[2022] UKFTT 00129 (TC)

TC 08460

Distribution – share premium- Jersey law – dividend of a capital nature – First Nationwide considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019 /09085

BETWEEN

ALEXANDER BEARD **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE Rachel Short

The Tribunal determined the appeal on 21 – 25 February 2022 using the Tribunal's video platform with the parties' consent. The form of the hearing was V.

A face-to-face hearing was not held because of the coronavirus restrictions in place at the time the hearing was listed.

Prior notice had been published on the gov.uk website, with information about how representatives of the media and/or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

Malcolm Gammie QC of One Essex Court Chambers instructed by Keystone Law for the Appellant

Andrew Hitchmough QC and Calypso Blaj counsel of Pump Court Tax Chambers, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the correct UK tax treatment of distributions paid by a Jersey limited company derived from its share premium account. HMRC issued a closure notice on 8 October 2019 assessing the Appellant, Mr Beard, to income tax on distributions paid by the Jersey company for the tax years 2011-12 to 2015-16. Mr Beard appealed against those closure notices on the basis that the distributions were distributions of a capital nature which were subject to capital gains tax and not income tax in the UK.

2. Mr Beard appealed to this Tribunal on 5 November 2019.

BACKGROUND FACTS

3. The background facts are broadly not disputed between the parties. An agreed statement of facts was provided to the Tribunal and is set out in detail below.

4. In brief, the Appellant is a shareholder in Glencore, a publicly listed company incorporated in Jersey and domiciled in Switzerland ("Glencore") and in that capacity received distributions paid in each of the tax years 2011-12 to 2015-16. (the "Distributions") In each case the Distributions paid were derived from the share premium account of the company. That share premium arose as the result of a corporate restructuring in which certificates in a Swiss subsidiary of Glencore were exchanged for Glencore shares.

5. The distributions include one distribution made by way of in-specie distribution paid in the 2015-16 tax year. The parties agreed that the in-specie Distribution should be treated for the purpose of this Decision in the same way as the cash distributions.

6. Neither the timing nor the quantum of the Distributions paid to Mr Beard are in dispute.

7. The issues for this Tribunal to determine are:

(1) Are the Distributions "dividends" for the purposes of s 402 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA");

(2) If the Distributions are "dividends", are they "dividends of a capital nature" for the purposes of s 402(4) ITTOIA.

AGREED STATEMENT OF FACTS

8. Mr Beard ("the Appellant") acquired 326,035,949 ordinary shares of US$0.01 each in Glencore International PLC ("Shares") on 24 May 2011 as a result of the restructuring which completed on that date. The Appellant immediately sold 5,775,539 of the Shares reducing his holding to 320,260,410 Shares.

9. Following the global offer described below, the Shares became (and remain) listed in the Official List of the London Stock Exchange ("LSE").

10. The Appellant received the interim and final dividends/distributions declared in the tax years relevant to this appeal in relation to his holding of 320,260,410 Shares.

11. Glencore PLC was incorporated under the Companies (Jersey) Law 1991 (as amended) as Glencore International Limited on 14 March 2011. On 12 April 2011 it changed its name to Glencore International PLC and on 2 May 2013, following its merger with Xstrata PLC, changed its name to Glencore Xstrata PLC. It became Glencore PLC on 20 May 2014.

12. Throughout the period from the 2011-12 tax year to the 2015-16 tax year (inclusive) Glencore was a publicly listed limited company incorporated in Jersey and domiciled in

Switzerland, with its head office in Switzerland. It is not resident in the UK for UK tax purposes.

13. On 24 May 2011, pursuant to an opportunity provided by Glencore to acquire Shares made available to institutional and certain other investors ("the Global Offer"), Glencore issued 922,713,511 Shares, comprising 891,463,511 Shares to institutional investors at a price of 530 pence (US$8.56) per Share on the LSE and 31,250,000 Shares to professional and retail investors in Hong Kong at a price of HK$66.53 (US$8.56) per Share on the HKSE.

14. Immediately prior to the listing of the Shares on the LSE pursuant to the Global Offer ("the Listing"), Glencore became the immediate holding company of Glencore International AG ("AG") pursuant to a restructuring of the ownership of the Glencore group ("the Restructuring"). AG was previously owned as to 85 per cent by Glencore Holding AG ("Holding AG") and as to 15 per cent by Glencore LTE AG ("LTE AG"), both of which were wholly owned by the management and employees of the Glencore group as it existed prior to the Restructuring and Listing.

15. AG was authorised by its articles of association to issue profit participation certificates ("PPCs") with no nominal value, enabling Glencore group employees to participate in one or more of four separate profit-sharing arrangements entitling the participating employees ("profit participation shareholders"), including the Appellant, to a portion of AG's funds accumulated during the period that such employees held the PPCs. Profit participation shareholders also acquired shares in Holding AG and/or LTE AG. Immediately before the Restructuring, the Appellant held (directly or indirectly) 5,500 shares in Holding AG,

16. The IPO Prospectus for the Global Offer records that all amounts attributed to profit participation shareholders who remained in employment at the time of the Global Offer (together with their holdings of shares in Holding AG and LTE AG) were converted to Shares on the Restructuring. The PPCs were initially exchanged for shares in Holding AG. Holding AG and LTE AG then simultaneously merged with AG by way of statutory merger under Swiss law, with AG as the surviving entity.

17. Following completion of that merger and before the Listing, 100 per cent of the issued shares in AG were contributed to Glencore under the Glencore International Purchase Agreement, pursuant to which Glencore issued 6,000,000,000 Shares at the Offer Price, credited as fully paid up, to Revelstoke Limited on behalf of the "Existing Shareholders".

18. As a result, Glencore became the holding company of the Glencore group on the day before the Listing. The Global Offer and the Listing were conditional upon the implementation of the Restructuring in all material respects as described.

19. As a result of the Restructuring and the Global Offer, 6,922,714,000 Shares were in issue as at 30 June 2011, comprising

(1) 6,000,000,000 Shares arising from the Restructuring and

(2) 922,714,000 Shares issued in the Global Offer.

20. The difference between the nominal and fair value of the Shares was recognised as share premium. As at 30 June 2011, Glencore's share premium was recorded as being US$27,122,000,000.

21. The IPO Prospectus for the Global Offer records that on 7 January 2011, the Swiss Federal Tax Administration signed a ruling to confirm that "Qualifying Reserves" of approximately US$8.8 billion would be created on the Restructuring, that the Global Offer would create additional "qualifying reserves" equal to the share premium created on the issue

of the shares and that distributions could be made from "qualifying reserves" free of Swiss withholding tax.

22. The "Existing Shareholders" comprised all those who held Shares as a result of the Restructuring other than the "Selling Shareholder", who was to make the "Sale Shares" available for sale as part of the Global Offer;

23. "Qualifying Reserves" is defined in the IPO Prospectus as "Capital Contribution Reserves in terms of Swiss tax law and according to the Swiss GAAP financial statements as included in the notes to the annual financial statements. These are reserves from capital contributions made by shareholders to Glencore after 31 December 1996, which can be repaid free of Swiss Withholding Tax".

24. The Prospectus for the Global Offer stated as follows:

> "It is at the discretion of the Company's shareholders to decide (at a shareholders' meeting) whether to distribute a dividend out of Qualifying Reserves free of Swiss Withholding Tax and/or out of profit/retained earnings/non-qualifying reserves subject to Swiss Withholding Tax. Once cumulative distributions out of Qualifying Reserves exceed the value threshold described above, any distributions paid by the Company will be subject to Swiss Withholding Tax. To the extent that additional shares are issued by the Company in the future, the value of the distributions which can be made free of Swiss Withholding Tax will be increased by an amount corresponding to the total nominal share capital and paid-in capital/share premium of the shares issued."

25. The taxation section of the IPO Prospectus for the Global Offer also indicated that, based on current UK tax law and the current practice of HMRC, UK individual shareholders will be charged to income tax on dividends paid in respect of their Shares.

26. In a letter dated 09 January 2014, Glencore advised the Appellant that, having taken further advice, all dividends/distributions made from share premium account (a capital contribution reserve) are or will be, in the hands of relevant UK shareholders, subject to UK capital gains tax rather than income tax. That letter also recommended shareholders consult their own tax advisors immediately.

27. In October 2012, Glencore acquired an additional 18.91 per cent interest in a company known as Kazzinc for a consideration that included the issue of 176,742,520 Shares, valued at US$959 million. Accordingly, the total Shares in issue at 21 December 2012 increased from 6,922,714,000 to 7,099,456,520. On 2 May 2013, Glencore acquired the remaining 66 per cent of the shares in Xstrata that it did not already own through the issuance of 6,163,949,435 Shares at a premium of US$30,073,00.

Glencore's Dividends/Distributions

28. Details of the distributions made by Glencore in each year of assessment under appeal are set out below. All distributions were declared and paid in US dollars, although shareholders (other than those on the Hong Kong branch register) were able to elect to receive their payments in pounds sterling, Euros or Swiss Francs based on the exchange rate seven days prior to the payment date. The Appellant usually elected to receive his share of Glencore's cash distributions in sterling, but some were in fact received in US dollars.

Tax Year 2011/12: 2011 Interim Dividend

29. An interim dividend of US$0.05 per share (amounting to US$346 million) out of Glencore's capital contribution reserves was declared by the directors on 22 August 2011 and was paid on 30 September 2011.

30. The dividend was debited to Glencore's share premium account, which at 31 December 2011 stood at US$26,797,000,000. No part of the dividend was debited to retained earnings.

Tax Year 2012/13: 2011 Final Dividend and 2012 Interim Dividend

31. The directors recommended a final dividend for 2011 of US$0.10 per share (amounting to US$692 million), to be paid out of Glencore's capital contribution reserves.

32. At the Annual General Meeting on 9 May 2012, the Shareholders approved the following resolution (amended via special resolution prior to its approval):

> "To declare a final dividend of US$0.10 per ordinary share for the year ended 31 December 2011, which the Directors propose, and the shareholders agree, is to be paid only out of the capital contribution reserves of the Company."

The final dividend was paid on 1 June 2012. The dividend was debited to Glencore's share premium account which, as at 30 June 2012, stood at US$26,105,000,000. No part of the dividend was debited to retained earnings.

35. On 21 August 2012, the directors declared out of Glencore's capital contribution reserves an interim dividend for 2012 of US$0.054 per share amounting to US$374 million. The dividend was paid on 13 September 2012 and debited to Glencore's share premium account. After deduction of the 2011 final dividend and 2012 interim dividend (amounting to US$1,066 million), Glencore's share premium stood at US$26,688,000,000 on 31 December 2012. No part of the dividend was debited to retained earnings.

Tax Year 2013/14: 2012 Final Dividend and 2013 Interim Dividend

33. The directors recommended a final dividend for 2012 of US$0.1035 per share (originally amounting to US$735 million), to be paid out of Glencore's capital contribution reserves.

34. At the Annual General Meeting on 16 May 2013, the Shareholders approved the following resolution:

> "To declare a final dividend of US$0.1035 per ordinary share for the year ended 31 December 2012, which the Directors propose, and the shareholders agree, is to be paid only from the capital contribution reserves of the Company."

35. The final dividend was paid on 7 June 2013. The dividend was debited to Glencore's share premium account which, as at 30 June 2013, stood at US$55,406,000,000. No part of the dividend was debited to retained earnings.

Tax Year 2014/15: 2013 Final Distribution and 2014 Interim Distribution

36. The directors recommended a final distribution for 2013 of US$0.111 per share (amounting to US$1,457 million), to be paid out of Glencore's capital contribution reserves.

37. At the Annual General Meeting on 20 May 2014, the Shareholders approved the following resolution:

> "To declare a final distribution of US$0.111 per ordinary share for the year ended 31 December 2013, which the Directors propose, and the shareholders resolve, is to be paid only from the capital contribution reserves of the Company."

3.10 The final distribution was paid on 30 May 2014. The distribution was debited to Glencore's share premium account which, as at 30 June 2014, stood at US$53,320,000,000. No part of the distribution was debited to retained earnings.

38. On 19 August 2014, the directors declared out of Glencore's capital contribution reserves an interim distribution for 2014 of US$0.06 per share amounting to US$787 million.

The distribution was paid on 19 September 2014 and was debited to Glencore's share premium account.

39. After deduction of the 2013 final distribution and 2014 interim distribution (amounting to US$2,244 million), Glencore's share premium stood at US$52,533,000,000 on 31 December 2014. No part of the distribution was debited to retained earnings.

Tax Year 2015/16: 2014 Final Distribution and 2015 Interim Distribution

40. The directors recommended a final distribution for 2014 of US$0.12 per share (amounting to US$1,551 million), to be paid out of capital contribution reserves.

41. At the Annual General Meeting on 7 May 2015, the Shareholders approved the following resolution:

> "To declare a final distribution of US$0.12 per ordinary share for the year ended 31 December 2014, which the Directors propose, and the shareholders resolve, is to be paid only from the capital contribution reserves of the Company."

3.13 The final distribution was paid on 21 May 2015. The distribution was debited to Glencore's share premium account which, as at 30 June 2015, stood at US$50,684,000,000. No part of the distribution was debited to retained earnings.

42. On 18 August 2015, the directors declared out of the capital contribution reserves an interim distribution for 2015 of US$0.06 per share amounting to US$776 million. The distribution was paid on 29 September 2015 and was debited to Glencore's share premium account.

43. At the Annual General Meeting on 7 May 2015 the shareholders were also asked to approve a distribution in specie of 139,513,430 ordinary shares of US$1 each in Lonmin plc to shareholders on the register at 7 p.m. CEST on 15 May 2015, to be effected out of Glencore's capital contribution reserves.

44. Following their approval, the in-specie distribution was completed on 9 June 2015 on the basis of 1.079134 Lonmin shares for every 100 Shares. Based on the closing Lonmin share price, the fair value of the Lonmin shares was determined to be US$298 million. The Lonmin shares had been acquired by Xstrata prior to its merger with Glencore.

45. Following Glencore's acquisition of Xstrata the decision was made to divest the stake in Lonmin. Glencore chose to do that by way of a distribution in specie to its shareholders. As a result of this in specie distribution, the Appellant received 3,456,037.22 Lonmin shares.

46. After deduction of the 2014 final distribution and 2015 interim distribution (amounting to US$2,328 million) and taking account of the Lonmin in-specie distribution, Glencore's share premium stood at US$52,338,000,000 on 31 December 2015. No part of the distribution was debited to retained earnings.

THE LAW

47. The relevant law includes not only the relevant tax legislation, but also the relevant Jersey company legislation. That is because UK case law has long established that in determining the correct tax treatment of a payment made by a non-UK company such as Glencore, the correct approach is to establish the character of the payment under the corporate law of the jurisdiction in which the paying company is incorporated, in this case Jersey, and apply UK tax legislation to that payment.

> "When considering the question of income arising from foreign possessions under Case V of Schedule D, the precise interest taken by the person owning the foreign possession must be determined by the proper law of the foreign possession" Upjohn LJ at p 21 *Rae v Lazard*

Jersey Law

48. The relevant Jersey legislation dealing with distributions and share premium has been the subject of various amendments from its original form in 1991 to the dates which are relevant for this appeal. The full detail of those changes is set out in Appendix 1; the main provisions as they were at the time of the Distributions are set out here.

Dealing with share premium

49. The Companies (Jersey) Law 1991 ("CJL 1991") sets out in its standard articles at Article 39 how share premium can be applied by Jersey companies:

"**Share premium accounts for par value companies**

(1) If a par value company allots shares at a premium, (whether for cash or otherwise)

(a) where the premiums arise as a result of the issue of a class of limited shares, a sum equal to the aggregate amount or value of those premiums shall be transferred, as and when the premiums are paid up, to a share premium account for that class; and

(b) where the premiums arise as a result of the issue of a class of unlimited shares, a sum equal to the aggregate amount or value of those premiums shall be transferred as and when those premiums are paid up, to a separate share premium account for that class.

(1A) An amount may be transferred by the company to a share premium account from any other account of the company other than the capital redemption reserve or the nominal capital account.

(2) A share premium account may be expressed in any currency.

(3) A share premium account may be applied by the company for any of the following purposes:

(a) in paying up unissued shares to be allotted to members as fully paid bonus shares

(b) in writing off the company's preliminary expenses

(c) in writing off the expenses of and any commission paid on any issue of shares of the company

(d) in the redemption or purchase of shares under Part 11; and

(e) in the making of a distribution in accordance with Part 17.

(4) Subject to this Article, the provisions of this Law relating to the reduction of a par value company's share capital apply as if each of its share premium accounts were part of its paid-up share capital"

50. Subsection (3)(e) was inserted by Companies (Amendment No 10) (Jersey) Law 2009 on 6 November 2009.

Reduction of a company's capital accounts

51. Article 61 at Part 12 of the 1991 law sets out the process by which a Jersey company can reduce its capital accounts:

Special Resolution for reduction of share capital

(1) Subject to confirmation by the court, a company may by special resolution reduce its share capital in any way.

(2) In particular, without prejudice to paragraph (1), the company may-

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) With or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

With or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the company's wants,

And the company may, if and so far as is necessary, alter its memorandum by reducing the amount of its shares and share capital accordingly"

52. This was amended by Amendment No 11(Jersey Law) 2014 to remove the requirement under Part 12 for the court to sanction a reduction in capital made under that Part to say that:

"(1) A company may reduce its capital accounts in any way.

(1A) A reduction of capital shall be sanctioned by a special resolution of the company"

Definition of dividend or distribution

53. There is no definition of "dividend" for Jersey law purposes, but there is a definition of a "distribution" which was amended in 2008:

Part 17 Definition of distribution for Jersey law purposes:

54. **Article 114(1) as amended by Companies (Amendment No 9) (Jersey) Law 2008**:

"Articles 114 and 115 substituted

For Articles 114 and 115 of the principal Law there are substituted the following Articles:

114 meaning of distribution in this Part

(1) In this Part "distribution" in respect of a company, means every description of distribution of the company's assets to its members as members, whether as cash or otherwise.

(2) However, distribution does not include a distribution by way of-

(a) an issue of shares as fully paid up or bonus shares;

(b) the redemption of purchase of any of the company's shares;

(c) any reduction of capital by extinguishing or reducing the liability of any of the members on any of the company's shares in respect of capitals not paid up; or

(d) a distribution of assets to members of the company on its winding up"

55. This definition defines a "distribution" by exclusion, any transfer of assets to a company's members is a distribution unless it falls within one of the excluded categories.

56. Article 115 sets out restrictions on distributions, stating that:

> "115(1) A Company may make a distribution at any time
>
> 115(2) A Company shall not make a distribution other than in accordance with this Article
>
> 115(3) A Company (other than an open-ended investment company) may make a distribution only if the directors who are to authorise the distribution make a statement in accordance with paragraph 4."

57. Paragraph 4 sets out the requirement of the directors to make a solvency statement.

58. Paragraph 7 sets out the accounts from which a distribution paid under Article 115 is debited:

> "(7) A distribution made in accordance with this Article is debited to -
>
> > (a) a share premium account, or a stated capital account of the company, or
> >
> > (b) any other account of the company, other than the capital redemption reserve of the nominal capital account".

59. Only the nominal capital and capital redemption reserve accounts are excluded for these purposes.

60. Paragraph 9 (introduced by Companies (Amendment 10) Jersey Law 2009) states that

> "(9) A distribution made in accordance with this Part is not for the purposes of Part 12 a reduction of capital"

61. The earlier version of Article 115 (Article 114) provided a more restrictive definition of payments which could be made by way of distribution, restricting those payments to payments made out of realised profits (less realised losses) or realised revenue profits, subject to the making by the directors of a solvency statement.

UK tax law

62. **S 402 Charge to tax on dividends from non-UK Resident companies**

> **"**S 402 (1) Income tax is charged on dividends of a non-UK resident company.
>
> 402(2) For exemptions, see in particular section 770 (amounts applied by SIP trustees acquiring dividend shares or retained for reinvestment)
>
> 402(3) Subsection (1) is also subject to section 498 of ITEPA 2003 (no charge if shares ceasing to be subject to SIP in certain circumstances)
>
> 402(4) In this chapter "dividends" does not include dividends of a capital nature"

63. The parties also referred us to previous versions of both Jersey and UK corporate law to attempt to put the current legislation of both countries in a wider context. Details of the changes in the Jersey legislation are set out in detail at Appendix 1 of this Decision. There are however some critical legal changes to both Jersey and UK law which are worth setting out here:

(1) Changes introduced by the UK Companies Act 1948, which, for the first time, took share premium out of the category of distributable reserves or, to use other terminology,

applied the maintenance of capital principle, and "assimilated" share premium to share capital.

(2) The Jersey Companies Act of 1991 ("CJL 1991") which assimilated share premium to share capital, applying Part 12 (governing reductions of capital) and including the original Article 114 restricting a Jersey company's ability to make distributions out of realised profits. Referred to by the parties as "applying the doctrine of the maintenance of capital".

(3) The Jersey Companies (Amendment No 9) Jersey Law of 2008, which introduced Part 17 of the Jersey Companies Act under which share premium could be distributed under that Part, amending Article 114 CJL 1991 and adding Article 115, so that share premium was freely distributable under Part 17. Referred to by the parties as the point at which Jersey and English company law diverged and the point at which Jersey law removed the doctrine of the maintenance of capital.

(4) The Jersey Companies (Amendment No 10) Jersey Law of 2009 which stipulated that distributions made under the new Article 115 were not to be treated as reductions of capital.

(5) The Jersey Companies (Amendment No 11) Jersey Law 2014 which made changes to the rules for distributions under Part 12 CJL 1991; companies could now make reductions of capital under Part 12 without the need for consent of the court.

64. We were also referred to extensive authorities, some of quite venerable age, which have considered the correct approach to characterising distribution and dividend payments made by UK and non-UK companies:

*Bouch Re, Sproule v Bouch (*1885) 12 App cases 385

Trevor & Anor v Whitworth & Others (1887) 12 App cases 409

*Lee v Neuchatel Asphalte Co Ltd (*1889) 41 Ch D 1

IRC v Blott [1921] 2 A.C 171

In re Bates; Mountain v Bates [1928] Ch 682

Hill & Ors v Permanent Trustee of New South Wales Limited & Ors [1930] A.C 720

Drown v Gaumont-British Picture Corporation Limited [1937] Ch 402

IRC v Reid's Trustees (1949) 30 TC 431

In Re Duff's Settlement; *National Provincial Bank Ltd v Gregson & Ors* [1951] Ch 721

In Re Duff's Settlements; National Provincial Bank Ltd v Gregson & Ors [1951] Ch 923 (CA)

Rae (HMIT) v Lazard Investment Co Ltd (1963) 41 TC 1

Courtaulds Investments Ltd v Fleming (HMIT) (1969) 46 TC 111

Shearer (HMIT) v Bercain Ltd [1980] STC 359

*Esso Petroleum Co Ltd v Ministry of Defenc*e [1990] Ch 163

Sinclair v Lee & Anor [1993] Ch 497

Quayle Munro Ltd 1992 SC 24 Ct of Sess

Memec plc v IRC (1998) 71 TC 77

First Nationwide v HMRC [2010] SFTD 408 (FTT)

First Nationwide v HMRC [2011] STC 1540 (UT)

First Nationwide v HMRC [2012] STC 1261 (CA)

WPP plc [2013] JRC 031

TSB Bank Channel Islands Limited 1992 JLR 160

THE EVIDENCE

65. I saw expert reports for both parties and heard oral evidence from both parties' experts at the Tribunal.

66. The experts provided a written memorandum which included the matters on which they were agreed:

(1) The genesis of the law in Jersey, as set out above and in Appendix 1.

(2) That at the time when Glencore made its distributions to Mr Beard, if a Jersey company wanted to make a distribution under Part 17 CJL 1991, the directors were obliged to form a view of the company's solvency and make a relevant statement.

(3) That the CJL 1991 does not require a Part 17 distribution to be made from the profits of the company, the only requirement is that the directors form the prescribed view in relation to the company's solvency.

(4) The term "dividend" is used but not defined by the CJL 1991. There is no operative provision in the CJL 1991 relating to the payment of a dividend. In particular the term dividend is not used in Part 17 CJL 1991.

(5) The term distribution is defined by Article 114 CJL 1991 and is used for the purposes of Part 17 to describe a payment made by a company to its members.

(6) Article 115 does not state whether a distribution should be regarded as capital or income or use those terms in this context.

(7) The CJL 1991 does not state whether share premium is "assimilated" to capital and the question of assimilation to capital has not been considered by the Jersey courts.

(8) A distribution made under Part 17 CJL 1991 and debited to a share premium account reduces the amount standing to the credit of a capital account.

(9) If the Jersey legislature had intended the amendment which introduced Part 17 to have the effect of characterising all distributions made under Part 17 which are debited to share premium account as distributions of income or profit, express language would have been required to achieve that.

67. I also saw:

(1) Relevant extracts from Glencore's Articles of Association adopted on 3 May 2011.

(2) Glencore's Articles of Association as amended by Special Resolution on 20 May 2014.

(3) Glencore's IPO prospectus for listing on London and Hong Kong stock exchanges.

(4) Glencore's Interim and Annual Reports for each of the years 2011 to 2015 including the Half Year Report for 2014 released on 20 August 2014 which referred in the report highlights to the declaration of an "interim distribution of $0.06 per share, an

11% increase over the 2013 interim distribution" but referred in the Chief Executive Officer's Review, in a paragraph dealing with the interim distribution to "our goal remains to grow our free cashflow and with it the base dividend..... We will further revisit the outlook for both the base dividend and equity buy-backs at our preliminary 2014 results in March 2015"

Mr Simon Felton – The Appellant's expert witness

68. Mr Felton, a Jersey qualified solicitor, provided a written expert report dated 29 March 2021 and gave oral evidence to the Tribunal. He was cross-examined by Mr Hitchmough.

Relevance of English law

69. Mr Felton suggested that it was not possible to rely on English legal cases to determine the proper treatment of the Distributions under Jersey law, despite suggestions from Mr Hitchmough that there were some strong similarities between the relevant Jersey law and UK companies' law, (such as the similarities between Article 39(4) and s130(3) Companies Act 1985).

70. Mr Felton said that any UK authorities were only relevant to transactions prior to the Jersey law amendments of 2008, after which there was a divergence between Jersey and UK law.

Definition of dividend

71. Mr Felton accepted that Jersey law does not use the term dividend and it is not defined anywhere for Jersey law purposes. Nor does Jersey law distinguish between income or profit. However, he explained that the term dividend is used "colloquially" to refer to the payment of a distribution. In his view, there is no meaningful distinction between the term dividend and distribution for Jersey purposes.

72. Mr Felton pointed out that Glencore's articles (at Article 132) state that a dividend may be paid "out of profits available for distribution or from any other source from which a dividend may be paid under the Law".

Interpretation of Article 39(4) CJL 1991

73. Mr Felton accepted that this section is a deeming section and that the same mechanics apply whether a distribution is made out of share premium or a general profit or reserve account. However, in his view, payments made under Article 39(4) should be treated as capital because they derived from the share premium account which is a capital account of the company as designated by Jersey law. The procedure applied to make the distribution is not relevant to its character.

74. In Mr Felton's view for Jersey company law purposes, the share premium account of a par value company is part of the paid-up share capital of the company and the share premium account is one of the company's capital accounts.

Part 12 and Part 17

75. Part 17 (Article 115) states that a distribution made under that part is not a reduction of capital under Part 12, but the reason for that is to make clear that a distribution can lawfully be made from share premium account (despite Article 39(4) CJL 1991) without complying with the additional requirements of Part 12.

76. According to Mr Felton, a distribution made under Part 17 does not involve the prior creation of distributable reserves and a distribution from share premium account under Part 17

is neither a distribution of profits nor a reduction of capital, but is a distribution of capital to a shareholder.

77. It is reasonable to conclude that a distribution made under Part 17 from share premium account should be treated as a return of capital to a member; if the Jersey legislature had intended Part 17 to treat payments out of capital accounts made under that part as distributions of income or profit, express language would have been required to achieve that.

78. As to the distinction between a distribution under Part 12 and Part 17, only payments under Part 12 can change the nominal capital of a company.

79. A company has a choice which procedure to use to make a payment out of share premium, but the choice of procedure does not impact the character of the payment, because it is always derived from the share premium account which is a capital account. It cannot be right that payments out of the same account can be either capital or income depending on the procedure used for the payment.

80. Mr Felton accepted that there was no reason for Jersey law purposes why a company would choose to rely on Part 12 rather than Part 17 to make a distribution. In the *WPP* decision of the Jersey courts, the reason given for the choice was to satisfy English law requirements. The Jersey courts could have refused WPP's application to cancel its share premium under Part 12 on the basis that WPP could have relied instead on Part 17, but the Jersey court granted WPP's application under Part 12.

Advocate James Willmott HMRC's expert witness

81. **Mr Willmott, advocate of the Royal Court of Jersey, provided a written expert report dated 26 March 2021, provided oral evidence to the Tribunal and was cross-examined by Mr Gammie.**

Relevance of English law

82. Unlike Mr Felton, Mr Willmott explained that it was legitimate to rely on English case authorities to interpret Jersey law because, in the face of a lack of Jersey authorities, English authorities are the next best source and because the question raised was a question which is being considered by a UK tax tribunal.

83. For example, he had used the concept of "assimilation to capital" because that was the term used in the *Nationwide* case. The term "assimilation" has no technical meaning for CJL 1991 purposes. Jersey law does not "assimilate" share premium to capital. Funds in a share premium account are distributable in the same way as funds in any other non-capital account.

84. On the basis of a comparative law analysis Mr Willmott concluded that:

(1) Neither the pre or post 1948 English law position is directly comparable to the Jersey law at the time when the Distributions were paid.

(2) There can be no assumption that modern Jersey law is aligned entirely to either the pre or post 1948 English law.

Definition of dividend

85. Mr Willmott, like Mr Felton, accepted that the CJL 1991 does not contain a definition of a dividend and said that the term which is used; "distribution", is a generic term used to describe a direct or indirect transfer of value by a company to one of its members.

Interpretation of s 39(4) CJL 1991

86. Mr Willmott accepted that it was impossible to be certain about the correct interpretation of the Jersey legislation and that it was hard to reconcile the Jersey law post 1968 with the pre-1948 English company law. The "maintenance of capital" principle has been abandoned by Jersey law, but it is not clear that even prior to that abandonment, Jersey law was equivalent to the pre-1948 English law (as considered in *Duff's Settlement*).

87. His conclusion however was that for Jersey law purposes share premium is essentially an income account, with payments derived from that account also being of an income nature. Part 12 distributions are an exception to that rule.

88. Mr Willmott accepted that the share premium account is a capital account but said that this does not mean that payments out of the account are themselves capital. In general, the concept of a "capital account" is used very sparingly in the Jersey corporate law; in only three places including Part 12.

89. Mr Willmott says that in some very restricted circumstances payments made under Part 17 can be capital payments, but only if it is possible to trace directly through to a capital source for the payment, which would usually be fraught with difficulty.

Part 12 and Part 17

90. In Mr Willmott's view, only payments made under Part 12 are within the Jersey law's "maintenance of capital" regime. In general, holistic terms, share premium is not, for Jersey law purposes "locked in" as share capital, but is freely distributable. The fact that the share premium account is defined as a capital account has no significant impact.

91. If a company wants to be certain that a distribution debited to share premium account will be treated as a capital receipt, it is appropriate to make a distribution through a formal reduction of capital under Part 12.

92. Payments made under Part 17 reduce a company's share premium account but have no impact on the nominal value of its shares. While the payment could be described as reducing the company's capital (because the payment is from a capital account) that does not make the payment a return of capital. The share premium account is not part of shareholders' capital. The "maintenance of capital" principle does not apply to payments made under Part 17 and those payments are not therefore distributions of capital.

93. Mr Willmott pointed out that a share premium account could be made up of various different components, not all of which were of a capital nature, while still retaining its nominal character as a capital account.

94. Part 17 does not make a distinction between a "dividend" and a distribution, but the type of distribution which would ordinarily be described as a dividend can only be made under Part 17.

95. The Jersey courts have not opined on the correct treatment in the hands of a recipient of a distribution made under Article 17, but in his view:

(1) The company account from which a distribution is made is irrelevant.

(2) There is a presumption that a distribution under Part 17 is a receipt of income.

(3) It is possible for a distribution under Part 17 to be a receipt of capital, but only where the amount distributed is clearly a distribution of the company's capital without the need to undertake any sort of tracing exercise.

96. Mr Willmott made the point that new Article 61(3) and the addition of Article 115(9) of the CJL 1991, inserted by Amendment 10 in November 2009, was intended to clarify that distributions under Part 17 were not to be treated as reductions of capital. As such it was a clarification of the existing situation rather than a change in the law. Mr Willmott accepted that prior to the introduction of amendment 10, it was arguable that a distribution made under Part 17 was a formal reduction of capital, but that was no longer arguable after 2009.

THE APPELLANT'S ARGUMENTS

97. Mr Gammie argued on behalf of Mr Beard that each of the Distributions should be treated as capital receipts, either as dividends of a capital nature or simply as capital receipts.

Are the distributions dividends?

98. In essence, Mr Gammie argues that the distributions are capital receipts not dividends because they are derived from a capital account; the share premium account, and are not distributions out of profits.

History of English corporate law approach to dividends

99. The question of what is a dividend under s 402(4) ITTOIA is a question of English law and therefore Mr Gammie suggests that the evolution of the treatment of share premium for English law purposes is relevant to understanding the treatment of these payments.

100. Prior to the changes to English company law introduced in 1948, it was possible to pay dividends out of share premium. Those dividends were treated as capital dividends (*Reid's Trustees*).

101. The English tax law treatment of payments from foreign companies changed significantly in 2005, abandoning the earlier concepts of payments arising from foreign possessions. Authorities on the treatment of dividend payments from foreign companies relying on the earlier law (such as *Reid's Trustees* and its focus on whether the corpus of the shareholding has been impacted by a payment) are not necessarily relevant to the new legislation (s 402 in particular and the idea of a "dividend of a capital nature").

102. The comparative law exercise undertaken by Mr Willmott is not relevant because of the very significant change made to Jersey law in 2008 and its treatment of share premium from that date.

History of Jersey corporate law

103. The 1968 Jersey company law recognised that share premium was in the nature of capital. Despite the changes made in 2008 to Part 17 CJL 1991, Glencore's share premium account is still a "capital account" under Part 12 and payments out of that account must also be payments of a capital nature. Ordinary business profits are not within the scope of Part 12. There is no basis for assuming that despite the changes made to Part 12 and 17, the intention of the legislation is to treat share premium as part of a Jersey company's ordinary profits.

Significance of the source of payment

104. Mr Gammie maintains that the fact that a payment is derived from a capital account is significant; the source from which a dividend is paid is significant for payments from a "foreign possession" and is carried over into s 402(2) ITTOIA. That section recognises that whatever English law may conclude, it is possible under foreign law for a company to make a payment of a distribution other than out of distributable profits.

105. The meaning of the term dividend is the same for UK and foreign companies. In all cases the character of the payment is considered from the perspective of the paying company and not the recipient shareholder. The essential question is whether the payment made by the company represents a distribution of profits. The return of shareholder capital is not a payment of profit. It is well established that share premium is capital for these purposes (See *Shearer v Bercain* and *Sinclair v Lee*):

> "In substance, in paying a premium, they will have paid the full value of their slice of the assets of a company, which is diminished by the payment out of the premium. So, it is hardly surprising that the Cohen Committee......... recommended that in the case of issuing shares at a premium, those profits should be carried to share premium account, which was distributable only if the procedure for the reduction of capital was carried through" Walton j at p 365 of *Shearer v Bercain*.

106. The term profits for these purposes should be taken as a reference to normal trading profits, not the type of profits which are represented by share premium, which are not trading profits. This distinction was made clear in *Shearer v Bercain*:

> "Where a company issues shares at a premium, the premium is a receipt on capital account. It is not a trading profit and is not chargeable to income tax" p373 referring to the earlier decision in *Lowry*.

107. *Sinclair v Lee* demonstrates that it is possible to make a payment in the form of a distribution which is not a payment of distributable profits, in that case an in-specie dividend paid on a demerger, which despite its payment in the form of a dividend was held by the court to be a payment of capital.

Distributable profits

108. Mr Gammie stressed that payments representing reimbursement of capital are not dividends: the meaning of dividends (in the context of payment out of a German silent partnership) was considered in *Memec* where the court held that the term as used in Income and Corporation Taxes Act 1988 ("ICTA 1988") was not specifically defined, but took its meaning from an ordinary businessman's understanding of a dividend.

109. A dividend is a "payment out of part of the profits for a period in respect of a share in a company" as defined by Harman J in *Esso* and reiterated in *Memec*.

> "In ordinary language today among people having some understanding of business a "dividend" refers to a payment out of part of the profits for a period in respect of a share in a company" Harman J at p165.

110. *Memec* provides direct authority for the meaning of dividend; ITTOIA was a rewrite of the ICTA 1988 provisions considered in that case.

111. The normal definition of dividend was considered by the Upper Tribunal in *First Nationwide*, taking account of both *Esso* and *Memec* to state that

> "A capital profit is a profit which can be brought into account in deciding what level of dividend it is appropriate to declare. But a capital profit is not made "for a period" in the same way that a trading profit is made, which shows that these words are not to be taken as legislation. It can, in any case, sensibly be said that the "profit" (see *Duffs' Settlement*) which accrues when a premium is paid on a subscription is part of the profit for the accounting period during which the subscription is made, although since the companies Act 1948 came into force, it has not been profit divisible by way of dividend".

112. The decision in *First Nationwide* did not establish that a payment which was not made out of distributable profits could be a dividend, just because the mechanics for making the payment were dividend mechanics. In *First Nationwide* it was agreed that the payments on the preference shares in question were distributable profits and were dividends as a matter of Cayman Island law (equivalent to English distributable profits prior to the 1948 rule changes). That is not true of the Glencore Distributions.

Jersey law - share premium accounts

113. For Jersey law purposes share premium is not distributable profit per se. The funds in the share premium account do not represent a gain from the business (see *Hills Trustees* on this). This is reflected in the earliest iterations of Jersey law; the 1861 legislation which prohibited distributions other than out of business profits.

114. Mr Gammie argues that for Jersey law purposes there is no concept of the "assimilation of capital" or any concept of the maintenance of capital since Jersey law diverged from English law in 1968.

115. Part 17 CJL 1991 demonstrates that share premium is divisible between shareholders in their capacity as shareholders. The share premium is part of a bundle of rights held by each shareholder.

116. For CJL purposes a par value company (such as Glencore) has to recognise as the "cause" (consideration) given for its shares, the nominal value of the shares (in the share capital account) and any premium in a share premium account. A non-par value company, only has one "cause" account; the share premium account. This indicates that share premium is not considered to be "profit" for CJL 1991 purposes.

117. The expert evidence demonstrates that Jersey companies are obliged to create share premium accounts as capital accounts within the remit of Part 12. To that extent, share premium is assimilated to share capital. The fact that payments can be made to shareholders under Part 17 from the share premium account does not "de-assimilate" that account from the company's share capital.

English law – Share premium accounts

118. For English law purposes share premium is treated as a special capital account (see *Duff's Settlement*). This is more than treating share premium "as if it is share capital" (Jenkins in *Duff's Settlement*). The decision in *Trevor v Whitworth* that share premium is a type of profit has to be seen in the context of a corporate law system which allowed share premium to be freely distributable. S 402 ITTOIA reflects a different approach to the payment of profits.

First Nationwide

119. Mr Gammie seeks to differentiate Mr Beard's situation from the decision in *First Nationwide*. In that case HMRC accepted that payments out of share premium were dividends, because under Cayman law share premium could be paid as a dividend, but argued that the dividends were capital receipts.

120. It was accepted in *First Nationwide* (but is not accepted here) that Cayman law was intended to be the equivalent of the pre-1948 English law. That is why the payments were treated as dividends (unlike for example the position in *Rae v Lazard* and *Sinclair v Lee*). The character of the payments was based on the company's right to pay dividends out of share premium, rather than any particular provisions of the company's articles. The Cayman law examined in *First Nationwide* did not have the equivalent of Article 39(4) CJL 1991.

121. The experts accept that if Glencore had chosen to make its payments to Mr Beard under Part 12 rather than Part 17 CJL, those payments would not have been a "dividend".

122. Jersey law has identified share premium as something other than profit; a payment from share premium account is a debit to a capital account which is assimilated to share capital. There is no reason to believe that the Jersey courts would conclude that a payment made by a Jersey company out of its share premium account should be treated the same as a distribution made out of its business profits. Jersey law (the Jersey Loi of 1861) has always considered that a company could not pay a dividend out of its capital.

Are the Distributions dividends of a capital nature?

123. According to Mr Gammie, if the distributions are dividends, they are "dividends of a capital nature", this is because:

The "capital" nature of share premium

124. On first principles, it is not possible to declare a dividend out of share capital. Similarly, share premium cannot be paid as a dividend.

125. The concept of "corpus" and the reliance on *Reid's Trustees* needs to be considered cautiously in the context of s 402 ITTOIA whose starting point is the payment of something which is a "dividend". Asking whether the "corpus" of the shareholding has been diminished is not necessarily the correct starting point.

126. s 402 ITTOIA clearly envisages that a category of dividends which are not paid out of distributable profits may exist under foreign law. That creates a third category of Distribution which was not contemplated in *First Nationwide;* "a dividend of a capital nature".

127. Share premium is capital contributed to the company on the issue of its shares. It does not represent profits arising from the business of the company. Therefore, a distribution derived from share premium is capital. It is a payment in the nature of share capital as described in *Shearer v Bercain* and considered by the Cohen Committee.

128. As the court concluded in *Rae v Lazard*, what is required is to "look at the true legal nature of what is done", looking behind any labels to find the substance of the payment. In Glencore's case the substance of the payment is the making of a capital payment derived from share premium.

129. The source of a payment for these purposes is relevant if it is a relevant determinant under local law, in terms of whether the payment is made from funds which are assimilated to share capital. In circumstances in which a payment is debited to a capital account, there is no need for any tracing exercise to establish that the payment is of a capital nature.

Courtaulds

130. Mr Gammie relied particularly on the decision in *Courtaulds,* in which a distribution of share premium by an Italian company was held to be a capital payment, taking from that decision the principle that if the local law treats share premium as capital, any distribution of share premium to shareholders is a capital payment.

Mechanism of payment

131. Mr Gammie accepts that it is correct that it is necessary to consider the legal mechanism by which dividends are paid (*First Nationwide*) and that payments have to fall into one of only two categories. However, says Mr Gammie, it is possible for a dividend to be of a capital nature falling under s 402(4) ITTOIA, therefore even if the mechanism which is used for the

payment is a "dividend" mechanism like Part 17, that does not mean that the dividend has to be an income receipt.

132. In *First Nationwide* the impact of payments on capital rights did not impact the treatment of payments as dividends, the analysis depended on the Cayman Island law, which was not the same as CJL 1991, in particular it had abolished the equivalent of Article 39(4). There had been a "de-assimilation" of share premium in Cayman law, that has not occurred in Jersey.

133. Just because share premium can be distributed, it does not necessarily mean it represents income or profit; it depends on the law of the relevant jurisdiction.

134. Mr Gammie stresses that Jersey law is not equivalent to pre-1948 UK corporate law (share premium could be treated as profit) and the wide definition of distribution under Jersey law can encompass a capital distribution.

135. HMRC accept that it is possible for some payments made under Part 17 to be capital payments, if a direct tracing exercise can be undertaken; here that tracing exercise takes the shareholder back to a capital account. A reduction in that capital account is a reduction in a shareholder's rights in the company.

136. Jersey law explicitly accepts that share premium is a capital account. Payments out of that account are therefore capital dividends. Share premium has an inherently capital character as made clear in *Shearer v Bercain*.

137. The CJL 1991 gives companies a choice of the mechanics under which payments are made to shareholders, but when Glencore made its payments, it made it clear that it was making payments out of share premium. No further tracing is required to establish that this is a capital payment.

HMRC'S ARGUMENTS

Are the Distributions dividends

138. HMRC assert that the Distributions are dividends because:

History of English corporate law

139. For the purposes of English company law, only a limited means of returning capital to shareholders under UK law exist, all other payments are dividends.

140. The post 1948 changes to English company law do not turn share premium into share capital, but (under s 56 Companies Act 1948), merely take share premium out of the category of distributable profits and are concerned with the mechanics of how a payment is made to shareholders (*Duffs Settlement* Jenkins J).

> "A company...can make a distribution amongst its members (otherwise than in a winding up) in one of two ways, but only in one of two ways; that is by distribution of divisible profits, that is, by way of dividend; and by way of a return of capital pursuant to an order of the court upon a petition for reduction of capital in accordance with the Act. The question whether a given distribution lawfully made by a company is of the former or the latter description may thus justly be determined by reference to the method or methods of distribution, permitted or enjoined by the Act, which the company has adopted in regard to it; and the answer to that question must prima facie also determine the question whether the distribution is capital or income....." Jenkins J at p 930-931.

141. The definition of a dividend for these purposes is primarily a question of English law, the question is whether under the relevant foreign law (Jersey) the payment falls within that term. See *First Nationwide* Upper tribunal at [23]:

> "We start then with the meaning of "dividend" as a matter of ordinary usage in England and Wales....... Although not necessarily determinative of the meaning of the word in the tax legislation, it is the appropriate starting point. The meaning of the word in tax legislation is a matter of English law, not of Cayman law"

142. The correct analysis to determine the character of the Distributions, starts with English law definitions, looks at the Jersey law and applies what is happening for Jersey law purposes to the UK law; See *First Nationwide* in the Upper Tribunal at [48]

> "In construing the word dividend, we think it is right to consider what the relevant company is actually permitted to do under its governing law, rather than what that company would be able to do with its share premium were it an English company".

143. The comparative law analysis undertaken by Mr Willmott is valid because the starting point is an understanding of the concept of a dividend for English law purposes. Only once that is established, is it possible to decide whether, having applied that analysis to Jersey law, the Distribution payments are dividends for UK tax purposes. See on this point *TSB Bank Channel Islands* in which the Jersey court referred to the English cases as being given "the fullest regard" in interpreting Jersey law.

History of Jersey corporate law

144. In order to understand the implications of the 2008 changes, it is important to understand the earlier versions of the Jersey law; Article 7 of CJL 1991 prior to 1968 reflected the doctrine of the maintenance of capital.

145. A comparative law analysis is also relevant because prior to Amendment No 9 in 2008, Article 125 CJL 1991 was very similar in terms to UK law.

146. Under current Jersey law, there are no restrictions on what a company can use share premium for. The specific distributions of capital referred to in Article 114(2) do concern repayments of capital, but these are not the subject of Part 17 CJL. Article 115(9) now specifically states that payments made under Part 17 are not to be treated as reductions of capital.

Significance of source of payment

147. Counter to Mr Gammie's arguments, HMRC say that source is not the relevant criteria in determining the character of the Distributions. The fact that the payments have been made out of Glencore's capital account is not determinative of their character. (See *Rae v Lazard* and *Reid's Trustees*); the nature and origin of a payment does not affect the character of its receipt. The fact that the dividend paid in *Courtaulds* was derived from annual profits (which had been moved into a share reserve account) did not influence the court's decision.

Distributable profits

148. According to HMRC, the real question here is whether the Distributions paid by Glencore were payments of distributable profits. For Jersey law purposes, that includes capital profits and share premium after the legal changes made in 2008.

149. The decisions relied on by the Appellant*, Memec* and *Esso* are not apposite because it is not correct that there is a "universal" meaning of the term dividend; see the statements made by the Upper Tribunal in *First Nationwide* that these authorities are not helpful in considering

the correct treatment of a payment made out by way of capital profit "a capital profit is not made for a period in the same way as a trading profit". [37]

150. Profits can include capital profits and can include share premium, depending on the law of the jurisdiction in which the distributions are paid. (*Re Hill*) If the payment is a division of profits, it is a dividend, See *Re Bates*, considering the allocation of profits arising from the sale of steam trawlers held in the company's suspense account

> "The mere impressing of these distributions with the appellation of "capital distributions" cannot in my opinion determine their true character....The suspense account represented realized profit on the company's capital assets..... no part of it was required to satisfy either the creditors or shareholders of the company. In this state of affairs, it was a fund which the company could treat as available for dividend and could distribute as profits". [*Re Bates* at p 687 Eve J]

151. An also the comments made in *Drown,* admittedly a pre-1948 decision, but one which held that share premium is to be treated as normal profits

> "The [share] premium from its very nature is not part of the capital paid up on the shares; it is the surplus of the sum received in respect of the share over the amount required to pay up the share to the extent to which it is treated by the company as paid up. The capital paid up on the share must not be divided in dividend; but the premium is not capital paid up on the share but a sum received by the company in excess of the capital paid up on the share; and the principle that capital paid up on the share must not be divided in dividend is in no way infringed by distributing the premium as dividend" Clauson J at 403.

152. Similarly, the suggestion in *Duffs Settlement* that the UK company law change in 1948 was a novelty in assimilating share premium to share capital:

> "S 56 is a novelty which seems to me to create a new class of capital of a company, not being share capital it is true, but not being distributable as income any more than any capital asset" Harman J at p726

Jersey law - share premium accounts

153. Mr Hitchmough suggested, that whatever might have been the position in the UK post 1948, the relevant question for this appeal is what can a company do with its share premium for Jersey law purposes.

154. For English law purposes the changes made in 1948 did not go as far as to actually convert share premium into share capital, it was just to be "regarded as share capital"; terminology very similar to the CJL 1991 at Article 39(2). In the same way, before Part 17 was introduced in Jersey, share premium was assimilated to, but did not become, share capital.

155. After the introduction of Part 17 Jersey companies were given a choice of how to deal with share premium, a choice recognised in Article 39(4) CJL 1991, which is made specifically subject to Article 39(3)(e) (referring to the making of distributions under Part 17). That legal choice must be taken to have some effect; a distribution from share premium cannot intrinsically be capital.

156. As a matter of Jersey law, the share premium is freely distributable as profit as long as it is not assimilated to capital. Only share premium which is treated as distributable under Part 12 is "assimilated to capital" for this purpose. That is not the case for distributions paid under Part 17.

English law - share premium accounts

First Nationwide

157. HMRC argue that the logic applied in *First Nationwide* can also be applied to the Distributions. The Upper Tribunal accepted that a dividend could be paid out of capital profits, referring to

> "One feature of English company law is and always has been that distributions can be made only by way of distributions of profit.... by a reduction of capital pursuant to statutory procedures, or by way of distribution in respect of share on a winding up. It is, and has always been the case that profits include capital profits" [25]

158. The Upper Tribunal accepted that prior to the 1948 changes, a division of distributable profit included share premium which could be an income payment (in reliance on Harman J in *Duff's Settlement)*. Similarly, the Upper Tribunal stated that the 1948 Companies Act change did not change the meaning of "dividend" for English law purposes:

> "The Companies Act 1948 did not alter the meaning of dividend; what it did was to treat what at common law was a distributable profit as no longer such so that it could no longer be paid out as a dividend" [33]

159. If the mechanism which is used to make a payment out of share premium is a distribution mechanism, the resulting payment will be a dividend:

> "If it were possible for an English company to effect a distribution out of share premium account by the same mechanism as it pays a dividend out of trading profits, that would constitute a dividend within the ordinary meaning of the word" [38].

Are the Distribution dividends of a capital nature?

160. HMRC accept that s 402(4) ITTOIA does contemplate dividends of a capital nature, however in Mr Hitchmough's view, if the Distributions are dividends, they are not dividends of a capital nature because:

The "capital" nature of share premium

161. The test is a question of substance, the labels applied by CJL 1991 or indeed in Glencore's articles are not determinative (see *Rae v Lazard*). Mr Hitchmough pointed out that Glencore's articles had been changed on the advice of Mr Gammie in 2014 after the *First Nationwide* decision, presumably to support their position that the payments were capital payments and not dividends. Mr Hitchmough also pointed out that in Glencore's financial reports there was an inconsistency in how the Distributions were described.

162. The origin of the payment is not relevant, the only relevant issue is the mechanism for the payment. The references to the source of the payments under Glencore's articles (article 129 and 132) is not determinative (see *Hill v Permanent Trustees*).

> "No statement by the company or its officers that the moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect on the rights of the beneficiaries". [731] Lord Russell.

For Jersey law purposes, that means that only distributions paid under Part 12 can be dividends of capital nature.

163. The "substance" test is whether the payment made has left the corpus of the companies' shares intact (*Reid's Trustees*). If there has been no change in the shareholding as a result of the payment, the dividend cannot be a capital dividend.

> "Where the question is as to income arising from a foreign possession, then [I cannot imagine a safer or better basis than] to ask whether the corpus of the asset remains intact in the hands of the taxpayer" [p10 Lord Simonds] and "The dividend cannot be capital because the Respondent's foreign possessions, the shares, remain intact and therefore the dividend must be income". [p 18 Lord Reid]

164. A dividend payment is prima facie an income payment, but can be a distribution of capital in particular circumstances, such as the scrip dividend paid in *Sinclair v Lee.*

Courtaulds

165. HMRC say that *Courtaulds* can be distinguished from the facts in this case because:

(1) It was found as a fact that under Italian law share premium was treated as capital of the company.

(2) Share premium reserve was assimilated to share capital.

(3) The payment was not a dividend of a capital nature because it had no impact on the corpus of the shares.

Mechanism of payment

166. HMRC argue that in order to determine the character of a distribution, the mechanics of the way in which the distribution is paid for Jersey law purposes is the fundamental test. See Duff's *Settlement* and *Rae v Lazard;* the legal machinery employed is determinative.

> "In deciding whether a shareholder receives a distribution as capital or income, our law goes by the form in which the distribution is made rather than by the substance of the transaction". [p27] and "Thus it is not the source from which the assets are distributed but the machinery employed in their distribution which determines the question whether they are received as income or capital" [p31] *Rae v Lazard*

167. *First Nationwide* made clear that in this respect the courts take a form over substance approach, in which the character of a payment is determined by the manner in which it is paid out by the company. HMRC attempted to follow a "substance" argument; arguing that the substance of the payments made by the Cayman company eroded the corpus of the company's shares, but this was rejected by the Court of Appeal.

168. The character of that payment can be only one of two kinds of payment, capital or dividend, "there is no more than this dichotomy". Moses LJ [10] in *First Nationwide*. For Jersey purposes, those mechanics are either Part 12 or Part 17 requiring either a special resolution or an ordinary resolution.

169. In Glencore's case, the Part 17 mechanism is not designed to protect the capital of the company, but is a mechanism for ordinary profit distribution. For these purposes share capital has not been "assimilated to the paid-up share capital of the company" or brought within the maintenance of capital principle.

170. HMRC conclude that the starting presumption for Jersey law purposes is that the receipt will be income, unless it is clearly capital with no need for any tracing exercise to be undertaken. A limited class of capital distributions can be paid out under Part 17, such as scrip dividends, but the Distributions do not fall into that very restricted category. The Distributions are therefore not dividends of a capital nature.

DISCUSSION AND DECISION

General points

Terminology

171. In this decision I have used the neutral term "distribution" to describe the payments made by Glencore to Mr Beard.

172. There are some other terms which were used by the parties which it is worth pinning down before going any further:

(1) *Capital accounts;* The parties accepted that the Distributions made by Glencore were payments made out of an account which was labelled as a capital account. The term "capital account" as it is used for these purposes is not the same as a reference to shareholders' funds.

(2) Payments out of the *company's capital*; This term is used in many of the authorities referenced and refers to a payment out of shareholders' funds and capital in this context means share capital.

(3) Payment out of a *capital account* is not necessarily the same as the payment of a *company's capital*.

(4) "*Assimilation to capital*". This refers to capital in the sense of shareholders' funds.

(5) *A capital dividend* or *a dividend of a capital nature.* The Upper Tribunal in *First Nationwide* recognised the potential double meaning of the term "capital dividend", which could include both a dividend paid out of capital profits and a return of capital to shareholders. Before me the parties agreed that there was a difference between a capital dividend and a dividend of a capital nature; for these purposes, the first is taken to refer to a dividend paid out of the proceeds of capital assets of a company (as in the sale of the warehouses and office premises in *Reid's Trustees*). In contrast, a dividend of a capital nature as the term is used in s 402(4) ITTOIA refers to a payment from the permanent capital of the company.

Trees and fruit

173. Many of the authorities referred to the well-worn analogy of the tree (for capital payments) and the fruit (for income payments). Mr Hitchmough made the point that this analogy can only be taken so far. I agree. It suggests that the dichotomy between capital and income is more absolute that is actually the case.

174. Rather, as the authorities indicate, there is some degree of fluidity between the two categories both in theory and in practice; income profits can become capital profits and vice-versa, as was achieved by Courtaulds under Italian law:

> "the effect of building up a reserve of this character is to engraft on the tree of the shareholder's original investment in the form of paid-up share capital an additional member, not of the same provenance or of the same original character as the tree itself, which must nevertheless be accepted as becoming part of the tree to the exclusion of any character it may previously have had as a fruit of the tree" [p16 Buckley J]

175. And similarly, in *Re Bates*, a much earlier authority, on the question of the correct treatment of distributions made out of a suspense account, described by the company as a capital payment but held by the court to be available for distribution as a profit:

> "Unless and until the fund was in fact capitalised, it retained its character of a distributable profit" Eve J at p 688.

176. The point is most clearly (and recently) made in *Sinclair v Lee* in which Nichols J struggled with the fact that retained earnings could be taken account of in the market value of a share, yet still be treated as an income distribution if paid out in dividend form.

177. I have not assumed that there is an absolute difference between an income and a capital payment or that there is no possibility of cross-over between the two concepts. However, I have assumed that there is no third category of payment types.

Findings of Fact

178. On the basis of the evidence seen and heard at the Tribunal I make the following findings of fact:

(1) If Glencore had chosen to pay the Distributions in reliance on Part 12 CJL 1991 the Distributions would not have been treated as distributions for Jersey law purposes.

(2) The account from which Glencore debited the Distributions was a capital account. For Jersey law purposes that does not necessarily mean that the Distributions were debited to shareholder funds.

(3) Under CJL 1991 the only funds from which distributions cannot be made are the nominal capital and capital redemption reserve funds of a Jersey company.

(4) Glencore used both the term "dividend" and the term "distribution" to describe the Distributions made to shareholders.

(5) Part 17 CJL 1991 is the only relevant machinery which can be used by a company like Glencore to make income distributions.

Were the payments made by Glencore dividends?

The relevance of English case authorities

179. The correct approach to considering whether the Distributions paid by a Jersey company should be treated as dividends for English law purposes is, as set out by the Upper Tribunal in *First Nationwide* in reliance on earlier decisions particularly *Rae v Lazard*:

(1) first, consider the meaning of dividend as a matter of ordinary usage for English law purposes, then look at the foreign law governing the relevant payment, in this case CJL 1991, and

(2) Second, decide whether the payment made under Jersey law fulfils that definition for English law purposes (s 402 ITTOIA).

180. The parties took a very different approach to the reliance which could be place on English law authorities to determine the proper character of these payments made by a Jersey company. Their difference in approach relied on the significance of the fact that Jersey law "diverged" from English law when it decided, in 2008 that share premium should no longer be protected in the same way as share capital. This, says Mr Gammie, is such a significant break as to make all English authorities which are founded in the English law post 1948 irrelevant.

181. I do not agree with this approach which I consider to be throwing the baby out with the bath water. The English authorities which were referred to include detailed considerations not just of the specifics of the English law, but also general principles of how to determine the correct character of a payment.

182. Considerations of the logical process to apply to decide whether a payment should be treated as an income or a capital payment for example, do not seem to me to much affected by the particular way which the law treats share premium at a given time or in a given jurisdiction. That is part of the factual framework within which the analysis is done, but does not alter the logical framework which should be applied.

183. The Upper Tribunal in *First Nationwide* said that, whatever changes were introduced by the Companies Act 1948, that legislation did not change the definition of a dividend and continued

> "In construing the word "dividend" we think that it is right to consider what the relevant company is actually permitted to do under its governing law rather than what that company would be able to do with its share premium were it an English company." [48]

184. It is also worth noting that many of the English authorities referred to pre-date the changes to share premium under English law in 1948 in any event, some by nearly a hundred years.

185. HMRC referred us to the decision in *TSB Bank Channel Islands* as authority for the reliance which could be placed on English cases. I do not accept that the situation here is as straightforward as in that case, in which the Jersey court accepted that the Jersey and English laws were in identical terms. Any guidance from English decisions needs to be tempered by a consideration of the relevant context; the parties agreed that Jersey law was similar to English law at least until the changes introduced in 2008.

186. In circumstances where there is little guidance from the local courts and where it is accepted that English law is similar (if not identical) in some important aspects to the law in question, (such as the provisions of Article 39 of the CJL 1991 to which Mr Willmott referred) it seems to me perfectly reasonable to undertake the kind of comparative exercise undertaken by Mr Willmott and to assume that a Jersey court would do the same were it asked the same question. I do not accept, as Mr Gammie suggested, that this amounts to applying English law concepts to what is a Jersey law question.

187. I have relied on these principles from the English authorities as common to the general consideration of what should be treated as a dividend:

(1) The test is to be looked at from the perspective of the paying company.

(2) The source of the payment is not determinative.

(3) The labels applied by the paying company are not determinative.

(4) The broad description of a dividend set out by Harman J in *Esso* is a starting point for the definition of a dividend, providing "general words but not legislation" (*First Nationwide* Upper Tribunal [37])

(5) Each case needs to be considered on its particular facts, including, as a relevant fact, whether the "dividend" in question is debited to a capital account (*First Nationwide* Upper Tribunal at [37])

Meaning of "dividend"

English legal definition of a dividend

188. Do the Distributions, which Glencore was happy to initially describe to its shareholders as dividends, fulfil the meaning of a dividend for English law purposes?

189. The parties were divided about what the correct English law definition of a dividend actually was; the Appellant referred to the definition of a "dividend" set out in the cases of *Esso* and *Memec* as *"*payments out of the profits for a period in respect of a share in a company*"*. According to Mr Gammie, the share premium account out of which the Distributions were paid does not represent the "profits" of Glencore's business; payments out of the share premium

account are payments out of part of the capital raised by the company. For Jersey law purposes, share premium is not "profit" and so the Distributions fall outside this definition of a dividend.

190. HMRC referred to the wider definition of dividend considered in cases such as *Drown* which suggested that

> "the principle that capital paid up on the share must not be divided in dividend is in no way infringed by distributing the premium as dividend" [403].

In other words, anything other than protected share capital (for Jersey purposes nominal share capital and the capital reserve account) can be categorised a profit which is divisible between the shareholders, ie it amounts to a dividend payment.

191. Or, as described in *R A Hill v Permanent Trustee co of New South Wales* as

> "any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by dividing profits. Whether the payment is called "dividend" or "bonus" or any other name, it must still remain a payment on division of profits" Lord Russell at p739.

192. The First-tier Tribunal in *First Nationwide* accepted a wide definition of a dividend:

> "I can see no reason for ascribing any meaning to dividend in this context that is different from the ordinary understanding of that term as a matter of legal machinery" [29]

193. The Upper Tribunal took a more circumspect approach to applying these labels to payments made from capital profits (*First Nationwide* Upper Tribunal at [37]), but nevertheless decided that the payments made by a Cayman company out of share premium could properly be treated as dividend payments, a point which was ultimately accepted by HMRC:

> "there is nothing to support the view that the ordinary meaning of the word "dividend"... excludes the sort of distribution considered in *Duff's settlement.* Accordingly, if it were possible for an English company to effect a distribution out of share premium account by the same mechanism as it pays a dividend out of trading profits, that would constitute a dividend within the ordinary meaning of the word" [38]

194. In response to the "profits for a period" test in *Esso*, the Upper Tribunal in *First Nationwide* suggested that share premium would be treated as profits accruing for the period in which the share subscription on which the premium arose was made:

> "It can in any case sensibly be said that the "profit" (See *Duff's Settlement*) which accrues when a premium is paid on a subscription is part of the profit for the accounting period during which the subscription is paid" [37]

Jersey corporate law

195. There is no doubt, and the parties agreed, that it is a fundamental part of this analysis to consider how the Jersey law treats the Distributions paid to Mr Beard.

196. For Jersey law purposes those were distributions made under Part 17 to Mr Beard in his capacity as a shareholder of the company. As the experts agreed, Jersey law does not define or use the term dividend, nor does it provide any guidance as to whether payments made under Part 17 out of share premium account are to be treated as income or capital. The term used for CJL purposes is a "distribution".

197. Some points on the Jersey law:

(1) The Jersey legislature has changed its position on the treatment of share premium over time, but, at the time when Mr Beard received his distributions share premium could be used to make payments of distributions either under Part 12 or Part 17. There was no legal difference for Jersey law purposes which process was used.

(2) The only limiting factor in paying distributions out of share premium under Part 17 was the solvency statement which the director were required to make. That was a statement which looked to the protection of the creditors of the company, not its shareholders.

(3) The experts agreed that a payment made using Part 17 reduced a capital account of the company (the share premium account).

(4) The experts agreed that had Glencore used the Part 12 mechanism for paying the Distributions, including the necessary special resolutions, that would have been a return of capital which would have been treated as a capital dividend.

Dividends and distributions

198. Both of the parties' experts agreed that although the term dividend was not defined by the Jersey legislation, it was used as a colloquial term and that the term dividend and distribution were used interchangeably in general usage.

199. Each of the pre-2014 Distributions were paid in accordance with Glencore's articles of association which referred to the declaration of final dividends (Article 129) and the declaration of Fixed and interim dividends (Article 130) including in Article 130

> "the Directors may pay the fixed dividends on any class of share carrying a fixed dividend expressed to be payable thereof and may also, from time to time, announce and pay interim dividends on shares of any class of such amounts and on such dates and in respect of such periods as they see fit."

200. Mr Hitchmough also pointed out that, on the advice of Mr Gammie at the end of 2013, Glencore had changed its terminology from referring to "dividends" to "distributions" in its corporate documents from May 2014 and changed its article dealing with capital distributions (Article 8) to say

> "The company may, by Ordinary Resolution, approve the distribution to its members of any sum standing to the credit of the Company's share premium account, but no such distribution shall exceed the amount that is recommended by its Directors"

201. Distributions paid after these changes were paid under Article 8 rather than Articles 129 and 130. In some, but not all, of Glencore's corporate documents the Distributions after this date are referred to as "distributions", though there are inconsistencies.

202. This suggests that, until specific advice was given, Glencore assumed that the payments it was making out of share premium account could properly be described as dividends for Jersey purposes.

Conclusion

203. I have concluded that the Distributions fall within the meaning of a dividend as a matter of ordinary usage for English law purposes; in fact, the Distributions fulfil almost exactly the example description provided in *First Nationwide*; the Distributions were paid out of share premium account by the same mechanism (Part 17 CJL 1991) as would be used for paying a dividend out of trading profits.

204. The shareholder resolutions passed by Glencore in respect of each of the final Distributions, at least until they received Mr Gammie's advice at the start of 2014, do not suggest that the company considered that they were making payments which differed in quality to a normal distribution: in all cases in Glencore's company half year and final reports the Distributions are stated to have been made for a specific period, referring in each case to the year for which the final dividend (or distribution) was paid.

205. While accepting that the labels applied by Glencore to the Distributions are not determinative of their legal character, I have concluded that there is nothing either in the Jersey legislation or the manner in which these payments were made by Glencore to indicate that the Distributions cannot be treated as fulling the English law definition of a dividend.

Does it matter that the Distributions were paid out of share premium?

Has the maintenance of capital principle been retained?

206. The related, and more fundamental argument put by the Appellant is that the nature of funds in a company's share premium account for Jersey law purposes means that the Distributions cannot be treated as income distributions.

207. One way of framing this appeal is to ask whether, on its facts and depending on Jersey rather than Cayman law, it is possible to come to a different decision than the decision which was reached on this point by the Upper Tribunal in *First Nationwide*. In other words, is share premium more strongly "assimilated to share capital" under Jersey law than was the case in *First Nationwide*? The question formulated by the Upper Tribunal was: "Is there any reason to think that dividends..... paid out of share premium account of a Cayman company, are not dividends as ordinarily understood". In this case that question must be answered by reference to Jersey rather than Cayman law

208. Mr Gammie stressed, and I agree, that it is not correct to view the Jersey law post the 2008 changes as equivalent to English law prior to 1948 with its complete freedom about the use to which share premium could be put. On this point at least, the position of Glencore is not the same as the position of the company in *First Nationwide.*

209. However, neither it is the case that Jersey law is the equivalent of English law post 1948. Instead, Jersey law inhabits a hybrid territory between the two cases; having retained, from the time when it did have a more restrictive view of the use to which share premium could be put, Part 12, while also including the more recent, and more liberal Part 17.

210. Mr Gammie and Mr Felton say that there is a reason to think that the Distributions are not dividends; because of the terminology of Article 39(4) CJL 1991 which provides a strong enough "assimilation to capital" to overcome any other indications that the Distributions should be treated as anything other than repayments akin to repayments of share capital.

211. It is correct that Article 39(4) CJL 1991 is similar in its terms to the UK Companies Act, in which share premium is deemed to be assimilated to share capital, but unfortunately for Mr Beard's arguments, unlike for English law purposes, that is not where the analysis stops.

212. Whatever Article 39(4) may suggest about the character of share premium for CJL 1991 purposes, it is impossible to ignore the significance of the changes made in Amendment No 9 in 2008 and Amendment No 10 in 2009 and Part 17 of the Jersey legislation, to which, on any straightforward reading, Article 39(4) is subject; the reference at Article 39(4) to treating share premium as if it were share capital is "subject to this Article" which includes Article 39(3)(e) and its reference to the ability of Jersey companies to pay distributions out of share premium under Part 17.

213. At the very least, Part 17 introduced a significant watering down of the protection of capital principle, if it did not destroy it altogether.

214. Both parties referred me to the one Jersey court decision which considered the application of Part 12 and Part 17 of CJL; the *WPP* decision. With respect to the opinions of the experts, I have taken the statements of the Jersey judges about the application of their own law as the definitive view for these purposes.

The WPP decision

215. The share premium which was the subject of the court application in WPP had arisen from a company reconstruction not unlike the Glencore situation. The Jersey court made clear that the incentive for asking which was the correct process for Jersey law purposes was to clarify the UK tax treatment of the payments made. It was clear that a payment made under the Part 12 process would be a capital payment, but the parties wanted to clarify what the correct treatment was for payments made under Part 17:

> "Although Article 115..... permits a company to make a distribution from its share premium account without court sanction......., since a share premium account is a capital account, it is apparently not clear whether a distribution made from a share premium account would constitute an income payment in the hands of the recipient shareholders" [31]

216. The judges in that case, referring to the question of whether the maintenance of capital principle had been maintained in Jersey after the 2008 changes said: "The principle of the maintenance of capital is now of very limited application in Jersey" [19], and in the context of Part 17:

> **"**The 2008 amendments do not remove the duty of the Court to have regard to the interests of creditors in relation to the reduction of capital. The sole effect of the 2008 amendments is that, where the reduction effectively transfers funds from a capital account, such as a share premium account (from which distributions may be freely made under Article 115 subject only to the solvency requirement) to a non-capital account (from which distributions may be made on exactly the same basis) it is hard to envisage the Court concluding that creditors may be prejudiced or that any other measure to protect creditors is required" [24]

217. The Court held, from the perspective of creditors, that there was no distinction for Jersey law purposes between the company's ability to make a distribution out of its share premium account or from funds which had been moved into a new profit reserve account. Despite the fact that the share premium account was a capital account, distributions could be made out of it in the same way as from a non-capital account, as long as in both instances the rights of creditors were respected.

Conclusion

218. I have concluded, particularly in reliance on the decision of the Jersey court in *WPP* that payments debited from a capital account, such as a share premium account, in Jersey, are no more "assimilated to capital" than payments from any other type of account from which distributions can be legally made.

Significance of source

219. Mr Gammie consistently stressed the significance of the fact that the Distributions were paid out of a “capital account”. In my view that is simply not sufficient to demonstrate that the Distributions must be capital payments themselves. It may be a starting point, but it is certainly not the finishing point as far as the relevant authorities are concerned.

220. As was stated by Lord Reid in *Reid’s Trustees*

> “There are many ways in which a company can deal with its profits. If it adopts certain methods, the result is the creation of new capital assets. If it adopts other methods, the result is the receipt of income by its shareholders. In either case it is immaterial whether the profits were trading profits or capital profits”. [p18]
>
> and “if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits do not and cannot be made to affect the quality of the receipt for income tax purposes”.

221. The Upper Tribunal in *First Nationwide* took a dim view of the relevance of the categorisation of the share premium reserve account under Cayman Law:

> “It will be noted that, under our approach and analysis, the categorisation under Cayman law of the share premium account as capital or profit is not relevant. Nor is it relevant whether Cayman law would treat a dividend paid out of the share premium account as income or capital in the hands of the recipient” [50]

222. Much of the Appellant’s arguments are an attempt to establish that share premium, whether in the UK, Jersey, Cayman or Italy, has an essential character as capital, and this essential character must be carried through to any payments made out of a share premium account.

223. I do not accept this approach. If the authorities and the legal history of English and Jersey law which the parties rehearsed demonstrate anything, they demonstrate that the legal character of share premium is not settled. Different legislatures take different views of its nature and the same legislature can change its mind about how it should be treated over time, as both the English legislature and Jersey legislature have done.

224. This is clear from the change of approach which was described in *Duff’s Settlement* [Ch division Harman J]: as a result of the 1948 Companies Act changes in the UK:

> “The effect of s 56 of the Companies Act 1948 is that monies paid out of a share premium account, being a repayment to shareholders made as the result of an order on a petition under that section, is to be treated as capital not as income”

225. S 56 is creating, not reflecting the capital character of the share premium account. It is the change in the law which has “capitalised” the share premium account and which has altered the “bundle of rights” which shareholders have:

> “A share in a company............. has been described as a bundle of rights, and one of those rights, since the passing of the 1948 Act, has been to maintain the share premium inviolable except to the extent it may be distributed under s 56” Harman J [p 727]

226. I do not accept that share premium is a separate category of profits, inhabiting a hybrid space between share capital and distributable reserves. No such third category exists as the authorities make clear:

> “A company, [having] an artificial person, can (as it has been laid down) make a distribution among its members (otherwise than in a winding up) in one of two ways – but only in one of two ways: that is by a distribution of distributable profit, that is by

> way of dividend; and by way of return of capital pursuant to an order of the court upon a petition for the reduction of capital" [p 930] Jenkins LJ in *Duff's Settlements*

227. Instead, I would describe share premium as having a chameleon character, taking its colour from the law which is applied to it; it has no intrinsic colour of its own.

228. The only question, in a particular case, is how the relevant law treats share premium. This was clearly recognised by the First-tier Tribunal in *First Nationwide*, referring to the decision in *Drown*:

> "This [Clauson J in *Drown*] is as clear a statement as there could be that share premium is different to share capital, and that the rules as to maintenance of share capital do not apply to share premium where it is not, by statute, assimilated to share capital" [43]

229. The fact that share premium sits in a particular account of the company which is labelled a capital account, does not determine its character. To accept this is in effect accepting a "source" based approach which was roundly rejected by the Upper Tribunal in *First Nationwide* and the earlier authorities on which that decision depended:

> "It is always open to the legislature..... to state that a particular fund may or may not be distributed in a certain way. Thus, the Companies Act 1948 provided that share a premium account could only be distributed by way of a procedure appropriate to a reduction of capital, with the consequence, as we have seen, that the share premium account could no longer be seen as profit available for distribution and was perhaps to be seen as more akin to capital than profit if one were to apply the conventional division between capital and profit. Equally, there is no reason in principle why exactly the reverse should not occur....... if that were done, there can be no doubt in the light of the authorities which the judge discussed..... that the share premium account of an English company would once again be seen as representing profit rather than capital" [77]

230. Mr Gammie referred us to the Cohen Committee which considered the English law changes of 1948 and said in its 1945 report "share premiums are in essence capital, though the assets acquired therewith do not represent the capital account strictly so called and there is no legal objection, apart from any provision in the articles, to prevent the distribution thereof by way of dividend", but this does not mean that they cannot be distributable profits, as they were in England prior to 1948.

231. See also in the Court of Appeal Jenkins LJ in *Duff's Settlements,* while referring to the "essentially capital character of premiums received on the issue of shares" goes on to say:

> "A fund representing share premium if distributed in cash before s 56 came into operation would have been income........ notwithstanding its capital character when considered as a receipt of the company. But that was because as the law then stood, such a fund constituted a profit available for distribution as a dividend" p 932.

232. The point is made even more clearly in *Quayle Munro Limited* (referred to in *First Nationwide*), where the Scottish Court of Session held that:

> "The statutory restrictions which apply to the share premium account prevent sums held at credit of that account from being distributed as distributable profits of the company. But once they have been released from the share premium account following upon its cancellation, they are available to be distributed, in accordance with the principles described in *Drown*" [27]

233. Mr Gammie attempted to argue that because share premium was derived from capital originally paid by shareholders on their shares, it must remain as part of the capital of the company. On my analysis, even if share premium was, on earlier iterations of Jersey law, part

of the shareholders' capital, the impact of the changes introduced by Part 17 in 2008 is to remove share premium from the "bundle of rights" held by shareholders.

Conclusion

234. It is the terms of the statute which create the character of a share premium account. It has no essential character as "capital" even if that is how it is labelled by the company. If the relevant law does not define share premium as assimilated to share capital, it must fall into the only other category of funds held by a company available to its shareholders, distributable profit, and as such is available be paid by a company by way of dividend.

Conclusion on the dividend question

235. For these reasons I have concluded that the Distributions paid to Mr Beard under the provisions of Part 17 CJL 1991 and Glencore's articles, were not, for Jersey law purposes payments of shareholders' capital, but should be treated as paid out of profits available for distribution and are dividends within the ordinary meaning of that word for the purposes of s 402 ITTOIA.

Are the Distributions dividends of a capital nature?

Share premium as capital

236. The Appellant argued that if the Distributions are dividends, they are nevertheless "dividends of a capital nature", that category reflecting the fact that for non-English law purposes it may be possible to pay dividends out of non-distributable profits. That is an apt description for the Distributions because they were debited out of a share premium account, which is in substance a capital account.

237. The parties referred us to a large number of case authorities dealing with the distinction between income and capital payments made by companies to their shareholders, some of a very distinguished age and most arising from the need to make a clear distinction between income and capital because of inheritance rights divided between income and capital beneficiaries.

238. In *Bouch v Sproule* in 1885 Lord Herschell referred to the question of determining whether such payments were income or capital "as a question of considerable difficulty". The question has not got much easier in the ensuing 150 years.

Guidance from Courtaulds

239. Mr Gammie referred us to *Courtaulds* as the most apposite authority for interpreting the Jersey law in this case and I have taken *Courtaulds* as my starting point for this analysis. Like this case, the Italian company in *Courtaulds* did, under Italian law, have some flexibility about making payments out of share premium reserve; a dividend could be paid out of share premium as long as the company's legal reserve stood above a certain amount.

240. However, there are at least two significant differences between Courtauld's position and Glencore's:

(1) Although Italian law gave Courtaulds a choice about whether dividends could be paid out of share premium reserve, that was a conditional choice; the dividends were payment subject to satisfaction of the legal reserve criteria. Share premium became distributable (or to use the parties' terminology non-assimilated) only when the legal reserve reached a certain level. The circumstance of the payment of a share premium derived dividend did not depend on the mechanics of the payment (that would always be

the same). In other words, the share premium reserve was assimilated to capital until this specific condition was met and was part of the "corpus" of the shareholders assets until that point.

(2) Unlike the Jersey situation, it was clear that the payment was properly a dividend under Italian law.

241. The question which was asked by the Court of appeal in *Courtaulds* was whether the payment reduced the "corpus" of the share capital, what was the effect of the payment on the shareholders of the company, or, asked in another way, does the shareholding remain intact after the payment?

242. It was decided that the dividend payment was a capital payment because the share premium account was distributable only subject to the specific condition being met: "Italian law must treat premiums paid on shares as being ab initio and always notional paid-up share capital of the company". The distribution made from the share premium reserve "lopped from the tree part of the engrafted member consisting of the share premium reserve" [p17 Buckley J].

243. This was also considered to be the fundamental issue in *First Nationwide*:

> "The key question in determining the nature of the preference dividends for this purpose is the consequence of those dividends on the corpus of the first and second issued preference shares" (First-tier Tribunal at [55])

244. Can the same be said of Glencore in its position as a Jersey company? In my view it cannot because:

(1) Unlike under the relevant Italian law, there appears to be no mechanism under Jersey law to protect shareholders if the directors choose to make a payment out of share premium account. The only protection is directed at creditors of the company in the form of the solvency statement.

(2) It is impossible to say of the share capital account in Jersey that it is ab initio capital, as discussed in more detail below.

(3) Finally, it is worth noting that CJL 1991 defines what is a distributable profit in inclusive rather than exclusionary terms; everything is distributable unless it is specifically determined not to be under [Article 114(2)]; the fact that it is always legally possible to elect to make a distribution from share premium under Part 17, means that it is impossible to say that share premium has the character of capital "ab initio".

Mechanism of payment

245. It is clear, from *First Nationwide* and the earlier cases on which that decision relied, including *Rae v Lazard,* that the critical question which determines the character of a payment from a company to its shareholders is the mechanism by which the payment is made

> "In deciding whether a shareholder receives a distribution as capital or income our law goes by the form in which the distribution is made rather than by the substance of the transaction" [26] Lord Reid.

246. The relevant payment mechanism for these purposes is Part 17 CJL 1991 and in particular Article 115. The experts disagreed about the character of that mechanism. The parties did agree that Part 12 is a mechanism for returning capital to shareholders. Of course, it does not necessarily follow that Part 17 cannot also have that character. However, in my view it is more

likely that the Jersey legislature intended these to be discrete rather than overlapping provisions.

247. Mr Willmott suggested that while the default position is that payments made under Part 17 are income payments, it is also possible for a "capital dividend" to be paid under Part 17, subject to a very clear "tracing" exercise being possible. On the basis of the English authorities, that is a difficult position to sustain; if the form of the distribution is determinative for these purposes, it must be the case that all payments paid under the same mechanism are of the same character. Equally, the English authorities are clear that the source of the payment (based on any kind of tracing exercise) is not relevant for these purposes.

248. I have proceeded on the basis that:

(1) Payments made under Part 17 must be different than payments made under Part 12; they are different mechanisms producing different legal effects.

(2) All payments made under Part 17 must, for these purposes, have the same character.

(3) *WPP* supports the proposition that while Jersey companies have a free choice as to the mechanism to use, that does not mean that the two mechanisms are the same.

249. For Jersey law purpose, Part 17 is a "distribution" payment mechanism. Does that mean that it cannot be used as a mechanism for returning capital to shareholders? My view is that the better view of the Jersey law for these purposes is that Part 17 is a mechanism for returning funds which are "distributable" i.e., neither nominal share capital nor share capital reserve, to shareholders.

250. Mr Felton points out that funds paid under Part 17 as distributions do not have to be transferred to a distributable reserve fund before they are paid out, suggesting that this means that they retain their capital character under Part 17.

251. I do not think that this can be correct. On my analysis, and even taking account of Article 39(4), my view is that Part 17 overrides the "assimilation to capital" provided by Article 39; the deeming provision at Article 39(4) is made subject to the ability of a company to pay a distribution under Part 17 (Article 39(3)(e)). The legal character of share premium as assimilated to share capital is broken by Article 39(3)(e) and payments made under Part 17 cannot properly be treated as anything other than distributable profits.

252. There is not, as Mr Felton tried to establish, any third category of payments. Part 12 governs payments which are, or are assimilated to, share capital. Part 17 governs any other payments which can only be distributions of profit. Part 17 is not, to use the terminology of Moses J "a mechanism which is readily identifiable as designed to protect the capital of the company".

253. Applying the *Rae v Lazard* principle, this is determinative because that mechanism reflects the underlying legal nature of the payment (as either share capital or otherwise).

> "Payments made by a company in respect of shares are either income payments or, if the company is not in liquidation, by way of an authorised reduction of capital. The courts have recognised no more than that dichotomy. The distinction has depended upon the mechanics of distribution. If the payments are made by deploying the mechanisms appropriate for the reduction of capital, then they are payments of capital. *Such mechanisms can be readily identified as designed to protect the capital of the company*. If the payments are not made by such mechanisms but are made by way of dividend, they are income payments" [*First Nationwide* Moses J [10]]

254. The linkage made between the form of the payment and the nature of the payment in *First Nationwide* and earlier cases, in particular *Hill v Permanent Trustees:*

> "From this it would appear that moneys paid in respect of shares in a limited company may be income or corpus of a settled share according to the procedure adopted, ie according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up" [Russell J at p729]

suggests that payments out of accounts (however labelled by the company) which are not nominal share capital, have no "essential" character and so are characterised by the choice which either the company, and/or the relevant corporate law makes, about the way in which the payments are made.

255. The element of choice is reflected in the *Bouch v Sproule* decision:

> "In a case like the present, where the company has power to determine whether profits reserved and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company". Watson LJ at [p410]

256. So too, the references to some of the even older cases cited in that decision that companies may have "floating capital" and the acceptance that

> "what is paid by the company as dividend goes to the tenant for life and what is paid by the company to the shareholder as capital, or appropriated as an increase of capital stock in the concern, enures to the benefit of all who are interested in capital" [Herschell J at p397-8].

257. In *Bouch v Sproule* (which involved a payment out of retained profits to shareholders to be used by them to subscribe for bonus shares) Herschell J said that it was necessary to look at both the form and the substance of the transaction, which in that case included the paying up of newly issued shares and avoided the suggested from (even) earlier cases that "what the company says is income shall be income and what it says is capital shall be capital", considering instead that

> "The substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid up capital upon newly created shares. And the form in which the operations were effected points in the same direction" [p399]

258. Mr Gammie relied on *Sinclair v Lee* as a further example of a situation in which, despite the form of the payment being by way of distribution, the court nevertheless accepted that the distribution was a capital payment. Nichols J in that case clearly struggled with the *Bouch v Sproule* approach to form over substance and concluded that the transfer of shares as part of a demerger by way of the declaration of a dividend should not be respected as an income distribution if that was clearly at odds with the intention of the testator/settlor:

> "The inflexible approach of these principles [form over substance] would produce a result manifestly inconsistent with the intention of the testator or settlor and the court should not be required to apply them slavishly" p 515.

259. This situation in this appeal does not seem to me to be analogous to the position in *Sinclair v Lee;* first, because the value which is the subject of the Distributions is share premium, rather than shares themselves, so is at least one remove away from actual share capital and second, because there is no indication of any "intention" or purpose as far as the treatment of the Distributions by the shareholders is concerned.

260. The principle derived from these case authorities seems to me to suggest that, unless there is a very clear indication of an intention to the contrary, how a company make payments out of share premium must reflect the view which the local corporate law, or the paying company, has of the nature of that share premium; More restrictive payment methods (court sanction for example) suggest a "maintenance of capital" approach.

261. This is reflected by the statements of Moses LJ in *First Nationwide* referred to above. To that extent the mechanics of payment are not completely divorced from the underlying corporate law concepts of how free or otherwise a company should be to pay away share premium and the character of the payment is more than "mere labelling" which a court can disregard.

The dualistic approach of Jersey law

262. I have considered whether it can be correct that the mechanism of a payment out of share premium for Jersey law purposes is determinative, because for Jersey law purposes there is a choice of mechanism. As Mr Willmott said; share premium is assimilated to capital if the payment is made under Part 12, but is un-assimilated and is a dividend if the payment is made under Part 17, despite both payments coming from the same share premium account.

263. Mr Willmott struggled to explain when the transformation which determined whether the share premium was to be de-assimilated or re-assimilated with share capital occurred, but on his analysis, it can only have been after Glencore had decided which route to follow.

264. That gives share premium for Jersey law purposes something of the character of Schrodinger's cat; Mr Willmott resisted the suggestion that the share premium account was anything other than essentially capital ab initio, but did suggest that its character depended on a decision by the company about how it was to be paid out.

265. This seems to push the "mechanistic" approach adopted in *First Nationwide* and derived from earlier cases quite some way. It is only having made a choice between two possible methods of payment that the nature of the payment is determined.

266. None of the cases which were cited to me, including *First Nationwide*, dealt with a situation in which a company had a choice about the manner in which payments out of share premium were made. As explained by Mr Willmott, while there might have been commercial reasons for electing to pay by one method or the other, there were no legal reasons in Jersey why a company such as Glencore would pick Part 12 or Part 17.

267. It is true that the cases demonstrate that there is some flexibility in moving a company's earnings between accounts (as in *Courtaulds*), but in no other case has the local law given a binary choice to a company to determine the character of the payment made by the company.

268. I have considered whether this pushes the *First Nationwide* "mechanics" analysis so far as to render it meaningless, or to suggest, as Mr Gammie argued, that the issue is one of mere labelling, which the court should look through. Here, form is determining character in circumstances where there is no legal differentiation between the payments, to such a fundamental extent that, as Mr Willmott accepted, it would be possible for a company to make a payment out of share premium on one day under Part 12 which would be treated as a re-payment of share capital and on the following day to make a payment out of the same share premium under Part 17 which would be treated as an income distribution.

269. However, having considered the authorities up to and including *First Nationwide* which adhere to the mechanism approach, underpinned by the principles originally expressed in the *Bouch v Sproule* line of authorities, I have concluded that even in these circumstances, the form in which the payment is made must be taken to determine its character. The position is not, as

Herschell J feared in *Bouch v Sproule* "that what the company says is capital is capital and what the company says is income is income"; rather, what Jersey law says can be distributed as a distributable profit is a distributable profit, including payments made under Part 17.

270. For that reason, I accept that because Glencore paid these Distributions out its share premium out using the mechanism available under Part 17, that payment must be treated as an income distribution for Jersey law and therefore also for English law purposes.

Conclusion on the dividend of a capital nature question

271. I have concluded that the payments made by Glencore to Mr Beard were dividends of an income and not a capital nature, despite the fact that they were paid out of a "capital" account and out of share premium.

DECISION

272. For these reasons this appeal is DISMISSED

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 12 April 2022

Appendix 1

Summary of historic position under Jersey law – from agreed Experts' Memorandum

The Companies (Jersey) Law 1991 (the CJL) was introduced to replace the Loi (1861) sur les sociétés à responsabilitée limitée and the Companies (Supplementary Provisions) (Jersey) Law 1968 (collectively known as the Companies (Jersey) Laws 1861 to 1968) and came into force on 30 March 1992 (with exception for certain purposes Articles 114 to 223 CJL, which came into force on 2 November 1992). There have been numerous updates to the CJL since then.

The drafting of the CJL initially owed much to the Companies Act 1985 (the CA 1985). Over time the CJL has intentionally diverged from the CA 1985 and the CA 1985 itself has been replaced by the Companies Act 2006 (the CA 2006).

The doctrine of maintenance of capital was reflected in Article 114 of the CJL as originally enacted. This provided that a Jersey incorporated company may only make a distribution out of its realised profits (or with the sanction of a special resolution and a statement of solvency, out of its unrealised profits, which was itself a divergence from the position under the CA 1985). A reduction of capital under the CJL as originally enacted could only be made if sanctioned by the court.

Amendment No 9

However, a significant divergence from English company law occurred in 2008, with the coming into force of the Companies (Amendment No.9) (Jersey) Law 2008 (Amendment No 9), which substantially removed the doctrine of maintenance of capital from the CJL and with it the requirement that distributions be made from a profit and loss account, provided the directors of the relevant company made a cash flow statement of solvency in order to protect the company's creditors.

There is limited authority in Jersey in relation to the payment of distributions by Jersey companies, in one of the only relevant authorities. In the matter of the representation of WPP plc [2013] JRC 031 Birt B said:

> "The position in Jersey, however, is now very different. As a result of the amendments introduced by the Companies (Amendment No.9) (Jersey) Law 2008 and the Companies (Amendment No.2) (Jersey) Regulations 2008 (together the "2008 amendments") the principle of the maintenance of capital is now of very limited application in Jersey. In particular, Articles 114 and 115 of the Law were repealed and replaced with new provisions. So far as relevant, Article 115 now provides as follows: -

"115 (1) A company may make a distribution at any time.

(2) A company shall not make a distribution except in accordance with this Article.

(3) A company (other than an open-ended investment company) may make a distribution only if the directors who are to authorise the distribution make a statement in accordance with paragraph (4).

(4) The statement shall state that the directors of the company who are to authorise the distribution have formed the opinion: -

(a) that, immediately following the date on which the distribution is proposed to be made, the company will be able to discharge its liabilities as they fall due; and

(b) that, having regard to: -

(i) the prospects of the company and to the intentions of the directors with respect to the management of the company's business, and

(ii) the amount and character of the financial resources that will in their view be available to the company, the company will be able to: -

(A) continue to carry on business, and

(B) discharge its liabilities as they fall due, until the expiry of the period of 12 months immediately following the date on which the distribution is proposed to be made or until the company is dissolved under Article 150, whichever first occurs.

(5) A director who makes a statement under paragraph (4) without having reasonable grounds for the opinion expressed in the statement is guilty of an offence.

(6) …

(7) A distribution made in accordance with this Article shall be debited by the company to: -

(a) a share premium account, or a stated capital account of the company; or

(b) any other account of the company, other than the capital redemption reserve or the nominal capital account.

(8) In paragraph (7), "nominal capital account", in relation to a company, means a share capital account of the company to which are credited funds equivalent to the nominal value of the shares issued by the company.

(9) A distribution made in accordance with this Article is not for the purposes of Part 12 a reduction of capital."

As can be seen therefore, distributions are no longer restricted to being made out of profits. They may be made out of a share premium account or any other account except the nominal capital account or a capital redemption reserve account. No matter what account the distribution is made from, the directors must sign the relevant solvency statement and that is now the key protection for creditors.

Amendment No 11

A further significant amendment was made to the CJL by way of the Companies (Amendment No. 11) (Jersey) Law 2014 (Amendment No 11), which came into force on 1 August 2014. Whereas the Amendment No 9 made significant changes to the rules for distributions under Part 17 (Distributions) CJL, Amendment No 11 made similarly significant changes to the rules around the reduction of capital accounts under Part 12, which aligned the CJL more closely

with the relevant provisions of the CA 2006 by permitting a reduction of capital to take place without a requirement for court sanction.
The provisions of Part 17 (Distributions) CJL in relation to distributions from the share premium account of a company remained unamended.

The resulting change in the CJL meant that, although the court procedure remains available, a Jersey company no longer has to obtain the consent of the court in order to make a reduction of its capital accounts, provided that the directors can provide a solvency statement and the reduction is sanctioned by a special resolution of the members of the company.

Key statutory provisions

Article 1(1) CJL defines "capital accounts" as follows:

> "(a) in relation to a par value company, its share capital accounts and any share premium accounts and capital redemption reserves; and (b) in relation to a no-par value company, its stated capital accounts;"

Article 39(4) CJL provides as follows:

> "Subject to this Article, the provisions of this Law relating to the reduction of a par value company's share capital apply as if each of its share premium accounts were part of its paid-up share capital."

Both immediately before and immediately after Amendment No 9 came into force on 27 June 2008, Article 39(3) CJL provided as follows:

> "A share premium account may be applied by the company for any of the following purposes –
> (a) in paying up unissued shares to be allotted to members as fully paid bonus shares;
> (b) in writing off the company's preliminary expenses;
> (c) in writing off the expenses of and any commission paid on any issue of shares of the company; and
> (d) in the redemption or purchase of shares under Part 11."

Prior to the coming into force on 27 June 2008 of the relevant provisions of Amendment No 9, a share premium account of a Jersey company could only be applied in accordance with Article 39(4) CJL on a reduction of a par value company’s share capital or for one of the purposes then set out in Article 39(3) CJL.

Pursuant to Article 115 CJL as substituted by Amendment No 9, from 27 June 2008 a distribution falling within Part 17 (Distributions) CJL could be debited to (amongst other accounts) a share premium account of a company, with Article 115(7) CJL then providing as follows:

> "A distribution made in accordance with this Article is debited to –
> (a) share premium account or stated capital account, of the company; or
> (b) any other account of the company, other than the capital redemption reserve or the nominal capital account."

Article 115(7) CJL was subject to some minor amendments made by the Companies (Amendment No.10) (Jersey) Law 2009 (Amendment No 10) with effect from 6 November 2009, by which the first line of Article 115(7) CJL was amended to read as follows:

> "A distribution made in accordance with this Article shall be debited by the company to –".

With effect from 6 November 2009, Article 39(3) CJL was amended by Amendment No 10 by the insertion of a new paragraph (e), which expressly permits a par value company to apply its share premium account "in the making of a distribution in accordance with Part 17".

With effect from 6 November 2009, Article 115 CJL was amended by Amendment No 10 by the insertion of a new Article 115(9) CJL, which provides that:

> "A distribution made in accordance with this Article [Article 115 CJL] is not for the purposes of Part 12 a reduction of capital."

Neither Amendment No 9 nor Amendment No 10, nor any subsequent amendments to the CJL, amended Article 39(4) CJL.

Article 39(1A) CJL, which was introduced by Amendment No 11, permits a transfer to be made directly into the share premium account of a company without an associated issue of shares, which would have the effect of increasing the amount standing to the credit of a capital account of a company without the company issuing shares.