HIGH COURT OF JUSTICE (CHANCERY DIVISION)—27 AND28 NOVEMBER AND 19 DECEMBER 1980

HOUSE OF LORDS— 16 AND 17 NOVEMBER 1981 AND 21 JANUARY 1982

Pilkington Brothers Ltd. *v.* Commissioners of Inland Revenue[1]

Corporation tax—Capital allowances—Scheme for the sale of allowances in respect of a new ship by shipowners to a company having no other connection with shipping—Purchasing company made member of same group as shipowners subsidiary which ordered ship—Whether scheme involved "arrangements" within s 29(1) (*b*) (ii), *Finance Act* 1973, *such as to render it ineffective.*

ML was part of a shipping group proposing to invest in a new ship. However the capital allowances to be derived from such investment were more than ML and its group could use.

PB, a company unconnected with shipping had large available profits. With a view to securing to PB the benefits of the excess allowances ML entered into the following scheme with PB, designed to bring PB into the same group for "group relief" purposes as the ML group company (hereinafter called "GCL"), which would order the ship, and so entitle PB to use GCL's allowances.

PB had two wholly-owned dormant subsidiaries called HTV and Villamoor. ML had a wholly-owned subsidiary GCL, whose main object was to undertake all or any of the trades of a carrier by sea. HTV amended its objects so as to become an investment holding company. Villamoor amended its objects similarly and also its articles of association so as to redesignate its two issued shares, held by PB, as "A" shares and two more ordinary shares, which were afterwards issued for cash to ML as "B" shares. GCL also amended its articles. No changes were made to the memoranda or articles of association of PB or ML.

On 30 September 1974 ML agreed to sell half the issued share capital of GCL to HTV and half to Villamoor.

The result was that although PB retained 100 per cent. of the issued share capital of HTV and continued to control it the 50/50 split of the issued share capital of Villamoor between PB and ML meant that neither PB nor ML controlled or could control Villamoor; and similarly the 50/50 split of the issued share capital of GCL between HTV and Villamoor meant that neither HTV nor Villamoor controlled or could control GCL.

(1) Reported (Ch D) [1981] 1 WLR 781; [1981] STC 219; 125 SJ 135; (HL) [1982] 1 WLR 136; [1982] 1 All ER 715; [1982] STC 103; 126 SJ 84.

Also on 30 September 1974 GCL entered into an agreement with shipbuilders for the construction of a ship. Then on 31 December 1974 PB entered into an agreement with GCL whereby GCL would claim capital allowances so as to produce over a period available losses not exceeding £13,000,000 for companies in the PB group and such companies would pay ML 87½ per cent. of the corporation tax thereby saved.

It was common ground that as a result of the scheme PB and GCL satisfied all the requirements of ss 258 and 259 of the Income and Corporation Taxes Act 1970, and the further requirements of s 28, Finance Act 1973, and that PB was entitled to group relief in respect of capital allowances surrendered to it by GCL unless s 29(1)(*b*)(ii) of the Finance Act 1973 applied.

Before the Special Commissioners the Crown contended that there were within s 29(1)(*b*), "arrangements" in existence by virtue of which at some time during or after the expiry of [the relevant] accounting period (ii)...any persons together have or could obtain control of the first company but not of the second because taking GCL as the first company and PB as the second:

(i) PB and ML together had control of GCL but did not together have and could not together obtain control of PB, and

(ii) (assuming that the person or persons having control or the ability to obtain control for the purposes of s 29(1)(*b*)(ii) had to be third parties and not the first and second companies themselves) the shareholders of PB and ML together had control over GCL but did not together have and could not together obtain control of PB.

The Special Commissioners, accepting both contentions, dismissed the appeal. The Company appealed.

The Chancery Division, allowing the Company's appeal, held (1) s 29(1)(*b*)(ii) contemplates that the person or persons there referred to is or are a third party or third parties distinct from the first or second companies, and (2) the "arrangements" must be "things or measures" which are combined or disposed for a particular purpose and so could not embrace the articles of association of PB, which had been in existence before and had not been altered by the scheme.

Held, in the House of Lords allowing the Crown's (leap frog) appeal by a majority of three to two (Lords Fraser, Bridge and Brandon, Lords Wilberforce and Russell dissenting), that PB's articles of association were "arrangements ...in existence" for the purposes of s 29(1)(*b*)(ii) and accordingly, taking PB as the first company and GCL as the second, arrangements were in existence by virtue of which the shareholders of PB had control of PB but not of GCL.

Semble the person or persons having control or the ability to obtain control for the purposes of s 29(1)(*b*)(ii) must be third parties and not the first and second companies themselves (see *per* Lord Wilberforce at page 728 and Lord Russell at page 730 post respectively).

Semble also s 29(1)(*b*)(ii) may not apply to prevent group relief between companies A and C in the situation where they are together in a group with company B, B being the wholly-owned subsidiary of A and C being the wholly-owned subsidiary of B, since it is powerfully arguable that company B

A is a person who can be ignored, because it must act as instructed by company A, so that, applying the definition of "control" in s 534 of the Taxes Act, the only "person or persons together" who control company C are the same as those who control company A (see *per* Lord Bridge at page 736 post).

CASE

B Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 22 and 23 January 1979 Pilkington Bros. Ltd. (hereinafter called "PB") appealed against the refusal of H.M. Inspector of C Taxes to allow group relief hereinafter referred to for the accounting period to 31 March 1975.

2. Shortly stated, the question for our decision was whether PB and Manchester Liners Ltd. (ML) had so arranged matters that s 29(1)(*b*)(ii) of Finance Act 1973, applied so as to preclude the treatment of PB for the accounting period ended 31 March 1975 as being a member of the same group D of companies as Golden Cross Line Ltd. (GCL). If that section applied, PB was not entitled to the relevant group relief; if it did not apply, PB was so entitled.

3. David John Bricknell (Mr. Bricknell), solicitor of the Supreme Court and employed by PB as their assistant solicitor, gave evidence before us.

4. The following documents were proved or admitted before us:

E (1) Memoranda and articles of association of the following companies as at 30 September 1974: (*a*) Pilkington Bros. Ltd. (PB); (*b*) Manchester Liners Ltd. (ML); (*c*) Hello TV Ltd. (HTV); (*d*) Villamoor Ltd. (V or Villamoor); (*e*) Golden Cross Line Ltd. (GCL).

(2) Contract between GCL and Smiths Dock Co. Ltd. dated 30 September 1974 (shipbuilding agreement).

F (3) Contract between ML, PB and GCL dated 30 September 1974 (shareholders' agreement).

(4) Contract between ML, HTV and V dated 30 September 1974 (sale and purchase agreement).

(5) Contract between ML, GCL, HTV and V dated 30 September 1974 (indemnity agreement).

G (6) Contract between P and GCL dated 31 December 1974 (group relief agreement).

(7) Contract between GCL and ML dated 31 December 1974 (supervision agreement).

(8) Contract between GCL and ML dated 24 January 1975 (time charter). A

(9) Contract between GCL and ML dated 24 January 1975 (management agreement).

(10) Notes of meetings and telephone conversations between various of the parties between the dates 12 July 1974 and 16 August 1974.

(11) Correspondence between various of the parties being: (*a*) letter from ML to PB dated 30 September 1974 supplemental to the shareholders' B agreement; (*b*) letter from ML to HTV dated 27 September 1974 supplemental to the sale and purchase agreement; (*c*) letter from ML to V dated 27 September 1974 supplemental to the sale and purchase agreement; (*d*) letter from N.R.Wiskar (of P) to Messrs. Norton Rose Botterell & Roche dated 30 September 1974 relating to the sale and purchase agreement; (*e*) letter from ML to GCL dated 27 January 1975 supplemental to the time charter. C

Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required.

5. The following facts were admitted between the parties:

I. *Conception of the scheme.* In July 1974 ML put to PB a proposal whereby both PB and ML could benefit by the utilization of capital allowances on container ships. Discussions proceeded between representatives and D advisers of the two groups, culminating in an outline of the proposed scheme described in the following notes (taken by Mr. Bricknell) of a meeting held on 16 August 1974:

"The Scheme was outlined in that P.B. would have a 100 per cent Subsidiary (Company 'A') and a 50 per cent Associate (Company 'B') which would in turn hold 50 per cent each of the shares in Golden Cross E Line Limited. The remaining 50 per cent of the shares in Company B would, in the normal way, be held by Manchester Liners. However, their Group Policy is to avoid Associate Companies and they hoped that a 'friendly' company could be persuaded to hold this 50 per cent. The shipbuilding contract has not yet been executed and will be entered into by Golden Cross after the shares have been purchased by A and B. The F company is carrying on the business of chartering ships already so that trade need not be established for Revenue purposes. We pointed out that this may present problems as we would need to be indemnified against the past performance of the company and its continuing trade outside the simple business of the Scheme. It may be necessary to appoint a manager to organise this existing business. Mention was made that Golden Cross G has liabilities of some £40,000. Golden Cross Line has a share capital of 45,600 10 per cent non-cumulative preference shares of £1, all of which are issued and 54,400 ordinary shares of £1,300 of which are issued. The remainder of the Scheme would be on the normal lines, the chartering having a put option at the end of 15 years with a possible termination provision at the end of the 8th year when the facility will have been H repaid. It was anticipated that SMFC would be arranging for Barclays to put up 80 per cent of the capital for the vessel at 7 per cent and it was likely that the remaining 20 per cent would also come from Barclays. The lawyers then discussed the steps which needed to be taken to set up the Scheme:

1. Prepare Golden Cross.

(a) Convert preference shares into ordinary and split the 48,600 ordinaries then in issue equally into A and B shares. A shares would then be transferred to Company A and the B shares to Company B.

(b) The rights attached to the shares would be designed to ensure control for the A shareholders in all areas other than the composition of the Board of Directors. Consequently, A shares would have 2 votes per share on all matters save the election of directors, the B shares would have one vote.

(c) There would be 6 directors of Golden Cross, 3 A directors and 3 B directors.

2. Company B would have a simple investment company having A and B shares with complete deadlock.

3. The 20 per cent facility would probably be a revolving credit enabling the interest during the first 18 month period prior to the first Group Relief Payment to be rolled up.

4. A shareholders agreement would cover the general points of the Scheme and will impose certain restrictions on the transfer and issue of shares in Golden Cross. This would be between P.B. and the friendly third party.

It was left that P.B. would prepare the Share Purchase Agreement, the Memorandum and Articles of Association of Companies A and B and an informal letter covering the unscrambling. Norton Rose would prepare Memorandum and Articles of Golden Cross and the necessary changes in capital, a Shareholders Agreement, Charter Party, Supervision Agreement, Building Contract and Group Relief Agreements."

II. *Companies involved.* (*a*) Manchester Liners Ltd. (ML) are shipowners in the Furness Withy Group. At the material date ML was interested in securing a new ship. If ML had entered into a contract with the builders to buy the ship, first year allowances would have considerably exceeded the amount of the Group's liability to corporation tax. Such excess is hereinafter called "excess tax relief". ML's object in entering into the arrangements described below was to turn such excess tax relief into cash. (*b*) PB are well known and highly expert manufacturers of glass and glass products. Their object in entering into the arrangements described below was to save corporation tax by, in essence, purchasing such excess tax relief, at a discount from its face value, from ML. (*c*) Hello TV Ltd. (HTV), a private company and previously a dormant subsidiary of PB, on 26 September 1974 adopted amended objects clauses, to carry on business as a general investment holding company. (*d*) Villamoor Ltd. (Villamoor), a private company and previously a dormant subsidiary of PB with no liabilities, on 26 September 1974 adopted amended objects clauses and articles; its two issued ordinary shares were redesignated as "A" shares, and two more ordinary shares designated as "B" shares, were issued for cash to ML. The amended objects clauses were to carry on business as a general investment holding company. The following articles are material to this case:

Shares.

"4. (A) The share capital of the Company at the date of the adoption of these Articles is £100 divided into 96 Unclassified Shares of £1 each, 2

'A' Ordinary Shares of £1 each and 2 'B' Ordinary Shares of £1 each. (B) The Company may from time to time by Special Resolution increase the share capital by such sum, to be divided into shares of such amount, as the appropriate resolution shall prescribe. 5. The 'A' Ordinary Shares ("'A' Shares") and the 'B' Ordinary Shares ("'B' Ordinary Shares") shall be separate classes of shares but save as hereinafter otherwise provided shall rank pari passu in all respects. 6. Unless otherwise determined by Special Resolution:—(A) Any shares unissued at the date hereof and any shares hereafter created shall only be issued or allotted with the consent in writing of the holders of all the 'A' Shares and all the 'B' Shares for the time being in issue. (B) Any shares issued to a person who is already a holder of 'A' Shares shall be designated as 'A' Shares and shall accordingly be subject to such of the provisions of these Articles as are applicable to the 'A' Shares; any shares issued to a person who is already a holder of 'B' Shares shall be designated as 'B' Shares and shall accordingly be subject to such of the provisions hereof as are applicable to the 'B' Shares. (C) Subject as aforesaid and to any directions which may be given by the Company in General Meeting, any shares shall be under the control of the Directors, who may allot, grant options over or otherwise dispose of the same to such persons including the Directors themselves on such terms and at such times as they may think proper, provided that no shares shall be issued at a discount except as provided by section 57 of the Act."

Transfer of shares.

"9. Unless in any particular case all the holders for the time being of the 'A' Shares and 'B' Shares otherwise agree in writing, no legal or beneficial interest in any share of the Company shall be transferred."

Variation of rights.

"12. (A) The special rights attached to the 'A' Shares and the 'B' Shares may in either case, whether or not the Company is or is about to be wound up, be varied or abrogated with the sanction of Extraordinary Resolutions passed at separate General Meetings of the holders of shares of both classes each voting separately as a class. To every such separate meeting the provisions of these Articles with respect to notice of and proceedings at General Meetings shall mutatis mutandis apply, but so that the requisite quorum shall be one person holding or representing not less than three quarters of the issued shares of the class and that any holder of shares of the appropriate class present or represented may demand a poll and shall have one vote for each share of which he is the holder. (B) The passing of any Resolution of the Company in General Meeting (whether such Resolution be proposed and passed as a special, extraordinary or ordinary resolution) shall be deemed to constitute a variation of class rights and may be effected only with the sanction of Extraordinary Resolutions passed at separate General Meetings of the holders of shares of both classes each voting separately as a class pursuant to paragraph (A) of this Article."

Proceedings at general meetings.

"19. (A) At any General Meeting of the Company every holder of 'A' Shares present in person or by proxy shall on a show of hands or on a poll have one vote for each 'A' Share held by him and every holder of 'B' Shares present at such Meeting in person or by proxy shall on a show of hands or on a poll have one vote for each 'B' Share held by him. (B) In the event of a Resolution being proposed at a General Meeting of the Company for the removal of any Director appointed by either the holders of the 'A'

Shares or the holders of the 'B' Shares then in any case where such Resolution is for the removal of a Director appointed by the holders of the 'A' Shares the 'B' Shares shall confer no right of voting and in any case where such resolution is for the removal of a Director appointed by the holders of the 'B' Shares the 'A' Shares shall confer no right of voting."

Directors.

"20. (A) There shall be an even number of Directors, being not more than six, of whom one half shall be appointed by the holders of the 'A' shares and one half shall be appointed by the holders of the 'B' Shares. Provided that in the event that the holders of the 'A' Shares or the 'B' Shares shall fail to appoint the number of Directors which they are entitled to appoint pursuant to this Article the Board of Directors shall consist of those persons who have been appointed Directors pursuant to this Article. Provided also that the Directors of the Company at the date of the adoption of these Articles of Association shall be deemed to have been appointed by the holders of the 'A' shares. (B) The holders of the 'A' Shares may at any time and from time to time by a memorandum signed by the holders of a three-quarters majority of the 'A' Shares (a corporation which is a holder acting by resolution of its directors evidenced by the signatures of any two of its directors or of one of its directors and its secretary) remove any Director appointed by the holders of the 'A' Shares and appoint another in his place and may similarly fill any other vacancy in the Directors appointed by the holders of the 'A' Shares. Any such appointment or dismissal shall take effect at and from the time when the memorandum is lodged at the registered office of the Company or produced to a meeting of the Directors. (C) The rights conferred by the proceeding paragraph upon the holders of the 'A' Shares shall mutatis mutandis apply in respect of the holders of the 'B' Shares in relation to the Director or Directors appointed by the holders of the 'B' Shares."

Proceedings of directors.

"24. (A) The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, provided that the quorum necessary for the transaction of the business of the Directors shall be two Directors of whom one at least shall be a Director appointed by the holders of the 'A' Shares and one at least a Director appointed by the holders of the 'B' Shares. Provided that in the event that at any meeting of the Directors which shall have been duly convened, the Directors present do not constitute a quorum, the meeting shall be adjourned to such time (not being less than 7 days therefrom) and place as the Directors present shall determine and the quorum at such adjourned meeting shall be any two Directors. (B) Questions arising at any meeting of Directors shall be decided by a majority of votes with each Director having one vote. In the case of an equality of votes on any question the motion shall be deemed to have been lost."

(*e*) Golden Cross Line Ltd. (GCL), was prior to 30 September 1974 a wholly-owned subsidiary of ML, having as its main object (b) "to undertake and carry on all or any of the trades or businesses of carriers by sea ...". On 26 September 1974 it adopted new articles, of which the following are material to this Case:

Shares.

"4. (A) The share capital of the Company at the date of the adoption of these Articles is £100,000 divided into 51,400 Unclassified Shares of £1 each, 24,300 'A' Ordinary Shares of £1 each and 24,300 'B' Ordinary Shares of £1 each. (B) The Company may from time to time by Special Resolution increase the share capital by such sum, to be divided into shares of such amount, as the appropriate resolution shall prescribe. 5. The 'A' Ordinary Shares ("'A' Shares") and the 'B' Ordinary Shares ("'B' Shares") shall be separate classes of shares but save as hereinafter otherwise provided shall rank pari passu in all respects. 6. Unless otherwise determined by Special Resolution: (A) Any shares unissued at the date hereof and any shares hereafter created shall only be issued or allotted with the consent in writing of the holders of all the 'A' Shares and all the 'B' Shares for the time being in issue. (B) Any shares issued to a person who is already a holder of 'A' Shares shall be designated as 'A' Shares and shall accordingly be subject to such of the provisions of these Articles as are applicable to the 'A' Shares; any shares issued to a person who is already a holder of 'B' Shares shall be designated as 'B' Shares and shall accordingly be subject to such of the provisions hereof as are applicable to the 'B' Shares."

Transfer of shares.

"9. Unless in any particular case all the holders for the time being of the 'A' Shares and 'B' Shares otherwise agree in writing, no legal or beneficial interest in any share of the Company shall be transferred."

Variation of rights.

"12. (A) The special rights attached to the 'A' Shares and the 'B' Shares may in either case, whether or not the Company is being or is about to be wound up, be varied or abrogated with the sanction of Extraordinary Resolutions passed at separate General Meetings of the holders of shares of both classes each voting separately as a class. To every such separate meeting the provisions of these Articles with respect to notice of and proceedings at General Meetings shall mutatis mutandis apply, but so that the requisite quorum shall be one person holding or representing not less than three quarters of the issued shares of the class and that any holder of shares of the appropriate class present or represented may demand a poll and shall have one vote for each share of which he is the holder. (B) The passing of any Resolution of the Company in General Meeting (whether such Resolution be proposed and passed as a special, extraordinary or ordinary resolution) shall be deemed to constitute a variation of class rights and may be effected only with the sanction of Extraordinary Resolutions passed at separate General Meetings of the holders of shares each voting separately as a class pursuant to paragraph (A) of this Article."

Proceedings at general meetings.

"19. (A) At any General Meeting of the Company every holder of 'A' Shares present in person or by proxy shall on a show of hands or on a poll have two votes for each 'A' Share held by him and every holder of 'B' Shares present at such Meeting in person or by proxy shall on a show of hands or on a poll have one vote for each 'B' Share held by him provided always that in the event of any Resolution being proposed at a General Meeting of the Company for the election of a Director of the Company every holder of 'A' Shares and every holder of 'B' Shares shall have one vote for each share held by him. (B) In the event of a Resolution being proposed at a General Meeting of the Company for the removal of any Director appointed by either the

holders of the 'A' Shares or the holders of the 'B' Shares then in any case where such Resolution is for the removal of a Director appointed by the holders of the 'A' Shares the 'B' Shares shall confer no right of voting and in any case where such Resolution is for the removal of a Director appointed by the holders of the 'B' Shares the 'A' Shares shall confer no right of voting."

Directors.

"20. (A) There shall be an even number of Directors, being not more than four, of whom one half shall be appointed by the holders of the 'A' Shares and one-half shall be appointed by the holders of the 'B' Shares. Provided that in the event that the holders of the 'A' Shares or the 'B' Shares shall fail to appoint the number of Directors which they are entitled to appoint pursuant to this Article the Board of Directors shall consist of those persons who have been appointed Directors pursuant to this Article. (B) The holders of the 'A' Shares may at any time and from time to time by a memorandum signed by the holders of a three-quarter majority of the 'A' Shares (a corporation which is a holder acting by Resolution of its Directors evidenced by the signatures of any two of its Directors or of one of its Directors and its Secretary) remove any Director appointed by the holders of the 'A' Shares and appoint another in his place and may similarly fill any other vacancy in the Directors appointed by the holders of the 'A' Shares. Any such appointment or dismissal shall take effect at and from the time when the memorandum is lodged at the registered office of the Company or produced to a Meeting of the Directors."

Proceedings of directors.

"24. (A) The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, provided that the quorum necessary for the transaction of the business of the Directors shall be two Directors of whom one at least shall be a Director appointed by the holders of the 'A' Shares and one at least a Director appointed by the holders of the 'B' Shares. Provided that in the event that at any meeting of the Directors which shall have been duly convened, the Directors present do not constitute a quorum, the meeting shall be adjourned to such time (not being less than seven days therefrom and place as the Directors present shall determine and the quorum at such adjourned meeting shall be any two Directors. (B) Questions arising at any meeting of Directors shall be decided by a majority of votes with each Director having one vote. In the case of an equality of votes on any question the motion shall be deemed to have been lost. (C) Notwithstanding anything contained in these Articles no decision or Resolution of the Directors or any Committee of the Directors affecting the matters enumerated below shall be effective if at the meetings at which any of the said matters are considered or resolved upon any Director (whether a Director appointed by the holders of 'A' Shares or the holders of 'B' Shares) shall have dissented therefrom:—(i) the creation or issue of any shares or the grant or agreement to grant any option over shares or any uncalled capital of the Company or the issue of any obligations convertible into shares; (ii) the capitalisation repayment or other form of distribution of any amount standing to the credit of any reserve of the Company or any other reorganisation of the share capital; (iii) the declaration or payment of any dividend or the making of any distri-

bution; (iv) the giving of any guarantee or indemnity; (v) the commencement by the Company of any new type of business (not being ancillary or incidental to the business of ship owning and chartering); (vi) the formation or acquisition of any subsidiary of the Company; (vii) the borrowing of any money in excess of £50,000; (viii) the disposal of any assets of the Company having a book value or for a consideration in excess of £50,000; (ix) the sale or disposal of the whole or a substantial part of the undertaking or the assets of the Company; (x) the amalgamation or merger of the Company with any other company or concern. Nevertheless no person having dealings with the Company shall be concerned to see or enquire whether any Director did so dissent unless he shall have actual notice. (D) Notwithstanding any provision in these Articles to the contrary, a Director appointed by the holders of the 'A' Shares or the holders of the 'B' Shares (as the case may be) shall in the absence from any meeting of the Directors of any Director or Directors appointed by such class be entitled to exercise without production of any authority in that behalf all voting powers which such absent Director or Directors would have been entitled to exercise at such meeting had he or they been present thereat. If more than one Director appointed by such class shall be present at such meeting such power in respect of absentees shall be exercised by the senior in age of such Directors."

(*f*) Smith's Dock Co. Ltd. (Smith's) are shipbuilders, not concerned with the group relief scheme.

III. *The material agreements and extracts therefrom.*

(*a*) By an agreement dated 30 September 1974 ("the shareholders' agreement") made between ML, PB and GCL, it was agreed: (1) PB and ML would each lend Villamoor one half of the consideration payable by Villamoor to ML under the sale and purchase agreement referred to in (*c*) below. (2) ML, HTV and Villamoor would execute the sale and purchase agreement referred to in (*c*) below. (3) ML and PB would procure that Villamoor nominated Messrs. Stokes and Patterson (who were directors of ML) as directors of GCL. (4) ML and PB would procure that GCL entered into the five agreements referred to in (*d*) to (*h*) below. (5) ML would issue in favour of Barclays Bank International Ltd. (International) and/or Barclays Bank Ltd. (Barclays) such guarantee as might be required by International and the Department of Industry and/or Barclays in respect of the financing of the vessel and the containers, the subject matter of the shipbuilding agreement referred to in (*d*) below. (6) No transfer of shares in HTV, Villamoor or GCL was to take place without the consent of both PB and ML. (7) PB and ML would procure GCL to lend to ML at 12 per cent. all sums received by GCL from PB under the group relief agreement referred to in (*f*) below. (8) PB and ML would procure that any persons nominated as directors of GCL by Villamoor would be persons nominated by ML. (9) PB and ML would ensure that the type of business carried on by GCL would not be altered unless mutually agreed between them. (10) PB would ensure that GCL would not repudiate the five agreements referred to in (*d*) to (*h*) below. (11) This agreement should continue in force for so long as PB and ML remained interested directly or indirectly in the share capital of GCL.

(*b*) By letter also dated 30 September 1974 headed "Smith's Dock—Ship Number 1335 Sale of Capital Allowances" it was agreed between PB and ML as follows:

"With reference to the Shareholders Agreement entered into to-day between Manchester Liners Limited (1), Pilkington Brothers Limited (2) and Golden Cross Line Limited (3), and in particular to the Group Relief Agreement to be entered into between yourselves and Golden Cross Line Limited pursuant to Clause 1(d)(iv) of the said Shareholders Agreement, we hereby confirm and agree for respective selves and, so far as we are respectively able, for Golden Cross Line Limited, that there shall as soon as practicable hereafter be entered into between the said Golden Cross Line Limited and Pilkington Brothers Limited the said Group Relief Agreement in a form substantially that as attached hereto, subject to such amendments as may be necessary thereto to reflect:—(i) the operation of the Group Relief scheme envisaged thereunder in the manner tabulated in the appendix hereto; and (ii) the confirmation of Pilkington Brothers Limited given hereby to the extent that nothing is presently envisaged by the said Pilkington Brothers Limited which would in any way prejudice the said operation of such Group Relief scheme and that the said Pilkington Brothers Limited will use every best endeavour to ensure that nothing is effected on their part which will or may in the future prejudice the operation of such scheme.

For and on behalf of Pilkington Brothers Limited	For and on behalf of Manchester Liners Limited
John C Richards	M Pattinson."

A copy of the appendix referred to is annexed to this Case marked exhibit (A)(1).

(*c*) By an agreement also dated 30 September 1974 ("the sale and purchase agreement") ML agreed (i) to sell 24,300 "A" ordinary shares in GCL to HTV and 24,300 "B" ordinary shares in GCL to Villamoor; and (ii) to procure the appointments of Messrs. Richards (Group Taxation Manager—an accountant) and Wiskar (Assistant Solicitor—a barrister) as two directors nominated by HTV (the directors nominated by Villamoor being Messrs. Stokes and Patterson as aforesaid).

(*d*) By an agreement also dated 30 September 1974 ("the shipbuilding contract") Smith's agreed to build and deliver to GCL a containerised cargo vessel ("the vessel"), Yard No. 1335, and containers, at a basic price of £11,070,000. Clause 10 thereof read as follows:

"10 Inspection

(A) The Purchaser may appoint a reasonable number of duly authorised Inspectors who shall have the right to inspect the Vessel at the premises of the Builder during construction at any time during normal working hours and shall have the right of access to those parts of the Builder's Workshops and other places where work is carried out in fulfilment of this Agreement provided the progress of work under this Agreement is not thereby impeded. (B) The Builder shall use its best endeavours to arrange similar facilities to those referred to in (A) above at the works of its subcontractors. (C) The purpose for which the facilities for inspection are granted shall be to satisfy the Purchaser that the materials used and workmanship are in accordance with the said Specifications and this Agreement and shall be limited accordingly. Such

(1) Not included in the present print.

inspection shall not relieve the Builder of its responsibilities under this Agreement. (D) If during the construction of the Vessel the duly authorised Inspectors shall reasonably allege any defect or omission in the Vessel as not being in accordance with the Specifications and the Builder agrees thereto the Builder shall rectify any such defect or omission. (E) The inspector as aforesaid shall be at the cost of the Purchaser. (F) The Purchaser shall relieve the Builder of all liabilities whatsoever for loss of life or personal injury to or for loss or damage to the property of the Purchaser its representatives or agents while on or about the Vessel or while in the Builder's or its subcontractors' premises at the request of or on behalf of the Purchaser, unless such loss of life or personal injury loss or damage is caused in whole or in part by negligence or breach of statutory duty of the Builder its servants or agents or the negligence or breach of statutory duty of any subcontractor its servants or agents in which case the rights of the parties shall not be affected by the provisions of this sub clause."

(*e*) By an agreement dated 31 December 1974 ("the supervision agreement"), GCL appointed ML as their authorised representative to exercise their rights (*inter alia*) under clause 10 of the shipbuilding agreement.

(*f*) By an agreement also dated 31 December 1974 ("the group relief agreement") and made between PB as "the claimant company" and GCL as "the surrendering company" it was agreed that for the accounting periods ending 31 March 1975, 1976 and 1977: (i) GCL would claim capital allowances so as to produce sufficient "available loss" not exceeding £13,000,000 for companies in PB's group; and (ii) such companies would pay ML 87½ per cent. of the corporation tax thereby saved. By clause 1.03 "available loss" was to have the following meaning:

> "Trading losses and other amounts described in Section 259 which are or could (on the assumption that the Surrendering Company claims and is entitled to claim first year allowances within the meaning of Section 41 of the Finance Act 1971 in respect of all capital expenditure incurred by the Surrendering Company on the provision of the Vessel for which such allowances have not previously been claimed) be available for surrender by the Surrendering Company under Section 258."

(*g*) By a time charter by way of demise dated 24 January 1975 ("the management agreement") GCL leased the vessel to ML for 15 years from date of delivery for the charter hire therein specified.

(*h*) By an agreement also dated 24 January 1975 GCL appointed ML its manager, responsible for the day to day management of GCL's business.

6. It was contended on behalf of the Appellant PB:

(*a*) Control or lack of control in s 29(1)(*b*)(ii) of the Finance Act 1973 has to be by virtue of "arrangements".

(*b*) The shareholders in PB and ML do not together control GCL by virtue of any arrangements: these shareholders together are not party to any arrangements.

(*c*) If, contrary to (*b*), the shareholders in PB and ML together control GCL, these shareholders togetheralso control PB.

A (*d*) If, contrary to (*c*), the shareholders in PB and ML together do not control PB, this is not by virtue of any arrangements.

(*e*) The shareholders of PB do not control PB by virtue of any arrangements.

(*f*) There are no arrangements in existence in the present case by virtue of which the conditions referred to in s 29(1)(*b*)(ii) are satisfied.

B (*g*) The power to secure that the affairs of the (Company) are conducted in accordance with the wishes of (X) had to be found in either paras (*a*) or (*b*) of s 534 of the Income and Corporation Taxes Act 1970. ML did not have a power to secure by reference to the provisions of para (*a*). ML did not have a power to secure by reference to the provisions of para (*b*). The "other document" referred to in para (*b*) must be a document "regulating" the body C corporate and regulating in the same way as articles of association regulate or a charter or statute regulates, that is to say, regulation under the constitution of the body corporate. The management agreement and supervision agreement were not such documents.

(*h*) If, contrary to (*g*), the management agreement and the supervision agreement were "other documents" in the relevant sense, then, having regard, D for example, to clause 9 in the management agreement and clause 6 in the supervision agreement, the control of the affairs of GCL were conducted in accordance with its own wishes which it expressed through its agent, ML, under the management agreement and the supervision agreement.

7. It was contended on behalf of the Commissioners of Inland Revenue:

(*a*) Where, as in this appeal, there is an inbuilt "deadlock situation" by E virtue of the voting rights of ML and PB in Villamoor, and of the voting rights of Villamoor and HTV in GCL, *no one company has control within Income and Corporation Taxes Act 1970, 534* (*a*).

(*b*) This peculiar voting arrangement in practice requires accord between both ML and PB before GCL can operate at all: thus there are *two persons together* who have control over GCL within the meaning of Finance Act 1973, F s 29(1)(*b*)(ii).

(*c*) Further or alternatively, in all the circumstances ML has sole control of "the affairs of the company" by virtue of the management and supervision agreements.

(*d*) Therefore, turning to the precise provisions of s 29(1)(*b*)(ii) of Finance Act 1973, and taking GCL as the first company and PB as the second—(i) no G [single] person has or could obtain "control" of GCL: instead, there are *two* bodies of persons together (viz. the shareholders of ML and of PB) who have "control" over GCL: which two [bodies of] persons together neither have, nor could obtain, "control" of PB: "control" having the meaning assigned to it by 534, Income and Corporation Taxes Act 1970; (ii) for the purposes of the enactments relating to group relief, [GCL] shall be treated as not being a H member of the same group of companies as [PB].

(*e*) The day to day business of GCL and the particular matters surrounding the contract to build and run container vessel 1335 and its

containers, arising out of which the group relief scheme stemmed, were controlled by ML through its two nominated directors—the two HTV nominated directors being Messrs. Richards and Wiskar, who were experts in shipping generally, but who had no special ship-building or ship-running expertise. That state of affairs amounted to ML's having the power to secure that the affairs of GCL were conducted in accordance with ML's wishes, within the meaning of s 534 of the Income and Corporation Taxes Act 1970.

8. The only case cited to us was *Commissioners of Inland Revenue* v. *Lithgows, Ltd.* 39 TC 270, at page 278.

9. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 13 March 1979. A copy of our Decision is annexed hereto marked Exhibit B.

10. Figures were agreed between the parties on 3 April 1979 and on 14 June 1979 we adjusted the assessment accordingly.

11. The Appellants, immediately after the determination of the appeal, declared to us their dissatisfaction therewith as being erroneous in point of law and on 10 July 1979 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56 which Case we have stated and do sign accordingly.

12. The question for the opinion of the Court is whether our decision was erroneous in point of law.

B. James
A.K. Tavare
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House
94—99 High Holborn
London WC1V 6LQ

28 February 1980

Decision

This is an appeal by Pilkington Bros. Ltd. (PB) against the Revenue's refusal of a claim for group relief for the accounting period ending 31 March 1975. It is common ground that PB satisfied all the requirements of ss 258 and 289 of the Income and Corporation Taxes Act 1970, and also all further requirements of ss 28 and 29 of the Finance Act 1973, except those of s 29(1)(*b*)(ii) (hereinafter referred to as sub-para (ii), the material parts of which read as follows:

> "29 (1) If, apart from this section, two companies (in this section referred to as 'the first company' and 'the second company') would be treated as members of the same group—(*a*) ...(*b*) arrangements are in existence by virtue of which at some time during or after the expiry of that accounting period—(i) ...(ii) any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second (iii) ... then, for the purposes of the enactments relating to group relief, the first company shall be treated on and after 6 March 1973 as not being a member of the same group of companies as the second company."

By s 29(5) of the Finance Act 1973 "control" has the meaning assigned to it by s 534 of the Income and Corporation Taxes Act 1970 (hereinafter referred to as s 534), the material parts of which provide that "control" in relation to a body corporate means "the power of a person to secure (a) by means of the holding of shares or the possession of voting power in or in relation to that or any other body corporate, or (b) by virtue of any powers conferred by the articles of association or other document regulating that or any body corporate that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person..."

For the purposes of sub-para (ii) in this appeal the first company is Golden Cross Line Ltd. (GCL) and the second is PB. The issue is whether or not there were in existence arrangements by virtue of which any persons together had control of GCL but not of PB. The background and agreed facts, which are complicated, may be outlined as follows:

PB, manufacturers of glass and glass products, cast about for a method whereby it could obtain substantial group relief. It entered into a scheme with Manchester Liners Ltd. (ML), shipowners in the Furness Withy group. The scheme made use of Hello TV Ltd. (HTV) and Villamoor Ltd. (Villamoor), which were two wholly-owned subsidiaries of PB and GCL, which was a wholly-owned subsidiary of ML. The essence of the scheme was that under a shipbuilding agreement dated 30 September 1974 a cargo vessel and containers should be built for GCL by Smiths Dock Co. Ltd. at a basic price of £11,070,000. The first year allowance on that figure would exceed GCL's liability to corporation tax. ML sought to turn that excess into cash by (in effect) selling it to PB at a discount, so that PB would save corporation tax. The overall scheme was initiated by the shareholders' agreement dated 30 September 1974 and implemented by the following main arrangements:

(1) A sale and purchase agreement dated 30 September whereby it was agreed that ML should sell 24,300 'A' ordinary shares in GCL to HTV and 24,300 'B' ordinary shares in GCL to Villamoor; and that the board of GCL should consist of two directors nominated by PB and two by ML; (2) a group relief agreement dated 31 December 1974, whereby it was agreed that GCL should claim sufficient capital allowances to produce "available loss" not exceeding £13,000,000 for PB's group, such companies to pay ML 87½ per cent. of the corporation tax thereby saved by PB; (3) a supervision agreement dated 31 December 1974 whereby GCL appointed ML its authorised representative to exercise its rights under the shipbuilding agreement; (4) a time charter agreement dated 24 January 1975 whereby GCL leased the vessel to ML for 15 years from date of delivery; (5) a management agreement dated 24 January 1975 whereby GCL appointed ML its manager responsible for the day to day management of GCL's business. Pursuant to the arrangements the articles of association of Villamoor, HTV and GCL were altered (where necessary) so that: (*a*) ML and PB had equal shareholdings and equal voting rights in Villamoor; (*b*) PB had all the shares and all votes in HTV; (*c*) Villamoor and HTV had equal shareholdings in GCL (Villamoor held the 'B' shares and HTV held the 'A' shares) and HTV had twice as many votes, but the latter's preponderance of voting power appears to have been counteracted by GCL's article 12B, requiring all resolutions to be approved by both 'A' and 'B' shareholders, except resolutions appointing or removing directors under article 19B.

On these facts the Revenue refused PB's claim for group relief. Mr. Jackson, on behalf of the Solicitor of Inland Revenue put forward the

following grounds for the refusal: (*a*) because there was an inbuilt deadlock voting arrangement between the two groups, no one company had control within the meaning of s 534; (*b*) in practice accord between ML and PB was needed before GCL could operate, so that there were two persons together who had control over GCL within the meaning of sub-para (ii); (*c*) alternatively, ML had control "of the affairs of" GCL by virtue of the supervision and management agreements and also by virtue of the expertise of the two shipping directors nominated to GCL's board by ML.

Mr. Bates, Counsel for PB, supported the claim for relief and countered the Revenue's arguments by a number of submissions which may fairly be summarised as follows: (*a*) sub-para (ii) postulates three or more persons—the first company (GCL), the second company (PB) and the controller or controllers, but it is inherent in the statutory wording that the second company cannot be one of the controllers; (*b*) PB and ML shareholders were not together party to any arrangements through which they controlled GCL; alternatively, if they did so control GCL, they also controlled PB; in the further alternative, if they did not so control GCL, that was not by virtue of any arrangements; (*c*) in any event PB shareholders did not control PB by virtue of any arrangements; (*d*) there were no "powers" within the meaning of s 534 by which ML controlled GCL: in particular neither the supervision agreement nor the management agreements, both of which established the relationship of principal (GCL) and agent (ML), was such a "document" as is mentioned in s 534 (*b*).

Having considered the facts and the rival arguments we have reached the conclusion that the appeal fails, for the following reasons. First, it seems to us that the words "power ... to secure..." in s 534 require complete and ultimate control, *de jure* and *de facto*, not merely the ability to produce deadlock, i.e. to obstruct by veto. On this view control of GCL lay, by virtue of the arrangements, in PB and ML together, not in the one or the other by itself. To put it another way, the control was shared or joint. Second, we see nothing in the wording of sub-para (ii) that prevented PB as the second company from also being one of the joint controllers of GCL. Indeed, the word "any" *prima facie* suggests absence of exclusion, limitation or restriction. Third, it could not be said that PB and ML together had "control" of PB in the ordinary meaning of that word. The whole of the control of PB was vested in its shareholders, and no part had been transferred by virtue of any arrangement or otherwise to ML or the latter's shareholders.

The case was heard in the Chancery Division before Nourse J. on 27 and 28 November 1980 when judgment was reserved. On 19 December 1980 judgment was given against the Crown, with costs.

C.N. Beattie Q.C. for the Company.

A. Heyman Q.C. and *Robert Carnwath* for the Crown.

Nourse J:—The question in this case is whether group relief from corporation tax which would otherwise have been available to Pilkington Brothers Ltd. under s 258 of the Income and Corporation Taxes Act 1970, has been denied it by the restrictions on that relief which were introduced by the Finance Act 1973. The particular provision of the 1973 Act with which this case is concerned is s 29(1)(*b*)(ii). Broadly stated, that says that the relief is not to be available as between two companies in a group where arrangements are

in existence by virtue of which, at some time during or after the expiry of a relevant acounting period, any person or persons control or could obtain control of one of the companies but not the other. The question comes to the Court as an appeal by way of Case Stated from a decision of the Special Commissioners given on 13 March 1979. The effect of their decision was to confirm the Inspector of Taxes' refusal to allow Pilkington Brothers the group relief which had been claimed for the accounting period to 31 March 1975. Pilkington Brothers now appeal against that decision.

Before turning to the facts of the present case I should like to say something about group relief in general terms. It was first introduced in 1967. Its broad purpose was to allow one company in a group to deduct the trading losses and other amounts eligible for relief from corporation tax (for example, capital allowances) of another company in the same group in computing its own profits for the purposes of that tax. Two companies could claim to be members of the same group for this purpose only if one was a 75 per cent. subsidiary of the other or both were 75 per cent. subsidiaries of a third company. A company was treated as being a 75 per cent. subsidiary of another if and so long as not less than 75 per cent. of its ordinary share capital was owned directly or indirectly by that other. There were further provisions dealing with what was meant by ownership, direct or indirect. The ordinary share capital of a company was so defined as to exclude capital the holders whereof had a right to a dividend at a fixed rate but had no other right to share in the profits of the company. One of the results of that last definition was that participating preference shares, by carrying rights to share in the profits of the company, ranked as ordinary share capital for the purposes of group relief.

Mr. Beattie, who appears for Pilkington Brothers, told me that before 1973 advantage was taken of the then provisions, in particular of the definition of ordinary share capital, for the purpose of obtaining group relief in circumstances where Parliament might well not have intended it to be available. He illustrated that by an example, not so far removed from the present case, of a shipping company which wanted to buy a new ship but could do so only by incurring losses during the period of construction. It was a member of a group which made overall losses or at least had insufficient profits to take full advantage of the shipping company's losses for the purposes of group relief. Some clever lawyer or accountant then conceived the idea of getting round this difficulty by obtaining group relief in another way. This was how they did it. Suppose that the shipping company had an issued capital of £100 divided into 100 ordinary shares of £1 each. All it had to do was to issue for cash at par 300 participating preference shares of £1 each to a profitable company outside the group. The shipping company thus became a 75 per cent. subsidiary of the outside company, which took a surrender of the losses and put in a claim for group relief. In return for this the outside company agreed to pay to the shipping company an amount equivalent to the corporation tax saved by it, less an appropriate discount. Once the ship had been built and was available for charter the operation was put into reverse. The shipping company was returned to its old group and its profits on chartering became available to absorb the losses there. Mr. Beattie says—and he may be right—that it was in order to defeat this sort of device that ss 28 to 32 of the Finance Act 1973, were enacted. And he says that of those sections it is s 28 which is the most important. Subsection (2) of that section introduced two new requirements before one company could be treated as being a subsidiary of another for the purposes of group relief. In the case of a 75 per cent. subsidiary it requires, first, that the parent company should be

beneficially entitled to not less than 75 per cent. of any profits available for distribution to equity holders of the subsidiary company, and, secondly, that the parent company should be beneficially entitled to not less than 75 per cent. of any assets of the subsidiary company available for distribtuion to its equity holders on a winding-up. Those, says Mr. Beattie, were the two additional requirements which were needed to defeat, and did defeat, the sort of device to which I have referred. He then says that if Parliament had also intended that there should be some overriding requirement as to voting control, then that is something which one would have expected to find in s 28(2) and not in s 29. He then goes on to advance a broadly-based argument to the effect that s 29 is concerned with arrangements for some change to take place and not with a static state of affairs.

The material facts in the present case are these. In July 1974 another company, Manchester Liners Ltd., put a proposal to Pilkington Brothers which was intended to benefit both companies by the utilisation of capital allowances in container ships. Manchester Liners is a company of shipowners in the Furness Withy Group, and it wanted a new ship. If Manchester Liners had simply gone ahead and commissioned and paid for the building of the ship, first-year allowances would have considerably exceeded the amount of the group's liability to corporation tax. Accordingly, those allowances would not have been fully utilised. So far as Pilkington Brothers was concerned, the proposal would have the advantage of reducing its own liability to corporation tax by the purchase of the excess allowances from Manchester Liners at an appropriate discount. Negotiations proceeded between both sides during the summer of 1974 and the resultant scheme, so far as now material, had been agreed and implemented by the end of the year.

In the light of a considerable narrowing of the issues in dispute it is unnecessary for me to deal with the scheme in the detail in which it had to be looked at by the Special Commissioners. The essentials of the scheme, so far as material for present purposes, were these. Pilkington Brothers had two wholly-owned dormant subsidiaries called Hello TV Ltd. and Villamoor Ltd. On the other side, Manchester Liners had a wholly-owned subsidiary called Golden Cross Line Ltd., whose main object was to undertake and carry on all or any of the trades or businesses of carriers by sea. On 26 September 1974, (1) Hello TV amended its objects so as to carry on business as a general investment holding company; (2) Villamoor amended its objects in like manner and also its articles of association; its two issued ordinary shares were re-designated as "A" shares and two more ordinary shares designated as "B" shares were issued for cash to Manchester Liners; and (3) Golden Cross Line amended its articles of association. On 30 September Manchester Liners agreed to sell half the issued share capital of Golden Cross Line to Hello TV and half to Villamoor. As a result of these dealings with the share capital of Villamoor and Golden Cross Line and the material amendments to the memoranda and articles of association of those two companies and Hello TV, the position was as follows. Pilkington Brothers retained 100 per cent. of the issued share capital of Hello TV and 50 per cent. of the issued share capital of Villamoor (the "A" shares). Manchester Liners had acquired the other 50 per cent. of the issued share capital of Villamoor (the "B" shares). (It is agreed that in spite of apparent differences between the voting rights attaching to the "A" and "B" shares there was deadlock between Pilkington Brothers and Manchester Liners in regard to Villamoor, so that neither controlled or could control it.) Hello TV and Villamoor had each acquired 50 per cent. of the issued share capital of Golden Cross Line, but again there was deadlock between them, so that neither controlled or could control Golden Cross Line.

This latter deadlock, at all events, was intentional and was thought desirable for commercial reasons, but it is the admitted inability of Hello TV and therefore of Pilkington Brothers to control Golden Cross Line which is perhaps the most crucial issue in the determination of Pilkington Brothers' claim to be allowed group relief in the present case. Also on 30 September an agreement was entered into by which a firm of shipbuilders agreed to build and deliver to Golden Cross Line a containerised cargo vessel and containers at a basic price of £11,700,000.

The final step in the scheme which is material for present purposes was an agreement dated 31 December 1974, between Pilkington Brothers and Golden Cross Line, by which it was agreed that for the accounting periods ending 31 March 1975, 1976 and 1977 Golden Cross Line would claim capital allowances so as to produce sufficient "available losses" not exceeding £13,000,000 for companies in Pilkington Brothers' group and that such companies would pay Manchester Liners 87.5 per cent. of the corporation tax thereby saved. I have been told that the target of £13,000,000 was fully reached, and may have been exceeded. On a figure of £13,000,000 the saving to Pilkington Brothers of corporation tax at 52 per cent. would be £6,760,000. Accordingly, if the scheme worked Pilkington Brothers would have to pay £5,915,000 to Manchester Liners and would be able to retain a saving of £845,000 for itself.

I should emphasise, for the purposes of the argument of Mr. Heyman for the Crown, that the whole scheme and every stage of it required and was conditional upon the approval of the boards of Pilkington Brothers and Manchester Liners. On the other hand, and for the purposes of the argument of Mr. Beattie for Pilkington Brothers, I should emphasise that although the scheme required and involved amendments to the objects of Hello TV and Villamoor, and to the articles of Villamoor and Golden Cross Line, it did not require and it did not involve any amendments to the memoranda or articles of association of either Pilkington Brothers or Manchester Liners.

It has been common ground throughout that Pilkington Brothers satisfied all the requirements of ss 258 and 259 of the 1970 Act, and also all the further requirements of ss 28 (in particular, the two additional requirements of subs (2)) and 29 of the 1973 Act, except those of s 29(1)(*b*)(ii), which, when suitably abstracted, reads as follows:

> "29(1) If, apart from this section, two companies (in this section referred to as 'the first company' and 'the second company') would be treated as members of the same group and ... (b) arrangements are in existence by virtue of which at some thime during or after the expiry of that accounting period ... (ii) any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second ... then, for the purposes of the enactments relating to group relief, the first company shall be treated on and after 6th March 1973 as not being a member of the same group of companies as the second company."

Section 29(5) gives to "control" the meaning assigned to it by s 534 of the 1970 Act. I need not refer to that, because it has not given rise to any debate before me. Section 32(6) of the 1973 Act defines "arrangements" to mean arrangements of any kind, whether in writing or not. I need not refer to any of the other statutory provisions.

I should like to make two observations in s 29(1)(*b*)(ii) at this stage. First, as between two companies in the same group either can be "the first company" or "the second company", and vice versa. Secondly, on what I

conceive to be the natural reading of sub-para (ii) that provision contemplates that the person or persons there referred to is or are a third party or third parties distinct from the first and second companies. A

It is not entirely clear from the Case Stated how the matter proceeded before the Special Commissioners, or what were the precise grounds of their decision in favour of the Crown, but my understanding of the position is as follows. For the purposes of the Crown's arguments Golden Cross Line was the first company and Pilkington Brothers the second. The Crown's primary argument was that arrangements were in existence by virtue of which, at some time during or after the expiry of the relevant accounting period, Pilkington Brothers and Manchester Liners together had control of Golden Cross Line but not of Pilkington Brothers. That argument was accepted by the Commissioners as the main ground for their decision. The Crown's secondary argument was that arrangements were in existence by virtue of which, etc., the shareholders of Pilkington Brothers and the shareholders of Manchester Liners together had control of Golden Cross Line but not of Pilkington Brothers. Mr. Beattie says—and I agree with him—that the Commissioners appear, somewhat obliquely, to have accepted this argument as an alternative basis for their decision in favour of the Crown. B C D

In opening Pilkington Brothers' appeal to this Court Mr. Beattie dealt first with the two arguments which had been advanced by the Crown before the Special Commissioners and then with an entirely new point which had been raised by the Crown pursuant to a notice under Ord 91, r 4. But when Mr. Heyman came to argue on behalf of the Crown he confined himself to this new point. With regard to the other two points he did no more than formally adopt the reasoning and decision of the Commissioners so far as necessary. I think that means that Mr. Heyman left it to me to see whether I thought that the Commissioners' decision could be supported on either of the grounds on which they appear to have founded themselves. I cannot, without some enlightenment, see my way to doing that. It seems to me that the first ground involves the doubtful proposition that the persons referred to in sub-para (ii) can include the first or second company. It also involves the curious, even comical, notion that a company (in this case Pilkington Brothers) might in certain circumstances be said to control itself. As to the second ground, that involves the different but equally curious notion that when considering who controls Pilkington Brothers you can bring into the reckoning the shareholders of Manchester Liners, whose presence at any meeting of the shareholders of Pilkington Brothers, even if it was welcome, would nevertheless by superfluous. E F G

I turn therefore to the new argument which has been advanced on behalf of the Crown. The companies are now reversed, the first being Pilkington Brothers and the second Golden Cross Line. Mr. Heyman says that arrangements were in existence by virtue of which at some time during or after the expiry of the accounting period ending 31 March 1975, the shareholders of Pilkington Brothers together had control of Pilkington Brothers but not of Golden Cross Line. On that footing he says that para (*b*)(ii) is satisfied and that, for the purposes of the enactments relating to group relief, Pilkington Brothers is to be treated as not being a member of the same group of companies as Golden Cross Line. It will at once be seen that the Crown's new argument does not involve the doubtful proposition of either or the curious notions which appear to me to have infected its earlier arguments. But Mr. Beattie has advanced a number of submissions to the contrary, including his broadly-based argument as to the concern of s 29. H I

A The first, and in my view the crucial, question is: What are the "arrangements" contemplated by s 29(1)(*b*)? Mr. Heyman says that in the present case they were the share structure of Villamoor and Golden Cross Line, and the arrangements subsisting within each of those companies and the other companies concerned (including Pilkington Brothers) under their respective articles of association. He points in particular to the articles of B Pilkington Brothers, which admittedly enable the shareholders of that company to control it, and says that they are part of the arrangements contemplated by the provision. Although Mr. Beattie is prepared to accept that the dealings with the share capital of Villamoor and Golden Cross Line and the material amendments to the memoranda and articles of those two companies and Hello TV were part of the arrangements, he emphatically C denies that status to the articles of Pilkington Brothers. He says, correctly, that they have been in existence for very many years, and the scheme did not require and did not involve any amendments to them. He says, therefore, that they cannot be part of the arrangements which are contemplated by the provision, particularly when it is borne in mind that the shareholders were not parties to the scheme and in all probability knew nothing about it, at all events D until after it had been implemented. He then cites an anomaly which would flow from the Crown's argument and to which I shall refer in due course. In reply to this Mr. Heyman says that all the provision requires me to ask is what arrangements were in existence at the material time. Why should they not include the articles of association of a company, which embody the arrangements between the shareholders for the governance of the company, E albeit that they have been in existence for very many years and did not require any alteration for the purpose of the scheme?

Mr. Heyman also submits that I must adopt a similar approach to the interpretation of these provisions as that now adopted for the purposes of the legislation enabling the Inland Revenue to counteract the tax advantages of certain transactions in securities under s 460 of the 1970 Act. For that he refers F to a well-known passage in the speech of Lord Wilberforce in *Commissioners of Inland Revenue.* v. *Joiner*[1] [1975] 3 All ER 1,050 at page 1,055, where he said this:

> "On the enactment of the original section 28 of the Finance Act 1960 it was possible to contend, and it was contended, that this section (and its associated sections) were directed against a particular type of tax G avoidance known generally under such descriptions as dividend-stripping, asset-stripping and bond-washing, and that the sections and particular expressions used in them, amongst others 'transactions in securities', should be interpreted in the light of this supposed purpose. But this line of argument became unmaintainable after the decisions of this House in *Inland Revenue Commissioners* v. *Parker*[2] and *Greenberg* v. *Inland* H *Revenue Commissioners*[3]. It is clear that all the members of the House who decided those cases were of opinion that a wide interpretation must be given to the sections and to the expressions used in them. More than this, it appeared from the opinion of Lord Reid in *Greenberg* v. *Inland Revenue Commissioners* that the sections called for a different method of interpretation from that traditionally used in taxing Acts. From whereas it I is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and

(1) 50 TC 449, at p 480. (2) 43 TC 396. (3) 47 TC 240.

general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop." A

Mr. Heyman submits that those observations apply to any legislation which mounts a wide and general attack on tax avoidance, and he says that ss 28 to 33 of the 1973 Act are enactments of that character. I have no hesitation in rejecting that argument, which, if correct, would be the thin edge of a substantial wedge. I find it impossible to read the words of Lord Wilberforce, or of Lord Reid before him, as having been intended to go further than to prescribe an approach to the legislation which was there under consideration. B

In the circumstances, I approach the interpretation of ss 28 to 33 by the traditional route which has to be followed in the construction of a taxing statute. I think that means that, just as the taxpayer has the benefit of doubts or ambiguities in deciding whether a tax has been imposed upon him, so does he have that benefit in deciding whether a relief which was formerly available to him has been restricted. However, I do not find it necessary to rely on that principle for the purpose of determining what are the arrangements contemplated by s 29(1)(*b*) in the present case. As to that question, I start from the position that "arrangements" means arrangements of any kind, whether in writing or not, and that it is in both ordinary and statutory parlance a word of wide import by no means confined to relationships having contractual force and effect. But that is not to say that anything which in isolation or in another context can be described as arrangements are necessarily arrangements or part of the arrangements for the purposes of the provision now in question. They must in my judgment be arrangements by virtue of which both the control of the first company is had *and* the control of the second is lacking. The articles of association of Pilkington Brothers were in themselves arrangements by virtue of which the control of that company was had. The provisions of the scheme were in themselves arrangements by virtue of which the control of Golden Cross Line was lacking. Do the arrangements contemplated by the provision include both? Unless they do the provision does not operate. C D E F

I think that my general approach to the meaning of "arrangements" must be dictated by a passage in the speech of Lord Wilberforce in *Commissioners of Inland Revenue* v. *Plummer*(1) [1979] 3 All ER 775, at page 782 "F" to "G", where his Lordship was considering the definition of "settlement" which is to be found in s 454(3) of the 1970 Act. That reads, "any disposition, trust, convenant, agreement or arrangement". Lord Wilberforce said this: G

"But it still becomes necessary to enquire what is the scope of the words 'settlement' and 'settlor' and of the words which are included in 'settlement' in the context in which they appear. If it appears, on the one hand, that a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that, on the other hand, a legislative purpose can be discerned of a more limited character which Parliament can reasonably be supposed to have intended, and that the words used fairly H

(1) 54 TC 1, at p 42.

admit of such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary, for the courts to adopt such a meaning."

If, therefore, I felt that a completely literal reading of "arrangements" in s 29(1)(*b*)(ii) would so widely extend the reach of the provision that no arrangements of whatever character and however dissociated from each other fell outside it, then I would have to pay close attention to Mr. Beattie's argument as to the concern of s 29 in order to see whether I could discern a legislative purpose of a more limited character which Parliament could reasonably be supposed to have intended. However, I do not find that necessary in the present case, which in my judgment can be decided on no more than the ordinary meaning of the word.

The material dictionary meanings of "arrangement" are: a structure or combination of things for a purpose; a disposition of measures for a particular purpose. Both those definitions require that the individual elements of an arrangement should be combined or disposed for a particular purpose, and I do not think that, unless there is a context to the contrary, that requirement is displaced by the use of the plural as opposed to the singular. All that that adds is the possibility that there may be more than one combination of things or more than one disposition of measures. But without a context it would, as it seems to me, be unnatural to read the plural as dispensing with the need for some unifying link between each of the combinations or dispositions. I therefore construe this provision in the expectation that it is intended to refer to things or measures which are combined or disposed for a particular purpose. On that footing it is at the least difficult, and in my view impossible, to see how it can include the articles of association of Pilkington Brothers, whose nature and effect remained unchanged throughout and cannot in any ordinary sense be said to have been things or measures which were combined or disposed with the provisions of the scheme. The unifying link is just not there. That point seems to me to be emphasised by a consideration of the fact that the shareholders of Pilkington Brothers, who are the persons between whom the articles have effect as the arrangements for the governance of the company, were not parti to the scheme. It was said on behalf of the Crown that the shareholders were "brought into the arrangements" by the board of Pilkington Brothers, alternatively that they "were as much bound by the arrangements" (those were the Special Commissioners' words) as the company itself, but vague concepts of that kind are not really an aid to statutory construction.

I can perhaps best express my own view of the meaning of "arrangements" by reference to the so-called Aristotelian or dramatic unities of action, time and place. Just as the European drama outside the French 17th century in general ignored the unities of time and place (there are notable exceptions, such as *The Alchemist* and *John Gabriel Borkman*), so it seems to me that they are unnecessary requirements of "arrangements", which can be enacted over a considerable period of time and in a number of different places. But on the unity of action both the drama and the language have insisted. It seems to me that "arrangements" cannot sensibly include the script of another piece played out at a second theatre, normally not more than once a year, by actors not only not booked to appear on the stage of the first, but unaware that the performance was on.

I must now refer to the anomaly which Mr. Beattie says would result from the Crown's new argument. Mr. Beattie took the simple example of three

companies, A, B and C, where A is the parent company, B is a wholly-owned subsidiary of A and C is a wholly-owned subsidiary of B. That, he says, is an entirely straightforward and familiar type of company structure. There can be no doubt that before the 1973 Act C could have surrendered its losses to A, which could then have claimed group relief. But on the Crown's new argument that would no longer be so for these reasons. C is the first company and A the second for the purposes of s 29(1). B is a person who has control of C (by virtue of C's articles of association), but not of A. On the Crown's argument s 29(1)(*b*)(ii) is satisfied, and that means that A cannot claim group relief on a surrender to it of C's losses. That, said Mr. Beattie, would be a most anomalous and far-reaching result of the Crown's new argument. Mr. Heyman accepted this as an inevitable result of the argument, but he sought to counter the difficulty by saying that it would be open to the three companies to take simple and inoffensive steps to remedy the position. That may well be so, but that again is not an aid to statutory construction. It seems to me that an anomaly of this kind, unless it can be answered, is one which, if it were necessary to do so, would again have to be taken very seriously in discerning the legislative purpose which Parliament can reasonably be supposed to have intended in regard to this provision. However, I wish to emphasise that I have not found it necessary to rely on it for the purpose of arriving at a conclusion on this point.

In the circumstances, my conclusion on what in the end is a short point is that the "arrangements" for the purposes of s 29(1)(*b*)(ii) in the present case did not include both the articles of association of Pilkington Brothers and the provisions of the scheme. That is enough to dispose of the Crown's new argument, and I propose to say nothing further about Mr. Beattie's alternative submissions to the contrary. The appeal must be allowed.

Appeal allowed, with costs.

Certificate granted to the Crown to appeal direct to the House of Lords pursuant to s 12, Administration of Justice Act 1969.

The Crown's appeal was heard in the House of Lords (Lords Willberforce, Fraser of Tullybelton, Russell of Killowen, Bridge of Harwich and Brandon of Oakbrook) on 16 and 17 November 1981 when judgment was reserved. On 21 January 1982 judgment was given in favour of the Crown, with costs.

S.A. Stamler Q.C., C.H. McCall and *Robert Carnwath* for the Crown.

C.N. Beattie Q.C. and *C.J.F. Sokol* for the Company.

The following cases were cited in argument:—*W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* 54 TC 101; [1981] 2 WLR 449; *Reg* v. *Schildkamp* [1971] AC 1; *Littman* v. *Barron* 33 TC 373; [1952] 2 All ER 548; *Commissioners of Inland Revenue* v. *Lithgows Ltd.* 39 TC 270; *Prince Ernest Augustus of Hanover* v. *Attorney-General* [1957] AC 436.

Lord Willberforce—My Lords, this appeal, which comes direct from the High Court by leave granted under s 12 of the Administration of Justice Act 1969, involves a question of group relief against corporation tax. The facts are fairly elaborate and are set out over many pages in the Case Stated by the Special Commissioners.

The Respondent company, the well-known glass manufacturers, in 1974 entered into an arrangement or arrangements with Manchester Liners Ltd. ("ML"), a shipping company in the Furness Withy Group, the broad object of which was to finance the building of a ship for ML and for losses so incurred to be surrendered to Pilkingtons for cash. Pilkingtons would be able to deduct the losses against their trading profits, and ML would obtain the equivalent (less a discount) in cash. Pilkingtons made a profit to this extent of the discount. The scheme involved setting up a group, of which Pilkingtons and the ship owning company would be members, so that the legal provisions concerning group relief would apply. It may be worth stating that as a result of this scheme a ship was in fact built: it could probably not have been financed but for the group relief.

The Case Stated sets out the arrangements made in great detail. They involved the reconstruction of three companies. Golden Cross Line Ltd. ("Golden Cross") which was to be the shipowning company; a subsidiary of Pilkingtons called Hello TV Ltd., and a dormant company called Villamoor Ltd. Elaborate arrangements were made as to the structure and share capital of these companies the end result of which (simplified) was as follows. The shares in Golden Cross were held equally by Hello TV and Villamoor. The shares in Villamoor were held equally by Pilkingtons and ML. Pilkingtons remained the holder of all the shares in Hello TV; Golden Cross and Villamoor were "dead-locked" companies, in the sense that neither of the 50 per cent. capital owners could prevail over the other. It is common ground that (*a*) Pilkingtons, through Hello TV and Villamoor, was entitled to 75 per cent. of the profits of Golden Cross; (*b*) Pilkingtons, through Hello TV and Villamoor, would be entitled to 75 per cent. of the assets of Golden Cross in a winding-up; (*c*) Pilkingtons was not in control of Golden Cross, nor was ML, nor was Villamoor. On these facts the Special Commissioners held that Pilkingtons and Golden Cross were not members of the same group and refused group relief. The High Court (Nourse J.) reversed this decision.

The requirements for group relief are contained in the Income and Corporation Taxes Act 1970, and the Finance Act 1973. Pilkingtons and Golden Cross satisifed the relevant provisions of the Act of 1970 but additional requirements were introduced in 1973. These were in two sections. Section 28 created additional *qualifications*: these were that the parent company of the group had to be entitled to at least 75 per cent. of the profits and 75 per cent. of the assets available for distribution of the subsidiary. The necessary qualifications were both met. There is no *qualification* as regards voting control. This effectively answers the Crown's contention that the object of ss 28 and 29 is to confine group relief to circumstances in which all the prescribed elements of control and entitlement to dividends and assets are present and are intended to be present. If this were the case, voting control would have been made a *qualification*. Section 29 laid down certain conditions for *disqualification*: these included the possibility that one of the "group" companies could cease to be a member of the group or that another company could take over its trade. The relevant disqualification here is created by the following:

> "29(1)(*b*) [if] arrangements are in existence by virtue of which, at some time during or after the expiry of [an accounting period which ends on or after 6th March 1973] (*b*)(ii) any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second,...."

The Acts contain other provisions relating to "control" to which I need not refer. The whole issue depends on the provisions I have quoted.

Before expressing my own opinion on this appeal, which unfortunately diverges from the majority view, I would make two points. 1. In order to disentitle Pilkingtons to group relief the Commissioners must point to some person or persons who by virtue of arrangements in existence control Pilkingtons but do not control Golden Cross. Before the Special Commissioners, it was argued that ML and Pilkingtons together controlled Golden Cross but did not control Pilkingtons: this involved the odd conception of control of Pilkingtons by itself and another company. As an alternative it was argued that the shareholders in ML and Pilkingtons together controlled Golden Cross but did not control Pilkingtons: this involved the odd conception that one could enquire whether the shareholders of one public company (ML) did or did not partly control another public company (Pilkingtons). Before the High Court a different proposition was argued—that the shareholders of Pilkingtons controlled Pilkingtons but not Golden Cross and this I understand is acceptable in this House. I shall examine it in a moment but at this stage it is fair to comment that if, as is suggested, this is a simple answer, on an ordinary reading of the relevant section, it is surprising that it was not thought of earlier. It suggests that the section is not so plain in its wording as to compel the result contended for. Certainly, a strong argument based on literality can be made for including the shareholders and the company's articles in the arrangement, and for saying that these arrangements were in existence at the relevant time, but this does not convince me, any more than it convinced the Judge, that no other meaning of the phrase is legitimate. 2. It seems at first sight strange that the critical persons to consider should be the shareholders of Pilkingtons at all. In the first place, the three paragraphs in s 29(1)(*b*) seem to be thinking of some third person, outside the first company and the second company, who is in a position by one means or another to take over one or other of the first company, or the second company (here, Pilkingtons or Golden Cross). Secondly, the shareholders of Pilkingtons are not persons one would think of in connection with the scheme. There is no mention of them in the elaborate account of the arrangements. It is not found that they knew anything about the arrangements, still less entered into them. If the necessary condition for disallowing the exemption cannot be found among the five companies involved in the arrangements, or in any outside body that suggests that the disqualifying conditions are not met. They would certainly have been met if ML had been in control of Golden Cross. But this situation has been avoided. They would certainly have been met if some company could obtain control of Golden Cross, but this was not the case.

The approach which I would make to the subject is a simple one—or one for which simplicity can be claimed as justly as for the Crown's approach. Were there arrangements in existence by virtue of which any persons (the shareholders in Pilkingtons) had or could obtain control *of the first company but not of the second*? The essential words are those underlined: the arrangements must produce the whole result—positive and negative. Now we know what arrangements were made in 1974: they produced the group structure, including the deadlocked companies. These arrangements, as pointed out above, did not bring paragraph (ii) into play because ML was not in control of Golden Cross. The shareholders of Pilkingtons had no part in these arrangements, they were not consulted, they did not agree to them. Can we then add in, as arrangements, those made (we do not know when, but probably they were spread over years as each shareholder acquired his shares)

by which these shareholders were able, ultimately, to control Pilkingtons, arrangements which had nothing to do with the creation of the group structure? I cannot think so. I regard the sub-sub-section as directed to arrangements for setting up the group structure as existing in 1974 and to no other arrangements. Giving "arrangements" the widest possible meaning, I cannot go beyond this.

The Crown tried to argue that in as much as the 1974 arrangements were built upon an existing structure—viz. that of Pilkingtons as it was—with shareholders and directors having powers defined by articles, that brought whatever arrangements had been made and subsisted, in order to maintain that structure, into the existing arrangements. And a number of rather farfetched analogies were suggested to support this. But this fails, to my mind, to get over the fundamental difficulty. It does not explain how, or when, the shareholders of Pilkingtons, a fluctuating body of probably several thousand, are said to have entered into arrangements which in 1974 had the result of setting up the group. If one asks, as the Crown invited us to ask, whether the shareholders' "arrangement" was a *sine qua non* of the scheme, the answer is plainly no.

I need only add that I agree with the Judge in rejecting the Crown's alternative arugment, which was hardly pressed, that either Pilkingtons and ML, or the shareholders of Pilkingtons and of ML jointly controlled Golden Cross but not Pilkingtons. Since this argument remains one largely of impression, expansion of it would be profitless. I am content to say generally that I agree with and adopt the reasoning of the Judge, and for my part, would have dismissed the appeal.

Lord Fraser of Tullybelton—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich, and I entirely agree with his conclusion, and with the reasoning by which he reaches it. I wish to add only two brief comments.

First, on a literal reading of s 29(1)(*b*), it seems to me to point strongly towards the conclusion reached by Lord Bridge. I attach importance to the fact that the question to which para (*b*) directs attention is whether arrangements "are in existence" by virtue of which certain consequences may follow, and not whether such arrangements came into existence or were entered into for the purpose of setting up the group structure. In my opinion it is, therefore, immaterial that the voting control of Pilkington Brothers Ltd. was with the shareholders of the company before the present question relating to the group structure arose. It was an element which existed before, and continued to be in existence during, the relevant accounting period, and I regard it as having been built upon, and included in, the total arrangements for the group structure. That might have been more obvious if the articles of association of Pilkington Brothers, as they stood before the present group structure was created, had provided for control of the company being exercised in some unusual way (as, for instance, by giving votes only to a relatively small class of shares), and that provision has been continuing in existence and turned to account for the purposes of the group structure. But the position is no different in the present case, where the voting control was on ordinary straightforward lines. Secondly, the result to which I think the paragraph leads does not seem to me so surprising or inconvenient as to suggest that it ought to be construed in some more restricted way. I recognise that it cannot be regarded as an obvious construction, since it was not at first adopted by the Inland Revenue. But once it had been pointed out it seems to me to be irresistible.

I would, therefore, allow the appeal. A

Lord Russell of Killowen—My Lords, others of your Lordships have set out the statutory provisions relevant to this appeal, and the facts of the case, and I need not repeat them. If a company carries on, as one entity, a number of trading activities, in one of which it makes profits and in another of which it makes losses, the losses can be set against the profits to arrive at its net profits for tax: and this is so if the various trading activities are dignified with the title B of "Divisions". In the most general terms it might be said that the aim of group relief is to achieve a similar result where the various trading activities are carried on not by Divisions but by subsidiaries forming part of one group of companies. But to say that is not *per se* to negative Pilkington's claim in the present case: nor does it suffice for that purpose to notice that at the heart of the scheme in this case was the acquisition by Pilkingtons of losses of a C company not then within Pilkington's group, and not involved with glass manufacture. The solution to the appeal must depend upon the impact, or lack of impact, of the relevant statutory provisions.

The solution to this appeal depends upon the impact on the facts of s 29(1) of the Finance Act 1973. That refers to two companies (the "first" and the "second") which would otherwise qualify as members of the same group for D the purposes of group relief so that one could "surrender" losses to the other (as would the two companies in this case), and proceeds in stated circumstances to require that on and after 6 March 1973 the first company be treated as *not* being a member of the same group as the second company. The Crown contend that such treatment is required because, within the language of s 29(1)(*b*)(ii), this is a case where: E

> "arrangements are in existence by virtue of which, at some time during or after the expiry of that accounting period,... any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second."

The reference to "that accounting period" is to an accounting period which ends on or after 6 March 1973. F

Before the Special Commissioners the Revenue put forward two contentions for requiring such treatment. One was that under the arrangements involved in the scheme Manchester Liners and Pilkingtons were persons who together controlled Golden Cross but did not control Pilkingtons: the other contention was that the *shareholders* in Manchester Liners and in Pilkingtons were persons who together controlled Golden Cross but did not G control Pilkingtons. Both of these concepts appear to me to be remarkable, the one involving the concept of a question being asked whether company A *and* company B controlled together company A, the other involving the concept of a question being asked whether the shareholders in company A *and* the shareholders in company B controlled company A. I am not able to attribute to the legislature the intention that such questions should be asked. However, H the Special Commissioners saw nothing peculiar in this and decided against Pilkingtons, who appealed to the High Court on a Case Stated. When the matter came to the High Court the Crown produced a brand new contention. That was that the shareholders from time to time in Pilkingtons were persons who together controlled Pilkingtons but did not control Golden Cross. The only explanation, of which I can think, for not so arguing before the Special I Commissioners is that it did not occur to the Revenue that, within the existing "arrangements by virtue of which", *could* be included the background,

entirely dehors and irrelevant to the scheme which was carried out, that the shareholders in Pilkingtons (or a sufficient majority) under its untouched memorandum and articles of association controlled Pilkingtons. It is, of course, true that the Revenue, though of all organisations the Revenue should know the scope of what was intended by the fiscal legislation proposed to Parliament, sometimes miss a trick. But the circumstance that this new point was not raised before the Special Commissioners at least must give rise to some uncertainty as to its validity.

Undoubtedly the shareholders from time to time in Pilkingtons (or a sufficient majority of them) were persons who together had control of Pilkingtons: and those same persons together did not have control of Golden Cross. But the crux of the case is whether that situation was one which was the outcome ("by virtue of which") of "arrangements" [that] "are in existence". What are "arrangements" referred to in this obscure paragraph? Of course "arrangements" is a word of wide import in one sense. But is it to be taken to include the memorandum and articles of association of Pilkingtons, just because they undoubtedly embody an arrangement between the shareholders in Pilkingtons *inter se* and with Pilkingtons? I do not think so. The grouping scheme in the present case in no way involved the internal structure of Pilkingtons: nor did it concern in any way those who at the time of the scheme (or thereafter) might be shareholders in Pilkingtons. Who those persons (shareholders) were, and the internal structure of Pilkingtons as an "arrangement" were matters of total irrelevance to the complicated arrangements involved in the grouping scheme and to the existence of the resultant intended group. I am not persuaded that the reference to "arrangements" is properly to be regarded as extending to something—the internal structure of Pilkingtons—so totally irrelevant to the group situation which otherwise exists and which s 29(1)(*b*) is designed to narrow in stated circumstances.

I would accordingly uphold the decision of Nourse J. and would dismiss the appeal.

My Lords, speaking entirely for myself I would have been happier had your Lordships' Committee not allowed this as a "leapfrog" appeal, when your Lordships would have had the benefit of the opinions of the Court of Appeal.

Lord Bridge of Harwich—My Lords, the question in this appeal is whether the Respondents Pilkington Brothers Ltd. ("Pilkingtons") are entitled to group relief from corporation tax in respect of a claim for capital allowances based on the cost of a large container ship, which claim was surrendered to Pilkingtons by Golden Cross Line Ltd. ("Golden Cross"), the buyers of the ship.

Group relief was first introduced by s 258 and the following sections of Chapter I of Part XI of the Income and Corporation Taxes Act 1970 ("the Taxes Act"). Section 258 enabled one company in a group of companies to transfer to another company in the same group its right to relief from corporation tax arising from trading losses or otherwise, e.g. from capital allowances. The value of the provision to an enterprise carried on through a group of companies, where one company has a right to relief exceeding its taxable profits and another has taxable profits exceeding its right to relief, is

obvious. What constituted a group of companies for the purpose of group relief was originally to be ascertained in accordance with the following provisions of the Taxes Act (so far as relevant to the present appeal):

> "258.—(1) Relief for trading losses and other amounts eligible for relief from corporation tax may in accordance with the following provisions of this Chapter be surrendered by a company (called 'the surrendering company') which is a member of a group of companies and, on the making of a claim by another company (called 'the claimant company') which is a member of the same group, may be allowed to the claimant company by way of a relief from corporation tax called 'group relief'. . . . (5) For the purpose of this section and the following sections of this Chapter—(*a*) two companies shall be deemed to be members of a group of companies if one is the 75 per cent. subsidiary of the other or both are 75 per cent. subsidiaries of a third company, . . . 532.—(1) For the purposes of the Tax Acts a body corporate shall be deemed to be— . . . (*b*) a '75 per cent.subsidiary' of another body corporate if and so long as not less than 75 per cent. of its ordinary share capital is owned directly or indirectly by that other body corporate."

The Finance Act 1973 ("the Act of 1973") introduced important new provisions having effect from 6 March 1973, designed to limit the availability of group relief. Those primarily relevant to the point on which this appeal turns are the following:

> "28. . . . (2) Notwithstanding that at any time a company (in this subsection referred to as 'the subsidiary company') is a 75 per cent. subsidiary . . . within the meaning of section 532 of the Taxes Act, of another company (in this subsection referred to as 'the parent company') it shall not be treated at that time as such a subsidiary for the purposes of the enactments relating to group relief unless, additionally, at that time—(*a*) the parent company is beneficially entitled to not less than 75 per cent. . . . of any profits available for distribution to equity holders of the subsidiary company; and (*b*) the parent company would be beneficially entitled to not less than 75 per cent. . . . of any assets of the subsidiary company available for distribution to its equity holders on a winding-up. 29.—(1) If, apart from this section, two companies (in this subsection referred to as 'the first company' and 'the second company') would be treated as members of the same group of companies and—(*a*) in an accounting period which ends on or after 6th March 1973, one of the two companies has trading losses or other amounts eligible for relief from corporation tax which it would, apart from this section, be entitled to surrender as mentioned in subsection (1) of section 258 of the Taxes Act, and (*b*) arrangements are in existence by virtue of which, at some time during or after the expiry of that accounting period,—(i) the first company or any successor of it could cease to be a member of the same group of companies as the second company and could become a member of the same group of companies as a third company, or (ii) any person has or could obtain, or any persons together have or could obtain, control of the first company but not of the second, or (iii) a third company could begin to carry on the whole or any part of a trade which, at any time in that accounting period, is carried on by the first company and could do so either as a successor of the first company or as a successor of another company which is not a third company but which, at some time during or after the expiry of that accounting period, has begun to carry on the whole or any part of that trade, then, for the purposes of the enactments

A relating to group relief, the first company shall be treated on and after 6th March 1973 as not being a member of the same group of companies as the second company....(5) In subsections (1) and (2) above—...'control' has the meaning assigned to it by section 534 of the Taxes Act. 32.—(6) In...section 29...'arrangements' means arrangements of any kind, whether in writing or not."

B The Taxes Act, by s 534, defines "control", in relation to a body corporate, as meaning:

"...the power of a person to secure—(*a*) by means of the holding of shares or the possession of voting power in or in relation to that or any other body corporate, or (*b*) by virtue of any powers conferred by the articles of association or other document regulating that or any other
C body corporate, that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person."

The matter in issue in the appeal arises out of a series of agreements concluded between Pilkingtons and Manchester Liners Ltd. ("Manchester Liners"). Pilkingtons are the well-known manufacturers of glass; Manchester Liners are ship owners. Manchester Liners wanted to acquire a new container
D ship which was to cost more than £11,000,000. This would give rise to a claim for capital allowances exceeding any taxable profits of Manchester Liners, or any company in the same group as Manchester Liners, against which the claim could be set. Pilkingtons were willing to purchase the claim at a discount. Pilkingtons had two wholly owned subsidiaries, Hello TV Ltd. ("HTV") and Villamoor Ltd. ("Villamoor"). Manchester Liners had a wholly owned
E subsidiary, Golden Cross. Without examining the details it is sufficient to say that agreements were concluded between these companies which produced the following end result as regards the structure of the companies. Pilkingtons retained its holding of all the shares in HTV. Pilkingtons retained 50 per cent. of the shares in Villamoor; the remaining 50 per cent. was acquired by Manchester Liners. HTV and Villamoor each acquired 50 per cent. of the
F shares in Golden Cross. It is not disputed that the effect of this distribution of shares was to constitute Golden Cross a "75 per cent. subsidiary" of Pilkingtons both within the original definition in s 532 of the Taxes Act and in accordance with the provisions qualifying that definition in s 28(2) of the Act of 1973. Certain necessary alterations were effected to the articles of association of HTV, Villamoor, and Golden Cross. Again, it is not disputed
G that the effect of the provisions of the articles of association of Villamoor and Golden Cross, as applied to the equally divided share holdings in both those companies, was to render each a fully "deadlocked" company, in that Villamoor was not under the control of either Pilkingtons or Manchester Liners and Golden Cross was not under the control of either HTV or Villamoor. It follows, of course, that Golden Cross was not under the control
H of Pilkingtons.

Golden Cross concluded an agreement with shipbuilders for the purchase of the container ship and agreed to surrender its claim to capital allowances arising from that purchase, not exceeding £13,000,000, to Pilkingtons, who were, in turn, to pay to Manchester Liners 87½ per cent. of the corporation tax which they would, it was hoped, thus be enabled to save by way of group
I relief. In short, Pilkingtons purchased the claim to capital allowances from Golden Cross at a discount of 12½ per cent.

The Revenue disallowed Pilkington's claim for group relief on the ground that s 29(1)(*b*)(ii) of the Act of 1973 applied to prevent Golden Cross from

being treated as a member of the same group of companies as Pilkingtons. Pilkingtons appealed unsuccessfully to the Special Commissioners, but, on appeal by Case Stated to the Chancery Division, succeeded before Nourse J. The decision is reported at [1981] 1 WLR 781([1]). The present appeal by the Crown is brought directly to your Lordships' House under s 12 of the Administration of Justice Act 1969. The basis of the Revenue's contention that s 29(1)(*b*)(ii) applied, so as to disentitle Pilkingtons, to the group relief claimed has been differently formulated at different stages of the litigation. In particular, the primary contention advanced before the Special Commissioners and on which the Special Commissioners decided in the Revenue's favour has now been abandoned. I shall confine myself to consideration of the primary contention advanced in support of the appeal by Mr. Stamler Q.C., for the Crown, in your Lordships' House. That contention in summary is that "arrangements [were] in existence by virtue of which" at all material times "persons together" (sc. the shareholders of Pilkingtons) "[had] control of the first company" (Pilkingtons) "but not of the second" (Golden Cross). Mr Beattie Q.C., for Pilkingtons, seeks to controvert this contention primarily on the ground that s 29(1)(*b*)(ii) is concerned and concerned only with arrangements which provide for some future change affecting the two companies to which the subsection refers. This submission was not dealt with by the learned Judge, who decided in Pilkingtons' favour on another ground. In support of the submission, Mr. Beattie relies first on the side-notes to ss 28 and 29, secondly, on the phrase "at some time" in the opening words of para (*b*) of subs (1) and thirdly, on the evident concern exclusively with future events of sub-para (i) and (iii) of para (*b*).

The respective side-notes read: "Group relief: qualifications for entitlement". (section 28). "Group relief: effect of arrangements for transfer of company to another group, etc." (section 29). The suggestion is that to construe s 29(1)(*b*)(ii) as the Crown proposes is to introduce an additional qualification for entitlement to group relief, which, if it were intended, would be, in accordance with the indication given by the side-note, included in s 28, and not in s 29, the side-note to which is inapt to refer to such a provision. Assuming that side-notes are entitled to any weight in the construction of the enacting words of a statute, it is clear to my mind that they cannot here sustain the weight of this far-fetched argument.

As to the two points made on the language of s 29(1) itself, I do not see how they can possibly prevail over the express language of (*b*)(ii)—"any person *has* or could obtain, or any persons together *have* or could obtain"—which plainly contemplates either a present or a future state of affairs. Moreover, if present unity of control is not a necessary qualification for group membership, it is impossible to discern any sensible legislative purpose in making arrangements for a future separation of control a ground for disqualification.

Mr. Beattie's second submission founds upon the circumstances that the several agreements between Pilkingtons and Manchester Liners and the three subsidiary companies concerned involved alterations in the structure and control of those subsidiary companies as part of the scheme devised for the purpose of constituting Golden Cross a 75 per cent. subsidiary of Pilkingtons; the control of Pilkingtons on the other hand, by its shareholders through its articles of association, was unaffected by the scheme. No alteration was made to Pilkington's articles of association and the shareholders, as such, were not parties to the scheme. In the light of this it is said that whilst the

([1]) Page 718 *ante*.

A "arrangements" contemplated by s 29(1)(*b*)(ii) clearly embrace the provisions of the scheme establishing the new company structure of HTV, Villamoor and Golden Cross, they cannot include the articles of association of Pilkingtons, which are the only arrangements affecting the control of Pilkingtons.

As I am driven to differ from his conclusion, it is only right that I should set out in full the passages from the judgment of the learned Judge which B explain his reasons for acceding to this submission. He said (at page 790 D to F and 791 B to F)([1]):

> "I start from the position that 'arrangements' means arrangements of any kind, whether in writing or not, and that it is in both ordinary and statutory parlance a word of wide import by no means confined to relationships having contractual force and effect. But that is not to say that C anything which in isolation or in another context can be described as arrangements are necessarily arrangements or part of the arrangements for the purposes of the provisions now in question. They must in my judgment be arrangements by virtue of which both the control of the first company is had and the control of the second is lacking. The articles of association of the taxpayer company were in themselves arrangements by virtue of which D the control of that company was had. The provisions of the scheme were in themselves arrangements by virtue of which the control of Golden Cross Line Ltd. was lacking. Do the arrangements contemplated by the provision include both? Unless they do the provision does not operate. . . The material dictionary meanings of 'arrangement' are: 'a structure or combination of things for a purpose'; 'disposition of measures for a particular purpose': see E the *Shorter Oxford English Dictionary*, 3rd ed. (1944), p.99. Both those definitions require that the individual elements of an arrangement should be combined or disposed for a particular purpose, and I do not think that, unless there is a context to the contrary, that requirement is displaced by the use of the plural as opposed to the singular. All that that adds is the possibility that there may be more than one combination of things or more than F one disposition of measures. But without a context it would, as it seems to me, be unnatural to read the plural as dispensing with the need for some unifying link between each of the combinations or dispositions. I therefore construe this provision in the expectation that it is intended to refer to things or measures which are combined or disposed for a particular purpose. On that footing it is at the least difficult, and in my view impossible, to see how G it can include the articles of association of the taxpayer company, whose nature and effect remained unchanged throughout and cannot in any ordinary sense be said to have been things or measures which were combined or disposed with the provisions of the scheme. The unifying link is just not there. That point seems to me to be emphasised by a consideration of the fact that the shareholders of the taxpayer company, who are the persons H between whom the articles have effect as the arrangements for the governance of the company, were not parties to the scheme."

I cannot, with respect, accept the soundness of this reasoning. On the contrary, I find myself unhesitatingly driven to the opposite conclusion by three main considerations which I will examine in turn. First, the definition of "arrangements" as meaning arrangements of any kind predisposes me against I imposing any limitation on the ordinary meaning of the word unless forcibly driven to do so by the context. Secondly, I turn to consider in detail the

([1]) [1981] 1 WLR 781; Pages 724–5 *ante*.

language of the critical sentence which has to be construed, sc. "... arrangements are in existence by virtue of which...any person has...or any persons together have...control of the first company but not of the second". "Arrangements" is in the plural, not the singular, and I can see no justification for applying to the plural the concept of a combination for a singular purpose derived from the dictionary definition of a singular "arrangement". The arrangements to be considered are such as "are in existence"; it matters not when they came into existence. When the draftsman of the Act of 1973 wishes to distinguish arrangements which "come into existence" after a given date from those which "are in existence" on that date, he does so: see Sch 12, para 10(2). The next critical phrase is "by virtue of which". This directs attention to the effect of the arrangements not to their purpose. But, to my mind, the consideration of overriding significance is that the whole sentence is concerned with those arrangements which determine the control of *both* the companies whose entitlement to be treated as members of the same group is in issue. To construe "arrangements" as excluding, notwithstanding the definition of "control" in s 534 of the Taxes Act, those arrangements which regulate the conduct of the affairs of *either* of the companies in accordance with the wishes of its controlling shareholders seems to me simply to negate the plain meaning of the statutory language. I should add, under this head, that I can attach no significance, in applying the language of s 29(1)(*b*)(ii) to the circumstances of the case, to the fact that the shareholders in Pilkingtons were not "parties" to the scheme devised to enable Pilkingtons to acquire a claim to group relief, in the sense that they, as shareholders, as distinct from the board of directors carrying on the management of the company, participated in the planning and negotiation of the scheme. There is nothing in the statutory language to indicate a requirement that they should be. Thirdly, if one seeks to discern a legislative purpose underlying s 29(1)(*b*)(ii) one is driven, I think, to conclude that this provision was intended to introduce a requirement, as a qualification for entitlement to group relief, in addition to those introduced by s 28, that the two companies (in the original terminology of the Taxes Act "the surrendering company" and "the claimant company") claiming membership of the same group of companies should be under the same control. This requirement is, I would assume, introduced in s 29(1) rather than in s 28 because the draftsman found it convenient to include in a single provision both the original requirement of unified control and a requirement that there should be no arrangements in existence during the relevant accounting period making provision for a future severance of control and it is in s 29(1) that he deals with other cases where the benefit of group relief will be lost by reason of existing arrangements providing, in one way or another, for future severance of the group. The narrow construction of "arrangements" adopted by the learned Judge would have what to my mind would be the startling consequence that the only kind of scheme setting up a group of companies, where none existed before, for the purpose of obtaining group relief, which would be liable to disqualification under s 29(1)(*b*)(ii), would be a scheme specifically designed to embody the very disqualifying features at which the provision is directed. Such a construction must, it seems to me, effectively deprive the provision of any practical operation as limiting the circumstances in which group relief is to be available. It was presumably intended to have such a practical operation and I can see no room here for applying any restrictive interpretation so as to cut down the plain meaning of the statutory language to make it accord with some supposedly limited legislative intent.

It remains only to notice an argument advanced by Mr. Beattie, which evidently found some favour with the learned Judge, although he did not in

A the end find it necessary to rely on it, based on an anomaly which, it is suggested, would arise from the adoption of the construction contended for by the Crown. We are asked to consider companies A, B and C, where B is the wholly-owned subsidiary of A and C is the wholly owned subsidiary of B. Here, if company C surrenders a claim to relief to company A, says Mr. Beattie, on the Crown's argument company A cannot claim group relief
B because, by virtue of the arrangements inherent in the group structure, company B is a person who has control of company C but not of company A. It seems to me powerfully arguable that, in applying s 29(1)(*b*)(ii) to the facts posited, company B is a person who can be ignored. In exercising control of company C, company B must act as instructed by company A. Thus the "person or persons together" in accordance with whose wishes the affairs of
C company C are conducted are those who control company A. From this it would follow, applying the definition of "control" in s 532 of the Taxes Act, that the only "person or persons together" who control company C are the same as those who control company A. But I find it unnecessary to express a concluded opinion as to whether this argument is effective to dispose of the suggested anomaly. If the anomaly exists, I cannot see that it lends any
D support to Mr. Beattie's argument, since it would arise, according to the circumstances in which the A, B, C, group of companies was constituted, whatever construction was given to "arrangements" in s 29(1)(*b*)(ii).

I would accordingly allow the appeal, set aside the order of the learned Judge and restore the determination of the Special Commissioners.

Lord Brandon of Oakbrook—My Lords, I have had the advantage of
E reading in draft the speeches prepared by my noble and learned friends, Lord Fraser of Tullybelton and Lord Bridge of Harwich. I agree with them both and would allow the appeal accordingly.

Appeal allowed, with costs.

[Solicitors:—Messrs. Norton Rose Batterell & Roche; Solicitor of Inland Revenue.]

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Printed for Her Majesty's Stationery Office by Commercial Colour Press, London E7. 5/85, C53, Dd.737314.