

118. In this regard there is the contemporaneous documentary evidence contained in the minutes of the 30 November 2009 board meeting as well as the evidence of Mr Kushel in relation to that meeting. However, as he accepted, he could not speak on behalf of the other board members.

119. Although, and perhaps not surprisingly as it was some ten years before the hearing, Mr Kushel could not recall the details of the board meeting held on 30 November 2009 but said that he had not taken account of any UK tax advantage into account in making the decision to proceed with the transaction. Minutes of the meeting confirm that Mr Fleming advised that such an approach should be taken and Mr Kushel believed he had followed this advice and the minutes do not record that any of the other Board members had not done so. Also, Mr Kushel said that as he was comfortable with it and had no concerns over its commercial viability the transaction would have proceeded even if, at the last minute, the tax advantage had ceased to exist. Additionally, he confirmed that, in making the decision to approve LLC5 entering into the Loans, he considered his fiduciary duty was satisfied.

120. Mr Kushel did not go so far as Ms Mallalieu, who “had no thought of warmth and decency” when she bought her “working clothes”, and say that a tax advantage was not an object or purpose of LLC5. However, adopting the reasoning of the House of Lords in *Mallalieu v Drummond* as further explained in *Vodafone* to the present case it is necessary to look beyond the conscious motives of LLC5 and take account of the inevitable and inextricable consequences of it entering the loan relationship with LLC4. Having regard to all the circumstances of the case it is, in my judgment, clear that the securing of a tax advantage is an inevitable and inextricable consequence of the Loan between LLC4 and LLC5.

121. This cannot be described as merely incidental and, as such, is clearly an important purpose, so much so that I consider it to be a main purpose of LLC5 in entering into the Loans. However, the evidence is that LLC5 entered into the Loans in the furtherance of the commercial purpose of its business of making and managing passive investments. This too is clearly an important purpose and, as such, is to be regarded as a main purpose also.

122. Having come to the conclusion that there was a commercial and a tax purpose, it is therefore necessary to consider a “just and reasonable apportionment”, as required by s 441 CTA 2009. In doing so I have adopted the approach taken by Judge Beare in *Oxford Instruments*.

123. The evidence of Mr Kushel is that LLC5 would have entered into the Loans with LLC4 even if there had been no tax advantage in doing so. Like Judge Beare, and as the tax advantage purpose has not increased the debits, I consider that, on a just and reasonable basis, that all of the relevant debits arising in respect of the Loans should be apportioned to the commercial main purpose rather than the tax advantage main purpose.

DECISION

124. Therefore, for the above reasons, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

