Double taxation – residence – disposal of assets by trustees – Mauritian trustees appointed to replaced Isle of Man trustees – Mauritian trustees disposing of assets – capital gains – UK trustees appointed to replace Mauritian trustees – trustees as a continuing body of persons – whether the double taxation convention applies – place of effective management – whether capital gains chargeable to tax in the UK – appeal dismissed

FIRST-TIER TRIBUNAL **Appeal number: TC/2014/00462**
TAX CHAMBER

BETWEEN

(1) DAVID STUART WESLEY
(2) NICOLA SUZANNE MACKAY (AS TRUSTEES OF THE ELLEN MORRIS 1990 SETTLEMENT)
Appellants

-and-

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

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at Manchester on 13 – 15 January 2020

Mr K. Gordon, Counsel for the Appellant

Mr T. Brennan QC, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION AND PRELIMINARY MATTERS

1. This is an appeal by the Appellants as trustees of the Ellen Morris 1990 Settlement against a closure notice issued by the Respondents ("HMRC") on 29 May 2013 which amended the trustees' self-assessment for 2002/03 made under s9C TMA 1970 so as to bring into charge to capital gains tax net gains of £2,907,189 with tax due of £988,444.26 realised on the liquidation of Wesmor Ltd, a company incorporated in the Isle of Man and wholly owned by the trust.

2. The delay in reaching the hearing of the substantive matter resulted from a strike out, subsequent reinstatement and permission to submit amended Grounds of Appeal which are not relevant to the issues in this appeal. However, as a result this appeal was heard a significant amount of time after the closure notice was issued.

3. There has been further delay as a result of simultaneous proceedings in the High Court brought by Mrs Mackay against Mr Wesley. In summary Mrs Mackay submitted that she should be released from liability and removed as a trustee as she had no knowledge of signing the relevant documents nor was she aware that she was a trustee. The proceedings in the High Court were not defended by Mr Wesley. HMRC did not apply to be a party to those proceedings, instead choosing to provide the court with written observations setting out their position.

4. Mrs Mackay's application for summary judgment was unsuccessful. However, she was granted permission to appeal and has kept the Tribunal updated as to the ongoing proceedings. Although the delay in issuing this Decision is regrettable, it was clear to me at the hearing and since that these proceedings, in addition to those in the High Court have caused Mrs Mackay a significant amount of distress. It also appeared to me that there was a likelihood that any ruling by the High Court could impact on these proceedings. For those reasons I considered that the most pragmatic solution was to await the outcome of the High Court proceedings before releasing this Decision.

5. By letter dated 18 December 2020 I was notified that by Charles Russell Speechlys LLP who represented Mrs Mackay in the High Court proceedings that Mrs Mackay's appointment as a trustee had been set aside by Order of the High Court. As a result, I sought the views of the parties as to the effect on this appeal.

6. On 19 January 2021 Mr Wesley indicated to the Tribunal that he did not intend to appeal the Order and therefore Mrs Mackay should no longer be named in this appeal. On 25 January 2021 HMRC agreed that:

> "Ms Mackay is neither a party nor an interested party in the First-tier Tribunal."

7. I agreed with the parties that Mrs Mackay is no longer an interested party to this appeal. Furthermore, for reasons that will become clear in due course, the issue regarding Mrs Mackay's knowledge or otherwise of her trusteeship was not a matter which fell to be determined by me nor did it impact on the issues which fell to be determined. Having been named on the Notice of Appeal as a trustee representing the Appellant who brought this appeal I have not removed Mrs Mackay's name. However, for the avoidance of doubt I accept that Mrs Mackay no longer has any legal standing to bring the appeal nor was she a trustee at the relevant time such that HMRC will no longer be able to pursue any liability against Mrs Mackay personally. The Appellant in this appeal is the single and continuous body of persons consisting of the trustees, which in this appeal is represented by Mr Wesley as trustee, by virtue of section 69 of the Taxation of Chargeable Gains Act 1992.

BACKGROUND

8. This appeal is concerned with arrangements which are commonly referred to as "round the world" schemes (see *Smallwood v HMRC* [2010] STC 2045 in the Court of Appeal and *Lee & Bunter v HMRC* [2017] UKFTT 0279 (Ch)) and involves the issue of where a settlement was resident for the purposes of capital gains tax in relation to gains realised by the settlement's trustees in Mauritius.

9. The events will be set out in more detail in due course. However, by way of background, the following is a summary of the core events. The Ellen Morris 1990 Settlement followed an earlier settlement by Ellen Morris (deceased) who was Mr Wesley's mother-in-law and grandmother of Mrs Mackay. The Ellen Morris 1990 Settlement was set up in 1990 in the Isle of Man. The original settlor was Mr Wesley's mother in law who was resident in the Isle of Man. The bulk of the trust's assets came from the sale of an incorporated business, the shares in which were sold in or around 1996 resulting in a gain of approximately £2.3m.

10. The initial trustees were Abacus Trust Company Ltd ("Abacus") and Law Trust Ltd (both Isle of Man resident) until March 2001. Thereafter Abacus was left as sole trustee. Between 1996 and 2002 the trustees had increased the value of the trust's assets to approximately £3.6m.

11. In July 2002 Abacus retired in favour of Standard Bank Trustee Company (Mauritius) Ltd. Between September and November 2002 the Mauritian trustees realised the assets of the trust and made distributions to beneficiaries.

12. On 19 March 2003 the Mauritian trustees retired in favour of the Appellant Mr Wesley, Mrs Mackay and a corporate trustee owned by solicitors Browne Jacobson (formerly Browne Jacobson Trustees Ltd and latterly Castlegate 722 Ltd).

RELEVANT LEGISLATION AND AUTHORITIES

13. There was no dispute in relation to the legislation applicable and the principles set out in the relevant authorities. The issue between the parties lay in the application of those principles to the facts in this appeal. It may assist at this point to set out material aspects of the relevant authorities at this point.

14. In *Lee & Bunter v HM Revenue and Customs* [2017] UKFTT 279 (TC) Judge Bishopp provided the following concise overview of the type of arrangements which form the subject of this appeal (at [2]):

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

15. Judge Bishopp went on to explain the arrangements as follows at [12] & [13]:

> "It is appropriate to begin with s 69 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), which provides that the trustees of a settlement are treated in UK law as a single continuing body of persons. The same section contains rules determining the residence for the time being of trustees for the purposes of UK tax law. The place of residence of the trustees in this case, determined in accordance with s 69, was initially in Guernsey, moved to Mauritius as STC was replaced by DTOS, and moved again to

the UK as DTOS was replaced by Island and Walbrook. Had the trustees remained resident in Guernsey or Mauritius throughout the whole year s 86 of TCGA would have rendered the appellants, as the UK-resident settlors, liable to CGT on the gains. In addition, by virtue of s 77, if "at any time during the year the settlor has an interest in the settlement" and "the settlor is, and the trustees are, either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year", any chargeable gains accruing to the trustees are instead to be treated as accruing to the settlor. None of that is in dispute, and I do not need to deal with those provisions in any greater detail (although s 69(1) is set out at para 70 below).

> Taking the TCGA provisions alone, therefore, the appellants were liable for UK CGT on the gains arising on the disposal of the shares notwithstanding the overseas residence of their respective Settlements. The appellants' only possible avenue of escape from the charge, and the purpose behind the move of the trusteeship to Mauritius and then to the UK, lies in their being able to demonstrate that the DTC had the effect of conferring the exclusive right to tax the gains on Mauritius."

16. Article 1 of the DTC between the UK and Mauritius, brought into effect in UK law by the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981, SI 1981/1121, provides that it:

> "shall apply to persons who are residents of one or both of the Contracting States".

Article 2, so far as relevant, is as follows:

> "(1) The existing taxes to which this Convention shall apply are:
>
> (a) in the United Kingdom of Great Britain and Northern Ireland:
>
> (i) the income tax;
>
> (ii) the corporation tax; and
>
> (iii) the capital gains tax;
>
> (hereinafter referred to as *United Kingdom tax*);
>
> (b) in Mauritius:
>
> (i) the income tax;
>
> (ii) the capital gains tax (*morcellement*);
>
> (hereinafter referred to as *'Mauritius tax'*).
>
> (2) This Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes."

17. A key provision, namely article 13(4) of the treaty with Mauritius, provides as follows:

> "Capital gains…shall be taxable only in the Contracting State of which the alienator is a resident."

Therefore, in order for the Appellant to succeed the arrangements depend on the alienator being resident in Mauritius and not in the UK.

18. Residence is defined in Article 4(1) which provides that "residence" means a person's potential fiscal attachment to a jurisdiction "by reason of his domicile, residence, place of management or any other criterion of a similar nature".

19. If under the definition of "residence" a person is deemed to be resident in both the UK and Mauritius art 4 provides for the operation of a tie-breaker to determine in which of the jurisdictions the person is treated as being resident for the purposes of the treaty. In relation to a trust the relevant provision in Article 4(3) provides:

> "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."

20. In *Smallwood* the tie-breaker was explained as follows (at [12] and [13]):

> **"**The question of residence is, of course, a key factor in relation to income tax and capital gains tax and the DTA applies only to residents of one or both of the Contracting States: see art 1. To this end, the DTA provides a definition of the term "resident of a Contracting State" in art 4(1) which Mr Prosser QC, on behalf of Mr and Mrs Smallwood, accepts is engaged by the provisions of art 13(4). This definition requires the person in question to be liable to taxation in the relevant Contracting State by reason of his domicile, residence, place of management or other similar criterion. PMIL as trustee was clearly resident in Mauritius and the Smallwoods similarly have always been resident and ordinarily resident in the UK, both personally and as trustees. It is also common ground on this appeal that the fact that Mauritius does not tax capital gains is irrelevant to the application of art 4(1). "Liable to taxation" (the meaning of which I discuss later in this judgment) is a reference to any of the taxes covered by the DTA.
>
> Where the art 4(1) definition leads to a person other than an individual being treated as a resident of both Contracting States then art 4(3) provides a tie breaker based on the person's place of effective management ("POEM"). This provision of the DTA was used by the Special Commissioners to determine the Smallwoods' appeal on the basis of a finding that the trustees were resident within the meaning of art 4(1) in both Mauritius and the UK in the period culminating in the time when the shares were sold. To reach this conclusion they interpreted "resident" in art 4(1) (and therefore art 13(4)) as meaning chargeable to tax rather than simply physically resident. But this was not HMRC's preferred approach and Mr Prosser criticised it before the judge as wrong both in fact and law."

21. In *Smallwood* the Court of Appeal held that in determining POEM the snapshot approach was not appropriate and that the test required looking over a longer period. However, the Court of Appeal was not unanimous in relation to the application of the POEM test; Patten LJ considered that the decision of the Special Commissioners could not be sustained, drawing a distinction between a decision taken in Mauritius on the basis of UK advice and the Mauritian trustees' role being usurped by the UK based advisers. However, the majority held that the Special Commissioners had reached a permissible decision on the facts, Hughes LJ stating at [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. 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."

ISSUES

22. The issue in this appeal relates to the efficacy of the arrangements using temporary trustees in Mauritius.

23. HMRC raised two issues for determination:

(i) Whether Article 4(3) of the DTC applies (the 'different persons' argument; and

(ii) The location of the POEM of the trust.

24. In relation to issue (i), in summary HMRC contend that on the facts of this appeal the DTC does not restrict the UK's right to tax the gains because the UK and Mauritius tax different persons; the UK imposes tax on the single and continuing body of <u>trustees</u> (s69 TCGA) whereas Mauritius imposes tax (where applicable) on the <u>trust</u>.

25. As to (ii), HMRC argue that even if the UK and Mauritius were to tax the same person, HMRC submit that the correct application of the DTC results in the UK having sole charging rights over the gains realised by that person because the POEM was in the UK in the relevant tax year.

26. Mr Gordon, on behalf of the Appellant, contended that the facts of this appeal are distinguishable from both *Smallwood* and *Lee and Bunter* and that the application of the principles to be applied to the facts in this appeal demonstrates that the POEM was in Mauritius. Furthermore, Mr Gordon submitted, the different persons argument was considered in *Lee and Bunter* and dismissed; the Appellants contend that the same approach should be adopted in this appeal.

EVIDENCE

27. Evidence was called from Mr Wesley as trustee. In support of the Appellant's case evidence was also given by Mrs Mackay, Mr Fleming of Abacus and Mr Dunk of PwC. The remainder of the evidence comprised three bundles of documents.

28. It may assist to set out at this point a chronological summary taken from the documentary evidence which provides further detail to the background set out above.

29. The original Ellen Morris Settlement was dated 4 February 1980. On 6 September 1990 the Ellen Morris 1990 Settlement was set up; the beneficiaries were the descendants of Ellen Morris and their spouses. The assets from the 1980 settlement were transferred to the trustees of the Ellen Morris 1990 Settlement, Abacus and Law Trust, both of which were based in the Isle of Man.

30. On 26 June 2000 Abacus raised with Mr Wesley the possibility of tax planning through derivatives. On 7 November 2000 Mr Wesley met with Browne Jacobson and Abacus to discuss the Settlement and possible tax planning further which ultimately did not go ahead.

31. On 8 February 2001 Mr Fleming of Abacus wrote to Mr Dunk of PwC in the UK to seek advice relating to tax planning:

> "Unfortunately, Kevin and I think that the definition of "settlement" in section 97(7) TCGA gives us a problem…
>
> In previous advice obtained on geared flip flops, all counsel have raised the "arrangement settlement" point as a real point…Given that New Idea 2 contemplates the trustees deliberately crystallising £4m approximately of section 87 gains, relying on a technical argument…we would be reluctant to take the risk without having counsel's advice on this point, but I should be grateful for your views…
>
> I look forward to hearing from you urgently, since we must decide how we are to proceed in this case, given that…budget day is about five weeks away."

32. On 14 February 2001 PwC wrote to Abacus emphasising importance of:

> "…discussing the planning with the settlor's daughter and her husband, and would be unlikely to proceed unless they agreed it was appropriate to do so."

33. On the same date Mr Fleming at Abacus sought advice from Mr Dunk at PwC and requested specific issues be raised with counsel in relation to the proposed 'New Idea 2'.

34. On 21 February 2001 PwC instructed counsel to advise and on 23 February 2001 Abacus wrote to Mr Wesley outlining "the PricewaterhouseCoopers alternative to the derivative planning" and inviting Mr Wesley to agree a way forward.

35. On 28 February 2001, communications between Abacus and Mr Wesley indicate that there had been a telephone call in which Mr Wesley had agreed to "a new form of planning". However, this does not refer to the arrangements which form the subject of this appeal. A file note recorded by Mr Fleming noted:

> "…We concluded we will not be in a position to have flipped the Ellen Morris Settlement monies across to the two United Kingdom's settlements pre Budget day…There is adequate time between Budget day and the end of the tax year to conclude the planning as envisaged if the Budget does not block it.
>
> If the Budget does block it then it was agreed we would consider entering into the derivative planning if that was still available but somebody would need to speak to Dave Wesley on behalf of the beneficiaries to explain the change of strategy and what the trustees now propose to do."

36. By letter dated 14 March 2001 Mr O'Loughlin of Abacus informed Mr Wesley that Law Trust Limited had retired as a trustee and that PwC were advising the trustees on the proposed tax planning. Mr Wesley was invited to join a telephone conference with the advisers at PwC, Mr Dunk and Mr Harries. The following day discussions took place between Mr O'Loughlin and Mr Wesley regarding the two options of derivative planning and the "loophole" planning.

37. On 12 February 2002 Mr Dunk at PwC set out in writing to Mr Fleming at Abacus considerations of derivative based "flip flop" planning and the alternative proposal involving treaty planning "which would allow the eradication of the "stockpiled" s87 gains within the Settlement". The latter was described as "aggressive and likely to excite the scrutiny of the Inland Revenue" as a result of *Ramsay v IRC* arguments. This was the start of the RTW scheme involving the appointment of Mauritian trustees and the liquidation of Wesmor followed by the appointment of UK trustees.

38. Between 28 February 2002 and 5 March 2002 there were discussions between Mr Wesley, Abacus and PwC. An email from Mr O'Loughlin at PwC to Mr Fleming of Abacus on 28 February 2002 stated:

> "Following our telephone conversation with D Wesley this afternoon, couple of points occurred, about DTA planning, which I thought I should mention prior to your intended conversation with him tomorrow."

In a further email on 5 March 2003 Mr O'Loughlin sought advice from a colleague, stating that he would relay the comments to Mr Wesley who was considering the matter with Mr Fleming.

39. On 6 March 2002 Mr Wesley wrote to Mr Fleming of Abacus confirming that the arrangements involving Mauritius trustees were the "preferred option". On 14 March 2002 an email from Mr Fleming at Abacus to Mr Dunk of PwC confirmed that:

> "In consultation with the beneficiaries, it has been decided to proceed with the double taxation agreement planning…please can you advise the names and addresses of the proposed new trustees…"

40. On the same date Mr Fleming wrote to Mr Wesley attaching PwC's advice letter and confirming that the beneficiaries including Mr Wesley wished the trustees to proceed with the Mauritius route and that the trustees were willing to do so.

41. An email from Ms Beatrice Fok Chow at Standard Bank Trust Company (Mauritius) Limited (hereafter "Standard Bank") dated 27 June 2002 to Abacus is the first evidence of Standard Bank's involvement. It refers to a review by Standard Bank of the indemnity and minor amendments to be made.

42. On 19 July 2002 the Trust agreement was sent from Abacus to Standard Bank and on 24 July 2002 the retirement and appointment draft was faxed to Abacus and executed on 26 July 2002. Abacus ceased to be trustee, with Standard Bank, Mr Jonathan Sprigg and Ms Beatrice Fok Chow appointed. Abacus remained involved in the administration of Wesmor.

43. In email correspondence between Ms Fok Chow of Standard Bank and Mr Harries of PwC between 20 and 22 August 2002 Ms Fok Chow stated:

> "I am still awaiting the trust's original documents to be forwarded to us and we are in the process of opening a trust account in Mauritius. Please advise what is the next step with regard to the tax planning for the trust and the underlying company".

44. Mr Harries responded on 22 August 2002 inviting Ms Fok Chow to discuss the residence status of the trust and tax planning options available which, he suggested, should involve liquidating Wesmor. A conference call took place between Ms Fok Chow, Mr Harries and Ms Dowling of Abacus the following day.

45. On 3 September 2002 PwC sent an engagement letter to the Mauritian trustees. The scope of the retainer is to advise on "…tax liabilities on extraction of funds" from Wesmor and the 1990 Settlement.

46. On 9 September 2002 the tax residence certificate for the settlement was obtained as from 26 July 2002 signed by M. Mosafeer. On 12 September 2002 the Mauritian trustees confirmed to PwC their view that the proposal involving treaty planning would be the preferred proposal. The following day they resolved to appoint PWC as "the tax adviser to the trust with immediate effect" and to liquidate Wesmor effective from that date. On 29 September 2002 the Mauritian trustees requested a loan from Wesmor to meet trust expenses and which was used in part to pay Abacus. On 4 October 2002 the Mauritian trustees acting by proxy passed a resolution that Wesmor be wound up and Mr Fleming was appointed as liquidator.

47. On 8 October 2002 Mr Wesley requested distributions from the trust followed by Ms Fok Chow seeking advice from Mr Harries at PwC as to the appropriateness of this "…in light of the current tax planning exercise we are undertaking". It was decided that PwC would meet Mr Wesley and that the trustees did not need to take any action.

48. Discussions took place between PwC and Abacus on 9 October 2002 at which PwC referred to meeting Mr Wesley to "go through the current state of play and proposed transactions with him". PwC informed Mr Wesley in a letter dated 9 October 2002 that the request for distributions had: "…tax implications; not the least because (as you know) the Trustees are in the process of implementing sophisticated tax planning to mitigate capital gains tax." Mr Harries suggested a meeting with Mr Wesley to answer any queries. On the same date Mr Harries telephoned Mr Sprigg at Standard Bank to recap on the situation as it stood and the two stages involved in the planning:

> "No 1 being the treaty planning i.e. moving the trust to Mauritius and stage 2 being further planning which involved the section 87 stock piled gains. NH confirmed that it was appropriate for the trustees to start considering the stage of the tax planning which involved the trustees borrowing against the assets held by the Trust and then distributing the borrowed funds to the new settlement.
>
> JS confirmed that the trustees would reconsider and review this tax advice and if thought fit approach several banks in respect of the required finance"

49. On the following day Ms Dowling of Abacus spoke to Ms Fok Chow regarding Mr Wesley's request for distribution; Ms Dowling suggested that before the trustees spoke to Mr Wesley they should consult PwC. Ms Dowling also mentioned that Mr Wesley had noticed on Abacus' monthly statements to him a loan from Wesmor to the trust to settle various invoices; she suggested that as Mr Wesley was not aware of the level of fees charged by Standard Bank that a copy of the invoice should be sent to Mr Wesley to "keep him in the picture". Mr Sprigg wrote to Mr Wesley on 10 October 2002 providing an update on the tax planning, explaining that the trustees were in close liaison with PwC in respect of action to be taken and disclosing Standard Bank's fee for acting as trustees.

50. On 10 December 2002 the entire portfolio was liquidated to the value of £2.5m.

51. On 5 March 2003 Ms Worwood at Browne Jacobson sent Ms Fok Chow a draft deed of retirement and appointment to appoint UK trustees in place of the Mauritian trustees. On 6 March 2003 an attendance note by Ms Worwood for the client Abacus recorded a telephone call with Mr Wesley who informed Ms Worwood that he was unhappy at signing the deed of release and was "concerned that no one seemed to be driving this". In relation to the RTW scheme Ms Worwood explained: "we would just be appointed as trustees of the 1990 Settlement so there will be three trustees" and she would deal with the deed of appointment and retirement. The attendance note recorded that "it is important the tax is paid in Mauritius to show that the trust has been resident there. They have a retained income of about £5,000."

52. On 14 March 2003 Ms Worwood emailed Ms Fox Chow confirming that she had established that the UK trustees would be Browne Jacobson, Mr Wesley and Mrs Mackay. The Mauritian trustees were invited to retire and appoint the new trustees as soon as possible. On the same date Ms Worwood contacted Abacus and Ms Fok Chow to confirm PwC's advice that liquidation of Wesmor should be completed before the trust was reimported to the UK and that it would need to be reimported the following week to give a two or three-week presence in the UK during the relevant tax year.

53. On 17 March 2003 Ms Fok Chow sought confirmation of the identities of the UK trustees and confirmed she would wait for completion of liquidation before the migration of the trust to the UK. The UK trustees executed the deed of appointment on 19 March 2003.

54. Mr Wesley's witness statement explained that the Settlement was set up in 1990 in the Isle of Man where Mr Wesley's late mother-in-law had been resident. The bulk of the assets of the settlement came from the sale of shares in Bodycare Toiletries Ltd which were purchased in 1990 and sold in approximately 1996 resulting in a profit of £2.3m.

55. During the years 1996 to 2002 the trustees increased the asset value of the Settlement to £3.6m. Abacus were the initial trustees in the Isle of Man. In November 2002 Abacus retired in favour of Standard Bank and on 19 March 2003 the Mauritian trustees retired in favour of the Appellant, Mrs Mackay and Browne Jacobson Trustees Ltd. At that point approximately £61,000 remained in the Settlement. Browne Jacobson acted as the "professional trustees" and carried out general management of the Settlement from that point onwards. The Settlement was wound up in or about 2004.

56. In relation to the appointment of Mrs Mackay as a trustee, Mr Wesley explained that in March 2003 he was informed that the Mauritian Trustees needed three UK Trustees to take over management of the Settlement. Mr Wesley agreed to be a co-trustee along with Browne Jacobson. Due to poor health it was considered unsuitable to appoint Mrs Wesley. Mr Wesley could not recall who suggested his daughter as a suitable replacement but he explained that the decisions were made quickly with no time to explain to Mrs Mackay the details of the trust and risks/responsibilities the appointment carried with it. Mr Wesley added that he did not want to trouble his daughter with the details of the Settlement due to her ill health and just asked her to

sign the signature page of the relevant documents without explaining to her that she was becoming a trustee. Mr Wesley relied on Browne Jacobson to take care of all of the trustee duties on their behalf and they did not correspond with Mrs Mackay who took no knowing part in the arrangements.

57. In a second statement produced for the substantive appeal Mr Wesley added the following information. In 2000 the trustees decided to look at how they could facilitate the distribution of settled funds to beneficiaries on a more tax efficient basis. As Mr Wesley understood the position, the 2000 Budget introduced changes which made the current method of distribution inefficient. The trustees approached PwC in London for tax advice. Mr Wesley stated that he did not instigate these discussions nor did he play any part in them. In oral evidence Mr Wesley strongly disputed that he had taken any involvement in decisions relating to the settlement. He confirmed a decision made by Abacus which he believed to be sensible but he took no part in the decision relating to the trust being in Mauritius.

58. When the trustees decided on the steps to take they asked Mr Wesley if he had any objections; Mr Wesley confirmed that he did not as he trusted that the best advice possible had been obtained. Mr Wesley confirmed that at that point he was the main contact with the trust on behalf of the beneficiaries due to his wife's terminal illness.

59. Mr Wesley stated that he took no active part in decision making during the course of the trust moving from the Isle of Man to Mauritius. Following the Appellant's appointment Mr Wesley relied on Browne Jacobson to carry out the trustees' duties; Mrs Mackay continued to have no involvement due to the difficult circumstances she was experiencing at the time. Mr Wesley did not inform Mrs Mackay about HMRC's enquiry or provide her with any correspondence as he hoped it would come to nothing.

60. Mr Wesley explained that Browne Jacobson had offered no assistance in relation to the substantive appeal nor had Ms Fok Chow in Mauritius. Browne Jacobson appeared unwilling to help the Appellants and Ms Chow indicated that she would not be able to assist beyond the information already available in the trust files due to the passage of time.

61. Mr Wesley confirmed that he had been asked and had contact with those dealing with the trust but he did not have the necessary tax knowledge to make any decisions; he was merely kept informed and consulted from time to time. Mr Wesley believed that although he did not have the knowledge to make decisions, he was consulted because he was the lead beneficiary and he assumed that the trust looked to him for approval although, Mr Wesley added, he was unable to either give approval or make any suggestions regarding the trust. Mr Wesley confirmed that he had been asked for his agreement but was unable to explain why this had been as that was something only the trustees knew. Mr Wesley disputed that the theme of the documents indicated that he was frequently consulted by the Isle of Man trustees; he agreed he had been consulted at various times but explained he was unable to answer whether it was on a frequent basis or not. However, he agreed he had been kept informed about significant transactions.

62. Mr Wesley stated that he did not know what the outcome would be if he had not given approval. He explained that Abacus was run by Mr Fleming who was a strong-minded individual. Mr Wesley agreed that he was also a forceful character with significant business experience but he added that he had been retired for many years.

63. Mr Wesley agreed that when the tax laws changed Abacus approached him with tax planning proposals for different ways of running the trust, although at that point the proposal was not followed. A letter from Mr Fleming at Abacus dated 26 June 2000 to Mr Wesley referred to a telephone earlier that week and set out:

> "…issues I need to deal with in this letter; the possibility of appointing some of the trust fund on to a new settlement, to minimise taxes on distributions to the family, and the implications of the 2000 Budget."

64. The letter set out that the assets of the trust were approximately £4m and the letter continued:

> "There are also stockpiled capital gains of £130,000 at 5 April 2000 (these gains include the gains of Wesmor which are treated as arising to the trustees) which will be matched against capital payments (again broadly capital distributions or benefits) made to beneficiaries. Likewise there will be capital gains realised by the trustees since 5 April 2000 but I have not quantified the amount…"

65. After setting out the tax issues Mr Fleming invited Mr Wesley to discuss the proposal and provide his "initial reaction before taking it further including if you decide to proceed seeking further advice from Counsel." Mr Wesley explained that the suggestions came from Abacus who needed to keep Mr Wesley informed of the important changes to the law.

66. A meeting took place on 7 November 2000 at which Mr Wesley, Mr Jenkins of Browne Jacobson, Mr Fleming and Mr Watkins of Abacus were present. At the meeting there were discussions regarding who should be added as beneficiaries to the trust in relation to spouses. Mr Wesley agreed that at the meeting he was consulted about the proposals and that his agreement would have been sought if a way forward had been found. Mr Wesley agreed that without his agreement the tax proposals were unlikely to happen but he added that he was not the trust itself.

67. Mr Wesley was referred to a file note of Mr Fleming dated 28 February 2001 which recorded:

> "Dave Wesley called in relation to my letter to him of 23 February.
>
> I asked him to confirm that subject to the two points we were going to discuss later in the letter that he would want us to proceed with the alternative PricewaterhouseCoopers restructuring discussed in my letter of 23 February and in the instructions to Counsel a copy of which I had sent to him with that letter. He said he was content to proceed…
>
> In relation to the possibility of Dave being regarded as settlor of the trust he felt quite relaxed on that issue…I did explain to him that no matter what we thought he could reasonably conclude the Revenue might take a different view and he accepted that.
>
> On the basis of all of this Dave is content for us to proceed with the planning as outlined in the instructions to Counsel and has carefully considered all the points I have made in my letter of 23 February but nothing in there causes him to suggest the trustees ought not to proceed."

68. Mr Wesley confirmed that the proposal did not go ahead as he could have been regarded as settlor but explained that, in his view, it demonstrates he went along with the suggestions made and took the advice of professionals.

69. On 12 February 2002 in a letter from PwC to Mr Fleming at Abacus the RTW proposal was made. It was Mr Wesley's view that the client of PwC must have been Abacus as he was not the client. Mr Wesley could not recall if he saw the letter which set out in full the proposal and possible pitfalls but he confirmed he was aware of the gist of it. He added that he had insufficient knowledge to comment on whether he believed the arrangements were "aggressive" or not.

70. In a letter dated 6 March 2002 to Mr Fleming, Mr Wesley stated in relation to the two tax arrangement proposals:

> "It is our opinion that the preferred option is the Mauritius route. We ask that you proceed with this option…"

71. Mr Wesley explained that he could not recall due to the passage of time who "we" referred to nor could he recall what, if any, discussions he had had with other people although it would have to refer to discussions within the family as there was no one else it could have been. Mr Wesley clarified that had he not given approval he would not have expected Mr Fleming to proceed. However, he noted, Mr Fleming was a trustee and therefore could have gone ahead as he had always made clear that it was the trustees' responsibility. Mr Wesley explained that on this occasion Mr Fleming had made the decision in consultation with the beneficiaries, although he clarified the consultation had taken place with him and not all of the beneficiaries however he did not speak for the other beneficiaries.

72. An email from sent on behalf of Mr Fleming to Mr Dunk dated 14 March 2002 stated:

> "In consultation with the beneficiaries, it has been decided to proceed with the double taxation agreement planning. We will prepare our standard deed of retirement and appointment of trustees; however, please can you advise the names and addresses of the proposed new trustees, or alternatively let me have a contact there whom I can ask for this information…"

73. Thereafter the Mauritian trustees were appointed; Mr Wesley did not know who arranged this but a letter from Abacus to Mr Wesley dated 14 March 2002 stated:

> "I take from your letter that the beneficiaries, including you, wish the trustees to proceed with the Mauritius route, notwithstanding this disclosure to the Inland Revenue, and as the trustee is willing to do so I will arrange to have drafted a deed of retirement and appointment of trustees which I will send to PwC, as I understand that it will be PwC in Mauritius who will act as the new trustees…
>
> I should stress that once Abacus retired as the trustee of the settlement, in place of the Mauritius trustees, control of the settlement (and therefore substantially of Wesmor) will pass to the new Mauritius trustees…"

74. Mr Wesley confirmed that he had approached the Mauritian trustees for distributions from the trust in July 2002. He did not know whether he ever met Mr Harries at PwC but he believed that he had not as his wife was in poor health at that time. Mr Wesley highlighted a note of a telephone conversation between Mr Harries of PwC and Emer Dowling of Abacus on 9 October 2002 in which Mr Harries confirmed that he and Mr Dunk would arrange to meet Mr Wesley the following week to update him in relation to the proposed transactions; Mr Wesley stated that the note confirms he would have known the information and met Mr Harries had he been driving the arrangements yet he had no recollection of meeting Mr Harries.

75. Mr Wesley agreed that all of the trustees viewed him as the lead beneficiary. He also presumed that PwC London provided the main technical tax advice although Mr Wesley stated that they were not advising him and he did not know if they were advising Abacus or Standard Bank in Mauritius. He agreed that when Abacus considered PwC's advice they consulted Mr Wesley and although he could not be sure of what would happen had he vetoed the arrangements he expected that they would not have gone ahead. Mr Wesley saw Mauritius as a temporary measure but he was not aware whether or not the trust had anything to do with Mauritius save for tax planning.

76. Mrs Mackay's first witness statement (which was provided in relation to the application to reinstate the appeal) set out the background to appointment as a trustee. Mrs Mackay explained that the appointment was made on 19 March 2003 without Mrs Mackay's knowledge or consent. Whilst Mrs Mackay accepted that the relevant documents contained her signature, she explained that she would have signed them in Mr Wesley's lounge at home on the dining

table. Mrs Mackay cannot recall when this took place as there were a number of occasions when her father produced documents for Mrs Mackay's signature. At the time the family were also dealing with the paperwork relating to Mrs Wesley's terminal illness and Mrs Mackay did not see full documents, only the page she was asked to sign.

77. Mrs Mackay highlighted that at that time she was in a vulnerable state as she was caring for her mother and young child. Mrs Mackay was also involved in difficult hospital meetings relating to the loss of her child in very traumatic circumstances. Mrs Mackay highlighted that she would not have agreed to be a trustee and believes it is clear from the documents that the decision to appoint her was taken in hurried circumstances with no regard to the implications for Mrs Mackay nor any advice given to her.

78. Mrs Mackay explained that she has no knowledge, understanding or expertise in any matters relating to tax or trusts. Mr Wesley dealt with the family finances and did not discuss them with Mrs Mackay or her sister.

79. In September 2011 Mrs Mackay became aware she had been a trustee and that HMRC had opened an enquiry into the trust. Mrs Mackay explained that all correspondence and communication regarding the trust was sent to her father.

80. Mrs Mackay stated that she has no knowledge or understanding of the arrangements of the trust. Mrs Mackay explained that following meetings with HMRC she was encouraged to pursue an action to the High Court to be removed as a trustee and to consider taking action against Browne Jacobson for appointing Mrs Mackay without her knowledge or consent. Mrs Mackay explained that she suffers from a rare condition which causes exhaustion, communication and mobility issues and it has been exacerbated by the stress caused by the situation with HMRC and legal proceedings.

81. Following Mrs Mackay's first witness statement in support of the application to reinstate, a second supplementary statement was provided for the substantive appeal. The statement confirmed the account given previously by Mrs Mackay and added further details of the stress and emotional trauma Mrs Mackay was subjected to during the relevant period relating to her pregnancy and subsequent loss of her child as well as her mother's terminal illness. None of these issues were disputed and I do not intend to rehearse the evidence due to its personal nature and the fact that it does not assist in determining the legal issues in this appeal.

82. Mrs Mackay agreed that she had received £40,000 from the trust but explained that as far as she was concerned it came from her father after her grandmother died and she was told it was inheritance; she did not know the finer details of what it was or that it came from a trust. Mrs Mackay stated that her father was a private man and he did not discuss matters with the family. She was aware her grandparents lived in the Isle of Man but she did not know that there was a trust there or the details of financial matters.

83. Mr Dunk of Berwyn Consultants Ltd provided a witness statement. Mr Dunk was a director at PwC London at the relevant time. In early 2001 he was approached by Mr Fleming of Abacus to provide advice in relation to the Ellen Morris 1990 Settlement. The approach was brought about by tax changes introduced by the Finance Act 2000 and the impact on the trustees' ability to fund capital distributions to beneficiaries in a tax efficient manner.

84. At that time PwC had not previously been engaged to advise the trustees or the Appellants. On 20 February 2001 PwC wrote to Abacus outlining a tax planning strategy. Following advice from Counsel Abacus did not proceed with the strategy, as Mr Dunk understood it, because of concerns that Mr Wesley was a joint settlor of the Settlement for capital gains tax purposes which had the potential for a personal tax liability.

85. In spring 2002 Abacus sought further advice from PwC which led to two proposals for consideration set out in a letter dated 19 February 2002; the two proposals were a derivative "flipflop" strategy and a "round the world" strategy. PwC set out the pros and cons of each and Abacus decided after a discussion with Mr Wesley that the "round the world" strategy was the preferred option.

86. Mr Dunk explained that PwC advised on how the arrangements should be implemented. He stated that all decisions or "real" decisions such as who should be the new trustee, were not taken by PwC although it may have introduced parties.

87. Mr Dunk explained that he believed that PwC was thinking of offering round the world planning to clients and it had already been in touch with Standard Bank in Mauritius but this may have been generally rather than specifically in relation to the Ellen Morris 1990 Settlement. He believed it was likely that PwC Mauritius was not considered suitable and that he or Mr Harries would have explained this to Abacus and offered an introduction to Standard Bank although the decision was a matter for the client who in this case was Abacus.

88. Mr Dunk agreed that PwC had discussions with Standard Bank prior to their appointment who signed a letter of engagement. He could not recall if advice was given or discussions had explaining the background and context for the appointment. He recalled providing the letter of advice from PwC to Abacus dated 19 February 2002 to Standard Bank; this was advice given to the predecessor trustees and not advice upon which Standard Bank could rely. He believed Abacus had already provided Standard Bank with a copy.

89. Mr Dunk was referred to a letter dated 11 May 2001 from PwC to Abacus which set out the various issues, proposals and pitfalls. The letter stated:

> "With regard to the treaty planning element of this proposal, once again this firm considers the planning to be effective and has obtained the opinion of leading Counsel to this effect. However, it should be noted that this planning is also aggressive and likely to excite the scrutiny of the Inland Revenue…"

90. Mr Dunk explained that insofar as arrangements intended to avoid the trustees or beneficiaries paying tax on the liquidation of Wesmor, HMRC were likely to take exception to the arrangements. The word "aggressive" was no more than a turn of phrase; at that time HMRC were starting to challenge arrangements with more vigour which is why the letter contained a "health warning". Mr Dunk's personal preference had not been the round the world arrangement.

91. In relation to a fax from Mr Harries at PwC to Abacus dated 10 April 2001 which stated:

> "Please find attached a copy of the note of the consultation with Brian Green QC in the above matter, as settled by him. Counsel has retained the draft documentation for the time being, and will proceed to settle it (if so instructed) when we decide to proceed further…"

Mr Dunk explained that the reference to "when we" was no more than clumsy use of language and inappropriate as the person making the decision was the client who may have decided not to proceed further. It was Abacus who would undertake the transactions, not PwC.

92. Mr Dunk confirmed that a meeting had taken place between PwC and Mr Wesley although he did not attend. As he understood it, the purpose of the meeting was for Mr Harries to explain what was happening around the trust and the tax implications to Mr Wesley and answer any questions Mr Wesley may have had. Mr Dunk did not know who had arranged the meeting but inferred from a memo dated 30 October 2002 that Standard Bank had asked Mr Harries at PwC for a meeting or for a PwC representative to answer Mr Wesley's questions. Mr Dunk confirmed that PwC's only client at that point was Standard Bank. The arrangement

between PwC and Abacus had been transferred to Standard Bank. PwC received a fixed fee for which it undertook to carry out the client's reasonable expectations.

93. Acting on PwC's advice Abacus retired as trustee of the Settlement on 26 July 2002 and appointed Standard Bank as new trustees. Mr Dunk cannot recall even with the assistance of the documents how Standard Bank were introduced to the arrangements although he noted from a letter dated 19 March 2002 from Abacus that the trustees were contemplating at that time that PwC Mauritius would be the new trustees. Mr Dunk clarified that Abacus, not PwC, made the decision relating to the new trustees.

94. Mr Dunk confirmed that at that point there was no formal engagement with Standard Bank but as they had accepted the trusteeship he would say that they were PwC's client. As to whether there was any engagement – either formal or informal – Mr Dunk stated that he could not recall or he may not have known but it would have been clear if Standard Bank was to take over as trustees and intended to proceed with the arrangements in PwC's letter that they would have instructed PwC or given serious consideration to instructing PwC. Although Standard Bank was independent, Mr Dunk explained that they had PwC's advice and it would be strange if they took an altogether different course.

95. On 20 August 2002 Standard Bank asked PwC to provide UK tax advice to them as successor trustees. PwC were formally engaged for their services on 13 September 2002 and sent Standard Bank a copy of the letter sent to Abacus on 19 February 2002 (although Mr Dunk believed Abacus may already have provided Standard Bank with a copy). Standard Bank decided to continue with the round the world proposal and on 13 September 2002 in accordance with PwC advice they instructed Abacus to liquidate Wesmor. Mr Dunk could not recall who paid PwC; he believed that Abacus had paid some of the fee and that there must have been some discussion between someone at PwC and Abacus or Standard Bank but he could not recall. Mr Dunk stated that the engagement letter and terms of engagement dated 3 September 2002 from PwC to Standard Bank would have been sent in contemplation of a fresh engagement with a new client. In relation to the period from July to September 2002 he stated that it would be within PwC's contemplation that the engagement would cover all of the work done; the letter of engagement was a standard letter and not specific to Standard Bank, had more thought been given to it the date may have been changed to the date Standard Bank became trustees. Similarly, Mr Dunk agreed that the reference to fees being calculated on a time spent basis was inconsistent with the contention that Standard Bank would get the benefit of the work carried out for Abacus but he reiterated that it was a standard letter.

96. Mr Dunk agreed that it was critical to the tax planning arrangements that the Mauritius trustees could be relied upon to liquidate Wesmor. However, he stated that he could not have been 100% confident as Standard Bank was an independent organisation and not under the control of PwC or Abacus; they could not be forced to take a route they did not want to take. Mr Dunk did not agree that the scheme only worked if the steps were followed through from start to finish which required PwC to present the arrangements on the basis that the trustees in Mauritius made the decisions and administered the trust. He stated that the Mauritian trustees knew the plan as presented would mean they held the trustee position for a temporary period. There was no commitment for them to carry through with the arrangements and they could have asked PwC to present alternatives. Mr Dunk stated that at the relevant time he was not concerned with the POEM test and if the provision of advice by PwC and other companies gave rise to POEM then any UK company providing tax advice would be subject to the same arguments. Prior to the *Smallwood* decision Mr Dunk believed the position was that if the trustees took the decision to liquidate Wesmor and they were in position as trustees at the time of taking all of the decisions and performing properly then that was sufficient for the purposes of the legislation.

97. On 19 March 2003 Standard Bank retired as trustees and appointed Browne Jacobson, Mr Wesley and Mrs Mackay as the new UK resident trustees. Mr Dunk believed that Browne Jacobson were recommended by Abacus who they had previously advised.

98. Mr Dunk stated that at all times the role of PwC was to provide the various trustees with advice on UK taxation matters. Although the arrangements implemented by the trustees were conceived by PwC the decision to implement those arrangements and all related decisions were taken by the trustees in accordance with the advice provided.

99. Mr Fleming is a member of The Institute of Chartered Accountants of Scotland and of the Society of Trust and Estates Practitioners. At the relevant time Mr Fleming was involved in Abacus where he had been a director since 1994 and he became a partner at PwC for approximately 18 months during the transitional period of the merger following which he retired from PwC. The original 1980 settlement was made when Mrs Morris (Mr Wesley's mother in law) was Isle of Man resident and domiciled for tax purposes. The settlement was dealt with by the predecessor of Abacus and then Abacus.

100. Mr Fleming stated that Abacus has always regarded itself as a tax aware trustee which administers trusts with the impact of taxation as an important factor in any decision making. Mr Fleming had kept Mr Wesley, the beneficiary of the trust with whom he regularly dealt on matters pertaining to the trust, informed of the tax changes arising from the Finance Act 2000. Mr Fleming also had regular dealings with Mr Dunk at PwC London and was aware from discussions with Mr Dunk that there were certain arrangements which could be used to minimise impact of the legislation. As a result, the trustee decided to engage PwC to advise on how it could improve its tax position. Mr Fleming clarified that PwC had not previously advised any member of the Wesley family and the decision to appoint PwC was based solely on the trustee's history of engaging PwC in relation to such matters. Mr Fleming explained that Abacus had also had dealings with Browne Jacobson in the UK since prior to his joining Abacus. Mr Fleming confirmed that the technical planning of the various arrangements came from Mr Dunk although he was broadly aware of the type of arrangements available at the time.

101. PwC initially advised in early 2001 however the trustee decided not to proceed with the proposed strategy as the extent of the risk to Mr Wesley was difficult to assess and impossible to eliminate. In early 2002 the trustee sought further advice from PwC who set out two alternative strategies; derivative flipflop and the round the world scheme.

102. The trustee discussed the two options with Mr Wesley as if either arrangement had been implemented and failed, any resultant tax liability would fall on the beneficiaries and not the trustee. Following consultation with Mr Wesley, Mr Fleming stated that the trustee decided to proceed with the round the world strategy.

103. Mr Fleming agreed that he was concerned to keep Mr Wesley fully informed of the planning ideas, although he qualified his agreement explaining that it is usual in such a situation where a trustee is considering planning proposals or investment of the trust fund. He explained that trustees are very concerned to ensure that they do not go on "a frolic of their own" or put themselves in the firing line for a course which is not the wisest to take. Mr Fleming explained that as a general matter any sensible trustee would discuss matters with the beneficiaries before embarking on a major course of action, particularly one which could leave a tax charge levied on a trustee or the beneficiaries; in Mr Fleming's view it was right and proper if dealing in the best interests of the beneficiaries to minimise any liability to tax and in this case caution was exercised to avoid Mr Wesley, Mrs Wesley and possibly their daughters becoming liable to a charge as a result of the trustees actions. Mr Fleming was referred to the email dated 8 February 2001 that:

> "We will in any event be discussing the planning with the settlor's daughter and her husband, and would be unlikely to proceed unless they agreed it was appropriate to do so."

He explained that if a trustee acted in the face of objections from the beneficiaries leading to a tax charge on the trust itself or the beneficiaries it is arguable that this could amount to a breach of trust. Mr Fleming confirmed that he would not have gone ahead with tax planning arrangements if the beneficiaries had objected. However, he did not agree that Mr Wesley had, in reality, a right of veto explaining that there was a difference between trustees considering a course of action and trustees deciding not to follow a course of action to which the beneficiaries objected. He clarified that trustees consult with beneficiaries on any number of matters and decisions are taken including those where there is concern or disagreement from the beneficiaries.

104. Mr Fleming agreed that Mr Wesley was consulted frequently for his observations and to agree a way forward for each of the planning opportunities. He explained that this approach was generally the way in which trustees act. He explained that after Mr Wesley had approved the round the world scheme he told PwC it would go ahead and then Mauritius trustees had to be found. Mr Fleming confirmed that he had no involvement in sourcing Mauritian trustees and had no recollection of being involved in any such dealings. He agreed it was likely that the PwC sourced the trustees in Mauritius. Mr Fleming could not recall the degree to which Abacus checked the Mauritius trustees or their terms if business but as they were professional, namely Standard Bank and two directors of Standard Bank, he believed they were reasonable trustees and there would generally be a limit in terms of enquiries made in such a situation.

105. Mr Fleming confirmed that generally one beneficiary would act as a conduit to the family and it was normal for Abacus to consult only one although the views of the beneficiaries as a whole would be taken into account.

106. Mr Fleming confirmed that Ms Emer Dowling was a manager employed by Abacus which remained director of Wesmor; her involvement he believed would have been in the capacity of corporate director of Wesmor with no technical involvement in the trust. Mr Fleming believed that it would have been reasonable for the Mauritian trustees to request accounts reflecting the position and assets up to Abacus' retirement and this was administration that Ms Dowling may have been responsible for. Similarly, Ms Dowling's involvement in obtaining the certificate of tax residence would be helpful as evidence of the position if Wesmor was liquidated; as directors and liquidator of Wesmor that information was reasonably required. Mr Fleming explained that "we all knew there was a plan" which relied on independent decisions being made at different time.

107. Abacus subsequently retired as trustee on 26 July 2002 in favour of Standard Bank, Jonathan Spriggs and Beatrice Fok Chow. Mr Fleming stated that neither Mr Wesley nor any other beneficiary was involved in sourcing the Mauritian trustees. The Mauritian trustees decided to liquidate Wesmor and Mr Fleming was appointed liquidator on 4 October 2002. Mr Fleming added that Abacus was responsible for introducing Browne Jacobson to the Mauritian trustees; Abacus had used Browne Jacobson for many years for advice on English trust law matters and Browne Jacobson had previously advised Abacus in relation to the trust.

108. A letter from Mr Mosafeer of the Mauritius Revenue Authority (who signed the tax residence certificate on 9 September 2002) to HM Revenue and Customs dated 13 March 2013 provided assistance under Article 28 of the UK/Mauritius double taxation convention. It stated, inter alia, that the amendment to Article 13 of the Mauritius – UK DTC was to capture trusts that were suspected to be involved in abusive schemes:

"In Mauritius a trust is liable to income tax in its own name in accordance with the provisions of section 46(1) of the Income Tax Act. A trust has the status of a 'person' by virtue of the definition of 'person' in section 2 of the Income Tax Act – a 'person' shall be deemed to include a trust.

The definition of the term 'person' in the Mauritius – UK DTC does not include 'trust' – one reason could be that the notion of 'trust' in 1980 when the DTC came into force was still absent in our tax law…in many of our later treaties, 'trust' is included in the definition of 'person'…

A trust is resident in Mauritius if the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius…

A trust which meets the definition of 'resident' as defined in the Income Tax Act is therefore liable to tax as a person in respect of its worldwide income. Such a trust is covered under Article 1 of the DTC as a resident of Mauritius since it is a 'person' liable to tax by reason of its residence as required by Article 4(1) of the DTC.

As correctly stated by you, section 119 of the Income Tax Act merely treats the trustee as an agent who is required to carry out the tax obligations of the trust. The trustee therefore is outside the purview of the DTC for treaty benefits…"

HMRC'S SUBMISSIONS

109. HMRC highlighted that the relevant events took place up to 18 years ago. Relying on *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 25 (Comm) at [22], Mr Brennan submitted that the contemporaneous documentation is likely to provide a more reliable guide to events, thoughts and actions of the relevant persons at the time than the oral evidence given by the witnesses:

"…the best approach for a judge to adopt in the trial of a commercial case, is in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and the known or probable facts."

(see also *Kimathi & others v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [96] – [97] and *Charman v HMRC* [2018] UKFTT 765 (TC) at [143] – [147] and [205] – [207].

110. Mr and Mrs Wesley, and Mrs Mackay were all within the class of discretionary beneficiaries and had received loans from the settlement. In order to extract funds from the settlement it was proposed to liquidate Wesmor Ltd. If this was done and the settlement remained outside the UK for the whole of the relevant tax year (2002/03) the effect of TCGA 1992 s87 would have been to attribute the resulting substantial chargeable gain to beneficiaries who received capital payments in that year, or previous years.

111. The Appellant implemented the round the world arrangements which included the temporary appointment of trustees in Mauritius and the migration of the trust to the UK by appointment of UK trustees in the same year as the relevant disposal of property. The Appellant submits that as a result of the arrangements they are entitled to the benefit of the UK/Mauritius DTC on the basis that as there was no relevant capital gains tax in Mauritius at the relevant time there is no liability.

112. The aim of the scheme was to remain outside the scope of s87 TCGA by appointing UK trustees within the tax year and use the DTC to avoid liability to capital gains tax under s 2 TCGA.

113. The settlement went from the Isle of Man to Mauritius to the UK within the same tax year. The pre-planned idea was that the relevant disposal (liquidation of Wesmor Ltd) would

be effected while the settlement had Mauritian trustees and UK trustees would then be appointed before 6 April 2003.

114. Trustees are to be treated pursuant to s69 TCGA 1992 as a single and continuing body of persons as distinct from the persons who may at time to time be the trustees.

115. Mr Brennan submitted that by virtue of s2 and s69 TCGA the UK potentially taxes its own resident if resident for at least part of the year in the UK. Following the appointment of Browne Jacobson, Mr Wesley and Mrs Mackay in the UK, the tax is on the persons and not the trust. The same type of scheme as those in *Smallwood* and *Lee and Bunter* was used in this case albeit it is not a settlor interest case.

116. The charge is on someone resident in the UK which includes a single body of trustees but double taxation arrangements may apply. Under Article 4 it is the person who under the law of the contracting state who is liable, the tie breaker is then found under 4(3) for non-individuals.

POEM

117. In order to succeed the Appellant must prove that POEM is in Mauritius. HMRC submit that it is insufficient, for example, for the Appellant to show that the trustees were originally in the Isle of Man and took advice there; in those circumstances the POEM would not be in the UK. The only relevance of POEM is as a tie-breaker between the UK and Mauritius under the DTC. The trustees were undoubtedly in the UK during the tax year and UK tax rights are not defeated by the DTC unless POEM was actually in Mauritius at all relevant times so as to give Mauritius taxing rights to the exclusion of the UK.

118. If the Tribunal finds that Article 4(3) of the DTC applies, it will have to identify the dual-resident person and then determine the POEM of that dual-resident person.

119. The Court of Appeal in *Smallwood* clearly rejected the “snapshot” at the time of disposal approach to POEM and the Tribunal is required to take a longer view of the place where effective management is to be found.

120. During 2002/03 the single and continuing body of trustees was undoubtedly in the Isle of Man in the period 6 April 2002 to 26 July 2002. The liquidation of Wesmor Ltd later took place in the Isle of Man. The Mauritius trustees acted from 26 July 2002 to 19 March 2003; a period known and intended by the participants to be temporary and which included the snapshot moment when instructions were given for Wesmor to be liquidated. UK trustees were appointed from 19 March 2003 onwards.

121. Mr Brennan submitted that all three contiguous periods must be considered when answering the POEM question. All of the periods are relevant because the UK taxes the single and continuing body of trustees (see s69 TCGA). It is clear that there was a period when POEM was in the UK and the trustees were in the UK. In those circumstances, HMRC submit, the Appellants cannot show that at no time during the relevant tax year there were trustees who were treaty resident in the UK because:

> (a) Prior to the Mauritius period, POEM was either in the Isle of Man or the UK;
>
> (b) During the Mauritius period POEM was in the UK which was where the real and effective decisions of the trustees were taken albeit they were effected by the Standard Bank trustees in Mauritius (the *Smallwood* point);
>
> (c) After the Mauritius period POEM was undoubtedly in the UK and this was during the same tax year.

122. Even if the Appellant could establish that the Mauritius trustees acted with robust independence during the Mauritius period, there were still trustees with POEM in the UK during the same tax year. The Appellants cannot rely on the "snapshot" argument which was rejected by the Court of Appeal in *Smallwood* and by which the Tribunal is bound.

123. It does not help the Appellants to claim that the Mauritius trustees applied their own minds to the decisions made, that they acted in what they believed to be the best interests of the trust and beneficiaries or that they relied on external events and properly administered the trust. Each of these factors were also present in *Smallwood* and *Lee & Bunter*.

124. In summary, HMRC submit that each of the facts identified by Hughes LJ in *Smallwood* as being important are also present in this case. The use of the round the world scheme was devised and coordinated throughout from the UK (and/or the Isle of Man) by the Appellants' advisers. Its use was expressly authorised by Mr Wesley from the UK and could not have happened without his authority. The real top-level management and decisions were taken in the UK. The temporary Mauritian trustees had to accept office, conduct basic administration, liquidate the assets when told and appoint UK trustees chosen for them.

Different persons argument

125. HMRC's primary position is that the DTC is not engaged because its relevant provisions address different persons. There is no dual residence of one person to engage the tie-breaker provisions of Article 4(3) of the DTC; such a conclusion is in accordance with the purpose of the DTC.

126. Mr Brennan highlighted that this argument was not raised before the Special Commissioners or appellate courts in *Smallwood* and there was therefore no decision on the issue.

127. Mr Brennan submitted that the Tribunal should be guided in its interpretation of the DTC by the summary of the principles of interpretation given by Mummery LJ in *IRC v Commerzbank* 63 TC 218, approved by the Court of Appeal in *Memec v IRC* 71 TC 77, including the Vienna Convention on the Law of Treaties 1969.

128. The Tribunal must interpret the words of the DTC in light of its "object and purpose". The purpose of the DTC can be gleaned from the preamble which records the desire of the parties to "conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion." In seeking a purposive interpretation of the DTC the Tribunal must bear in mind both of those principles (see *Bayfine UK v HMRC* [2012] 1 WLR 1630, 1636H (Arden J)).

129. Mr Brennan highlighted the comments of Patten J in *Smallwood* at [29] which rejected the snapshot approach:

> "…the DTA is not concerned to alter the basis of taxation adopted in each of the Contracting States as such or to dictate to each Contracting State how it should tax particular forms of receipts. Its purpose is to set out rules for resolving issues of double taxation which arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the Contracting States under the DTA."

130. The rules by which double taxation is avoided are described at [19] of the introduction to the OECD Model Convention upon which the DTC is closely based:

> "For the purpose of eliminating double taxation, the Convention establishes two categories of rules. First, Articles 6 to 21 determine, with regard to different classes of income, the respective rights to tax of the State or source or situs and of the State of residence…Second, insofar as these provisions confer on the State of source or situs a

full or limited right to tax, the State of residence must allow relief so as to avoid double taxation, this is the purpose of [the elimination of double taxation Article]."

131. The DTC, HMRC submitted, allocates taxing rights between states on the basis of one state being the residence state and the other being the source state. Where there are two residence states for the purposes of the DTC the tie-breaker in Article 4(3) operates to identify one residence state. However, if the person is not resident in both states, Article 4(3) does not arise (see para 3 and 4.1 of the Commentary to Article 23 of the Model Convention).

132. The starting point is therefore to determine whether under the domestic law of the UK and Mauritius there is double residence which requires resolution by the application of the tie-breaker provision at all.

133. Mr Brennan submitted that the following propositions from *Lee & Bunter* at [44] are common ground:

(a) In Mauritian law a trust has the status of a person and is liable to income tax, tax on morcellement and, should it arise, VAT in its own name;

(b) In Mauritian law the trustees (whether taken to mean trustees for the time being or trustees as a continuing body) do not have any such liability;

(c) The Mauritius Income Tax Act 1995 treats the trustees as the trust's agent for the purpose of meeting the trust's tax obligations but goes not further;

(d) A trust is resident in Mauritius for the purposes of Mauritian law if it is administered in Mauritius and a majority of the trustees are resident in Mauritius or the settlor was resident in Mauritius when the trust was created;

(e) A trust which is resident in Mauritius is, for that reason, liable to Mauritian income tax on its worldwide income;

(f) In Mauritius it is a trust which is, or would be, the taxable entity; in the UK the taxable entity is the trustees as a continuing body.

134. The propositions set out above are consistent with the evidence of Mr Mosafeer of the Mauritius Revenue Authority whose evidence is set out at [109] above and which was provided under international mutual assistance arrangements. The evidence confirms that the Mauritius trustees (as opposed to the trust) are outside the purview of the DTC for treaty benefits.

135. Mr Brennan submitted that the premise of HMRC's argument had been accepted by Judge Bishopp in *Lee & Bunter* at [87] – [92] that for the purposes of applying Article 4(1) of the DTC, under their respective domestic laws the UK and Mauritius seek to tax different persons. Although Judge Bishopp rejected the "different persons" argument in *Lee & Bunter*, HMRC submitted that the Judge had misunderstood the point and erred in recording the argument at [87] as:

> "the Settlements were not…resident in Mauritius for the purposes of the DTC."

However, Mr Brennan explained, the argument was that the Settlements were resident in Mauritius for the purposes of the DTC, it was the trustees as a single body of persons who were not so resident. Therefore, there was no dual residence of the same person. The focus was not on the identity of the person liable to tax but on the lack of dual residence of any person at all.

136. In the UK the DTC applies to income tax, corporation tax and capital gains tax (Art 2(a)). In Mauritius it applies to income tax and the tax on morcellement (Art 2(b)). The application of the DTC to the trust on one hand and the trustees on the other must be determined by reference to the way that the UK and Mauritius impose those taxes because only persons who come within the terms of Article 1 are those to whom the DTC applies and it is only in respect

of those specified taxes that a person could be a resident of a contracting state under Article 4(1).

137. In relation to the taxes identified in Article 2(b) a trust falls within Article 1 of the DTC as being a person resident in Mauritius because, applying Article 4(1), under the domestic law of Mauritius the trust is liable to those taxes by reason of residence (with which Mr Mosafeer agreed notwithstanding they may otherwise be considered resident) As the trustees themselves are not liable in Mauritius to income tax on the income of the trust or to the tax on morcellement, the trustees are therefore not resident in Mauritius for the purposes of Article 4(1) of the DTC.

138. Under UK law the taxable entity is the single and continuing body of trustees (as distinct from the persons who may from time to time be the trustees) resident in the UK for the purposes of capital gains tax by virtue of ss2 and 69 TCGA. The trustees as a single body of persons are thereby resident in the UK under Article 4(1) of the DTC.

139. Under the law of Mauritius, it is agreed that the taxable person is the trust. Mr Mosafer issued the residency certificate for the settlement, not the trustees. Mr Brennan submitted that if the taxable person is the trustees in the UK but the trust in Mauritius, the tie breaker is not engaged as there is no person resident in both states. HMRC submitted that there is no dual residence of any one person because the trust and the trustees as a single body of persons are different persons and are resident only in Mauritius and the UK respectively. In those circumstances the tie-breaker provision in Article 4(3) is not engaged and the UK is entitled to treat the trustees as a single body of persons under Article 13(4) as they are resident only in the UK.

140. Mr Brennan recognised the difficulty which may arise in that there would be the potential for double taxation. The OECD Commentary on the Model Convention 2017 states that the convention is not aimed at the possibility of economic double taxation, i.e. taxing the same gain on different persons, but rather it is aimed at juridical taxation, namely taxing the same person twice in different places. However, this potential issue does not arise in this case as Mauritius does not impose a tax on the gains with which this appeal is concerned.

SUBMISSIONS FOR THE APPELLANTS

141. On behalf of the Appellant Mr Gordon explained that the Appellants proceed on the assumption that the decision in *Smallwood* has definitively determined the legal issues at the heart of this case. However, the Appellants nevertheless reserved the right to argue that *Smallwood* was decided wrongly and that:

(a) The correct approach is to consider the residence at the point of the relevant disposal (the "snapshot approach") and/or;

(b) The legal test for residence mirrors the central control and management test as applicable for corporate residence as recently reaffirmed in *Development Securities plc (and others) v HMRC* [2019] UKUT 169 (TCC).

POEM

142. Mr Gordon submitted that the decision in *Smallwood* does not make the present appeal bound to fail; ultimately *Smallwood* was unsuccessful on the particular facts of the case. The facts of this case are materially different to those in *Smallwood* and *Lee & Bunter*. *Smallwood* involved a settlor-interested trust and the disposal at the heart of the case was Mr Smallwood's shares in FirstGroup plc of which Mr Smallwood had been chairman. At the same time that the trustees made their disposal, Mr Smallwood disposed of 100,000 shares he had held personally. The key sections referred to in *Smallwood*, namely s77 and s86 TCGA 1992, are not directly relevant to the present appeal.

143. That said, the Appellant referred the Tribunal to the Court of Appeal judgment in *Smallwood* which, the Appellant submitted, provides a summary of the issues relevant to this appeal and which was the approach adopted by the Tribunal in *Lee & Bunter* at [67], [73] & [74]:

> "The underlying theme of Mr Brennan's arguments was that there is, in reality, nothing to distinguish this case from *Smallwood*, and that the considerations which led the Special Commissioners and the majority of the Court of Appeal to their conclusions in that case are of equal force here. Indeed, he said, once one pays regard to the title of the DTC, making it clear that it is a convention "for the avoidance of double taxation and the prevention of fiscal evasion", and not a means by which non-taxation is to be achieved, the proper outcome of this appeal becomes obvious.
>
> I accept Ms Hardy's argument that, despite the close resemblance, this case is not on all fours with *Smallwood*, and that I cannot, as Mr Brennan urged me to do, simply apply the outcome in that case to the facts in this. I agree with Ms Hardy too that it is plain from the judgment of Hughes LJ (with whom Ward LJ agreed without elaboration) that he determined the appeal by reference, not to his own view of the arrangements, but to the criteria laid down in *Edwards v Bairstow* [1956] AC 14 and the long line of authority following it, which limit the ability of an appellate court to interfere with findings of fact. Indeed, although what he said at [70], quoted above, suggests he agreed with the Special Commissioners on the outcome he did not expressly say so and one cannot be wholly certain that he did agree with them.
>
> Nevertheless, and despite Ms Hardy's strenuous efforts to persuade me otherwise, it does seem to me that a factual comparison of this case with *Smallwood* is informative, and I shall draw from such a comparison below. As *Smallwood* and the other authorities indicate, the essential question is, where were the most important decisions relating to the governance, or management, of the Settlements taken? The first step in the enquiry, as it seems to me, is to identify what were the most important decisions. Here, as in *Smallwood*, the Settlements were disposing of shares which represented all or virtually all of their assets. In neither case could the disposal be considered a matter of routine, or day to day, trust management; it was quite plainly of fundamental importance that the best price available was secured for the shares, that the sale was accomplished without adverse incident, and that the trust was transferred to the UK before the end of the tax year. I recognise that, because of the incidence of UK tax which I have described above, the transfer of the trust was undertaken for the benefit of the settlors rather than for the Settlements themselves, but I do not think this matters; DTOS, as trustee, had a duty to all of the beneficiaries including the settlors. I should mention at this point that I do not think there is anything in Ms Hardy's argument that it was Vodafone which brought forward the date of the sale; had it not done so it is plain that the scheme would still have been carried out, but in the following tax year."

144. In relation to POEM the Appellant relied on the factual distinctions between this appeal and *Smallwood*. Mr Gordon submitted that the contemporaneous documentation supports the contention that the arrangements were instigated and driven by the Abacus in the Isle of Man until the Mauritian trustees took over after which the Mauritian trustees made the relevant decisions. Simply because the UK advice was taken from PwC does not negate the fact that POEM was clearly in the Isle of Man and then Mauritius.

145. Mr Gordon submitted that POEM is a question of fact (see *Lee and Bunter* at [18]). He highlighted that this is not a case where the parties had tried in any way to disguise POEM which was not an issue at the relevant time, instead the parties were concerned with *Ramsay* principles. Mr Gordon submitted that this adds to the authenticity of the contemporaneous documents as no one at the time can be said to have been concerned to show decision were

taken in Mauritius at the relevant time in order to satisfy the test of POEM. This is clear from the initial proposals made by PwC which included the round the world scheme as an alternative and which Mr Dunk confirmed was not his preferred route.

146. The tiebreaker under Article 4(3) is triggered by the fact that the trust was in the Isle of Man, then Mauritius and then the UK. Mr Gordon submitted that although the judges in *Smallwood* differed about the application of the law to the specific facts of the case, they agreed on this point by which the Tribunal is bound.

147. Mr Gordon accepted that the trust was resident in the UK in the last two weeks of the 2002/2003 tax year, which was necessary for the scheme to work. However, Mr Gordon submitted, HMRC have attempted to use this to trump the POEM argument which is the wrong approach as it is analogous to the snapshot approach using a different moment in time.

148. POEM overrides residence and the Appellant submitted that on the facts of this case the trust was effectively managed from outside the UK. To the extent that the Mauritian and Isle of Man trustees took into account the views of people in the UK and consulted the Wesley family from time to time, this is not determinative of the issue.

149. Mr Gordon submitted that PwC identified one body of trustees and then advised another body of trustees, hence a fresh letter of engagement. However, it is clear that the trust as a concept continued throughout and the Mauritian trustees took their own decisions which was based on the advice given by PwC to a continuing trust.

150. Mr Gordon submitted that the emails contained within the bundles provide a reasonable explanation for the lack of evidence from Ms Fok Chow and Browne Jacobson. In those circumstances the Tribunal should not draw any adverse inferences against the Appellants for a perceived lack of co-operation by any party to the transaction and specifically Ms Fok Chow. Furthermore, Ms Chow confirmed that due to the passage of time she would have to rely on the documents which are before the Tribunal as she could not recall events. For that reason, the weight of the contemporaneous documents would outweigh any account Ms Chow could have given in evidence.

151. Mr Gordon submitted that the oral evidence was, in the main, consistent with the documents with only minor inconsistencies which are to be expected given the passage of time.

152. Mr Gordon submitted that it was Abacus in the Isle of Man which was in the driving seat until the Mauritian trustees took over in 2002 from which point they made all effective decisions. Both trustees independently took advice from PwC which is not surprising; PwC knew how the scheme worked and how it was to the benefit of the trust or trust beneficiaries. It is not borne out by the evidence that PwC drove the scheme and Mr Dunk confirmed that the trustees were free to make, and did make, their own independent decisions.

153. Mr Gordon took the Tribunal through a significant number of documents in support of the contention that the arrangements were not driven by Mr Wesley or PwC. He submitted that the evidence demonstrated that Abacus instigated the discussions and sought advice from PwC; from time to time Abacus kept Mr Wesley informed which was proper behaviour from a trustee. When the Mauritian trustees took over they sought advice and made their own decision to continue with the scheme proposed. Following advice is not akin to displacing effective management or usurping the decision making.

154. Mr Wesley highlighted that had he been running or controlling the arrangements he would have been aware of the fees; the fact that he was not indicates he was not in control. The extent of PwC's involvement was limited to providing advice to the trustees from time to time.

155. In summary, Mr Gordon submitted, Mr Wesley did not issue instructions regularly or instigate regular telephone calls or meetings. At their highest the documents show that Mr Wesley was consulted from time to time regarding the activities of trust in circumstances where he was lead beneficiary which does not satisfy the test of POEM. Mr Gordon submitted that the sliding scale referred to by Judge Bishopp in *Lee and Bunter* suggests that a snapshot approach is correct although the Appellant accepted that the appeal would proceed on the issue of POEM.

Different persons argument

156. In relation to the different persons argument, the Appellant submitted that the argument was rejected by the FTT in *Lee & Bunter* (at [83] – [92]). The Appellant invited the Tribunal to follow the same approach and reject HMRC's argument that the DTC does not operate in the contexts of trusts for the same reasons.

157. Mr Gordon submitted that the *Smallwood* judgment did not specifically address the different persons argument. However, Mr Gordon noted that *Smallwood* did not decide that the scheme was flawed or failed, rather the case was lost on the implementation.

158. The DTC at the relevant time defined "residence" at Article 4 as:

> "…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."

159. Article 4(3) goes on to provide that:

> "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."

160. Mr Gordon submitted that Article 3 "General Definitions" provides a broad definition at 3(e):

> "the term *"person"* comprises an individual, a company and any other body of persons, corporate or not corporate."

161. Mr Gordon submitted that the distinction between economic and juridical double taxation does not need to be considered as the situation applicable to this appeal is found in the OECD commentary on Articles 23A and 23B:

> "1. These Articles deal with the so-called juridical double taxation where the same income or capital is taxable in the hands of the same person by more than one State.
>
> 2. This case has to be distinguished especially from the so-called economic double taxation. i.e. where two different persons are taxable in respect of the same income or capital…
>
> 3…
>
> b) where a person is resident of a Contracting State (R) and derives income from, or owns capital in, the other Contracting State (S or E) and both States impose tax on that income or capital…
>
> 6. For some items of income or capital, an exclusive right to tax is given to one of the Contracting States, and the relevant Article states that the income or capital in question "shall be taxable only" in a Contracting State. The words "shall be taxable only" in a Contracting State preclude the other Contracting State from taxing, thus double taxation is avoided. The State to which the exclusive right to tax is given is normally the State of which the taxpayer is resident within the meaning of Article 4, that is State R, but in

> Article 19 the exclusive right may be given to the other Contracting State (S) of which the taxpayer is not resident within the meaning of Article 4."

162. Mr Gordon agreed that economic and juridical taxation are different concepts but submitted that HMRC's argument is flawed. The Introduction to the OECD Commentary on the Model Tax Convention explains:

> "International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods" (emphasis added).

163. Mr Gordon submitted that the situation in this appeal is covered by the Commentary and there is therefore no need to go further and consider issues of economic or juridical double taxation. The Commentary on Article 3 "concerning general definitions" explains (at [2]) that "the definition of the term "person" given in subparagraph a) is not exhaustive and should be read as indicating that the term "person" is used in a very wide sense…The definition explicitly mentions individuals, companies and other bodies of persons. From the meaning assigned to the term "company" by the definition contained in subparagraph b) it follows that, in addition, the term "person" includes any entity that, although not incorporated, is treated as a body for tax purposes. Thus, e.g. a foundation…may fall within the meaning of the term "person". Partnerships will also be considered to be "persons" either because they fall within the definition of "company" or, where this is not the case, because they constitute other bodies of persons".

164. Mr Gordon highlighted the following from *Bayfine UK v Revenue and Customs Commissioners* [2012] 1 WLR 1630:

> "These words, however, make it clear that the primary purposes of the Treaty are, on the one hand, to eliminate double taxation and, on the other hand, to prevent the avoidance of taxation. In seeking a purposive interpretation, both these principles have to be borne in mind. Moreover, the latter principle, in my judgment, means that the Treaty should be interpreted to avoid the grant of double relief as well as to confer relief against double taxation."

165. In summary, the Appellant contended that the different persons argument is wrong in law and goes against common sense and the purposive construction of legislation. HMRC's argument is not supported by proper interpretation of the Treaty. Furthermore, HMRC ran the same argument unsuccessfully in *Lee and Bunter* which, although not binding, is clearly the correct decision.

DISCUSSION AND DECISION

Ancillary issues

166. Before turning to the substantive issues, I will address a number of matters raised by the Appellant.

167. Mr Gordon requested findings of fact regarding Mrs Mackay's knowledge, or lack thereof, of her appointment as a trustee. Given that the High Court has now handed down its judgment on the issue there is no reason for me to make any findings of fact in that regard. Furthermore, HMRC did not rely on Mrs Mackay's knowledge as part of its case nor did it pursue the issue at the hearing. In those circumstances there is no basis upon which to make any findings and I decline to do so.

168. Mr Gordon also sought findings in relation to the 'snapshot' issue; as stated in his skeleton argument the "Appellants currently proceed on the assumption that the decision in *Smallwood* has definitively determined the legal issues at the heart of this case. Nevertheless, the Appellants reserve the right to argue that *Smallwood* was in fact wrongly decided." I agreed

with Mr Gordon that HMRC did not challenge the fact that the trust was resident in Mauritius at the time of disposal and, on the evidence before me there would be no basis for doing so. However, the test to be applied in such cases was clearly set out by the Court of Appeal in *Smallwood* and I consider that it is not open to the Appellant to challenge that test. I therefore did not accept the Appellant's invitation to consider residence at the point of the relevant disposal in any further detail.

169. The Appellant submitted that the legal test for residence mirrors the central control and management test applicable for corporate residence and reaffirmed in *Development Securities plc (and others) v HMRC* [2019] UKUT 169 (TCC). I was unclear as to whether Mr Gordon sought to persuade the Tribunal to apply the test for CMC instead of or in addition to POEM. However, in my view while there are clearly similarities it would not be appropriate to conflate the two. The tests of CMC and POEM are clear and distinct in their respective contexts and I agree with the comments of the UT in *Development Securities* at [66] and [67]:

> "HMRC submitted to the FTT that the decision of the Court of Appeal in *HMRC v. Smallwood* could and did elucidate the test for CMC that we have described in Section B above. The FTT considered the *Smallwood* decision at [342]*ff* of the Decision, and concluded (at [389]) that there was no basis for using the *Smallwood* decision to elucidate the CMC test because *Smallwood* was concerned, not with CMC, but with the residence of a trust under different rules to the rules relating to the residence of corporations.
>
> We, of course, accept that it is quite possible for one area of law to inform another: but this is not such a case, and we consider that the FTT was correct to hold that *Smallwood* was "inapplicable in these circumstances". We have not considered it necessary to incorporate the analysis in *Smallwood* into Section B above for that very reason: the principles in *Smallwood* – were we to incorporate them – distort rather than elucidate the CMC test for corporate residence."

170. Mr Gordon submitted that the Tribunal should not draw any adverse inferences from the absence of evidence from Ms Fok Chow and Browne Jacobson and, as I understood it, HMRC did not positively seek the Tribunal to do so. I considered *The Commissioners for HM Revenue and Customs Commissioners v Sunico* [2013] EWHC 941 which cited with approval the principles set out in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324:

> "…the familiar four principles summarised by Brooke LJ in *Wisniewski v Central Manchester Health Authority* ([1998] PIQR 324, at p 340:
>
> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

171. I was satisfied that the explanation provided for the absence of the witnesses was sufficient and that it would not be appropriate to draw any inferences. Furthermore, I was able to determine the issue of POEM on the material before me without the need or assistance of

evidence that might have been called but which, for the reasons given, was not. I therefore did not find it necessary to draw any adverse inferences from the failure of the Appellant to produce evidence from Browne Jacobson or Ms Fok Chow.

POEM

172. The issues in this appeal relate to the efficacy of the "round the world scheme" used by the appellants to avoid taxation on their gains in the UK arising from the liquidation of Wesmor.

173. As explained by Judge Bishopp in *Lee and Bunter* at [19]:

> "If the Settlements were resident throughout the year in Mauritius and ss77 and 86 of TCGA would, as I have explained, result in the imposition of UK CGT on the appellants. The key to the success of the round the world scheme lies, first, in ensuring that the relevant trust is resident in an overseas territory with which the UK has a DTC for part of the tax year, that the disposal takes place while it is so resident, and that it is resident in the UK for the remaining part of the tax year, thus engaging the DTC and overriding ss 77 and 86, and, second, in the exploitation of the "tie-breaker" of art 4(3) of the DTC in order to ensure that taxation rights are vested exclusively in the overseas territory. It follows that the identification of the place of effective management, or "POEM", of the Settlements, on which the application of the tie-breaker is dependent, is of fundamental importance in cases of this kind…"

174. Under domestic law the Appellants were liable for UK CGT on the gains arising on the disposal of the trust. The purpose of moving trusteeship from the Isle of Man to Mauritius and then to the UK was to demonstrate and rely on the argument that by virtue of the DTC no liability would arise because the DTC had the effect of granting the exclusive right to tax the gains on Mauritius.

175. HMRC submitted that the Appellants' implementation of the scheme did not work as the DTC does not assist them and that they are liable to UK CGT on the gains. HMRC contend that there is nothing to distinguish this case from *Smallwood* and *Lee and Bunter* whereas the Appellants' position is that there are significant factual differences and on that basis the authorities are distinguishable.

176. Irrespective of whether or not the facts of this appeal are similar to *Smallwood* or *Lee and Bunter*, more about which I will say later, I found the authorities informed my approach to the issue of POEM and the principles to apply; the Court of Appeal, by which I am bound, held that residence must be determined by reference to the domestic legislation of the relevant states. However, when the application of that legislation leads to the conclusion that a taxpayer was resident in both states the tie-breaker comes into play. The Court unanimously agreed in *Smallwood* that the snapshot approach was not the correct approach and that the facts should be viewed over a longer period. It is also clear from the authorities that in determining the issue of POEM consideration must be given to, as explained by the Special Commissioners in Smallwood: "in which State "the real top level management (or the realistic, positive management) of the trustee qua trustee is found" and as per the Court of Appeal at [66], [68], [69] & [70]:

> "On the issue of POEM, with suitable hesitation, I respectfully differ from Patten LJ.
>
> 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, [2006] STC 443, [2006] 1 WLR 1393 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.
>
> But it seems to me that to apply this reasoning to the present case is to ask the wrong question, and indeed to return to the rejected snapshot approach. The taxpayers with whom we are concerned under s 77 are the trustees. Trustees are, by s 69(1) TCGA 1992, treated as a continuing body:
>
> "In relation to settled property the trustees of the settlement shall for the 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*, ie of the trustees as a continuing body. That is the question which the Special Commissioners addressed: see their paras 140 and 145."

177. I agreed with and adopted the starting point set out by Judge Bishopp in *Lee & Bunter* as follows:

> "…the essential question is, where were the most important decisions relating to the governance, or management, of the Settlements taken? The first step in the enquiry, as it seems to me, is to identify what were the most important decisions. Here, as in *Smallwood*, the Settlements were disposing of shares which represented all or virtually all of their assets. In neither case could the disposal be considered a matter of routine, or day to day, trust management; it was quite plainly of fundamental importance that the best price available was secured for the shares, that the sale was accomplished without adverse incident, and that the trust was transferred to the UK before the end of the tax year. I recognise that, because of the incidence of UK tax which I have described above, the transfer of the trust was undertaken for the benefit of the settlors rather than for the Settlements themselves, but I do not think this matters; DTOS, as trustee, had a duty to all of the beneficiaries including the settlors..."

178. In this appeal, the following facts were present as they were in *Smallwood* and *Lee & Bunter*:

- A trust resident outside the UK held an asset pregnant with an unrealised capital gain;
- The trustees of the trust resigned and were replaced by trustees based in Mauritius;
- The Mauritian trustees disposed of the asset and thereby realised the capital gain;
- Before the end of the tax year, the Mauritian trustees resigned and were replaced by UK-resident trustees.

179. Although Mr Brennan helpfully identified the three contiguous locations where the trust was based, namely the Isle of Man, Mauritius and the UK, residence is not determinative of the issue and I found more assistance in considering the pertinent questions which, as per Judge Bishopp, are:

(1) What were the main decisions that were taken; and

(2) Where were those decisions taken?

180. I consider that the main decisions taken were to authorise use of the round the world scheme and devising/planning the arrangements necessary to give effect to the scheme, namely the liquidation of Wesmor, the timing of moving and liquidating the trust and appointment of trustees in Mauritius and the UK.

181. It was clear that the witnesses gave their evidence to the best of their recollection but understandably given the passage of time memories had faded and I found the most reliable evidence was contained within the contemporaneous documents. I accepted Mr Gordon's submission, and there was no suggestion, that the parties to the arrangements had acted with the POEM test as set out in *Smallwood* in mind. However, in my view the documentary evidence did indicate that the parties were seeking to demonstrate residence and management of the arrangements in Mauritius by their actions, for instance as demonstrated by an email from Ms Fok Chow to Abacus and PwC dated 4 October 2002 which stated:

> "…I am following up on the status of the two sets of accounts for the above trust which we are still awaiting from you. We require the said information in order to set up the necessary book-keeping and maintain proper accounting records in Mauritius so as to demonstrate the management and control of the trust being carried out in Mauritius…"

182. In respect of the witness evidence I found that Mr Wesley downplayed his role relying on his lack of tax expertise. I did not accept that he took no active part in the scheme nor that he was unable to give approval for it and simply followed advice. The evidence showed that Mr Wesley's approval was sought and given. Both Mr Wesley and Mr Fleming agreed that the scheme would have been unlikely to go ahead without his approval; again, I found that this downplayed the reality, the evidence led me to conclude that the scheme would not have gone ahead without Mr Wesley's authorisation.

183. Mrs Mackay's evidence was directed toward her appointment as trustee and knowledge of it; it therefore added little of relevance to the issues to be determined.

184. I was satisfied that both Mr Dunk and Mr Fleming did their best to recall events. However, as set out earlier I found the contemporaneous documents were more reliable given the passage of time that has elapsed. I found Mr Dunk's evidence that no real decisions were taken by PwC understated the reality and was not borne out by the evidence; for instance, his acceptance that PwC "introduced parties" did not reflect the fact that it was PwC which was responsible for sourcing and choosing the Mauritius trustees who were accepted by Abacus with no evidence of any due diligence or meaningful consideration of their suitability. The fact that the round the world scheme was not Mr Dunk's personal preference of the options proposed in my view reinforced the fact that it was Mr Wesley from whom the participants took their steer; thereafter it was PwC's plan that was followed. The use of the phrase in a fax from Mr Harries to Abacus on 10 April 2001 "…when we decide to proceed…" may, as Mr Dunk's believed, have been a clumsy use of language; as the author of the letter did not give evidence there was no definitive answer, however it did indicate to me the thinking behind it, namely that it was, at least in part, PwC's scheme to implement. Again, I found Mr Dunk's evidence that it would have been "strange" if the Mauritian trustees did not follow the course understated the matter; in my view it would have been wholly unlikely given that it was the sole reason for their appointment. Similarly, Mr Dunk accepted that it was "critical" to the tax planning arrangements that the Mauritian trustees could be relied upon to liquidate Wesmor although his evidence was that he was not 100% confident that they would do so. In reality the Mauritian trustees were aware that there was a plan and that their appointment was temporary for the purposes of that plan; while in theory they could have considered alternatives, the reality is that there was limited time in which to do so given that the arrangements were already in motion and there was no evidence that any consideration was given to alternatives or even to the detail of the arrangements provided to them.

185. Mr Fleming clearly had a general understanding of the type of arrangements available however I found that the evidence indicated that he relied on PwC to a large extent. Mr Fleming's evidence that he discussed matters with Mr Wesley appeared driven by his concern to ensure he acted properly in his role as trustee and avoid any repercussions should the scheme fail and a liability fall on the beneficiaries. While such motives were clearly commercially sensible, I found the evidence indicated that Mr Fleming took his steer from Mr Wesley. As to whether Mr Wesley had a right of veto is a matter of speculation as the issue did not arise, however it was clear from his evidence that Mr Fleming was concerned to ensure Mr Wesley's approval before any further steps were taken. I did not accept the evidence that independent decisions were taken at different times; as Mr Fleming himself stated "we all knew there was a plan". That plan comprised a number of predetermined steps which although involved decisions could not, in my view, be said to have been taken either independently or at different times; each party knew their role and the decisions had, in effect, already been made it was simply a matter of administration for the parties to implement those decisions. The evidence from PwC setting out at various stages the necessary steps and draft timetable unequivocally led me to conclude that PwC managed each event and dictated the timing of those events in advance to ensure adherence by both Abacus and the Mauritian trustees.

186. In my view there are factual similarities with *Smallwood*. For instance, Mr Wesley reiterated on a number of occasions that he was unable to make any decisions given his lack of understanding in relation to tax matters. In *Smallwood*, it was accepted that Mr Smallwood was not an expert but the Special Commissioners took into account that he had the assistance of experts KPMG, as Mr Wesley had the assistance of PwC in this appeal. In addition, the scheme used in this appeal was devised (in this case by PwC) in the UK, as it was in *Smallwood* and *Lee and Bunter*. In all cases the schemes required the parties involved to follow the steps necessary to give effect to the arrangements. In this appeal, for reasons I will set out, I was satisfied that there was a clear assumption that the Mauritian trustees would wind up Wesmor and retire in favour of UK trustees in order for the trust to return to the UK within a set period of time.

187. The documentary evidence included considerations of tax planning arrangements prior to the round the world scheme and which did not go ahead. In my view the evidence was relevant in showing that Mr Wesley had an understanding and involvement in tax matters pertaining to the trust. By way of example, Abacus wrote to Mr Wesley on 26 June 2000 setting out the assets of the trust and "the possibility of appointing some of the trust fund on to a new settlement, to minimise taxes on distributions to the family, and the implications of the 2000 Budget." The letter refers to Mr Wesley's understanding of the income tax position "from our previous discussions" and the issue of capital gains. The level of detail in the letter and invitations to Mr Wesley that "perhaps we could discuss" and "I would want your initial reaction before taking it further including if you decide to proceed seeking further advice from Counsel" indicated, in my judgment, that Mr Wesley had a reasonable, if not high level of understanding regarding the tax matters arising from the trust and that Mr Fleming discussed matters with Mr Wesley to the point that he sought Mr Wesley's view before raising them with the co-trustee:

> "You will no doubt want to talk to me about this and I am in the office next week…if you care to telephone m., At this stage I have not discussed anything with Abacus' co-trustee but if there was a serious interest in pursuing it I would need to speak to Mr Crellin."

188. In an email from Mr O'Loughlin of Abacus to PwC dated 14 February 2001 it is clear that in considering possible tax planning arrangements the trustees were concerned with obtaining approval for any arrangements and to avoid potential repercussions:

"…If the planning fails, such that advances to beneficiaries carry section 87 charges in respect of the £4million, the beneficiaries could attach (whether successfully or not I do not comment here) the trustee for having engaged in planning which incurred that charge, when there was an alternative planning (the derivative planning) which (the beneficiaries would allege) could have been engaged in and which would have avoided that charge. The beneficiaries would argue that the trustee took an unjustifiable risk…engaging in the planning without counsel's advice as to the prospects of success, and would argue that the trustee was negligent or in breach of trust.

It would be possible to argue that if the planning fails the trust fund suffers no loss (as you point out, the tax is payable by the beneficiary and not the trustee) so that if one obtained a fully informed consent and/or release from the adult beneficiaries, the trustee is protected from an action by them. For that to be fully informed consent, the beneficiaries would need to be independently legally advised…

We will in any event be discussing the planning with the settlor's daughter and her husband, and would be unlikely to proceed unless they agreed it was appropriate to do so."

189. I took into account the evidence that it was Abacus who engaged PwC for advice and, as set out in a letter dated 14 February 2001 from Abacus to Cairns Gordon Bell in the Isle of Man (who had been appointed to provide an opinion under Manx law as to the validity of possible tax planning in relation to a number of settlements in relation to which Abacus were considering arrangements):

"Pricewaterhouse Coopers in London are advising the trustees on United Kingdom tax…The planning currently under consideration involves the trustee entering into two sets of derivative contracts…"

In addition to evidence relating to tax planning prior to the round the world scheme, I also took into account letters confirming the role of the trustees as those who were proceeding with arrangements. However, in my view the documents and letters could not be viewed in isolation as to do so did not provide a full or accurate picture.

190. A letter from Abacus to Mr Wesley dated 23 February 2001 following Mr Fleming's meeting with Counsel to discuss the "Pricewaterhouse Coopers alternative to the derivative planning" sets out a number of points in relation to the proposals, for instance the possible implications were HMRC to argue that Mr Wesley was the settlor:

"…it is important that we agree on the way forward before we proceed further and in this respect I look forward to hearing from you as soon as possible."

191. A file note of Mr Fleming dated 28 February 2001 records that Mr Wesley had been provided with counsel's advice and indicates that Mr Wesley was "quite relaxed" on the issue of being regarded as settlor and:

"…content for us to proceed with the planning as outlined in the instructions to Counsel and has carefully considered all the points I have made in my letter of 23 February but nothing in there causes him to suggest the trustees ought not to proceed."

192. Notably, in relation to this scheme Mr Wesley stated in a letter to Mr Fleming dated 6 March 2002:

"With reference to our recent discussions regarding the two possibilities to alter the trust. It is our opinion that the preferred option is the Mauritius route, we ask that you proceed with this option…Should the trustees proceed with the Mauritius route, it would beneficial to have listed the varying investment strategies the trustees will be pursuing once the Mauritius trust is set up…I would like to have a meeting during the next 2

> months to discuss the plan to maximise the trusts value and also control the costs which are now quite high…"

193. I inferred that "we" referred to the beneficiaries and I concluded that it was Mr Wesley who made the decision to set the arrangements in motion. My conclusion was reinforced by the evidence of Mrs Mackay that her father did not discuss financial matters concerning the family with them but took the decisions himself. Moreover, Mr Fleming confirmed that the scheme would not have been implemented without Mr Wesley's authorisation as the advisers did not want to risk blame or negligence claims if they went against the wishes of the beneficiaries. The evidence indicated that Mr Wesley had more involvement that simply confirming decisions made by Abacus as he suggested; it was clear that Mr Wesley spoke for and on behalf of the beneficiaries and that he considered, understood and made decisions in relation to the tax planning arrangements. On the material before me I was satisfied that Mr Wesley gave the "go ahead" and without his express approval the scheme would not have been embarked upon. It was clear that the trustees did more than just keep Mr Wesley informed; they sought his express approval. Once that was received, as the evidence showed, it was PwC who "called the shots" from sourcing the Mauritian trustees to timetabling the arrangements. I have no doubt that Abacus acted in accordance with its duties but the evidence indicated that they did not know the details of the arrangements nor were they involved in their implementation. By way of example as at 14 March 2002 Abacus informed Mr Wesley that:

> "…as I understand that it will be PwC in Mauritius who will act as new trustees."

which, it transpired, was not the case. Further correspondence indicated that Mr Wesley was not only kept up to date but that he was more involved: by way of example an email from Mr O'Loughlin at Abacus to Mr Harries at PwC dated 5 March 2002 stated:

> "…I will relay your comments to Dave Wesley – he and Stewart are considering this matter."

194. Once Mr Wesley approved the scheme, I consider that it was PwC London who devised and arranged its implementation and I was satisfied that the scheme was orchestrated and controlled in the UK.

195. I did not accept the Appellant's submission that PwC did no more than act in advisory capacity to the "trust as a concept which continued" and which, as I understood it, therefore encompassed Abacus and the Mauritian trustees without distinction. This, in my view, was not borne out by the evidence; it was PwC who sourced the Mauritian trustees; a Trust Committee Resolution dated 23 July 2002 noted that "The trust was introduced by Nicholas Harries of PricewaterhouseCoopers, London". Furthermore, the Mauritius trustees quoted their fees to PwC. In reality it was PwC who engaged the trustees rather than the trustees engaging PwC; I was satisfied that the inclusion of a minimum fee indicated that the fees were quoted by Standard Bank expressly on the basis that they knew their appointment was temporary. Moreover, PwC provided advice prior to being formally engaged by the Mauritian trustees and, on the material before me, seemingly by their own instigation which reinforced my conclusion that the trustees were aware of the limited and effectively artificial role they were introduced to play.

196. In viewing the scheme as a whole I consider that the acts of the Mauritian trustees amounted to no more than "window dressing". I am satisfied that the scheme was described by PwC as "aggressive" because it was considered by PwC to be so by the artificial insertion of the Mauritian trustees for a temporary period for no other reason than to liquidate Wesmor and engage the DTC and for that reason I rejected the Appellant's contention that the arrangements were not predetermined; on the material before me it was clear that PwC were controlling the arrangements which the Mauritian trustees implemented without question or any meaningful

consideration. By way of example, in an email to Mr Harries at PwC on 20 August 2002 Ms Fok Chow sought instructions from PwC who had not, at that point, been formally engaged:

> "I wish to inform you that we have now completed the documentation in respect of the retirement of Abacus IOM and the appointment of the Mauritian trustee.
>
> I am still waiting for the trust's original documents to be forwarded to us and we are in the process of opening a trust account in Mauritius.
>
> Please advise what is the next step with regard to the tax planning for the trust and the underlying company."

197. That information was provided in an email from Mr Harries at PwC to Ms Chow dated 22 August 2002, again prior to PwC's formal engagement:

> "There are a few points I would like to discuss with you regarding (among other things) the residence status of the Settlement in Mauritius. In this regard I would appreciate a conference call with you within the next few days. We can also discuss the options open to the trustees from a tax planning perspective. In this connection, whilst the trustees of the Settlement are resident in Mauritius, they should in my view consider liquidating Wesmor, the Isle of resident investment company, wholly owned by them…"

198. A file note of a conference call between Ms Fok Chow of Standard Bank, Mr Harries of PwC and Ms Dowling of Abacus on 23 August 2002 noted the following:

> "NH requested an update on the tax residency position of the trust. BF…confirmed that an application for a TRC has already been submitted with the authorities and that she will be following up the matter with them. NH then requested what was the time frame for obtaining the TRC and BF responded that it usually takes around 2 weeks…ED then proposed that the decision to appoint a liquidator for Wesmor be delayed until the TRC is obtained and NH agreed.
>
> NH mentioned that although he would be providing advice as to the planning, it was imperative that the Mauritian trustees are seen to be exercising their discretion in all matters relating to the trust and that it was the trustees' decision to liquidate Wesmor. NH further states that the trustees should ensure that this is undertaken so as to protect against future attacks from the UK Inland Revenue. BF also confirmed that since one of the conditions (illegible) the granting of a TRC was that the management and control must be exercised (illegible) trustees in Mauritius, the trustees will ensure that all decisions be taken by them…
>
> NH also mentioned that he will be sending the letter of engagement in respect of the tax advice he would provide to the trustees…
>
> …BF confirmed that she has spoken with Mr Wesley over the past weeks and is keeping him updated on matters relating the trust…
>
> ED questioned NH regarding the transfer of the trust to the UK and timing thereof. NH mentioned that there was no precise time frame at the moment but anticipates this to occur before the tax year."

199. In assessing the evidence as a whole I was left in no doubt that the Mauritian trustees were only required for the scheme to work and that their actions amounted to no more than day to day administration which was controlled and directed by PwC. I did not accept, as submitted by Mr Gordon, that the Mauritian trustees acted of their own accord. It was critical to the scheme that each required step was carried out; there would be no point in embarking on it if the trustees could not be relied upon to do what was required of them, and they did so.

200. An email dated 12 September 2002 from Ms Fok Chow to Mr Harries states: "we have considered the advice you had given to the former trustee and are of the view that the proposal involving treaty planning would be the preferred proposal…" However, having considered all

of the material before me, there is no documentary evidence recording any such considerations such as obtaining the views of the beneficiaries which was, as Mr Fleming described, the general way in which trustees would act. Nor was there any evidence to indicate that the Mauritian trustees had ever considered why or whether it was in the trust's best interest that Wesmor should be liquidated.

201. A letter from Ms Dowling of Abacus to Ms Fok Chow dated 11 September 2002 explained that Abacus required the certificate of residence in the name of the trust and if received "we will proceed with liquidation of Wesmor Ltd". However, at that point Abacus had no such instructions from the Mauritian trustees who, on the face of the documents, had not even decided to go ahead with the round the world scheme or informed Abacus of their intent to do so; it was not until the following day on 12 September 2002 (above at [200]) that Ms Fok Chow emailed PwC to state that the treaty planning was the preferred proposal and that the trustees would take the necessary steps to instruct Abacus to liquidate Wesmor. In my view this was another example of the preordained nature of the scheme and the roles of the Mauritian trustees and Abacus in following the predetermined steps necessary for the scheme to work.

202. On 4 November 2002 PwC provided a letter detailing the next steps together with a draft timetable for key events for the trustees. In my judgment this is further evidence of the Mauritian trustees fulfilling a day to day administrative role which was controlled and managed by PwC. It was notable that the letter was cc'd to Mr Wesley which, when compared with the frequent earlier direct liaison between Mr Wesley and Abacus, highlighted to me the lack of any real connection between the Mauritian trustees and Mr Wesley and I inferred that implementation of the scheme was under the control and supervision of Mr Harries at PwC and not the Mauritian trustees.

203. Further evidence that Ms Chow was instructed and complied with the predetermined steps necessary for the trustees to take is seen in emails from PwC to Ms Chow dated 3 February 2003 and 21 February 2003:

> "…we are aiming to repatriate the trust to the UK as soon as possible before the end of February and I will be in touch again shortly in this regard…"
>
> …
>
> "Dear Beatrice,
>
> We should aim to have the repatriation completed by the end of February to give the UK trustees a reasonable period of administration before the end of the tax year…"

204. The Mauritian trustees had applied for a Tax Residence Certificate from the Mauritius authorities; as they explained to PwC (at C/91/368)

> "BF [Beatrice Fok Chow] confirmed that since one of the conditions for the granting of a TRC was that the management and control must be exercised by the trustees in Mauritius, the trustees will ensure that all decisions be taken by them."

205. I did not accept that there was no more than a "hoped-for-course of action" which would be in the beneficiaries' interests and I did not accept the Appellant's submission that the relationship between the trustees and PwC was no more than that of professional trustee and tax adviser. Although theoretically the trustees could legally have taken a different route, the reality is that they were told the steps to take and took them, seemingly without any detailed consideration.

206. I accepted that there was evidence of the trustees acting independently, for instance an email highlighted by Mr Gordon from Ms Fok Chow to Abacus on 27 June 2002 which stated:

> "Jonathan and I have reviewed the indemnity and apart from some minor amendments…"

which, the Appellant submitted, shows that the Mauritian trustees were not simply 'rubber stamping'. I also accepted that the Mauritian trustees completed and signed the relevant documents in performing their role. However, in viewing the evidence as a whole, in my judgment this was not sufficient to demonstrate that the trustees had considered the scheme and documents in detail or that they would have declined to follow the instructions provided by PwC. As professional trustees I have no doubt that they took their obligations in that role seriously and acted accordingly but to conclude that the trustees truly understood the scheme and took the high-level decisions independently is not, in my view, borne out by the evidence.

207. I was satisfied that the Mauritius trustees were told who and what was needed in respect of the new trustees' appointments and that they followed instructions from PwC without exercising any independent judgement or due diligence; an email from Ms Worwood at Browne Jacobson to Ms Chow dated 12 March 2003 stated:

> "…I have now spoken to PwC and we need at least two UK trustees to be appointed…"

This was followed by an email from Ms Chow to Ms Worwood at Browne Jacobson dated 17 March 2003:

> "…Please advise who would be the additional UK trustee(s) and I shall make the necessary amendments to the Deed…"

208. While I accepted Mr Gordon's submission that the facts of this appeal are not identical to those in *Smallwood* and *Lee & Bunter*, the principles set out in the authorities are equally applicable here. In reality, the arrangements were instigated and implemented by Mr Wesley and PwC in the UK. I am satisfied that Mr Wesley was not merely kept informed but that he expressly authorised the use of the scheme which was, thereafter, controlled by PwC. I do not accept that Mr Wesley had no involvement; he was kept informed at all stages and it was clear from the evidence that the scheme would not have been used without his approval. Although Mr Wesley did not give instructions there was no need for him to do so; the scheme followed a number of predetermined steps set by PwC and as put by Mr Fleming "everyone knew there was a plan".

209. I rejected the evidence that Mr Dunk was "not 100% confident" that the Mauritian trustees would resign and appoint UK trustees; in my judgment there was no possibility that the Mauritian trustees would decline to follow the instructions. There was, in my view, no realistic likelihood that the Mauritian trustees would ever deviate from the plan; the decisions had already been made and the sole purpose of engaging the Mauritian trustees in the arrangements was to fulfil one function, namely demonstrating the trust's residency in Mauritius. They did not in any meaningful sense manage the trust, there was no discernible evidence of any special expertise relevant to the trust they could add, prior to being sourced by PwC it appears that they were wholly unknown to Abacus, Mr Wesley and the beneficiaries and without the scheme there was no reason to move the trust to Mauritius nor, I inferred, would it have been moved. It is not sufficient in my view to simply look at individual pieces of correspondence and who they were written by but rather the full picture can only be accurately determined by looking at the evidence overall from which I concluded that there was a programme to follow for the scheme to work with express authorisation given by Mr Wesley to follow it and with PwC controlling and implementing the planning of scheme. The Mauritian trustees were chosen because they could be relied upon to follow that programme; the fact that the trustees applied some thought to decisions made and properly administered the trust were features also present in *Lee & Bunter* but which I found do not detract from the reality that the top decisions rested with Mr Wesley and PwC.

210. In conclusion I am satisfied that the high-level decisions and place of effective management of the trust was in the UK. The scheme and necessary arrangements were devised in the UK and following authorisation from Mr Wesley on advice from PwC were orchestrated from there. Control of the scheme viewed overall went beyond the daily administrative tasks and management carried out by the Mauritian trustees during the temporary period the trust was located in Mauritius. Accordingly, by operation of the tie-breaker provisions, the gains realised are taxable in the UK, and the appeal on this ground must be dismissed.

Different persons argument

211. Although HMRC advanced the different persons argument as its primary case, given my conclusion on the POEM issue the appeal must be dismissed. However, for completeness the following sets out my conclusion on the different persons argument.

212. As summarised earlier in this decision, Mr Brennan for HMRC submitted that the DTC does not apply in this case because the UK and Mauritius tax different persons: in the UK, the single and continuing body of trustees and in Mauritius the trust. Article 4(1) of the DTC (above at [18]) must be construed consistently with the object and purpose of the DTC, namely "the avoidance of double taxation and the prevention of fiscal evasion" (see *Bayfine UK v Revenue and Customs Commissioners* [2012] 1 WLR 1630, [2011] STC 717).

213. As explained by Judge Bishopp in Lee & Bunter at [86]:

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

214. The statement from Mr Mosafeer (see [108]) on behalf of HMRC explained that in Mauritius it is the trust which is the taxable entity however the trustee is treated as an agent and therefore outside the DTC. HMRC submitted that Article 4(1) is not engaged because in the UK the taxable entity is the trustees as a continuing body and the trustees were taxable in the UK and, by virtue of art 4(1), resident in the UK and therefore Article 4(3) does not assist as there are no two persons who might be regarded as alienators

215. In rejecting the different persons argument in *Lee & Bunter*, Judge Bishopp explained (at [44] & [87] - [92]):

> "In Mauritian law a trust has the status of a "person" and is liable to income tax, tax on *morcellement* and, should it arise, value added tax, in its own name. Correspondingly, the trustees, whether that is taken to mean the trustees for the time being or the trustees as a continuing body, do not have any such liability. The Mauritius Income Tax Act 1995 treats the trustee as the trust's agent for the purpose of meeting the trust's tax obligations, but goes no further. A trust is resident in Mauritius for the purposes of Mauritian law if it is administered in Mauritius and a majority of the trustees are resident in Mauritius or (which is not the case here) the settlor was resident in Mauritius when the trust was created. A trust which is resident in Mauritius is, for that reason, liable to Mauritian tax on its worldwide income.
>
> …
>
> In Mauritius, as the experts agreed, it is a trust which is, or would be, the taxable entity; in the UK, as is common ground, the taxable entity is the trustees as a continuing body. The Settlements in this case were not, however, resident in Mauritius *for the purposes of the DTC*, Mr Brennan continued, because they were not liable to tax there, and art

4(1) was accordingly not engaged. The trustees, however, were taxable in the UK and, by virtue of art 4(1), resident in the UK and only the UK. It was nothing to the point, as the appellants argued, that art 13(4)…permitted the imposition of tax on the alienator since in UK law the trustees were the alienator. Article 4(3) resolves issues of residence, but does not choose between two persons who might potentially be regarded as alienators.

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

"… art 13(4) must, I think, be construed as effective to deal with any liability to taxation for capital gains which either contracting state may impose regardless of the basis of that charge under the domestic legislation in question. It seems to me unlikely that the draftsman of the model convention intended that capital gains which are to be taxable only on the basis of residence should depend exclusively on residence at the date of disposal and so exclude the rights of a contracting state to tax gains by reference to residence within the same tax year. The definition of 'resident of a Contracting State' in art 4(1) reinforces this view by making 'liability to taxation' by reason of residence the criterion for the taxation of capital gains under art 13(4). This, I think, must denote what the Special Commissioners described as chargeability and not simply physical residence. That view is, I think, consistent with the purpose of art 13(4) and avoids descending into whether the UK or Mauritian requirements for residence are satisfied. The definition assumes that they are and allocates the right to tax on the basis that there is liability."

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

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

> "Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated."
>
> There is nothing in that provision which relates to the identity of the taxable person, and correspondingly nothing in it which dictates how the relevant Contracting State may tax the profits, or on whom the burden of the tax is to fall. The same is true of the first two paragraphs of art 13, which confer the right to tax, respectively, gains on the disposal of immovable property, and moveable property owned by businesses "of" one Contracting State with a permanent establishment in the other, but say nothing about the manner in which the gains are to be taxed, and in particular who is to be liable to the tax.
>
> In my judgment Mr Brennan's argument attaches to the word "resident" a meaning the DTC does not intend it to bear. Article 4, when properly analysed, shows that the term is used as convenient shorthand, since a "resident" is one who is "liable to taxation in [a Contracting State] by reason of his domicile, residence, place of management or other criterion of a similar nature". In other words, the focus is on liability to tax, for various reasons of which residence in the ordinary sense is only one. The purpose of the DTC, as I see it, and indeed as Mr Brennan urged on me in another context, is to eliminate the risk of income or gains being taxed twice, and it does so by determining in which one of the two Contracting States tax may be imposed. It makes that determination in some cases by reference to the source of the income or gain (thus for example art 6 deals with income and art 13(1) with gains derived from immoveable property) and in others by reference to the residence, in its extended meaning, of the recipient; but it is nevertheless the income or gain which is the focus. Once the DTC has identified, by this means, the Contracting State in which tax may be levied it has no further part to play—it does not go further and dictate how or on whom tax is to be imposed. I would resolve this issue in the appellants' favour."

216. Although Mr Brennan sought to persuade me that Judge Bishopp had misunderstood or erroneously recorded HMRC's argument, I do not agree. Whether or not the submission was inaccurately summarised, it is clear from reading the Decision as a whole that Judge Bishopp fully understood the premise of HMRC's argument and I do not consider the sentence highlighted by Mr Brennan (see [135]) demonstrates otherwise or that it materially affects the conclusion reached.

217. I agreed with the comments of Judge Bishopp that the focus of the DTC is identifying a liability to tax as opposed to how and on whom the liability is to be imposed and for the same reason I reject the different persons argument. I was reinforced in my conclusion by the comments in *Smallwood*, albeit in the context of considering the 'snapshot' approach (at [13], [43], [46], [68] & [69]):

> "Where the art 4(1) definition leads to a person other than an individual being treated as a resident of both Contracting States then art 4(3) provides a tie breaker based on the person's place of effective management ("POEM"). This provision of the DTA was used by the Special Commissioners to determine the Smallwoods' appeal on the basis of a finding that the trustees were resident within the meaning of art 4(1) in both Mauritius and the UK in the period culminating in the time when the shares were sold. To reach this conclusion they interpreted "resident" in art 4(1) (and therefore art 13(4)) as meaning chargeable to tax rather than simply physically resident…
>
> …
>
> I therefore accept Mr Brennan's basic submission that the provisions of art 13(4) are not to be read as incorporating a reference to the date of disposal but (for the reasons already given) I am not persuaded by his submission that one can construe art 4(1) as meaning

no more than tax resident and so avoid any application of the tie-breaker provisions in art 4(3). The definition of "resident" in art 4(1) is critical to the meaning of art 13(4) and art 4, once applied by the wording of art 13(4), has to operate in its entirety. The definition of "resident" in art 4(1) is expressly subject to art 4(3) which therefore applies whenever the alienator is liable to taxation in both Contracting States in respect of the gain. Article 4(3), as I have explained, is focused on liability for tax regardless of the period of residence under national law which creates that liability. Looked at in this way it becomes meaningless and impermissible to draw a distinction between consecutive and concurrent periods of "residence". The DTA is concerned only with the possibility of a double tax charge on the same gain and not with the period of residence which gives rise to it. If that situation occurs then art 4(3) operates to resolve the matter as part of art 13(4) which incorporates it.

…

In summary, then, I reject the trustees' argument that art 13(4) requires one to look no further than where the trustees were tax resident at the date of the disposal without regard to subsequent events. I also prefer the view of the Special Commissioners that "resident of a Contracting State" under art 4(1) means chargeable to tax in that State on account of residence and that, for this purpose, one has to take into account the tax treatment of the gain under the domestic legislation of both Contracting States regardless of the period of residence which gives rise to the liability. It follows that I also reject Mr Brennan's argument that there is no need to apply art 4(3) because the period of residence which gives rise to the UK tax charge in this case under s 2 was consecutive upon the earlier period of Mauritian tax residence up to and including the date of the disposal. It follows from my construction of art 4(1) that art 4(3) applies in every case in which there is a "liability to taxation" in both Contracting States.

…

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] STC 443, [2006] 1 WLR 1393 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.

But it seems to me that to apply this reasoning to the present case is to ask the wrong question, and indeed to return to the rejected snapshot approach. The taxpayers with whom we are concerned under s 77 are the trustees. Trustees are, by s 69(1) TCGA 1992, treated as a continuing body:

"In relation to settled property the trustees of the settlement shall for the 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*, ie of the trustees as a continuing body."

218. In my judgement *Smallwood* supports the conclusion that there is no material distinction to be drawn between a trust and trustee for the purposes of the application of art 4 of the DTC. Taken together with the Introduction to the Model Convention which expressly provides for a

broad interpretation and bearing in mind the primary purpose of the Treaty to eliminate the risk of double taxation on gains, I find for the Appellant on this ground. However, as set out above, in light of my conclusion on the POEM issue the appeal must be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JUDGE
TRIBUNAL JUDGE

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