Hilary Term
[2025] UKPC 20
Privy Council Appeal No 0054 of 2022

JUDGMENT

Methanex Trinidad (Titan) Unlimited (Appellant) *v* The Board of Inland Revenue (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Hamblen
Lady Rose
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
22 April 2025

Heard on 16 April 2024

Appellant
Alnasir Meghji
Edward Rowe
Jonathan Walker
(Instructed by Miguel Vasquez of M Hamel-Smith & Co (Trinidad))

Respondent
Claude Denbow SC
Dharmendra Punwasee
Jerome Rajcoomar
(Instructed by Charles Russell Speechlys LLP (London))

LORD RICHARDS:

Introduction

1. The appellant ("Methanex Trinidad") was assessed to withholding tax of $28,382,495.79 on four dividends totalling US$85.4 million ("the Dividends") paid by it during the income tax year 2007. Its appeal against the assessment was dismissed by a decision of the Tax Appeal Board ("the TAB") dated 21 January 2019, which was affirmed by the Court of Appeal by an order dated 16 November 2021. Methanex Trinidad appeals to the Board.

2. The basis of the assessment was that, although the Dividends were in form paid by Methanex Trinidad to its immediate holding company, Methanex Trinidad Holdings Ltd ("Methanex Barbados") a company incorporated in Barbados, they were in truth or in substance paid directly to its ultimate holding company, Methanex Corporation ("Methanex Canada") a company incorporated in Canada. To the extent that the Dividends were presented as dividends paid to Methanex Barbados, they were "fictitious" or "artificial" and therefore fell to be disregarded by the respondent for tax purposes by reason of section 67 ("section 67") of the Income Tax Act (Chap 75.01) ("the ITA").

3. Dividends paid by a company resident in Trinidad and Tobago to persons (including companies) resident in Barbados are not subject to withholding tax in Trinidad and Tobago, by virtue of a double taxation treaty ("the Treaty") made in July 1994 among the member states of the Caribbean Community ("CARICOM"). Trinidad and Tobago was an original party to the Treaty, while Barbados acceded to it in July 1995. The provisions of the Treaty are incorporated into the domestic law of Trinidad and Tobago by the Double Taxation Relief (CARICOM) Order, 1994. Under the Treaty, payments of dividends by a company which is a resident of a CARICOM member state to a resident of another member state are to be taxed only in the first such state and are subject to withholding tax thereon at a rate of zero per cent. By contrast, dividends paid by a Trinidad company to a Canadian company are subject to withholding tax at 5% under the Double Taxation Relief (Canada) Order 1996.

4. Three issues arise on this appeal. The first is whether the courts below erred in holding that the Dividends were fictitious or artificial, so as to engage section 67. If they were correct so to hold, Methanex Trinidad argues that they were wrong to hold that the Dividends could be re-characterised as dividends paid to Methanex Canada. The second issue is whether section 67 is inconsistent with article 11 of the Treaty, which deals specifically with dividends, and, if so, whether it can override the relevant terms of the Treaty. These issues were decided against Methanex Trinidad by the courts below. The third issue, decided against the respondent by the courts below, is whether the Dividends qualified for relief under the Treaty and, in particular, whether under article 4 of the

Treaty Methanex Barbados was liable to tax in Barbados by reason of being resident there; if it were not resident in Barbados, the Dividends would not be exempt from withholding tax. This issue raises questions of interpretation of the Treaty.

5. For the reasons given in this judgment, the Board allows the appeal on the first issue. In those circumstances, it is not necessary for the Board to consider the second issue, and it does not do so. The Board upholds the decision of the Court of Appeal on the third issue. The result overall therefore is that the Board allows the appeal.

The facts

6. The Methanex group of companies, with Methanex Canada as its ultimate holding company, is a leading producer and supplier of methanol. The relevant part of its corporate structure in 2007 for the purposes of this appeal was as follows. Methanex Trinidad was a wholly-owned subsidiary of Methanex Barbados. The latter was incorporated under the International Business Companies Act (Cap 77) ("the IBCA") of Barbados and its sole business was that of a holding company. Methanex Barbados was a wholly-owned subsidiary of Methanex International Holdings Ltd ("Methanex Cayman"), a company incorporated in the Cayman Islands which was likewise purely a holding company. Methanex Cayman was a wholly-owned subsidiary of Methanex Canada.

7. The Dividends were paid between July and November 2007: US$30 million on 23 July 2007, US$25.4 million on 9 August 2007, US$20 million on 4 September 2007 and US$10 million on 1 November 2007. The sequence of events was largely the same in the case of each dividend. First, the secretary of Methanex Trinidad sent to the directors a draft resolution for the approval of a dividend on or before a specified date. Second, by a written resolution the directors approved the payment of the dividend. Third, Methanex Trinidad gave written instructions to its bank, Toronto Dominion Bank in New York, to transfer the amount of the dividend to the account of Methanex Barbados with Royal Bank of Canada ("RBC") Main Branch in Vancouver. Fourth, the dividend was paid to that account.

8. The second and third Dividends were paid pursuant to an email sent by an employee in the treasury department of Methanex Canada to the secretary of Methanex Trinidad, stating: "Based on the Q3 2007 cash repatriation forecast, we will require funding from Methanex Trinidad in the form of dividend payments as follows: August 10 2007 $25.4 million, September 4 2007 $20 million. Please note these dates on the calendar and ensure the dividend resolutions are ready in time." A similar request or instruction was made before the dividend of $10 million was paid on 1 November 2007.

9. Within a very short time of receipt of each of these Dividends from Methanex Trinidad, Methanex Barbados declared and paid a dividend of the same amount to Methanex Cayman. The TAB found that Methanex Cayman received dividends from Methanex Barbados and three other subsidiaries from which it "met its operating expenses, serviced its debt obligations, undertook its investment activities and paid a dividend" to Methanex Canada. The amount of the dividend paid to Methanex Canada does not appear from the judgments below, but it is agreed that it was substantial.

Proceedings below

10. The TAB considered a substantial body of oral and documentary evidence. It made findings of fact which Rajkumar JA, giving the leading judgment in the Court of Appeal with which Mendonça JA and Kokaram JJA agreed ("the CA judgment"), highlighted at para 60:

(i) At least three of the Dividends were requested by Methanex Canada in advance of the resolution by the directors of Methanex Trinidad to pay those Dividends in the exact amounts requested, notwithstanding that Methanex Canada was not the direct parent company of either company.

(ii) No independent discretion was exercised by the boards of Methanex Trinidad or Methanex Barbados in resolving to pay the Dividends.

(iii) The Dividends were paid by Methanex Trinidad to a bank account in the name of Methanex Barbados in Vancouver which was under the sole control of Methanex Canada.

(iv) The dividends paid by Methanex Barbados to Methanex Cayman were in the exact amounts which it had received from Methanex Trinidad.

(v) Those dividends were paid to a bank account in the name of Methanex Cayman in Vancouver which was also under the sole control of Methanex Canada.

(vi) The rapidity with which the requests made by Methanex Canada were given effect and Methanex Barbados' role in facilitating them were matters which the TAB was entitled to take into account in assessing whether the dividends "were actually payments of dividends from Methanex Trinidad intended from inception to actually be for the benefit [of] Methanex Canada".

11. In addition to those findings, the respondent placed reliance in its submissions to the Board on further findings made by the TAB:

(i) Methanex Barbados was interposed pursuant to a restructuring for tax planning purposes – the combination of the provisions of the Treaty and Barbados tax law meant that no withholding tax fell to be deducted on dividends paid by Methanex Trinidad to Methanex Barbados and then by Methanex Barbados to Methanex Cayman, although the Cayman Islands are not a party to the Treaty.

(ii) The role of Methanex Barbados was that of a conduit or vehicle used as a virtual funnel to achieve a tax-free result.

(iii) Although the paper trail spanned four jurisdictions, the banking trail spanned only two jurisdictions (the US and Canada) with the Dividends never touching Barbados or any bank account under the control of Methanex Barbados.

(iv) Neither Methanex Barbados nor Methanex Cayman had bank accounts in their respective jurisdictions.

(v) The accounts of Methanex Barbados and Methanex Cayman were at the same branch of RBC in Vancouver and were both under the control of Methanex Canada by virtue of treasury agreements.

12. On the basis of the evidence, and in particular the findings summarised at para 60 of its judgment, the Court of Appeal held at para 64 that "the transactions in so far as they purported to be simply payments to Methanex Barbados, attracting zero per cent withholding tax, could legitimately be characterised as artificial and fictitious" and that the TAB "could not be faulted for doing so". The TAB "was entitled to conclude that the beneficial ownership of dividends in the exact amounts declared by Methanex Trinidad, and paid to Methanex Barbados, lay, not with Methanex Barbados, but with Methanex Canada" (para 62).

13. The Court of Appeal accepted at para 67 that Methanex Trinidad "was entitled to utilise its corporate structure to facilitate tax planning and efficiency" and that Methanex Canada was entitled to "request and expect dividend payments from its subsidiaries as a return on its investment and capital", but if it did so the tax consequences of "the actual transaction would apply, and not the tax consequences of any disguised or fictitious transaction".

Section 67: the law

14. Section 67(1) provides:

> "Where the Board is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in fact been given to any disposition or settlement within the meaning of section 72 the Board may disregard any such transaction or disposition or settlement within the meaning of section 72 and the persons concerned shall be assessable accordingly."

15. It is the respondent's case that the effect of section 67 in the present case is that, if the Dividends paid by Methanex Trinidad to Methanex Barbados were properly regarded as artificial or fictitious, it may disregard them as dividends paid to Methanex Barbados and treat them instead as dividends paid to the ultimate holding company, Methanex Canada.

16. The principal issue as regards section 67 is whether the TAB, and the Court of Appeal, were correct to treat the dividend payments to Methanex Barbados as "artificial or fictitious".

17. As the respondent accepts, the terms "artificial" and "fictitious" are alternatives and have established meanings when used in the context of tax legislation such as section 67.

18. Equivalent provisions in Jamaican tax legislation using these terms were considered by the Board in two appeals, *Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioners* [1977] AC 287 ("*Seramco*") and *Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd* [2012] UKPC 9, [2012] 1 WLR 1794 ("*Cigarette Company*"). It is common ground that there is no relevant distinction between those provisions and section 67.

19. *Seramco* concerned a scheme by which the shareholders of a company with large undistributed profits sold all the shares to the trustees of a superannuation fund which was exempt from income tax on the receipt of dividends. The contract of sale granted a call option in favour of the sellers to repurchase the shares at the same price less the gross amount of an intended dividend. After the transfer of the shares to the trustees, the company declared and paid the dividend, net of tax. The Commissioner refused the trustees' application for repayment of the tax deducted, on the grounds that the sale of the shares to the trustees on the terms agreed was an artificial transaction.

20. Lord Diplock, giving the advice of the Board, described the transaction as a dividend-stripping scheme but said that this was not sufficient of itself to bring the sale agreement within the section unless the transaction for which it provided was artificial or fictitious. Whether it could properly be so described depended on the terms of the transaction and the circumstances in which it was made and carried out: pp 297G-298A.

21. In an important passage at p 298A-D, Lord Diplock addressed the meaning of the terms "artificial" and "fictitious":

> "'Artificial' is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. In common with all three members of the Court of Appeal their Lordships reject the trustees' first contention that its use by the draftsman of the subsection is pleonastic, that is, a mere synonym for 'fictitious'. A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out. 'Artificial' as descriptive of a transaction is, in their Lordships' view a word of wider import. Where in a provision of a statute an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the shares agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as 'artificial' within the ordinary meaning of that word."

22. Lord Diplock examined in detail the terms and circumstances of the transaction, leading to the conclusion that the transaction was artificial for reasons which included: the trustees had no funds with which to make the purchase, which was funded out of the dividend; the trustees were protected against the risk of any loss; in the event of default by the trustees in paying any instalment of the purchase price, the sellers would be entitled to cancel the agreement, retain instalments already paid and require the re-transfer of the shares but they would have no further remedy, such as claiming payment of the outstanding instalments; there must therefore have been an understanding that the trustees would not default; although the sale agreement provided for a call option, it was never contemplated by the parties that the shares would not be re-transferred to the sellers: see p 299A-E.

23. In the light of all the circumstances, the Board agreed with the Court of Appeal that the cumulative effect of these features was that the transaction was properly described as "artificial". It was, Lord Diplock said, impossible to regard the transaction either as a genuine exercise by the trustees of their powers of investment or as a genuine sale of the shares for a price payable by instalments accompanied by no more than an "option" to repurchase them.

24. *Cigarette Company* concerned the correct treatment for tax purposes of large sums, totalling about $6.4 billion, paid by the appellant company to its parent company, Carreras Group Ltd, between 1997 and 2002 and treated by those companies as interest-free and unsecured loans. The Commissioner contended that they should be treated as distributions subject to income tax deductible at source, on the grounds that the loans were artificial transactions.

25. The parties accepted that Lord Diplock had given authoritative guidance in *Seramco* as to the meaning of "artificial" and "fictitious", and that "artificial" has a meaning different from and wider than "fictitious". Giving the judgment of the Board, Lord Walker at para 21 said that "fictitious" was an expression "approximating in meaning to 'sham'".

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."

27. Lord Walker examined the particular circumstances and features of the loans, two of which are pertinent to the present appeal. First, at para 15, he quoted with approval the observations in the leading judgment in the Court of Appeal that there was nothing odd about the arrangements within the Carreras group whereby the parent company provided a centralised treasury function for its subsidiaries, pursuant to which the parent company

held surplus cash within the group on the basis of unsecured, undocumented and interest-free loans. Second, he said at para 26(5):

> "The group structure was not, as the judge seems to have been suggesting, a reason for treating the loans as artificial. It was, on the contrary, the commercial context in which there was nothing abnormal or artificial in the loans being unsecured, interest-free, and documented only by normal accounting and auditing processes."

28. The Board concluded that the loans in question, although made on terms which in other contexts would be uncommercial, were, as intra-group loans, not artificial in the context of a group of companies.

29. The conclusions of the TAB and the Court of Appeal in the present case that, on the basis of the primary facts found by the TAB, the Dividends were fictitious or artificial were evaluative judgments. If there is no proper basis in the findings of primary fact for those evaluative judgments, they constitute errors of law which an appellate court such as the Board is required to correct.

Fictitious

30. Considering first the question whether the Dividends were "fictitious", it is appropriate to refer to the well-known description of a sham transaction given by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 as one which is 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".

31. The Court of Appeal held at para 82 that the Dividends were "fictitious simply because they were not, as they purported to be, actual dividend payments to Methanex Barbados as its ultimate intended beneficiary. The intended and actual beneficiary was Methanex Canada". It referred to the rapid transfer of the dividends from Methanex Trinidad to Methanex Barbados and then to Methanex Cayman, in each case to accounts under the control of Methanex Canada. It was said that "[w]hen examined as to their substance the evidence clearly revealed these transactions did not simply end with the payment to Methanex Barbados": para 83. The Dividends were "from inception intended for and transmitted to Methanex Canada": para 85.

32. The decision of the Court of Appeal, upholding the TAB's decision, was therefore that the Dividends were fictitious to the extent that they were presented as dividends

declared in favour of and paid to Methanex Barbados when, in truth, they were intended to be and were dividends declared in favour of and paid to Methanex Canada. It was not, however, suggested that the payments were not dividends.

33. As regards the grounds given by the Court of Appeal for this conclusion, it must first be noted that the fact that a payment is made by A to B with the intention that it should be paid by B to C does not of itself render fictitious the payment from A to B. This is all the more so where dividends are paid up a corporate chain with the intention that they should be received by the ultimate holding company. As counsel for the respondent accepted, a company cannot lawfully declare and pay a dividend directly to its ultimate holding company. Each company in the chain must have the distributable profits needed to pay the dividend to its own immediate holding company and, in the present case and in many other cases, the distributable profits of the intermediate companies are themselves derived from the dividends received from their subsidiaries. Thus, it is not sufficient to render the Dividends fictitious that Methanex Barbados was not the "ultimate intended beneficiary" of the Dividends, or that they "did not simply end with the payment to Methanex Barbados", or that they were "from inception intended for and transmitted to Methanex Canada". These characterisations are all consistent with each of the Dividends paid up the chain being, in law and in substance, valid dividends.

34. The courts below and the respondent placed reliance on the fact that the Dividends were paid pursuant to a request, or requirement, from Methanex Canada and not as a result of the exercise by the directors of their own discretion, and that they were paid as part of a pre-ordained plan involving further dividends being paid up the corporate chain. These features do not make the Dividends fictitious. There is nothing unusual or surprising for the ultimate holding company of a group to require subsidiaries to pay some or all of their distributable reserves by way of dividend up the corporate chain. It does not evidence or even suggest that the payments then made by the subsidiaries were anything other than dividends.

35. The Court of Appeal said at para 90:

> "The evidence left no doubt that the dividend payments to Methanex Barbados were not simply dividend payments to Methanex Barbados, but rather one stage in a multistage transaction intended to secure for Methanex Canada payments from Methanex Trinidad of \$85.4 million US dollars for the income year 2007. On the evidence Methanex Trinidad and Methanex Barbados were simply facilitating a cash repatriation request by Methanex Canada. In those circumstances there can be no complaint that Methanex Canada was found by the Tax Appeal Board to be the beneficial owner of those dividends,

albeit that they purported to emanate from Methanex Cayman via Methanex Barbados."

36. However, the features identified in that paragraph are not sufficient to reach the conclusion that the Dividends were fictitious or that Methanex Canada became their beneficial owner on payment to Methanex Barbados. As is apparent from other parts of the judgments of both the TAB and the Court of Appeal, and as the respondent emphasised in its submissions, an important factor in the conclusions of the courts below was the finding that, although the Dividends were paid to a bank account in the name of Methanex Barbados, it was not with a bank in Barbados but with RBC in Vancouver and that it was under the sole control of Methanex Canada.

37. Thus, as the respondent submitted, the true nature of the Dividends was disguised by presenting them as dividends paid to Methanex Barbados when "in fact the monies were paid directly into the hands" of Methanex Canada. For the reasons already discussed in para 33 above, Methanex Trinidad could not lawfully pay a dividend to Methanex Canada. But, in any event, it takes too far the finding that the bank account was under the sole control of Methanex Canada. That finding was based on the undisputed evidence given on behalf of Methanex Trinidad that the authorised signatories to the account were employees in the treasury department of Methanex Canada. It is not a finding that Methanex Canada was entitled to treat the funds credited to the account as Methanex Canada's own property, to do with as it wished. The contrary is shown by the evidence that funds credited to the account of Methanex Cayman, which were in part derived from the Dividends, were applied in payment of liabilities of that company and in making investments on its behalf. When employees in Methanex Canada's treasury department gave instructions for payments from the bank accounts of its subsidiaries, they must in the absence of evidence to the contrary be taken to have been doing so as agents on behalf of the subsidiary. It cannot be inferred from their status as employees of the parent company that the funds credited to the subsidiaries' bank accounts were beneficially owned by Methanex Canada.

38. The courts below were of course correct to have regard to all the evidence in reaching their conclusion, but it is the Board's view that the evidence is incapable of supporting the conclusion that the Dividends were fictitious.

Artificial

39. The Court of Appeal and the TAB relied on the same evidence to support their conclusions that the Dividends were artificial.

40. After quoting paras 21 to 23 of Lord Walker's judgment in *Cigarette Company* and referring to the abnormal features of the transactions in this case identified by the TAB, the Court of Appeal said at para 69:

> "The features in the instant transactions that are abnormal were those identified by the TAB itself as set out above. The overall overriding abnormalities were that four dividend payments purporting to be made from Methanex Trinidad to Methanex Barbados, though routed through Methanex Barbados and Methanex Cayman Islands, were received **within two business days** at accounts under the sole control of **Methanex Canada,** in three cases in identical amounts as sums which had been previously **requested** by Methanex Canada. These matters suggested a preconceived **plan** by Methanex Canada to request the receipt of payments by specified dates, and direct the form in and mechanism by which those payments were to be made. Those were matters that did not suggest the exercise of independent discretions by the Boards of Methanex Barbados or Methanex Trinidad." [emphasis in the original]

41. It is said at para 72 of the CA judgment that there was "sufficient and in fact overwhelming evidence" for the TAB's conclusion that the Dividends "were actually, in reality and in substance, payments to Methanex Canada, despite being passed through Methanex Barbados to Methanex Cayman".

42. In the Board's opinion, there are two fundamental problems with the reasoning that led the Court of Appeal and the TAB to that conclusion.

43. First, as previously stated, if Methanex Trinidad at the request of Methanex Canada was to pay dividends that were intended ultimately to be received by Methanex Canada, that could be achieved only by declaring dividends and paying in favour of Methanex Barbados, to be followed by similar dividends up the corporate chain. As was accepted in para 86 of the Court of Appeal judgment, the declaration and payment of the Dividends by Methanex Trinidad could not be said to lack a commercial purpose. It cannot be "artificial" to execute a legitimate commercial decision by the only available legal means. This may be contrasted with the tax authority's case in *Cigarette Company*. In that case, the appellant Jamaican company had left large sums outstanding on inter-company loan account with its ultimate holding company for a long period without any interest or security. The tax authority's case was that the loans should be re-characterised for tax purposes as dividends. On those facts, there were (at least) two legal routes whereby funds could be transferred by the Jamaican subsidiary – loans or dividends. That is not, however, applicable to the present case, where the only legal means was for Methanex Trinidad to declare and pay dividends in favour of its immediate holding company.

44. In this connection, it was noted in para 91 of the Court of Appeal judgment that the TAB did not treat the interposition of Methanex Barbados as the immediate holding company of Methanex Trinidad as itself artificial, nor was this suggested by the respondent. If the existence of Methanex Barbados had been held to be artificial, then it might follow that a dividend paid to it should be regarded as artificial.

45. Secondly, it was necessary for the respondent to show that the Dividends had abnormal features of which "a well informed bystander might say, 'This simply would not happen in the real world'" (*Cigarette Company* at para 22). As Lord Walker also said at para 22: "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…".

46. Para 88 of the Court of Appeal judgment states:

> "It is accepted that: i. payment of dividends in the normal course of commercial business by a subsidiary to its parent company is not commercially abnormal, ii. within a group of companies the payment of dividends by a subsidiary in that group to the ultimate parent would not be commercially abnormal, iii. that a subsidiary may be requested by its parent company to declare a dividend in respect of surplus cash."

47. Notwithstanding the acceptance of those matters, para 88 goes on to state:

> "In this case however, the request for the dividend payment came from Methanex Canada, and not the appellant's parent company Methanex Barbados. Further, the declarations of dividends by Methanex Barbados were in the exact total amount as the dividends it received from Methanex Trinidad and in the exact amount as requested by Methanex Canada in respect of at least three of those dividend payments. The extreme rapidity with which those payments ended up in an account under the sole control of Methanex Canada has already been noted."

48. In the view of the Board, these are not matters which can be regarded as abnormal. Far from being abnormal, the payment of dividends up a corporate chain at the request of the ultimate holding company is a commercial commonplace in national and international groups, not least because it is the only lawful means by which distributable profits can be brought up from subsidiaries. To repeat what Lord Walker said at para 26(5) in *Cigarette Company*:

> "The group structure was not, as the judge seems to have been suggesting, a reason for treating the loans as artificial. It was, on the contrary, the commercial context in which there was nothing abnormal or artificial in the loans being unsecured, interest-free, and documented only by normal accounting and auditing processes."

49. The Board is satisfied that there was no basis on which the Dividends could properly be characterised as artificial.

Issues as to the interpretation of the Treaty

50. The Treaty applies to taxes on income, profits and capital gains arising in a Member State: article 2(1). Article 3(1) defines "person" to include "an individual, a company and any other body of persons" and "company" to include a body corporate. Central to the issues which arise on this part of the appeal is article 4(1) which provides:

> "For the purposes of this Agreement, the term 'resident of a Member State' means any person who under the law of that State is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature."

51. As regards dividends, article 11 provides:

> "1. Dividends paid by a company which is a resident of a Member State to a resident of another Member State shall be taxed only in the first-mentioned State.
>
> 2. The rate of tax on the gross dividends shall be zero per cent.
>
> 3. The provisions of paragraph 1 of this article shall not affect the taxation of the company in respect of the profits out of which the dividends are paid."

52. The respondent advances four submissions on the proper interpretation and application of the Treaty, each of which if correct would deprive the Dividends of the benefits conferred by the Treaty and would instead require withholding tax to be deducted from them:

(i) Methanex Barbados was not a "resident" of Barbados as defined in article 4(1) because its liability to tax in Barbados arose not by reason of residence or any other criterion referred to in article 4(1) but by reason of being licensed under the International Business Companies Act ("the IBCA"), which in turn resulted in a significantly lower rate of tax.

(ii) Liability to tax for the purposes of article 4(1) requires that the person concerned is liable to tax on its worldwide income, but Methanex Barbados was not so liable.

(iii) Liability to tax for the purposes of article 4 requires that the person is liable to tax at the full rate, not at the very substantially lower rate applicable to Methanex Barbados as an International Business Company ("IBC").

(iv) In order for dividends to be "paid … to a resident of another Member State" for the purposes of article 11, the payee must have complete dominion and control over the funds paid to it.

53. The TAB and the Court of Appeal rejected the first to third of these submissions, while the respondent has raised the fourth submission for the first time before the Board.

Principles of interpretation of double taxation treaties

54. The principles applicable to the interpretation of double taxation treaties are well-established and not in dispute between the parties. As international treaties, they are subject to the Vienna Convention on the Law of Treaties (1969), article 31(1) of which requires that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31(2) provides, so far as relevant in the present case, that the context for the interpretation of a treaty comprises its text, including its preamble and annexes. Article 31(3) requires certain subsequent agreements between the treaty parties and the subsequent practice of the parties to be taken into account, but no such agreements or practice are relied on in this case. Article 32 permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when, applying article 31, it is otherwise ambiguous or obscure or manifestly absurd or unreasonable.

55. Lord Reed said in *Revenue and Customs Comrs v Anson* [2015] UKSC 44, [2015] 4 All ER 288 ("*Anson*"), at para 56:

> "Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose."

56. Côté J, giving the majority judgment of the Supreme Court of Canada in *Canada v Alta Energy Luxembourg SARL* 2021 SCC 49, [2021] 3 SCR 590 ("*Alta Energy*"), said at para 37 in terms applicable also to Trinidad and Tobago and to the United Kingdom, "the methodology prescribed [by the Vienna Convention] is not radically different from the modern principle applicable to domestic statutes in Canada – that is, one must consider the ordinary meaning of the text in its context and in light of its purpose", but qualified by the consideration that "unlike statutes, treaties must be interpreted 'with a view to implementing the true intentions of the parties'". That requires an approach to the text which acknowledges that the language has not been chosen by parliamentary drafters applying domestic principles of statutory construction but "is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law": *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 281-282 per Lord Diplock. There is a predisposition "to favour an interpretation which reflected the ordinary meaning of the words used and the object of the Convention" as against "narrow and technical constructions": see *Anson* at paras 110-111 per Lord Reed.

57. The first to third submissions of the respondent all relate to article 4 of the Treaty and, while they raise separate issues, they are closely linked.

Was Methanex Barbados "a resident" of Barbados for the purposes of the Treaty?

58. The respondent's first submission is that, although Methanex Barbados was incorporated in Barbados and carried on its business from within Barbados, it was "liable to tax" in Barbados by reason only of being licenced under the IBCA which, it submitted, does not qualify as a criterion giving rise to liability to tax for the purposes of article 4.

59. It is necessary to say something about the IBCA and the effect of being licensed as an IBC. The purposes of the IBCA are set out in section 2(1):

> "The purposes of this Act are to revise the law governing international business companies carrying on the business of international manufacturing or international trade and commerce from within Barbados with a view to

> (a) encouraging the development of Barbados as a responsible international financial centre;
>
> (b) provision of incentives by way of tax reduction, exemptions and benefits for international manufacturing and international trade and commerce from within Barbados."

60. The phrase "international trade and commerce" is defined in section 6 to include, as well as certain specified businesses, "any other business carried on from Barbados". The business of Methanex Barbados as a holding company qualified for these purposes.

61. Recognition of a company as an IBC is governed by sections 7 to 9 of the IBCA. Section 7(1) provides that, subject to exceptions not relevant to this appeal, "a company or a person who intends to incorporate a company may apply to the Minister for a licence for the company to carry on business as an international business company" where the company intends to carry on, or it is the intention that the proposed company carry on, "from within Barbados, the business of international manufacturing or international trade and commerce".

62. Section 8 provides that a company shall not be granted a licence unless, among other things, the company "is resident in Barbados". Where an application is approved by the Minister, he may issue a licence subject to such conditions as he may specify: section 9(1). The licence must be renewed annually: section 9(3).

63. Sections 10 to 22 set out the "incentives by way of tax reduction, exemptions and benefits" to which section 2(1)(b) refers. As regards taxation, section 10(1) and (2) and section 11 provide:

> "10. (1) Subject to this section and section 11, in lieu of tax at the rate specified under the Income Tax Act, there shall be levied and paid to the Commissioner of Inland Revenue, in respect of the income year 1991 and in each subsequent income year of an international business company, a tax on the profits and gains of the company at the following rates
>
> (a) 2.5 per cent on all profits and gains up to $10,000,000;
>
> (b) 2 per cent on all profits and gains exceeding $10,000,000 but not exceeding $20,000,000;

(c) 1.5 per cent on all profits and gains exceeding $20,000,000 but not exceeding $30,000,000;

(d) one per cent on all profits and gains in excess of $30,000,000.

(2) An international business company may elect to take a credit in respect of taxes paid to a country other than Barbados provided that such an election does not reduce the tax payable in Barbados to a rate less than one per cent of the profits and gains of the company in any income year."

"11. An international business company shall not be liable to pay any tax under the Income Tax Act except as is provided by section 10 hereof in respect of an income year, nor shall it be liable under this or any other enactment to pay any other direct tax on its profits and gains in respect of that income year."

64. Section 13(1) provides that dividends paid by an IBC to a person resident outside Barbados are exempt from tax under the Income Tax Act and section 14 provides that such dividends are not subject to withholding tax. Section 13(2) imposes tax at the appropriate rate under the Income Tax Act on any dividends paid to a person resident in Barbados who does not carry on international business.

65. Section 23 provides that:

"Except to the extent that this Act operates to exempt an international business company from tax under the Income Tax Act, all the provisions of that Act apply with necessary modifications to an international business company."

66. Methanex Barbados is a company incorporated under the Companies Act (Cap 308) of Barbados to which the Minister granted a licence under the ICBA. Before doing so, the Minister was required to be satisfied that Methanex Barbados was resident in Barbados and was carrying on international business from within Barbados. Indeed the Barbados Revenue Authority issued a certificate of residence in Barbados to Methanex Barbados for the Income Tax Year 2016 and there has been no suggestion that there was any relevant change of circumstances between 2007 and 2016.

67. The respondent accepts that, as a matter of Barbadian domestic law, Methanex Barbados was resident in Barbados for tax and other purposes. The respondent, however, submits that the liability of Methanex Barbados to tax in Barbados arose by reason of its licence under the IBCA and the consequential liability to tax under section 10 of that Act and not by reason of its residence as a company incorporated in Barbados carrying on business from within Barbados, and therefore it was not a resident of Barbados for the purposes of the Treaty.

68. In support of this submission, the respondent relies on the decision of the Supreme Court of Canada in the important case of *Crown Forest Industries Ltd v Canada* [1995] 2 SCR 802 ("*Crown Forest*"). That case concerned the status of a company under a provision of the Canada-United States Income Tax Convention (1980) ("the Convention") equivalent to article 4 of the Treaty. The company ("Norsk") was incorporated in the Bahamas, but its only office and place of business was in the United States. A Canadian company ("Crown Forest") paid rent to Norsk for the hire of barges and withheld tax at the lower rate of 10% prescribed by the Convention on the basis that Norsk was a resident of the United States for the purposes of the Convention.

69. Under US tax law, Norsk as a foreign corporation was treated as liable to tax only on income which was effectively connected with its business conducted from the United States ("source income") and not on its worldwide income. (Although the rent on the barges hired by Crown Forest derived from Norsk's US-based business, it did not pay US tax on it by reason of reciprocal arrangements between the United States and the Bahamas as regards international shipping companies.) The Supreme Court of Canada held that a criterion was relevant under article 4 or its equivalent only if it led to the company being liable to tax on its worldwide income, that is to say that the State in question asserted jurisdiction to charge the company to tax on its worldwide income. Although Norsk's place of business was in the United States, it was not by reason of that liable to tax under US law on its worldwide income. Accordingly, it was not for the purposes of the Convention a resident of the United States and Crown Forest was therefore obliged to deduct withholding tax at the full rate of 25%.

70. The difficulty which the respondent faces in its submission based on *Crown Forest* is that, unlike the position of Norsk in the United States, Methanex Barbados is liable to tax in Barbados on its worldwide income, albeit at an advantageous rate under section 10 of the IBCA. No distinction is drawn in the IBCA between different sources of income. The liability to tax under section 10 applies to all its profits or gains, whatever their source. This liability to tax arises by reason of being a corporation resident in Barbados. If it was not licensed under the IBCA, Methanex Barbados would be liable under the Income Tax Act at the appropriate rate, which itself would depend on the amount of its income. As it was licensed under the IBCA, it was liable at the rates specified in section 10. Irrespective of the rate at which tax was charged, Barbados asserted jurisdiction to impose tax on all the income of Methanex Barbados as a resident of Barbados.

71. Far from supporting the respondent's first submission, the decision in *Crown Forest* demonstrates that Methanex Barbados was liable to tax under the law of Barbados by reason of its residence in that state.

72. The respondent also relied on a first instance decision of the Tax Court of Canada in *Alberta Printed Circuits Ltd v The Queen* 2011 TC 232, which concerned the tax treatment of payments made by a Canadian company to a Barbados IBC. The Canadian company argued that the assessments to tax in Canada, which were the subject of the appeal, were made outside a limitation period provided by the Canada-Barbados Double Taxation Treaty (1980). The issue arose whether that treaty applied to the tax imposed on the Barbados company as an IBC. The judge held that it did not do so, although he accepted that an IBC was liable to tax in Barbados. The treaty was expressly confined to particular types of tax in Barbados which included corporation tax imposed by the Income Tax Act but, the judge held, did not include the tax to which IBCs were subject. In any event, as the judge noted, the treaty expressly excluded IBCs, which it might be thought was a decisive answer to the appellant company's reliance on the treaty. It is not a decision which can provide any assistance on interpretation or application of the Treaty in this appeal which is drafted in very different terms.

73. The Board agrees with the Court of Appeal that Methanex Barbados was liable to tax in Barbados "by reason of [its] domicile, residence, place of management or … other criterion of a similar nature".

Was Methanex Barbados liable to tax on its worldwide income?

74. As regards the respondent's second submission, it accepts that liability to tax under article 4 requires liability to tax on worldwide income, but it argues that the tax under section 10 of the IBCA is not imposed on an IBC's worldwide income. This submission ignores that section 10 in terms imposes tax "on *all* profits and gains". The extent of the liability of Methanex Barbados to tax as a matter of Barbadian law is before the courts of Trinidad and Tobago a question of fact on which it, but not the respondent, adduced expert and factual evidence before the TAB. The TAB found at paras 73-74 that the worldwide income of Methanex Barbados was liable to tax in Barbados. This finding was upheld by the Court of Appeal at para 145. In *Perry v Lopag Trust Reg (No 2)* [2023] UKPC 16, [2023] 1 WLR 3494, the Board reviewed the application to findings of foreign law of its longstanding practice of not entertaining challenges to concurrent findings of fact save in exceptional circumstances. The Board held that the willingness of an appellate court to interfere with findings as to foreign law depended on the extent to which its own expertise and experience qualified it to review the finding. Accepting that the Board faces no particular difficulty in reviewing decisions on the law of Barbados, there is nonetheless in this case no basis for doubting the correctness of the conclusion of the courts below that Methanex Barbados was liable to tax on its worldwide income.

"Full" liability to tax

75. The respondent's third submission is that, in order to qualify as a person liable to tax for the purposes of article 4, that person must be liable at the full rate applicable generally and not at a substantially reduced rate, such as that under section 10 of the IBCA.

76. In support of this submission, the respondent relied on the decision in *Crown Forest* and on what it submitted were the objects and purposes of the Treaty.

77. As noted above, the Supreme Court of Canada held that Norsk was not liable to tax in the United States by reason of any of the applicable criteria, because its liability did not extend to its worldwide income but was limited to its US source income. As Iacobucci J, giving the unanimous judgment of the Court, said at para 40:

> "I agree with the appellant that the most similar element among the enumerated criteria is that, standing alone, they would each constitute a basis on which states generally impose full tax liability on world-wide income … In this respect, the criteria for determining residence in Article IV, paragraph 1 involve more than simply being liable to taxation on some portion of income (source liability); they entail being subject to as comprehensive a tax liability as is imposed by a state. In the United States and Canada, such comprehensive taxation is taxation on world-wide income."

78. At para 45, Iacobucci J said that "the application of the Convention is to be limited to taxpayers bearing full tax liability in one of the contracting parties". The nature of "full tax liability" appears from commentaries on the OECD Model Convention and other works cited in the judgment, including the American Law Institute's Proposals on United States Income Tax Treaties (1992) quoted at para 57:

> "Under the prevailing practice, a country entering into an income tax treaty extends the benefits of the treaty to a person or entity that is a 'resident of (the other) Contracting State'. 'Residence', in turn, is defined in terms of taxing jurisdiction. A person or entity is considered resident in a country if that country asserts an unlimited right to tax his or its income – that is, a right based upon the taxpayer's personal connection with the country (as opposed to the source of the income or other income- or asset-related factors). The test of residence requires that the person or entity claiming treaty benefits be 'fully taxable' in the residence

> country, in the sense of being fully subject to its plenary taxing jurisdiction."

79. Iacobucci J stated his conclusion on this point at para 68(3):

> "The parties to the Convention intended only that persons who were resident in one of the contracting states and liable to tax in one of the contracting states on their 'world-wide income' be considered 'residents' for purposes of the Convention."

80. There is nothing in the judgment in *Crown Forest* to suggest that "full tax liability" meant anything more than that the country in question asserted the right to tax a person on its worldwide income. In particular, there is nothing to suggest that it meant liability to the top rate of tax payable by, for example, companies other than IBCs. This was made clear by the Supreme Court of Canada in *Alta Energy* at para 54 of the majority judgment:

> "In the context of corporations, the 'liable to tax' requirement is met under the Treaty where the domestic law of a contracting state exposes the corporation to full tax liability on its worldwide income because it has its residence in that state (see *Crown Forest*, at paras 40 and 45). Liability to full taxation is established by the nexus between that State and the corporation's resident status. The 'liable to tax' requirement is often described in terms that may perhaps appear misleading, such as 'comprehensive taxation' or 'full liability to tax'. These terms convey the idea that residents enjoying tax holidays may be more suspicious than others. In reality, this requirement is not concerned with whether the person claiming benefits is in fact subject to taxation. Being liable to tax is better understood as being 'liable to be liable to tax', meaning that taxes are a possibility, regardless of whether the person actually pays any (R Couzin, *Corporate Residence and International Taxation* (2002), at p 107; see also pp 106 and 111). Therefore, corporate residents enjoying certain tax holidays, for example on capital gains, do not automatically lose their resident status under the Treaty because they are not subject to every possible form of taxation (Couzin, at pp 110-11 and 150). This can be contrasted with fiscally transparent vehicles like partnerships that are not exempted from taxation but, rather, are not exposed to tax at all, as their income is taxed in the partners' hands instead."

81. The respondent relied on what it submitted were the purposes or objects of the Treaty to support its interpretation of "liable to tax" in article 4. The only materials on which the respondent relied in this connection were article 41(2) of the Treaty of Chaguaramas (1973), which established CARICOM, and the preamble to the Treaty. Article 41(2) provides: "With a view to encouraging the regulated movement of capital within the Common Market, particularly to the Less Developed Countries, Member States agree to adopt among themselves Agreements for the Avoidance of Double Taxation". The preamble to the Treaty reads:

> "The Governments of the Member States of the Caribbean Community desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, profits or gains and capital gains and for the encouragement of Regional Trade and Investment."

82. The respondent submitted that "this treaty was intended to benefit nationals of the member states and not nationals of third-party states who set up holding companies for the sole or major purpose of obtaining preferential tax treatment at negligible rates". If accepted, this proposition would involve implying into the terms of the Treaty a requirement that "a resident of a Member State", if a company, had to be owned by nationals of Member States. There is no hint in the terms of the Treaty or in its preamble that any such restriction was intended by the Member States, still less is there any indication as to the details of any such restriction, such as the extent of any permitted foreign ownership, whether control would be equated with ownership, how preference shares and shareholder loans would be treated and so on.

83. Secondly, the respondent submitted that it could not have been intended "that one member state [in this case, Trinidad and Tobago] would cede its taxing jurisdiction where the other member state [in this case, Barbados] created a special taxing regime outside of its plenary taxing laws and which permanently imposed tax on these special entities at a negligible rate". It followed, the respondent submitted, that a defined group of persons such as IBCs which were not subject to tax at the rate payable by other companies were outside the state's plenary taxing laws and outside the intended scope of "residents of a Member State".

84. Again, however, there is no basis for this implied restriction on those persons who may qualify as residents. The creation of a special category to which different, and generally lower, rates of tax on worldwide income apply *is* an exercise of a state's plenary taxing jurisdiction. If it were intended to exclude such a category, it could have been done expressly, as was the case in the Canada-Barbados double taxation treaty considered in *Alberta Printed Circuits Ltd v The Queen* and is also the case in the UK-Barbados double taxation treaty (2012): see article 22(2).

The meaning of "paid ... to a resident of another Member State"

85. The respondent's final submission, which was not advanced below, is that the words "paid … to a resident of another Member State" in article 11 of the Treaty should be read purposively so as to require that any dividends must in substance be received and used by a resident of a member state.

86. This submission was based on the first instance decision of the United States Tax Court in *Aiken Industries Inc v Commissioner of Internal Revenues* (1971) 56 TC 925 ("*Aiken Industries*"). That case concerned the application of a provision of the US-Honduras Income Tax Convention which provided that interest on notes "from sources within one of the contracting States received by a resident, corporation or other entity of the other contracting State … shall be exempt from tax by such former State". The respondent in particular relied on this passage in the judgment, at p 933:

> "As utilized in the context of article IX, we interpret the terms 'received by' to mean interest received by a corporation of either of the contracting States as its own and not with the obligation to transmit it to another. The words 'received by' refer not merely to the obtaining of physical possession on a temporary basis of funds representing interest payments from a corporation of a contracting State, but contemplate complete dominion and control over the funds."

87. The case concerned withholding tax on interest payments on intra-group borrowing. A US corporation ("MPI"), owned by a Bahamian company ("ECL"), issued a loan note to ECL for a total principal sum of $2,250,000 carrying interest at 4% pa. ECL assigned the loan note to a Honduras company ("Industrias") which was also owned by ECL, in consideration of the issue by Industrias to ECL of loan notes with the same principal amount and carrying interest at 4% pa. As the court said, at p 934 Industrias "was committed to pay out exactly what it collected, and it made no profit on the acquisition of MPI's note in exchange for its own". In the circumstances, the court held that the transaction had no "valid economic or business purpose", but was motivated only by tax avoidance considerations and, applying US tax law, held that "such a motive standing by itself is not a business purpose which is sufficient to support a transaction for tax purposes". The court continued:

> "In effect, Industrias, while a valid Honduran corporation, was a collection agent with respect to the interest it received from MPI. Industrias was merely a conduit for the passage of interest payments from MPI to ECL, and it cannot be said to have received the interest as its own. Industrias had no actual

> beneficial interest in the interest payments it received, and in substance, MPI was paying the interest to ECL which 'received' the interest within the meaning of article IX. Consequently, the interest in question must be viewed as having been 'received by' an entity (ECL) which was not a 'corporation or other entity' of one of the contracting States involved herein, and we therefore hold that the interest in question was not exempt from taxation by the United States under article IX of the convention."

88. The Board does not consider that the reasoning in *Aiken Industries* can as a matter of law or fact be transposed to the present case. As to the facts, Industrias was contractually obliged to pay on to ECL all payments it received from MPI. It could not make a profit on the transaction whereby it acquired the MPI loan note, and its function was, in the view of the court, limited to that of a collection agent with "no actual beneficial interest in the interest payments it received". As to the law, not only was the wording of the US-Honduras double taxation convention ("received by") different from article 4 of the Treaty ("paid to") but the court applied principles of US tax law.

89. As regards the position in the present appeal, the Board has earlier analysed the extent of group control of the funds held by Methanex Barbados and rejected the conclusion that the Dividends were paid to Methanex Canada, rather than to Methanex Barbados and then to Methanex Cayman. Further, not only did Methanex Barbados make a profit as a result of the payment of the Dividends to it, but the profit thereby accruing to it was essential to the legality of the dividends which it then paid to Methanex Cayman. The Dividends were "paid to" Methanex Barbados, and indeed "received by" it, in the ordinary sense of those words.

90. The Board therefore rejects the respondent's fourth (and new) submission and agrees with the Court of Appeal in rejecting the other submissions on the interpretation of the Treaty.

Conclusion

91. For the reasons given in this judgment, the Board allows the appeal.