Carvill v Inland Revenue Commissioners

CHANCERY DIVISION

SIR JOHN VINELOTT (SITTING AS A JUDGE OF THE HIGH COURT)

11, 12, 13, 21 DECEMBER 1995

Case stated – Remission – Motion to remit – Omission from case stated – Applicant alleging omissions from case stated – Applicant requesting remission of case to Special Commissioners for further findings of fact and to identify evidence relied on for certain findings – Whether case stated should be remitted.

The taxpayer, an individual ordinarily resident in the United Kingdom participated in a share exchange whereby he obtained shares in a company resident in Bermuda for the shares he held in a company resident in the United Kingdom and by virtue of which income became payable to the Bermudan company. He was assessed to income tax for the years 1987–88 to 1992–93 inclusive under s 739 of the Income and Corporation Taxes Act 1988 on the ground that he had sought to avoid liability to income tax by means of a transfer of assets abroad. A Special Commissioner dismissed the taxpayer's appeal holding that s 739 was not disapplied by s 741 as the taxpayer had failed to show that avoiding liability to taxation was not the purpose or one of the purposes for which the share exchange was effected and that he had failed to show that the transfer was a bona fide commercial transaction not designed for the purpose of avoiding liability to taxation. The taxpayer applied to the court for an order to remit the case stated to the Special Commissioner with a direction, inter alia: that he consider whether any of the facts set out in part I of the schedule to the notice of motion[a] were established by the evidence and that he make further findings in relation to the facts there set out or state which facts were not so established; that he identify the oral or documentary evidence relied on for certain facts found in his decision and set out in part II of the schedule; that he find as a fact whether the taxpayer was asked to comment during the course of giving evidence on an alleged discrepancy between a statement he gave in evidence and a statement which the taxpayer was recorded as having made on 15 February 1984; and that he state what events were comprised within 'the chain of events leading to the declaration of the first dividend in 1987 [of the non-resident company whose shares the taxpayer had obtained by the share exchange]' and what inference (if any) had he deduced from 'the coincidence' of that chain of events.

Held – Three practical considerations were implicit in the principles which should guide the court in the exercise of its jurisdiction to remit a case stated to the commissioners for amendment. (a) It was the usual practice for the commissioners to transmit with a case stated copies of any documents proved or admitted before them with a copy of any agreed note of any oral evidence given at the hearing and if not transmitted it was open to the court to call for them. Nothing was gained by remitting a case stated solely for the purpose of adding material which could be obtained from the documents or an agreed note of the oral evidence. (b) It was for the court to decide on the hearing of the appeal whether a given conclusion followed as a matter of logical or practical necessity from the findings of facts by the commissioners or whether their findings of fact were inconsistent with their conclusion. No purpose was served by remitting a case stated to the commissioners for them to spell out what was implicit or followed as a matter of logical or practical necessity from their findings and conclusions. (c) It was for the commissioners as the fact-finding tribunal to state whether any inference should be drawn from the primary facts and in doing so they necessarily had to decide which facts they found

[a] The notice of motion is set out in an annex to the judgment at p 141 *b* to p 153 *g*, post.

relevant and what relative weight should be given to them. The court could only interfere if it could be said that the commissioners' conclusion was an impossible one which no person acting judicially or properly instructed as to the relevant law could have come to. It would be wrong to remit a case stated to the commissioners to inquire which of the facts found or admitted they considered to be relevant to their conclusion or to ask them to state what, if any, weight they had given to the facts which they had considered to be relevant. In the instant case the application went far beyond the proper invocation of the court's jurisdiction to remit a case stated to clarify obscure or ambiguous findings or to make further findings necessary for the proper disposal of an appeal. The application would therefore be dismissed. Dicta of Scott J in *Consolidated Goldfields plc v IRC* [1990] STC 357 at 361 applied.

Notes

For the remission of the case stated, see Simon's Direct Tax Service A3.710.

Cases referred to in judgment

Consolidated Goldfields plc v IRC [1990] STC 357, [1990] 2 All ER 398, 63 TC 333.

Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, [1955] 3 All ER 48, 36 TC 207, HL.

Cases also cited

Browne v Dunn (1893) 6 R 67, HL.

Leith Hull and Hamburg Steam Packet Co v Musgrave (Surveyor of Taxes) (1898) 4 TC 80.

Hinchcliffe (Inspector of Taxes) v Crabtree [1972] AC 707, [1971] 3 All ER 967, 47 TC 419, HL.

Ransom (Inspector of Taxes) v Higgs [1974] STC 539, [1974] 1 WLR 1594, [1974] 3 All ER 949, 50 TC 1, HL.

Whittles (Inspector of Taxes) v Uniholdings Ltd [1993] STC 671.

Application

By a notice of motion annexed hereto Rory Kerr Carvill (the taxpayer) sought an order that the case stated by a Special Commissioner dated 11 April 1995 dismissing the taxpayer's appeal against an assessment to income tax for the years 1987–88 to 1992–93 inclusive under s 739 of the Income and Corporation Taxes Act 1988 be remitted to the Special Commissioner for amendment. The facts are set out in the judgment.

Andrew Thornhill QC and *Giles Goodfellow* (instructed by *Slaughter & May*) for the taxpayer.

Alan Moses QC and *Rabinder Singh* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

Cur adv vult

21 December 1995. The following judgment was delivered.

SIR JOHN VINELOTT. In this application Rory Kerr Carvill (the taxpayer) seeks an order remitting a case stated by Mr T H K Everett, one of the Special Commissioners, with directions under para 1 that the Special Commissioner consider whether any of the facts set out in part I of the schedule to the notice of motion was established by the evidence adduced before the Special Commissioner; under para 2, that the Special Commissioner make further findings in relation to any further facts which were established by the evidence either in the terms set out

in part I of the schedule or in such other terms as the Special Commissioner thinks appropriate, and to state which of the facts set out in part I of the schedule the Special Commissioner does not consider were established by the evidence; under para 3, that the Special Commissioner identifies with proper particularity the oral and documentary evidence relied on by him for the findings of fact set out in part II of the schedule; under para 4, that the Special Commissioner finds as a fact whether the taxpayer was at any time asked to comment on any discrepancy found by the Special Commissioner to exist between the evidence given by him and a minute of a meeting of the directors of the company R K Carvill (International Holdings) Ltd, dated 15 February 1984; and, under para 5, that the Special Commissioner state what events were comprised within 'the chain of events leading to the declaration of the first dividend' referred to by the Special Commissioner in his decision and set out the inference he drew from 'the coincidence' of that chain of events.

The facts which the Special Commissioner is asked to consider and in relation to which further findings are sought are 35 in number, and the text runs to some 20 pages. I shall have to say something about the majority of the further findings which are sought. However, it would add unduly to the length of this judgment were I to repeat each of the further findings. I shall therefore refer to them by number without citing them in full. To make this judgment intelligible, the notice of motion is annexed hereto (see p 142 *d* to p 153 *g*, post).

The issues

Section 739 of the Income and Corporation Taxes Act 1988 is designed to counter 'the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.' Subsection (2) provides:

> 'Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.'

It was not in question before the Special Commissioner that an exchange of shares of a company resident in the United Kingdom, R K Carvill (UK) Ltd, by holders ordinarily resident in the United Kingdom, including the taxpayer (the majority shareholder), for shares of R K Carvill (International Holdings) Ltd, a company incorporated and resident in Bermuda, was a transfer of assets by virtue of which income became payable to the latter company. The question before the Special Commissioner was whether the taxpayer could bring himself within either of the 'escape routes' in s 741 which, so far as material, provides:

> '[Section] 739 ... shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either—
>
> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of

avoiding liability to taxation.'

Jurisdiction

In an appeal by case stated under s 56 of the Taxes Management Act 1970 the court has jurisdiction on the application by either party to remit the case stated to the commissioners for amendment. The principles which should guide the court in the exercise of its jurisdiction were summarised by Scott J in *Consolidated Goldfields plc v IRC* [1990] STC 357 at 361 in the following terms:

> '(1) The findings of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings. (2) The parties are entitled to expect that the commissioners will in the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal. (3) If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are (a) material to some tenable argument, (b) at least reasonably open on the evidence that has been adduced, and (c) not inconsistent with the finding or findings that have already been made. I would add this. In my opinion the commissioners must be protected from nit-picking. If the case stated is full and fair, in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court should I think be slow to send the case back, particularly so if it appears that the Special Commissioners have had the proposed findings in mind when settling the final form of the case stated.'

To those principles I think I should add three practical considerations which are implicit in those principles and which must be borne in mind in applying them to the facts of any given case.

(a) It is the usual practice for the commissioners to transmit with a case stated copies of any documents proved or admitted before them with a copy of any agreed note of any oral evidence given at the hearing. If not transmitted, it is open to the court to call for them. The judge hearing the appeal can be referred to the documents and any note of the oral evidence for the purpose of amplifying the case stated. Nothing is gained therefore by remitting a case stated solely for the purpose of adding material which can be obtained from the documents or an agreed note of the oral evidence (if there is more than one note of the oral evidence and the notes are inconsistent the commissioners can be asked to resolve the inconsistency).

(b) It is for the court to decide on the hearing of the appeal whether a given conclusion follows as a matter of logical or practical necessity from the findings of fact by the commissioners or whether those findings of fact are inconsistent with their conclusion. No purpose is served by remitting a case stated to the commissioners for them to spell out what is implicit or follows as a matter of logical or practical necessity from their findings and conclusions.

(c) The issue that most frequently comes before the court on a case stated is whether an inference, often referred to as an inference of secondary fact, can or cannot be drawn from the primary facts admitted or found by the commissioners. It is for the commissioners as the fact-finding tribunal to say whether any clear pattern or picture emerges in the light of the multifarious primary facts, and in doing so they must necessarily decide which facts they find relevant, which facts they find to be part of the picture and what relative weight should be given to them. The court can interfere only if it can be said that the commissioners' conclusion is an impossible one, that is, in the often cited words of Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, 36 TC 207 at 227, 'that the facts found are such that no person acting judicially and properly instructed as to the

relevant law could have come to the determination under appeal.' It would be wrong to remit a case stated to the commissioners to inquire which of the facts proved or admitted they considered to be relevant or irrelevant to their conclusion, just as it would be wrong to ask the commissioners to say what, if any, weight they gave to the facts which they did consider to be relevant.

The background

Before turning to examine the findings which the Special Commissioner is to be asked to consider, I must shortly summarise the undisputed history, the principal areas of dispute and the Special Commissioner's findings.

The taxpayer was born in the Republic of Ireland in 1941 and came to England in 1959. After a short time in marine insurance he joined the C T Bowring Group (Bowrings) where he worked as a treaty reinsurance broker. He spent two years in the United States of America between 1967 and 1969. His special field was treaty medical reinsurance. United States treaty reinsurance risks could be placed in the United Kingdom market only through a Lloyd's broker. It was also difficult for a Lloyd's broker to place United States treaty reinsurance risks directly with a United States insurance company; any overt attempt to do so would have courted retaliation by United States brokers withdrawing instructions to the broker for the placing of risks in the United Kingdom.

In the late seventies there was an important development. Changes in the statutes of Lloyd's permitted United States brokers to purchase controlling interests in Lloyd's brokers. The taxpayer feared that Bowrings might be acquired by a large United States broker and that, following the acquisition, other United States reinsurance brokers who dealt with Bowrings would place their treaty reinsurance through other brokers. The acquisition of Bowrings might in turn be followed by the acquisition of other Lloyd's brokers by United States brokers and the large United States brokers (some ten in number) might in time acquire a dominant position in the United Kingdom reinsurance market.

In 1977 the taxpayer and a colleague, Mr K W Copleston, left Bowrings and formed a United Kingdom company, R K Carvill & Co Ltd (Carvill UK) with a view to placing United States treaty reinsurance business in the United Kingdom on behalf of United States brokers displaced by the takeover of Bowrings and other Lloyd's brokers. Carvill UK commenced business on 1 March 1977. Shortly thereafter, on 25 July 1977, the taxpayer established another United Kingdom company, R K Carvill (Holdings) Ltd (Holdings) which acquired all the shares of Carvill UK in exchange for its own shares. Carvill UK became a Lloyd's broker in 1979. Carvill UK and Holdings made a slow start. The takeover of Bowrings by the United States brokers did not take place until 1980. In that year there was a dramatic improvement. The taxpayer obtained the California Hospital Association professional liability reinsurance business which generated $US 40m in premium income. To deal with this business, he established a company in Bermuda, R K Carvill (International) Ltd (International). It was acquired by Holdings in May 1980 and started to trade in June 1980. In December 1980 the taxpayer acquired 51% of the shares of International from Holdings. In a later application for retrospective clearance under s 482(1)(d) of the Income and Corporation Taxes Act 1970, the taxpayer claimed that International was formed with the intention that he, the individual mainly responsible for obtaining its United States business, should own 51% of the shares. The taxpayer entered into a contract of employment with International covering duties performed outside the United Kingdom. He was also employed by Carvill UK.

Thus, the position in early 1982 was that Holdings held all the shares in Carvill UK and 49% of the shares in International. The taxpayer held 51% of the shares in Holdings and 51% of the shares in International. The other 49% of the shares

of Holdings not held by the taxpayer were held by Mr Copleston and other directors and employees of Holdings and Carvill UK.

In January 1982 Neville Russell & Co, the taxpayer's accountants and the accountants and auditors of Holdings and Carvill UK, approached the inspector of taxes for a ruling that the taxpayer was not domiciled in the United Kingdom. A favourable ruling was obtained but not until 2 September 1982. The effect of the ruling was that the income of the taxpayer from a foreign source was liable to United Kingdom tax only if remitted here.

Shortly after the application had been made, a Mr K D Tuson became the taxation and financial adviser to the Carvill companies. He subsequently became the taxation and financial adviser to the taxpayer, though it is not clear precisely when. However, on 5 July 1982 there was a meeting of the board of directors of Holdings. The minutes record that it had been called 'to consider proposals for a revised group strategy to procure and service business in North America. A paper presented by Mr Tuson which suggested that a new international holding company should take control of the company was considered.' It was resolved that applications for clearance should be made under ss 464 and 482 of the Income and Corporation Taxes Act 1970 and s 88 of the Capital Gains Tax Act 1979. Clearances were subsequently applied for. The paper presented by Mr Tuson was not adduced in evidence before the Special Commissioner. It was said that it could not be found.

Application was made to Lloyd's on 2 August 1982 for approval to these changes, and clearances under the Income and Corporation Taxes Act 1970 and the Capital Gains Tax Act 1979 were sought on 9 September 1982. Consent from Lloyd's and the Treasury and the Revenue had all been received by 27 September, that is, some four weeks after the taxpayer's domicile in the Republic of Ireland had been accepted. A new company, R K Carvill (International Holdings) Ltd (International Holdings) was incorporated in Bermuda and the shares of Holdings were exchanged for its shares. The new structure was put in place towards the end of December 1982 and took effect on 1 January 1983. At this point, the taxpayer held 59% of the issued shares of International Holdings carrying 64% of the voting rights, he having acquired some additional shares of Holdings prior to 1982.

As part of the same reorganisation, a company called RKC (Personal Services) Ltd (Personal Services) was incorporated in Jersey. The taxpayer was the sole shareholder. On 29 December 1989 he entered into a contract with Personal Services to perform duties for that company in the United Kingdom, and Personal Services and Carvill UK entered into an agreement under which Personal Services agreed to second the taxpayer to work for Carvill UK. His contract with Carvill UK was amended so that he gave up his executive duties and received a director's fee only. He also ceased working for International. The run off of the business of International was handled by International Holdings, and in time International was wound up. Lastly, as part of the reorganisation International Holdings entered into a brokerage sharing agreement under which in broad terms International Holdings received one third of the commission attributable to contracts introduced or serviced by International Holdings, the other two thirds being retained by Carvill UK.

Shortly before the reorganisation, on 10 December 1982, the taxpayer had written to a Mr J F Sullivan, a retired United States reinsurance broker of experience and renown, asking whether he would accept office as a director of International Holdings. It is apparent from that letter that the possibility had been discussed between him and the taxpayer in October 1982. The letter records that the taxpayer intended to form International Holdings, and it goes on to say:

> 'I know that your knowledge and experience of the United States insurance market would be invaluable to us in establishing the new operation and I would

be very pleased if you would accept this offer of appointment as a director of the Company. This would not involve the acceptance of any executive responsibilities but we would welcome your general support, advice and assistance when required.' *a*

Mr Sullivan replied accepting this offer on 21 December 1982.

The main reason for the formation of a new holding company resident in Bermuda, as set out in the letters seeking clearance, was that the result of the strengthening of the association between United States and United Kingdom insurance brokers through takeovers, mergers and working relationships was that a *b* growing proportion of United States business was channelled through a United Kingdom associate and a smaller proportion of this business was available for independent United Kingdom brokers. It was said that in order to create opportunities for the growth of the group it would have to become more involved in the procurement of business in the United States but that—

'... given the existing connections which [the] Company has with United *c* States brokers and the severely detrimental effect which a precipitate breaking of those links would have on [the] Company's business, the Group cannot openly and directly establish a United States broking activity in competition with existing brokers.'

It was then explained that the proposal to overcome this problem while still *d* achieving the desired result was that—

'... International Holdings should be formed and located in Bermuda and should issue its shares in exchange for the existing shares in Holdings. From its base in Bermuda, International Holdings would then be able to procure the United States business for [the] Company without being seen to compete with *e* established United States brokers.'

The first step in implementing this strategy was the formation in February 1994 of another company, R K Carvill Inc (Carvill America) in the state of Delaware. It was formed as a subsidiary of Carvill UK, apparently to satisfy the United States regulator of insurance business. In December 1985 the shares were transferred to International Holdings. In December 1987 the shares were retransferred to *f* Holdings. The reason for the last of these changes was not explored. What is important is that the taxpayer recruited a Mr Koziol to run Carvill America. It is said that Mr Koziol was chosen to head Carvill America because, while he had wide insurance experience, he had no knowledge of and no profile in the reinsurance market.

In April 1985 he was joined by a Mr Striffler, a high profile figure in the United *g* States treaty reinsurance business. At that stage, in effect the cover was removed. The group lost business as a result of retaliation by United States brokers, but the loss of business was more than compensated by the new business procured in the United States.

Thus, 1985 was a turning point in the fortunes of the Carvill group. Until 1985 *h* the profits of the group had been largely concentrated in Holdings. It was a well-established and widely-applied practice where reinsurance business was placed with a Lloyd's broker for the commission to be split so that the United Kingdom broker received one third of the brokerage attributable to the risk placed in London and two-thirds remained with the United States broker introducing the business. As I have said, from the creation of the new structure at the end of 1982 *j* brokerage commission on business introduced by International Holdings was split in the reverse proportions. International Holdings received only one third of the commission on business introduced or serviced by it. In the case of Carvill America, with effect from 1 January 1986 it similarly received one third of

brokerage handled by Carvill UK in cases where no other United States intermediary broker was involved.

However, the profits of Holdings shown in its profit and loss account were modest. In the year to 31 December 1995 the profit was only £144,000. The reason for this modest profit on what was by then a very large turnover is to be found in a profit-sharing agreement under which substantially the whole of its profits were divided among the directors and other employees. The divisions were initially made in accordance with their relative shareholdings in Holdings, and later International Holdings and later still by the allocation of units. When it became clear that the profits largely earned through expansion into the United States market were likely to be very much increased this scheme was abandoned. The profit shares other than the taxpayer's share were capped at the level enjoyed in 1985, plus an allowance for future inflation and with adjustments to take account of new employees. The partial abandonment of profit-sharing could not be compensated by increased distribution of the profits of International Holdings, even though the employees held similar proportions of the shares of International Holdings. The reason is that Holdings would pay corporation tax (at the rate of 52%) on its profits and, as International Holdings was a non-United Kingdom company, on a subsequent distribution of profits to International Holdings, or by International Holdings to its shareholders, the shareholders would be liable to income tax at 60% and an investment surcharge of 15% but would not receive a tax credit.

The solution found was for International Holdings to buy out the minority shareholders leaving the taxpayer as the sole shareholder. The proposals were first put forward by Mr Tuson at a meeting of the directors of International Holdings on 16 July 1985. His report was not available to the Special Commissioner. Like the report laid before the meeting of the directors of Holdings on 5 July 1982, it is said to have been lost. In his oral evidence, Mr Tuson said that the report dealt with profit-sharing, the buying back of the shares and the change in name of International Holdings to R K Carvill (Reinsurance Brokers) Ltd (though it reverted to its old and present name in April 1987). The increase in the profits shown in the consolidated accounts of Holdings for the year to 31 December 1986 illustrate the dramatic change in the profits of the group and the effect of capping the profit-sharing arrangements. The operating profit was £4,884,000. The negotiations for the buy-out of the minority shareholders were protracted and not completed until a year after the profit-sharing had been capped. However, following the buy-out Holdings paid a dividend of £2,380,000 to International Holdings on 1 October 1987, and shortly thereafter substantially the whole of the dividend was distributed by International Holdings by way of dividend to the taxpayer. Thereafter, during each of the years of assessment 1988–89 to 1992–93 (both inclusive) subsequent profits were passed up by Holdings to International Holdings and distributed to the taxpayer.

Evidence of two expert witnesses was adduced by the Crown: a Professor Dickinson and a Mr Stoker. The Special Commissioner derived no assistance from the evidence of Professor Dickinson whom he found to have no relevant experience of North American treaty reinsurance. Mr Stoker is a man of wide experience in all fields of insurance. He worked for the Sedgwick group for over 30 years and towards the end of his career ran a group strategy and research and development unit. He is currently a self-employed consultant on strategic insurance and reinsurance issues. The Special Commissioner accepted his evidence in broad terms subject to certain comments to which it is unnecessary to refer at this stage.

The taxpayer gave oral evidence, as did Mr Koziol, Mr Copleston, Mr Tuson and a Mr Bailey (who had experience in the United States reinsurance market but whose evidence is not referred to by the Special Commissioner). The witness statements initially supplied by the taxpayer's solicitors did not include a statement

by Mr Tuson. I was told by Mr Moses QC, who appeared for the Crown, that he referred more than once in the course of his case to the absence of a witness statement by Mr Tuson. He was ultimately called.

I must now set out in some detail the conclusions of the Special Commissioner. Having pointed out that the exchange of shares of Holdings for shares of International Holdings was a transfer within the scope of s 739, and the contentions of Mr Thornhill QC, for the taxpayer that 'his client had proved that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer was effected', he continued (at pages 19–20 of the decision):

> 'I must make it clear from the outset that I do not accept all the oral testimony of Mr Carvill or Mr Tuson at face value. Mr Carvill's memory of events was to my mind somewhat selective and it is clear from the minute of the meeting of the directors of International Holdings held on 15 February 1984 that Mr Carvill does not always give a completely accurate rendition of the facts. At para 4 of the minutes of that meeting he is stated to have reported "that in November he had met Mr Donald E Koziol and had been most impressed with his knowledge of and connections with the United States reinsurance industry." He knew well that Mr Koziol had little knowledge of and no connections with the United States reinsurance industry. Those very facts were reasons for his employment to run Carvill America. In relation to Mr Tuson I do not find it credible that as taxation adviser he did not discuss the payment of dividends with Mr Carvill except on the one occasion when he was concerned about the returns available to shareholders other than Mr Carvill. In my judgment and on balance Mr Carvill has not discharged the burden of proof necessary for him to be able to rely upon the "escape clause" contained in s 741. The critical purpose for the establishment of International Holdings in Bermuda was [asserted] by Mr Carvill in cross-examination to be the recruitment from the United States of leading figures in the treaty reinsurance market, to assist the Carvill Group in establishing its own business in the United States. They were referred to as "big hitters". That purpose was not apparent from the clearance applications submitted by Mr Tuson in 1982 and did not make an appearance in negotiations between the Inland Revenue and Mr Carvill until 31 March 1992. It appears to have been very much an after-thought as a purpose for the establishment of International Holdings and I reject Mr Tuson's assertion that the reasons for the establishment of International Holdings were fully set out in the clearance applications and that the need to recruit "big hitters" was one of the methods by which International Holdings proposed to obtain business in the United States. His assertion does not accord with the evidence of Mr Carvill. But for the alleged necessity to establish a parent company in Bermuda in order to attract Mr Sullivan and others to serve on the board of International Holdings it is quite clear that International could have fulfilled all the tasks required of International Holdings.'

That passage contains the substance of his conclusions. He went on to find (at page 21 of the decision) that—

> '... Mr Tuson as taxation adviser devised the strategy whereby International Holdings was set up in Bermuda, a well known tax haven. It may well have been true that according to Mr Tuson's evidence Mr Carvill "wished to move his company to Bermuda" and that hearing of that wish Mr Tuson prepared the plan which he disclosed in the report which he presented on 5 July 1982, no copy of which now exists. But Mr Carvill's wish, if it existed, was not necessarily for purely commercial reasons.'

Having pointed out that the question of the taxpayer's domicile was raised not by the Revenue but by Neville Russell, he added (at page 21 of the decision)—

> '... I do not accept that it was mere coincidence as stated by Mr Carvill and Mr Tuson that the reorganisation which took place in 1982 occurred so soon after it was established that Mr Carvill was not domiciled in the United Kingdom.'

Having referred to the evidence that the reorganisation in 1986 followed a report by Mr Tuson, which was also not available, the Special Commissioner concluded (at pages 21–22 of the decision):

> 'The critical reason for the establishment of International Holdings according to Mr Carvill was the need to attract the "big hitters" who would only serve on a parent board and would not serve on a United Kingdom board or on an American subsidiary of a United Kingdom company. In my judgment the evidence does not support such a contention. Not one of the "big hitters" gave evidence before me and I attach little weight to Mr Koziol's evidence in relation to this matter as he was merely stating his belief. Mr Stoker's evidence, which I accept, is that senior American executives would be quite willing to serve on the board of a parent company in the United Kingdom and there is the notable fact that Mr Striffler, who was acknowledged to be a leading light in the North American treaty reinsurance market, was content to be employed by Carvill America which at that time was a subsidiary of Carvill UK. The coincidence of the chain of events leading to the declaration of the first dividend in 1987 is too strong to ignore even allowing for the rather long time scale. I cannot accept the submissions made on behalf of Mr Carvill in relation to s 741.'

The Special Commissioner held that the taxpayer had failed to show that the purpose of avoiding liability to taxation was not one of the purposes for which the share exchange was effected, and that he had failed to show that the transfer was a bona fide commercial transaction not designed for the purpose of avoiding liability to taxation.

Part II of the schedule to the notice of motion

I will start with the claim that the Special Commissioner should identify the oral or documentary evidence relied on by him for the findings of fact set out in part II of the schedule.

Paragraph 1

It was for the Special Commissioner to form his own view as to the reliability of Mr Stoker's evidence and the weight he should attach to it and for that purpose to evaluate the relevance of Mr Stoker's undoubtedly wide experience to the issues raised in the appeal, in particular whether the business conducted by International Holdings could have been conducted by Holdings or International. He cannot be asked to explain his reasons for accepting Mr Stoker's evidence and preferring it to other evidence.

Paragraph 2

This finding was wrongly attributed by the Special Commissioner to Mr Stoker. It is in fact a quotation from the evidence of Professor Dickinson on whose evidence the Special Commissioner did not rely. However, Mr Stoker did say that he doubted very much the proposition that Mr Sullivan would be more willing to serve a Bermudan rather than a United Kingdom company and said that other Americans seemed to be willing to work for United Kingdom companies. The Special Commissioner clearly had that in mind. It would be pointless to remit the

case stated to the Special Commissioner to comment on an obvious and understandable slip. Mr Moses made it clear that at the hearing of the appeal the Crown would make it clear that they would not rely on the quoted passage as being evidence given by Mr Stoker.

Paragraph 3

This finding is clearly an inference from the reference in the board minute of 5 July 1982 to a 'paper presented by Mr Tuson which suggested that a new International Holdings company should take control of the Company'. Further, the Special Commissioner clearly took the view that it was inconceivable that Mr Tuson as the tax adviser to the group and (whether then or later) to the taxpayer personally did not discuss with him the taxation consequences of the proposed change, in particular as regards the dividends paid by the new holding company. Whether or not he was justified in drawing that inference is a question that will have to be decided when the appeal is heard. To ask the Special Commissioner to say what advice was given and when is to my mind simply absurd. Only the taxpayer and Mr Tuson could have given that evidence, and of course they did not volunteer it.

Paragraph 4

Great stress was placed in argument before me on the difference between the need to attract 'big hitters' with contacts in and access to the United States reinsurance market and the desire to establish an international board on which 'big hitters' from the United States would be represented and which would formulate the policy of the group. It was that difference in the explanation of the need to recruit 'big hitters' on which the Special Commissioner found a divergence between the evidence of the taxpayer and Mr Tuson. Whether there is any material difference in their evidence on this point seems to me to be irrelevant to the central issue which the Special Commissioner had to decide. That issue was whether the need or desire to attract 'big hitters' was the reason for establishing a holding company in Bermuda rather than using the existing Holdings company or International, that is, whether they could not equally have served on the board of one of the latter companies.

Paragraph 5(a)

This finding is again an inference founded on the minute of 5 July 1982.

Paragraph 5(b)

As it stands, this sub-paragraph to my mind makes no sense. The primary evidence as to the taxpayer's motives or intentions was his own evidence. Mr Thornhill explained that the purpose of this sub-paragraph was to invite the Special Commissioner to make it clear whether he accepted that the taxpayer's wish to move his company to Bermuda was independent of any advice as to the tax consequences of doing so given by Mr Tuson. The Special Commissioner has already decided that the taxpayer's wish, if it existed, was not for purely commercial reasons and the Special Commissioner cannot now be asked to make further findings inconsistent with that finding.

Paragraph 6

This paragraph was not pursued by Mr Thornhill.

Paragraph 7

The Special Commissioner found that the evidence did not justify the conclusion that 'big hitters' would not serve on a United Kingdom board or on an American subsidiary of a United Kingdom company, and pointed to the notable

fact that Mr Striffler, a big hitter, in fact did so. That is all. He cannot now be asked to revise his finding or to make further findings inconsistent with it.

Paragraph 5 of the notice of motion

The issue which the Special Commissioner had to decide was whether the avoidance of taxation was one of the purposes for which the share exchange was effected and whether the transfer was 'designed' for the purpose of avoiding taxation. In deciding these questions in favour of the Crown, the Special Commissioner clearly had in mind as the 'coincidence in the chain of events' the application and favourable ruling upon the taxpayer's domicile and the consideration given to, and the implementation of, the reorganisation of the group as a group with a Bermudan holding company. It was no part of the Crown's case or the Special Commissioner's reasoning that the subsequent capping of the profit-sharing arrangement, the acquisition of the minority shareholding and the declaration of dividend by International Holdings were linked in the sense that they were preordained or contemplated when the reorganisation of the group took place in 1982.

Part I of the schedule

I turn next to consider paras 1 and 2 of the notice of motion and the numbered paragraphs of part I of the schedule.

Paragraph 1

The Special Commissioner accepted that the usual practice was for the commission to be split so that the broker placing reinsurance business on behalf of a United States broker took one third of the commission and that that practice was not followed as regards business placed by Holdings or Carvill UK on behalf of International or International Holdings. It is not relevant to his conclusion whether the usual practice was to record the split of brokerage in writing or not.

Paragraphs 2 and 3

These paragraphs are unnecessary elaborations of the facts summarised in the decision as to the taxpayer's reasons for setting up R K Carvill (UK) Ltd.

Paragraph 4

These sub-paragraphs are again an unnecessary elaboration of the facts found by the Special Commissioner. They are part of the background which can be elaborated if necessary at the hearing of the appeal by reference to documentary evidence.

Paragraph 5(a)

The point which it is sought to delete was clearly established by the evidence, and indeed was not in dispute. In any event, the deletion would not assist any tenable argument adduced by the taxpayer.

Paragraph 5(b)

It makes no difference when the clearance application was granted.

Paragraph 6

The new sub-paras 15A and B add nothing to the facts broadly summarised by the Special Commissioner as to the circumstances leading to the formation of R K Carvill (UK) Ltd and the decision to seek to do reinsurance business in the United States. Mr Thornhill accepted that the Special Commissioner could not be asked to add the last sentence to para 15D. If that sentence is deleted the new

sub-paragraphs do not add anything relevant to the question whether it was necessary for commercial reasons to establish a new holding company in Bermuda.

Paragraph 7

The only relevant sentence is the penultimate one. The relevant fact found by the Special Commissioner as a primary fact is that it was not credible that Mr Tuson did not discuss the payment of dividends with the taxpayer, and it is immaterial whether he was or was not the taxpayer's personal adviser at that time.

Paragraph 8

This paragraph amplifies the summary of the purpose and duration of the profit-sharing arrangements and the machinery adopted for ascertaining the shares of those entitled thereunder set out in paras 40 and 42 of the decision. The question whether this background compels the conclusion that tax avoidance was not one of the purposes of the share exchange, or part of the design of the new group, in that substantially the whole of the profit was distributed under these arrangements, can be argued at the hearing of the appeal. What the Special Commissioner cannot be asked to do is to say how far he took these factors into account in reaching his conclusion and what weight he thought should be attached to them.

Paragraph 9

The fiscal disadvantages of the payment of dividends to shareholders resident and domiciled in the United Kingdom can if necessary be elaborated at the hearing.

Paragraph 10

These amendments can fairly be described as 'nit-picking'.

Paragraph 11

The fact that the clearances have never been revoked is irrelevant. It was for the Special Commissioner to say whether the facts shown in the applications were accurate and complete. He found that the reasons for the establishment of International Holdings were not fully set out in the applications.

Paragraph 12

This again is part of the background. The fact that the pool of profits was concentrated in the United Kingdom initially by the limitation of the share of International Holdings to one third of the brokerage commission (and later to 110% of the costs incurred by it), and that the pool of profits in Holdings was the subject of the profit-sharing arrangement, was accepted by the Special Commissioner.

Paragraph 13

The purpose of seeking this finding is to establish that persons who had achieved prominence in United States reinsurance broking and insurance—the 'big hitters'—were wanted on the board of International Holdings, both because of the role they would play in introducing business and because they would assist in formulating the group strategy of penetrating the United States market. It does not bear on the question what the Special Commissioner regarded as the crucial issue, whether big hitters would have served on the board of Holdings or International and, accordingly, whether it was necessary to form a holding company in Bermuda for the purpose of securing their services.

Paragraphs 14–16

In so far as these paragraphs are directed to showing that International Holdings succeeded in obtaining the services of big hitters in the United States reinsurance field and penetrating the United States market, and that these big hitters contributed to the formulation of the strategy pursued by the group, they add nothing of substance to the facts found by the Special Commissioner or which can be ascertained from the documentary evidence. They do not bear on the central question whether these results would have been achieved without forming a holding company for the group in Bermuda.

Paragraph 17

The Special Commissioner did not accept that Mr Koziol's belief that Mr Sullivan would not have joined the United Kingdom board of 'Carvills' or of any subsidiary of 'Carvills', and that others would have been uncomfortable at being on the United Kingdom board of 'Carvills' was well founded. He cannot be asked to review that finding and there can be no other purpose in elaborating Mr Koziol's evidence.

Paragraph 18

There was no evidence to support the alleged 'policy'. More importantly, the existence or otherwise of the alleged policy is irrelevant to any issue in the case stated.

Paragraph 19

There is no dispute as to the history of the capping of the profit-sharing arrangement and the subsequent acquisition of the shares of the minority shareholders. The question whether this history compels the conclusion that the avoidance of tax could not have been one of the purposes, or part of the design of the 1982 reorganisation, is a question to be determined at the hearing of the appeal.

Paragraphs 20–21

The only relevance of the history of Carvill America and the reason for incorporating it as a subsidiary of Holdings, and the way in which it was presented to insurers in the United States, is to support the claim that to penetrate the United States market Carvill America had to be held out as a subsidiary of a Bermudan holding company, at least after the pretence that Carvill America had been established only to service and place risks in relation to the existing business of the Carvill Group had been abandoned. The Special Commissioner did not accept that the commercial strategy could not have been pursued without the formation of a Bermudan holding company, and he cannot be asked to review that fundamental finding.

Paragraph 22

I have already dealt with the evidence as to Mr Striffler's willingness to accept employment by a United States subsidiary of a United Kingdom company in para 7 of part II to the schedule to the Notice of Motion. The Special Commissioner cannot be asked to make a finding as to the 'sincerity' of Mr Koziol's beliefs.

Paragraph 23

If it is necessary to refer to the effect of the emergence of Carvill America as a broker it can be gleaned from the documentary evidence, including the accounts of the companies, and the undisputed oral evidence.

Paragraphs 24–25

These paragraphs do no more than elaborate the background to the capping of the profit-sharing arrangement.

Paragraph 26(a)

This is a minor and obvious slip.

Paragraph 26(b)

It is not in dispute that the success of the penetration of the United States market and the large profits made in 1985 and 1986 could not have been predicted with any confidence in 1982, and I can see no other relevance in this paragraph.

Paragraph 27

The status of Bermuda as a market for third-party reinsurance and the willingness of United States insurance companies to accept business direct from a Bermudan broker was dealt with in the evidence of Mr Stoker and Mr Bailey, who was one of the witnesses who gave evidence on behalf of the taxpayer. The Special Commissioner accepted Mr Stoker's evidence. I can see no purpose in a proposed new paragraph at page 17G, or the new paragraph which it is sought to introduce in paras 29–32 of part II, except to undermine Mr Stoker's evidence, notwithstanding its acceptance by the Special Commissioner with the qualifications explained by him.

Paragraph 28

The omission of 'not' is a patent slip.

Paragraph 33

The Special Commissioner clearly did not accept Mr Bailey's view that Mr Sullivan would not have been willing to become a director of Holdings.

Paragraph 34

The reference to 31 March 1992 is a reference to a meeting between the taxpayer and his advisers and representatives of the Revenue when the taxpayer advanced for the first time the claim that it was necessary to establish a holding company in Bermuda in order to attract big hitters—a claim which notably was not included in the clearance letters. It seems to me that the proposed new paragraphs add nothing to that history.

Paragraph 35

The Special Commissioner did not accept that this belief was well founded, whether or not it was entertained by the taxpayer and Mr Bailey.

Paragraph 4 of the notice of motion

It is the case that the taxpayer was not asked any questions at any stage in his evidence relating to the reference in the minute of 15 February 1984 to Mr Koziol's knowledge of and connection with the United States reinsurance market. It was no part of the Crown's case at the hearing before the Special Commissioner that the statement in the minute that the taxpayer had met Mr Koziol and had been impressed by his knowledge of and connections with the United States reinsurance market showed that he was an unreliable witness. It seems to me that the Crown's position on this point having been recorded in this judgment, it is now unnecessary to remit it to the Special Commissioner in order to have that fact formally recorded in an amendment to the case stated or in a supplemental case stated.

In my judgment, therefore, this application fails in totality. I should add that in my judgment the application goes far beyond the proper invocation of the

jurisdiction of the court to remit a case stated to clarify obscure or ambiguous findings, or to make further findings which are necessary for the proper disposal of an appeal.

a In the event, the review of the case stated and of much of the supporting evidence has been as extensive and as time-consuming as is likely to be called for on the hearing of the appeal. In my judgment, nothing has been achieved by it.

Application dismissed with costs. Leave to appeal granted.

b Susan J Murphy Barrister.

Annex

IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION CH. 1995. C. No. 2262.

c

IN THE MATTER OF A CASE STATED DATED 11TH APRIL 1995

— and —

IN THE MATTER OF THE TAXES MANAGEMENT ACT 1970

d BETWEEN:

RORY KERR CARVILL

Appellant.

- and -

e

THE COMMISSIONERS OF INLAND REVENUE

Respondent.

REAMENDED
NOTICE OF MOTION

f TAKE NOTICE that this Honourable Court will be moved before the Honourable Mr Justice on the day of 1995 at o'clock in the noon or so soon thereafter as Counsel can be heard by Counsel for the above named Appellant for an order that the Case Stated should be remitted to the Special Commissioner with a direction that:

g 1. The Special Commissioner should consider whether or not all or any (and if some only then which) of the facts set out in Part I of the Schedule to this motion were wholly or to any extent established by the evidence; and

2. By way of amendment or addition to the Case Stated the Special Commissioner should:

h (i) make further findings in relation to such (if any) of the said facts as were wholly or to some extent established by the evidence, such further findings to be either in the terms appearing in Part I to the Schedule hereto or in such modified or other terms as the Special Commissioner may consider appropriate; and

(ii) state which (if any) of the said facts the Special Commissioner does not *j* consider to have been established by the evidence.

3. The Special Commissioner should identify with proper particularity the oral or documentary evidence relied upon by him for the findings of fact set out in Part II to the Schedule.

4. The Special Commissioner should find as a fact whether the Appellant was at any time during the course of giving evidence asked to comment on the alleged discrepancy in the evidence he gave concerning Mr Koziol's experience of Treaty Reinsurance prior to joining the Carvill Group and the account that the Appellant is recorded as giving by the Minutes of the Meeting of the Board of R. K. Carvill (International Holdings) Limited on the 15th February 1984.
5. The Special Commissioner should state:

(i) what events were comprised within 'the chain of events leading to the declaration of the first dividend in 1987' (as found at page 22 of the Decision (see p 135 *d*, ante);
(ii) what inference (if any) did he deduce from such coincidence.

AND that the costs of this application shall be the Appellant's costs in any event.

Dated the 11th day of July 1995.
Slaughter and May,
35, Basinghall Street,
London, EC2V SDB.
Ref: BDK. Tel: 0171 600 1200.
Solicitors for the Appellant.

To the Respondent and to the Inland Revenue, Solicitor's Office, Somerset House, London, WC2R 1LB, ref: SLR49375/FJN: tel: 0171 438 7075.

THE SCHEDULE

PART I

Unless otherwise indicated, references to page and paragraph numbers are references to the equivalent pages and paragraphs of the Special Commissioner's Decision [not annexed hereto].

1. *Page 4, paragraph 5*

Additional sentence to be inserted at the end of this paragraph [which stated: "There existed a well-established and widely applied practice to split brokerage commissions so that the United Kingdom broker received only one third of the brokerage attributable to that part of the risk placed in London. The remaining two thirds was paid to the United States broker."]:

'This practice was so well-established that it was not the custom in the industry to record the split of brokerage unless, exceptionally, it differed from these proportions.'

2. *Page 5, paragraph 10*

Delete the last sentence of this paragraph [which stated: 'After the change in the Lloyd's statutes permitting United States brokers to purchase controlling interests in Lloyd's brokers, Mr Carvill perceived that many Lloyd's brokers would be swallowed up by American Brokers and from the time of such takeovers such United Kingdom subsidiaries would be deprived of much of their freedom of action. In the words of Mr Carvill, their opportunity to be "creative" would suffer.'] and substitute the following:

'As a Lloyd's broker, Mr Carvill saw his role as being a manufacturer's representative for Lloyd's and not what he described as being "a messenger boy for US brokers". If the UK broker was put in a position of having to take instructions from his US parent broker as to what risks to place, the UK broker would lose his opportunity for being creative.'

3. *Page 6, paragraph 13*

As an additional sentence at the end of this paragraph [which stated: 'Initially Mr Carvill's new venture was far from successful. The threatened take-over of C T Bowring by Marsh & McLennan did not take place until 1980 and Carvill UK did not become a Lloyd's broker until 1979.']:

'Until the takeover did take place, other US brokers were unwilling to break their existing relationships with C T Bowring.'

4. *New paragraphs 13A–C*

To be inserted before paragraph 14 of the Decision:

'13A. When CT Bowring was taken over in 1980, other US brokers began to move business away from Bowrings. Some of this business was referred to Carvill UK. In particular, Mr Gerry Sullivan of GJ Sullivan & Co decided that he had to move the California Hospitals Association account ("CHA"). Marsh McLennan (through its subsidiary Guy Carpenter) had been seeking to take that account away from GJ Sullivan for many years.'

'13B. The CHA account was one of the largest risks placed in the Lloyd's market with a history of claims' handling work for the reinsurance broker lasting up to 25 years. Because the brokerage was so large compared with Carvill UK's paid up capital, in order to obtain the business, Carvill UK had to reassure Mr Sullivan and the Lloyd's Underwriters that the brokerage due on the risk placed in the first year would be available to meet the cost of servicing claims made in later years and would not have been paid out by way of staff bonus.'

'13C. Accordingly, in May 1980, Holdings acquired the issued share capital of International (formerly a dormant company called Chalkhill Intermediaries Limited). International was a company incorporated in Bermuda. International was retained as UK broker on the CHA account and retained Carvill UK to place the risk in the Lloyd's market. International paid Carvill UK an annual fee equal to 10% of the brokerage paid to International. This arrangement was followed by International until 1985 when International's business was transferred to International Holdings and the arrangement was thereafter followed by International Holdings.'

5. (a) Delete the first part of paragraph 14 [which stated: 'In 1980 Mr Carvill's fortunes improved markedly. Using the contacts which he had acquired in America he succeeded in obtaining the California Hospital Association's professional liability business which generated about $US 40m in premium volume. To handle that account he established another company, namely RK Carvill (International) Ltd ("International"), a company incorporated in Bermuda. The share capital of International (formerly a dormant company called Chalkhill Intermediaries Ltd) was acquired by Holdings in May 1980. Two years later Carvill UK stated to the Revenue in a retrospective clearance application pursuant to s 482 (1)(d) of the Income and Corporation Taxes Act 1970: "International ... was acquired by Holdings ... with a view to its commencing business as a reinsurance broker in producing business emanating from the United States to [Carvill UK] (a wholly owned subsidiary of Holdings) to be placed on the London Insurance market. At the outset it was intended that Holdings should retain 49% and Mr Carvill as the individual mainly responsible for obtaining the business in the United States on behalf of International should personally own 51%. However, as a matter of convenience, the whole issued share capital of International was initially acquired by Holdings and the 51% shareholding was not formally transferred to Mr Carvill until International commenced in business."'] down to and including the sentence ending 'was acquired by Holdings in May 1980'.

(b) Insert the following sentence after the quoted extract from the section 482 clearance application:

'This clearance application was drafted by K Tuson shortly after he started working for the Carvill Group in April 1982.'

6. *New paragraphs 15A–D*

To be inserted after paragraph 15 of the Decision [which stated: 'International commenced trading as a reinsurance broker in June 1980 and in December of that year Mr Carvill acquired 51% of the shares of International from Holdings.']:

'15A. Between 1980 and 1982, the vast majority of Carvill UK's business was placing US Treaty Reinsurance risks in the Lloyd's market on behalf of seven out of the top leading US reinsurance brokers. All these brokers were possible candidates for acquiring or being acquired by UK brokers. The acquisition of Bowrings by Marsh McLennan was followed by the acquisition by Frank B Hall (a US broker) of Leslie & Godwin plc (a UK broker) in 1981, the acquisition by Alexander & Alexander (a US broker) of Alexander Howden (a UK Broker) in 1982, and the merger between Minets (a UK broker) and St Paul's (a US broker) in 1982. The management of the Carvill Group was concerned that, if this trend continued, the source of their business would ultimately "dry up". They were regularly being approached by other US brokers to see if they were interested in forming part of the larger group. Such approaches were not taken up because the Carvill Group wished to preserve its independence.'

'15B. Mr Carvill, Mr Copleston and other members of the Carvill Group management considered what course to take over approximately twelve months. In order to remain independent in the long term, the Carvill Group needed to develop its own capacity to generate business in the US (i e direct instructions from US reinsureds). At the same time the management of Carvill Group was concerned that its attempts to develop a US production capacity would not obtain any new business but would simultaneously alienate its existing US broker clients, thus doing serious damage to its existing business.'

'15C. Mr Carvill knew that any attempt to develop a production capacity in the US could not be overt since his existing US broker clients would react adversely to the Carvill Group setting up in direct competition to them and were likely, where possible, to move their existing business away from Carvill UK.'

'15D. Mr Carvill realised that if any Carvill company were to develop a production capacity in the US, the services of well connected and influential American brokers dealing with Treaty Reinsurance would be needed in order to effect introductions and identify sources of Business. Furthermore, the Carvill company would ultimately have to establish a greater presence in the US to follow up and develop the initial introductions. Consequently, it was always intended that control and management of International Holdings should be exercised through directors and other employees meeting and working in Bermuda and the United States.'

7. *Page 7, paragraph 16*

Amend paragraph 16 [which stated: 'Until early 1982 the taxation advisers to Mr Carvill and his companies were Neville Russell, chartered accountants. In April 1982 Mr Keith David Tuson, an unqualified taxation and financial consultant became taxation adviser initially to the Carvill group and

subsequently to Mr Carvill personally. Neville Russell remained as auditors to the United Kingdom companies.'] so that it should read as follows:

'Until April 1982, the taxation advisers to the Carvill Group were Messrs Neville Russell, Chartered Accountants. In April 1982, Mr Keith David Tuson, an unqualified taxation and financial consultant, became taxation adviser to the Carvill Group. Messrs Neville Russell continued as personal tax advisers to Mr Carvill until about October 1982 when Mr Tuson took over. Messrs Neville Russell remained auditors to the United Kingdom companies.'

8. *Page 8, paragraph 19*

Amend and supplement paragraph 19 [which stated 'Until 1986 no Carvill company paid a dividend. Profits were distributed as salaries and bonuses on a profit-sharing basis.'] so that it reads as follows:

'Until 1987 no Carvill company paid a dividend. Since it had commenced in business, it had been the established policy of Carvill UK and Holdings to pay out any surpluses by way of bonuses on a profit sharing basis. Carvill UK used to retain an amount equal to a return of 30–35% on the capital employed in the business (which was not great) or a return in excess of the capital requirements of the business. The major part of any surplus was divided between staff in accordance with the number of profit sharing units held by them. Initially, participating staff were issued with ordinary shares in Holdings to represent their profit sharing entitlement. Subsequently, non-voting shares were issued and ultimately profit sharing units were issued to such staff. The majority of profit sharing units were held by senior personnel. This policy of distributing the whole of the surplus income without limit continued without any fundamental change until the beginning of the accounting period for the year to 31st December 1986. For the year ending 1st December 1986 and subsequent accounting periods a limit was imposed on the maximum amount of bonus payable in respect of any unit of profit share. This "cap" was set above the level of bonus which had been paid per unit for the 1985 accounting period.'

9. *New paragraph 19A*

To be inserted after paragraph 19:

'19A. At the time of the Share for Share Exchange there was no expectation that Holdings would pay a dividend to International Holdings. Prior to the Share for Share Exchange, Mr Tuson raised with Mr Chalkin and Mr Carvill the adverse tax consequences for the other UK resident and domiciled shareholders in International Holdings if Holdings were ever to pay a dividend which International Holdings in turn paid on by way of a dividend to its shareholders. In particular, such shareholders would have been charged to tax on the full amount of the dividend declared by International Holdings without the benefit of any tax credit on account of the ACT paid by Holdings on the dividend from Holdings. International Holdings would not have been able to recover the ACT. In 1983, the top marginal rate of income tax was 60% and the investment income surcharge of 15% would have applied to the dividends received from International Holdings. Mr Carvill dismissed Mr Tuson's concerns on the grounds that it was not the policy to pay dividends.'

10. *Page 8, paragraph 20*

(a) Add the word 'who' before the word 'was' on the first line of paragraph 20 [which stated 'On 5 July 1982 a meeting of the directors of Holdings took place. Mr Bassett (was also a director of Carvill UK) was in the chair and Mr Chalkin, the financial director of Carvill UK was present as secretary. Mr Carvill, Mr Copleston and Mr Tuson were in attendance with Mr Kirby,

another director of Carvill UK. The minute for that meeting reads as follows: "The Meeting had been called to consider proposals for a revised group structure to improve the ability of the group to procure and service business in North America. A paper presented by Mr Tuson which suggested that a new International Holding company should take control of the Company was considered. RESOLVED that applications should be made for consents under Sections 464 and 482 of the Income and Corporation Taxes Act 1970 and under Section 88 of the Capital Gains Tax Act 1979 for the proposed transactions and that subject to those applications the company should seek to become a UK holding company with an international grouping. There being no further business the meeting closed."'];

(b) Amend the fourth sentence so as to read:

'The decision of the Board, as minuted, was as follows:'

11. *Page 11, paragraph 25*

Insert the following additional sentence at the end of paragraph 25 [which stated: 'On 23 September 1982 the Treasury gave consent pursuant to s 482 of the 1970 Act. On 27 September 1982 the Revenue gave clearance pursuant to s 464 of the 1970 Act, "on the understanding that the consideration shares in International will not be redeemable shares". The clearance also stated that the notification did not extend "to any repayment (in a winding up or otherwise) of the consideration shares to be issued, or of any share premium account thereby created by International. On 30 September 1982 the Revenue gave clearance pursuant to s 88 of the Capital Gains Tax Act 1979, "on the strict understanding that there is no present intention on the part of International Holdings to dispose of any of the shares acquired in Holdings."']:

'None of these clearances has subsequently been revoked. The Inland Revenue Special Office accepted, at a meeting of 5th May 1993, that the clearance applications were full and sufficient for their statutory purposes.'

12. *Page 13, After paragraph 31, new paragraph 31A*

Insert the following paragraph after paragraph 31 of the Decision [which stated: 'Also as part of the reorganisation, with effect from 1 January 1983 International Holdings and Carvill UK entered into a brokerage sharing agreement under which, broadly, International Holdings received one third of brokerage attributable to contracts produced or serviced by International Holdings.']:

'In March 1985, Mr Peter Kirby, a director of Carvill UK requested the Board of International Holdings to restrict the amount of brokerage on business introduced by International Holdings to 110% of the costs incurred by International Holdings in carrying out its obligations under the Agreement. This limit would ensure that the pool of profits available to be distributed by way of bonus to the staff of Carvill UK would not be restricted. At its Board Meeting of 15th April 1985, the Board of International Holdings agreed to this limit since it was not International Holdings' intention to earn a substantial profit from its activities to the detriment of the profit available to the placers of business in the UK and the US. Under the second Brokerage Agreement dated 22nd July 1985 International Holdings' entitlement was limited to 110% of the costs incurred by it in performing its obligations under the Agreement. The percentage of brokerage to which Carvill UK became entitled was much greater than it would have been entitled to if the equivalent business had been introduced by one of its existing US broker clients.'

13. *Page 14, paragraph 33*

At the end of paragraph 33 [which stated: 'In order to foster contacts with US insurance companies Mr Carvill needed the services of well-connected and influential US treaty reinsurance brokers to effect introductions and identify sources of business. The pool of suitable candidates was very small but having obtained the services of Mr Jack Sullivan, Mr Carvill was also successful in obtaining the services of others, most of whom eventually became employees or directors of International Holdings.'] insert the following additional finding:

'All these persons had achieved prominence either in US reinsurance broking or in US insurance. All played a valuable role in introducing certain accounts and, in the case of the directors, used their extensive knowledge and experience to formulate the Group strategy for penetrating the US market.'

14. *New paragraph 33A*

'33A. The business function of International Holdings was to act as the international holding company of the Carvill Group whilst seeking to procure and service reinsurance business in North America. International Holdings, in its first year of operation, engaged three American citizens, Mr Jack Sullivan as a non-executive director (from 1st January 1983), Mr M J Wybar as an executive insurance producer (from 23rd May 1983) and Mr Tom Welstead as a non-executive director (from 27th September 1983). All three played important roles in effecting introductions and obtaining business for the Carvill Group. Mr Jack Sullivan played the most important role since his knowledge and contacts within the US reinsurance market were the most extensive and his reputation gave an instant credibility to the Carvill Group's efforts to secure more direct business in the US. Mr Sullivan received considerable sums of remuneration for these efforts (e.g. $200,000 for the 1983 accounting period).'

15. *New paragraphs 33B and C*

'33B. Between January 1983 and February 1984, International Holdings, principally through the efforts of Mr Sullivan, Mr Welstead and Mr Wybar along with Mr Carvill, who was also a director and employee of International Holdings, sought to carry on the twin functions of procuring new business and placing and serving existing business in the US. Following the commencement of business of RK. Carvill Inc ("Carvill America"), the functions of placing insurance risks in the US and servicing existing clients were allocated to Carvill America.'

'33C. International Holdings, through its Board of Directors, continued to set the strategy and monitor the progress of the Carvill Group's efforts to develop its own production capacity in the US. Even though Carvill America had at various times been a directly owned subsidiary of Carvill UK, operationally, the two businesses were always managed as sister companies with the management of each company reporting directly to the Board of International Holdings.'

16. *New paragraph 33D*

'33D. From 1983 onwards, Mr Carvill spent a very substantial proportion of his time working on the business of International Holdings outside the United Kingdom. He received substantial remuneration for these services, the cost of which was borne exclusively by International Holdings. International Holdings also bore the substantial cost of Mr Carvill's services being made available to Carvill UK for the work in the United Kingdom. International Holdings also discharged the cost of Carvill UK's obligations under its

brokerage sharing agreement with Carvill America. Under its brokerage sharing agreement with Carvill America, Carvill UK was obliged to pay brokerage equal to 110% of Carvill America's costs.'

17. *Page 14, paragraph 34*
Insert the following additional findings at the end of paragraph 34 [which stated 'In February 1994 a company called R K Carvill Inc., which subsequently became Carvill America was incorporated in Delaware and began trading from a small office near Chicago, initially as an office servicing the Carvill Group. Mr Carvill recruited Mr Donald P Koziol Junior to run Carvill America. Mr Koziol was chosen as a man with wide insurance experience who had recently been made redundant. He had no experience or knowledge of the reinsurance market or of its personalities.']:

'Mr Koziol had known Mr Jack Sullivan before Mr Koziol was retained as a consultant to International Holdings. Mr Sullivan had helped find a buyer for MGIC, Mr Koziol's former employers. Mr Koziol believed that Mr Jack Sullivan would not have been interested in joining the UK Board of Carvills nor would he have been interested in joining the Board of any subsidiary company. Mr Koziol also believed that people like Mr Hearn, a former president of GL Hodson & Co, would have been uncomfortable being on the UK Board of Carvill.'

18. *Page 15, paragraph 36*
Insert the following sentence at the end of the first sentence of paragraph 36 [which stated: 'Prior to 1986, Mr Carvill owned 276,000 of the 400,000 voting shares issued by International Holdings, having purchased Mr Bassett's shares when he left the group in July 1985, leaving Mr Carvill with approximately 69% of the voting shares in International Holdings. The remainder of the voting shares and 31,800 non-voting shares were held by employees of the group. At the end of 1986 International Holdings bought back from all shareholders other than Mr Carvill their shares in the company leaving Mr Carvill as 100% shareholder in International Holdings.']:

'It was the policy both before and after the creation of International Holdings for Mr Carvill to purchase the shares of any departing employee of the Carvill Group.'

19. *Page 15, paragraph 36*
Insert the following additional findings at the end of paragraph 36:

'When it was proposed in late 1985 that the minority shareholders in International Holdings should be bought out, the minority shareholders initially refused to be bought out since they were concerned about their position in the event of Mr Carvill's death or the sale of the Carvill Group. The agreement for the repurchase by International Holdings of these shares was finally reached at the end of 1986 after the concerns of minority shareholders had been allayed by the proposed creation of an employee trust and various alterations to Mr Carvill's Will.'

20. *Page 15, paragraph 37*
Amend the first sentence of paragraph 37 [which stated: 'Initially Carvill America was incorporated as a subsidiary of Carvill UK but on 31 December 1985 Carvill UK transferred its shares in Carvill America to International Holdings (which was for a short time between 1985 and 1987 called R K Carvill (Reinsurance Brokers) Ltd). Consent to the transfer pursuant to s 482(1)(d) of the 1970 Act had been applied for in March 1985. It was stated

that the consideration for the transfer was the sum of £1,037,072.'] so as to read as follows:

'Initially Carvill America was incorporated as a subsidiary of Carvill UK. This was in order to minimise difficulties which might arise under Regulation 98 of the New York Insurance Department Regulations. It was always the intention that Carvill America should become a directly owned subsidiary of International Holdings. On 31st December 1985 Carvill UK transferred its shares in Carvill America to International Holdings (which was for a short time between 1985 and 1987 called RK. Carvill (Reinsurance Brokers) Limited).'

21. *New paragraphs 37A–C*

'37A. The decision to set up an office in America was taken after much consideration and some hesitation. Mr Carvill asked for reports from other senior personnel within the Carvill Group concerning the likely consequences of setting up an office in America. In November 1983, International Holdings commissioned Mr Koziol to prepare a report on the feasibility of setting an office up in America. Many of the senior personnel within the Carvill Group were nervous that setting up in America would alienate existing clients without obtaining new business. Even when the decision to set up an office near Chicago through Carvill America was taken, the prospects of success for the US office were very uncertain since it was not known how the office would be received by other US brokers.'

'37B. Initially the business function of the US office was to act as a defensive mechanism in case US brokers who had recently or might in the future form links with other UK brokers sought to remove business from Carvill UK in favour of their London affiliates. By having a capacity to service and place risks in the US, the Carvill Group would be able to compete directly with the US broker. The possibility of such competition would make it less likely that the US brokers would seek to move away existing business from the Carvill Group. The establishment of the US office was held out to other US brokers purely as a means of servicing and placing risks in relation to existing business. Some US brokers had received news of the establishment of the US office with some suspicion. Mr Koziol had attended a conference of US reinsurance brokers shortly after the establishment of the US office. His reception from some US reinsurance brokers had been somewhat cool and he had been made to feel almost as if he were being a traitor by working for a foreign broker.'

'37C. The US office was established and started to consolidate its links with American insurance companies without leading to a precipitate withdrawal of business from other US brokers. In Mr Koziol's opinion this was because although the US office was perceived by some brokers as a potential threat it was not perceived nor could it be represented as a sufficient threat to justify moving existing accounts away from the Carvill Group. Mr Koziol believed that the fact that Carvill America was held out as a subsidiary of a Bermudan holding company, that the US office was held out as a servicing and placing operation and that he had no established reputation in reinsurance broking all contributed to reducing the perceived threat.'

22. *Page 15, paragraph 38*

At the end of the last sentence of paragraph 38 [which stated: 'At a board meeting of International Holdings held on 15 April 1985 Mr Carvill reported that Mr R Striffler of John F Sullivan and Co., had accepted an invitation of

employment with Carvill America. Mr Striffler was a high profile figure in the North American treaty reinsurance market.'] insert the following findings:

'Mr Striffler would not have joined Carvill America if it was to be operated as a subsidiary of a UK broker. Mr Striffler had previously worked for a US broker and in consequence was used to giving orders to UK brokers and would not have wished to have received instructions from a parent board dominated by UK brokers. It was important to the recruitment of a person like Mr Striffler that at an operational level Carvill UK and Carvill America were treated as sister companies reporting to the Board of International Holdings on which both US and UK brokers were represented.'

Alternatively, if the Special Commissioner does not accept that the above findings were proved, the Special Commissioner should make a finding as to the sincerity or otherwise of Mr Koziol's stated belief that the additional findings set out above were true.

23. *New paragraph 38A*

'38A. Following the recruitment of Mr Striffler, Carvill America was perceived to be in a position of outright competition with other US brokers. In the ensuing turmoil the Carvill Group lost a substantial number of accounts as US brokers took this opportunity either to move the accounts to their UK affiliates or to other non-UK brokers who were not direct competitors. However, Carvill America was able to secure a certain number of substantial accounts directly. The increased percentage of brokerage on these accounts more than compensated for the loss of brokerage on the other accounts.'

24. *New paragraph 38B*

'38B. International Holdings and Carvill America proved to be much more successful in procuring direct business than was anticipated at the time of the Share for Share Exchange in December 1982. Because of the favourable split of brokerage under the Brokerage Sharing Agreements, the turnover of Carvill UK increased rapidly between the accounting period ending December 31st 1983 and the accounting period ending December 31st 1985. The increases in brokerage greatly exceeded the amounts budgeted for. The increases in both brokerage and other investment income of Carvill UK as disclosed by its audited accounts are summarised in Schedule 3 to this Case.'

25. *New paragraph 38C*

'38C. The substantial increase in the turnover of Carvill UK coupled with the continued policy of distributing almost the entirety of any profit by way of staff bonuses meant that senior personnel within the Carvill Group enjoyed very substantial increases in bonus payments. Since their level of participation was determined by the number of profit sharing units held by them, these increases in bonuses were not necessarily attributable to any special effort on their part but merely reflected an increase in the goodwill of the Carvill Group. Mr Carvill decided that the existing pattern of profit sharing was no longer the most suitable to facilitate the future expansion of the Group and asked Mr Tuson to advise upon the suggested alternatives.'

26. *Paragraph 41*

(a) Substitute the reference [in para 41 which stated: 'The operating profit of Holdings in the consolidated profit and loss account for the year ended 31 December 1985 was £144,000. The comparable figure for 1986 was £4,884,000. A copy of the consolidated profit and loss account for Holdings for 1986 is annexed to this decision as annex 2.'] to the year ended 31st December 1985 for the reference to the year ended December 31st 1986.

(b) Insert the following additional findings after the end of the second sentence in paragraph 41:

'The operating profit for the 1986 period was the result of the capping of the profit share per unit. However, it was not anticipated that this cap would produce a substantial operating profit. The operating profit arose because of another substantial increase in turnover between the 1985 and 1986 accounting periods.'

27. *Page 17G*
After the sentence ending 'contraction in the market in 1986' [which was set out after the sentences: 'In broad terms I accept the evidence of Mr Stoker subject to the following comments which emerged during his oral evidence, in relation to the numbered paragraphs of his report: 1. Today, Bermuda is a very international and quite substantial market for reinsurance business. There was a contraction in the market in 1986.'] insert the following additional findings:

'In the late 1970s/early 1980s Bermuda was a growing market for third party reinsurance. Certain Bermuda captive reinsurance companies were writing third party reinsurance mainly for US tax reasons. However, other companies, such as Inscon (which was managed by Mr Leslie Dew, a former Deputy Chairman of Lloyd's) were writing third party reinsurance business for wholly commercial reasons. The overall effect was that there was a substantial capacity for accepting third party reinsurance risks in Bermuda at favourable rates. In 1983, the Carvill Group was able to place 20% of the CHA contract with reinsurers in Bermuda. Bermuda was not regarded as being the exclusive territory of either US brokers or UK brokers. Unlike the position of a UK broker, the US insurance companies were prepared to accept business directly from a Bermudan broker. US insurance companies were also prepared to instruct Bermudan brokers to place reinsurance on their behalf.'

28. *Page 18.2*
In the sentence 'many contracts did not change hands as a result of takeover of London brokers by American firms' [the second comment by the commissioner on Mr Stoker's evidence] delete the word 'not'.

29. *Page 18.3*
After the sentence ending '... (including Sedgwicks) had American subsidiaries' [which was set out in the commissioner's third comment on Mr Stoker's evidence: '3. The Carvill Group did remarkably well in its penetration of the American market but it was not alone. Other London brokers (including Sedgwicks) had American subsidiaries. It was necessary for all United Kingdom brokers to tread very carefully when operating in the United States but some did so with success.'] insert the following additional findings:

'However, Sedgwicks were not in a comparable position to Carvill UK because of their much greater size and because ultimately Sedgwicks purchased an existing well-established US brokers in order to establish a US production capacity. The only other example that Mr Stoker gave was of Minets establishing a subsidiary in America in the late 1950s. However, this example was not comparable to the Carvill Group for three reasons:

(i) the size of Minets relative to the Carvill Group in 1982;
(ii) Minets' subsidiary was mostly involved in insurance broking rather than reinsurance broking; and
(iii) Minets, in 1982, merged with or was acquired by St Paul's, a US broker.'

30. *Page 18.4*

After the sentence ending '... by Mr Thornhill on behalf of Mr Carvill' [in the commissioner's fourth comment where it was stated: 'Mr Stoker agreed that the Carvill Group was seen as a threat to the American market and accepted that some business was removed from the Carvill Group in the manner suggested by Mr Thornhill on behalf of Mr Carvill. In Mr Stoker's opinion niche firms could still survive in London and at the time of the hearing there were still some successful independent London broking firms.'] insert the following additional finding:

'i.e. as a result of representations made to the client by the US broker which reacted against the competitive threat posed by the Carvill Group to its US business.'

31. *Page 18.4*

At the end of paragraph 4 on page 18 insert the additional finding:

'Mr Stoker accepted that a US broker would seek to move business away from an independent UK broker to its own UK subsidiary irrespective of the competence of the UK broker and often against their clients' best interest.'

32. *New paragraph 4A on page 18*

Insert the following additional finding as a new paragraph 4A:

'Mr Stoker was not familiar with the pattern of the Carvill Group's business. The ability of a US broker to move business away from a UK broker depended upon a range of factors including the standing of the US broker and the attitude of the particular US client. Mr Stoker conceded that it was possible that an overt attempt by the Carvill Group to compete with the US brokers would have lead to an immediate loss of most of its US intermediary business.'

33. *New paragraph 4B on page 18*

'Mr Stoker agreed that reinsurance broking was very much a people's business depending upon the personalities of the persons involved. Mr Stoker did not know Mr Jack Sullivan. Mr Bailey who had dealings with Mr Sullivan in his capacity as a Lloyd's underwriter, believed that it was unlikely that Mr Sullivan would have wished to become a director of Carvill Holdings in the United Kingdom because of the damage that would have done to his own relations with other UK brokers.'

34. *Page 20*

After the sentence ending 'between the Inland Revenue and Mr Carvill until 31st March 1992' [see the extract set out in the judgment at p 134 *e*, ante] insert the following additional finding:

'This explanation was given at the first meeting attended by Mr Carvill in the course of which he was asked to elaborate upon the commercial thinking behind the setting up of International Holdings.'

35. *Page 21*

After the sentence ending '... Mr Koziol's evidence in relation to this matter as he was merely stating his belief' [see the extract set out in the judgment at p 135 *b c*, ante] insert the following additional findings:

'Mr Carvill and Mr Bailey both believed that Mr Jack Sullivan and other prominent US reinsurance brokers would not be interested in being a director on the Board of a subsidiary company and would find it politically embarrassing to be a director on the Board of a UK holding company.'

PART II

1. *Page 17F*

The finding [in the paragraph set out below the heading *Expert evidence* which stated: 'The Revenue called two expert witnesses to give evidence on their behalf, namely Professor Gerard Michael Dickinson and Mr John Mayfield Stoker. I gained no assistance from the evidence of Professor Dickinson as he appeared to me not to have relevant experience or knowledge referable to the North American treaty reinsurance market. On the other hand the experience of Mr Stoker appeared to me to be entirely relevant particularly in view of his knowledge gained as an employee of the Sedgwick group for over 30 years, up to 1989.'] that Mr Stoker's experience was 'entirely relevant'.

2. *Page 18.6*

The finding that 'a leading American executive might well be flattered to become a director of the parent holding company in London, owing to the pre-eminence of the London Market' [in para 6 of the commissioner's comments on Mr Stoker's evidence which stated: 'Some American executives worked quite willingly for United Kingdom subsidiaries during the relevant period. In addition in Mr Stoker's opinion a leading American executive might well be flattered to become a director of a parent broking company in London, owing to the pre-eminence of the London market.'].

3. *Page 20.1*

The implied finding (see p 134 *c d*, ante) that Mr Tuson did discuss the payment of the dividends with [the taxpayer], in particular any evidence establishing what advice was given and when that advice was given.

4. The finding that the evidence of Mr Tuson as recorded on page 20 of the Case Stated (see p 134 *f*, ante) does not accord with the evidence of the Appellant.

5. For the findings in the first paragraph on page 21 of the Case Stated, in particular:

(a) the finding that Mr Tuson devised the strategy under which International Holdings was set up in Bermuda (see p 134 *h*, ante) ,

(b) the implied finding (see p 134 *h*, ante) that the only evidence of the Appellant's to wish to move his company to Bermuda was Mr Tuson's.

6. The conclusion in the first sentence of the last paragraph on page 21 (see p 135 *b c*, ante) if that conclusion is meant to exclude, as part of the purpose, the formation of an internationally managed insurance broking Group.

7. The implied finding that Mr Striffler would have been content to be employed by Carvill America even if it had not been part of a Group controlled by an internationally managed holding company but had been a subsidiary of a UK holding company (i.e. Holdings).

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