HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, NETTLE AND GORDON JJ

Matter No S134/2016

BYWATER INVESTMENTS LIMITED & ORS APPELLANTS

AND

COMMISSIONER OF TAXATION RESPONDENT

Matter No S135/2016

HUA WANG BANK BERHAD APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

Bywater Investments Limited v Commissioner of Taxation
Hua Wang Bank Berhad v Commissioner of Taxation
[2016] HCA 45
16 November 2016
S134/2016 & S135/2016

ORDER

Matter No S134/2016

Appeal dismissed with costs.

Matter No S135/2016

1. The respondent's summons filed on 2 June 2016 be dismissed.

2. Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A J Myers QC and F D O'Loughlin with T L Bagley for the appellants in S134/2016 (instructed by Henry Davis York)

N C Hutley SC with T H J Hyde Page for the appellant in S135/2016 (instructed by Henry Davis York)

A H Slater QC with K A Stern SC and J E Jaques for the respondent in both matters (instructed by Australian Government Solicitor)

CATCHWORDS

Bywater Investments Limited v Commissioner of Taxation
Hua Wang Bank Berhad v Commissioner of Taxation

Taxation – Income tax – Residence of company – *Income Tax Assessment Act* 1936 (Cth), s 6(1) – Where directors of appellant companies resident abroad – Where meetings of directors of appellants ostensibly held abroad – Where directors acted at direction of Australian resident who controlled appellants and made decisions then implemented by directors – Whether appellants residents of Australia for income tax purposes – Whether "central management and control" of appellants located abroad in place where boards of directors met – Whether, as question of fact and degree, real business and operations of appellants controlled and directed from Australia – Whether functions of appellants' boards of directors usurped – Effect of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1972) 129 CLR 177.

Taxation – Income tax – Residence of company – Double taxation agreements – Tie-breaker provisions – Whether appellants entitled to protection from Australian income tax under relevant double taxation agreements – Whether "place of effective management" of appellant companies other than in Australia.

Words and phrases – "Australian resident", "central management and control", "company's constitutional organs", "corporate residence", "formal organs", "place of effective management", "real business", "residency", "rubber-stamp", "superior or directing authority", "usurp".

Income Tax Assessment Act 1936 (Cth), ss 6(1), 25A, Pt X.
Income Tax Assessment Act 1997 (Cth), ss 6-5, 995-1.
International Tax Agreements Act 1953 (Cth), Scheds 1, 15.

1 FRENCH CJ, KIEFEL, BELL AND NETTLE JJ. These are appeals from a judgment of the Full Court of the Federal Court of Australia (Robertson, Pagone and Davies JJ) upholding a decision of Perram J that the central management and control of each of the appellant companies ("Bywater", "Chemical Trustee", "Derrin" and "HWB") was exercised in Australia and, therefore, that they were each resident in Australia for income tax purposes.

2 In substance, the appellants contend that, because Perram J found that the directors of each appellant were resident abroad, and because meetings of those directors were held abroad, Perram J and the Full Court were bound to hold that the central management and control of each company was exercised abroad, and, therefore, that the appellants were not residents of Australia for income tax purposes.

3 For the reasons which follow, that contention should be rejected and the appeals should be dismissed.

The history of the litigation

4 Each of Bywater, Chemical Trustee and Derrin claimed that, at relevant times, its central management and control was exercised in Switzerland and, as a result, that it was not resident in Australia within the meaning of s 6(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"). It followed, it was said, that a liability to tax in Australia, within the meaning of s 6-5, read with the relevant definitions in s 995-1, of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"), did not arise in respect of income derived from sources outside Australia, nor in respect of income derived from sources within Australia, either because of the operation of Australia's double taxation agreement with Switzerland at the relevant time[1], or alternatively, in the case of Chemical Trustee and Derrin, because of the operation of Australia's double taxation agreement with the United Kingdom[2], those companies having been incorporated in the United Kingdom.

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1 Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income, and Protocol [1981] ATS 5; *International Tax Agreements Act* 1953 (Cth), Sched 15.

2 Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on

(Footnote continues on next page)

5 HWB contended that, at relevant times, its central management and control was exercised in Samoa and, as a result, that it was not resident in Australia within the meaning of s 6(1) of the 1936 Act. It followed, it claimed, that it was not liable to tax in Australia on income derived from sources outside Australia within the meaning of s 6-5 of the 1997 Act. HWB did not contend that it was exempt from tax in Australia on ordinary income derived from sources within Australia.

6 In the course of argument, it was accepted that, if, in the circumstances of this case, an appellant did have its central management and control in Australia within the meaning of s 6(1) of the 1936 Act, Australia would also be the appellant's "place of effective management" within the meaning of the applicable double taxation agreement[3], and, therefore, that the appellant would not be entitled to protection from Australian taxation under that agreement. As will become apparent, in view of that concession, which was properly made in the circumstances of this case, it is unnecessary to deal with any issue other than the question of whether each company had its central management and control in Australia within the meaning of s 6(1) of the 1936 Act.

The facts and findings at first instance

7 The facts emerge from the judgment of Perram J. As there appears, the positions of the appellants were not in all respects identical and to some extent require separate consideration.

Chemical Trustee Limited

8 Chemical Trustee was incorporated in the United Kingdom and adopted its present name in 1996[4]. During the relevant years of income (2001,

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Income and on Capital Gains [2003] ATS 22; *International Tax Agreements Act* 1953 (Cth), Sched 1.

3 Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income, and Protocol [1981] ATS 5, Art 4(3); Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains [2003] ATS 22, Art 4(4).

4 *Hua Wang Bank Berhad v Federal Commissioner of Taxation* 2014 ATC ¶20-480 at 16,443 [9].

2003-2004, 2006-2007), all of the issued shares in the capital of Chemical Trustee were held by Guardheath Securities Ltd ("Guardheath"). Guardheath was a nominee company owned by the partners of a London firm of accountants, Lubbock Fine. Guardheath held the shares in Chemical Trustee as nominee for JA Investments Ltd ("JA Investments"), a company incorporated in the Cayman Islands. JA Investments was described in Chemical Trustee's abbreviated accounts as Chemical Trustee's ultimate parent[5]. The sole recorded director and shareholder of JA Investments was Mr Peter Martin Borgas ("Borgas") and, at material times, the only recorded directors of Chemical Trustee were Borgas, his wife, Mrs Winny Borgas, and their son, Mr Timothy Borgas. Between 2001 and 2007, the minutes of the meetings of directors of Chemical Trustee recorded that such meetings as there were were held in Neuchâtel, Switzerland and were attended by Borgas and Mrs Borgas[6].

9 Chemical Trustee claimed that, because Borgas resided and operated in Switzerland, Chemical Trustee's central management and control was situated in Switzerland and, therefore, that Chemical Trustee was not resident in Australia for income tax purposes[7]. Consequently, Chemical Trustee did not file an Australian income tax return for any of the relevant years of income. Nevertheless, on 12 August 2010, the respondent ("the Commissioner") issued assessments (and in one case, subsequently, an amended assessment) in which he assessed Chemical Trustee as liable to tax and penalties in respect of its share trading profits[8]. Chemical Trustee objected to the assessments and the objections were disallowed. Chemical Trustee appealed to the Federal Court.

10 Before Perram J, Borgas gave evidence that he was the beneficial owner of the shares in JA Investments, made all the commercial judgments on behalf of Chemical Trustee and exercised all his powers as an appointed director to decide on Chemical Trustee's actions, in Neuchâtel[9]. Chemical Trustee also tendered a volume of documents which were said to show that Borgas had made all commercial judgments and decisions on behalf of Chemical Trustee in

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5 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,443 [9]-[10].

6 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,443-16,444 [11].

7 See *Income Tax Assessment Act* 1936 (Cth), s 6(1) definition of "resident or resident of Australia".

8 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,444 [16]-[17].

9 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,450-16,451 [62], 16,454 [85].

Neuchâtel[10]. Perram J, however, rejected Borgas' testimony as untruthful and found that the documents had been falsely contrived to appear to corroborate Borgas' testimony[11].

11 Contrary to Borgas' testimony, Perram J concluded[12] that, throughout the relevant years of income, Mr Vanda Russell Gould of Chatswood, New South Wales ("Gould") was "the Appointor" under the articles of association of JA Investments and thus that, "as a matter of legal theory", Gould had control of the affairs of JA Investments. That control was effected by Art 3, which enabled Gould to appoint additional members of the company, Art 43, which provided that the members could remove any director, and Art 24, which enabled the members to appoint directors. The legal capacity to control the company was in turn reflected in what Perram J described as the "indisputable reality" of a deed executed between Gould and Offshore Nominees Limited ("Offshore Nominees"), a company incorporated in the Cayman Islands, which evidenced that JA Investments was Gould's company and that the shares in the company were to be registered in the name of Offshore Nominees "acting solely as Nominee" for Gould and held "together with all dividends, bonuses and interests therein on behalf of [Gould] and [dealt with] as [Gould] may from time to time direct"[13].

12 Based on a detailed analysis of the documentary and oral evidence, Perram J concluded[14] that JA Investments was in truth beneficially owned and controlled by Gould; Gould "micromanaged" Chemical Trustee's reporting and banking; Gould "undertook responsibility for Chemical Trustee's compliance with ASX requirements 'respecting on-market investments'"; Gould made all other decisions of Chemical Trustee, without the involvement of Borgas; the apparent ownership and directorial structure was "fake"; and "[n]othing happened in Neuchâtel but the generation of pieces of paper".

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10 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,451 [65]-[66].

11 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,451 [67], 16,456 [97]-[98].

12 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,454 [79]-[80].

13 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,454 [81]-[84].

14 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,452 [68], 16,465 [145], 16,482-16,483 [276]-[284], 16,485 [290]-[293], 16,488 [314].

Derrin Brothers Properties Limited

13 Derrin was incorporated in the United Kingdom on 19 May 1959 and changed its name to Derrin Brothers Properties Limited on 27 October 1992[15]. At relevant times (2003-2005), its sole shareholders were Guardheath and Lordhall Securities Limited ("Lordhall"), which was another Lubbock Fine entity. Guardheath held all its shares as nominee for JA Investments. Lordhall held 50 of its 1,050 shares as nominee for JA Investments and the remaining 1,000 for MH Investments Limited ("MH Investments")[16]. MH Investments was incorporated in the Cayman Islands in 1994 and, until 2012, its sole shareholder was Offshore Nominees. Thereafter, Borgas was the sole shareholder[17].

14 The only directors of Derrin were Borgas and Mrs Borgas. The secretary was a United Kingdom company, M & N Secretaries Limited. The minutes of the meetings of directors of Derrin purported to record that all meetings of directors took place in Neuchâtel and were attended only by Borgas and Mrs Borgas[18].

15 In each of the 2003, 2004 and 2005 years of income, Derrin made profits on the purchase and sale of shares listed on the ASX. Derrin maintained that, because Borgas resided and operated in Switzerland, Derrin's central management and control was situated in Switzerland and, therefore, that Derrin was not resident in Australia for income tax purposes[19]. Consequently, Derrin did not file Australian tax returns for the years 2003-2005. As with Chemical Trustee, however, on 12 August 2010, the Commissioner issued notices of assessment (and subsequently an amended assessment) to Derrin for each of those years of income[20]. Derrin objected and when the objections were disallowed, Derrin appealed to the Federal Court.

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15 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,444-16,445 [19].

16 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,445 [20]-[21].

17 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,445 [21].

18 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,445 [23].

19 See *Income Tax Assessment Act* 1936, s 6(1) definition of "resident or resident of Australia".

20 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,445-16,446 [25]-[26].

16 Perram J found[21] that the position of Derrin was largely the same as that of Chemical Trustee. Derrin's apparent beneficial owners were JA Investments and MH Investments through the nominee structure with Guardheath and Lordhall. Gould was the ultimate beneficial owner[22]. The ownership structure was a "ruse" to conceal the fact that Gould was in control[23]. Borgas was not involved in the decision-making process. His role was to transact Gould's business as if it were his own and thereby to conceal the fact that Gould was in control. Perram J concluded[24] that the entire ownership and directorial structure of Derrin was "a façade to conceal Mr Gould's role".

Bywater Investments Limited

17 Bywater was incorporated in the Bahamas on 20 June 1994 with two issued shares. At relevant times (2002-2007), those shares were held by Anglore SARL (*société à responsibilité limitée*) ("Anglore")[25]. It is not clear where Anglore was incorporated but its only office holders were Borgas, Mrs Borgas and one Mr Lonsdale. Anglore was held out to be a "corporate services business" based in Neuchâtel and it marketed itself as a "discrete, low profile fiduciary and administration company" offering the services of "the incorporation of companies located in many jurisdictions throughout the western world" and "the provision of directors and other corporate officers for such companies". Anglore was the principal vehicle through which Borgas provided "corporate services"[26]. It held its shares in Bywater as nominee for MH Investments[27].

18 The directors of Bywater were Borgas, Mrs Borgas and a company known as NTW Directors Inc of Nassau in the Bahamas. Under the law of the Bahamas,

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21 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488 [315], 16,492 [339].

22 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488-16,489 [318]-[320].

23 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488 [315].

24 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [339].

25 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,446 [27].

26 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,446 [27]. As to Anglore's involvement with Chemical Trustee and Derrin, see *Hua Wang Bank* 2014 ATC ¶20-480 at 16,483 [285], 16,485 [289], 16,488 [313], 16,490 [329]-[330].

27 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,446 [28].

Bywater was not required to hold directors' meetings or annual general meetings, and it did not do so. The only corporate records of Bywater were a cashbook that recorded payments from and receipts into Bywater's bank account. The cashbook was maintained at the offices of Lubbock Fine in London[28].

19 In the years of income between 2002 and 2007, Bywater made profits from the acquisition and sale of shares listed on the ASX. On 12 August 2010, the Commissioner issued assessments to Bywater in respect of those profits and for penalties. Bywater objected on the basis that, because Borgas resided and operated in Switzerland, Bywater's central management and control was situated in Switzerland and thus that Bywater was not resident in Australia for income tax purposes[29]. The objections were substantially disallowed and Bywater appealed to the Federal Court[30].

20 Perram J found[31] that Bywater was owned by Gould through MH Investments and that the respective roles of Gould and Borgas in relation to Bywater were the same as in relation to Chemical Trustee and Derrin.

Hua Wang Bank Berhad

21 HWB was not a bank in the ordinary sense of the word. It was incorporated in Samoa on 17 January 1994 under the terms of the *International Companies Act* 1987 (Samoa)[32].

22 At relevant times (2004, 2006-2007), the 250,000 issued shares in the capital of HWB were held by Pacific Securities Inc ("Pacific Securities"), which was also incorporated in Samoa under the *International Companies Act*. Before Pacific Securities acquired the shares, HWB issued a secured bearer debenture on terms (sustained by its articles of association and ss 15 and 57 of the *International Companies Act*) that, so long as the debenture remained unredeemed, the rights of the members of the company to vote or demand a poll

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28 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,446 [29].

29 See *Income Tax Assessment Act* 1936, s 6(1) definition of "resident or resident of Australia".

30 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,446 [30]-[31].

31 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [340].

32 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,448 [46].

were suspended. The effect of that was to place control of the company in the hands of persons other than members of the company[33]. On 4 March 1998, Pacific Securities resolved to convert the original secured debenture to a registered secured debenture in the name of "J.A. Investments Ltd, c/- Moore Stephens', 'Cayside' ... GRAND CAYMAN, CAYMAN ISLANDS", thereby placing control in the hands of JA Investments, which was one of Borgas' companies in the Cayman Islands[34].

23 Over the period 2000 to 2007, the HWB register of directors and secretaries recorded the names of several individuals and two companies (Westco Directors Ltd and Westco Secretaries Ltd). All but one of the individuals were persons employed by another entity, Asiaciti Trust Samoa Ltd ("Asiaciti"). Asiaciti was a Samoan-based international trustee and service provider, providing similar services to Anglore, including the provision of international companies, trusts, trustee services and international tax planning. All of the persons authorised to act on behalf of Asiaciti were, or had been, employees of Asiaciti's Samoan office[35].

24 During the 2004 and 2006-2007 years of income, HWB made profits on the purchase and sale of shares listed on the ASX. On 12 August 2010, the Commissioner issued assessments (which were later varied) to HWB in respect of those profits[36]. HWB objected and the objection was disallowed. HWB appealed to the Federal Court.

25 Perram J found[37] that HWB was controlled by JA Investments as one of Gould's "disguised entities" and that HWB's "curious debt-capital structure" had been erected in the hope of avoiding "attribution of [HWB's] profits to the beneficial owner under Australian Controlled Foreign Corporations taxation laws". Perram J concluded that Gould had used the services of the Asiaciti group to create the impression that HWB was being managed and directed in Samoa, in the same way that Gould had used the services of Anglore to assist him in

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33 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,448 [47].

34 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,448 [48]-[49].

35 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,448 [51].

36 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,449 [54].

37 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [344]. See relevantly *Income Tax Assessment Act* 1936, Pt X.

creating the impression that decisions in relation to Bywater, Chemical Trustee and Derrin were made in Switzerland[38].

26 All of the depositors in HWB were either Gould's clients or entities controlled by Gould. HWB's predominant business was receiving money from Gould or his clients and then remitting it to related entities of those clients in the form of what purported to be loans from a bank[39]. It was a term of HWB's licence in Samoa that it would "accept 'as depositors only those parties or entities owned or controlled by the owners or controllers of [HWB] or other connected parties and entities'". Every transaction carried out by HWB was implemented on the instructions of Gould. Although the business of HWB was formally transacted in Samoa by employees of Asiaciti stationed there for that purpose, those persons acted at the direction of Gould on every occasion. Their role was restricted to that of a "back-office" nature[40]. None of them "had any commercial input into the decisions" they implemented[41]. None of them knew anything of the entities which deposited moneys with HWB or of the entities to which HWB purported to lend the moneys. As such, none of them was the least concerned with the risk of lending to or recovering from any of the entities. All the directors provided by Asiaciti did was document exactly what Gould told them to do and direct the flow of moneys accordingly. Perram J concluded[42] that Gould owned and controlled HWB and that at all times the directors of HWB acted on his instructions. They were never in a position to exercise any judgment and in fact they did not exercise any judgment[43].

Critical findings at first instance

27 In summary, therefore, Perram J found as follows:

(1) Chemical Trustee's real business was conducted from Sydney by Gould. Borgas' role was "fake". The evidence that Gould ran

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38 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [346].

39 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,493 [350], [353].

40 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,493-16,494 [354]-[357].

41 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,494 [357].

42 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,495 [364].

43 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,503 [418].

every aspect of Chemical Trustee's business was overwhelming, notwithstanding that Gould had gone to great lengths to conceal that fact. The place of central management and control of Chemical Trustee was in Sydney, with Gould, and nowhere else[44].

(2) The same applied to Derrin[45].

(3) The same applied to Bywater[46], subject only to the slight and relevantly inconsequential difference that Bywater was incorporated in the Bahamas and did not purport to hold any directors' meetings.

(4) Gould owned HWB. His elaborate but ultimately unsuccessful attempts to make it appear otherwise suggested the presence of dishonesty. Every decision of consequence was made by Gould in Sydney. There was no occasion for the directors of HWB to exercise any judgment and in fact they did not. The real business of HWB was conducted by Gould from Sydney[47], where its central management and control was located.

The Full Court

28 The Full Court found[48] no reason to doubt Perram J's findings of fact and held that no error had been demonstrated in his Honour's reasoning or conclusion that each of the appellants had failed to discharge the burden of proof to establish that it was not resident in Australia for income tax purposes. Like Perram J, the Full Court rejected the appellants' contention that it necessarily followed from the fact that board meetings were purportedly held abroad that central management and control was situated abroad. Based on a survey of authorities, including this Court's decisions in *Esquire Nominees Ltd v Federal Commissioner of*

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44 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488 [311]-[314], 16,502 [405], [408], [409].

45 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [339], 16,502 [410].

46 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [340]-[343], 16,502 [411].

47 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,502-16,503 [415]-[419].

48 *Bywater Investments Ltd v Federal Commissioner of Taxation* (2015) 236 FCR 520 at 527-528 [17].

Taxation[49], the Full Court agreed with Perram J that the question of central management and control was a question of fact and degree and that, because the non-resident directors of the appellants never did more than mechanically carry out Gould's directions, the place of central management and control was, as a matter of fact, in Sydney where Gould made the substantive decisions[50].

Bywater, Chemical Trustee and Derrin's contentions

29 Before this Court, Bywater, Chemical Trustee and Derrin contended that, contrary to the Full Court's reasoning, it was evident that none of them could have entered into any of the transactions said to have generated taxable income during the relevant years unless, before entering into each such transaction, Borgas made a decision to give effect to Gould's wishes that the company do so. On that basis, it was submitted, contrary to Perram J's and the Full Court's assessment of Borgas' role as a mere formality, Borgas' decision-making was critical to the conduct of each company and, as a matter of fact, comprised the exercise of central management and control.

30 Counsel for Bywater, Chemical Trustee and Derrin argued that the error of the courts below was to focus on the fact of decision-making, rather than directing attention to the formal organs of control. The correct approach, it was submitted, was that essayed by Dixon J in *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation*[51] and *North Australian Pastoral Co Ltd v Federal Commissioner of Taxation*[52] and subsequently applied at first instance and on appeal in *Esquire Nominees*[53]. It was contended that the Full Court departed from that correct approach by failing to appreciate that references in those authorities to the "real business" of a company and to the "superior or directing authority" of the company were references to the "constitutional organs" of the company and the "lawful organs with authority to bind the company"; which, in the case of each of Bywater, Chemical Trustee and Derrin, meant the board of directors of the company. It was submitted that, with two exceptions to be mentioned later in these reasons, a person cannot be regarded as

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49 (1973) 129 CLR 177; [1973] HCA 67.

50 *Bywater Investments* (2015) 236 FCR 520 at 525-526 [11], 527-528 [15]-[17].

51 (1940) 64 CLR 15; [1940] HCA 33.

52 (1946) 71 CLR 623; [1946] HCA 17.

53 (1973) 129 CLR 177.

part of the "constitutional organs" or, therefore, part of the "real business" or "superior or directing authority" of a company, unless the person is at law a director of the company. Consequently, a person making decisions regarding the affairs of a company cannot be regarded as exercising the central management and control of that company unless the person is a director of the company.

31 Counsel for Bywater, Chemical Trustee and Derrin further contended that the fact that the directors of a company are in the habit of acting in accordance with the directions of a person external to the company's "lawful organs of corporate control" does not mean that the central management and control of the company is exercised by that person, and that that is so even in cases where directors invariably act upon the person's directions without any thought to the efficacy or propriety of the directions or to whether the directions are bona fide in the best interests of the company as a whole[54]. It was submitted that there are only two exceptions, which counsel described as "exception[s] to the true rule from *De Beers*"[55], namely:

(1) where an outsider has a legally enforceable right to compel directors to act in accordance with his or her directions; and

(2) where an outsider usurps the functions of the board by making and implementing central management and control decisions without going through the formality of referring such decisions to the directors for implementation as if they were decisions of the board.

32 It followed, it was contended, that, because Gould was not part of the "lawfully appointed", "constitutional organs" of the companies, and because there was no evidence that Gould had a legally enforceable right to compel Borgas to act in accordance with his directions, the Full Court should have held that it was the lawful directors who alone controlled Bywater, Chemical Trustee and Derrin.

33 Asked why it should be supposed that the statutory concept of residence is limited to the formality of board membership rather than focusing upon the actuality of substantive decision-making and control, counsel for Bywater, Chemical Trustee and Derrin submitted that it was apparent from this Court's decision in *Federal Commissioner of Taxation v Patcorp Investments Ltd*[56] that

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54 *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 480-482 per Latham CJ; [1939] HCA 2.

55 Referring to *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455.

56 (1976) 140 CLR 247; [1976] HCA 67.

terms used in cognate or related provisions of the 1936 Act are generally to be construed formalistically.

34 Further, in counsel's submission, it had been commonplace throughout the more than 40 years since *Esquire Nominees* was decided for the directors of foreign subsidiaries of Australian companies to act as they were instructed to by their Australian parent companies, without fear that the central management and control of the subsidiaries would thereby be sited in Australia. Counsel contended that if that state of affairs were now to be altered, persons who had planned their affairs on the basis of that assumption would be severely disadvantaged. The better approach, he said, was to retain a presumption, in effect, that boards of directors do the work which they are appointed to do and, consequently, that central management and control inevitably resides where the board of a company habitually meets. By contrast, if the test of residence were held to depend on the state of mind of directors, and in particular on whether the directors of a foreign subsidiary actually turn their minds to directions from an outsider and then actually decide whether the directions are proper and appropriate, there would be a lamentable degree of uncertainty as to tax liability and a greatly increased volume of litigation.

HWB's contentions

35 HWB contended to similar effect that the Full Court erred by failing to appreciate that the "real business" or "superior or directing authority" of a company must be "organic" to the company and that Gould was not "organic" to HWB. In its written submissions, HWB also argued that the correct view of the authorities, and in particular of the decision of Gibbs J in *Esquire Nominees*, is that a company is resident where the organs of the company meet to make decisions, even if that amounts to nothing more than "rubber-stamping decisions made elsewhere". Thus, it was contended that, even where an outsider like Gould is the most influential person in the decision-making process of a company, and the board in fact does nothing more than mechanically rubber-stamp the outsider's decisions, the company is nonetheless resident where the board meets to do the rubber-stamping, not where the influential decision-maker actually makes the decisions. Like Bywater, Chemical Trustee and Derrin, HWB accepted there would be an exception to that where a board has ceased to function as a board and the outsider completely bypasses the board and implements decisions without any involvement of the board, as was found to be the case in *Unit Construction Co Ltd v Bullock*[57].

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57 [1960] AC 351.

36 In the course of oral argument, counsel for HWB also advanced an alternative and more confined argument that, because of what he characterised as the very simple nature of HWB's business model – as he put it, simply receiving funds on deposit and lending them back to entities related to the depositors on what was de facto, if not de jure, a back-to-back basis organised by Gould – it was axiomatic that it was in the best interests of HWB to proceed with each such transaction; and, for that reason, it required no explicit thought on the part of the directors in order for them to act as directors. In counsel's submission, that was a sufficient basis to conclude that the Samoan directors of HWB did exercise the central management and control of the company and, accordingly, that it should have been held that HWB was resident in Samoa.

The Commissioner's contentions

37 The Commissioner argued that there was no error in the reasoning of Perram J or of the Full Court. The correct approach was as laid down by Lord Loreburn LC in *De Beers Consolidated Mines Ltd v Howe*[58]. On that approach, a company's central management and control is located at the place where the company's "real business" is carried on, the real business of a company is carried on at the place from where its operations are controlled and directed, and the place whence its operations are controlled and directed is invariably "a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading"[59]. Nothing said by Gibbs J or the Full Court in *Esquire Nominees* called into question the correctness of that approach. To the contrary, Gibbs J referred to the "well settled" course of authority that the "real business [of a company] is carried on where the central management and control *actually* abides" and thus that "[t]he question where a company is resident is one of fact and degree"[60]. Each of the members of the majority of the Full Court expressly agreed with that aspect of his Honour's reasoning[61].

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58 [1906] AC 455.

59 *De Beers* [1906] AC 455 at 458 per Lord Loreburn LC (all other members of the House agreeing at 460).

60 *Esquire Nominees* (1972) 129 CLR 177 at 189-190 (emphasis added).

61 *Esquire Nominees* (1973) 129 CLR 177 at 209 per Barwick CJ, 220 per Menzies J, 225-226 per Stephen J.

38 The Commissioner acknowledged that, in the result, Gibbs J held that a corporate trustee, set up as part of a tax avoidance scheme, was resident in Norfolk Island for income tax purposes notwithstanding that Australian-based accountants formulated the scheme and communicated to the directors of the corporate trustee in Norfolk Island every detail of the manner in which the scheme was to be carried out. But, in the Commissioner's submission, it was apparent that the reason the corporate trustee was held to be resident in Norfolk Island was that the Norfolk Island directors actually exercised independent judgment as to whether to implement the steps advised by the Australian accountants. By contrast, Perram J found[62] that the role of the directors in the management and control of Bywater, Chemical Trustee and Derrin was "fake" and that the Samoan directors of HWB were restricted to "back-office" functions.

Central management and control

39 Section 6(1) of the 1936 Act provides that a company is resident in Australia if it is incorporated in Australia or, if not incorporated in Australia, if it carries on business in Australia and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.

40 The latter part of that definition, first legislated in 1930[63], represents a statutory adoption of the test of residence, formulated by Kelly CB and Huddleston B in *Cesena Sulphur Company v Nicholson*[64] and later affirmed by the House of Lords in *De Beers*[65], that a company's central management and control is located at the place where the company's operations are controlled and directed and the question of where a company's operations are controlled and directed is invariably a question of fact to be determined, not according to the construction of the company's constitution, but upon a scrutiny of the course of business and trading. The test was reiterated by the House of Lords in *Bullock*[66]

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62 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,494 [357], 16,502 [405], [410]-[411].

63 *Income Tax Assessment Act* 1930 (Cth), s 2(i).

64 (1876) 1 Ex D 428 at 446-447 per Kelly CB, 453-454 per Huddleston B.

65 [1906] AC 455 at 458 per Lord Loreburn LC (with whom all other members of the House agreed at 460).

66 [1960] AC 351 at 360-361 per Viscount Simonds, 365-366 per Lord Radcliffe (with whom Viscount Simonds and Lord Goddard agreed at 363, 371), 372 per Lord Cohen.

and has been applied in numerous other decisions[67]. Thus, as Gibbs J stated in *Esquire Nominees*[68], there is a long line of authority that makes clear that, for the purposes of s 6 of the 1936 Act, a company has its central management and control where the central management and control of the company actually abides, that being a question of fact and degree to be determined according to the facts and circumstances of each case.

41 Ordinarily, the board of directors of a company makes the higher-level decisions which set the policy and determine the direction of operations and transactions of the company. Ordinarily, therefore, it will be found that a company is resident where the meetings of its board are conducted. But, contrary to the appellants' submissions, it does not follow that the result should be the same where a board of directors abrogates its decision-making power in favour of an outsider and operates as a puppet or cypher, effectively doing no more than noting and implementing decisions made by the outsider as if they were in truth decisions of the board. Accordingly, the question in this case is whether, in view of Perram J's findings concerning the role which Gould played and the absence of substantive decision-making by the boards of the appellants, the fact that the boards of the appellants were located abroad was sufficient to locate the residence of the appellants abroad. As will be seen, the course of authority comprised of the cases leading up to *Esquire Nominees* and the cases in point that have since been decided is largely, if not wholly, opposed to that conclusion. Hence, as will be explained, the appellants' submissions as to the effect of those authorities should be rejected.

The course of authority

(i) Cesena Sulphur

42 As was earlier noticed, the starting point is the decision of Kelly CB and Huddleston B in *Cesena Sulphur*[69]. The issue in that case was whether either of two companies, Calcutta Jute Mills Company (Limited) and Cesena Sulphur Company (Limited), was resident in England. Calcutta Jute Mills Company

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67 See, for example, *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560 at 566-568; [1994] 4 All ER 561 at 566-569; *Wood v Holden* [2006] 1 WLR 1393 at 1396 [6], 1404 [15] per Chadwick LJ (with whom Moore-Bick LJ and Sir Christopher Staughton agreed at 1418 [46], 1419 [47]).

68 (1972) 129 CLR 177 at 189-190.

69 (1876) 1 Ex D 428.

(Limited) was incorporated in England and its board of directors met in England, but it had no property in England. All of the operations connected with its business were wholly and exclusively carried on in India and it had appointed a firm of managers as its *del credere* agents in India with entire control of its business and works there. All of its profits were derived in India and all its moneys were kept, received, and dealt with by the management in India. Nothing came to the English directors apart from what was remitted from Calcutta (now Kolkata) from time to time to defray their necessary expenses. Apart from its registered office in London, the company had no office or other place of business in England, and its registered office in London was in fact the office of one of the directors of the company. All of the company's books of account, papers and other documents were kept in India[70].

43 Cesena Sulphur Company (Limited) was in most respects in an analogous position[71]. All of its manufacturing operations were carried on in Italy but its directors met in England, where they conducted what was described as the administrative part of the company's operations. London was where officers and agents were appointed and recalled, where their powers were granted and revoked, where whatever money was sent was received, and where dividends were declared and were payable[72].

44 Kelly CB and Huddleston B held[73] that both companies were resident in England because the directors who comprised the governing body of each company met in England and there actually made the decisions concerning the acts of highest importance affecting the operations of the company.

(ii) De Beers

45 In *De Beers*, the question was whether a company was resident in England despite having its head office in South Africa, always holding its general meetings there, deriving all its profits out of diamonds raised and sold there under annual contracts to a syndicate for delivery there, and having some

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70 *Cesena Sulphur* (1876) 1 Ex D 428 at 437-439.

71 *Cesena Sulphur* (1876) 1 Ex D 428 at 430-431.

72 *Cesena Sulphur* (1876) 1 Ex D 428 at 455-456 per Huddleston B.

73 *Cesena Sulphur* (1876) 1 Ex D 428 at 445-446, 451 per Kelly CB, 455-456 per Huddleston B.

directors and life governors who lived there[74]. Lord Loreburn LC, with whom the other Law Lords agreed[75], held that the question was to be decided according to the rule affirmed in *Cesena Sulphur*: that a company resides for income tax purposes "where its real business is carried on"; that "the real business is carried on where the central management and control actually abides"; and that the question of where central management and control actually abides is "a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading"[76]. It was held accordingly[77] that the company was resident in England because the majority of directors and life governors lived in England and the real control of the company was exercised in practically all the important business of the company, except the specifics of its mining operations, at meetings of directors in London. His Lordship noted in particular that the board in London invariably controlled the negotiation of contracts with the diamond syndicates, determined policy governing the disposal of diamonds and other assets, determined the working and development of mines, decided on the application of profits and determined board appointments.

(iii) Koitaki

46 The first instance decision in *Koitaki*[78] was the first case in this Court to consider the question of corporate residence for income tax purposes, in that case in the context of dual tax residence. The taxpayer was incorporated in New South Wales and its registered office was in Sydney. Its directors resided and met in Sydney and the meetings of its shareholders also were held in Sydney[79]. The company's seal, minute-book, register of members and records were kept at its registered office, and it employed a practising accountant as its Sydney manager who, subject to direction of the board of directors, did the work of the company in Sydney. Consequently, there was no doubt that the company was

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74 [1906] AC 455 at 458-459.

75 *De Beers* [1906] AC 455 at 460.

76 *De Beers* [1906] AC 455 at 458.

77 *De Beers* [1906] AC 455 at 459.

78 (1940) 64 CLR 15.

79 *Koitaki* (1940) 64 CLR 15 at 17.

resident in Australia[80]. The issue, however, was whether the company was also a resident of Papua (now Papua New Guinea) by virtue of the rubber plantations it maintained at Koitaki near Port Moresby. If that were so, the company contended that a provision of the income tax legislation then in force[81] operated to exempt it from tax on so much of its income as was derived from sale in Australia of rubber produced in Papua.

47 At first instance, Dixon J found that the Papuan plantations were managed by a Papuan resident officer of the company acting under a power of attorney authorising him to manage, carry on and conduct in Papua the company's property, affairs and business, and conferring on him ample powers to that end. He had an office at Koitaki which was staffed by an assistant manager and a book-keeper, and some of the company's book-keeping was necessarily done there[82]. Dixon J held that, although it was possible for a company to reside for tax purposes in more than one place, the better view was that such a finding should not be made unless the control of the general affairs of the company is not centred in one country, but is in fact divided or distributed among multiple countries[83]. His Honour added that, although the matter was always one of degree, and residence might be constituted by a combination of factors, "one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled"[84].

48 Dixon J concluded that the central management and control of the company was not divided between Sydney and Papua because, although the company carried on the activities of growing, treating, packing and exporting rubber in Papua, and the manager in Papua had full authority over those processes, he was subject in those matters to close supervision from Sydney and his authority did not extend to the control of the general or corporate affairs of the company or to matters of policy or finance. Control of all important matters

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80 *Koitaki* (1940) 64 CLR 15 at 17-18.

81 *Income Tax Assessment Act* 1936, s 23(n).

82 *Koitaki* (1940) 64 CLR 15 at 17.

83 *Koitaki* (1940) 64 CLR 15 at 18-19.

84 *Koitaki* (1940) 64 CLR 15 at 19.

was centred in Sydney[85]. An appeal to the Full Court of this Court was dismissed[86].

(iv) North Australian Pastoral

49 The next case in this Court to deal with the question of corporate residence was *North Australian Pastoral*[87]. Like *Koitaki*, it was concerned with dual tax residence, although in relation to two different places within Australia. The company was incorporated in the Northern Territory and carried on a business of breeding, purchasing, depasturing and selling cattle on and from its cattle station, Alexandria, in the Territory. At relevant times its registered office was at Alexandria but, under a power in its articles, it had established a branch office in Brisbane[88]. The books of account of the company were kept at Alexandria, although a duplicate accounting was carried out at the Brisbane office. Entries relating to cash, banking and dividends originated in Brisbane but other entries originated at Alexandria. The company's chief bank account was in Brisbane but there was another at Cloncurry, Queensland, for the use of the station. The issued share capital was held by about 26 persons, of whom some resided in England and some in Victoria, Tasmania and Queensland. There were seven directors, of whom five resided in Queensland, one in Tasmania and one in England, the last-mentioned being represented by an alternate who resided in Brisbane. Until May 1943, the managing director, a Mr Fraser, lived near Brisbane and the station was under the control of a non-shareholder manager, a Mr Barnes, who lived at Alexandria. In May 1943, Barnes was appointed managing director and became a shareholder, and Fraser became chairman of directors[89].

50 Business transacted on the company's behalf at Alexandria consisted of things necessarily done by an agent, such as buying a truck and a lighting plant, buying bulls, effecting insurances and interviewing authorities about renewal of

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85 *Koitaki* (1940) 64 CLR 15 at 18.

86 *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241 at 244 per Rich ACJ, 247 per Starke J and McTiernan J, 251-252 per Williams J; [1941] HCA 13.

87 (1946) 71 CLR 623.

88 *North Australian Pastoral* (1946) 71 CLR 623 at 625.

89 *North Australian Pastoral* (1946) 71 CLR 623 at 626.

leases. The manager made most of the more important decisions concerning the management of the station but some of the directors made visits to Alexandria on occasion in order to make policy decisions in conjunction with the manager[90]. Things needing the authority of the directors – such as affixing the seal to documents, approving of transfers of shares, arranging and watching the overdraft, appointing a secretary and recommending dividends – were dealt with by the directors. During the 1940 and 1941 years of income, all of the meetings of the directors and shareholders of the company were held at the Brisbane office[91]. The secretary of the company resided in Brisbane and kept the common seal and share register in Brisbane at that time. Later, however, in order to improve the company's chances of qualifying for a then extant legislative exemption[92] from income tax on income derived from primary production or mining in the Northern Territory by a resident of the Territory, the company began holding meetings of directors and shareholders at Alexandria and appointed a new secretary, who resided and kept the seal and share register there[93].

51 Dixon J observed that there was an increased tendency in judgments of the House of Lords to treat the question of dual tax residence as being "altogether a question of degree and of fact"[94] and his Honour approached the case on that basis. He thus identified the salient facts as being that the company was incorporated in the Territory, its undertaking was wholly within the Territory and its registered office and public officer for legal and fiscal purposes were located in the Territory[95]. The manager's capacity for control and management was essentially localised, but he "took the initial responsibility in everything that most really affected the success or failure of the company's undertaking"[96]. It was also significant that, when the directors met in Brisbane, it was for their common convenience rather than to facilitate the operations of the company. Their visits

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90 *North Australian Pastoral* (1946) 71 CLR 623 at 627.

91 *North Australian Pastoral* (1946) 71 CLR 623 at 633.

92 *Income Tax Assessment Act* 1936, s 23(m).

93 *North Australian Pastoral* (1946) 71 CLR 623 at 626.

94 *North Australian Pastoral* (1946) 71 CLR 623 at 630.

95 *North Australian Pastoral* (1946) 71 CLR 623 at 633.

96 *North Australian Pastoral* (1946) 71 CLR 623 at 633.

to the station were an acknowledgment of the necessity of reaching more important decisions of policy in or after consultation with the manager and of forming an opinion about them at the place where the business was conducted. Dixon J characterised[97] those visits as the occasional exercise of the superior controlling authority where the business was carried on. A further consideration was the practice of keeping not merely station accounts at Alexandria but also a full set of books[98].

52 Ultimately, however, what his Honour appears to have regarded as determinative was that the company carried on its substantial business in the place of its incorporation. He noted that, up to that point, there had not been any other case where, although a company carried on its substantial business in the place of its incorporation, it had been held not to reside in that place[99]. In the result, his Honour held that the company was resident in the Northern Territory throughout the relevant period notwithstanding that for part of the period board meetings had been conducted in Brisbane.

53 Counsel for HWB contended that it was significant that the company in *North Australian Pastoral* was held to be resident in the Northern Territory despite the fact that the company's practice of holding board meetings in the Territory was in part, if not wholly, motivated by concerns that the company might not otherwise be recognised as resident in the Territory for tax purposes. It was submitted that *North Australian Pastoral* marked the commencement of this Court's acceptance and approval of the idea that the location of a company's board meetings will always be the place of residence of that company, even if the only purpose for convening the meetings in that place is the gaining of a tax advantage.

54 That submission should be rejected. Relevantly, all that *North Australian Pastoral* established was that, on the facts of that case[100], the company was resident in the Territory. Granted, that was held to be so despite the fact that, for some of the time, the board had held its meetings in Brisbane and only later began to hold meetings in the Territory in the hope of securing a tax advantage by the company's residence in the Territory. But of itself that says nothing about

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97 *North Australian Pastoral* (1946) 71 CLR 623 at 633-634.

98 *North Australian Pastoral* (1946) 71 CLR 623 at 626.

99 *North Australian Pastoral* (1946) 71 CLR 623 at 634.

100 See particularly (1946) 71 CLR 623 at 633.

what the result should be in other circumstances, and particularly whether a company should be taken to be resident outside Australia merely because what is only nominally a board of directors of the company has been set up in another country with the intention and effect that it do no more than habitually implement, without demur, instructions formulated in Australia.

(v) Waterloo Pastoral

55 *Waterloo Pastoral Co Ltd v Federal Commissioner of Taxation*[101] was also concerned with dual tax residence. As in *North Australian Pastoral*, the question was whether the taxpayer was resident in the Northern Territory for the purposes of the earlier-mentioned exemption from income tax. Williams J stated[102] that he saw no reason to differ from what Dixon J had said on the subject of dual tax residence in *Koitaki*. His Honour then reiterated that the crucial test is where the real business of the company is carried on, not in the sense of where it trades, but in the sense of from where its operations are controlled and directed. He continued[103]:

> "A company can only have more than one residence where this control and direction is divided so that it is exercised to some extent from more than one place. In most instances a company resides where its board of directors habitually meets for the purpose of conducting the business of the company. But it was pointed out by Lord *Loreburn* LC in *De Beers Consolidated Mines Ltd v Howe* (where the company was incorporated and owned mines in South Africa), in a passage which has been frequently cited, that the question where the real control abides 'is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading.'" (footnote omitted)

56 The company in *Waterloo Pastoral* was incorporated in, and operated its business from, the Northern Territory. Its managing directors were resident in Sydney and the board of directors, which was empowered by the articles of association to require that decisions be subject to its confirmation, met mostly in Sydney during the relevant period. Williams J found[104], however, that the

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101 (1946) 72 CLR 262; [1946] HCA 30.

102 *Waterloo Pastoral* (1946) 72 CLR 262 at 266.

103 *Waterloo Pastoral* (1946) 72 CLR 262 at 266-267.

104 *Waterloo Pastoral* (1946) 72 CLR 262 at 265-266, 267.

company was resident in the Northern Territory, whether or not it was also resident in Sydney, because the "ultimate operative decisions" were made during visits to the stations in the Northern Territory, whereby tentative decisions made in Sydney would be given effect to or modified on the basis of local conditions assessed "on the spot" at the stations. As such, effective control was exercised from the Territory.

(vi) Malayan Shipping

57 On its facts, *Malayan Shipping Co Ltd v Federal Commissioner of Taxation*[105] comes closer to the present appeals but adds little of relevance. In that case, it was conceded that central management and control of a company incorporated in Singapore was exercised in Melbourne, where a Mr Sleigh resided. That was because, *inter alia*, the articles appointed Sleigh managing director; empowered him to appoint and remove other directors; provided that a resolution of directors was of no force unless first approved by Sleigh; and required that the seal of the company not be affixed without the authority of Sleigh. The only business done by the company during the relevant period was to charter a ship and to sub-charter it on a number of occasions, that charter being effected in London on instructions cabled from Sleigh in Melbourne, and the sub-charters being organised by Sleigh in Melbourne, where he prepared all the documents before sending them to Singapore for execution. It was contended that, although the central management and control of the company was located in Melbourne, upon a proper construction of the definition of "resident" in s 6 of the 1936 Act, a company should not be regarded as resident in Australia, notwithstanding that its central management and control was exercised from Australia, unless the company were also carrying on its business operations in Australia. Unsurprisingly, Williams J rejected that contention[106].

(vii) Bullock

58 The decision of the House of Lords in *Bullock* is significant for present purposes because it expressly rejected[107] the notion that a company must always be taken to be resident where its board is resident. There, three taxpayer

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105 (1946) 71 CLR 156; [1946] HCA 7.

106 *Malayan Shipping* (1946) 71 CLR 156 at 159-160.

107 [1960] AC 351 at 362-363 per Viscount Simonds, 370 per Lord Radcliffe (with whom Viscount Simonds and Lord Goddard agreed at 363, 371), 373-374 per Lord Cohen, 375 per Lord Keith of Avonholm.

companies were registered in Kenya and each company had a board of directors situated in Kenya. But, as the Court of Appeal had found[108]:

> "The directors of the [Kenyan] subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.
>
> The minute books of the directors' meetings of each of the [Kenyan] subsidiaries, recorded, in the main, only formal business (such as particulars of annual general meetings, appointments and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they recorded more important business, but in each such instance a decision had in fact been taken by the directors of [the parent company] in London and the record in the minute book of the [Kenyan] subsidiary merely formally records its implementation. ...
>
> At all material times the whole of the trading policy of the [Kenyan] subsidiaries was dictated by the board of directors of [the parent company]".

59 The House of Lords held that the real management and control was exercised by the directors of the parent holding company in London, despite that arrangement not being authorised by the memoranda or articles of the Kenyan companies. In rejecting the contention that the central management and control of the companies should be taken to be located in Kenya because the directors resided there, Viscount Simonds stated[109]:

> "The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. ... I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many cases would a limited company register in a foreign country,

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108 *Bullock v Unit Construction Co Ltd* [1959] Ch 315 at 320-321.

109 *Bullock* [1960] AC 351 at 363.

prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?"

60 Bywater, Chemical Trustee and Derrin contended that *Bullock* was materially different from this case because, whereas in *Bullock* the formalities of the board meetings in Kenya were largely ignored and the real business of the Kenyan subsidiaries was conducted by the board of the parent holding company in London, in this case it was apparent from the minutes that the formalities of board meetings had been punctiliously observed. On that basis, it was submitted that, in contrast to *Bullock*, the boards of directors here had not been usurped, as all of the decisions made by Gould in Sydney were duly channelled through the boards of Bywater, Chemical Trustee and Derrin in Neuchâtel and implemented by board resolutions duly passed at meetings of the boards and that, for that reason, the central management and control of Bywater, Chemical Trustee and Derrin was exercised in Neuchâtel.

61 That contention faces difficulties at several levels. First, as was earlier noticed, in the case of Bywater, there were no minutes and the only evidence of any meetings of directors was evidence given by Borgas, which Perram J rejected as untruthful[110]. In the case of Chemical Trustee and Derrin, there were minutes recording meetings of the boards but those minutes reveal that there was seldom more than one meeting of directors per year in addition to annual general meetings. The minutes refer only to formal business, such as the adoption of the annual accounts, the absence of a declaration of any dividend, directors' remuneration and auditors' remuneration. There is no written record of the boards of Chemical Trustee or Derrin ever considering any item of substantive business or corporate policy. For all that appears, such, if any, business as was implemented from Neuchâtel was implemented by Borgas, acting on the direct instructions of Gould, without consultation with the boards of directors. Relevantly, that is identical to the facts in *Bullock*[111].

62 Secondly, as was earlier recorded, Perram J found as a fact[112] that Borgas was simply Gould's puppet or cypher; the meetings of directors in Neuchâtel

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110 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [341].

111 [1959] Ch 315 at 320-321; see [58] above.

112 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,474 [219], 16,485 [295], 16,488 [308], 16,502 [405].

were mere window dressing that consisted of rubber-stamping decisions actually made by Gould in Sydney and implemented by Borgas as Gould's factotum; Borgas' role as a director was fake; and the minutes of Chemical Trustee and Derrin were contrived to make it appear otherwise. That leaves no reason to suppose that Gould and Borgas paid punctilious attention to the formal governance structure of the companies or to anything else, apart from that which was considered necessary to conceal Gould's involvement in the management and control of Bywater, Chemical Trustee and Derrin.

63 Thirdly, even if all of the formalities had been scrupulously observed, in the sense that all decisions made by Gould in Sydney were communicated to Borgas for formal adoption at a board meeting and were in fact formally adopted at such a meeting before being implemented, there would remain Perram J's undisputed findings of fact[113] that the directors acted "without thought" at those meetings because they "took no part to any extent in [the] decision-making processes". Given the "well settled" line of authority[114] that the question of where the central management and control of a company actually abides is to be determined by the solid facts and not by the terms of the company's constitution, why should meetings of directors which are no more than mere window dressing, serving only to rubber-stamp decisions actually made by others in another place, be regarded as the actual exercise of central management and control?

64 The same applies to HWB. Perram J found[115] that HWB's management structure was erected to provide an "illusion" that Gould was not running HWB, whereas, in fact, Gould alone "controlled [HWB's] every move" and the directors exercised no judgment in their capacity as directors. It was submitted that control and management of HWB could not be located with Gould because effective decisions, which were ex facie profitable, were being made by the board of directors in Samoa. For the reasons given above regarding the difference between actual decision-making and rubber-stamping, and for reasons that follow[116], that submission should be rejected.

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113 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,502 [406].

114 *Esquire Nominees* (1972) 129 CLR 177 at 189-190 per Gibbs J.

115 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [346], 16,493 [352], 16,503 [417].

116 See [87] below.

(viii) Esquire Nominees

65 The appellants argued that, although the place where central management and control of a company actually abides is a question of fact, it is a question of which facts. It was submitted that the decision of Gibbs J in *Esquire Nominees*[117], and the authorities on which that decision was based, mandate that the "real business" or "superior or directing authority" of a company are, as a matter of fact, to be found where the board of the company holds its meetings, even if the only thing done at those meetings is to record decisions actually made elsewhere by an outsider and the only purpose of situating the board in that place is to ground a claim that the company is not resident in Australia for tax purposes.

66 That contention should also be rejected. The authorities on which the decision in *Esquire Nominees* was based included *De Beers*[118], both the first instance[119] and Full Court[120] decisions in *Koitaki*, *North Australian Pastoral*[121] and *Bullock*[122]. As has been explained, none of those decisions supports the idea that a company is taken to be resident where its board meetings are held even if the meetings are mere window dressing comprised of rubber-stamping decisions actually made elsewhere by others and held in that place in the hope of avoiding tax liability in the place where the decisions are actually made. It is true that *Esquire Nominees* involved a contrived tax avoidance scheme, and it is also true that the company in that case was held to be resident where its board chose to meet as part of that scheme. But, despite what the appellants described as factual similarities between these appeals and *Esquire Nominees*, and what was submitted to be the improbability that the Norfolk Island directors in *Esquire Nominees* exercised any independent judgment, it is clear that Gibbs J found as a fact that the board meetings were held on Norfolk Island and that substantive decisions were made by the board. Admittedly, the directors complied with the

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117 (1972) 129 CLR 177.

118 [1906] AC 455.

119 (1940) 64 CLR 15.

120 (1941) 64 CLR 241.

121 (1946) 71 CLR 623.

122 [1960] AC 351.

advice of Australian accountants. But, as Gibbs J found[123], they did so "because they accepted that it was in the interest of the beneficiaries [of the trust], having regard to the tax position, that they should give effect to the scheme" and, if they had been advised to do something "which they considered improper or inadvisable", "they would [not] have acted on the instruction". In contrast to the facts of the present appeals, *Esquire Nominees* was not a case of a board rubber-stamping decisions made by others.

67 Counsel for Bywater, Chemical Trustee and Derrin submitted nonetheless that it was apparent from the reasons of Gibbs J that the fact determinative of the result in that case was that the Australian accountants did not have a legal power of control over the directors of the company, rather than that the directors actually made substantive decisions. His Honour reasoned thus[124]:

> "[I]t is obvious that what the appellant did in relation to the Manolas Trust was done in the course of carrying out a scheme formulated in Australia and that [the Australian accountants] not only communicated to the appellant particulars of the scheme but advised the appellant in detail of the manner in which it should be carried out. But if it be accepted that the appellant did what [the accountants] told it to do in the administration of the various trusts, it does not follow that the control and management of the appellant lay with [the accountants]. That firm had no power to control the directors of the appellant in the exercise of their powers or the A class shareholders in the exercise of their voting rights. Although it is doubtless true that steps could have been taken to remove the appellant from its position as trustee of one or more of the trust estates, *[the accountants] could not control the appellant in the conduct of its business of a trustee company. The firm had power to exert influence, and perhaps strong influence, on the appellant, but that is all*. The directors in fact complied with the wishes of [the accountants] *because they accepted that it was in the interest of the beneficiaries, having regard to the tax position, that they should give effect to the scheme. If, on the other hand, [the accountants] had instructed the directors to do something which they considered improper or inadvisable, I do not believe that they would have acted on the instruction.* It was apparent that it was intended that the appellant should carry on its business of trustee company on Norfolk Island. It was in my opinion managed and controlled there, none the less

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123 (1972) 129 CLR 177 at 191.

124 *Esquire Nominees* (1972) 129 CLR 177 at 190-191.

> because the control was exercised in a manner which accorded with the wishes of the interests in Australia. The appellant was, in my opinion, a resident of Norfolk Island." (emphasis added)

68 Counsel's submission should be rejected. Granted, Gibbs J referred in the first of the emphasised sections of the above passage of his Honour's reasoning to the fact that the Australian accountants had no power to control the directors of the company in the exercise of their powers. It may be that his Honour had in mind, and intended to distinguish, a case like *Malayan Shipping*, where one of the factors that was instrumental in fixing the residence of the company in Melbourne was that the articles of association provided that a resolution of directors was of no effect unless first approved by Sleigh in Melbourne[125]. But nothing Gibbs J said suggests that a company must be taken to be resident where its board of directors meets unless some other person has a legally enforceable power to control the board in its decision-making. Nor can it be supposed that his Honour intended that result; for that would run counter to *Bullock*, and Gibbs J referred to *Bullock* with evident approval as part of the line of authority that informed the meaning of corporate residence[126].

69 Further, if Gibbs J had considered the lack of a legal power to control the Norfolk Island directors to be determinative, there would not have been any purpose in his Honour going on to find, in the second of the emphasised sections of the above reasoning, that the Norfolk Island directors actually made substantive decisions. That was found to be so because, critically, the directors would not have done "something which they considered improper or inadvisable" and they complied with the advice of the Australian accountants "because they accepted that it was in the interest of the beneficiaries" to do so. Plainly enough, his Honour's conclusion that the company was a resident of Norfolk Island was based squarely on those findings. Far from contradicting *Bullock*, *Esquire Nominees* recognises, as was recognised also by the House of Lords, that the absence of legal power to control a board of directors is not determinative of whether that board is actually itself exercising central management and control. Gibbs J distinguished *Bullock*[127] on the basis that, in contrast to the Kenyan boards of directors in that case (which did not make any substantive decisions in that capacity), the board of directors in *Esquire Nominees* did make substantive decisions when electing to adopt the advice of the Australian accountants and it

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125 *Malayan Shipping* (1946) 71 CLR 156 at 158.

126 *Esquire Nominees* (1972) 129 CLR 177 at 189.

127 *Esquire Nominees* (1972) 129 CLR 177 at 190-191.

did so on the basis that the advice was considered to be in the best interests of the company.

(ix) More recent authority

70 More recently, in the United Kingdom, in *Wood v Holden*[128], the Court of Appeal drew a distinction between cases where central management and control is exercised through a company's constitutional organs on the basis of external advice or influence, but in fulfilment of the constitutional organ's functions, and cases where the functions of the company's constitutional organs are usurped by an outsider who dictates the decisions to be implemented, independently of or without regard to those constitutional organs[129]. The appellants invoked the Court of Appeal's decision as support for their contention, earlier rejected, that, provided all decisions are formally channelled through the board of a company, the "real business" or "superior or directing authority" of the company is to be taken to be located where the board of the company holds its meetings even if those meetings are perfunctory, in the sense of merely recording decisions made elsewhere by an outsider, and are convened in that location to provide a basis for claiming that the company is resident other than where the outsider resides.

71 The appellants' submission gains no additional support from *Wood v Holden*. So far as appears, the reasoning of the primary judge, which was approved by the Court of Appeal[130], rested heavily on the factual circumstances of the case, including that the only activities of the company in question were to enter into a contract to purchase shares from its parent company to the sum of an amount funded by an interest free loan from the parent company, and then to hold those shares. The primary judge considered that a case of that kind involved different considerations from a case involving the residence of a company with an active continuing business[131]. In explication of that conclusion, his Lordship

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128 [2006] 1 WLR 1393.

129 *Wood v Holden* [2006] 1 WLR 1393 at 1410-1411 [27] per Chadwick LJ (with whom Moore-Bick LJ and Sir Christopher Staughton agreed at 1418 [46], 1419 [47]).

130 *Wood v Holden* [2006] 1 WLR 1393 at 1410 [27] per Chadwick LJ (with whom Moore-Bick LJ and Sir Christopher Staughton agreed at 1418 [46], 1419 [47]).

131 *Wood v Holden (Inspector of Taxes)* [2005] EWHC 547 (Ch) at [25].

referred to four cases[132], of which one was *Esquire Nominees*, that he characterised as involving persons based in one jurisdiction (commonly, a high tax jurisdiction) causing companies to be established in other jurisdictions (commonly, low or no tax jurisdictions) in which the local boards did not take initiatives but responded to proposals presented to them. He observed that, in each of those cases, *Bullock* had been distinguished on the basis that, whereas in *Bullock* the parent company itself exercised central management and control, effectively bypassing the local boards altogether, in the four mentioned cases "the parent companies or their equivalents, while telling the local boards what they wished them to do, left it to the local boards to do it"[133]. In contrast to *Wood v Holden*, each of the appellants in the present case had an active continuing business of share trading and, in the case of HWB, money lending. And in contradistinction to *Esquire Nominees*, where the Norfolk Island board was found actively to have considered and approved the advice of the Australian accountants, it was not established that there were any meetings of the appellants' boards at which any part of the business of share trading or money lending was considered or approved, or at which any other of Gould's directions was considered or approved.

72 The appellants submitted that, although that might be so, properly understood, the distinction drawn in *Wood v Holden* – between a parent company itself exercising central management and control, and so bypassing a local board altogether, and a parent company telling a local board what it wishes the board to do but leaving it to the board to do it – was intended to encompass within the second category of that distinction both a situation where a local board fails to give active consideration to what it is left to do and a situation where the local board actively considers what it is left to do according to the best interests of the company.

73 That does not appear to be the case. In *Wood v Holden*, the primary judge spoke of the difference between "exercising management and control" and "being able to influence those who exercise management and control": a difference between "on the one hand, usurping the power of a local board to take decisions concerning the company and, on the other hand, ensuring that the local board

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132 *Little Olympian Each Ways* [1995] 1 WLR 560; [1994] 4 All ER 561; *Esquire Nominees* (1973) 129 CLR 177; *New Zealand Forest Products Finance NV v Commissioner of Inland Revenue* [1995] 2 NZLR 357; *Untelrab Ltd v McGregor* [1996] STC (SCD) 1.

133 *Wood v Holden* [2005] EWHC 547 (Ch) at [27].

knows what the parent company desires the decisions to be"[134]. At its base, that distinction appears to rest on whether the local board actually considers and makes a decision to adopt the parent company's recommendations as bona fide in the best interests of the subsidiary, or whether the local board just mechanically implements directions from the parent company because it is so directed.

74 The same notion appears to be implicit in a later observation of Patten LJ (dissenting in the result) in the Court of Appeal in *Revenue and Customs Commissioners v Smallwood*[135] that central management and control remained with a local board, notwithstanding that the directors were in the habit of acting in accordance with the advice of an outsider, because[136]:

> "they retained their right and duties as trustees to consider the matter at the time of alienation and did not ... agree merely to act on the instructions which they received".

75 If, however, the decisions in *Wood v Holden* and *Smallwood* are properly to be understood as holding that it is sufficient, in order to locate central management and control of a company in a foreign jurisdiction, to set up there a board of directors that does no more than implement directions from outside without active consideration of the best interests of the company and without actually deciding on that basis that the directions should be implemented, then, with all respect, those decisions should not be followed. For, given that the fact that the constitution of a company requires that board meetings be held in a place is not enough of itself to locate central management and control of the company in that place[137], it cannot be enough to locate the residence of a company in a place for the directors of a company to meet in that place solely for the purpose of maintaining a charade of documenting decisions made elsewhere by others. No doubt, such meetings provide an appearance of order and regularity to the affairs of the company. But, if the making of decisions by an outsider constitutes "usurpation" where there are no board meetings[138], why logically is there any less

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134 *Wood v Holden* [2005] EWHC 547 (Ch) at [25].

135 [2010] BTC 637.

136 *Smallwood* [2010] BTC 637 at 660 [63].

137 *Bullock* [1960] AC 351 at 363 per Viscount Simonds.

138 *Bullock* [1960] AC 351 at 374 per Lord Cohen.

"usurpation" where there are board meetings convened solely for the purpose of the directors acting out the pretence of making those decisions?

76 To take this case as an example, Perram J found that it was intended from the outset that Gould would make all the decisions and that Borgas' only role would be to implement Gould's decisions. Hence, as his Honour concluded[139], Borgas' role as a director was a "fake". There is no more support to be found, in principle or authority, for the idea that a company should be regarded as resident in the place where its "fake" board of directors is set up, than there is for the notion that a company should be regarded as resident in a place from which its board would have exercised its functions had they not been usurped by an outsider dictating the decisions to be made. In truth, in each case, the constitutional organs of the company do not, and are not intended to, exercise central management and control of the company.

77 As a matter of long-established principle, the residence of a company is first and last a question of fact and degree to be answered according to where the central management and control of the company *actually* abides. As a matter of long-established authority, that is to be determined, not by reference to the constituent documents of the company, but upon a scrutiny of the course of business and trading. Accordingly, to conceive of the task in terms of identifying established exceptions to the "true rule from *De Beers*" (as counsel for Bywater, Chemical Trustee and Derrin suggested) is both antithetical to the profoundly factual nature of the test and unhelpful. Each case depends on its own facts and circumstances, albeit that those cases that have been decided may provide a degree of guidance in relation to those still to come.

The policy arguments

78 As was earlier noticed[140], counsel for Bywater, Chemical Trustee and Derrin invoked this Court's decision in *Patcorp* as support for a formalistic approach to the construction of tax legislation, which it was said would provide certainty to those persons and their advisers responsible for the organisation of business structures and transactions. It was contended that, as applied to the statutory concept of residence, such an approach requires that the management and control of a company should inevitably reside with the board, and it was submitted that to hold otherwise would be productive of considerable uncertainty and increased litigation.

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139 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488 [314], 16,502 [405].

140 See [33] above.

79 Recourse to *Patcorp* is not persuasive. Relevantly, the Court in that case held[141], consistently with established authority[142], that a person who is a beneficial holder of shares in a company, but who is not and has not been entered in the register as the holder of those shares, cannot accurately be described as a "member" of the company or therefore as a "shareholder" within the meaning of the 1936 Act. There is nothing about that conclusion which suggests that the statutory concept of corporate residence should be approached otherwise than, as indicated in *De Beers*[143], as "a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading".

80 The concerns raised by each appellant about uncertainty and the likelihood of an increase in litigation are exaggerated. There is little which is uncertain about the difference between a board of directors that actually meets and makes independent judgments, and a board whose meetings are mere window dressing comprised of rubber-stamping decisions actually made elsewhere by others. In Australia, directors of a corporation are required by law[144] to inform themselves about the subject matter of decisions relating to the corporation to the extent that they reasonably believe is appropriate and to make decisions on the basis of what they rationally believe is in the best interests of the corporation. Similar obligations apply in the United Kingdom[145]. Experience suggests that there is no particular difficulty in determining whether or not directors have complied with those obligations, still less in determining whether a board has so abrogated its decision-making power as to become in effect a mere puppet or cypher for the implementation of instructions from another. Civil actions and prosecutions for breach of directorial duties are routinely prosecuted on that basis. Equally, Australia's income tax legislation has long contained provisions which depend on

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141 *Patcorp* (1973) 140 CLR 247 at 273 per Mason J (decision affirmed on appeal).

142 See *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 16 per Dixon CJ; [1963] HCA 21.

143 [1906] AC 455 at 458 per Lord Loreburn LC (with whom all other members of the House agreed at 460).

144 *Corporations Act* 2001 (Cth), s 180.

145 *Companies Act* 2006 (UK), ss 172-174.

the ascertainment of the purpose of a taxpayer[146] and there is a substantial body of jurisprudence[147] devoted to how the purpose of a taxpayer is to be ascertained.

81 Possibly, the approach favoured by the appellants would be productive of less litigation than might otherwise occur. But, as Lord Radcliffe observed in *Bullock*[148], residence has hitherto been treated as a question of fact as to which an inquiry must be conducted. Hence, rejection of the contention that the fact of a company's board meeting being held abroad is sufficient in itself to locate the residence of a company abroad, and the consequent requirement to inquire into and investigate the actual source of control, is unlikely to add materially to the Commissioner's already heavy burden.

82 The appellants further contended that, since *Esquire Nominees* was decided, there has been a generally accepted understanding in courts and within the academy that the central management and control of a company is taken to be exercised where the company's board meets to exercise its constitutional function, and therefore that a company will be taken to be resident abroad if its board meets abroad even if the board does no more than mechanically implement instructions given by residents of Australia. In the appellants' submission, it is also significant that, although the initial response to *Esquire Nominees* was to inquire into whether Australia should adopt a more stringent test of residence, whereby a company would be treated as an Australian resident if its board "habitually responds to instructions formulated in Australia", the Commonwealth Taxation Review Committee ("the Asprey Committee") recommended against changing the test of residence to "include the exercise of control and direction of the company's affairs otherwise than in the formal proceedings of the board-room"[149]. Instead, legislation was enacted[150] to deal with income and profits of

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146 See "profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making" in definition of "assessable income" of taxpayer: *Income Tax Assessment Act* 1936, s 26(a) (as made); *Income Tax Assessment Act* 1936, s 25A (in force).

147 See, for example, *McClelland v Federal Commissioner of Taxation* (1970) 120 CLR 487 (PC); *Macmine Pty Ltd v Commissioner of Taxation (Cth)* (1979) 53 ALJR 362; 24 ALR 217.

148 [1960] AC 351 at 371 (Viscount Simonds and Lord Goddard agreeing at 363, 371).

149 Taxation Review Committee, *Full Report*, (31 January 1975) at 255 [17.15].

150 *Taxation Laws Amendment (Foreign Income) Act* 1990 (Cth).

companies and other entities incorporated or carrying on activities outside Australia under the control of Australian residents. The appellants submitted that these amendments represented a legislative acknowledgment that it is acceptable for foreign companies to organise their affairs in a manner consistent with the general understanding of *Esquire Nominees* said to have prevailed in the courts and within the academy for the last 40 years, and, consequently, that it would be inappropriate for this Court now to adopt a view of residence at odds with that understanding.

83 Those submissions must be rejected. Whatever understanding there may have been about the effect of *Esquire Nominees*, for the reasons already stated, the most that can properly be drawn from the decision is that the company's activities in that case were not in reality directed from Australia because, although its Norfolk Island board habitually complied with the advice of the Australian accountants, the directors did so "because they accepted that it was in the interest of the beneficiaries [of the trust], having regard to the tax position, that they should give effect to the scheme" and their compliance with those instructions would not have extended to their doing "something which they considered improper or inadvisable". To adopt and adapt the language of Chadwick LJ in *Wood v Holden*[151], *Esquire Nominees* was a case where central management and control of the company was exercised through the company's constitutional organs in accordance with external advice and influence, but still in fulfilment of the constitutional organs' functions; as opposed to one in which the functions of the company's constitutional organs were usurped by an outsider who made decisions independently of or without regard to those constitutional organs. Nothing said in *Esquire Nominees*, and nothing in the recommendations of the Asprey Committee or in the subsequent enactment of Pt X of the 1936 Act, implies that a company should be regarded as residing outside Australia merely because it has established a board of directors abroad to act upon the dictates of an Australian resident.

84 Finally, in terms of the policy which underlies the statutory concept of corporate residence, the rejection of the appellants' formalistic approach, in favour of the test of fact and degree adopted in *Bullock* and *Esquire Nominees*, is fortified by the approaches adopted in other common law jurisdictions. In *Fundy Settlement v Canada*[152], the Supreme Court of Canada applied the same test of

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151 [2006] 1 WLR 1393 at 1410-1411 [27] (with whom Moore-Bick LJ and Sir Christopher Staughton agreed at 1418 [46], 1419 [47]).

152 [2012] 1 SCR 520 at 526 [15].

residence to a trust as to a company, namely "where the central management and control of the trust actually takes place". Accordingly, because the non-resident corporate trustee in that case deferred to the recommendations of Canadian resident beneficiaries in the substantive decisions made regarding the trusts, it was held that the trusts were resident in Canada[153]. Similarly, in *Hertz Corp v Friend*, the Supreme Court of the United States held[154] that, in determining whether a corporation is a "citizen" for federal jurisdictional purposes, the statutory criterion of "principal place of business" is:

> "best read as referring to the place where [the] corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center'. And in practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, ie, the 'nerve center', and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)."

HWB's alternative argument

85 It remains only to deal with HWB's alternative argument that, in view of its so-called very simple business model, such decisions as its Samoan directors made at board meetings are properly to be characterised as the exercise of central management and control of that business. That argument should be rejected.

86 Possibly, difficult questions of fact and degree will sometimes arise as to whether the decision-making arrangements that apply in a given case amount to a board retaining decision-making power although subject to some greater or lesser degree of influence from an outsider, or, alternatively, constitute the abrogation of decision-making power in favour of an outsider who makes decisions independently or without regard to the board. The nature of the decision-making required of the board in the course of the company's business may inform the answers to such questions. It is, however, necessarily implicit in the reasoning of *Esquire Nominees* that, if the Norfolk Island directors had been so strongly inclined to act in accordance with the Australian accountants' directions that they would have implemented those instructions regardless of whether they considered them to be in the best interests of the company, or despite knowing,

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153 *Fundy Settlement* [2012] 1 SCR 520 at 526-527 [15].

154 559 US 77 at 92-93 (2010).

or believing it possible, that the instructions were unlawful, Gibbs J would have considered that the directors had abrogated their decision-making power in favour of the Australian accountants.

87 Approaching this matter on the same basis, Perram J's findings of fact leave no room for doubt that the central management and control of HWB was in Sydney. The idea that the business model of the company was so simple that all that was required for the exercise of its central management and control was to abide by Gould's directions is untenable. HWB was not like the company in *Wood v Holden* that existed for the purpose of only one transaction[155]. It had a significant business of deposit taking and money lending, as well as share trading, and it continued for years. There were numerous transactions which had to be considered and numerous decisions of consequence which had to be made about each of them. But, as Perram J found[156], it was Gould who made every one of those decisions. Gould alone organised every deposit and every loan to the related entities, and every purchase and sale of shares, and Gould alone made each decision of consequence about the transactions and about the course of the company's business generally. There was no occasion for the directors to exercise any measure of judgment in respect of the transactions or the direction and policy of the company more generally. All the directors ever did was mechanically carry out Gould's directions. In truth and substance, that was an abrogation of the powers of management of the directors and in effect usurpation by Gould of the functions of the board.

Conclusion

88 It follows that the appeals should be dismissed with costs.

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155 *Wood v Holden* [2005] EWHC 547 (Ch) at [25], [49].

156 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,503 [417]-[418].

89 GORDON J. All deliberative decisions by each appellant company to buy and sell Australian shares on the Australian Securities Exchange ("the ASX") were made by Mr Vanda Gould, who was based in Sydney. The companies' officers were outside Australia, but they did no more than "rubber-stamp" the decisions made by Mr Gould in Australia. Is each company liable for Australian income tax because its "central management and control" or "place of effective management" is in Australia? The answer is "yes". Each appeal should be dismissed with costs.

90 These reasons will summarise the facts relevant to the appeals, consider the decisions below and then turn to consider each appeal.

Facts

91 The following facts were found by the primary judge (Perram J) and were not contested by the companies.

Mr Gould

92 Mr Gould is an accountant based in Sydney.

Mr Borgas

93 Mr Peter Borgas conducts a corporate services business from Neuchâtel, Switzerland through Anglore SARL ("Anglore"). Mr Borgas is an office holder of Anglore, along with his wife and one other person.

JA Investments Ltd and MH Investments Ltd

94 JA Investments was incorporated in the Cayman Islands. It has only one shareholder and one director, Mr Borgas. MH Investments is another Cayman Islands entity. Since 2012, the sole shareholder in MH Investments has been Mr Borgas.

95 Mr Gould held the position of "Appointor" under JA Investments' and MH Investments' respective articles of association.

Hua Wang Bank Berhad

96 HWB was incorporated in Samoa under the *International Companies Act* 1987 (Samoa). Its shares are held by Pacific Securities Inc, another international company incorporated in Samoa. Before Pacific Securities became the shareholder, it issued a bearer debenture which provided that, whilst it was unredeemed, the rights of the members of Pacific Securities to vote or demand a poll were suspended. In 1998, the original secured debenture was converted to a registered secured debenture in the name of JA Investments.

97 During the period 2000 to 2007, the register of directors and secretaries for HWB reveals that there were several individuals and two companies, Westco Directors Ltd and Westco Secretaries Ltd, on the register. All the individuals, except for one, were employed by Asiaciti Trust Samoa Ltd ("Asiaciti Samoa") in Samoa. Asiaciti Samoa is based in Apia, Samoa and one of its beneficial owners is Mr Graeme Briggs, the other individual on the register. Westco Directors was a member of the Asiaciti Group and all of the persons authorised to act on its behalf were or had been employees of Asiaciti Samoa. The directors of HWB largely met in Apia. HWB bought and sold a large number of shares on the ASX and made substantial profits from that activity in the 2004, 2006 and 2007 income years.

Bywater Investments Ltd

98 Bywater was incorporated in the Bahamas. Its two shares were held by Anglore. Anglore holds its shares in Bywater for MH Investments. Bywater had three directors: Mr Borgas, his wife and NTW Directors Inc, a company with an address in the Bahamas. Bywater's cashbook – its only corporate record – is maintained at the London offices of Lubbock Fine, a firm of accountants. Bywater is not required under the law of the Bahamas to have directors' meetings. Bywater traded a large number of shares listed on the ASX and made profits from that activity in the 2002 to 2007 income years.

Chemical Trustee Ltd

99 Chemical Trustee was incorporated in the United Kingdom. Chemical Trustee's sole shareholder was Guardheath Securities Ltd ("Guardheath"), a company owned by the partners of Lubbock Fine. Guardheath holds the shares in Chemical Trustee as nominee for JA Investments. The directors of Chemical Trustee have at all relevant times been Mr Borgas, his wife and their son. All minutes of its board meetings record that the meetings were held in Neuchâtel, Switzerland and attended by Mr Borgas and his wife. Chemical Trustee bought and sold a large number of shares on the ASX and made substantial profits from that activity in the 2001 to 2007 income years, except for the 2005 year.

Derrin Brothers Properties Ltd

100 Derrin was incorporated in the United Kingdom. Derrin's shareholders were Guardheath and another Lubbock Fine entity, Lordhall Securities Ltd ("Lordhall"). Guardheath holds the shares in Derrin as nominee for JA Investments. Lordhall holds 50 of its 1,050 shares in Derrin as nominee for JA Investments and the remaining 1,000 shares for MH Investments. The directors of Derrin were Mr Borgas and his wife. All minutes of its board meetings record that they were held in Neuchâtel, Switzerland and attended by

Mr Borgas and his wife. Derrin traded shares on the ASX and made profits from that activity in the 2003, 2004 and 2005 income years.

Decisions below

101 Before the primary judge, the Commissioner's case was that Mr Gould was running each company from Sydney and, therefore, that was where the "central management and control" of each company was located. The companies contended that, whilst the directors were "perhaps heavily influenced by Mr Gould, [they] nevertheless still applied their minds to the discharge of their respective offices"[157]. They contended that when this was taken together with factors such as the location of each company's incorporation, the "central management and control" (and for Bywater, Chemical Trustee and Derrin, the "place of effective management") was not in Australia.

HWB

102 In relation to HWB, the primary judge found it was controlled by JA Investments, and therefore by Mr Gould. The primary judge also found that the directors of HWB at all times acted on Mr Gould's instructions and "were never placed in a position where they had to exercise the slightest judgment"[158]. Although HWB's business was formally transacted by the employees of Asiaciti Samoa, every transaction it carried out was done on the instructions of Mr Gould.

103 As a result, the primary judge concluded that HWB had its "central management and control" in Australia and was therefore an Australian resident for tax purposes.

Bywater, Chemical Trustee and Derrin

104 The primary judge found that, as Mr Gould was the beneficial owner of JA Investments and could control its affairs by appointing additional members through his position as "Appointor", he was the true owner of JA Investments and he had actual control of it. The same was true of MH Investments. His Honour also found that Mr Borgas "did nothing in relation to the affairs of JA Investments other than give effect to Mr Gould's will"[159]. Because of Mr Gould's ownership and control of JA Investments, the primary judge considered that it was "an inevitable consequence that [Mr Gould] owned and

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157 *Hua Wang Bank Berhad v Federal Commissioner of Taxation* 2014 ATC ¶20-480 at 16,449 [59].

158 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,495 [364].

159 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,458 [110].

controlled Chemical Trustee" and that the Commissioner had established "an overwhelming case" to that effect[160]. The primary judge concluded "that all of the decisions of Chemical Trustee were made by Mr Gould and that Mr Borgas was not involved in them in the slightest way"[161]. The primary judge reached the same conclusions in relation to Derrin and Bywater[162].

105 The primary judge concluded that he was "satisfied that the directors of the [companies] exercised no independent judgment in the discharge of their offices but instead merely carried into effect Mr Gould's wishes in a mechanical fashion"[163]. As a result, the primary judge concluded that each of Bywater, Chemical Trustee and Derrin had its "central management and control" in Australia and was therefore an Australian resident for tax purposes. The primary judge also found that each of Bywater's, Chemical Trustee's and Derrin's "place of effective management" was in Australia, as "the key management and commercial decisions were made by Mr Gould in Sydney", and that therefore international tax agreements did not relieve any of them from liability to income tax under Australian tax law[164].

106 The Full Court of the Federal Court considered there was "no reason to reject his Honour's findings on the evidence or to reject his Honour's reasons for his findings"[165].

HWB's appeal in this Court

107 HWB was not incorporated in Australia, but Samoa. HWB conceded it carried on business in Australia. Australia does not have a double tax agreement with Samoa.

108 If HWB was an "Australian resident" it was liable to pay income tax under s 6-5(2) of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"), which provided that "your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia,

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160 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,465 [145], 16,488 [311].

161 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,488 [314].

162 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,492 [339], [343].

163 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,450 [60].

164 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,504 [430]; see also at 16,505 [440].

165 *Bywater Investments Ltd v Federal Commissioner of Taxation* (2015) 236 FCR 520 at 527-528 [17].

during the income year". Was HWB an "Australian resident"? The answer is that it was.

109 "Australian resident" is defined in s 995-1(1) of the 1997 Act by reference to the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"). "Resident" is defined in s 6(1) of the 1936 Act and includes a company incorporated in Australia and, in some circumstances, a company not incorporated in Australia. Paragraph (b) of that definition provides that a company not being incorporated in Australia is a resident if it:

> "carries on business in Australia, *and* has *either* its *central management and control in Australia*, *or* its voting power controlled by shareholders who are residents of Australia." (emphasis added)

110 Did HWB have its "central management and control in Australia" for the purposes of par (b)? The answer is "yes".

111 HWB did not contest the primary judge's finding that Mr Gould was the person who "controlled" HWB. Instead, HWB contended that its "real business" was "located at the place where the organs of the company exercise legally effective authority". According to HWB, "the place where the organs of the company exercise control" will be determinative in identifying the place of "central management and control" even where those formal organs are doing "nothing more than rubber-stamping decisions made elsewhere". That contention should be rejected. It finds no support in the text of the definition of "resident" in s 6(1) of the 1936 Act, in the authorities or in commercial reality.

"Resident" and s 6(1) of the 1936 Act

112 The definition of "resident" in s 6(1) of the 1936 Act draws a distinction between companies incorporated in Australia and those incorporated elsewhere. If a company is incorporated in Australia it will be an Australian resident. Parliament has explicitly chosen one formal aspect of a company's existence – incorporation – and deemed that to be determinative of whether a company is a "resident". Notably, it has not done this for any other formal aspect of a company. HWB's contention ignores that feature of the statutory language. For example, if Parliament had intended to make the location of directors' meetings determinative, it could have done so. But Parliament did not do so. Instead, for companies not incorporated in Australia, Parliament adopted language – "central management and control" – from common law authorities concerning residency. At the time the provision was enacted, that language was well understood to involve a factual inquiry; an inquiry to which the location of the various formal aspects of a company was relevant but not determinative.

113 The definition of "resident" in s 6(1) of the 1936 Act is multi-faceted. The definition records, and acknowledges, that a company can be incorporated

outside Australia but nevertheless can have its central management and control within Australia. In its terms, it refers to "central management and control". It does not in its terms, or implicitly, seek to limit that concept to the place where the organs of the company exercise legally effective authority. That it does not do so is not surprising. The breadth of the language chosen reflects commercial reality. What constitutes central management and control is a question of fact and degree and can and does account for a broad range of complex arrangements.

Authorities

114 HWB's contention also finds no support in the authorities.

115 The statutory language of "central management and control" derives from *De Beers Consolidated Mines Ltd v Howe*, where Lord Loreburn LC identified the principle "that a company resides for purposes of income tax where its real business is carried on ... and the real business is carried on where the *central management and control* actually abides"[166] (emphasis added).

116 The authorities confirm that the location of a company's "central management and control" is a question of fact and degree[167]. The question of where "central management and control" is located is answered by ascertaining "where the real business of the company is carried on, not in the sense of where it trades but in the sense of from where its operations are controlled and directed. It is the place of the personal control over and not of the physical operations of the business which counts"[168]. So, what circumstances are relevant to identifying the location of a company's central management and control? The circumstances include, but are not limited to[169]:

(a) the location of the company's registered office;

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166 [1906] AC 455 at 458.

167 *De Beers* [1906] AC 455 at 458; *North Australian Pastoral Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 623 at 630; [1946] HCA 17; *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1972) 129 CLR 177 at 190; [1973] HCA 67.

168 *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241 at 248-249; [1941] HCA 13 citing *Egyptian Delta Land and Investment Co Ltd v Todd* [1929] AC 1 at 25. See also *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1940) 64 CLR 15 at 19; [1940] HCA 33; *Unit Construction Co Ltd v Bullock* [1960] AC 351 at 365, 372.

169 See *Koitaki Para Rubber* (1941) 64 CLR 241 at 248; *North Australian Pastoral Co* (1946) 71 CLR 623 at 634; *Esquire Nominees* (1972) 129 CLR 177 at 190.

(b) the residency of the company's directors;

(c) the residency of the company's shareholders;

(d) where the company's meetings, including its directors' meetings, are held; and

(e) where the books of the company are kept.

Where the formal organs of the company are located is relevant but is not, and can never be, determinative.

117 The authorities consistently provide for and apply the test first set out in *De Beers*. In *Esquire Nominees Ltd v Federal Commissioner of Taxation*, the relevant circumstances were said to "strongly support the conclusion" that the taxpayer company was not a resident of Australia[170]. However, in that case, the Commissioner contended that the "central management and control" was in Australia because the directors of the company "merely carried out directions given to them" by members of a firm of accountants in Australia[171].

118 At first instance, Gibbs J accepted that the firm "not only communicated to the [company] particulars of the scheme but advised the [company] in detail of the manner in which it should be carried out"[172]. His Honour found that the firm had "power to exert influence, and perhaps strong influence", on the company[173]. But that was the limit of its control – the firm could not control the conduct of the company's business as a trustee company[174].

119 The directors of the company were in control of the company even though the decisions they made accorded with the wishes of the interests in Australia. Why? Because although the directors complied with the wishes of the Australian firm, they independently determined to implement the scheme because they assessed that the instructions were in the interests of the beneficiaries, having regard to the tax position[175]. The factual inquiry was directed at ascertaining the

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170 (1972) 129 CLR 177 at 190.

171 *Esquire Nominees* (1972) 129 CLR 177 at 190.

172 *Esquire Nominees* (1972) 129 CLR 177 at 190.

173 *Esquire Nominees* (1972) 129 CLR 177 at 191.

174 *Esquire Nominees* (1972) 129 CLR 177 at 191.

175 *Esquire Nominees* (1972) 129 CLR 177 at 191.

decision-making process and was not limited to, or determined by, the location of the formal organs of the company. The analysis by Gibbs J on this point was not disturbed on appeal[176].

120 *Unit Construction Co Ltd v Bullock* concerned subsidiary companies of an English company[177]. The subsidiary companies were incorporated in Kenya under Kenyan law and registered there[178]. The companies were placed in the hands of their directors and the articles of association "expressly provided that directors' meetings might be held anywhere outside the United Kingdom"[179]. The findings of fact demonstrated that "the management of the businesses of the companies was not exercised in the manner contemplated"[180].

121 All members of the House of Lords concluded that the "central management and control" of the companies was in the United Kingdom. In coming to that conclusion, Viscount Simonds observed that "residence is determined by the solid facts, not by the terms of [a company's] constitution, however imperative" and concluded that "it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company"[181].

122 Similarly, Lord Radcliffe determined that the directors of the parent company were running the subsidiary companies from London and that that was inconsistent with the formal articles of association[182]. But Lord Radcliffe did not believe that the test required that "you try to ascertain what are the real facts about the seat of management and control and to put in its place what seems to be the merely formal device of studying a set of written regulations"[183]. Although the articles of the companies "prescribe[d] what ought to [have been] done ...

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176 See *Esquire Nominees* (1973) 129 CLR 177 at 209, 212, 220, 225.

177 [1960] AC 351 at 359.

178 *Bullock* [1960] AC 351 at 362.

179 *Bullock* [1960] AC 351 at 362.

180 *Bullock* [1960] AC 351 at 362.

181 *Bullock* [1960] AC 351 at 363; see also at 362.

182 *Bullock* [1960] AC 351 at 364; see also at 369.

183 *Bullock* [1960] AC 351 at 370.

they cannot create an actual state of control and management ... which does not exist in fact"[184].

123 In short, there is no support for the contention that a company's residency is determined merely by the location of its formal organs. The contention is contrary to the text of s 6(1) of the 1936 Act, the authorities and commercial reality.

Application to HWB

124 So, what is the position with HWB?

125 HWB accepted it was a "captive entity" run by Asiaciti Samoa in accordance with the instructions of Mr Gould. The directors of HWB never exercised the slightest judgment. The directors had no idea of HWB's business. The directors merely did as Mr Gould instructed. There was no evidence of any transaction ever being refused by the employees of Asiaciti Samoa, who were also directors of HWB at various times, on the basis that allowing the transaction would have been a breach of their fiduciary duties to HWB.

126 HWB contended that the reason that its directors never exercised the slightest judgment was because of the company's "childishly simple business model". The business model was said to be the entering into of "back-to-back transactions" that gave rise to few occasions when the directors were required to exercise independent judgment. The customers of HWB were all clients of Mr Gould or entities associated with him.

127 While the business model may have comprised back-to-back transactions, the transactions were structured in that way because of the directions given by Mr Gould. Four people who had been directors of HWB at various times (who were also employees of Asiaciti Samoa) gave evidence that "they transacted the decisions of [HWB] in Apia doing so on *every* occasion at the direction of Mr Gould" (emphasis added). And although the primary judge accepted evidence of three of those employees who stated they would have rejected a transaction that was in breach of their fiduciary duties or otherwise unlawful, his Honour did not accept that they knew enough about the business for those statements to be "other than empty"[185]. The fact that the business ran in a particular way was a consequence of Mr Gould's control over the directors of HWB. HWB's contention should be rejected.

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184 *Bullock* [1960] AC 351 at 370.

185 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,494 [358].

128 Moreover, the back-to-back transactions comprised only part of the overall business of HWB and contributed, at best, little to HWB's assessable income. In the 2004, 2006 and 2007 income years, it purchased and sold a large number of shares on the ASX from which it made substantial profits.

129 Finally, it is necessary to address the decision of the Court of Appeal of England and Wales in *Wood v Holden*. In that decision, Chadwick LJ drew a distinction between cases[186]:

> "where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are 'usurped' – in the sense that management and control is exercised independently of, or without regard to, those constitutional organs."

130 Chadwick LJ went on to explain that[187]:

> "in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an 'outsider' in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions *and the role of an outsider who dictates the decisions which are to be taken*. In that context an 'outsider' is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function." (emphasis added)

131 Contrary to HWB's contentions, that distinction does not assist it. Mr Gould, an outsider from HWB's formal organs, dictated the decisions taken. HWB's real business was carried on in Australia by Mr Gould. Whether the board acted without exercising judgment or Mr Gould ignored the board, the answer is the same. Mr Gould did not merely influence the decisions of the board.

132 HWB had its central management and control in Australia. HWB was a resident for Australian tax purposes and liable to tax under s 6-5(2) of the 1997 Act.

133 The appeal should be dismissed with costs. The Commissioner's summons filed in HWB's appeal seeking revocation of special leave should also be dismissed.

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186 *Wood* [2006] 1 WLR 1393 at 1410-1411 [27].

187 *Wood* [2006] 1 WLR 1393 at 1411 [27].

Bywater, Chemical Trustee and Derrin

134 The issues in the appeal by Bywater, Chemical Trustee and Derrin are more complicated. There was no dispute that the income earned by those companies had an Australian source. Accordingly, even if it was assumed that each was a foreign resident, unless relief was available to each of them under a double tax agreement, each of them was liable to tax on that income under s 6-5(3) of the 1997 Act. Section 6-5(3) of the 1997 Act relevantly provided:

> "If you are a foreign resident, your assessable income includes:
>
> (a) the *ordinary income you *derived directly or indirectly from all *Australian sources during the income year".

135 It is therefore necessary to consider the terms of the relevant double tax agreements. Two are relevant:

(1) the Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, as affected by the 2003 United Kingdom notes ("the 2003 UK Convention")[188]; and

(2) the Agreement between the Government of Australia and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income, and the Protocol to that agreement ("the Swiss Agreement")[189].

136 An earlier agreement between Australia and the United Kingdom[190] was at first also said to be relevant, but ultimately that submission was not pressed.

137 This section of the reasons will consider the *International Tax Agreements Act* 1953 (Cth) ("the International Tax Agreements Act"), then the specific provisions of the 2003 UK Convention (for Chemical Trustee and Derrin) and

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188 [2003] ATS 22.

189 [1981] ATS 5.

190 The Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains that was signed at Canberra on 7 December 1967: [1968] ATS 9.

finally the Swiss Agreement (for Bywater, Chemical Trustee and Derrin) to determine whether one or more of them provides relief from s 6-5 of the 1997 Act.

138 As these reasons will explain, under the 2003 UK Convention and the Swiss Agreement, there are two possible avenues of relief: first, if the company is a resident *only* of the United Kingdom for the purposes of United Kingdom tax law (or Switzerland under the Swiss Agreement) and, second, if the company is a resident of both the United Kingdom for the purposes of United Kingdom tax law (or Switzerland) and Australia but its "place of effective management" is situated in the United Kingdom (or Switzerland).

139 Here, the first avenue turns on whether the company was also a resident of Australia for the purposes of Australian tax law and, in particular, the meaning of "central management and control" under the 1936 Act. If the company is also a resident of Australia, then it is necessary to consider the second avenue of relief. Whether that avenue is available turns on the proper construction of the phrase "place of effective management" under the relevant agreement and, in particular, whether the "place of effective management" is in the other country – respectively, the United Kingdom or Switzerland. As the Commissioner rightly submitted, "central management and control" and "place of effective management" are different concepts in different instruments. The consideration of the second avenue is important because, if the place of effective management is in the other country, the company is entitled to relief from tax in Australia.

The International Tax Agreements Act

140 The International Tax Agreements Act is "[a]n Act to give the force of Law to certain Conventions and Agreements with respect to Taxes on Income and Fringe Benefits, and for purposes incidental thereto".

141 Section 4 provided that the 1936 Act and the 1997 Act were incorporated into the International Tax Agreements Act and were to be "read as one" with the International Tax Agreements Act, but that the provisions of the International Tax Agreements Act "have effect notwithstanding anything inconsistent with those provisions contained" in the 1997 Act or the 1936 Act or in an Act imposing Australian tax.

142 During the relevant period, each agreement was set out in full in Schedules to the International Tax Agreements Act and given the force of law.

143 The 2003 UK Convention was set out in Sched 1 to the International Tax Agreements Act. Section 5 provided that, subject to the International Tax Agreements Act, "on and after the date of entry into force of the [2003 UK Convention], the provisions of the convention, so far as those provisions affect Australian tax, have the force of law according to their tenor".

144 The Swiss Agreement was set out in Sched 15 to the International Tax Agreements Act. Section 11E(1)(b) relevantly provided that, subject to the International Tax Agreements Act, on and after the date of entry into force of the Swiss Agreement, the provisions of the Swiss Agreement, in so far as those provisions affect Australian tax, "have, and shall be deemed to have had, the force of law ... in respect of income of the year of income that commenced on 1 July 1979 and of a subsequent year of income in relation to which the agreement remains effective".

145 How, then, is each agreement to be interpreted?

146 "The first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument"[191]. That step is critical, because, as a matter of statutory interpretation, there is a distinction between circumstances where international instruments, such as the two in issue in this matter, have been enacted into Australian law[192] and circumstances where provisions of an Act draw on a treaty which has not been enacted into Australian law[193].

147 Where, as here, an instrument is set out in full in legislation and given the force of law by it (save for where the legislation indicates otherwise), it is clearly the intention of the legislature that the "transposed text should bear the same meaning in the domestic statute as it bears in the treaty"[194].

148 If the terms of an instrument enacted into Australian law were interpreted strictly in accordance with domestic principles of statutory interpretation, there would be a risk that the treaty would be interpreted differently even though other

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191 *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 71 [61]; [2006] HCA 54.

192 See, eg, *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 166 [3], 186 [70], 210 [132], 224 [163]; [1998] HCA 65; *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 197 [3], 224 [107]; [2005] HCA 33.

193 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34]; [2006] HCA 53.

194 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231; [1997] HCA 4; *Great China Metal Industries* (1998) 196 CLR 161 at 186 [70], both citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265; [1982] HCA 27.

countries had adopted the same instrument[195]. That risk is significant with double tax agreements. The whole point of those agreements – to prevent double taxation across two jurisdictions – would be frustrated if "they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question"[196].

149 The principles applicable to construction of international instruments must be applied; those principles are found in the Vienna Convention on the Law of Treaties ("the VCLT")[197]. The VCLT largely reflects principles of customary international law[198]. The VCLT does not apply retrospectively and therefore does not apply in the interpretation of the Swiss Agreement, which was concluded prior to the entry into force of the VCLT for Switzerland[199].

150 It is necessary to consider each double tax agreement against that background.

The 2003 UK Convention

151 The 2003 UK Convention relevantly applied from 1 July 2004[200]. The assessments potentially subject to these provisions are those issued to Chemical Trustee and Derrin for the income years after that date.

152 The 2003 UK Convention applies to "persons who are residents of one or both of the Contracting States" (being Australia and the United Kingdom)[201] and, relevantly, the income taxes of those States[202]. Article 7(1) relevantly provides that "[t]he profits of an enterprise of a Contracting State shall be taxable only in

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195 See *Povey* (2005) 223 CLR 189 at 202 [25], 230 [128] and the authorities cited.

196 *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at 186 [120].

197 Arts 31 and 32 of the VCLT; [1974] ATS 2. See *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350, 356; [1990] HCA 37.

198 *Thiel* (1990) 171 CLR 338 at 349, 356.

199 Art 4 of the VCLT.

200 See Art 29(1) of the 2003 UK Convention.

201 Arts 1 and 3(1)(e) of the 2003 UK Convention.

202 Art 2(1)(a)(i) and (b) of the 2003 UK Convention.

that State". The phrase "enterprise of a Contracting State" is defined to mean "an enterprise carried on by a resident of a Contracting State"[203].

153 Under Art 4(1)(a), a person is a resident of the United Kingdom "if the person is a resident of the United Kingdom for the purposes of United Kingdom tax". "United Kingdom tax" means tax imposed by the United Kingdom[204]. Under Art 4(1)(b), a person is a resident of Australia "if the person is a resident of Australia for the purposes of Australian tax". "Australian tax" means tax imposed by Australia[205].

154 Article 4(4) recognises the possibility that a company may be a resident of both Australia and the United Kingdom. In that circumstance, Art 4(4) provides that the company "shall be deemed to be a resident only of the State in which its *place of effective management* is situated" (emphasis added).

155 There are two avenues open to Chemical Trustee and Derrin to rely on the 2003 UK Convention: first, if they are a resident only of the United Kingdom for the purposes of United Kingdom tax law; second, if they are a resident of both the United Kingdom and Australia under the respective domestic laws, but their "place of effective management" is situated in the United Kingdom.

156 The primary judge proceeded upon the assumption that Chemical Trustee and Derrin were residents of the United Kingdom[206]. On that assumption, the first relevant question is: are Chemical Trustee and Derrin also residents of Australia for the purposes of Australian taxation law? That question directs attention to the "central management and control" question considered earlier with respect to HWB. If the answer is "yes", then the further question is: where is the "place of effective management" of Chemical Trustee and Derrin situated? If the answer to that question is "the United Kingdom", then Art 7(1) operates to relieve Chemical Trustee and Derrin from Australian income tax. Of course, Chemical Trustee and Derrin must be considered individually.

157 Neither avenue is available to either Chemical Trustee or Derrin. The first avenue is closed because the "central management and control" of each is in Australia, making each an Australian resident. The second avenue is closed because, assuming Chemical Trustee and Derrin are also residents of the United

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203 Art 3(1)(i) of the 2003 UK Convention.

204 Art 3(1)(d) of the 2003 UK Convention.

205 Art 3(1)(c) of the 2003 UK Convention.

206 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,504 [424].

Kingdom, the "place of effective management" of each of Chemical Trustee and Derrin is in Australia and not the United Kingdom.

(i) "Central management and control"

158 Consistent with the principles concerning "central management and control" earlier identified, the location of the formal organs of each of Chemical Trustee and Derrin is not determinative. Accordingly, on the facts found by the primary judge regarding Mr Gould's role, it is clear that, for each of Chemical Trustee and Derrin, its "central management and control" was in Australia.

159 Chemical Trustee and Derrin submitted that "the lawfully appointed organs of the companies were not by-passed" and that the "effective decisions of the companies were made by the board or its directors albeit in many cases influenced by Mr Gould". That contention should be rejected. It is contrary to the finding of fact, not challenged on appeal, that Mr Gould was the person who controlled Chemical Trustee and Derrin.

160 Therefore, each of Chemical Trustee and Derrin is a "resident" of Australia for the purposes of Australian taxation law because its "central management and control" was in Australia.

(ii) "Place of effective management"

161 It is then necessary to consider the second avenue. The availability of that avenue turns on the meaning of the phrase "place of effective management" in Art 4(4) of the 2003 UK Convention.

162 Chemical Trustee and Derrin failed to substantively address this issue. As the Commissioner submitted, Chemical Trustee and Derrin did not approach the issue correctly.

163 Chemical Trustee and Derrin focussed too closely on the concept of "central management and control" without reference to the specific provisions of the 2003 UK Convention. At the hearing, counsel for Chemical Trustee and Derrin submitted that you look to the same matters to determine the "place of effective management" as you do to determine the place of "central management and control". As the Commissioner acknowledged, in some cases, such as the present, the result may be the same. But as the Commissioner rightly submitted, they are different concepts. The meaning of each turns on the interpretation of the phrase as it appears in the relevant instrument – the 1936 Act for "central management and control" and the 2003 UK Convention for "place of effective management". Each must be examined to determine the applicability of each in any given case. It cannot be assumed that if one test is satisfied, then it will automatically follow that the other is satisfied.

164 Once that interpretive task is undertaken in relation to "place of effective management" in the 2003 UK Convention, it is clear that the location of the formal organs of a company cannot be determinative of the "place of effective management" of that company.

165 Article 31(1) of the VCLT provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The ordinary meaning of the terms of the 2003 UK Convention points away from a construction that would benefit Chemical Trustee and Derrin. Significantly, Art 4(4) refers to the "place of effective management". The express terms of that phrase impose a requirement that in order to identify the place of *effective* management, the inquiry must go beyond the mere formalities of where the formal organs of a company might be located.

166 That conclusion is consistent with the object and purpose of the 2003 UK Convention. As noted earlier, the purpose of double tax agreements is to avoid tax being imposed on a person twice for the same activity. Under the 2003 UK Convention, the key determinant is residency. Article 4(4) operates against that background – it is enlivened when residency is *not* sufficient to provide an answer to the question: in which country should the person be taxed? Article 4(4) breaks any deadlock and, depending on the domestic laws of the relevant Contracting States, its ability to break a deadlock would be seriously undermined were it construed so as to be limited to an inquiry about the location of the formal organs of a company.

167 That construction is confirmed by Art 32 of the VCLT, which provides that "[r]ecourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31". The 2003 UK Convention is based upon the Organisation for Economic Co-operation and Development's ("the OECD") Model Tax Convention on Income and on Capital. In *Thiel v Federal Commissioner of Taxation*, all members of the Court referred to the Commentaries on the Articles of the Model Convention in accordance with Art 32[207].

168 What does the Commentary on Art 4 provide? During the relevant period, the Commentary relevantly stated that[208]:

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207 (1990) 171 CLR 338 at 344, 349-351, 356-358. See also *Revenue and Customs Commissioners v Smallwood* [2010] BTC 637 at 654 [48].

208 OECD, *Model Tax Convention on Income and on Capital*, 9th ed (2015) at C(4)-8 [22] and C(4)-20 [24].

> "It would not be an adequate solution to attach importance to a purely formal criterion like registration. Therefore [Art 4(4)] attaches importance to the place where the company, etc is *actually* managed.
>
> …
>
> The place of effective management is the place where *key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made*. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, *no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management*." (emphasis added)

169 As those passages of the Commentary explain, while the place of effective management may "ordinarily" be the place where the board of directors makes its decisions, "all relevant facts and circumstances must be examined to determine [where] the place of effective management" of a company is located[209].

170 So, where was the "place of effective management" for Chemical Trustee and Derrin – Australia or the United Kingdom? The answer is Australia. Indeed, at the hearing, counsel for Chemical Trustee and Derrin contended that neither company was managed or controlled in the United Kingdom but each was managed and controlled in Switzerland.

171 The companies were incorporated in the United Kingdom, as were their ultimate shareholders (Lordhall and Guardheath). However, for both Chemical Trustee and Derrin, the board of directors exercised the lawful authority of the company in Switzerland. Critically though, Mr Gould was the person who controlled, and ultimately owned, Chemical Trustee and Derrin. The key management and commercial decisions were made by Mr Gould in Australia. It was the "place of effective management".

172 For those reasons, Art 4(4) of the 2003 UK Convention deems each of Chemical Trustee and Derrin to be a resident of only Australia and, in accordance with Art 7(1), each is thereby taxable only in Australia. Thus, the 2003 UK Convention does not provide Chemical Trustee or Derrin any relief from s 6-5 of the 1997 Act.

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209 cf *Revenue and Customs Commissioners v Smallwood* [2010] BTC 637 at 654 [48]-[49].

The Swiss Agreement

173 The assessments potentially subject to the Swiss Agreement are all those issued to Bywater, Chemical Trustee and Derrin.

174 The Swiss Agreement applies to persons "who are residents of one or both of the Contracting States"[210] (being Australia and Switzerland)[211] and to "Australian income tax" and Swiss "[f]ederal, cantonal and communal taxes on income"[212].

175 Article 7(1) relevantly provides that "[t]he profits of an enterprise of one of the Contracting States shall be taxable only in that State". The phrase "enterprise of one of the Contracting States" means "an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Switzerland"[213].

176 A person is a "resident of Switzerland if the person is subject to unlimited tax liability in Switzerland"[214]. Under Art 4(1)(a), a person is relevantly a resident of Australia "if the person is a resident of Australia for the purposes of Australian tax". "Australian tax" means tax imposed by Australia[215].

177 Article 4(3) recognises the possibility that a company may be a resident of both Australia and Switzerland. When a company is a resident of both States, the company "shall be deemed to be a resident solely of the Contracting State in which its *place of effective management* is situated" (emphasis added).

178 As with the 2003 UK Convention, there were two avenues available to obtain relief from s 6-5 of the 1997 Act. Again, neither avenue is available.

179 First, the "central management and control" of each company is in Australia, meaning they are residents of Australia and not solely residents of Switzerland (assuming that they were also residents of Switzerland).

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210 Art 1 of the Swiss Agreement.

211 Art 3(1)(c) of the Swiss Agreement.

212 Art 2(1)(a) and (b) of the Swiss Agreement.

213 Art 3(1)(f) of the Swiss Agreement.

214 Art 4(1)(b) of the Swiss Agreement.

215 Art 2(3) of the Swiss Agreement.

180 Second, the "place of effective management" of each company is in Australia and not Switzerland.

181 The Swiss Agreement, like the 2003 UK Convention, derives from the Model Convention. However, unlike the 2003 UK Convention, its interpretation is not governed by the VCLT. That is because Art 4 of the VCLT relevantly provides that it "applies only to treaties which are concluded by States after the entry into force of the [VCLT] with regard to such States". The VCLT did not enter into force with regard to Switzerland until after the conclusion of the Swiss Agreement[216]. Nevertheless, this Court has recognised[217] that, consistently with international law[218], Arts 31 and 32 of the VCLT reflect customary international law and it is appropriate to undertake the interpretive task by reference to those provisions.

182 For the reasons given above, an inquiry about the "place of *effective* management" is not limited to or answered by identification of the location of the formal organs of each entity.

183 Moreover, the primary judge found that, as a matter of Swiss law, a company will be subject to unlimited tax liability in Switzerland if it has its place of effective management in Switzerland[219]. And it was agreed that a company's place of effective management is where the day-to-day business decisions are made. It was also agreed that, in that context, strategic decisions are relevant, although not as relevant as day-to-day decisions, and administrative activities are irrelevant[220].

184 None of the companies had its "place of effective management" in Switzerland. The primary judge found that Mr Borgas' role was a "façade" and "fake"[221]. The primary judge found that Mr Borgas exercised no independent

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216 The Swiss Agreement was signed on 28 February 1980 and entered into force on 13 February 1981. Switzerland did not accede to the VCLT until 7 May 1990.

217 *Thiel* (1990) 171 CLR 338 at 349, 356.

218 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment* [2002] ICJ Rep 625 at 645 [37]. See generally Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 13-19.

219 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,505 [438].

220 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,505 [439].

221 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,451 [67], 16,488 [312]-[314], 16,492 [339], [343], 16,502 [405], [410]-[411].

judgment. His position was "to do as he was told by Mr Gould without thought"[222]. All that occurred in Switzerland was the formal implementation of decisions that, in substance, were made by Mr Gould. On that basis, it is a nonsense to say that Mr Borgas was "effectively managing" each entity from Switzerland. The "place of effective management" was with Mr Gould in Australia.

185 For those reasons, Art 4(3) of the Swiss Agreement deems each of Bywater, Chemical Trustee and Derrin to be a resident only of Australia and, in accordance with Art 7(1), each is thereby taxable only in Australia. Thus, the Swiss Agreement does not provide Bywater, Chemical Trustee or Derrin any relief from s 6-5 of the 1997 Act.

Orders

186 Each appeal should be dismissed with costs. The Commissioner's summons filed in HWB's appeal should also be dismissed.

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222 *Hua Wang Bank* 2014 ATC ¶20-480 at 16,502 [406].