

**ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN
SUPREME COURT (SAINT VINCENT AND THE GRENADINES)**

SVGHCVAP 2021/0010

BETWEEN: -

UNICOMER (ST. VINCENT) LTD

Appellant

and

(1) APPEAL COMMISSIONERS

(2) THE COMPTROLLER OF INLAND REVENUE

Respondents

THE APPELLANT'S CASE

SUMMARY OF THE APPELLANT'S CASE

1. This appeal raises several issues concerning the interpretation and application of the Income Tax Act, Cap. 435 of Saint Vincent and the Grenadines (the "ITA"). The Appellant invites the Board to allow the appeal on the following broad grounds:

- (i) The premium paid by the Appellant to Massy United Insurance Limited (formerly known as United Insurance Company Limited) ("United") for insurance coverage to be made available by United to the Appellant's customers was *prima facie* a legitimate and genuine overhead of the Appellant's business of selling furniture and white goods on hire purchase terms, along with Credit Protection Insurance ("CPI"). As such, Unicomer should have been allowed as a deduction under ss 39 [AB 3/EB1145], 40 [AB 4/EB1146] of the ITA in respect of its payments to United, which has a branch in Saint Vincent and the Grenadines. The insurance contracts disclose nothing to unseat the *prima facie* right to deduct, given that they create normal rights and obligations between parties to hire purchase credit arrangements and associated insurance cover, in a manner and by means which are normally employed in connection with adding such insurance cover in connection with such arrangements. The Court of

Appeal's judgment results in the Appellant being denied its deduction while additionally being assessed to pay withholding tax at 20% of the value of the disallowed deduction, based on the legal fiction that this disallowed amount constituted a payment to a non-resident reinsurer, Canterbury.

- (ii) In the insurance industry globally, both the use of fronting and captive insurance companies is normal practice. They are often used together. The Caribbean is no exception. Both practices have received extensive judicial acknowledgement, without criticism, over a long period. Given the number of sovereign Island States, in close proximity in the Caribbean, cross-border insurance and reinsurances are likely to be common place. Hence, cross-border insurance is to be expected to be part of the normal picture, including in reinsurance layers.
- (iii) On a proper reading of the legislation, as applied to the documented facts, no tax was improperly avoided in this case. A genuine overhead was incurred in connection with a real policy offered to customers for a premium which they were at liberty to accept or reject (and so was subject to arm's length market forces), and in the shape of a policy, a copy of which they could ask to see. Section 23 of the ITA [AB 2/EB1144] does not apply to the CPI transaction because: (a) the arrangements were commercially normal, correctly recorded and lawfully carried out; (b) the trial judge found that United was not a 'mere conduit' (taken to mean legally without significance and akin to a 'sham'); (c) the only basis for the Court of Appeal's contrary conclusion— i.e. that Unicomer engaged in 'self-insurance' and was to be treated as if it made 'direct payments' to Canterbury Insurance Company Limited ("Canterbury")— was not open to it, given the trial judge's unchallenged findings of fact and the evident normality of the documentation; and (d) accordingly no tax was in fact avoided.
- (iv) Alternatively, should Section 23 [AB 2/EB1144] apply, the assessment would be considered excessive and not permissible. The Comptroller simultaneously disallowed the deduction of the CPI expense for corporation tax purposes (\$4,450,000.00) [EB 427] whilst additionally imposing a withholding tax assessment thereon at a rate of 20 per cent (i.e. \$890,000.00), as if (i) the Appellant was in a direct contractual relationship with the offshore reinsurer

(Canterbury) and (ii) the onshore primary insurer (United) did not exist [EB 425-427]. This was an internally inconsistent approach well beyond the potential scope of s 23 [AB 2/EB1144] (on the hypothesis that it applied at all – *quod non*), producing a punitive outcome exceeding any legitimate restorative/reconstructive remedy.

- (v) In the instant circumstances, Section 66 of the ITA [AB 5/EB1149] operates as a restorative remedy where Section 23 of the ITA [AB 2/EB1144] is applicable to the CPI transaction. But there has to be rigour and clarity as to what hypothetical counterfactual structure replaces the actual transaction deemed unacceptable under the statute. Merely disregarding the role of United is insufficient and leads to error. In this case, it was established—both by the parties’ agreed facts and by the trial judge’s findings—that Unicomer physically paid the premium amounts to United, which has a branch in Saint Vincent and the Grenadines and is regulated by the Saint Vincent and Grenadines insurance regulator, and did not make any direct payments to Canterbury, the non-resident.
- (vi) On the quite separate point of Section 9 of the ITA [AB 3/EB1142] (i.e. at what point HP income should be recognised by ITA purposes – either, in full on the making of the initial contract, or progressively when instalments became due and payable), this section was misapplied. The Comptroller failed to discharge the evidential burden of establishing that Unicomer’s income recognition system for tax purposes departed, *inter alia*, from the ‘commercially recognised system of accounting’ in force in Saint Vincent and the Grenadines. Consequently, the default rule in Section 9(1)(e) of the ITA [AB 3/EB1142] —i.e., that income accrues when it becomes due and payable—should have been applied.

THE FACTS

2. It is common ground (see SFI ¶8) that:

- (i) Premiums, paid by the customers in the context of the Hire Purchase agreement, between the Appellant and its customers were collected by Unicomer;
- (ii) The premium (net of claims and commission) was paid by Unicomer to United; and

- (iii) The reinsurance premium was paid by United to Canterbury.
3. That was an entirely normal sequence of events in the context of an insurance and reinsurance of aspects of an HP transaction (i.e. financial default or damage to the goods). Accordingly, the transactions involved four parties (i.e. Unicomer (intermediary/policyholder), its customers (the assureds), United (a resident insurer), and Canterbury (a non-resident reinsurer).
4. In addition to the agreed facts [see SFI ¶3 to ¶10], and consistently with them, is the evidence disclosed by the contemporaneous documentation of the various transactions which lie at the heart of this appeal. The precise detail of those agreements is material, and is briefly summarised next.
5. The critical terms of the various relevant contracts can be summarised as follows:

The Hire Purchase agreement

- (i) The parties to this were the Appellant (referred to as ‘Courts’, and owner of the goods sold), and its customers.
- (ii) The Hire Purchase agreement between the Appellant and its customers is described in broad terms at SFI ¶3. Of specific relevance are cll. 1 (payments) [EB 367], 2 (ownership) [EB 367], 6 (insurance, both of the goods subject to HP, and as a means of payment protection of the financial obligations assumed by the customer[EB 367]; the customer is informed: ‘*A copy of the Policy wording is available on request.*’; 7 (termination & repossession) [EB 367]; 8 (general) [EB 367].

The primary insurance layer

- (iii) The contract is between United (as insurer), the customers (as buyers/assureds), and the Appellant (as coverholder/policyholder/agent of customer) It is described in broad terms at SFI ¶4-5.¹

¹ The contract constituting the primary insurance layer dates from 2005, and still in force. The current litigation only arises in connection with the period from 2007 to 2011, when internal reporting within the wider corporate group reporting misdescribed the flow of monies, as an intra group payment.

(iv) Of specific relevance are the following clauses:²

(i) The definition of:

- the *account*, between the hirer and the policyholder; [EB 374]
- the *agreement* between the hirer and the policyholder (i.e. the Appellant) and of the *outstanding balance* thereunder [EB 374]
- the *policy* as ‘*The rights and obligation under this document between the Company and the Policyholder*’, the latter defined as ‘*Courts (St Vincent) limited on behalf of the hirer.*’ [EB 375]
- the *Scope of the insurance* which is linked to the status from time to time of the discharge of the HP debt (but also contains other forms of cover). [EB 376]

(ii) How the customer was to make a claim under the policy, i.e. in writing to the Appellant. [EB 384]

(iii) Benefits to be paid to the policyholder ‘*as trustee for the Hirer*’ [EB 385]

(iv) Premiums ‘*must be paid in full to the Company as a single premium.*’ [EB 385]

(v) Cancellation ‘*on behalf of hirer*’ on 30 days’ notice or by Hirer if they settle the debt early [EB 385]

(vi) Amendments of the insurance agreement to be in writing [EB 386]

(vii) Complaints by the Hirer could ultimately be addressed directly to United/ Massey [EB 387]

(viii) A binding claims handling agreement, dated 6 June 2006, between the Appellant and United is set out in the agreement. It is in a standard format. [EB 388]

² It is presumed that the Court of Appeal’s effective treatment of United as a mere conduit purportedly wrote these provisions out of the analysis, but this is not entirely clear.

The reinsurance layer – quota share policy

- (v) The quota share policy of reinsurance dated 20 December 2002, with effect from 31 March 2005, between United and Canterbury is described in broad terms at SFI ¶5. Under it, Canterbury accepted a 100 per cent quota share of United's liabilities under the primary layer, in exchange for 95 per cent of the premium thereunder. This was an entirely normal, run of the mill quota share.
- (vi) Of specific relevance are the following clauses:
 - (i) Art. I - 'Coverage/Perils' which specifies application to the Credit Protection Insurance provided by United, on follow the fortunes terms. [EB 393]
 - (ii) Art. II - 'Original conditions': *'the liability of the Reinsurer commences simultaneously with that of [United] and Reinsurance ceded hereunder is subject to all of the conditions of the original insurance'* [EB 393]
 - (iii) Art. IV - set off permitted as between sums passing between United and Canterbury [EB 393]
 - (iv) Art. V - premiums settlement (gross/net). [EB 393-394]

In summary

6. In overall terms, on the basis of the above, it is clear that alongside the formation of a contract of sale of goods by hire purchase, an arrangement was made between the buyer (assured), the policyholder (the Appellant, acting as agent/intermediary for the customer in connection with the insurance with United) and United (the primary insurer), in the terms referred to above. The Appellant represented in clear terms to the customer that this policy *with United* had been purchased, issued, and would benefit them in the circumstances set out above. A copy of the policy was available on demand by the customer. In the event of loss, the customer had a direct right of indemnity *against United* who had allowed a policy to be issued which would be seen by and relied on by customers, and the Appellant. United had a direct right of indemnity against Canterbury in the event of its being held liable to the customers. All this was quite normal and business-like. It also was the real world situation. If the purport of

the ‘mere conduit’ conclusion of the Court of Appeal was that United stepped out of the chain, and never became liable to the customers, it would mean that it could never issue a claim against Canterbury: in other words, if United is written out of the story, then in effect so must be Canterbury, United’s reinsurer. (Even on a follow fortunes basis, the reinsurer is still a reinsurer, and not a direct one).

7. Importantly, one of the various elements of the cover afforded to the Appellant’s customers was against risks of damage and loss associated with the Hire Purchase Agreements between the Appellant and its customers (as distinct from ‘fair wear and tear’, which always remained the Appellant’s responsibility as owner of the HP goods). Under the policy, the assureds are the customers who enter into an obligation to pay for the goods, and the premium. The Appellant is the policyholder/coverholder. Upon receipt of the premium specified in the policy, whether paid by or on behalf of the Appellant, United assumes its responsibilities as insurer to the assureds in accordance with the terms outlined in the policy. Claims are paid under the policy to assureds. By express agreement, as is frequently done, claims up to a given amount were handled by the policyholder (the Appellant who had a practical relationship with the assureds/purchasers and knew the goods) under a binding authority from the insurer (United). Claims paid are netted off against premiums due. By reason of s 40(1)(e) ITA [AB 4/EB1146], any premium paid in respect of an insurance policy covers damage to property in Saint Vincent and the Grenadines is deductible.
8. A further relationship also thereby came into existence in the shape of the quota share policy between United and Canterbury. This was plainly a fronting arrangement, of a type very familiar in the insurance industry (see further below). This action was prompted by Canterbury’s lack of authorization to conduct business in Saint Vincent and the Grenadines. Also to note is the fact that Canterbury was in common ultimate ownership with the Appellant within the Unicomer group. Neither was the subsidiary of nor had control of the other. It would be right to describe Canterbury as a ‘captive’ insurer, i.e. an insurer in the same corporate group as another party to the insurance chain (here, the Appellant). United is an insurer incorporated in Barbados [SFI ¶4]. It has a branch in Saint Vincent and the Grenadines.
9. Neither the Appellant nor Canterbury (incorporated in and conducting business in Bermuda) [SFI ¶5-6] were authorised to write insurance business in Saint Vincent and

the Grenadines (or anywhere else in the Appellant's case). Only United was so authorised. There was no suggestion of any regulatory breach in connection with United's being reinsured by Canterbury in respect of its primary layer insurance business lawfully written in Saint Vincent and the Grenadines.

10. United would at all times be fully liable to the customers for the claims made under the primary layer. However, in exchange for 95 per cent of the premium income, it would be able to look to Canterbury to cover its liability, and absent the financial failure of Canterbury, or some other defence open to Canterbury under the reinsurance contract. It is unclear why the Court of Appeal thought it necessary at ¶34 of the decision (EB 59) to comment that there was no evidence of negotiation of premium rates between United and Canterbury: (i) there is no evidence of this, but it is submitted that it does not matter – they are arm's length, and regulated, (ii) the premium rates are proposed to the general public, and so are set in a market place with third parties at arm's length and (iii) a small turn is normal in retail insurance fronting given the lack of business generation that the fronter has to do to receive the stream of business that it writes and the small risk it takes.
11. If United or Canterbury wrote insurance/reinsurance business in Saint Vincent and the Grenadines without regulatory authority and consent, they would be subject to criminal penalties under the Insurance Act cap. 306, s. 9, carrying a financial penalty of up to \$ 100,000.
12. In anti-avoidance terms, this is a case where the taxpayer points to the real world, and (it is submitted) it is the decisions below that rest on fictional assumptions.

THE ISSUES

High Level

13. At the highest level, three issues arise on this appeal:
 - (i) Whether the Court of Appeal erred in connection with the application of Section 23(1) of the ITA [AB 2/EB1144].
 - (ii) Whether the Court of Appeal erred in connection with the application of Section 66 of the ITA [AB 5/EB1149].

- (iii) Whether the Court of Appeal erred in connection with the application of Section 9 of the ITA [AB 1/EB1142].

Granular level

14. At a more granular level, the key issues to be determined in this appeal are:

- (i) Whether the Court of Appeal erred in connection with the application of Section 23(1) of the ITA [AB 2/EB1144]:
 - (i) What elements collectively constitute the impugned “transaction” for the purpose of section 23(1) of the ITA? [AB 2/EB1144]
 - (ii) Whether, by reference to the means or manner by which the impugned transaction was entered into or carried out (section 23(1)(a) of the ITA [AB 2/EB1144]) and/or by reference to the rights or obligations created by the transaction (section 23(1)(b) of the ITA [AB 2/EB1144]), the impugned transaction was “abnormal” or not at arm’s length within the meaning of section 23(1) of the ITA [AB 2/EB1144].
 - (iii) In what manner the impugned transaction falls to be recharacterized (if at all) under Section 23 of the ITA [AB 2/EB1144] to counteract any avoidance, reduction, or postponement of tax liability to which the said abnormality has given rise (i.e., what is the “normal transaction” in the circumstances?).
 - (iv) Specifically, whether it is permissible for the recharacterised ‘normal transaction’ to be one that would have been in breach of regulatory rules (here insurance regulations, which did not permit either Unicomer or Canterbury to write direct insurance business in Saint Vincent and the Grenadines).
 - (v) Relative to the tax effect the ‘normal transaction’ would have given rise to, did the impugned transaction have the effect of avoiding, reducing or postponing the liability to tax (the “tax advantage”) of any person? If so, what is the quantification of the tax advantage in this case for the purposes of section 23(1) of the ITA? [AB 2/EB1144]

- (vi) Did Section 23 of the ITA [AB 2/EB1144] permit the Second Respondent to simultaneously deny the CPI expense in the calculation of Unicomer's assessable income yet impose withholding tax on the deemed payment to Canterbury?
 - (vii) Whether the Court of Appeal erred in relation to its conclusion in respect of the issues, and whether those errors were founded on a critical misunderstanding of the facts established in the decision of Byer J. (the Judge below) in relation to, among other things, whether Unicomer engaged in "self-insurance" as a matter of fact, and whether (if it did) it was sufficient to engage section 23 of the ITA [AB 2/EB1144].
- (ii) Whether the Court of Appeal erred in connection with the application of Section 66 of the ITA [AB 5/EB1149].
- (i) Whether the payments to Canterbury in consideration for the reinsurance services it provided to United, were improperly subjected to withholding tax pursuant to sections 66 [AB 5/EB1149] and/or the Third Schedule of the ITA [AB7/ EB1151].
 - (ii) Is United the "person who makes any payments to a non-resident" (Canterbury) for the purposes of Section 66 of the ITA [AB 5/EB1149]?
- (iii) Whether the Court of Appeal erred in connection with the application of Section 9 of the ITA [AB 1/EB1142].
- (i) Which sub-section of section 9 of the ITA applies as to the timing of tax liability in respect of the hire purchase contracts entered into and performed by Unicomer.
 - (ii) Whether section 9(1)(b) of the ITA [AB 1/EB1142] placed an evidential burden of proof upon the Second Respondent to submit sufficient evidence that:
 - (a) The Appellant "regularly followed" a "commercially recognised" system of accounting.

(b) Pursuant to the commercially recognised system of accounting, income should have been credited in the books of account of Unicomer in the manner proposed by the Second Respondent in the instant case?

SUBMISSIONS

A. SECTION 23 OF THE INCOME TAX ACT

Highest Level Considerations

15. It appears that the Courts below, took the view that the entirely genuine and normal arrangements outlined above, as they believed they were operated, constituted an offence to the ITA and so engaged the application of s 23 [AB 2/EB1144] thereof.
16. Undoubtedly, if the premiums paid out by the Appellant were deductible by it, that would be a tax advantage. All deductions are advantageous. But an anti-avoidance provision needs more to activate it than a justified claim for a deduction. One question is whether the deduction here was one that fell within the scope of the policy of the ITA on the topic of deductions. In brief: if the facts outlined at ¶2 to ¶11 above correctly establish grounds for a deduction, then the ordinary nature of the transaction is enough to support that entitlement against any challenge. However, if those facts do not meet the requirements of the ITA's deduction rules, there is no reason to consult the anti-avoidance provision in section 23 [AB 2/EB1144]; the facts simply will not qualify.
17. Here, the primary unchanged facts fit properly with the deduction policy and language of ITA ss 39 [AB 3/EB1145]. That policy is to allow full deductions, save for certain specified instances, none of which apply to the Appellant premium payments to United (cf ITA ss 40 [AB 4/EB1146], 66A [AB 5/EB1149] and Third schedule [AB 7/EB1151]). If the Appellant was going to offer insurance cover to its retail customers, it could be expected to have to arrange and pay for it. United was selected as the primary layer insurer, responsible for underwriting insurance business in Saint Vincent and the Grenadines. This was unexceptionable in fiscal terms.
18. By 'rewriting' the facts, purportedly under s 23 [AB 2/EB1144], to exclude United from the insurance/reinsurance chain, the Courts below have departed from the actual facts of the case which were normal in both their objective and means of achieving it. They

have not thereby revealed an alternative commercial normality that the Appellant should be treated as having utilized in the circumstances. Instead, the Comptroller has created, and the Courts below have endorsed, an alleged counter factual, which seeks to drop United from the analysis, leaving (it appears) the Appellant in a direct relationship of some kind with Canterbury and/or as a direct insurer of its customers. This was not documented in writing, and may have involved an assumption that the Appellant and/or Canterbury should be treated (for counter factual purposes) as carrying on insurance business in Saint Vincent and the Grenadines, which would be a counter factual involving a breach of the law (and so could not be ‘normal’ in statutory terms); it also left United with substantial funds passing through its hands which can only have been the overheads incurred by the Appellant.

Legal Analysis

19. The constituent elements of Section 23 [AB 2/EB1144]; are as follows:
- (a) **The Transaction** – The identification of the impugned transaction (i.e. the series of events that the Revenue suggests lacks commercial substance).
 - (b) **The Abnormality** – The evaluation of whether the impugned transaction is abnormal, which requires the Court to determine the characteristics of a normal transaction and compare it to the impugned transaction.
 - (c) **The Tax Avoided** – The determination of whether the abnormal transaction results in reduced tax liability (i.e., does the abnormal transaction cause the taxpayer to pay less tax than would have been paid under a normal transaction?).
 - (d) **The Restorative Remedy** – The Comptroller is authorized to assess the taxpayer as if the normal transaction had taken place. In situations where the arrangement lacks any commercial merit whatsoever (i.e. constitutes a “sham” – see ¶21(a) et seq. below), the entire transaction may be disregarded; therefore, no normal transaction is recognized.

Types of Transaction

20. Lord Templeman, in the case of *The Commissioner of Inland Revenue v Challenge Corporation Limited* [1987] 2 WLR 24 (“*Challenge Corp*”) [AB 20/EB1548], identified the following four types of transaction (at page 31):

“There are ... discernible distinctions between a transaction which is a sham, a transaction which effects the evasion of tax, a transaction which mitigates tax and a transaction which avoids tax.”

21. Concerning the four types, as is well-known, Lord Templeman differentiated them as follows:

- (a) **The Sham** - A sham is a transaction that is ‘*constructed as to create a false impression in the eyes of the tax authority. The appears created by the documentation [is not in accordance with] the reality*’.
- (b) **The Evasion** - “*Evasion occurs when the Commissioner is not informed of all the facts relevant to an assessment of tax.*”
- (c) **The Mitigation** - “*A taxpayer has always been free to mitigate his liability to tax... Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer’s tax advantage is not derived from an ‘arrangement’ but from the reduction of income which he accepts or the expenditure which he incurs.*

Thus, when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.”

- (d) **The Avoidance** – As indicated by the term itself, the taxpayer structures their affairs specifically to circumvent the default tax outcomes that would typically arise from standard business activities. Frequently, “*the material distinction...is between tax mitigation and tax avoidance,*” as articulated by Lord Templeman

in *Challenge Corp* [AB 20/EB1548]. To provide guidance on identifying the boundary between mitigation and tax avoidance, Lord Templeman offered the following reasoning at page 33:

“In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax.

In CIR v. Duke of Westminster (supra), the Duke avoided tax by reducing his assessable income without reducing his income by the method of substituting an annuity for a wage payable to his gardener. So long as the gardener continued to work, the Duke gained a tax advantage over other taxpayers who paid wages to their working gardeners.

In Black Nominees Ltd v Nicole [1975] 50 T.C. 229 an actress sought to avoid income tax by reducing her assessable income without reducing her income. She converted her earnings into instalments of capital by a number of transactions each designed to take advantage of some specific exemption or relief provision of the taxing statute. She attempted to obtain a tax advantage over other actresses and other taxpayers who paid tax on their earnings.

In Chinn v Collins [1981] 1 All E.R. 189 the trustees and beneficiaries under a settlement attempted to avoid capital gains tax payable on the distribution of trust property. By a number of transactions each designed to take advantage of some specific exemption or relief provision of the taxing statute, the beneficiary entitled to trust shares was converted into a purchaser of the shares without involving him in the expenditure

of a purchase price. The beneficiary attempted to obtain a tax advantage over other beneficiaries who paid capital gains tax when they became entitled to trust property.

In Ramsay v. CIR and Bilbeck v. Rawling [1982] A.C. 300 the taxpayer attempted to avoid capital gains tax by making a deductible loss matched by a non-chargeable gain and setting off the loss against a pre-existing chargeable gain. In reality the taxpayer did not make any loss. The taxpayer attempted to obtain a tax advantage over other taxpayers who paid capital gains tax on chargeable gains.

In CIR v. Burmah Oil Co. [1980] 54 T.C. 200 the House of Lords refused to accept that the taxpayer “had achieved the magic result of creating a tax loss that was not a real tax loss”; per Lord Fraser of Tullybelton at page 221. Lord Scarman said at page 222 that in considering any tax avoidance scheme “it is now crucial ... to take the analysis far enough to determine whether a profit, gain or loss is really to be found”.

Most tax avoidance involved a pretence; see the analysis in Ramsay v. CIR [1979] 3 All E.R. 213 at 214. ...” [emphasis added]

22. The recent Privy Council ruling in ***Methanex Trinidad (Titan) Unlimited v The Board of Inland Revenue***, [2025] UKPC 20 (“***Methanex***”) [AB 31/EB1839], shed additional light on what constitutes a “tax avoidance” transaction. In this case, the Board used the word “artificial” as a synonym for “tax avoidance” and “fictitious” as a synonym for “sham” (refer to ¶25 of the decision). It is a most helpful case in the current circumstances. The Board reasoned as follows:

“26. As regards the meaning of “artificial”, Lord Walker acknowledged the importance of context when considering whether a transaction was artificial and said at para 22:

“While mindful of Lord Diplock’s warning against too much judicial exegesis the Board consider that in this context a transaction is ‘artificial’ if it has, as compared with normal transactions of an ostensibly similar type, features that are abnormal and appear to be part of a plan. They are the sort of features of which a well informed bystander might say, ‘This simply would not happen in the real world.’ Recognising a transaction as artificial in this sense is an evaluative exercise calling for legal experience and judgment. It is certainly not an ordinary question of primary fact, as [counsel for the Commissioner] acknowledged in abandoning one of the main points in his written case.”

23. *Methanex* [AB 31/EB1839] remains an up-to-date statement of the relevant principles. It was dealing with a differently worded anti-avoidance provision emanating from the Trinidad and Tobago Income Tax Act, which had in common with s 23 [AB 2/EB 1144], the absence of a motive wording. The test is based on objective criteria rather than subjective taxpayer intention. Structurally, it closely resembles certain UK anti-avoidance rules and the EU VAT anti-avoidance rule, which identify as abusive any transactions undertaken outside the scope of normal commercial activities that effect a tax advantage. Reconfiguring can take place in such cases, but it has to be clear, given that it involves expressing a precise Parliamentary intention as to what should be the tax base. It is not a matter of discretion.
24. Provisions of this type can have application irrespective of whether the taxpayer had an actual purpose of avoiding tax.
25. Case law has accordingly developed in such contexts that could be of relevance in the current situation, particularly as to what is or is not ‘normal’. Often the cases involve the insertion of an intermediary step that lacks commercial substance. It is submitted that the following general propositions emerge:
 - (a) Steps entered into for commercial reasons will not be disregarded. However, elements inserted without any purpose other than tax avoidance can be disregarded (*UBS AG v HMRC* [2016] 1 WLR 1005 at [64]-[65] [AB 47/EB

2374] *per* Lord Reid, citing Lord Carnwarth in *Barclays Mercantile*, [2002] EWCA Civ 1853; [2003] STC 66, para 66).

- (b) It cannot be “artificial” to execute a legitimate commercial decision by the only available legal means. *Methanex* [AB 31/EB1839] at [¶43], [¶48].
- (c) Artificiality can be the antithesis of normality, in that transactions that are not “artificial” are (or in any event more likely to be) “normal.” (*Comr of Taxpayer Audit v Cigarette Company of Jamaica* [2012] 1 WLR 1794 [AB 21/EB 1563] *per* Lord Walker at [22]. See also *Ahmed v White & Co* [2025] EWHC 2399 (Comm) [AB 11/ EB1162], [300]-[303])
- (d) There may be more than one normal way to carry forward a transaction (*Halifax v CE Comrs* C-255/02; [2006] STC 919 [AB 26/EB1643], *per* A-G Maduro at [56]).
- (e) Particular care must be taken not to stigmatise as artificial choices of jurisdiction in the process of setting up transactions (*Cadbury-Schweppes v IRC* C-196/04; [2006] STC 1908 [AB 18/EB1410], A-G at [68]-[69]; *HMRC v RBS* C-277/09; [2011] STC 345 at [52]-[53] [AB 38/EB2129]). As the CJEU put it in *RBS* at [53]:

“52. In those circumstances, the fact that services were supplied to a company established in one Member State by a company established in another Member State, and that the terms of the transactions carried out were chosen on the basis of factors specific to the economic operators concerned, cannot be regarded as constituting an abuse of rights. RBS in fact provided the services at issue in the course of a genuine economic activity.

53. It is important to add that taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens.”

26. Materially, when reconfiguring an abusive transaction, legal certainty is of paramount importance: there is no discretion in the tax authority as to how to do it. ***Project Blue v HMRC*** [2018] 1 WLR 3169 [AB 36/EB2065], *per* Lord Reid at [43]-[44], in other words there has to be an answer in the statute with regard to whom the tax disadvantage would have to fall.

[44] ‘...*The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions.*’

Application of the Principles to the CPI Transaction – sham, evasion, mitigation or avoidance?

27. In ***Challenge Corp*** [AB 20/EB 1548], the inquiry focused on identifying which of the four categories encompassed the impugned transaction (page 31 to 33 of the decision). Likewise, the primary issues in the present case are to (i) delineate the steps comprising the 'impugned transaction,' and (ii) categorise the impugned transaction within one of the four established categories.

Findings in the Court Below

28. The Comptroller looked at the multipartite CPI insurance arrangement (i.e. the contractual / payment relationships between the customers, Unicomer, United and Canterbury) and treated that as the impugned “Transaction”. The Comptroller concluded that United's participation in the CPI Transaction as an insurer was solely a contractual arrangement in form, lacking substantive function and operating merely as a conduit without genuine commercial significance. The Comptroller’s position, therefore, was that the multipartite CPI Transaction was fictitious / a ‘sham’³ (i.e. a transaction or arrangement that appears valid on paper but lacks genuine substance or a legitimate business purpose and is carried out primarily to avoid taxes).
29. Unlike the Comptroller, the High Court considered the contractual / payment relationships to be within the sphere of normality. In other words, the High Court did

³ High Court Transcript EB862 (lines 8-12)

not consider the multipartite CPI Transaction to be a ‘sham’. As such, the High Court recognized that United was not a conduit but played a vital role in facilitating the provision of a genuine insurance product in Saint Vincent and the Grenadines. Instead, the High Court regarded the challenged multipartite transaction as constituting "tax avoidance," by relying upon Unicomer's incorrect classification of the transaction as a “related party transaction” in its financial statements. The High Court, therefore, considered that the financial statements demonstrated irregularity.

30. At paragraph 1 of the High Court's decision, Judge Byer outlined the task before her in these terms:

*“[1] This case was the perfect example of the dicta of Lord Tomlin in action, that is “every man [or business] is entitled if he can, to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be.” In this court’s mind that is what the Claimant did, however **the question that was before this court was whether in doing so, the actions of the Claimant went beyond simply ordering their affairs to pay less tax within the provisions of the law⁴, or did their actions go beyond what is legally allowed and trespassed into the realm of behaviour that was contrary to the law in force.⁵**” [Emphasis Added]*

In other words, Byer J aimed to determine whether this case should be categorized as one of 'mitigation' or 'tax avoidance' (with the Appellant not admitting to either).

31. The Court of Appeal’s interpretation differed materially from that of the Comptroller and the Judge. In summary, the Court of Appeal regarded the CPI Transaction as a **bipartite transaction** "in form" and “in substance” while the Comptroller considered it a bipartisan transaction "in substance" only. Specifically, the Comptroller acknowledged that Unicomer made a payment to United, which then paid Canterbury; however, for tax purposes, it disregarded United’s involvement entirely (including as to the receipt and forwarding of payments), deeming it commercially and legally irrelevant (i.e. a ‘mere conduit’). Conversely, the Court of Appeal found that Unicomer

⁴ i.e. “mitigation”

⁵ i.e. “tax avoidance”

made a direct payment to Canterbury (as distinct from there being payments from Unicomer to United to Canterbury).

Error 1 – Improper Findings of Fact

32. The Appellant contends that the Court of Appeal erred in law in making findings of fact that contradict that of the learned trial judge at the High Court.
33. Simply put, there was never any evidence of a direct payment of CPI Premiums from United to Canterbury: indeed, it is an agreed fact that all money movements were along the chain as per the policies [SFI ¶8]. The High Court had observed that while Unicomer's financial statements listed CPI payments as related party transactions, the funds were paid to United—not Canterbury. This crucial 'real world' fact was apparently ignored in the Court of Appeal. Nor could there have been any "self-insurance" [¶35 of decision; EB 58] by any of the parties to the insurance arrangements, since they disclose nothing of the kind; indeed, their existence is conclusively inconsistent with any kind of self-insurance.
34. 'Self-insurance,' properly understood, occurs where a person *retains risk* rather than transferring it to a third-party insurer. A self-insurer does not pay premiums to any external party; it simply absorbs the risk of loss on its own account. The facts found by the trial judge are fundamentally inconsistent with self-insurance. It may be that 'self insurance' is another way of suggesting a sham.
35. Here, Unicomer's customers' risks were genuinely transferred to United under binding contracts of insurance. United was legally obligated to pay claims. The fact that United reinsured 100% of its risk with Canterbury does not convert the primary insurance into 'self-insurance'; it is simply United buying reinsurance, which is a ubiquitous and entirely legitimate feature of the global insurance market. Accordingly, it is submitted that the Court of Appeal's characterization of the arrangement as 'self-insurance' (¶35) is a fundamental mischaracterization of the commercial and legal reality and directly contradicts the trial judge's finding at ¶64 that this contention was '*belied*' by the evidence.
36. Moreover, the High Court accepted that neither Unicomer nor Canterbury was licensed to write direct insurance business in Saint Vincent and the Grenadines (see High Court

Judgment ¶53). If Unicomer had engaged in 'self-insurance'—that is, if it had accepted premiums from customers and borne the insurance risk of having to pay out an indemnity to the customers, itself—it would have been operating an unlawful insurance business. The Court of Appeal's finding that Unicomer engaged in 'self-insurance' is therefore not merely unsupported by the evidence; it imputes to Unicomer the commission of a regulatory offence which was neither alleged nor proved. Given that it is a fundamental aspect of the 'counter factual', that counter factual cannot pass the test of 'normality' – breach of the law can never feature, even in a notional counter factual, which must independently pass the test of normality.

37. The Comptroller's case, as presented to the High Court (and maintained on appeal), was that United was a 'conduit' or 'mere conduit' without commercial substance. The learned trial judge expressly rejected this contention, finding at ¶62-63 that there was '*not even a scintilla of evidence*' to support the factual proposition that United acted '*solely at the behest of Unicomer*'. Insofar as United's involvement in the CPI Transaction was a matter of fact, it was entirely within the ambit of Her Ladyship's possible conclusions to reach this determination based on the documents and evidence presented. As this is a primary factual finding, it is not subject to challenge.
38. The Court of Appeal's reasoning proceeded on a fundamentally different basis: that there was a 'direct payment' from Unicomer to Canterbury and that this amounted to 'self-insurance' (¶31, ¶35 of the Court of Appeal's judgment). This alternative factual characterisation was not the Comptroller's case, nor was it the finding of the High Court, nor is it consistent with the agreed facts [SFI ¶8]. The Privy Council has emphasised that appellate courts are rarely justified in overturning findings of primary fact made by a trial judge in circumstances, such as the instant case, where the trial judge has had the opportunity to test the credibility of witnesses: *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 [AB 19/EB1434] at [6]-[8]. Consequently, the Appellant contends that the Court of Appeal's finding of fact that Unicomer engaged in an abnormal self-insurance transaction contradict the factual findings made by the High Court and, therefore, constitutes an error of law.

Error 2 – Excessive Tax Liability

39. The Appellant contends that section 23 of the ITA [AB 2/EB1144] provides for a restorative remedy, not a punitive one (refer to ¶19 (d) above). In other words, the Comptroller is only permitted to determine the liability to tax that:

- (i) wholly disregards the Impugned Transaction (when the impugned transaction constitutes a “sham”); or
- (ii) counteracts such avoidance, reduction or postponement of liability as would otherwise be effected by the transaction (where the impugned transaction constitutes “tax avoidance”).

The Sham analysis

40. The Comptroller's case before the High Court was, in essence, that the CPI Transaction was a 'sham', such that United could be disregarded entirely. The legal test for a sham transaction was articulated by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802⁶ [AB 43/EB2217]: a sham requires that *'the documents are intended by [the parties] to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.'*

41. As a starting observation, the facts found by the High Court are fundamentally inconsistent with any finding of a sham. The trial judge found that: (i) United was a licensed insurer operating in Saint Vincent and the Grenadines; (ii) there existed a valid and enforceable contract of insurance between Unicomer and United (¶60); (iii) United bore genuine insurance risk; (iv) there was 'not even a scintilla of evidence' that United acted at Unicomer's behest (¶63); and (v) the arrangement was necessary for Unicomer to lawfully offer CPI to its customers (¶64). These findings, which were not challenged on appeal, preclude any characterisation of any aspect of the CPI Transaction as a sham.

42. Critically, the fact that United retained 5% of the net premium as commission and bore the credit risk of Canterbury's potential insolvency, demonstrates that United was not a 'mere conduit' passing through 100% of the premium without retention of economic risk. A 'mere conduit' presumably retains no economic interest in the transaction.

⁶ See also *Challenge Corp* [AB 20/EB1548] per Lord Templeman (¶21(a) above)

United's retention of commission and assumption of counterparty credit risk is inconsistent with conduit status.

43. However, if the transaction in question was indeed a "sham," the Comptroller should have determined liability as though the transaction never took place. This was not the approach taken by the Comptroller.
44. In particular, in this situation, the Comptroller's assessment did not completely disregard the CPI Transaction; instead, it kept the income component, denied the expense portion, and imposed withholding tax on the disallowed premium payments. This method is not provided for under section 23 of the ITA [AB 2/EB1144], and both the High Court and Court of Appeal made an error by not finding the assessment to be excessive. Further, as noted above, there is nothing 'normal' as to the counterfactual constructed by the Comptroller.
45. Section 23 of the ITA [AB 2/EB1144] provides for a *restorative* remedy, not a punitive one. The Comptroller is authorised to '*determine the liability to tax as if the transaction had not been entered into, or in such other manner as he deems appropriate to counteract such avoidance, reduction or postponement of liability.*' The word 'counteract' connotes restoration to the position that would have obtained absent the avoidance—it does not authorise the imposition of tax liability exceeding what would have arisen under *any* legitimate characterisation of the facts.
46. The Comptroller's assessment produces a logically incoherent result. The CPI premium expense of EC\$4,450,000 is: (a) *disallowed* for corporation tax purposes on the ground that the payments were, in substance, made to Canterbury (a non-resident related party) rather than to United; and simultaneously (b) *subjected to withholding tax* under Section 66 of the ITA [AB 5/EB1149] on the basis that the payments constitute income of Canterbury. The Comptroller cannot coherently maintain both positions.
47. The logical alternatives are as follows. *Either* the payments to United were genuine—in which case they are deductible expenses and no direct payment to Canterbury occurred that could attract withholding tax—*or* the payments were in substance made directly to Canterbury—but there would still need to be an enquiry as to why this was so, and in particular whether the monies were still in effect being paid in connection with the same overall multipartite transaction (i.e. the United premium, 95 per cent of

which was to have been passed onto Canterbury); in other words notwithstanding some irregularity in cash movements (found as a fact never to have occurred) but where everything panned out as planned in the documents.

48. If a case emerges in which case Section 23 [AB 2/EB1144] requires the entire arrangement to be disregarded, then the assessment should be computed on the basis that no CPI transaction occurred at all. The Comptroller is not entitled to selectively reconstruct the transaction to maximise revenue. The assessment as upheld creates, at the minimum, a punitive withholding tax liability of EC\$900,000.00—a sum that far exceeds what would have been payable had the impugned CPI payment to United simply been disregarded in its entirety.

The Tax Avoidance Transaction Analysis

49. In matters of “tax avoidance”, the calculation of avoided tax is inherently linked to identifying (and ring fencing) the abnormality within the transaction. Specifically, it is essential to compare the tax liability that would have arisen from the standard transaction—i.e., the arrangement the taxpayer sought to circumvent (or the "Counter-Factual")—with the tax liability resulting from the identified abnormal transaction. The tax avoided is defined as the difference by which the tax liability from the counter factual exceeds that derived from the Impugned Transaction.
50. In light of the High Court’s determination that the CPI Transaction was both necessary and commercially substantive, and (alternatively) in light of the documented transactions as summarised above, as seen through the lens of the case law dealing with fronting and captive-related transactions, the CPI Transaction should not be characterised, in form or substance, as just an arrangement directly between either the buyer and its ‘insurer’ (the Appellant), or between the Appellant and Canterbury directly, excluding United.⁷
51. In these circumstances, Unicomer submits that it would be inappropriate to disregard the full stages of the CPI Transaction, as such an approach would not reflect the commercial reality that Unicomer provided a *bona fide* insurance product to the public.⁸

⁷ High Court decision, ¶64.

⁸ Contrast authorities referenced at ¶25 (a) of these submissions above

Indeed, the High Court identified the erroneous recording of the CPI transaction in Unicomer's books and records as a related party transaction as the only abnormality in play. But it is an abnormality only in the sense that it represents a divergence from the CPI Transaction as agreed in writing, and carried out in the real world.

52. This 'abnormality', however, did not (and, causally, could not) result in a reduction of Unicomer's tax liability. For illustration, one may consider a scenario where a taxpayer incurs a legitimate electricity expense but mistakenly attributes the payment to entity X rather than entity Y; such an error does not lead to any tax benefit. In both scenarios, the taxpayer has incurred a legitimate tax-deductible expense and should not be subject to penalty for an inadvertent transcription error in documentation that is not part of the official tax return. The same principle applies to the present matter. As the CPI transaction conformed to standard pricing and responsibilities, the misattribution of the expense to a related party in the accounting records does not lead to a tax benefit.
53. Consequently, the High Court erred in concluding that section 23 of the ITA [AB 2/EB1144] applied given that there was no tax avoidance emanating from the inaccurate allocation of the CPI Premium expense to Canterbury in the books of Unicomer, either in the real world or any reconstruction thereof for fiscal purposes.
54. The correct analytical approach as to the significance, if any, to be attached to the issue of the corporate reporting, over many years, apparently treating the premiums as passed straight on to Canterbury (rather than to and through United) is to weigh the evidence in each direction on the payment point, both for and against the documented transactions being real, including its relationship with business normality, bearing in mind the relevant yardstick, here, the statutory concept of normality in s 23 [AB 2/EB1144].
55. If this is done, it is clear that the evidence of the nature of the transactions is fully documented; so, is the fact that the funds travelled along the retail/insurance chain in the manner envisaged by the contractual documentation. Even without insurance expert evidence, it can be concluded that (i) the transaction is *prima facie* normal (see Byer J., High Court decision, ¶64; EB 24–25) and (ii) was executed as agreed in writing (affirmed at SFI ¶8).

56. Against this, is the evidence that internal reporting, in the years 2006 to 2014, described the funds representing the premiums as moving directly from the hands of the Appellant to Canterbury. That is certainly evidence of the perception of the author of the various internal corporate reports. However, the question of whether it displaced the *prima facie* evidence in the documents is the key. The ‘displacement’ would not be of some details here and there – but (as one can see from the nature of the s 23 [AB 2/EB1144] rewriting by the Courts below), something quite fundamental, involving the removal of a whole stage of the transaction, with significant implications, including as to the legality of the rewritten narrative.
57. Therefore, it is important not to immediately treat corporate reports as somehow definitive ‘admissions against interest.’ Instead, they should be viewed, at most, as potential starting points for uncovering previously hidden primary evidence of deception or concealment. However, no such primary evidence exists in this case; there is nothing indicating that the documented agreements within the retail/insurance chain were not faithfully implemented as intended. In fact, all available evidence and agreed facts consistently support that actions matched the terms of the agreements.
58. Further, it is eminently conceivable that someone in an accounting function with the corporate group, misunderstood the precise legal nature of the retail/insurance chain. Their mission was to track flows of value to ‘related companies’. At a group-wide level, it may be loosely said of any captive insurance arrangement that the premiums ‘stay in the group’: they enter through whatever HP sale transaction generates them (here, from a third party customer) and ‘end up’ in the hands of the captive (via a fronting company outside the group, whose accounts would not be sighted by the authors). However, the in-out-in stage involving the front (here, not part of the corporate group) might very well not be appreciated sufficiently, and be collapsed together as if a direct movement of value occurred from the group member who first got the funds (the Appellant) to the one who ‘ended up’ with them. Further, the set off permitted between United and Canterbury [see Art IV of the reinsurance at EB 393] may have added complexity to the figures while reducing the number of money movements. There were periods since the years during which the erroneous reporting happened which treated the income properly in Unicomer’s financial statements and, to

date, there has been no further challenge by the Comptroller, although all the same terms are in place.

59. However, even without speculating on such matters, the point remains that the internal reporting has not triggered a factual revelation of a new stream of primary evidence demonstrating a different set of facts hitherto concealed. It is simply internal reporting, which could be right or wrong. Until the internal report is confirmed by reference to objective facts (which it was not here), it cannot bear the weight of an ITA s 23 [AB 2/EB1144] re-writing of the transaction.
60. In fairness, the Court of Appeal did not suggest that there was a ‘shadow’ reinsurance arrangement. It did not appear to conclude that there was some other ‘real’ transaction entered into between the various parties to the documentation. It simply treated the reported direct flow of funds from the Appellant to Canterbury as just that, without asking what the surrounding legal analysis would be.
61. The analysis appears to have implicitly disregarded the possibility that, even if there had been a pattern of direct payments from the Appellant to Canterbury (*quod non*), reinsurance cover was nonetheless provided as agreed. Insurance coverage is considered to be supplied from the moment the policy is executed (see *Customs and Excise Commissioners v Deutsche Rück UK Reinsurance Co Ltd* [1995] STC 495 at p. 501) [AB 22/EB1577]. However, given that the policies continued in force, being sold and presumably honoured, the worst inference that can be drawn is that the money still ended up where it would have done anyway, albeit by the wrong route. United would still have got its 5 per cent turn on the policies it issued (making its supply of insurance cover at that moment) and Canterbury went on getting its 95% gross, but net of claims, on the policies that it issued. So, none of the conclusions drawn by the CA in its s 23 analysis follow, even if the internal reporting were to have turned out to be correct.
62. It is important to stress that one is dealing with the insurance sector, a highly regulated market, where presumably the accounts of both United and Canterbury showed the various flows of premiums and claims as they would be described under the policies. For Canterbury to show its regulators a multi-year flow of ‘premium’ income from the policyholder, and to say that it was doing nothing in return, is unthinkable.

63. Indeed, moving into a more restitutionary mode, it is difficult to believe that Canterbury simply held onto funds received (wrongly) from the policyholder, which it would know could only have been referable to the legal obligation of the primary insurer, whom it was reinsuring, without either returning them to the policyholder with a request to reroute them through the primary insurer (which, of course, was what happened anyway) or simply honouring its obligations, as new policies were added and claims received, subject to any necessary cashflow adjustments (to allow for the 5 % turn on premium). In short, the flow of funds that reached Canterbury, was clearly treated as consideration for it fulfilling its reinsurance commitments, whether received from United or the policy/cover holder, the Appellant.
64. The above analysis could, depending on the facts, be framed in various ways, both in restitutionary terms or estoppel by convention between United and Canterbury – the premiums kept flowing and the claims got paid, even if they came to Canterbury from a party who had a role in the insurance chain, but was not its reinsured. One may test it by positing a claim by United against Canterbury for non-payment of claims. Canterbury could hardly defend the case on the ground of failure to pay premiums or failure of consideration, if the stream of money had continued all the while, directly.
65. It follows that Canterbury never stopped being an active reinsurer of United, either in the real world or any reconstruction thereof for fiscal purposes. United was always the insurer of the customer.
66. The phrase used by the CA at [36] may be of significance: *‘The learned judge considered all the evidence before the court in its totality and concluded that the second respondent was entitled to form the opinion that the transaction was carried out in a manner which was abnormal.’* This was said in the context of an apparent acceptance that in some way the cash flow had departed (or was to be treated as having departed) from the tramlines in the insurance policies. If so, it would have been abnormal. But to carry out the transaction in an abnormal way (i) does not render the transaction abnormal (particularly, if there are legal arguments of the sort just posited which re-anchor its effects back on the intended track) and (ii) in any event, if the transaction is carried out abnormally, the s 23 [AB 2/EB1144] remedy is to go back to the transaction as agreed, i.e. as evidenced in the documentation.

67. Further, it does not follow that the Appellant's allegedly paying the premiums direct to Canterbury causes there to be 'self-insurance' (Court of Appeal decision at ¶35; EB 58). The implication of this is that Canterbury and the Appellant are one and the same entity or are to be treated as such for tax purposes given their co-existence in the same corporate group. However, there are no relevant grouping provisions in the ITA. They must therefore be treated as separate entities for all purposes, including ss 23 [AB 2/EB1144] and 66 [AB 5/EB1149] of the ITA.

Error 3 – The Court of Appeal Applied the Wrong Standard of Review

68. The reasoning of the Court of Appeal in ¶36 of the decision is of additional significance because it incorrectly states the standard of review that should be applied to the Comptroller's opinion under section 23(1) of the ITA [AB 2/EB1144]. At [36], the Court held that "the learned judge considered all the evidence before the court in its totality and concluded that the second respondent was *entitled to form the opinion* that the transaction was carried out in a manner which was abnormal." This formulation conflates the threshold jurisdictional question (whether there was material upon which the Comptroller could form an opinion) with the merits question (whether, on the primary facts found by the trial judge, the Comptroller's conclusion was correct). The error was compounded by the Respondent's express assertion at the hearing that the Court's role was "a judicial review sort of situation" (Transcript pp.118–120; EB 1029–1031)—a characterization the Court of Appeal appears to have adopted. This is an avoidance case and (as Lord Wilberforce said in *Vestey v Inland Revenue Comrs (Nos 1 and 2)* [1980] AC 1170 at p 1172) [AB 48/EB2408] "*Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle.*" (Quoted by Lord Reid in *Project Blue* [loc cit.] [AB 36/EB 2065] at [43]).
69. Even assuming that a judicial review-type approach is right, the correct standard of review is that established in *Edwards v Bairstow* [1956] AC 14 [AB 24/EB1593]. As Lord Radcliffe explained (at p.36), even "without any such misconception appearing ex facie, it may be 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. In those circumstances, too, the court must intervene." His Lordship identified three equivalent formulations of this test: (i) no evidence to support the determination; (ii) evidence inconsistent with and contradictory of the determination; or (iii) "the true and only reasonable conclusion contradicts the determination." This is not a *Wednesbury*-type review of whether the decision-maker acted reasonably; it is an examination of whether, on the primary facts found, the conclusion reached was one that could properly be reached. The words "the Comptroller is of the opinion" in s.23(1) do not insulate the Comptroller's conclusion from this form of appellate review.

70. The *Edwards v Bairstow* [AB 24/EB1593] principle provides a parallel and independent avenue of attack. Lord Radcliffe made clear (at p.36) that error in point of law may be established in two distinct ways:

- (i) First, where there is "anything *ex facie* which is bad law and which bears upon the determination"—a direct misconception of law appearing on the face of the judgment.
- (ii) Second, where the facts found are such that no properly instructed decision-maker could have reached the determination—the court "has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

71. In the present case, *both* avenues are engaged. As to the first: the Court of Appeal's adoption of a "judicial review sort of situation" standard—asking only whether the Comptroller was "entitled" to form his opinion rather than whether that opinion was correct on the facts found—constitutes a direct misdirection in law *ex facie*. The statutory language ("the Comptroller is of the opinion") was treated as conferring a discretion reviewable only for *Wednesbury* unreasonableness, when the correct approach requires the court to determine whether, on the primary facts found, the statutory criteria ("abnormal"; "not at arm's length") were satisfied. This misconstruction of the statutory test is itself an error of law. Further, the Court of Appeal's approach to construing s 23 itself was *per se* in error, for reasons set out above.

72. As to the second: the primary facts found by Byer J. are such that no properly instructed decision-maker could have concluded the transaction was "abnormal" or not at arm's

length. The Court of Appeal is therefore bound to intervene on either basis. The two avenues are cumulative, not alternative: demonstrating error of law on either ground suffices to set aside the determination.

73. This approach is confirmed by *Secretary of State for Education v Tameside MBC* [1977] AC 1014 [AB 45/EB2257], where Lord Wilberforce held (at p.1047) that even where a statute uses "subjective" language ("if the Secretary of State is satisfied"), "the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account." It is further confirmed by the directly analogous case of *Commissioner for Inland Revenue v Louw* [1983] ZASCA 77 [AB 30/EB1749], concerning the South African equivalent of s.23 [AB 2/EB1144], which likewise made the Commissioner's determination dependent on his "opinion" but expressly subject to appeal. Corbett JA held (at p.23) that "the Special Court may, on appeal to it by the taxpayer, re-hear the whole case and, if it so decides substitute its own decision for that of the Secretary." The Court of Appeal's reliance (at [28]) on *Maraj* (TT 1984 CA 6) [AB 17/EB1392] for the proposition that "the grounds for its belief must be reasonable though the facts on which it bases its belief or its conclusion on the law may on appeal prove to be wrong" in fact supports the Appellant: the phrase "may on appeal prove to be wrong" contemplates the appellate court reaching its own view on the correctness of the conclusion, not merely reviewing whether it was reasonable for the decision-maker to reach it.
74. Applying *Edwards v Bairstow* [AB 24/EB1593] to the present case: Byer J made detailed findings of primary fact that (i) the CPI arrangement was genuine (¶64; EB 24-25); (ii) there was "not even a scintilla of evidence" that United was a "mere conduit" (¶63; EB 24); (iii) United was a licensed insurer bearing real risk (¶62–65; EB 24-25); (iv) the arrangement was the only lawful means to offer CPI to customers (¶64; EB 24-25); and (v) the premiums paid were "reasonable" and a "legitimate expense" (¶77; EB 28). On these findings, the Comptroller's conclusion that the transaction was "abnormal" or not at arm's length is one that *no properly instructed decision-maker could have reached*. "The true and only reasonable conclusion contradicts the determination." The Court of Appeal erred by failing to ask whether, on Byer J's actual

findings of fact, the Comptroller's s.23 opinion was correct—instead deferring to the Comptroller's view as one he was "entitled" to hold.

Error 4 – The Use of an Inappropriate Counter-Factual

75. This has been repeatedly touched upon above. At ¶43 of the Privy Council's decision in *Methanex* [AB 31/EB1839], the Board held that:

“It cannot be ‘artificial’ to execute a legitimate commercial decision by the only available legal means.”

76. At this point (and in case judicial notice cannot be taken of this obvious fact) it may be material to deploy the material that confirms that there is nothing abnormal or underhand in fronting in insurance transactions, even if a captive insurer is involved, as here.

Fronting acceptable in modern (re)insurance practice

77. The Respondent's submission regarding whether United constituted a 'mere conduit' could indicate a requirement to validate the appropriateness of fronting as an accepted practice within the insurance industry. Critically, this involves the opposite of treating the fronter as a 'look through' without enduring legal significance. The fronter is on the hook to the primary assured for everything that is set out in its primary layer policy. Such was the case here with United, as the terms of the cover show. It is irrelevant that, for commercial and/or regulatory reasons, there is a reinsurer standing behind the fronter. The policies need to be respected. The reinsurer (Canterbury) is only under an insurance obligation to the primary *insurer* (United), not the ultimate assured.
78. In *Sedgwick Tomenson Inc v PT Reasuransi Umum Indonesia* [1990] 2 Lloyd's Rep 334 at 341 (“*Sedgwick*”) [AB 39/EB2151], Evans J (as he then was) said:

‘The meaning of "fronting" is clear. When one insurer is willing to take a risk but either is unable to do so, not being licensed to do business in the territory in question, or is not acceptable to the assured, for part or all of the risk, either for commercial (security) reasons or perhaps on political grounds, then another insurer may be able to "front" for him, by underwriting the insurance in full and then reinsuring part or all of

*the risk with him. There may be standing arrangements to this effect when a number of insurers belong to a group or pool and for whatever reason the insurance is accepted by one or more insurers but the risk is shared by them with others under built-in reinsurance agreements.*⁹

79. Prominent insurance law textbooks align with the reasoning articulated by Evans J. (as he then was) in Sedgwick. For instance:

(i) *MacGillivray on insurance law* [16th ed. at #33-022] [AB 51/EB2429]:

“Insurer A may be willing to accept a risk but be unable to do so, for example because he is not licensed or is unacceptable to the insured. In this event another insurer, B, may act as a ‘front’ by entering into a contract of insurance with the insured and reinsuring most or all of the risk with insurer A. Ordinarily insurer B will be liable in full to the insured under the contract of insurance but will be entitled to an indemnity from insurer A under the contract of reinsurance, and will receive a commission from insurer A for acting as a front.” [Fn citing *Sedgwick Tomenson Inc v PT Reasuransi Umum Indonesia* [1990] 2 Lloyd’s Rep 334 at 341.]

(ii) *Colinvaux’s Law of Insurance* 14th ed at #16-040, # 18-003 [AB 50/EB2475].

The Use of Captive insurers is normal in the Insurance Industry

80. The Appellant and Canterbury share common ownership at the corporate grandparent level, specifically with Grupo Unicomer Corp. The direct parent of the Appellant is

⁹ For other cases to the same effect, please refer to *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54; [2004] 1 WLR 3251 [AB 40/EB2160] at ¶¶5–7 (per Lord Bingham); *North Atlantic Insurance Co Ltd v Nationwide General Insurance Co Ltd* [2004] EWCA Civ 423, [2004] 1 C.L.C. 1131 [AB 32/EB1865] per Lord Bingham at #5-7; *Randgold Resources Ltd v Santam Ltd* [2018] EWHC 2493 (Comm); [2019] Lloyd’s Rep IR 467 [AB 37/EB2114] at #2 (where the Judge adds, # 2.3: **(3) The reason for this approach [the use of fronting of the facts] was to be found in the relatively common requirement that insurances in many countries have to be placed with local insurers (a practice commonly known as “fronting”). Those local insurers then reinsure much or all of the risk to foreign reinsurers.**); *Universal General Insurance Co v Societe Group Josi Reinsurance Co SA*: C-412/98 [2001] QB 68 [AB 25/EB1619]: (a CJEU case concerning jurisdiction under the Brussels Convention 1968), per A-G at # 23, 32.

Unicomer Caribbean Holding Co. Ltd, while Canterbury's immediate parent is Regal Worldwide Trading Inc.

81. While related party transactions may sometimes encourage prioritising tax benefits over genuine commercial purpose, section 23 of the ITA [AB 2/EB1144] does not intend to prohibit or deter such dealings. Instead, these transactions should avoid ‘abnormal features’ that set them apart from typical transactions of a similar kind (to paraphrase Lord Walker as quoted by the Board in *Methanex* [AB 31/EB1839] at ¶26¹⁰). The assessment of what is ‘normal’ should take into account the specific context of the industry involved; otherwise, “normality” becomes a theoretical and abstract concept.
82. Modern (re)insurance practice makes extensive use of captive (i.e., related party) insurers, often in a fronting context. As already noted, fronting enables companies to access primary insurers (in the jurisdiction where the primary layer risk is located) who qualify for supervision by the local regulators, even if the local company market is not commercially adapted to the type or quantum of primary risk, and so wishes to lay it off to others who have the capacity, but not the requisite regulatory status. Similarly, the use of captive insurers by corporate groups is extensive, and can interlock (as here) with the use of fronting, i.e. the primary insurer fronts for the captive(s). This enables 2 problems to be solved at once – the regulatory problem (just discussed) and also (particularly with profitable business, of high frequency and low value – as here) keeping premium-based profits within the corporate group.
83. Just as it is a caricature of fronting to describe the fronter as a ‘mere conduit’, so it is equally inaccurate to describe the use of captives by members of a corporate group as ‘self-insurance’. Both approaches run roughshod over the contractual terms and associated concepts of privity, without any basis (i.e. the Appellant is not Canterbury, and *vice versa*). It was (rightly) not expressly suggested that the corporate veil of either be pierced.
84. The import of ¶76 to ¶83 above is this: the *only* lawful means by which Unicomer could have offered CPI to its customers was through a licensed insurer in Saint Vincent and

¹⁰ Refer to ¶22 of these submissions above.

the Grenadines such as United. The transaction as structured was therefore not merely commercially rational but legally required.

85. The trial judge found, and the Comptroller accepted (High Court Judgment ¶53), that *'if the money was sent directly to Canterbury, the following regulatory issue is immediately evident: neither Unicomer nor Canterbury are registered to sell insurance in SVG.'* Canterbury was a Bermuda-incorporated reinsurer not authorised to write direct insurance business in Saint Vincent and the Grenadines. Unicomer was not authorised to write insurance business at all, in any location.
86. As noted, above, the counter-factual posited by the Comptroller—that Unicomer paid Canterbury directly for insurance, or that Unicomer engaged in 'self-insurance'—would in either case have constituted a breach of insurance regulations.
87. The Appellant asserts that Section 23 of the ITA [AB 2/EB1144] operates by comparing an impugned transaction with a hypothetical 'normal' transaction—the counter-factual. The tax avoided is the difference between the tax that would have been payable under the counter-factual and the tax payable under the actual transaction. If no lawful counter-factual exists against which to measure 'tax avoidance,' then Section 23 [AB 2/EB1144] has no application. A transaction that contravenes regulatory law cannot be a 'normal' transaction within the meaning of Section 23 [AB 2/EB1144].
88. It constitutes an error of law to assess tax liability by reference to a counter-factual that would have been unlawful if implemented, and at odds with the normal transactional documentation that had come into existence, in preference to a structure found to be commercially rational and legally required.
89. If the Respondent's arguments concerning either fronting or captives were upheld as valid at the highest judicial level in the United Kingdom—even in a routine case where both full commercial justification for fronting and the use of a captive are present—this would likely have significant adverse implications for tax and regulatory practices extending well beyond Saint Vincent and the Grenadines.

B. SECTION 66 OF THE INCOME TAX ACT

90. The nuanced distinction between the perspectives of the Comptroller and the Court of Appeal is particularly apparent in their respective analyses of withholding tax (refer to

¶31 above). The Comptroller accepted that the determination of withholding tax depends on whether the tripartite transaction constitutes a sham¹¹—effectively, a bipartisan transaction in substance. By contrast, the Court of Appeal addressed the withholding tax issue independently of this consideration, as it found that Unicomer had made a direct payment to Canterbury.

91. The Appellant maintains, consistent with the stance of both parties before the High Court, that section 66 [AB 5/EB1149] is intrinsically linked to the analysis under section 23. More precisely, in the agreed facts, section 66 applies solely as a restorative remedy to address tax avoidance within the framework established by section 23 and does not possess independent application.¹²
92. The parties expressly acknowledge that the CPI Transaction constituted a multipartite arrangement, whereby United made payments to Canterbury, the non-resident entity (¶8 of the Agreed Statement of Fact and Issues). Consequently, withholding tax is not applicable unless the payments from Unicomer to United can be disregarded as a matter of law.¹³ Based on the High Court’s findings of fact (refer to ¶41 above), United cannot be considered a mere conduit and its role in providing a bona fide insurance product cannot be disregarded.
93. Section 66(1) [AB 5/EB1149] of the ITA provides that 'Every *person who makes any payments* to a non-resident, shall deduct tax from such payments in accordance with... the Third Schedule' (emphasis added). The statutory language imposes the withholding obligation on the person who *makes* the payment—not on any other party in a chain of transactions.
94. The agreed facts (SFI ¶8(iii)) establish that 'the reinsurance premium was paid by United to Canterbury.' Unicomer made no payment to Canterbury. Unicomer paid United. United, in turn, paid Canterbury pursuant to United's separate contractual obligation under the reinsurance agreement. On a straightforward reading of the statutory language, United—not Unicomer—was 'the person who makes any payments to [Canterbury]' for the purposes of Section 66 [AB 5/EB1149]. Therefore, there are no

¹¹ High Court decision ¶82 (EB29)

¹² High Court Transcript EB900 line 20 to EB901 line 1

¹³ High Court Transcript EB866 line 22 to EB867 line 8; EB873 line 12-15

payments from Unicomer to Canterbury to which section 66 of the ITA [AB 5/EB1149] would apply.

95. The Comptroller's imposition of withholding tax on Unicomer requires 'looking through' United—treating United as if it did not exist for the purposes of identifying the payer. This is only permissible if United is properly disregarded as a 'mere conduit' under Section 23. As demonstrated above, the trial judge expressly found that there was *'not even a scintilla of evidence'* to support conduit status (¶63; EB 24). If Section 23 does not apply to disregard United, then Section 66 cannot be invoked against Unicomer.
96. In any event, paragraph 1(1)(i) of the Third Schedule to the ITA [AB 7/EB1151] provides that the Schedule applies to 'insurance premiums *excluding re-insurance premiums*' (emphasis added). The payments from United to Canterbury were, on the agreed facts, reinsurance premiums paid pursuant to the reinsurance agreement between United (as cedant) and Canterbury (as reinsurer). Even if (contrary to the Appellant's primary case) Unicomer could be treated as the payer, the payments would still be excluded from the withholding tax regime as reinsurance premiums. The Court of Appeal's conclusion that the exclusion does not apply (¶44) was premised on its erroneous finding that Unicomer engaged in 'self-insurance' rather than genuine insurance with reinsurance—a finding that contradicts the trial judge's unchallenged findings of fact.
97. Alternatively, Unicomer argues that if the CPI Transaction is considered a sham, section 23 of the ITA [AB 2/EB1144] mandates the transaction be completely disregarded. As a result, using section 66 [AB 5/EB1149] as a corrective measure would be unsuitable; rather, it would have a punitive effect (refer to ¶48 above).
98. In all the above circumstances, it is submitted that the appeal should be allowed on the first two issues referenced at ¶13 above.

C. SECTION 9 OF THE INCOME TAX ACT

99. The Appellant's position is that:
- (i) The purpose of section 9 of the ITA [AB 1/EB1142] is to determine, as accurately as possible, the profits or losses of the taxpayers' business for the

assessment periods in question. Section 9(1)(e) of the ITA [AB 1/EB1142] provides the default position: income accrues when payment becomes due and payable to the taxpayer.

- (ii) Under the terms of the Hire Purchase Agreement, customers agree to make an initial payment to Unicomer when signing the agreement, followed by monthly payments thereafter.¹⁴
- (iii) For tax purposes, Unicomer recognized income from the hire purchase agreement when payment became due under its terms.
- (iv) Section 9(1)(b) [AB 1/EB1142] of the ITA provides an exception from the default position. Section 9(1)(b) [AB 1/EB1142] stipulates that, when a commercially recognised accounting system is employed, prevailing commercial accounting standards for revenue recognition applicable to the specific income shall be employed to determine the profits or losses of the taxpayer.
- (v) The Commercial accountancy standards applicable in Saint Vincent and the Grenadines are the International Financial Reporting Standards (IFRS).¹⁵ Under IFRS 16 [AB 52/EB2491], lessors record operating lease income on a straight-line or other systematic basis.
- (vi) The Appellant maintains that its tax filings comply with section 9(1)(e) [AB 1/EB1142] of the ITA and the IFRS.
- (vii) The Comptroller did not show that section 9(1)(b) [AB 1/EB1142] applies in a manner to override the default position in section 9(1)(e) [AB 1/EB1142] of the ITA.

Error 1 – Misapplication of the Burden of Proof

¹⁴ EB 365

¹⁵ Under the Securities Act 2001 and the Eastern Caribbean Securities Regulatory Commission (ECSRC) regulations, companies with publicly traded securities (or reporting obligations under the ECSRC) were required to prepare financial statements in conformity with International Accounting Standards and International Financial Reporting Standards issued by the International Accounting Standards Board (IASB); IFRS Standards – Application Around the World | Jurisdictional Profile: St Vincent and the Grenadines. [AB 52/EB2491]

100. Unicomer recognized income from hire purchase when the payments became due and payable under the High Purchase Agreement, as is consistent with section 9(1)(e) of the ITA which provides that income accrues when payment becomes due and payable to the taxpayer.
101. The Comptroller assessed Unicomer on the basis that Unicomer should have recognized the full income from the sale of goods at the time customers took possession of the goods, irrespective of when payments were made. The Comptroller's position is that the circumstances of Unicomer's tax filings fall within one of the exceptions from the default position, specifically subparagraph (b) of section 9(1) [AB 1/EB1142], which provides as follows:
- “in the case of a business, in relation to **which the Comptroller is satisfied** that a commercially recognised system of accounting other than a cash received basis is regularly followed, when it is credited, or should be credited, in the books of account such person;”* [Emphasis added]
102. Unlike section 9(1)(e) of the ITA [AB 1/EB1142], section 9(1)(b) of the ITA [AB 1/EB1142] does not specify a formula for revenue recognition, instead it provides that the treatment must be in accordance with a commercially recognized system of accounting.
103. The Appellant invokes the maxim *onus probandi actori incumbit* (he who asserts must prove). Based on this maxim, and in reliance upon authorities such as *Board of Inland Revenue v Boland Maraj* [1979-85] 2 T.T.T.C. 504 [AB 17/EB1392] and *The Argosy* [1971] TR 29 [AB 14/ EB1352], it is the Comptroller's responsibility to demonstrate that section 9(1)(b) of the ITA [AB 1/EB1142] applied in a manner to conflict with the default rule in section 9(1)(e) of the ITA [AB 1/EB1142]. This requirement exists because the Comptroller is responsible for demonstrating *satisfaction* that section 9(1)(b) of the ITA [AB 1/EB1142] is consistently applied in accordance with the assessment.
104. It is therefore for the Comptroller—not the taxpayer—to establish: (i) that a commercially recognised system of accounting is regularly followed; and (ii) what that system requires in terms of income recognition.

105. The Comptroller adduced no expert evidence on the requirements of IFRS for hire purchase income recognition. There was no analysis of IFRS 16 [AB 53/ EB2497] (or its predecessor IAS 17). There was no evidence establishing what a 'commercially recognised system of accounting' required Unicomer to do. In the absence of such evidence, Section 9(1)(b) [AB 1/EB1142] cannot operate to displace the default rule in Section 9(1)(e) [AB 1/EB1142]—that income accrues 'when it becomes due and payable.'
106. The Appellant submits that, due to the lack of evidence presented by the Comptroller demonstrating what the commercially recognized system of accounting required under section 9(1)(b) of the ITA [AB 1/EB1142], it constituted a legal error for:
- (i) the High Court and the Court of Appeal to omit applying section 9(1)(e) [AB 1/EB1142] of the ITA, which is the default rule; and
 - (ii) the courts below erred by treating Unicomer as bound by its commercial financial statements without any inquiry into whether those statements conformed to the requirements of the commercially recognized system of accounting in force.

Error 2 – Failure to Consider Apply the Accepted Principles of Commercial Accountancy

107. As previously indicated, under section 9(1)(b) of the ITA [AB 1/EB1142] in Saint Vincent and the Grenadines, the onus of proving the correct application of commercial accountancy principles rests with the Comptroller. Should Unicomer's interpretation be found incorrect, it remains for the Court to direct that the objectively correct commercial accountancy principles are duly applied.
108. Specifically, the Court's primary focus at common law is to ascertain, with the utmost accuracy, the taxpayer's business profits or losses for the relevant income year. In the absence of specific statutory instruction—such as that provided by section 9(1)(e) of the ITA [AB 1/EB1142]—the established principles of commercial accountancy are considered authoritative in determining the taxpayer's true profits or losses.
109. Concerning this, Nolan LJ in *Kevin Patrick Threlfall et al v HM Inspector of Taxes* (Court of Appeal) [AB 46/EB2320] [page 33 of the decision], endorsed the following

reasoning of Pennycuik V-C in *Odeon Associated Theatres Limited v Jones* [1971] 1 WLR 442 [AB 33/EB1879].

“In an illuminating passage of his judgment on pages 453-4, Pennycuik V-C said:

*‘The effect of the principles laid down in Usher’s Wiltshire Brewery Ltd v Bruce and other cases, in including those in which the expression “ordinary principles of commercial accountancy” is used is this: **first one must ascertain the profits of the trade in accordance with ordinary principles of commercial accountancy.** That, of course, involves bringing in as items of expenditure such items as would be treated as proper items of expenditure in a revenue account made up in accordance with the ordinary principles of commercial accountancy. Secondly, one must adjust this account by reference to the express prohibitions contained in the relevant statute ... **In order to ascertain what are the correct principles it has recourse to the evidence of accountants. That evidence is conclusive on the practice of accountants in the sense of the principles on which accountants act in practice. That is a question of pure fact, but the court itself has to make a final decision as to whether that practice corresponds to the correct principles of commercial accountancy At the end of the day the court must determine what is the correct principle of commercial accountancy to be applied. Having done so, it will ascertain the true profit of the trade according to that principle, and the profit so ascertained is the subject of taxation.’ ”***
[Emphasis added]

And at p. 36

“[T]he central issue is at root a very short one. The object is to determine, as accurately as possible, the profits or losses of the taxpayers’ business for the accounting periods in question. Subject to

any express or implied statutory rule, of which there is none here, the ordinary way to ascertain the profits or losses of a business is to apply accepted principles of commercial accountancy. That is the very purpose for which such principles are formulated. As has often been pointed out, such principles are not static: they may be modified, refined and elaborated over time as circumstances change and accounting insights sharpen. But so long as such principles remain current and generally accepted they provide the surest answer to the question which the legislation requires to be answered.”

110. The decision of Sir John Pennycuik V-C in *Odeon Associated Theatres Ltd v Jones* (1970) [AB 33/EB1879] has also been affirmed in the House of Lords, per Lord Hoffman at ¶1, in the case of *Her Majesty’s Revenue & Customs (Respondents) v William Grant & Sons Distillers Limited et al*, [2007] UKHL 15 [AB 49/EB2549].
111. As previously submitted, companies in Saint Vincent and the Grenadines are expected to use IFRS as the accepted accounting standard.¹⁶
112. More specifically, with respect to income recognition arising from hire purchase arrangements, IFRS 16 is the applicable accounting standard. The guidance in the IFRS is as follows:

“Classification of leases (paragraphs B53-B58)

61. A lessor shall classify each of its leases as either an operating lease or a finance lease.

62. A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

...

Operating leases

¹⁶ IFRS Standards – Application Around the World | Jurisdictional Profile: St Vincent and the Grenadines [AB 52/EB2491]

Recognition and measurement

81. A lessor shall recognise lease payments from operating leases as income on either a straight-line basis or another systematic basis. The lessor shall apply another systematic basis if that basis is more representative of the pattern in which benefit from the use of the underlying asset is diminished.”

113. The IFRS 16 requires a two-stage analysis:

- (i) First, the hire purchase agreements must be classified as either 'finance leases' or 'operating leases'. This classification depends on whether 'substantially all the risks and rewards incidental to ownership of an underlying asset' are transferred to the lessee (IFRS 16 ¶62) [**AB 53/EB2497**].
- (ii) Second, once classified, the appropriate recognition rules must be applied. For operating leases, IFRS 16 ¶81 provides that 'a lessor shall recognise lease payments from operating leases as income on either a straight-line basis or another systematic basis'—that is, as instalments fall due, not at the point of contract execution.

114. Neither the High Court nor the Court of Appeal conducted this threshold classification analysis. The actual terms of Unicomer's Hire Purchase Agreements demonstrate that they were operating leases (EB 365-367). Specifically:

- (i) ownership remained with Unicomer until final payment;
- (ii) the customer had a right to return the goods at any time (clause 7);
- (iii) the risk of fair wear and tear remained with Unicomer (clause 4);
- (iv) the customer had no disposal rights (clause 8); and
- (v) the customer could not move the goods without Unicomer's consent (clauses 5 and 8).

115. Concerning this, the Court failed to consider the actual terms of the Hire Purchase Agreements, which provided that Unicomer retained the ownership, and the risks

associated with ownership, until all payments are made. Specifically, the customer has a right to return the goods at any time for whatever reason, in which circumstance Unicomer has the corresponding commercial obligation to collect and resell (clause 7). In light of this, Unicomer retained substantially all the risks of ownership, and it was therefore proper for Unicomer to recognize the income as instalments became due and payable under the Agreements, which is entirely consistent with Sections 9(1)(d) and (e) of the ITA.

- 116.** The lower courts erred by neglecting to perform the necessary analysis and instead concluded that Unicomer was obligated to adhere to its method of recording income in its financial statements, regardless of compliance with IFRS standards. This reasoning conflicts with the principle established by Pennycuik V-C in *Odeon Associated Theatres Ltd v Jones* [1971] 1 WLR 442 at 453-4 [**AB 33/EB1879**], which asserts that "the court itself has to make a final decision as to whether [accounting] practice *corresponds* to the correct principles of commercial accountancy." [**Emphasis Added**]

CONCLUSION

- 117.** In relation to the "granular issues" referenced at ¶14 above, the Appellant's position is as follows:

(a) Section 23 of the ITA

- (i)** **What elements collectively constitute the impugned 'transaction' for the purpose of section 23(1)?** [**AB 2/EB1144**]

The 'transaction' is the multipartite CPI insurance arrangement comprising: (1) the HP agreement, including the acceptance by customers of the specified insurance proposal therein, (2) the contract of insurance between the customers (as assureds) and United (as insurer), with the Appellant as policyholder/coverholder; and (3) the quota share reinsurance between United (as cedant) and Canterbury (as reinsurer). These are documented, arm's length contracts creating normal rights and obligations. The Comptroller erred in seeking to disaggregate this arrangement and characterise it as a direct payment from the Appellant to Canterbury.

(ii) Whether the impugned transaction was 'abnormal' or not at arm's length within the meaning of section 23(1)?

No. The transaction was entirely normal. The trial judge found that: (i) United was a licensed insurer; (ii) the contracts created genuine legal obligations; (iii) United bore real insurance risk; (iv) there was 'not even a scintilla of evidence' that United was a 'mere conduit'; and (v) the arrangement was the only lawful means to offer CPI. Fronting and captive reinsurance are ubiquitous in global insurance markets and carry no implication of abnormality (Sedgwick; Sirius; MacGillivray 16th ed ¶33-022). The Court of Appeal's characterisation of 'self-insurance' contradicts these unchallenged findings.

(iii) In what manner the impugned transaction falls to be recharacterised (if at all)?

The transaction does not fall to be recharacterised. Given the trial judge's findings of commercial normality, Section 23 [AB 2/EB1144] has no application. If (contrary to the Appellant's primary case) any recharacterisation were warranted, it could only address the erroneous 'related party' labelling in the Appellant's accounts—a clerical misdescription that caused no tax advantage. The Comptroller's wholesale reconstruction of the transaction into a fictitious direct arrangement between the Appellant and Canterbury is impermissible.

(iv) Whether the recharacterised 'normal transaction' can be one that would have breached regulatory rules?

No. Section 23 [AB 2/EB1144] operates by comparing the impugned transaction with a hypothetical 'normal' transaction. A transaction that would be unlawful cannot be 'normal' within the meaning of the statute. Neither the Appellant nor Canterbury was authorised to write direct insurance business in Saint Vincent and the Grenadines (Insurance Act cap. 306, s.9 [AB 8/EB1153]). The counter-factual posited by the Comptroller—direct insurance into Saint Vincent and the Grenadines by Canterbury or by the Appellant—would have constituted a criminal

offence. Per Methanex at ¶43: 'It cannot be "artificial" to execute a legitimate commercial decision by the only available legal means.'

(v) Did the impugned transaction have the effect of avoiding, reducing or postponing tax liability?

No tax was avoided. The premium paid by the Appellant to United was a legitimate, arm's length business expense properly deductible under s. 39 ITA [AB 3/EB1145]. The only 'abnormality' identified by the trial judge was an erroneous accounting label—describing the payment as a 'related party transaction' rather than a payment to United. This clerical error caused no tax benefit: the deduction claimed was identical regardless of how the payment was labelled. There is no comparator 'normal' transaction that would have yielded higher tax.

(vi) Did Section 23 permit the Comptroller to simultaneously deny the CPI expense and impose withholding tax?

No. Section 23 [AB 2/EB1144] provides a restorative remedy, not a punitive one. There is no discretion to be exercised by the Comptroller. The Comptroller's assessment is internally incoherent: it disallows the expense on the ground that the payment was 'really' to Canterbury, yet simultaneously imposes withholding tax on that same notional payment. Either the payment to United was genuine (deductible; no withholding) or the entire arrangement is disregarded as a sham (no expense and no income to Canterbury). The Comptroller cannot selectively reconstruct facts to maximise revenue. The resulting assessment of EC\$12,666,798.23 far exceeds any sum lawfully assessable.

(vii) Whether the Court of Appeal erred, founded on misunderstanding of facts established by Byer J.?

Yes. The Court of Appeal made findings of fact (that the Appellant engaged in 'self-insurance' and made 'direct payments' to Canterbury) that directly contradict the trial judge's unchallenged findings. Appellate courts are rarely justified in overturning factual findings where the trial

judge had the opportunity to assess evidence (*Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 [AB 19/EB1434] at ¶¶6-8). The Court of Appeal's reasoning was not the Comptroller's case, not the High Court's finding, and was not consistent with the agreed facts.

(b) Section 66 of the ITA

(i) Whether the payments to Canterbury were improperly subjected to withholding tax?

Yes. Withholding tax was improperly imposed for two independent reasons. First, the Appellant made no payment to Canterbury; it paid United, a resident. Section 66 [AB 5/EB1149] applies only to payments made 'to a non-resident.' The agreed facts establish that United paid Canterbury—not the Appellant. Second, even if the Appellant could somehow be treated as payer, the Third Schedule expressly excludes 'reinsurance premiums' from withholding tax (para. 1(1)(i)). The payments from United to Canterbury were reinsurance premiums. The Court of Appeal's contrary conclusion rests on its erroneous 'self-insurance' finding.

(ii) Is United the 'person who makes any payments to a non-resident' for the purposes of Section 66?

Yes. On the agreed facts (SFI ¶8(iii)), *'the reinsurance premium was paid by United to Canterbury.'* The statutory language of s. 66(1) [AB 5/EB1149] imposes the withholding obligation on 'the person who makes any payments to a non-resident.' That person was United, not the Appellant. Imposing withholding tax on the Appellant requires 'looking through' United as if it did not exist—a step permissible only if United is disregarded under Section 23 [AB 2/EB1144]. The trial judge found *'not even a scintilla of evidence'* to support such disregard.

(c) Section 9 of the ITA

(i) **Which sub-section of section 9 applies as to the timing of tax liability for hire purchase contracts?**

Answer: Section 9(1)(e) [AB 1/EB1142]—the default rule that income accrues '*when it becomes due and payable*.' Under the Hire Purchase Agreements, customers agree to pay in instalments over 18-36 months. Income becomes '*due and payable*' when each instalment falls due—not at contract inception. The Comptroller's reliance on s. 9(1)(b) [AB 1/EB1142] is misplaced: that provision applies only where '*the Comptroller is satisfied*' that a commercially recognised accounting system is regularly followed. The Comptroller adduced no evidence establishing what IFRS requires for hire purchase income, and s. 9(1)(b) [AB 1/EB1142] cannot displace the default rule absent such proof.

(ii)

(a) **Did section 9(1)(b) place an evidential burden on the Comptroller?**

Yes. Section 9(1)(b) [AB 1/EB1142] is an exception to the default rule. The statutory language requires that '*the Comptroller is satisfied*' that a commercially recognised system of accounting is regularly followed. The Comptroller bears the burden of establishing: (i) that such a system is followed; and (ii) what that system requires for income recognition. The maxim *onus probandi actori incumbit* applies. The Comptroller adduced no expert evidence on IFRS requirements. No analysis of IFRS 16 (or IAS 17) [AB 53/EB2497] was undertaken. Absent such evidence, the courts erred in applying s. 9(1)(b) [AB 1/EB1142] to displace the default rule.

(b) **Did the Comptroller establish regular following of a commercially recognised system and what it required?**

No, to both limbs. IFRS 16 [AB 53/EB2497] requires a two-stage analysis: first, classify hire purchase agreements as 'finance leases' or 'operating leases'; second, apply the appropriate recognition rules. For operating leases, income is recognised '*on a straight-line basis or another systematic basis*' as instalments fall due (IFRS 16 ¶81). Neither court conducted this analysis. The Hire Purchase Agreements exhibit operating lease characteristics: ownership remained with the Appellant until final payment; customers could return goods at any time; risk of wear remained with the Appellant. The courts below erred by treating the Appellant as bound by its financial statements without inquiry into whether those statements conformed to IFRS.

DISPOSITION

118. For these reasons, the Appellant respectfully submits that the appeal should be allowed. The Appellant invites the Board to:

- (i) Set aside the orders of the Court of Appeal dated 17th April 2024 and of the High Court dated 29th April 2021;
- (ii) Quash the assessments made by the Comptroller of Inland Revenue in their entirety;
- (iii) Alternatively, in the event that the Board considers that any part of the assessment was lawfully made, remit the matter to the High Court for redetermination of the quantum of lawfully assessable tax in accordance with the Board's judgment;
- (iv) Award the Appellant its costs of this appeal and of the proceedings below.

119. There was no lawful basis for the Comptroller's decisions to assess the Appellant under any of the heads of alleged liability. The findings of fact made by the trial judge do not support the legal conclusions drawn by either the High Court or the Court of Appeal. The Board is respectfully invited to allow the appeal on all points.

REASONS

BECAUSE the Court of Appeal applied the wrong legal test in concluding that on the primary facts as found by the single Judge, s 23 of the Income Tax Act [“ITA”] **[AB 2/EB1144]** was capable of being engaged in respect of the multipartite insurance arrangements [“the transaction”] which were before it

BECAUSE on the basis of the primary facts found by the trial judge and the documented contractual arrangements, the transaction was a normal real-world transaction, made on normal commercial terms and accordingly both normal in its objective and its means of achieving the objective for the purposes of s 23 ITA **[AB 2/EB1144]**

BECAUSE United was at no point a mere conduit in connection with the transaction

BECAUSE the Court of Appeal was not justified in overturning the primary findings of fact made by the learned trial judge on the evidence before her

BECAUSE the terms of the s 23 **[AB 2/EB1144]** recharacterisation of the transaction by the Court of Appeal were intrinsically abnormal (and so not compliant with s 23 ITA **[AB 2/EB1144]**) in that it involved positing the writing of insurance business by the Appellant and/or Canterbury Insurance Company that would have been a criminal breach of the Insurance Act s 9 **[AB 8/EB 1153]** and was otherwise inconsistent with the real world evidence as to the transaction

BECAUSE the Appellant never engaged in any form of “self-insurance” in connection with the transaction

BECAUSE the transaction did not involve the avoidance of any income tax

BECAUSE no comparator “normal” transaction exists which would have yielded more tax than was in fact yielded by the transaction

BECAUSE s 23 ITA **[AB 2/EB1144]** is designed to be a restorative not a punitive remedy and the Comptroller’s assessment, which simultaneously disallowed the CPI expense and imposed withholding tax thereon, was internally incoherent and exceeded any sum lawfully assessable

BECAUSE s 66 ITA [AB 5/ EB1149], as properly construed in the light of the facts agreed and/or found, did not subject payments made by the Appellant in connection with the transaction to withholding tax

BECAUSE United was the person by whom, for ITA purposes, payments were made to Canterbury

BECAUSE in any event, the payments to Canterbury were reinsurance premiums and are expressly excluded from the withholding tax regime by paragraph 1(1)(i) of the Third Schedule to the ITA [AB 7/EB1151]

BECAUSE s 9(1)(e) ITA [AB 1/EB1142] applied to establish the manner in, and timing at, which to bring the Appellant's Hire Purchase income to tax, namely when payments became due and payable

BECAUSE the Comptroller adduced no evidence before the Court that would have justified the application of s 9(1)(b) [AB 1/EB1142] by establishing what International Financial Reporting Standards required, and so did not discharge his evidential burden in the matter

BECAUSE for operating leases (into which category the Appellant's Hire Purchase agreements fall) income is normally recognised for accounting purposes as it falls due and payable

RODERICK CORDARA KC, SC

BARRIE ATTZS

MIKHAIL CHARLES

5 February 2026