Neutral Citation: [2023] UKFTT 449 (TC)

Case Number: TC08825

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard in person in Belfast

Appeal reference: TC/2019/09361

Loan relationships – whether a payment was paid to release a security over land – whether a payment arose from a company's loan relationship or related transaction- whether payment made in the context of a guarantee was a related transaction to the lending of money or was itself a transaction for the lending of money.
Taxation of chargeable gains – section 38 TCGA 1992 – whether a payment was made wholly and exclusively for enhancing the value of an asset.

Heard on: 7-11 November 2022
Judgment date: 22 May 2023

Before

TRIBUNAL JUDGE BOWLER

Between

SWISS CENTRE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Rory Mullan KC of Counsel, instructed by ASM Ltd

For the Respondents: Mr E. Waldegrave and Ms C. Blaj of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision concerns the dispute as to whether an amount of approximately £33.5 million (the "Disputed Sum") paid to an Irish government agency, the National Asset Management Agency ("NAMA") was deductible in calculating its profits for corporation tax purposes for the accounting period ended on 31 March 2012. The Appellant ("SCL") says that it is entitled to such a deduction under the "loan relationship rules" found in Part Five of the Corporation Tax Act 2009 ("CTA 2009"). Alternatively, approximately £24 million of the Disputed Sum is deductible in computing the chargeable gain on the sale of a property owned by it called the Swiss Centre, by virtue of the application s38(1)(b) of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").

2. In essence, SCL's case is that the two component parts of the Disputed Sum should be viewed as: (i) an amount which I refer to as the "Additional Sum" which SCL says was paid by to NAMA for the release of NAMA's security over the Swiss Centre; and (ii) a payment made in relation to a guarantee which had been given by SCL in relation to another company's debts in order to secure ongoing access to development finance for the Swiss Centre project. In both cases SCL says that it should be recognised that the amounts were paid in the very particular context of the financial crisis and its aftermath.

3. The core of HMRC's case is that the Disputed Sum was paid because it was in the interests of the wider group of companies of which SCL was a member ("the MAR Connection") and in the interests of the two principal individual shareholders/directors.

4. The case additionally involves some factual complexity over which company or companies in fact made payments and in what capacity they were made.

BACKGROUND AND PROCEDURE

5. The Swiss Centre was sold to Mr Al Faisal on 24 November 2011. At the time all involved believed that the beneficial ownership of the Swiss Centre had previously been transferred by SCL to a trust called the Capital Trust such that the Capital Trust sold the property.

6. SCL and HMRC agreed in 2017 that the purported transfer by SCL of the beneficial interest in the Swiss Centre by SCL to the Capital Trust should be regarded as having been of no effect. As a result, SCL agreed that it was liable for corporation tax in respect of the gain which it realised on the disposal of the Swiss Centre to Al Faisal. The parties did not agree, the quantum of SCL's corporation tax liabilities.

7. On 23 March 2018 HMRC issued a discovery assessment (the "Assessment") in relation to the period in which the sale of the Swiss Centre took place. The Assessment was issued to give effect to the agreement between HMRC and SCL that SCL was liable for corporation tax in respect of the gain which it realised on the disposal of the Swiss Centre. The quantum of the Assessment was £29,559,827.88. This amount was calculated on the basis that the Disputed Sum was not deductible in calculating the gain realised by SCL, or available to be set against it for corporation tax purposes under the loan relationship rules.

8. SCL appealed to HMRC against the Assessment on 17 April 2018. At SCL's request, HMRC subsequently conducted a review of the Assessment. The conclusion of the review was that the Assessment should be upheld and SCL was notified of this conclusion in a letter dated 28 November 2019.

9. On 16 December 2019 SCL notified its appeal against the Assessment to the First-tier Tribunal.

GROUNDS OF APPEAL

10. The grounds on which SCL continues to rely are:

(1) SCL was required to enter into a deed with NAMA obliging it to arrange the purchase of certain properties over which NAMA had security for a consideration which was £24 million in excess of their market value. That amount should be deductible for SCL in calculating its profits for corporation tax purposes on the basis that:

(a) the payment was deductible under the loan relationships rules as a result of arising from a related transaction to a loan relationship, namely financing provided for the development of the Swiss Centre, as a result of being incurred to secure the release of NAMA's security over the Swiss Centre;

(b) the payment was an expense incurred under or for the purpose of a loan relationship or related transaction. It is treated as incurred because it was incurred directly "as a result of any of [the related] transactions" within s307(4)(c) CTA 2009; or

(c) the obligation to acquire the properties at an overvalued was a cost of enhancing the value of the Swiss Centre as it was a payment made to a third party for it to release its security and thereby enable the sale of the Swiss Centre. Reliance is placed in particular on the decision in *HMRC v Blackwell* [2017] All ER 188. A cost will be deductible for the calculation of chargeable gains where it is reflected in the nature or state of the asset;

(2) the remaining amount of the Disputed Sum was €11.5 million paid in relation to a guarantee given by SCL in respect of the indebtedness of a company called Lavangna Ltd ("Lavangna"). On making the payment SCL acquired NAMA's rights to a loan made to Lavangna. The payment was therefore a related transaction. As the value of the rights acquired on the payment was nil SCL was entitled to a debit for the resulting loss.

BURDEN OF PROOF

11. The burden of proof rests with SCL to show that it was entitled to a deduction for the payment of the Dispute Sum. The ordinary civil standard of the balance of probabilities applies.

EVIDENCE

12. Both parties produced supplementary evidence shortly before or during the hearing the admission of which was not contested. As a result, the written evidence before me consisted of: a main hearing bundle of 1886 pages, a supplementary hearing bundle of 66 pages, an additional bundle of 79 pages; as well as corporate structure charts produced by Mr Waldegrave and agreed by Mr Mullan together with a list of company directors which was not challenged by SCL.

13. I heard evidence from:

(1) Mr Higgins – the former finance director of the MAR Connection as well as company secretary for many of companies. He was one of the key people involved in the negotiations with NAMA;

(2) Mr McAllister - a chartered accountant and director of the accounting firm advising the MAR Connection who was involved in providing advice at the time of the relevant transactions; and

(3) two expert accountants: Mr Richard Gardiner acting as expert for SCL and Mr Richard Jones acting as expert for HMRC.

14. Mr Surphlis' Witness Statement was not challenged by Mr Waldegrave. He was therefore not called to give evidence and his Witness Statement was taken as read. Mr Surphlis has been the property manager and then Director with responsibility for the MAR Connection property interests since 1996. In his Witness Statement he sets out a brief history of the MAR Connection, identifies the property assets involved in the NAMA transactions, their purchase price and values including the effect of the property crash following the global financial crisis.

15. I found Mr Higgins and Mr McAllister to be witnesses whose evidence was generally consistent. They conveyed fully the sense that the transactions must be viewed in the context of the extraordinary circumstances of the financial crisis as well as the particular circumstances and history of Norther Ireland. In relation to the latter, Mr Higgins described with some passion how bankruptcy was not seen in the same way as it might by others who had not lived through and experienced the traumas of the "Troubles". There is however some inconsistency in their written and oral evidence.

16. Mr Mullan submits that there is no basis to reduce the weight of the evidence of Mr Higgins and Mr McAllister given what he describes as the consistency of their evidence. However, it is incumbent of me to assess the evidence as a whole and in doing so bear in mind the oft quoted principles derived from the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)* particularly given the time which has elapsed since the relevant transactions.

17. It is clear that I must consider all the evidence. That is made clear in the decision of the Court of Appeal in *Kogan v Martin & Ors (Rev 1)* [2019] EWCA Civ 1645 (at para 88), where it is said that the *Gestmin* guidance does not prevent reliance upon witness statements.

> "A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence."

18. The same emphasis on the duty to consider all of the evidence and determining the weight to be given to it was stated in *BXB v Watch Tower and Bible Tract Society of Pennsylvania and Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 156 (QB), although the fallibility of memory was noted in the context of what has also been described in *Gestmin* as the tendency of people to develop a narrative after the event.

19. I perceived signs of that tendency on various occasions. For example, Mr Higgins pulled back from some statements made in his Witness Statement which he had adopted as evidence in chief. For instance, in relation to the reasons for SCL entering into the Lavangna Guarantee his evidence in his Witness Statement recognised issues such as the domino effect on the rest of the group and the impact on the construction business of the group if the lender called in another facility financing the development of the Swiss Centre. He also explained in his statement how the MAR Connection did not think the bank would deny SCL's other funding. However, in the hearing he was much less accepting of those points made in his Witness Statement and simply sought to focus on saying that the Lavangna Guarantee was entered into in order to fund the Swiss Centre.

20. I also recognise that Mr McAllister's evidence may similarly have been affected by the narrative developed. In his Witness Statement he describes the entire deal with NAMA being entered into in order to ensure that NAMA did not stand in the way of the sale of the Swiss Centre. He does not identify the Additional Sum specifically as having been agreed in order to achieve the release of the security by NAMA. In contrast, at the hearing he focused specifically upon the Additional Sum claiming that without the Swiss Centre security issue raised by NAMA, that amount would not have been paid.

21. Given that their Witness Statements were adopted by each of them as their evidence in chief I have given greater weight to the evidence there to the extent that there is inconsistency with their oral evidence. The Witness Statements also have the advantage of being written some 2 years before the hearing. Furthermore, I have considered the evidence as a whole in assessing the weight to be given to their evidence that the Additional Sum was paid simply in order to obtain a release of security "DS1" from NAMA. Indeed, even Mr Mullan's closing submissions pulled back from saying that the Additional Sum was payment for the DS1 rather than a more general payment to get the deal done for which the DS1 had been leverage.

22. I have also relied upon the evidence in Mr Gardiner's expert report setting out the accounting for the transactions which took place in 2011 and the basis of the prior year adjustment claimed to result from the conclusion that SCL had not transferred the Swiss Centre to the Capital Trust. However, I separately address in detail below his evidence regarding the deductibility of the Disputed Sum.

FINDINGS OF FACT

The MAR Connection

23. McAleer and Rushe Limited ("M&R Ltd") was a company incorporated in 1974 which carried on a construction business that had been established since 1967. By the 1990s Mr McAleer and Mr Laverty were each 50% shareholders in M&R Ltd.

24. Over time a collection of companies and partnerships was established which were held directly or indirectly by Mr McAleer, Mr Laverty, members of their families and trusts established for the benefit of the families of Mr McAleer and Mr Laverty ("the Discretionary Trusts"), with minority shareholdings held in a few entities by individuals outside the families. That collection of referred to as the "MAR Connection". The MAR Connection was seen by those involved with it as the business of Mr McAleer and Mr Laverty and their families.

25. The MAR Connection operated along three core business lines: construction, development and investment.

26. The Discretionary Trusts were set up in 2006 for the benefit of Mr McAleer and Mr Laverty's children and remoter descendants. Mr McAleer and Mr Laverty and their respective spouses were excluded from benefiting under the settlements.

27. The Discretionary Trusts held companies relevant for the purposes of this decision through two holding companies: McAleer & Rushe Properties Ltd ("MRP") and McAleer & Rushe Group Limited ("MRG"). The companies held by MRP were set up for development projects. Those companies included SCL and its immediate parent LSI (as well as another relevant development company called Flamewall Limited).

28. MRG owned entities carrying out the construction business as well as two relevant development business companies: Lavangna and College Court Properties Ltd. Not all of the relevant companies initially moved to be held through the Discretionary Trust structure and I address this further below.

29. The MAR Connection was run as a single composite business. In particular, there was a centralised finance function across the entire MAR Connection; and a "board" for the entire MAR Connection, the members of which were Mr Laverty, Mr McAleer, Mr Higgins, Mr Surphlis and Mr Magee. All key strategic decisions in relation to the MAR Connection were taken by Mr McAleer and Mr Laverty.

30. The directors of the companies particularly involved in the transactions with which this appeal is concerned are shown by the accounts to have been as follows ("M&R" standing for McAleer and Rushe where used):

(1) SCL - Mr McAleer and Mr Laverty until 12 October 2011 when Mr Magee and Mr Surphlis joined the board;

(2) Leicester Square Investments Ltd ("LSI") - Mr McAleer and Mr Laverty for the accounting period ended 31 March 2011; Mr Magee and Mr Surphlis joined in the accounting period ended 31 March 2012;

(3) Lavangna – Mr McAleer, Mr Laverty and Mr Hughes up to and including 31 March 2009; Mr McAleer, Mr Laverty, Mr Magee and Mr Surphlis in the accounting period ended 31 March 2012;

(4) M&R Group Limited, M&R Properties Ltd, M&R Residential - Mr McAleer and Mr Laverty for the accounting period ended 31 March 2012;

(5) Flamewall Limited - Mr McAleer, Mr Laverty, Mr Magee and Mr Surphlis for the year ended 31 March 2012;

(6) College Court Properties Limited, M&R Estates Ltd - Mr McAleer and Mr Laverty until 12 October 2011 when Mr Magee and Mr Surphlis joined the board;

(7) M&R Ltd, M&R Construction - Mr Laverty, Mr McAleer, Mr Surphlis, Mr Magee and Mr Higgins for the accounting period ended 31 March 2012;

(8) Larkmount Limited - Mr Laverty, Mr McAleer, Mr Surphlis, Mr Magee for the accounting period ended 31 March 2012;

(9) Larkmount's subsidiaries – Mr Laverty, Mr McAleer, Mr Magee and Mr Surphlis;

(10) - Scelcs Limited – Mr Laverty (from 12 October 2011), Mr McAleer, Mr Higgins and three others;

(11) Timec 1206 LLP – the designated members were Mr Laverty, Mr McAleer, Mr Surphlis, Mr Magee and Mr Higgins;

(12) SCML – Mr Laverty and Mr McAleer.

31. Mr Laverty and Mr McAleer were therefore directors of each of the companies involved in the transactions considered in this appeal. At certain relevant times they were the only directors of particular relevant companies as I come back to later.

32. By 2008 the MAR Connection was one of the largest property businesses in Northern Ireland. Its total assets by August 2008 were just under £1.05 billion but its total debt stood at nearly £667 million. Loans had been made to it by five banks: Ulster Bank, Bank of Scotland Ireland, Bank of Ireland, First Trust Bank (which was part of Allied Irish Bank) and Anglo Irish Bank. Loans were secured on properties and in some cases by personal guarantees from Mr McAleer and Mr Laverty and/or corporate guarantees.

33. Following the global financial crisis many of the MAR Connection development business entities were worth significantly less than the loans which had been obtained to fund their businesses. The lenders who had provided numerous loan facilities began to take a close look at the overall position of their portfolios of loans in early 2009; and the increasing issues with the borrowing secured on property, particularly development lands became apparent. As Mr Higgins recognises in his evidence, it started to "dawn" on the banks just how interrelated all the different aspects of the MAR Connection borrowings were, and they started to query to what extent all of the guarantees granted by M&R could be honoured. Some sought additional security (such as the Lavangna Guarantee dealt with below).

34. At the time of the sale of the Swiss Centre the MAR Connection had borrowings of £642 million of which £351 million had been transferred to NAMA from Irish banks. £106 million

of the amount was owed by LSI under a facility used to fund the development of the Swiss Centre.

35. SCL was one of the companies in the MAR Connection. It was purchased by the MAR Connection in 2004 when SCL owned the property known as the Swiss Centre. SCL's immediate parent company was LSI. LSI was transferred to be held as trust property on the setting up of the Discretionary Trusts.

36. Mr McAleer and Mr Laverty wholly owned M&R Estates Limited and Canterbrook Developments directly; and together with other individuals owned Timec 1206 LLP ("Timec") and Scelcs Limited ("Scelcs").

37. Stepping back from the detail of the group structures prior to 24 November 2011 the Discretionary Trusts were the ultimate owners of SCL, LSI, the Construction Business and three relevant debtor companies: Flamewall Ltd, College Court Properties Ltd and Lavangna Limited.

Overview of the relevant transactions

38. The appeal involves a complex history of transactions and interconnected parties. This section simply serves to give an overview to inform the more detailed findings of fact.

39. SCL was developing the Swiss Centre. At the time of the payment of the Disputed Sum all involved believed that SCL had transferred the beneficial ownership of the Swiss centre to a trust called the Capital Trust. Various MAR Connection entities were transferred at varying points to be held directly or indirectly by the Capital Trust. Some years later HMRC and SCL agreed that the transfer of the Swiss Centre had not in fact occurred. Some of the complexity in this case arises from the fact that the Disputed Sum was considered to have been paid at the time of payment by the Capital Trust from proceeds received by it as beneficial owner of the Swiss Centre, whereas the Capital Trust is now viewed as having acted as bare trustee for SCL.

40. Key transactions entered into by SCL prior to the payment of the Disputed Sum were:

(1) borrowing from its parent, LSI, to fund the development of the Swiss Centre where LSI was obtaining the funds itself by loans from a subsidiary of AIB called First Trust; and guaranteeing LSI's indebtedness;

(2) guaranteeing the indebtedness of Lavangna to First Trust.

41. On 24 November 2011 the Swiss Centre was sold to an independent third party. £163 million of the sale proceeds was paid to NAMA. That £163 million was identified in a deed signed with NAMA as being paid in respect of various liabilities owed by MAR Connection entities. Only an amount of approximately £33.5 million out of the £163 million is in dispute.

42. Of the Disputed Sum €11.5 million was paid in relation to the Lavangna guarantee. The Additional Sum does not relate to indebtedness of SCL, but to various MAR Connection entities carrying on development business which I refer to as the "Indebted Entities". Those entities owed amounts to NAMA significantly in excess of the value of their assets (development properties) due to the reduction in value of properties following the financial crisis.

43. In the context of the payments made to NAMA there was a major restructuring of the ownership of those MAR Connection entities which were companies, but not two partnerships:

(1) until 24 November 2011 Flamewall, College Court Properties and Lavangna were all ultimately held by the Discretionary Trusts; M&R Estates was held directly by Mr McAleer and Mr Laverty; and Scelcs Limited was held by Mr McAleer, Mr Laverty and others. From 24 November 2011 all of these companies were ultimately held by the

Capital Trust. They were transferred to newly formed subsidiaries of a newly formed holding company called Larkmount Limited which in turn was owned by the Capital Trust. The transfers all took place for nominal consideration as the companies were all insolvent;

(2) the ownership of two partnerships: Canterbrook Developments and Timec did not change. The first was a partnership between Mr McAleer and Mr Laverty and the second involved others as well.

44. Under the terms of the NAMA agreement funds were provided to the Indebted Entities to enable them to repay stated amounts of their indebtedness to NAMA. In essence, the amount paid in excess of the value of the properties held by the Indebted Entities was the Additional Sum. It was viewed by the MAR Connection as a fee or premium paid to NAMA because NAMA would only have received the market value of the properties if it had enforced its security in relation to the Indebted Entities. However, the amount repaid through the Additional Sum mechanism (including the amount reflecting the value of the properties) was less than the total amount owing to NAMA.

The Capital Trust

45. The Capital Trust was set up on 4 December 2009 as a remuneration trust for the benefit of employees of SCL and their families. The "founder" (settlor) was SCL which initially settled £100 into the Capital Trust. Bay Trust International Limited, a Belize company, was trustee and delegated the exercise of trustee powers to another Belize company called ZCT Holdings Ltd ("ZCT") on 28 April 2010. That company in turn entered into a fiduciary services agreement on the same date with a MAR Connection company called Swiss Centre Management Ltd ("SCML") as the "Fiduciary". Under the terms of that agreement SCML held ZCT's property on trust for ZCT. In fact, ZCT's "property" was its appointment as manager and custodian. Therefore SCML was acting as manager and custodian of the Capital Trust.

46. The directors of SCML were Mr McAleer and Mr Laverty. They were also the "protectors" with the power to appoint and remove trustees.

47. A class of persons including persons "connected with" or "participators in" SCL (as defined by s13 of the Inheritance Tax Act 1984) were excluded from benefiting under the Capital Trust. HMRC has not sought to challenge the analysis that this resulted in Mr McAleer and Mr Laverty being excluded from benefiting under the trust.

48. As part of the deal agreed with NAMA the company Larkmount Limited was set up as a holding company wholly-owned by the Capital Trust. The following Indebted Entities were then transferred to be held by newly formed subsidiaries of Larkmount: Flamewall, College Court Properties, Lavangna, Scelcs and M&R Estates. The Indebted Entities had negative net asset values and were therefore transferred for nominal consideration.

49. SCL was not held by the Capital Trust. It remained held by the Discretionary Trusts through LSI.

The business of SCL

50. SCL developed the Swiss Centre. This activity involved obtaining planning permission for a luxury hotel and apartments; demolishing the existing Swiss Centre and building the new hotel; negotiating an agreement for lease of the hotel; and selling the Swiss Centre.

51. By deed of guarantee dated 15 October 2004 SCL provided an unlimited guarantee of LSI's present and future indebtedness to AIB ("the LSI Guarantee") and a mortgage from SCL in respect of the Swiss Centre ("the Charge"). The LSI Guarantee was drafted widely enough

that it applied to the future facility entered into some four years later by LSI. Indeed, the SCL Guarantee was referred to in the later loan agreement.

52. Until 7 December 2009 SCL fully owned the Swiss Centre. SCL's accounts show that the directors of the company believed that on that date SCL assigned the whole of its beneficial rights and interests in the Swiss Centre to the Capital Trust by way of a gift and thereafter the company was acting as an agent for the Capital Trust with all profits/losses earned by the company accruing to the Capital Trust. As stated earlier, the parties have agreed that no transfer of the beneficial ownership of the Swiss Centre in fact took place.

53. The development of the Swiss Centre was funded by borrowing from AIB. Funding was obtained by SCL's parent, LSI, from AIB under a facility agreement dated 9 September 2008 ("the LSI Facility"). Under its terms:

(1) AIB agreed to provide LSI with three loan facilities totalling about £107 million. One facility in the sum of £49 million represented a refinancing of the amounts previously lent by First Trust in respect of the acquisition of the shares in SCL by the MAR Connection. A second facility of £57 million was to cover the costs associated with the development of the Swiss Centre. The third facility related to VAT payments;

(2) AIB would not be obliged to advance monies in relation to the second facility on the date of drawdown requests if there was a default which was defined by reference to a "Material Adverse Effect". That term was defined as an effect which was in the opinion of the bank acting reasonably materially adverse to the ability of any member of a defined group, which included LSI, SCL, M&R Ltd and M&R Construction Limited, to perform its obligations; or to the financial condition or prospects of any member of that group; or the validity or enforceability of or the effectiveness or ranking of security wanted to the bank.

54. The LSI Facility was entered into a week before the collapse of Lehman Brothers and the subsequent financial crisis.

55. The sums lent to LSI to fund the construction costs were lent on to SCL (" the LSI Loan") to enable it to pay for the development of the Swiss Centre.

56. Repayment under the LSI Facility was due to be made by 31 August 2010 although this was extended to 30 November 2010 on 11 October 2010. In fact, the debt was not repaid on 30 November 2010. By the time the process to sell the Swiss Centre had started in 2011, LSI was in default and NAMA (as the loan had moved to NAMA in July 2010) was in a position to enforce its security over the Swiss Centre through the Charge.

57. Although the accounts for the periods ended 31 March 2011 and 31 March 2012 were prepared assuming that SCL did not own the Swiss Centre, they are of relevance for showing the position of SCL as understood at the time.

58. The accounts for the period ended 31 March 2011 show that SCL had a financial asset on its balance sheet of just over £58 million which the notes explain represents the development costs incurred by SCL and which are expected to be recovered from the ultimate sale of the Swiss Centre. The notes go on to state that the financial statements were adjusted such that the balance sheet amount of the financial asset was written down by just over £43 million. (SCL's accounts for the period ended 31 March 2012 show the restated value of the financial asset in 2011 as the figure of just over £58 million.)

59. The 2012 accounts show that the £58 million financial asset had gone and the notes explain that this was as a result of the Swiss Centre being sold. In its place SCL had an asset

of nearly £58.5 million in the form of monies owed to it, nearly all of which was amounts owed by third parties. SCL was also showing nearly £63.5 million owed to related undertakings.

The Lavangna Guarantee

60. Lavangna was a MAR Connection company. It was incorporated in the Republic of Ireland. Initially Mr Laverty and Mr McAleer held shares in it directly. In April 2007 they transferred their shares to McAleer & Rushe Residential Limited in a share for share exchange. McAleer & Rushe Residential Limited transferred its shares in Lavangna to the Discretionary Trusts on1 April 2010 by which time McAleer and Rushe Residential Limited was already under the ultimate ownership of the Discretionary Trusts.

61. Lavangna was engaged in development projects in the Navan Lands in County Meath near Dublin. It had borrowed sums from First Trust (a subsidiary of AIB) which were secured on the Navan Lands. Following the 2008 financial crisis the value of the Navan Lands had declined significantly. The accounts of Lavangna for the accounting period ended 31 March 2009 show a loss of more than £4 million and net liabilities of nearly £8 million.

62. The First Trust loan to Lavangna was refinanced on 29 September 2009 ("the Lavangna Facility") on terms stating that:

(1) a facility of €25,818,000 was provided to restructure existing loans in relation to the Navan Lands;

(2) there was a capital moratorium until 31 May 2011;

(3) a capital reduction of a minimum €11.5 million would take place from the sale proceeds of the Swiss Centre development as and when sold "in reduction of the capital guarantee sum";

(4) security for the loan included a charge overall of Lavangna's assets; an interest shortfall guarantee executed by McAleer & Rushe Construction Limited to replace an existing interest shortfall guarantee; and a joint and several letter of guarantee from SCL and LSI which in turn would be supported by the following security already held by First Trust: a charge over all SCL assets, a charge over the Swiss Centre and a charge over all LSI assets.

63. In October 2009 LSI and SCL granted a joint and several guarantee in the amount of €11,500,000 in respect of the borrowing of Lavangna ("the Lavangna Guarantee"). The Lavangna Guarantee was itself secured by a charge over, inter alia, the Swiss Centre.

64. The terms of the Lavangna Guarantee provided that:

(1) in consideration of AIB agreeing to make or continue advances or facilities to Lavangna, SCL and LSI agreed to pay on demand all sums of money owing to AIB provided that the total amount recoverable from LSI and SCL together would not exceed the sum of €11.5 million together with interest thereon;

(2) any monies thereby guaranteed became due and payable by LSI and SCL upon written demand made by AIB.

65. The Lavangna Guarantee made no reference to the "capital reduction" described in the facility letter.

66. As of 1 April 2010, Lavangna's shareholder deficit was a little less than £12 million. At the time of the entering into the Lavangna Guarantee those involved from the MAR Connection recognised that it might be called upon by First Trust.

67. Mr Higgins describes the context of the Lavangna Facility and Lavangna Guarantee in his Witness Statement. First Trust was seeking extra security in relation to the Lavangna debt (not the Swiss Centre funding) and to get that security it threatened to potentially call in the LSI Facility. He explains that while a material change in the economic circumstances of LSI was a potential event of default under the LSI Facility, both the MAR Connection and First Trust knew that if the LSI Facility was called in then the debt might not be recovered in full by First Trust given the economic climate and the fact that the Swiss Centre property was merely a building site at the time. However, from a MAR Connection perspective the stopping of the SCL development of the Swiss Centre would put pressure on M&R Ltd as there were orders with subcontractors and suppliers which would no longer be completed. Those subcontractors and suppliers would be likely to seek payment from M&R Ltd who would in turn look to LSI but that company would be unable to pay. The development of the Swiss Centre was therefore important to the MAR Connection not just from a reputational standpoint but also because of the benefit which would be gained from creating value in that development and by avoiding unwelcome pressures in M&R Ltd. Furthermore, if one bank called in a development loan others may reassess creating a domino type effect.

68. I therefore find that it was in both sides' interests for the development of the Swiss Centre to continue. While the MAR Connection did not think First Trust actually wanted to call in the LSI Facility, given the issues the bank would face as a result, it cost the MAR Connection relatively little to agree to provide a guarantee of €11.5 million over the Swiss Centre in relation to the Lavangna Facility. Lavangna could offer nothing more given the dramatic reduction in values of its properties. The "golden" asset of the Swiss Centre provided a clear alternative.

69. However, it was not simply the case that the Lavangna Guarantee was entered into by SCL and LSI in order for the Swiss Centre to be completed. The provision of the Lavangna Guarantee also ensured that the Lavangna Facility was not called. The risk under the terms of the LSI Facility of further funding not being provided continued as the "Material Adverse Event" described in that Facility was ongoing, although I recognise as a result of the evidence of Mr Higgins that, in practice, the immediate real danger was averted given that First Trust had been provided with the additional security in relation to the Lavangna Facility.

70. Overall therefore the provision of the Lavangna Guarantee by both LSI and SCL had was for the following reasons:

(1) Lavangna's debt facilities remained in place such that its development could continue;

(2) the immediate threatened risk to the LSI Facility (and so to the Swiss Centre development) went away;

(3) the MAR Connection averted the problems identified by Mr Higgins for the business as a whole (not just SCL) if the LSI Facility was called in or otherwise stopped such that the Swiss Centre development was stopped.

71. As Mr Higgins recognised in the hearing, the provision of the commitment under the Lavangna Facility and the Lavangna Guarantee resulted in value moving from SCL to Lavangna.

72. As I explain further below €11.5 million was paid under the NAMA deal reflecting the fact that the refinancing in 2009 had required the repayment on the sale of the Swiss Centre of that amount of the capital owed by Lavangna. However, the refinancing letter was not entered into by SCL which owned the Swiss Centre at the time (or indeed the Capital Trust which was the entity thought to own the Swiss Centre when the payment was made to NAMA). There are no board or trustee minutes confirming that either entity agreed to enter into that commitment

at the time (before the Lavangna Guarantee was entered into by SCL and LSI). That reflects the evidence that the MAR Connection operated through one centralised "board".

The construction business

73. In the summer of 2011, the MAR Connection were considering, in the context of discussions with Ulster Bank (who had been the long-standing financial partner of the construction business), setting up a new construction company which would be beyond the reaches of NAMA and other funders. As Mr McAllister explains in his Witness Statement, the MAR Connection realised that the guarantees provided by M&R to NAMA funded companies posed a different method by which NAMA could apply pressure: NAMA could call on the security provided by M&R Ltd which would mean that Ulster Bank would have no option but to place M&R Ltd, the Swiss Centre principal contractor, in administration or liquidation. The construction business was considered to have value because of its long-standing expertise and reputation. As Mr McAllister explains, it was realised that it was "essential that the contracting company continue to be able to trade". The development business was where the problems lay, not the construction business. Everything in the development businesses was struggling with the exception of the Swiss Centre building and it was considered that the main value driver going forward was the construction business.

74. The proposal in early 2011 included funding from Mr McAleer and Mr Laverty from consideration for the sale of their interests in a company called "Keystone".

75. In the end that funding was not used. The setting up of the new construction business company took place shortly after the sale of the Swiss Centre and £3m was used from the surplus received from the sale of the Swiss Centre to fund the new company. Existing construction contracts could be assigned into the new company which would have no exposure to any of the banks including NAMA. Ulster Bank was persuaded to support the restructuring.

NAMA

76. NAMA was set up by the Irish government and came into operation on 21 December 2009. NAMA was to acquire questionable debt from commercial banks and seek to maximise recovery of the amounts owed.

77. Within Ireland NAMA had considerable powers to enable it to maximise its return, including powers to recover one entity's debts from a related person. In addition, Irish insolvency laws were considerably less favourable to debtors than those in the UK: discharge from bankruptcy took 12 years in Ireland compared to 12 months in the UK. Those involved from the MAR Connection in negotiations with NAMA perceived that NAMA did not appreciate the differences between the rules applying in the UK and Ireland.

78. NAMA acquired all of the loans owed by the MAR Connection to First Trust and AIB and some of those owed to Bank of Ireland on 18 July 2010. This is referred to as "the NAMA Debt". The NAMA Debt included the LSI Facility and the Lavangna Facility. Other MAR Connection loans owed to Bank of Ireland and those owed to Ulster Bank and Bank of Scotland were not acquired by NAMA and are referred to as "Non-NAMA Debt".

79. At the time at which NAMA took on the loans there was no interest shortfall vis-à-vis NAMA on debt within the MAR Connection (with the exception of a loan relating to one joint-venture) because the income from the investment assets owned by the respective families covered the shortfalls.

80. Mr McAleer and Mr Laverty had personally guaranteed sums owed to NAMA in the amount of approximately £21 million. Given the insolvent position of several of the development business entities Mr McAleer and Mr Laverty were at real risk of their guarantees being called in and even of being made bankrupt. This was acknowledged by Mr Higgins at

the hearing who explained that the risk was recognised by all involved. While it was not something Mr McAleer and Mr Laverty wished to happen, it was also recognised that bankruptcy under UK law only lasted for 12 months. Various steps were taken to ameliorate the effects; in particular taking steps to protect the construction business so that this could continue come what may. However, given the interconnectedness of the MAR Connection entities and the group debt there was a real risk of the "domino" effect if enforcement action was taken by one lender.

81. NAMA made clear throughout that they wished to access the sale proceeds from the sale of the Swiss Centre to reduce sums owed by the MAR Connection companies to NAMA. Fundamentally however, as Mr Mullan recognised at the hearing, NAMA simply wanted £163 million towards repayment of the debts owed to them and did not care about the structuring on the MAR Connection side in relation to that payment.

82. The MAR Connection was seeking to retain as much as possible of the profit from the sale of the Swiss Centre. Repayment of the LSI Facility and payment of €11.5 million in relation to Lavangna was not contentious. Instead, the value which it could retain from the development business entities (the Indebted Entities referred to earlier) and their assets was unclear and was the focus of negotiations.

83. The MAR Connection sought to "play for time" as Mr Higgins described the actions. They sought to keep NAMA engaged while avoiding as far as possible making commitments in relation to the Swiss Centre surplus. In contrast, NAMA was seeking commitment in relation to that surplus.

84. NAMA sought to use the threat of bankruptcy to force the MAR Connection to agree to the application of profits from the sale of the Swiss Centre towards other MAR Connection debts. On the basis of the understanding at the time that the Swiss Centre was held in the Capital Trust, NAMA were told that the use of the sale proceeds in this way was not open to Mr McAleer and Mr Laverty. NAMA then asked that Mr McAleer and Mr Laverty prevail upon the beneficiaries of the Capital Trust to make such a payment. Advice was obtained from Queen's Counsel and later provided to NAMA to explain how this could amount to a breach of trust. The threat of bankruptcy re-emerged later as I explain below.

85. On the face of it issues remained with the deal which was in fact reached with NAMA – not least in terms of the implementation which included funds from the Swiss Centre sale being paid to entities outside the Capital Trust "group" such as Canterbrook Developments where those entities were recognised to be in a position of being unable to repay the debts as a result the value of the assets held by them. However, looking at the evidence in the emails between the MAR Connection and NAMA the problem was considered to arise if the trustees provided 100% of any surplus arising from the sale of the Swiss Centre to NAMA as that would provide no identifiable commercial benefit for the beneficiaries. Therefore the problem was thought to be not so much the use of the net proceeds from the sale of the Swiss Centre to pay other entities' indebtedness, but that this could only be done if there was some amount of the proceeds left and/or other benefit for the beneficiaries of the Capital Trust.

86. Enforcement action by NAMA or any other lender had significant potential implications. In a note prepared by Mr Higgins he identified the potential downsides of NAMA calling in a "Navan loan". Most of the Navan Lands were owned by Canterbrook Developments and in that context the downsides included personal embarrassment for Mr McAleer and Mr Laverty (the partners in Canterbrook), reputational damage for the MAR Connection which may impact on asset values with the potential need for fire sales, the reversal of the "Keystone" transaction which at the time was thought to be needed to fund the establishment of a new company to

carry on the construction business and damage to the construction business itself. It would also have potentially led to a lower sales price being obtained for the Swiss Centre.

87. However, NAMA was initially able to exert pressure through the LSI Facility. LSI was in default and after the extension to October 2011, NAMA refused a requested further six month extension to the Agreement. In addition, NAMA withheld the final payments due under the Facility Agreement once LSI was in default. It was made clear that the release of funds was dependent on further security.

88. In a letter of 3 February 2011, a further drawdown of just over £2 million was made conditional on further security: SCL was to provide extensive guarantees in respect of debts of other MAR Connection companies. In fact, SCL did not rely upon the further drawdown and used an entirely separate MAR Connection "rainy day fund" to complete development of Swiss Centre instead.

89. On 3 February 2011 Mr Higgins produced a draft proposal which he sent to Mr McAleer, Mr Laverty and Mr McAllister. In that it was noted that the aspiration would be to generate an element of surplus cash on the sale of the Swiss Centre. In addition (in the context of everyone's understanding being that the Capital Trust owned the Swiss Centre) it was said that there was a willingness on the part of the beneficiaries of that trust to explore the possibility of using the surplus on the sale of the Swiss Centre to "acquire back" some of the development lands. This was a reference to the development properties held by the Indebted Entities. As a result of the value of the properties being less than the entities' secured lending now held by NAMA the properties were considered to be effectively held by NAMA. A proposal was then sent to NAMA on 16 February 2011 which included that wording.

90. On 17 February 2011 the MAR Connection provided a revised proposal in response to issues raised by NAMA. The revised proposal included a suggestion to pay a premium over market value of the development lands out of the Swiss Centre sales proceeds and furthermore it was proposed that:

(1) a new corporate vehicle would acquire the development land debt for consideration being the current market value plus a 25% premium;

(2) the acquisition would include restructuring of all personal debt and personal guarantees to ensure personal exposure was removed;

(3) £146,105,000 would be repaid by quarter three of 2011 and a further £144,333,000 would be repaid no later than March 2016. Mr Higgins explained at the hearing that this £144 million would come from the sale of investment assets by the families. Overall the package would provide an overall recovery of 85.2% of the total debt of £341,022,000

(4) £5 million would be placed on escrow from the Swiss Centre sale proceeds which would be released upon the £144.3 million owed to NAMA being repaid in full.

91. At the same time the MAR Connection pointed out that there was a legal requirement for the trustees of the Capital Trust to ensure any capital allocation provided a return of clearly defined commercial benefit. It was noted that NAMA was proposing that the trustees provide all of the surplus arising from the sale of the Swiss Centre to NAMA to be held until the end of the "business plan work through" but the MAR Connection said that such structure provided no identifiable commercial benefit for the beneficiaries.

92. An internal note dated 2 March 2011 from Mr Higgins to Mr Laverty and Mr McAleer shows the state of thinking around that time. It is clear that NAMA was pushing back hard on the proposals and the note considered what the options would be if NAMA did not accept them. In particular, the note considered NAMA calling in the personal loans on the Navan Lands and

bankrupting Mr McAleer and Mr Laverty. The consequences were described in summary as being none except the personal inconvenience for Mr McAleer and Mr Laverty and the need for them to resign as directors, as well as some reputational issues. It was noted that the existing construction contracts would be moved across to a new construction company from M&R Ltd which would be put into voluntary administration and the two directors could return to "business as normal" after 12 months. Business would continue; no jobs would be lost and no contracts would fall behind. At the same time all the proceeds from the sale of Swiss Centre would be retained. None of the development properties (held by the Indebted Entities) would be bought back at a premium and instead new development assets would be bought at impaired or distressed values with the cash from the sale of the Swiss Centre.

93. By 17 March 2011 an internal email shows it is clear that NAMA was threatening to call in the personal guarantees. At that point Mr Higgins was identifying a potential impact on the sale of Swiss Centre from this action, but concluded overall that NAMA were bluffing. A potential offer of moving the escrow amount into cash for the assets immediately was suggested.

94. On 25 March 2011 Mr Laverty sent a letter to NAMA in which the MAR Connection offered to pay £34.7 million for the development lands and 95% of the estimated net proceeds of sale of the Swiss Centre assuming a sale price of £185 Million. A further £5 million would be placed in escrow to provide additional comfort around the recoverability of about £153 million of the debt. It was noted in the letter that NAMA were still asking for all of the cash surplus arising on the sale of the Swiss Centre to be used in paying down the Indebted Entities' debt (despite the trust law issues which had previously been identified).

95. On 3 May 2011 a draft agreement was sent by the MAR Connection to NAMA proposing as follows:

(1) €11.5 million would be paid by SCL;

(2) the Capital Trust would pay £44.9 million to acquire the development assets back from NAMA in a tax efficient manner minimising SDLT. Of that nearly £37 million would be paid for purchase of the development assets and £8 million would be paid into escrow;

(3) all personal guarantees from Mr Laverty and Mr McAleer in respect of loans with NAMA would be released;

(4) all contingent corporate liabilities from M&R Ltd and M&R Construction Ltd to NAMA would be deemed to have been extinguished.

96. Heads of terms for a sale of the Swiss Centre for £197.5 million were agreed on 13 June 2011 with Al Faisal Holding Ltd. The next highest bid received was £165 million.

97. On 24 June 2011 NAMA sent the MAR Connection a draft Memorandum of Understanding which provided for the same £37,000,000 and €11.5 million payments, as well as the £8 million escrow amount as in the 3 May draft agreement, but it was stated that all existing security, cross collateralisation and guarantees would remain in place.

98. On 27 July 2011 the MAR Connection became aware that there was a target exchange date of 5 August 2011 for the sale of the Swiss Centre. By 5 August 2011 the target date had been postponed to 19 August 2011.

99. On 5 August 2011 NAMA wrote to the MAR Connection to say that it wished to see the sale of the development land assets to the Capital Trust on the same day on which the Swiss Centre sale was signed.

100. In the negotiations the core tensions arose from the different results sought by the parties. NAMA wanted legal certainty in relation to the use of the Swiss Centre surplus before sale of the Swiss Centre. The MAR Connection wanted to complete the property sale first so that it could negotiate with NAMA from a position of strength.

101. In an email dated 16 August 2011 NAMA said that its lawyers were being instructed to draft legal documentation in the form of a deed of agreement and a deed of confirmation. NAMA said that if it was not satisfied with all aspects of the proposed sale of the Swiss Centre, including confirmation of the use of the surplus proceeds and completion of all relevant documentation prior to the sale of the Swiss Centre, the memorandum of understanding would be withdrawn.

102. It soon became clear that the documentation with NAMA would not be agreed in time. The evidence overall shows that NAMA and the MAR Connection were talking about the £37 million expected to be paid for the purchase of the development assets as well as the previously discussed £8 million escrow amount to be placed in an escrow account. While the consistent evidence I heard from the witnesses for SCL was that the MAR Connection wanted the escrow account to be set up on the basis that the £45 million would be paid out to the MAR Connection in the event that no agreement was reached with NAMA, there is no evidence that NAMA ever suggested that was a viable option and it would be surprising, to say the least, if that would have been agreed by NAMA. Indeed, that is reflected by an internal email from Mr Higgins to the MAR Connection lawyers saying that NAMA have said that they will not consent to the release of the security unless funds are placed in escrow and they flow to NAMA in the event the facility amount is not agreed.

103. Negotiations continued and the MAR Connection discussed internally the idea that £45 million would be paid from the proceeds of the sale of the Swiss Centre into an escrow account to which the Memorandum of Understanding would be annexed with a list of those parts of it not yet agreed. The parties would have eight months to try and accomplish agreement in default of which an amount (not yet agreed) would be paid to NAMA and the remainder would revert to the Capital Trust. However, on 22 August 2011, the day after the MAR Connection had discussed this proposal, NAMA introduced a new element to the negotiations: it said that it was unwilling to grant consent to the sale of the Swiss Centre and to the release of the security charge over the site through the provision of a DS1 form unless the trustees of the Capital Trust agreed to place £37 million of the surplus proceeds into an escrow account on terms that failure to agree the overall agreement within an agreed period would see the full amount move to NAMA. In response Mr Higgins suggested a tougher stance than that of the previously discussed proposal in that it was now proposed that if the outstanding terms could not be agreed within eight months the monies would all be returned to the Capital Trust.

104. Further legal advice was taken by the MAR Connection in relation to the DS1 issue on 23 August 2011. The advice was that the purchaser (and in particular any financing of the purchaser) would require an undertaking either from NAMA's lawyers or from the MAR Connection lawyers. It was considered that the MAR Connection lawyers would not give such an undertaking without a corresponding one from NAMA's lawyers. However, the advice went on to say that it should be a very straightforward and quick process to get a court declaration requiring NAMA to confirm they would provide the DS1 when paid what was owed to them on the Charge as they had no legal entitlement to take the position they were adopting about that form.

105. In an email of 23 August 2011 Mr Higgins set out various issues including the exposure which the MAR Connection may have if contracts were exchanged and what steps could be taken after exchange to request confirmation about the DS1 in advance of completion or to

seek an anticipatory breach order in the event that NAMA declined to confirm the status. The MAR Connection wanted to avoid raising a potential issue with the Swiss Centre purchaser about the DS1 prior to contracts being exchanged on the sale of the Swiss Centre.

106. Earlier in the Swiss Centre sale process it had been identified that the lawyers acting on behalf of the purchaser wanted the DS1 to be handed over on completion rather than relying upon an undertaking from the vendor's solicitors. However, while there was evidence provided that the standard "Protocol" for the steps and undertakings required where a land sale involves the release of a security is such that it should be possible to exchange contracts, seek the anticipatory breach order against NAMA and then complete, I rely on the consistent evidence of Mr Higgins and Mr McAllister that the MAR Connection lawyers were not content to proceed to exchange where there was such an issue as NAMA's apparent threat to withhold the DS1.

107. Meanwhile on 23 August 2011 NAMA also made clear that the suggestion of the £37 million being withdrawn by the MAR Connection from the escrow account in the event that agreement was not reached was unacceptable. At that point an email from NAMA refers to the issue of the potential tax treatment of the restructuring of the development assets as being a key concern that was preventing agreement between the MAR Connection and NAMA. NAMA said that the alternative option of group-wide enforcement was not its preference but in the absence of agreement it may be forced to go down that route.

108. Mr Higgins provided evidence of how the matter was resolved. He, Mr McAllister, Mr Laverty and Mr McAleer met with NAMA on 25 August 2011. He says that NAMA was demanding a legally binding position on the allocation of the surplus proceeds from the sale of the Swiss Centre before consenting to that sale and the only concession they were prepared to make was the use of the escrow account. The MAR Connection reached agreement with NAMA and a Memorandum of Understanding was entered into on 15 September 2011. That document provided that NAMA would release its security over the "Development Assets" (defined as the assets of the Indebted Entities) on payment of £37 million and €11.5 million to NAMA together with a transfer of £8 million to a joint account "on transfer of the Development Assets to the [Capital Trust]". The funds in the joint account would be transferred to NAMA to cover any shortfall between the amount of debt repaid by the MAR Connection and a minimum target amount set out in the agreement with the balance (of any) being distributed to the MAR Connection.

109. As Mr Higgins describes in his evidence, the loan documentation to achieve the deal negotiated with NAMA took some weeks. He specifically notes that "thankfully, the Swiss Centre purchaser was content to wait whilst the loan documentation was finalised".

110. It therefore appears that the purchaser was aware that the MAR Connection had to deal with NAMA in order to proceed.

111. The sale of the Swiss Centre completed on 24 November 2011 and the deed giving effect to the NAMA deal was entered into on the same day.

The Deed of Agreement ("the Deed")

112. On 24 November 2011 (the date of completion of the sale of the Swiss Centre) a deed of agreement was entered into between:

(1) SCL,

(2) Swiss Centre Management Ltd ("SCML") (the fiduciary of the Capital Trust. (It was drafted with SCML as the party on the assumption that the Capital Trust beneficially owned the Swiss Centre although SCL was the registered owner at the time.))

(3) LSI,

(4) M&R (Civil Engineering) Ltd,

(5) National Asset Loan Management Limited (a NAMA company) ("NALM"),

(6) a series of "Vendors" who were:

(a) the following Development Companies: College Court properties Ltd ("College Court"), M&R Estates Ltd, Flamewall Ltd, Timec 1206 LLP ("Timec"), Lavangna,

(b) Mr Laverty and Mr McAleer,

(7) AIB, the Bank of Ireland and NAMA together referred to as the "Lenders",

(8) various MAR connection companies which had provided guarantees (corporate guarantors); and

(9) Mr Higgins, Mr Laverty, Mr Magee, Mr McAleer and Mr Surphlis (the personal guarantors) who had provided guarantees in relation to a loan from First Trust dated 29 January 2007 and a further guarantee of 24 April 2007 in the sum of £2 million also provided to First Trust.

113. The Deed provided as follows:

(1) Each of SCL, the Capital Trust and LSI agreed that immediately on receipt of the net proceeds of sale of the Swiss Centre:

(a) £105,279,323.57 would be paid to an AIB account on account of the repayments of principal, interest, costs and expenses under the LSI Facility;

(b) £1 million would be paid to an AIB account on account of the payment of outstanding fees under the LSI Facility;

(c) €11,500,000 would be paid to an AIB NAMA account "on account of the repayments under the Lavangna Guarantee";

(d) a little less than £2 million would be paid on account of repayment of all amounts outstanding in respect of an overdraft of M&R (Civil Engineering Ltd);

(e) approximately £45 million would be paid to various specified lenders' accounts "on account of repayment of amounts outstanding in respect of the Vendors";

(2) The personal and corporate guarantors agreed that their guarantees in favour of the Lenders would continue in full force and effect notwithstanding repayments to the Lenders as a result of the sale of the Swiss Centre;

(3) on or before the "Effective Date" (not defined but interpreted in the light of the evidence overall and the remainder of the Deed as being the date of completion of the sale of the Swiss Centre) LSI would pay or would procure the payment of £163 million from the net sale proceeds of the Swiss Centre to a firm of solicitors for the amount to be released to NAMA to repay a sterling amount of nearly £151 million and a Euro amount of just over €13 million. (Those amounts reflected the totals of the amounts set out above in (a)-(e).);

(4) pursuant to the Lavangna Guarantee, LSI and SCL had guaranteed all the monies and liabilities from time to time due, owing or incurred by Lavangna to AIB up to €11,500,000 together with interest thereon. The €11,500,000 to be paid on account of the repayments under the Lavangna Guarantee would be treated as a repayment of

amounts outstanding under the Lavangna Facility by Lavangna as well as a discharging in full all obligations of SCL and LSI under the Lavangna Guarantee. No formal demand under the Lavangna Guarantee had been made;

(5) the Capital Trust agreed with each Vendor to purchase or to procure the purchase of the specified development properties held by the Vendors in each case for a purchase price set out in the Deed. The aggregate consideration payable for the properties would be just under £43 million and just under €1.25 million (the "Aggregate Purchase Monies");

(6) the Aggregate Purchase Monies would be applied in reduction of the relevant Vendor's obligations under relevant loan facilities in the amounts set out in a schedule to the Deed;

(7) in consideration of the application of the Aggregate Purchase Monies in repayment of part of the relevant Vendor's loans each Lender released its security over each of the development properties and accordingly would provide an executed deed of release and land registry form DS1 in respect of each of the properties;

(8) the Vendors (other than Timec) would remain indebted to the Lenders in respect of all amounts outstanding to the Lenders until such time as an amount described as the "Cumulative Minimum Amount" was paid to the Lenders;

(9) Timec had no further obligations in respect of its loans after the payment to NAMA of the relevant amount relating to its properties.

114. The Deed then goes on to say that LSI will pay or procure the payment of £163 million from the net sale proceeds of Swiss Centre on the Effective Date with the amount being released to NAMA to satisfy the obligations to pay it. It makes little sense for the obligation to be on LSI given that it had no access to the funds which were being received by the Capital Trust. Furthermore, as Mr Mullan noted in the hearing the clause has further problems in that it refers to £163 million being paid out of the net sale proceeds and the net sale proceeds are themselves defined as being the proceeds from the sale less all amounts owed to AIB under the LSI Facility. I consider that this clause adds little to the analysis. The parties had reached a deal for the payment of the £163 million and the primary obligation to pay that amount was entered into by each of LSI, SCL and the Capital Trust. There was therefore an obligation on the Capital Trust.

115. The much-debated escrow amount which was still present in the signed Memorandum of Understanding on 15 September 2011 was not included in the Deed.

116. There is no provision in the Deed referring to NAMA providing the DS1 for the sale of the Swiss Centre. Mr Mallon submitted that it would not have been included in the Deed because the release of the security had to happen immediately before the flow of funds resulting from the completion of the sale. However, the Deed is not written on the basis of the sale having taken place. It is written with undertakings for payments to be made on receipt of the net sale proceeds from the sale of the Swiss Centre; and refers to actions being taken on or before the "Effective Date". The recitals refer to the Deed being entered into to set out the agreement between the parties as to the payment of the net sale proceeds on completion of the sale of the Swiss Centre. It is therefore forward-looking as to the completion of the sale. It would therefore have been perfectly possible for reference to be made to release of security by NAMA.

117. In fact, as the evidence of Mr Gardiner in particular shows, not all of the transfers of properties from the Vendors to the Capital Trust envisaged by the Deed took place. The Deed

envisaged that the properties held by Canterbrook Developments and Timec would be transferred but this did not happen.

118. The following table shows the ownership of the development properties which were stated to be transferred pursuant to the Deed arrangements, the "purchase" price as stated in the Deed, the values as at November 2011 provided by Mr Surphlis in his Witness Statement and the relevant amounts of facilities as referred to in the Deed or accounts where those details have been provided. Amounts have been rounded.

Vendor	Property "purchase" price (approx.) as stated in the Deed	Property estimated market value Nov 2011	Facility amount where stated in Deed or if not as stated in accounts
College Court	£2.5m	£2m	£3.7m
M&R Estates	£2.5m	£2m	
M&R Estates	£1.3m	£1.2m	
Flamewall	£9.5m	£5m	£11.75m + £12.25m
Flamewall	£12m	£6.5m	£11.75m + £12.25m
Timec	£1.3m	£850,000	
Lavangna	€1m	€780,000	
Lavangna	€4.1m	€3.65m	
Mr Laverty and Mr McAleer *	£8.2m	€6.5m	€10.2 million + €13 million + €15 million
Scelcs	£675,000	€300,000	

* The report of Mr Gardiner explains that the amounts stated as relating to Mr Laverty and Mr McAleer related to their activity trading through the Canterbrook Developments partnership.

Implementing the Deed

119. To achieve the transactions described in the Deed a new company called Larkmount Ltd was set up and wholly owned by Capital Trust. The corporate Indebted Entities (the corporate Vendors) were transferred to subsidiaries of Larkmount for nominal consideration. Each development property owned by those Indebted Entities was then transferred intra group at the prescribed Deed value so that there was a Larkmount subsidiary holding one or more of the properties. The funding of the Deed values came from what were originally considered to be loans from SCL (although it is now recognised that the amount in excess of the property values could not have been lent by SCL – see further below). The corporate Indebted Entities agreed that the proceeds of the sales of the properties would be applied in discharging their indebtedness to NAMA.

120. In relation to Timec and Canterbrook Developments the funds were provided directly from SCL to those partnerships to allow them to repay all (in the case of Timec) or some (in the case of Canterbrook Developments) of their indebtedness. There was no transfer of the properties held by those partnerships. The accounts also show that during the accounting period

ended March 2012 Timec repaid its bank loan in full and the bank loan as at March 2011 had been just over £1.3m. Accordingly, under the Deed Timec fully repaid its bank loan. This therefore explains its exclusion from ongoing liability after 24 November 2011.

121. The difference between the market value of the properties as at November 2011 and the amount paid to the Indebted Entities who then used it to repay NAMA (about £44 million) is what has been described as the "Additional Sum" and is one of the two amounts in dispute.

122. Lavangna was one of the corporate Indebted Entities holding properties with a value less than its indebtedness. It was therefore transferred to one of the new Larkmount subsidiaries and transferred its properties to its new parent. That parent was not only funded to enable the market value of the properties to be paid but was also provided €11.5 million by SCL which the parent "transferred" (as Mr Gardiner describes it) to Lavangna to enable it to repay NAMA.

123. The transactions were all affected by accounting entries with no funds flowing between the companies other than the payment made to NAMA by Capital Trust.

124. The sums paid to NAMA were initially accounted for the basis that they had been lent to the Larkmount subsidiary or the partnership by SCL. However, the evidence shows that as of 31 March 2011 the various entities were insolvent. Therefore only the amount equivalent to the market value of the properties will be shown as a loan. SCL has not identified what the remainder – i.e. the Additional Sum should be shown as in the Indebted Entities' accounts. When Mr Gardiner was asked at the hearing by me he could not provide an answer. Given that there is no other explanation offered for the nature of the Additional Sum in the hands of the Indebted Entities and it was given to them by SCL with no expectation of the money being returned I find that it was a gift or distribution in the hands of the Indebted Entities. I return to this categorisation later.

125. Out of the Indebted Entities shown in the table only College Court, Lavangna and Flamewall were under the ownership of the Discretionary Trusts prior to 24 November 2011. Canterbook Developments was owned by Mr McAleer and Mr Laverty. Scelcs and Timec were owned by Mr McAleer, Mr Laverty and others.

126. From 24 November 2011 Lavangna, College Court, Flamewall, and Scelcs were transferred to be held by the Capital Trust via the newly formed subsidiaries of Larkmount.

127. As can be seen from the schedule, the NAMA company received an amount in excess of the value of the properties (which otherwise it could potentially secure on enforcement of its security,) but less than the total amount outstanding of the NAMA debt. The remaining amounts due remained outstanding until the Cumulative Minimum Amount was paid, but importantly the lenders released all security over the properties referred to in the Deed.

128. The expert report of Mr Jones states (and this has not been challenged by SCL) that the remaining Indebted Entities' facilities after payment of the Cumulative Minimum Amount were assigned by a company acting on behalf of NALM and the previous lenders to Timec 1461 Limited for £1 on 21 August 2015. The exact ownership of Timec 1461 Limited is unclear, but it was a MAR Connection company. Consequently, some four years after the NAMA deal with which this appeal is concerned the remaining amounts after payment of the Cumulative Minimum Amount due in respect of the facilities were foregone by the lenders.

129. Once it was concluded that SCL had not transferred Swiss Centre to the Capital Trust SCL's accounts were restated. The accounting entries for Capital Trust have been unwound as a result of the conclusion that SCL held Swiss Centre. Given that the Larkmount subsidiaries should not have agreed to loans in excess of the value of the assets held by them, it is now accepted by SCL that the amounts were not in fact lent to them.

130. The cost of entering into the Deed has been identified as £33,792,086. This broke down to approximately £10 million in respect of the Lavangna Guarantee and £24 million in respect of the Additional Sum. It is planned that the accounts will show the total amount as a cost in SCL's profit and loss account.

Accounting

131. In the accounts of SCL for the period ended 31 March 2012 it is said that it acted as agent for the Capital Trust and held its assets in that capacity. The notes state that the company was reliant on the availability of historic financial support provided by some related parties which indicated the existence of a material uncertainty that may cast significant doubt on the company's ability to continue as a going concern. The notes also stated that the company's ultimate controlling parties were Mr Laverty and Mr McAleer (and not the discretionary trusts). The unchallenged evidence of Mr Higgins explained that this was because Mr Laverty and Mr McAleer were the trustees of the Discretionary Trusts.

132. Mr Gardiner's evidence confirms that SCL's accounts for the year ended 31 March 2012 are not GAAP compliant because they were incorrectly drawn up on the basis that the company did not beneficially own the Swiss Centre. Consideration has then been given to what the GAAP compliant position would be and this is addressed later in this decision.

133. The accounts of SCL for the period ended 31 March 2011 showed a financial asset of approximately £58 million which represented monies receivable from the Capital Trust in respect of development costs at the Swiss Centre.

134. Mr Gardiner's report includes worked examples of the Deed transactions and the accounting entries. The report of Mr Gardiner confirms that despite the fact that at the time it was considered that the Capital Trust owned the Swiss Centre and received the proceeds of sale in its own right, the settlement of the amounts to the lenders are set out in the Deed were originally posted through the MAR Connection as if SCL had lent funds to the relevant new Larkmount subsidiaries, Timec and Canterbrook.

135. In order to reflect the fact that it was later accepted that SCL had remained the beneficial owner of the Swiss Centre until its disposal on 24 November 2011 the accounts prepared for SCL for the year ended 30 September 2019 included a restatement of the 2018 accounts by means of a prior year adjustment. That adjustment stated that:

> "the prior year adjustment relates to the recognition of profits which were not previously reported in this company and has resulted in an increase in revenue reserves as of 1 October 2017 in the amount of £84.3 million."

136. That adjustment resulted from the following calculation:

Profit on sale of Swiss Centre	£126,492,868
Less fee paid to NAMA expensed to P&L	£33,792,086
Less other adjustments not related to this appeal	£8,331,751

137. The restated accounts of SCL show the cost of entering into the Deed (including the payment relating to the Lavangna Guarantee of €11.5 million) as a cost of £33,792,086 (the Disputed Sum) to be taken as an expense in the profit and loss account. I address the expert evidence about this amount further below.

Secondary findings about the relevant transactions

138. In this part of the decision I set out the secondary findings which result from the primary findings of fact and the evidence overall.

Lavangna Guarantee

139. Dealing first with the Lavangna Guarantee payment, the €11.5 million paid as "Lavangna Guarantee Repayment" was paid under the terms of the Deed. No demand was made under the Guarantee itself and the payment was part of the overall deal reflected in the Deed. However, it also reflected the terms of the Lavangna refinancing letter in 2009 which had provided that €11.5 million would be paid as a "capital reduction" of the loan on the sale of the Swiss Centre.

140. I conclude that the obligation at this point to pay the €11.5 million arose from the Lavangna Facility. It arose completely independently of the situation with NAMA. The DS1 issue did not affect it. It was payable under the terms of the Lavangna Facility simply as a result of the sale of the Swiss Centre occurring. I have set out earlier the findings about the context of the Lavangna Facility and, in particular, that the terms were agreed in the context of the MAR Connection needing to ensure that First Trust did not cut the funding for the development of the Swiss Centre at a time when everyone believed that the Swiss Centre was still owned by SCL.

Additional Sum

141. Turning to the Additional Sum the £45 million payment to NAMA was on the table for some months in 2011 and long before the DS1 issue arose. In the end it was structured so that £24 million was paid as a "premium" and £20 million was paid for the assets held by the development companies. The Capital Trust paid NAMA £20 million for £20 million worth of property (ignoring the value of the debt). The contentious amount is the remaining £25 million Additional Sum paid.

142. NAMA wanted as much of the debt owed to it paid back as possible. It had no interest in the restructuring and mechanics within the MAR Connection to achieve that. The restructuring of the corporate Indebted Entities' ownership of the development properties via the new Larkmount subsidiaries was therefore entirely a matter for the MAR Connection.

143. Both NAMA and the MAR Connection appreciated the key importance of the sale of the Swiss Centre. In 2010 NAMA had tried to exert pressure by slowing down the release of funding under the LSI Facility which put increased pressure on M&R Ltd when it was needing to get the development and the sale completed. At the same time the MAR Connection knew that NAMA realised its best way of getting value out of businesses was through the sale of the Swiss Centre. For the MAR Connection everything else apart from the Swiss Centre was "completely underwater". Furthermore, the MAR Connection identified a need for a new company out of which the construction business would be operated and the key to success for that new company was a source of funding. The source was identified as the sale proceeds from the sale of the Swiss Centre

144. Mr Higgins draws a comparison between the resolution of the NAMA debt and the resolution of debt with other funders saying that the key difference was how NAMA leveraged its position on the security and consent to the sale of the Swiss Centre. I consider it to be consistent that NAMA was in a different position because of the sale of the Swiss Centre, which was at the heart of the ongoing discussions, but that does not mean that the Additional Sum was in fact paid for NAMA's consent to the sale. The history of that additional amount is consistent with finding to the contrary. The deal with NAMA was broadly agreed from May 2011. £45m was already on the table, albeit that £8m was to be paid into escrow under the proposals at that time. The threat of problems with the DS1 did not cause that to increase.

145. The evidence from Mr Higgins was that the earlier negotiations should be discounted because the MAR Connection was simply seeking to string NAMA along so that the sale of the Swiss Centre could be completed and the MAR Connection could negotiate from a stronger

position. However, that does not alter the fact that the £45 million was on the table for some months before the parties finally reached agreement.

146. It is important to recognise which entities were entering into the Deed with NAMA and on what basis. At the time of the Deed the understanding was that the beneficial ownership of the Swiss Centre was held by the Capital Trust. As a result of the transfers of the corporate Indebted Entities into the Capital Trust structure, the Capital Trust was indirectly holding companies whose assets (the development properties) were effectively owned by the lenders as the value of the properties was so much less that the debts owed by the companies. As a result of the restructuring and the deal with NAMA affected by the Deed the Capital Trust retained the development properties and the domino effect of enforcement action was avoided. The structure used for the agreement with NAMA enabled the properties held by the corporate Indebted Entities to be transferred into the Capital Trust structure without SDLT. The deal with NAMA left the Capital Trust holding properties which the MAR Connection could continue to develop free from encumbrance. It therefore made sense for the Capital Trust to enter into the Deed and carry out the transactions procuring the purchase of the properties at a premium to their net asset value. The same could not be said for SCL. It did not own Larkmount and its subsidiaries and therefore could not take into account any benefit in holding the properties free from encumbrance.

147. Indeed, under the structure put in place in accordance with the Deed, while the cash transfer was made by the Capital Trust from the proceeds of sale of the Swiss Centre, the Deed and the transactions entered into in accordance therewith included the provision of an amount equal to the Additional Sum and the market value of the development properties to the Indebted Entities. Those entities then used that total amount to repay their indebtedness to NAMA. It is the treatment of the provision of the Additional Sum to the Indebted Entities which is at the heart of the dispute. No deduction is sought for the amount equivalent to the market value of the properties. However, the total amount (the Additional Sum and the property market value amount) was then used as repayment of liabilities of the Indebted Entities by them. The closest one can come to linking the payment of the Additional Sum to the release of security, as SCL contends, is to say that the provision of funds to the Indebted Entities, in circumstances where it was known that the Indebted Entities would not be able to repay that amount to SCL and where the monies were destined for NAMA, was in essence a cost of getting NAMA to release the security. These distinctions are relevant when applying legislation later in this decision.

148. The Additional Sum was only a premium as compared to the net asset value of the development properties over which NAMA had security. NAMA did not receive full repayment of all the facilities owed by the Indebted Entities. Amounts remained outstanding but the MAR Connection now owned the properties unencumbered whereas previously they had effectively lost ownership of those properties by virtue of the indebtedness of the relevant companies exceeding the value of the properties and the security held by the banks.

149. As Mr Mullan submitted, access to a big pot of cash as a result of the sale of the Swiss Centre was seen by the MAR Connection as a way to build and develop the business. Access to that money would be particularly valuable at a time when credit for property developers was extremely scarce. In fact, money from the sale of the Swiss Centre was subsequently used in just that way; in particular, to fund the new construction company and the continuation of the construction business.

150. At the same time NAMA had real incentives to get the deal done, as Mr Mullan submitted. As he put it, if NAMA had enforced security such that they ended up holding the development properties and even the Swiss Centre "good luck to them turning it into cash". It is not a straightforward matter for a bank to turn £153 million worth of property-particularly

development property-into cash in the aftermath of the financial crash and its devastating effects on the Irish property market. The MAR Connection were able to use that to say that they could manage the assets, sell them and pay NAMA. Although NAMA held the benefit of the personal guarantees given by Mr McAleer and Mr Laverty other banks also held security from them. The cleanest and simplest way of realising value from the MAR Connection was to obtain a portion of the Swiss Centre sale proceeds.

151. Given that the MAR Connection considered this was a strong bargaining position in relation to NAMA it is somewhat inconsistent to say that they considered that NAMA would in fact block the sale of the one asset which could be used to provide at least partial repayment of the facilities on its books. However, I recognise that at the point of the sale process the MAR Connection was absolutely focused on achieving that sale at the price offered by the highest bidder. It was the way to achieve so much for the MAR Connection as a whole. Therefore even while there may have been potential to take court action against NAMA to force it to provide the DS1 and even if one might say that the conveyancing protocol applicable in such situations possibly combined with court action would have enabled the parties to move to exchange of contracts for the sale of Swiss Centre without provision of the DS1, it is understandable that the MAR Connection felt that it was simply easiest to agree a deal which had substantially been on the table for months.

152. Much was made in the evidence of the risk of Al Faisal Holdings walking away from the deal or seeking to reduce the price if they were aware of the DS1 issue. However, the findings made earlier regarding the NAMA negotiations show that the exchange of contracts for the sale of the Swiss Centre was repeatedly delayed. The evidence does not show that this was as a result of some problem on the purchaser's side. Indeed, Mr Higgins acknowledged in his evidence that the purchaser was prepared to wait for the documentation with NAMA to be finalised. While I recognise that the MAR Connection would want to minimise the issues which they needed to disclose to the purchaser, it was clearly the case that the purchaser was aware of major discussions with a lender which were so linked to the sale of the Swiss Centre that exchange was delayed as a result. I therefore conclude that the extent of the concern about raising the DS1 issue is an example of the development of the narrative for this case over subsequent years.

153. When considering the evidence overall and the history of the deal as shown by the evidence, I find that there was a mixture of purposes and intentions in paying the Additional Sum to NAMA:

(1) to get the Swiss Centre sale completed as smoothly as possible at a time when the MAR Connection was heavily exposed in relation to the debt financing. The sale in turn enabled the setting up of the new construction business company to focus on the area of the MAR Connection which was considered to have real value;

(2) to get the NAMA facilities dealt with sufficiently to satisfy NAMA at the time without full repayment which could not be funded. For example, about half of Flamewall's debt was repaid and around a quarter of Canterbrook Developments' debt was repaid. While NAMA received a premium to the value of the land over which they held security they did not receive the full repayment of the facilities and the MAR Connection also avoided the consequences of enforcement of security;

(3) to retain the development properties unencumbered by bank security. In the case of Timec and Canterbrook owned as partnerships by Mr McAleer and Mr Laverty, the relevant development properties remained with the partnerships and the transactions resulted in the partnerships holding unencumbered properties. The evidence showed that

this was considered by the MAR Connection to be of value – they knew the development properties, they knew how to develop them.

154. These findings have focussed on the evidence from the perspective of the MAR Connection. That is because there is very little evidence to show the perspective of SCL. In addition, there are several issues regarding the position of SCL which must be recognised:

(1) at the time of the transactions the directors of SCL did not believe that the company still retained the beneficial ownership of the Swiss Centre. Therefore, any purpose or intention behind SCL's own involvement in the transactions at the time could only have been assessed by reference to the facts as they were understood at that time and not the retrospective adjustment to the ownership of the Swiss Centre agreed in 2017;

(2) as previously noted, the MAR Connection was run as one organisation with one centralised "board". Mr McAleer and Mr Laverty made the strategic decisions. This makes it particularly difficult to identify the basis on which any one particular entity was involved in the transactions.

155. I am therefore unable to make findings specifically about the basis on which SCL as opposed to the MAR Connection overall entered into the transactions.

156. As was made clear in evidence and submissions for SCL, the fact that the corporate Indebted Entities were what was described as "zombies" with the remainder of their debt facilities outstanding, but no assets was seen as being of no real consequence because of the very nature of a limited liability company. That same analysis does not work for the Canterbrook Developments partnership and in the case of Timec it fully repaid its loan so was not left insolvent. Therefore SCL provided funds to those entities to repay NAMA but the entities kept their properties.

157. With the funds obtained on the Swiss Centre sale and with NAMA dealt with the MAR Connection could move on. The risk of problems being caused with the sale by NAMA threatening to withhold the DS1 focussed the minds of the MAR Connection and got them to agree a deal which had substantially been on the table for months. Indeed, I raised this specifically with Mr Mullan on the last day of the hearing and he agreed that the Additional Sum was paid to get the sale away rather than the DS1 released, although raising the issue of the DS1/release of the charge was the lever which produced the result including the payment of the Additional Sum.

SCL'S CASE

158. I heard extensive submissions from both parties and only summarise the key points here.

159. Mr Mullan submitted:

(1) the dealings in this case need to be understood with the background of the financial crisis in mind;

(2) the witnesses had presented consistent evidence which was supported by the contemporaneous documents. They were in the midst of the issues and negotiations. Mr Waldegrave did not explain why their evidence should be disregarded in any way or the weight of their evidence reduced;

(3) SCL has not claimed that it was trading given that it originally acquired the Swiss Centre as an investment. Although looking at the position of SCL now raised questions as to whether it was in fact trading that line of argument had not been raised before and there was no application to amend the pleadings;

(4) the Lavangna Guarantee was not gratuitously granted by SCL but was in consideration of First Trust not seeking to exercise its rights under the Facility Agreement and related agreements. As a result, LSI/SCL were able to access a further sum in excess of £19 million under the Facility Agreement between the date of granting the Lavangna Guarantee and 10 December 2010 which was critical to completing the Swiss Centre development;

(5) the sum guaranteed by Mr McAleer and Mr Laverty to other banks was considerably in excess of the amount guaranteed to NAMA so on a practical level giving the profits on the sale of the Swiss Centre to NAMA would not remove their potential liability. The possibility and impact of their bankruptcy was something which was actively considered and was not considered disastrous. Even NAMA did not appear to consider the threat to be sufficient given their insistence on a legally binding agreement before releasing security over the Swiss Centre;

(6) LSI was in default under the LSI Facility and was not in a position to meet its payment obligations there under from 30 November 2010. SCL was therefore liable for those amounts under the LSI Guarantee. This meant that at all times from 30 November 2010 until the sale of the Swiss Centre NAMA was in a position to enforce its security over that property. Although it granted a short extension on 11 October 2011, NAMA refused a requested six month extension to the LSI Facility despite the development going well. It therefore put itself in a position to pressurise SCL. In an email 23 August 2011 NAMA threatened to enforce the security unless there was agreement that they participated in the surplus from the sale of the Swiss Centre;

(7) the MAR Connection attempted to deal with the problem by adopting a strategy of engaging with NAMA while seeking time to complete the development and sale of the Swiss Centre. Once the Swiss Centre had been sold NAMA could no longer hold the threat of enforcement of its security over SCL and there would be no incentive to give NAMA anything over what they were entitled to receive by reference to the market values of the properties held by the Indebted Entities;

(8) the position became acutely difficult once NAMA made clear that they would not consent to the release of the security through the provision of a DS1 form unless funds sought by them from the sale of the Swiss Centre were placed in escrow with the entire amount going to NAMA in the event that agreement was not reached. NAMA were not obliged to give an undertaking that a form DS1 would be provided. However, the purchaser of the Swiss Centre would expect one and would be unlikely to agree to buy property for £197.5 million without being satisfied that it was unencumbered;

(9) options to deal with this were considered but the sticking point was that it would need to be raised with the purchaser of the Swiss Centre which would put the sale or the price at risk. Furthermore, NAMA were threatening enforcement of their security which could potentially lead to even lower sale proceeds. The next highest bid was £32.5 million lower. It made going to court to obtain a declaration that NAMA was required to provide the DS1 unrealistic;

(10) as a result, there was a commercial need to accept NAMA's requirement that the MAR Connection purchased the development properties at an overvalue;

(11) quantifying the additional amount paid by SCL under the agreement reached with NAMA is complicated by reason of the way in which it was affected but in broad terms the cost reflected the difference between the amounts which it was required to pay NAMA and the value of the development properties released by NAMA;

(12) while it is accepted that the Larkmount subsidiaries could not have been taken to agree to loans in excess of the value of the assets held by them (and therefore SCL no longer pursues an argument based on the cost of making loans) it would be wrong to mis-characterise the arrangements as involving a gift to the Larkmount subsidiaries;

(13) the payment of the Additional Sum had a consequence of various debts being treated as paid down but that was not the purpose of the payment which was to get the security lifted for the sale of the Swiss Centre;

(14) Mr Jones's expert opinion lacked objectivity and strayed into advocacy. That lack of objectivity affected his analysis of the facts;

(15) the difference of opinion between the parties regarding the correct treatment under GAAP reflects a different interpretation of the facts. Mr Gardiner bases his views on the contents of the witness statements whereas Mr Jones adopts his own interpretation of what was happening. The Lavangna Guarantee payment was made in order to secure further borrowing; and the Additional Sum was incurred in order to enable the sale of the Swiss Centre to go through. Mr Jones' opinion that the Additional Sum was a distribution to Mr McAleer and Mr Laverty overlooks the fact that they were not owners of SCL and were excluded from benefiting under the Discretionary Trust. There was clear legal advice that it would have been a breach of trust with the Capital Trust to act for their benefit;

(16) to the extent that the Tribunal were to consider that GAAP did not require deduction, SCL's position would be that a debit would nevertheless need to be taken into account in order to fairly represent the losses and/or expenses arising to SCL from its loan relationships under s307 CTA 2007;

(17) when SCL settled the sum under the Lavangna Guarantee SCL was subrogated to NAMA's rights in relation to Lavangna and became a creditor of that company pursuant to the Mercantile Law Amendment Act. The acquisition of the rights was a related transaction for the purposes of section 304 CTA 2009. SCL suffered a loss since the rights were worthless. Lavangna was not connected to SCL within section 466 CTA 2009;

(18) in relation to Mr Waldegrave's submission that the debt does not arise from the transaction for the lending of money, Mr Mullen's response was that Lavangna has the debt as a result of borrowing money under the Lavangna Facility. That is the source of the debt. Therefore there was a transaction for the lending of money. In just the same way as when a creditor assigns his rights to somebody else that does not stop a loan relationship existing, so in this case the debt owed to SCL can be related to the original Lavangna Facility;

(19) the loss which SCL incurred in relation to the Lavangna Guarantee was not attributable to an unallowable purpose. Reliance is placed on the case of *Travel Document Service and another v HMRC* [2018] EWCA Civ 549 which confirms that a company has an unallowable purpose if its purposes include one that was not amongst a business or commercial purposes of the company. It is the company's subjective purposes that matter, but consideration is given to the surrounding circumstances. The evidence showed in this case that there is clearly a commercial purpose for making the payment;

(20) the relevant loan relationship in relation to the Additional Sum is that which arises from the SCL Guarantee given in relation to the LSI facility granted to LSI. That created a money debt in relation to which SCL stood in the position of a debtor. As it was secured

by the Charge it is treated as a transaction for the lending of money under section 303 CTA 2009;

(21) the Additional Sum was paid to get the sale of the Swiss Centre done. The DS1/charge therefore was used by NAMA to force payment and the payment was made "as a result" of the charge. Alternatively, the loan between LSI and SCL was a loan relationship to which the Swiss Centre charge related and the release of that charge was a disposal of rights in relation to its loan relationship and was therefore a "related transaction";

(22) the Additional Sum was paid in respect of the related transactions and therefore represented a loss on them which should be taken into account in determining SCL's profit or loss under s 307 CTA 2009;

(23) alternatively, the Additional Sum represented an expense incurred by SCL under or for the purpose of its loan relationships and related transactions. It was incurred in order to obtain the release of the security and as such it was incurred directly "as a result of any of the related transactions" within s 307 (4) CTA 2009;

(24) the result is consistent with the intent of the loan relationship rules which is that when a company has a cost which is incurred by reason of its loan relationships it can reflect that cost in its tax calculations. The loans have been made to fund the development and were secured on the development. There is no reason why a company should expect to be taxed on amounts which had to be paid to NAMA for perfectly commercial reasons;

(25) to the extent that the situation is not covered by the loan relationships rules, SCL maintains that the Additional Sum is properly to be taken into account in determining the gain on the sale of the Swiss Centre. It was paid to get rid of the charge and as such was within s 38 TCGA. In relation to the "wholly and exclusively" part of the s38 test, Mr Mullan relied upon *Vodafone Cellular & Others v Shaw* [1997] 69 TC 376 and in particular the distinction referred to therein between the purpose and the effect of expenditure.

HMRC'S CASE

160. Mr Waldegrave's submissions can be summarised as follows:

(1) HMRC maintains that the MAR Connection agreed to the payment of the Additional Sum because this was in the interests of the MAR Connection as a whole. NAMA would not have been able to demand anything other than the repayment of the Swiss Centre debt but for the existence of the wider MAR Connection. SCL was procuring benefits for related parties;

(2) Mr Jones' opinion regarding the correct GAAP treatment is that the Additional Sum was paid in substance for the benefit of SCL's owners and therefore the amount should not be treated as an expense in the profit and loss account of SCL;

(3) however, if the tribunal concludes that the Additional Sum should have been recognised as an expense by SCL the application of the loan relationship rules under section 307 CTA 2009 still result in no deductibility because:

(a) there was no loan relationship between SCL and NAMA. The LSI Guarantee did not give rise to a "money debt" because SCL did not owe anything pending the making of a demand by First Trust. It does not appear that any formal demand was ever made by NAMA under the LSI Guarantee;

(b) it was conceded though that the LSI Loan (the loan between LSI and SCL) was a loan relationship and the release of the NAMA charge over the Swiss Centre was a related transaction;

(c) however, the payment of the Additional Sum did not "arise from" the release of the Swiss Centre Charge. The case of *Hexagon Properties Limited v HMRC* [2022] SFTD 901 shows that is necessary for the tribunal objectively to consider what the cost in question arose from. The Additional Sum was paid because it was in the interests of the MAR Connection as a whole. Fundamentally it was a payment by SCL of a debt owed by related entities and cannot be regarded as arising from any loan relationship to which SCL was party, or from any related transaction. A comparison may be drawn to the case of *Shinelock Limited v HMRC* [2021] UKFTT 320(TC);

(d) similarly, the Additional Sum was not paid "as a result of" the release of the Swiss Centre Charge. It was paid on account of indebtedness of associated entities;

(4) Mr Jones' expert view regarding the Lavangna Guarantee is that there was little commercial rationale for SCL to grant it and the company's decision to do so can only be explained by reference to the wider interests of the MAR Connection. Mr Gardner's opinion that the amount was deductible was provided on the basis that the guarantee secured ongoing finance and that it was relatively unlikely when granted that it would be called. He recognised in his evidence that the county might change if this was not the case. In fact, the evidence showed that the guarantee was virtually certain to be called and instead, when it was entered into, it was in effect a commitment to pay by SCL. In entering into the guarantee SCL had moved value to Lavangna and Mr Gardner had agreed that this would give rise to a distribution;

(5) however, if the Tribunal takes the view that the Lavangna Guarantee payment should have been recognised in SCL's profit and loss account then HMRC maintains that there are the following problems with deductibility of that payment:

(a) while it was conceded in the hearing that when SCL paid the €11.5 million (either under the Guarantee or as an amount paid on behalf of Lavangna) it became a creditor in respect of a money debt from Lavangna, HMRC does not accept that this was a debt which arose "from a transaction for the lending of money". SCL became a creditor as against Lavangna because it paid an amount on its behalf. Where one company pays an amount on behalf of another to a third party there is no transaction for the lending of money unless there is evidence that provides for the amount to be treated as a loan *(MJP Media Services Limited v HMRC* [2010] SFTD 1083);

(b) in relation to SCL's contention that SCL's rights against Lavangna were "worthless" SCL is required to prove that this was so. Assuming it was, this does not mean SCL realised loss in respect of the supposed loan relationship to which it was party with Lavangna. Rather, the rights were simply worth nothing in ab initio. Alternatively, any loss does not "arise from" alone relationship because it arises from the making of alone in circumstances in which it could not be repaid in the first place;

(6) if contrary to these arguments the Lavangna Guarantee payment is considered to fall within section 307(3)(a) CTA 2009, SCL is prevented from bringing a debt into account under the loan relationship rules by the unallowable purpose" rules. Neither the granting of the Lavangna Guarantee nor the payment of the Lavangna Guarantee payment were amongst the business or other commercial purposes of SCL. It was not accepted

that the Guarantee was given in order that the Swiss Centre could continue to access finance because there was no evidence that First Trust when fact threatening to stop development funding. Indeed, it appears to have been accepted that it would be irrational for them to have done so. Therefore the only reason for the provision of the Guarantee was to shore up Lavangna in order to stabilise the whole MAR Connection and stave off threats resulting from cross collaterisation and enforcement of personal guarantees;

(7) in relation to the alternative arguments that a deduction is available to SCL under section 38 of the TCGA 1992, HMRC does not accept that the payment of the Additional Sum constituted “expenditure”. It falls to be regarded in effect as a gift to the Larkmount subsidiaries. However, if there was found to be “expenditure” incurred “by” SCL the Additional Sum was paid for the release of the indebtedness of entities within the MAR Connection. It was not paid to enhance the value of the Swiss Centre. Even if the payment of the Additional Sum was in SCL’s own interests it does not follow that it was paid wholly and exclusively to secure the release at the Swiss Centre Charge. On SCL’s own case it was paid to secure NAMA’s cooperation with the sale. In relation to the “wholly and exclusively” test reliance was placed on *Garforth v Tankard Carpets Ltd* [1980] 53 TC 342;

(8) to the extent that the payment was in fact made to secure the release of a registered charge over UK land HMRC would accept that it was reflected in the “state of nature” of the asset. However, if as HMRC contend, the purposes of the expenditure were broader than securing the release of the charge, it would not fall to be regarded as reflected in the state of nature of the Swiss Centre.

LAW

The loan relationship rules

161. Section 292(1) CTA 2009 says that Part 5 CTA 2009 “sets out how profits and deficits arising to a company from its loan relationships are brought into account for corporation tax purposes”.

162. Section 296 provides that “profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by Part 5 CTA 2009”.

163. Section 302 provides that a company has a loan relationship if:

> (a) the company stands in the position of creditor or debtor as respects any money debt (whether by reference to a security or otherwise), and
>
> (b) the debt arises from a transaction for the lending of money.
>
> (2) References to a loan relationship and to a company being party to a loan relationship are to be read accordingly.

164. Section 303 defines a “Money debt” as follows:

> (1) For the purposes of this Part a money debt is a debt which –
>
> (a) falls to be settled –
>
> (i) by the payment of money,
>
> …
>
> (3) A money debt is a debt arising from a transaction for the lending of money for the purposes of this Part if an instrument is issued by any person for the purpose of representing –
>
> (a) security for the debt, or
>
> (b) the rights of a creditor in respect of the debt.

165. Section 304 defines a “Related transaction” as follows:

> (1) In this Part “related transaction”, in relation to a loan relationship, means any disposal or acquisition (in whole or in part) of rights or liabilities under the relationship.
>
> (2) For this purpose the cases where there is taken to be such a disposal and acquisition include those where rights or liabilities under the loan relationship are transferred or extinguished by any sale, gift, exchange, surrender, redemption or release.

166. Section 305 makes provision for payments, interest, rights and liabilities under a loan relationship as follows:

> (1) For the purposes of this Part references to payments or interest under a loan relationship are references to payments or interest paid or payable in pursuance of any of the rights or liabilities under that relationship.
>
> (2) For the purposes of this Part references to rights or liabilities under a loan relationship are references to any of the rights or liabilities under the arrangements as a result of which that relationship subsists.
>
> (3) For the purposes of this Part rights or liabilities under a loan relationship are taken to include the rights or liabilities attached to any security that is issued in relation to the money debt in question (and so is a security representing that relationship).

167. Section 307 sets out the general principles about the bringing into account of credits and debits as follows:

> (1) This Part operates by reference to the accounts of companies and amounts recognised for accounting purposes.
>
> (2) The general rule is that the amounts to be brought into account by a company as credits and debits for any period for the purposes of this Part are those that are recognised in determining the company’s profit or loss for the period in accordance with generally accepted accounting practice.
>
> (3) The credits and debits to be brought into account in respect of a company’s loan relationships are the amounts that, when taken together, fairly represent for the accounting period in question –
>
> (a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),
>
> (b) all interest under those relationships, and
>
> (c) all expenses incurred by the company under or for the purposes of those relationships and transactions.
>
> (4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly –
>
> (a) in bringing any of the loan relationships into existence,
>
> (b) in entering into or giving effect to any of the related transactions,
>
> (c) in making payments under any of those relationships or as a result of any of those transactions, or
>
> (d) in taking steps to ensure the receipt of payments under any of those relationships, or in accordance with any of those transactions.
>
> (5) For the treatment of pre-loan relationship and abortive expenses, see section 329.

(6) Subsection (2) is subject to the provisions of this Part and, in particular, subsection (3).

168. In so far as relevant s 308 provides:

> Amounts recognised in determining a company's profit or loss
>
> (1) References in this Part to an amount recognised in determining a company's profit or loss for a period are references to an amount recognised in –
>
> (a) the company's profit and loss account, income statement, or statement of comprehensive income for that period,
>
> (b) the company's statement of total recognised gains and losses, statement of recognised income and expense, statement of changes in equity or statement of income and retained earnings for that period,
>
> or
>
> (c) any other statement of items taken into account in calculating the company's profits and losses for that period.

169. Section 309 CTA 2009 provides that where a company's accounts are not GAAP compliant references to amounts recognised for accounting purposes are references to the amounts that would have been recognised if GAAP-compliant accounts had been drawn up for the period of account.

170. Section 441 CTA 2009 restricts the availability of debits in respect of loan relationships which have an "unallowable purpose". The company may not deduct so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

171. Section 442 provides that:

> … a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company – (a) is a party to the relationship, or
>
> (b) enters into transactions which are related transactions by reference to it,
>
> include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.

The taxation of chargeable gains

172. The alternative analysis relied upon by SCL in relation to the Additional Sum is that the amount represented a cost of enhancing the value of SCL within s38(1)(b) TCGA 1992.

173. So far as relevant that section provides:

> 38 Acquisition and disposal costs etc.
>
> (1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in computation of the gain accruing to a person on the disposal of an asset shall be restricted to –
>
> …
>
> (b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset…

174. The restrictions on the "expenditure" come from the subsequent words of the subsection. I see no basis to constrain the meaning beyond those words. "Expenditure" may therefore include amounts which fall to be categorised as gifts for example.

175. In considering the "wholly and exclusively" requirements of the subsection I agree with Mr Mullan that the decision in Vodafone is relevant even though it was considering "wholly and exclusively" in a different context. In particular, Millett LJ (as he then was) set out a summary of the application of these words at paragraphs742-743 from which the following elements are particularly relevant:

> …To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.
>
> 3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.
>
> 4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.
>
> To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment.

176. As Mr Mullan submitted the object of the taxpayer must be identified and that is different from the effect of a payment.

177. Mr Waldegrave relied upon the case of *Garforth*. In that case the taxpayer company was a member of a group where an associated company obtained loans from a bank in circumstances where that company provided security, one of its subsidiaries provided security and the taxpayer company also provided security. The other companies were placed into receivership and the taxpayer company entered into various arrangements as a result of which an amount of £40,000 together with interest thereon was paid into the banks account. The taxpayer company claimed a deduction on the basis of the payment having been made under the charge given to the bank as the charge and the loss incurred thereunder were wholly and exclusively for the purpose of its trade. The General Commissioners found that the interests of all the three companies were considered together when decisions are made, but upheld the taxpayers claim. Walton J allowed HMRC's appeal saying that if the interests of all three companies were considered together when deciding to offer the security the test of "wholly and exclusively" could not possibly, realistically, be held to have been satisfied. He went on to say that:

> " … It must in the nature of things be extremely difficult for any directors to associated companies in the position of the taxpayer company and [the associated company] to be certain whose best interests, or, rather, in whose exclusive interests, any step which they take is being taken… In my judgement, Commissioners should be extremely slow in coming to any conclusion that the act was done solely for the benefit of the trade of one of

> the companies concerned, and should in general do so only when there are wholly separate findings of primary fact not depending on the say-so of the directors concerned. I cannot resist the impression that in 99 cases out of 100 the correct primary fact to find will be that which was in fact found in this case; namely that in such a situation as the present the interests of all the companies were considered together. This is in accord with all the probabilities in the present and, indeed most foreseeable cases.

178. *Garforth* is not inconsistent with *Vodafone*. It is simply addressing the specific example of applying a "wholly and exclusively" test in the context of associated companies with common directors and, in particular, the approach to be taken to the evidence in such a situation.

DISCUSSION

GAAP treatment of the Additional Sum and Lavangna Guarantee

179. Both parties have proceeded on the basis that the first step is to consider whether SCL has correctly recognised amounts in respect of the Lavangna Guarantee and the Additional Sum in determining its profits in accordance with GAAP. I have therefore started first with the GAAP analysis although of course not all expenses correctly deducted in a company's profit and loss account will fall within the loan relationships rules. Indeed, the expert report prepared by Mr Gardiner for SCL concludes that the Additional Sum was incurred in order to enable the sale of Swiss Centre to go through and as such should be treated as a loss in its profit and loss account. He does not conclude that it is an amount relating to a loan relationship or otherwise link it to any loan relationship or related transaction.

180. The experts have each provided a report and there is a further joint report focusing on the areas of difference between them.

181. Mr Mullan called into question the objectivity of Mr Jones' report. Mr Jones is employed by HMRC. I have applied *Field v Leeds City Council* [1999] EWCA Civ 3013 which confirms that there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties.

182. Mr Jones' qualifications have not been called into question. I am satisfied that, as both parties acknowledged at the hearing, the difference in opinion between him and Mr Gardiner was a result of their different views of the facts. Each of them could only produce their opinion on the basis of the factual information provided to them. Both of them have reached a conclusion about the facts which they have stated clearly in their reports and I find no reason to conclude that Mr Jones has been any less subjective than Mr Gardiner in so doing.

183. The parties have agreed that:

(1) the accounting treatment depends upon the substance of the transactions;

(2) it is ultimately a question for the Tribunal in terms of its findings of fact to determine the substance of the transactions.

184. Furthermore, at the hearing it was agreed that the nub of the difference between the two expert opinions is whether and to what extent there was a commercial benefit for SCL in paying the Disputed Sum.

185. It was also agreed that if the payment of the Additional Sum and the payment made in relation to the Lavangna Guarantee were not distributions then they should be accounted for as expenses through the profit and loss account. At the hearing Mr Gardiner went one step further and agreed that if a company makes a payment to a connected party for which they receive some benefit, but not a benefit commensurate with the payment made, then the transaction will be split across the profit and loss account and treatment as a distribution.

186. Mr Gardiner says that the transactions were initially recorded as SCL being owed the money it provided to the Larkmount subsidiaries to acquire the development properties. He confirms that SCL now accepts that it was incorrect to record the excess of the amount provided to the companies above the net asset value of the companies (i.e. the market value of the properties) to have been lent. In other words, the Additional Sum was not lent to the Larkmount companies by SCL. It was however a cost of SCL's finance in Mr Gardiner's view.

187. The restated accounts of SCL show the cost of entering into the Deed (including the payment relating to the Lavangna Guarantee of €11.5 million) as a cost of £33,792,086 (the Disputed Sum) to be taken as an expense in the profit and loss account. In reaching this conclusion Mr Gardiner explains that the principle of reporting a transaction to reflect substance rather than its legal form was permitted under Financial Reporting Standard 5 - Reporting the Substance of Transactions ("FRS5").

188. Mr Gardiner explains that the rationale for treating the Disputed Amount as a charge to the Profit and Loss Account is based on:

(1) SCL having to enter into the transaction in order to secure the sale of the Swiss Centre knowing that the assets which would be released had values well below the amount which was having to be paid to NAMA and with little comfort that they would be able to recover even the estimated market values at the time;

(2) in any event SCL concluding that they had to make the payments required by NAMA in order to secure the sale of the Swiss Centre at an attractive value, while at the same time facilitating repayment of the SCL borrowings of about £106 million in full and avoiding lengthy and costly legal action and further dispute with NAMA;

(3) accepting that in order to secure the sale of the Swiss Centre SCL had to enter into the Deed in order to secure NAMA's consent to release security over the property. He considers that there is no information available to him which contradicts the stated position of SCL that it had no option but to make the payments. However, at the hearing he acknowledged that if it was in fact the case that the Disputed Sum was going to be paid before the DS1 issue ever arose that would alter his conclusions.

189. In contrast, Mr Jones focuses particularly on what he describes as the sphere of influence of Mr Laverty and Mr McAleer in relation to the MAR Connection. He views the payment of the Disputed Sum to NAMA as having been facilitated by Mr Laverty and Mr McAleer from the net proceeds of SCL's development property to reduce the liabilities of other entities within their sphere of influence. He considers that they personally benefited from the payment as they reduced their personal liabilities and the liabilities of companies that they owned. Furthermore, he relies on the fact that SCL had no interest in the Indebted Entities or the purchase of their properties. He concludes that SCL received no direct benefit from the transfers of the properties and repayment of facilities by the Indebted Entities. He relies on the evidence that legal action could be taken to ensure that NAMA released its security over the Swiss Centre. He concludes that the effect of the Swiss Centre sale was to convert the equity in the project into cash which was available to support Mr Laverty's and Mr McAleer's other business ventures.

190. Mr Gardiner responds in the joint report to say that although Mr Laverty, Mr McAleer and entities owned or controlled by them may be seen as benefiting from the payment to NAMA, those benefits merely flowed from the sale of the Swiss Centre which first required SCL to agree to pay £163 million to NAMA.

191. In relation to the Lavangna Guarantee, Mr Jones considers that there is little commercial reason for SCL to have given that Guarantee. SCL received no consideration or substantial

commercial benefit or return for providing the Guarantee. Mr Jones works on the basis that Lavangna was owned by Mr Laverty and Mr McAleer to conclude that monies due to SCL (as owner of the Swiss Centre) were used to repay the debt of a company owned by Mr Laverty and Mr McAleer.

192. Given my findings made earlier I conclude that Mr Gardiner's report contains the following factual problems or errors:

(1) he states that the amount of €11.5 million was applied in settlement of the SCL guarantee but he has not addressed the fact that Lavangna had the primary obligation to make the payment, is stated under the Deed as having done so and this would have been the basis on which the payment was made at the time for the reasons I have previously explained. Indeed, at the hearing he repeated that the basis of his analysis was that the Lavangna Guarantee was given in 2009 in the expectation that it would not be called upon and was only crystallised in relation to the NAMA settlement. He does not take into account the existence of the obligation to pay €11.5 million out of the sale of the Swiss Centre aside from the Lavangna Guarantee;

(2) he states that under the terms of the Deed SCL agreed to purchase or procure the purchase of the various Indebted Entities' properties. However, SCL had little basis on which to procure that action given that it had no influence over those companies (in contrast to the Capital Trust). The fact that SCL is treated as having been the owner of the Swiss Centre at the time does not affect that issue;

(3) the failure to recognise any issues with the fact that the Larkmount subsidiaries were set up under the Capital Trust and not the SCL/Discretionary Trust "group" continues into his analysis of the fund flows as recorded through book entries. He says that cash was recorded as having flowed from SCL through each of the new subsidiary companies, through the original Indebted Entity companies and recorded as reducing the debts owed to the lenders. However, he does not acknowledge any issues with SCL being the beneficial owner of the cash (given its ownership of the Swiss Centre), but the funds moving to companies under the Capital Trust structure where the amounts have been accepted as non-recoverable ab initio;

(4) he states that the directors of SCL and the directors of the Discretionary Trust resisted NAMA's initial requests for the MAR Connection debts in the Indebted Entities to be dealt with through the proceeds of the sale of the Swiss Centre because of the issues with the Trust making assets available to secure meet third party liabilities. However, there is no little basis to conclude that it was the directors of SCL and/or the trustees of the Discretionary Trusts considering these issues at the time. Making the assumption that it was the directors of SCL and the Trustees of the Discretionary Trusts who considered the issue is an example of the incorrect extrapolation by Mr Gardiner of the fact that the Swiss Centre is to be treated as having been held by SCL at the relevant time. While I recognise that it was the same two individuals, Mr McAleer and Mr Laverty, who were taking the decisions and who were the directors of SCML, trustees of the Discretionary Trusts and directors of SCL, there were different circumstances to be considered when acting in each of those roles;

(5) That same error is continued when Mr Gardner says that he assumes that the "Directors of SCL and the trustees of the two Discretionary Trust fully considered the legal and fiduciary duties and proceeded with the transaction on the basis that it was in the best interests of SCL and the ultimate shareholders and beneficiaries". There is little evidence as to what the directors SCL thought at the time in their role as directors of that

company and in any event they would have done so on the premise of not owning the Swiss Centre

(6) Similarly, he states that in November 2011 the directors of SCL did not enter into the transaction on the basis that the full amount of the funding would be recovered from the respective Larkmount subsidiaries and the partnerships. He says Instead they entered into the transaction in order to release the Swiss Centre for sale and to avoid delay and further cost in dispute;

(7) Again later in the report the same problem arises when he states that the payment of the amount in excess of the net asset value of the Indebted Entities assets was approved by the Directors of SCL and paid through the settlement of the Deed on the basis that it was the "cost" to SCL completing the sale. I have been provided with no evidence that the directors of SCL approved at the time or have retrospectively approved the payment.

193. The fact that the Indebted Entities were not in the same part of the MAR Connection as SCL was expressly noted in the joint report. However, Mr Gardiner makes no comment relation to this. His analysis is entirely founded on the conclusion that the payments made under the Deed were simply made in order to allow completion of the sale of the Swiss Centre to Al Faisal Holding Limited. In the joint report he does not address the assumptions made by him about the decisions of SCL's Directors.

194. In relation to the Lavangna Guarantee payment Mr Gardiner refers to the "calling" of the Guarantee, whereas I have found that the Guarantee was not called and payment was made by Lavangna. Indeed, I have relied in part on his evidence in his report where he sets out the book entries for the Lavangna payment showing the money moving from SCL to Lavangna's new Larkmount parent which in turn passed the money to Lavangna for it to repay its facility.

195. Much of Mr Gardiner's report addresses the entire Disputed Sum as one adjustment on the basis that all of it was a cost of securing the sale of the Swiss Centre although in the joint report he recognises that the Lavangna Guarantee was granted in 2009 and concludes that it was in substance part of SCL's cost of borrowing as SCL was obliged to agree to it as a condition of AIB releasing further funds to complete the development of the Swiss Centre.

196. However, Mr Gardiner also states that the "calling of the Guarantee" was different in nature to the other parts of the Dispute Sum as it "did not relate directly to a property geld or to be required". He concludes, however, that even if the Lavangna Sum is excluded from being treated in the same way as the remainder of the Disputed Sum, it would still have to be charged against the profit and loss of SCL as it represented a loss to the company in the accounting period ended 31 March 2012.

197. I have found that there was a mixture of reasons for the provision of the Lavangna Guarantee:

(1) To enable Lavangna's debt facilities to remain in place such that its development could continue;

(2) To deal with the immediate threatened risk to the LSI Facility and so to the development of the Swiss Centre;

(3) To enable the MAR Connection to avoid the problems for the business as a whole if the LSI Facility was called in or otherwise stopped such that the Swiss Centre development was stopped.

198. However, Mr Jones's report is also based on certain incorrect facts. He also fails to take into account that decisions made in and around November 2011 by the directors of SCL could only have been made on the basis of their understanding at the time which was that the company

no longer held the beneficial ownership of the Swiss Centre. In addition, Mr Jones quite understandably works from the basis of statements in the relevant companies' accounts to conclude that SCL, Lavangna and others were ultimately controlled by Mr McAleer and Mr Laverty rather than by the Discretionary Trusts. Indeed, in their joint report both experts work on the basis that Lavangna was owned by Mr Laverty and Mr McAleer. These assumptions were wrong. At the hearing Mr Jones struggled to respond to the fact that the corporate Indebted Entities moved into the separate Capital Trust structure.

199. Mr Jones also relies on the fact that SCML was the owner of Larkmount and Mr Laverty and Mr McAleer were the sole shareholders of SCML. He does not take into account the fact that SCML was holding assets as fiduciary for the Capital Trust.

200. I have concluded that or all of the reasons I have identified Mr Gardiner's report is based on an assumption of facts which is not consistent with the findings I have made. While I recognise that the application of FRS5 looks to the substance of transactions and not the legal form, Mr Gardiner's conclusions are predicated upon facts which I have found to be incorrect. Given the issues which go to the core nature of the Disputed Sum and the purpose for which it was paid, I find that Mr Gardner's report is insufficient for me to conclude that payment of either the Lavangna Sum or the Additional Sum by SCL should be treated as an expense in its profit and loss account on the basis of it solely being paid to deal with the DS1 issue. He acknowledged at the hearing that if there was a mixture of reasons for the payment of the Disputed Sum this would alter his analysis.

201. I have also identified issues with Mr Jones' report which reduces the weight given to his opinion. However, at the heart of his opinion is the view that the payment of the Disputed Sum was for the benefit of the MAR Connection and Mr McAleer and Mr Laverty. While Mr McAleer and Mr Laverty cannot benefit themselves under the terms of the Discretionary Trusts and the Capital Trust, I have found that the reasons for agreeing the deal with NAMA and paying the Disputed Sum included the various MAR Connection benefits identified earlier in this decision. There was a mixture of reasons for the payment of the Disputed Sum. When standing back from the detail of the transactions to look at the substance the benefits for the MAR Connection mean that there should be some element, at least, of distribution taken into account such that the entire Disputed Sum would not be treated as an expense. In the case of the Lavangna Sum the payment was more closely aligned to the access of finance for LSI (and consequently SCL) in 2009, but even there I have found that the reasons for making the commitment to pay the €11.5 million were not simply limited to that development funding, but extended to other MAR Connection benefits.

202. Mr Mullan submitted that it could not be concluded that there was a distribution as the provisions of the Discretionary Trusts and the Capital Trust excluded Mr McAleer and Mr Laverty from benefit. However, treatment as a distribution does not require a conclusion that the distribution ended with Mr McAleer and Mr Laverty. Value moved from SCL (held by the Discretionary Trusts) to companies ultimately held by the Capital Trust whose beneficiaries were the same as the beneficiaries of the Discretionary Trust.

203. For all the reasons stated above I have concluded therefore that SCL has not shown that the Disputed Sum should be treated as an expense in its profit and loss account.

204. However, SCL's position is that even if I conclude that the Disputed Sum should not be treated as an expense under GAAP, a debit would nevertheless need to be taken into account under the loan relationship rules in order fairly to represent the losses and/or expenses arising to SCL from its loan relationships under s307 CTA 2007.

205. I therefore move on to further consider the application of those rules.

Loan relationship rules – the Additional Sum

206. The starting point is to identify the loan relationship to which the payment of the Additional Sum can be related.

A loan relationship between LSI and SCL

207. I start with the analysis put forward by Mr Mullan relying upon the loan between LSI and SCL as HMRC conceded that it was a "loan relationship".

208. LSI obtained the LSI Facility, the monies from which were then lent on to SCL to fund the development of the Swiss Centre. Mr Waldegrave accepted on behalf of HMRC that there was a loan relationship between LSI and SCL and the release of the Charge by NAMA is a related transaction for that loan relationship.

209. This means that I then need to determine whether the Additional Sum was a loss arising to SCL from that loan relationship and/or whether the release of the Charge was a related transaction in relation to which the Additional Sum was a loss.

210. Mr Waldegrave relied upon the case of *Hexagon Properties Limited.* As Judge Poole identified in that case, the central issue, made clear in the case of *Union Castle Steamship Co Ltd v HMRC* [2020] EWCA Civ 547 (albeit in another statutory context) is the use of the phrase "arise from" in the legislation. Section 306A brings into account "profits and losses of the company that arise to it from its loan relationships and related transactions…".

211. In the case of *Union Castle* an accounting debit arose for the taxpayer company where 95% of the value of relevant derivative assets owned by it was de-recognised as a result of an issue of shares which effectively transferred that benefit to the company's parent. The question was whether the loss did "arise from" the derivative contracts or the issue of shares. Both the Court of Appeal and the Upper Tribunal decided that the loss arose from the issue of shares.

212. Judge Poole in *Hexagon Properties* accepted that following *Union Castle* a "direct causal connection" is required to satisfy the "arise from" wording. He concluded that a payment resulting in a release by a bank of a debt owed to it by the taxpayer in the context of settlement of a claim by the taxpayer against the bank, arose as a result of the taxpayer claiming damages against the bank and not from any related transaction of its loan relationships. That conclusion was reinforced by the GAAP compliant accounts which identified the payment as receipt for compensation for the mis-selling of a product by the bank to the taxpayer.

213. Judge Poole drew a comparison with an example referred to in the case of the owner of a company deciding to release a large debt owed to her by the company, which he was satisfied would be chargeable under the loan relationship regime as a profit arising from the release and not as "arising from" the bounty of the shareholder in releasing the debt.

214. In this case I am not satisfied that there is sufficient causal connection between the payment of the Additional Sum and the related transaction of the release of the Charge for the payment to be considered of the Additional Sum to "arise from" that transaction. While I recognise that the posturing by NAMA, when it indicated that it would not provide the DS1, brought the parties to the position of finally agreeing a deal, the Additional Sum was paid for a raft of reasons as set out earlier and had been on the table for some 6 months.

215. I recognise that without the Swiss Centre sale, SCL would not have been in a position to make the payment and the sale was facilitated by the deal with NAMA being agreed. Thus it can be said that the Additional Sum was connected to or related to the release of the Charge. Indeed, I have found that the payment of the Additional Sum facilitated the sale of the Swiss Centre. As Mr Waldegrave submitted when I raised this understanding of the facts with the parties at the hearing, the Additional Sum can be said to "arise from" a general facilitation

commitment to expedite the sale. That does not fall within the narrower confines of s.307. There is insufficient nexus for me to conclude that the payment "arose from" the related transaction of the release of the Charge. Its true causal nexus was the indebtedness of the Indebted Entities.

216. Mr Mullan relied alternatively upon s307(4)(c) to submit that the payment was made "as a result of" the Charge. He did not seek to rely on any particular authority for the meaning of the phrase "as a result of". I note that the legislation simply requires the loss to be "a result of" not "the result of" a related transaction, but this provision is in the context of explaining the meaning of "all expenses incurred by the company under or for the purposes of those relationships and transactions".

217. I agree with the submission of Mr Waldegrave that the Additional Sum related to a wider fact pattern and should not be specifically related to the release of the Charge. The Additional Sum was not incurred by SCL under or for the purpose of the LSI/SCL loan relationship, or under or for the purpose of the Charge. The loss from payment of the Additional Sum did not result from the release of the Swiss Centre charge; it resulted from the deal with NAMA rooted in the indebtedness of the Indebted Entities.

218. Moreover, it was not SCL who paid the Additional Sum to NAMA – the Indebted Entities did. SCL provided monies to the Larkmount subsidiaries to fund their newly acquired subsidiaries, and provided monies to Timec and Canterbrook Developments directly. The Indebted Entities then used the monies to repay their debts accordingly. None of that involves payment for release of the Charge or even for the DS1.

219. SCL says that the circumstances overall should be considered and in particular the threat by NAMA not to provide the DS1 on the sale of the Swiss Centre. SCL says that it was this threat that caused them to finally agree and sign the NAMA deal and therefore the Additional Sum should be attributed to the need to obtain the release of the charge. However, I have found little basis to attribute the Additional Sum (or indeed any element of the deal reflected in the Deed) to release of the Charge. Instead, NAMA's "threat" brought the MAR Connection back to the table when, as the witnesses described, the MAR Connection was otherwise seeking to sell the Swiss Centre and negotiate with NAMA from the position of strength that resulted. That bringing to the table is not enough to make the ultimately paid Additional Sum a payment made as a result of the Charge. It was a payment made as a result of the overall relations between NAMA and the MAR Connection and the indebtedness of the Indebted Entities. As said at most it can be said to have facilitated the Swiss Centre sale, but, even stepping back from the detail, that facilitation was not a payment made under or for the purposes of SCL's loan relationships and related transactions.

Loan relationship arising from the LSI Guarantee

220. Mr Mullan submitted that the LSI Guarantee creates a money debt and is treated as a transaction for the lending of money as a result of s.303(3) which states that "a money debt is a debt arising from a transaction for the lending of money for the purpose of this part of an instrument is issued by any person for the purposes of representing security for the debt". He submits that it does not matter that the LSI Guarantee was not called upon. There was an immediate obligation to pay any amount which was due, or may become due, from LSI on a demand being made. Mr Mullan recognised that there was no liability until there was a demand, but sought to draw an analogy with borrowing an amount from a bank on terms that it is repayable one year later. Mr Mullan relied on the cases of *Shop Direct*, *Amalgamated Metal* and *Greene King* to submit that "money debt" should be construed widely.

221. I consider that there is a very real difference between the contingent liability of the LSI Guarantee, requiring a demand to be made, and a known actual liability to pay at a future date.

In a response to questions from me in the hearing Mr Mullan confirmed that the LSI Guarantee was not reflected in SCL's accounts. In comparison the theoretical debt repayable after a year has passed would be reflected in a company's accounts. The loan relationship rules are rooted in the idea of the alignment of the tax treatment of loan relationships with their accounting treatment.

222. Turning to the authorities relied upon by Mr Mullan, in *Shop Direct* the Court of Appeal considered the nature of HMRC's obligation to repay overpaid VAT. It was held that that obligation was an obligation to repay a sum or sums of money and the right to receive it was a right to a sum or sums of money. The fact that the amount was found to be ascertained by reference to matters which vary from time to time was irrelevant. It remained from start to finish a primary obligation to pay a sum or sums of money and was, from the perspective of the recipient, a money debt. That approach was adopted by Judge Mosedale in *Amalgamated Metal Corporation plc* who concluded that a restitutionary claim in the context of a claim to repayment of advance corporation tax which had been unlawfully paid to HMRC gave rise to a money debt.

223. However, both cases involve situations where an amount of money has been paid by one person to another in circumstances where it later becomes clear that the payor was always entitled to repayment. That is quite different to the situation of a guarantee. I agree with Mr Waldegrave that no debt arose until the guarantee was called upon. There is no sense in which it can be said that SCL had any entitlement to be paid as a result of the uncalled LSI Guarantee.

224. I recognise that in the case of *Greene King* the Court of Appeal when concluding that the assignment of a right to interest brought about a relationship of creditor and debtor as between the assignee and the borrower albeit that the debt was payable in the future, emphasise the wide nature of the loan relationships rules stating (at paragraph 46) that the code "embraced a wide category of corporate debt, which would not in ordinary legal or trade terms be categorised as a loan". However, *Greene King* is not authority for stretching the meaning of a relationship beyond situations where there is a money debt. In that case itself there was an obligation on the borrower to pay the assignee the amount of interest, albeit at a future date. Furthermore, the Court of Appeal noted in the context of its conclusions regarding the width of loan relationships the fact that the conclusion in that case that there was a loan relationship was consistent with the accruals basis of accounting. The court looked to that key foundation of the rules in making tits decision. That is not possible her where there has been no reflection of the LSI Guarantee in SCL's accounts.

225. I therefore conclude that the LSI Guarantee does not qualify to be treated as a loan relationship of SCL.

LOAN RELATIONSHIP RULES-THE LAVANGNA SUM

226. Mr Mullan submitted that the €11.5 million paid under the Deed was paid to settle SCL's obligations under the Lavangna Guarantee. The acquisition of the rights under that loan relationship was a related transaction. SCL suffered a loss as the rights were worthless. As Lavangna was not connected to SCL (within section 466 CTA 2009) the debit for that loss would be recognised in the usual way. SCL says that when it settled the sum due under the Lavangna Guarantee it was subrogated to NAMA's rights in relation to Lavangna and became a creditor in relation to that loan relationship.

227. During the hearing HMRC conceded that when SCL paid the €11.5 million (either under the Lavangna Guarantee or as an amount paid on behalf of Lavangna) it became a creditor in respect of a money debt from Lavangna. Given that that concession was made I have addressed the case as presented by both parties. However, I would note that my findings of fact conclude that the Lavangna Sum was paid by SCL to Lavangna's immediate parent company which on

lent it to Lavangna. SCL did not pay NAMA the amount directly. It did not pay the amount on behalf of Lavangna. As a practical matter, the money was paid by the Capital Trust out of the Swiss Centre sales proceeds (to save the money being transferred through numerous bank accounts). However, that was just payment mechanics short-circuiting the various intragroup movements and does not detract from the analysis of the payments, which in this case means it was Lavangna who paid off its debt, not SCL under the Lavangna Guarantee.

228. Turning back to the case as presented, HMRC maintained that the conceded money debt owed by Lavangna to SCL was not a debt which arose "from a transaction for the lending of money". SCL could only have been said to become a creditor because it had paid an amount on Lavangna's behalf; and applying the case of *MJP Media Services Limited v HMRC* that does not result in a transaction for the lending of money unless there is evidence that provides for the amount in question to be treated as a loan.

229. Mr Mullan did not seek to distinguish the *MJP Media Services* case or argue that the interpretation should be different. Indeed, I respectfully agree with, and adopt, the reasoning of Sir Stephen Oliver and Judge Redston in that case, in particular at paragraph 90:

> "the phrase "for the lending of money" is thus a limiting provision as well as a defining one. Helped by the decision in *Potts*, we find that the plain meaning of the words in Finance Act 1996 does not stretch to include payments to a third party which discharge the debt of another…"

230. I agree with Mr Waldegrave that any money debt arising as a result of the Lavangna Sum did not arise from a transaction for the lending of money by SCL to Lavangna, given the lack of evidence that the parties intended a loan to arise.

231. Furthermore, at the point at which SCL became a creditor of Lavangna, having paid the €11.5 million to NAMA, the rights against Lavangna were worthless. Lavangna was an insolvent company. As Mr Waldegrave submitted the rights against Lavangna were worth nothing ab initio. Therefore there cannot have been any value to be recognised in SCL's accounts for the rights to which a debit would have applied.

232. In the hearing Mr Mullan sought to relate the SCL payment back to the Lavangna Facility as the transaction for the lending of money. However, that was not a loan relationship of SCL's.

233. I therefore conclude that the Lavangna Sum was not deductible as a debit paid under the loan relationship rules without going further to address the unallowable purpose rules.

WAS THE ADDITIONAL SUM A COST OF ENHANCING THE VALUE OF THE SWISS CENTRE FOR THE TAXATION OF CHARGEABLE GAINS?

234. The crux of this question lies in the "wholly and exclusively" requirement in s38 TCGA. Applying the *Vodafone* principles for the reasons explained earlier, I therefore considered what the object of the payment of the Additional Sum was. *Vodafone* makes clear that the taxpayer's subjective intentions are generally determinative, although some consequences are so inevitably and intrinsically linked that they must be taken to be a purpose for which the payment was made.

235. SCL's case is that I should look beyond the terms of the Deed and identify for what the additional amount was really paid. SCL's witnesses say that the amount was paid as a result of the threat by NAMA to withhold the DS1 and therefore should be treated as a payment to obtain that DS1. In my earlier findings I have identified that the position is more nuanced.

236. If I start with the Deed itself, it is clear that the Additional Sum was not paid in order to release the DS1. It was at its core a negotiated amount of repayment of the debts owed by the Indebted Entities to NAMA.

237. Furthermore, when I apply the approach of *Vodafone* in this case there are some particular characteristics of the evidence. Firstly, one would generally look to the evidence of the directors of a company in order to determine the subjective intentions of the company. In this case the only director of SCL who gave evidence was Mr Surphlis. Mr Mullan submitted that this was not an issue as the people who were involved on the ground in negotiations gave evidence. While the evidence of SCL's witnesses has been given weight as I have described earlier in this decision that is still not the same as hearing the evidence of the directors. Mr Surphlis was a director of SCL at the relevant time and his evidence in his Witness Statement was not challenged. However, it does not address the intentions of SCL at the time of the NAMA transactions; or even address what the directors would have thought had they known that SCL continued to hold the beneficial ownership of the Swiss Centre.

238. Indeed, there is an added complication in this case by virtue of the fact that the entity entering into the NAMA transactions was thought by all involved to be the Capital Trust as beneficial owner of the Swiss Centre. Therefore it would be difficult to say the least to identify what the intentions of SCL were. The conclusion that the Capital Trust entered into the transactions effectively as bare trustee for SCL does not enable some mental leap to follow as to the intention of SCL at the time.

239. In practical terms all the key decisions were taken by Mr Laverty and Mr McAleer as described in the evidence before me. This is a paradigm example of the problems identified in *Garforth* where individuals are directors of more than one associated company involved in a transaction. They were directors of all the companies involved in the NAMA transactions and were directors of the fiduciary company, SCML. At the time they were taking the key decisions in relation to the NAMA transactions on the basis that the Capital Trust owned the Swiss Centre and paying the Additional Sum in the context of the Deed enabled the MAR Connection to achieve the transfer of the development properties into the Capital Trust structure free of encumbrance. There was benefit for several companies and entities in the MAR Connection in entering into the Deed and paying the Additional Sum. I have little doubt, as explained before, that Mr McAleer and Mr Laverty were considering the interests of the MAR Connection overall.

240. Even if I step back from these evidential issues and focus on the evidence provided by Mr Higgins and Mr McAllister of the reasons for the agreement with NAMA I have found earlier that the threat of withholding the DS1 had focused the minds of the MAR Connection and brought them to the point of signing the deal with NAMA so that the sale of the Swiss Centre could take place with all the benefits previously identified.

241. Therefore for all these reasons I conclude that the Appellant has not shown that the Additional Sum was paid wholly and exclusively for enhancing the value of the Swiss Centre.

CONCLUSION

The appeal of SCL is therefore dismissed. The Disputed Sum is not deductible in calculating its profits for corporation tax purposes for the accounting period ended on 31 March 2012.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

242. 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.

JUDGE TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 22nd MAY 2023