of all those taxpayers, and in particular those without representation, who might be prejudiced if HMRC was permitted to make references to unpublished authorities of which HMRC alone were likely to be aware.

    (4) There was ample authority before us from the higher courts as to the correct test for the POEM of the trusts and we had the benefit of full submissions from experienced counsel. We considered that we were unlikely to gain any further assistance from *Wesley*.

11. Weighing all these factors, we considered that fairness and justice required us to refuse permission for HMRC to rely on *Wesley* in its unpublished state.

12. In the FTT there may be additional relevant factors. For example, the FTT in *Ardmore* noted that as a matter of judicial comity, the FTT will generally follow other FTT decisions unless satisfied that they are wrong. The perception of unfairness may be stronger in those circumstances. However, we do not rule out that there may be cases where it may be appropriate for the FTT to be referred to and to take into account an unpublished FTT decision. Indeed, HMRC may well consider it appropriate to refer the FTT to an unpublished decision which is unfavourable to their case.

13. For the reasons set out above we decided that we should not have regard to *Wesley* in its unpublished state. Our decision on this question at the hearing has now been overtaken by the event that the decision in *Wesley* has been published. This has allowed us to consider *Wesley*. We have now considered the parties' written submissions on the significance of *Wesley*, which also concerned the POEM of a trust used in the round the world scheme. Our initial view is confirmed that, as with *Lee and Bunter*, it does not add anything to the detailed analysis of *Smallwood* which we have set out in the main body of this decision.

14. We would add that the present circumstances vividly illustrate the potential unfairness to taxpayers. *Wesley* concerned the question of POEM. It also concerned what was described as the "*different persons argument*". The FTT determined that argument in favour of the taxpayer. The same argument was raised by HMRC in this appeal before the FTT. The decision in *Wesley* was released to the parties in February 2021, which was after the FTT hearing in the present appeal but a year before the FTT released its decision. We understand that the present appellants and their legal advisers were unaware that there was an FTT decision which dealt with POEM and the different persons argument. It might well have assisted the taxpayer and indeed the FTT in this appeal to see how the FTT in *Wesley* had dealt not only with POEM but also with the different persons argument. In the event, the FTTs came to the same conclusion on the different persons argument. Of course, this might all have been avoided if HMRC had invited the FTT to publish the decision in *Wesley* soon after it was released. It seems unlikely that it went unnoticed by HMRC that the decision had not been published.