[2020] UKFTT 443 (TC)

TC07920

INCOME TAX/CORPORATION TAX – Acquisition of Barclays Global Investors – Loan notes issued to parent company to finance investment – Whether loans would have been on the same terms and in the same amounts if between independent enterprises – If not, would independent enterprises have entered into the loans – Whether 'main purpose' of loan relationship was to secure a tax advantage – If so, what was the amount of any debit attributable to such a purpose – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08836

BETWEEN

BLACKROCK HOLDCO 5 LLC **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 4 – 6 and 9 – 10 March 2020

Kevin Prosser QC and David Yates QC, instructed by Simmons & Simmons LLP, for the Appellant

David Ewart QC and Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. BlackRock Holdco 5 LLC ("LLC5") appeals against closure notices issued by HM Revenue and Customs ("HMRC") amending its company tax returns for the accounting periods ended 30 November 2010 to 31 December 2015, inclusive. The amendments to the returns disallow the deduction by LLC5 of loan relationship debits in respect of the interest payable (the "Interest") on, and other expenses relating to, $4 billion worth of loan notes (the "Loans") issued by LLC5 to its parent company, BlackRock Holdco 4 LLC ("LLC4").

2. The parties have agreed that the following issues arise in this appeal:

(1) For each relevant accounting period, was a main purpose of LLC5 being a party to the loan relationships with LLC4 to secure a tax advantage for LLC5 or any other person?

(2) Insofar as securing a tax advantage was a main purpose of LLC5 for any relevant accounting period, what amount of any debit is attributable to such a purpose on a just and reasonable apportionment?

(3) Whether the Loans between the LLC5 and LLC4 differ from those which would have been made between independent enterprises, taking account of all relevant information, including:

(a) Would the parties have entered into the loans on the same terms and in the same amounts if they had been independent enterprises?

(b) If the answer to question (a) is negative, would they, as independent enterprises, have entered into the loans at all, and if so, in what amounts, at what rate(s) of interest, and on what other terms?

Issues 1 and 2 are described as the "Unallowable Purpose Issue" and Issue 3, the "Transfer Pricing Issue.

3. LLC5 was represented by Kevin Prosser QC and David Yates QC. David Ewart QC and Sadiya Choudhury appeared for HMRC. While I am grateful for their clear and helpful submissions, both written and oral which I have carefully considered, in reaching my conclusions I have not found it necessary to refer to each and every argument advanced on behalf of the parties.

FACTS

4. The parties produced the following Statement of Agreed Facts ("SOAF"):

Background

(1) LLC5 is a limited liability company incorporated and registered in the State of Delaware.

(2) LLC5 is resident for tax purposes in the UK and registered for corporation tax.

(3) LLC5 is a member of a group of companies ultimately owned by BlackRock, Inc. (the "BlackRock Group"), a publicly owned and traded company incorporated and resident in the United States of America.

(4) In December 2009, the BlackRock Group undertook the acquisition of the worldwide Barclays Global Investors business ("BGI"). The dispute with HMRC arises out of the way that the acquisition of the US part of the BGI business ("BGI US") was structured.

Acquisition of BGI US

(5) On 16 September 2009 the following new limited liability companies were registered in the State of Delaware:

(a) LLC4;

(b) LLC5; and

(c) BlackRock Holdco 6 LLC ("LLC6").

(6) On 30 November 2009:

(a) BlackRock Financial Management Inc., an indirectly owned subsidiary of BlackRock Inc, incorporated in Delaware and tax resident in the US ("BFM"), executed the Limited Liability Company Agreement of LLC4 as its sole member. LLC4 elected to be a disregarded entity for US tax purposes with the result that the interest accruing to it under these arrangements was not taxed in the US;

(b) LLC4 executed the Limited Liability Company Agreement of LLC5 as its sole member; and

(c) LLC4 and LLC5 executed the Limited Liability Company Agreement of LLC6.

(7) On 1 December 2009:

(a) BFM entered into a Contribution Agreement with LLC4, pursuant to which BFM contributed $2,252,590,706 in cash and 37,566,771 shares in BlackRock, Inc. (the "BRI Shares") to LLC4.

(b) LLC4 entered into a Contribution and Issue Agreement with LLC5, pursuant to which LLC 4 contributed $2,144,788,229 in cash and the BRI Shares to LLC5 in return for 100 ordinary shares in LLC5 and the issue by LLC5 of the loan notes listed below (the "Loan Notes").

The Loan Notes

(i) Tranche 1 – a short term loan note in the amount of $420,000,000, repayable 26 November 2010, with interest of 2.2% (the "Short Term Loan Note");

(ii) Tranche 2 – a quoted Eurobond in the amount of $1,680,000,000, repayable 30 September 2014, with interest of 4.65%;

(iii) Tranche 3 – a quoted Eurobond in the amount of $1,400,000,000, repayable 30 September 2016, with interest of 5.29%; and

(iv) Tranche 4 – a quoted Eurobond in the amount of $500,000,000, repayable 30 September 2019, with interest of 6.62%,

(c) LLC4 entered into a Contribution Agreement with LLC6, pursuant to which LLC4 contributed $107,802,477 in cash to LLC6 in return for the issue of 100,000 common shares in LLC 6 (the "LLC 6 Common Shares").

(d) LLC5 entered into a Contribution Agreement with LLC6, pursuant to which it contributed $2,144,788,229 in cash and the BRI Shares to LLC6 in return for the issue of 2,400,000 preferred shares in LLC6 (the "LLC 6 Preference Shares").

(e) LLC6 completed the acquisition of BGI US by acquiring all of the outstanding shares in Delaware Holdings Inc from BGI for $2,252,590,706 and the BRI Shares.

The LLC6 Common and Preference Shares

(8) The LLC6 Limited Liability Company Agreement contained the following provisions regarding the LLC6 Common Shares and LLC6 Preference Shares (capitalised terms are as defined in that Agreement):

(a) Common and Preference share-holders had the right to attend and vote at meetings and the shares possessed voting power for the election of Board Members and for all other purposes under the Delaware Limited Liability Company Act or the LLC6 Limited Liability Company Agreement. Common Shareholders were entitled to 216 votes for each Common Share. Preference Shareholders were entitled to 1 (one) vote for each Preference Share. (sections 5.2(d) and 5.3(d)).

LLC5 had a total of 2,400,000 votes by virtue of its LLC6 Preference Shares. LLC4 had a total of 21,600,000 votes by virtue of its LLC6 Common Shares.

(b) The LLC6 Board of Managers (the "LLC6 Board") with the approval of all Members could establish different classes of shares (section 5.1). The number of preference shares could be increased by unanimous vote of the holders of all Shares (section 5.3 (c)).

(c) Section 6.1 stated that the Board would determine in its sole and absolute discretion the amount of Available Assets that were available for distribution and the amount, if any, of such Available Assets to be distributed to Members in accordance with the following order of priority:

(i) A total annual distribution of $300 per Preference Share (section 6.1(a)).

(ii) A total annual distribution of $20 per Common Share, but no Common Dividend to be made unless and until all Preference Dividends for such period had been paid (section 6.1 (b)).

(iii) Any unpaid amounts of either Preference or Common Dividends would be carried forward. Interest on any sum accrued but unpaid would accrue from 30 November of the year in which payment was due (sections 6.1(c) to (e)).

The Loan Notes

(9) On 15 March 2010, Tranches 2, 3 and 4 of the Loan Notes were admitted to the Official List of the Cayman Islands Stock Exchange.

(10) On or around 24 September 2010, LLC5 received a distribution of US$162,100,000 from LLC6. On 24 September 2010, LLC5's Board of Managers (the "LLC5 Board") approved a payment to LLC4 of $162,100,000 in settlement of interest accrued on Tranches 2, 3 and 4 of the Loan Notes. The payment was funded by the distribution from LLC6.

(11) On 26 November 2010:

(a) The Limited Liability Company Agreement of LLC6 was amended and restated to re-classify the 2,400,000 LLC6 Preference Shares held by LLC5 into

131,356 senior preference shares (the "LLC6 Senior Preference Shares") and 2,268,644 junior preference shares.

(b) LLC4 entered into a sale and purchase agreement with LLC5 to acquire the LLC6 Senior Preference Shares on 26 November 2015 for $420,000,000 (the "Prepaid Forward Contract"). The Prepaid Forward Contract gave the Appellant the option to settle the Contract in cash; and

(c) The obligation for LLC4 to pay LLC5 $420,000,000 for the LLC6 Senior Preference Shares was offset against the Appellant's obligation to repay the Short Term Loan Note.

(12) On 30 March and 23 September 2011, LLC5 approved and made further payments of interest that had accrued on Tranches 2, 3 and 4 of the Loan Notes.

(13) During 2012, the BlackRock Group was uncertain about the tax consequences of LLC6 paying a dividend and LLC 6 delayed making distributions to LLC5 until that uncertainty was resolved. LLC5 obtained alternative funding to service the interest payable to LLC4 in March 2012 on Tranches 2, 3 and 4 of the Loan Notes. On 31 March 2012, LLC5 entered into a loan agreement with LLC6, pursuant to which LLC6 loaned $92,640,000 to LLC5 (the "March 2012 Loan Agreement"). LLC5 used these funds to make the interest payments due on Tranches 2, 3 and 4 of the Loan Notes.

(14) In September 2012, LLC4 agreed to reduce the interest rates payable in respect of Tranches 2, 3 and 4 of the Loan Notes. The interest rates applicable to Tranches 2, 3 and 4 of the Loan Notes with effect from 1 October 2012 were as follows:

(a) Tranche 2: 3.08% per annum

(b) Tranche 3: 3.5% per annum

(c) Tranche 4: 4% per annum.

(15) In consideration of the reduction in the applicable interest rates on Tranches 2, 3 and 4 of the Loan Notes, the Appellant issued a short term promissory note to LLC4 in the sum of US$6,265,000.

(16) On 30 September 2012, LLC5 entered into a loan agreement with LLC6, pursuant to which LLC6 loaned $92,728,008 to LLC5 (the "September 2012 Loan Agreement"). LLC5 used these funds to make the interest payments due to LLC4 in September 2012 on Tranches 2, 3 and 4 of the Loan Notes.

(17) At a board meeting on 8 November 2012, the LLC5 Board resolved to approve, ratify and confirm the March 2012 Loan Agreement and the September 2012 Loan Agreement. The minutes of the 8 November 2012 meeting and the loan document that was presented to the LLC5 Board described the amount of the September 2012 Loan as $93,140,256. However, the amount of the September 2012 Loan as advanced by LLC6 to the Appellant and recorded in the Appellant's accounts was $92,728,008.

(18) In March and September 2013 and 2014, the Appellant made further payments to LLC4 in respect of interest that had accrued on Tranches 2, 3 and 4 of the Loan Notes. LLC5 funded these payments with dividends received from LLC6 in March and September 2013.

(19) Between September 2013 and June 2015, LLC5 made payments to LLC4 in accordance with the terms of the Limited Liability Company Agreement of LLC5. The details of those payments were as follows:

(a) In September 2013, a payment of $91,080,637;

(b) In December 2013, a payment of $184,950,255;

(c) In March 2014, a payment of $193,102,398;

(d) In June 2014, a payment of $237,840,114;

(e) In September 2014, a payment of $228,484,185;

(f) In December 2014, a payment of $269,889,965;

(g) In March 2015, a payment of $281,023,356; and

(h) In June 2015 a payment of $197,990,535.

(20) LLC5 funded these payments with dividends received from LLC6.

(21) Tranche 2 of the Loan Notes was refinanced in on or around its maturity date of 30 September 2014.

(22) In September 2015, LLC5 settled the Prepaid Forward Contract with a cash payment to LLC4 of $504,731,053.

Loan relationship debits claimed by the Appellant

(23) LLC5 has filed company tax returns for accounting periods ending 30 November 2010 to 31 December 2015.

(24) In computing its profits chargeable to corporation tax for the purpose of its tax returns, LLC5 took into account non-trading loan relationship debits to reflect the finance expenses that it had incurred in connection with the Loan Notes and the Prepaid Forward Contract in the periods to which the returns related (the "NTLR Debits").

(25) When it first filed returns for the accounting periods ending 30 November 2010, 31 December 2010, 31 December 2011 and 31 December 2012, LLC5 did not record NTLR Debits in its returns in relation to all of the finance expenses as the Appellant applied the provisions of Part 7 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA").

(26) The NTLR Debits that LLC5 initially recorded on its returns for the accounting periods ending 30 November 2010, 31 December 2010, 31 December 2011 and 31 December 2012 may be summarised as follows:

	30-Nov-10	**31-Dec-10**	**31-Dec-11**	**31-Dec-12**
	$	**$**	**$**	**$**
LLC5 finance expense ($)	194,520,000	16,915,072	197,639,405	217,012,641
TIOPA Pt 7 disallowance ($)	(169,639,999)	(15,440,001)	(186,280,000)	(169,360,148)
Deduction claimed ($)	**24,680,001**	**1,475,071**	**12,359,405**	**47,652,493**
FX rate USD to GBP per filed return	1.55101989	1.55821346	1.603426	1.585025
	30-Nov-10	**31-Dec-10**	**31-Dec-11**	**31-Dec-12**
	GBP	**GBP**	**GBP**	**GBP**
LLC5 finance expense (£)	125,414,252	10,855,427	123,260,696	136,914,333
TIOPA Pt & disallowance (£)	(109,502,141)	(9,908,784)	(115,552,573)	(106,850,143)
Deduction claimed (£)	**15,912,111**	**946,642**	**7,708,123**	**30,064190**

(27) At a meeting on 22 April 2013, BlackRock presented a paper to HMRC stating that it was now their view that the 'gateway test' in section 264(2)(c) TIOPA 2010 operated so that the provisions of Part 7 of TIOPA 2010 did not apply. BlackRock's position was based on the way that the gateway test applied to treat returns on fixed

income securities that were payable by BlackRock Life Limited to its policy holders as a 'relevant liability' for the purpose of calculating the 'worldwide gross debt' of the BlackRock Group.

(28) Following further correspondence, HMRC accepted BlackRock's position in a letter dated 15 January 2014 and asked for gateway test calculations and revised computations detailing the interest deductions that were now being claimed. In late 2015, the Appellant therefore filed amended returns for the accounting periods ending 30 November 2010, 31 December 2010, 31 December 2011 and 31 December 2012 to reflect that there was in fact no disallowance of the NTLR Debits required by Part 7 of TIOPA 2010.

(29) The full amount of the NTLR Debits that the Appellant has claimed through these amended returns and the original returns that it filed for the accounting periods ending 31 December 2013 to 31 December 2015 may be summarised as follows:

	30-Nov-10	**31-Dec-10**	**31-Dec-11**	**31-Dec-12**
	$	**$**	**$**	**$**
LLC5 finance expense ($)	194,520,000	16,915,072	197,639,405	217,012,641
TIOPA Pt 7 disallowance ($)	0	0	0	0
Deduction claimed ($)	**194,520,000**	**16,915,072**	**197,639,405**	**217,012,641**
FX rate USD to GBP per filed return	1.55101989	1.5582135	1.603426	1.585025
	30-Nov-10	**31-Dec-10**	**31-Dec-11**	**31-Dec-12**
	GBP	**GBP**	**GBP**	**GBP**
LLC5 finance expense (£)	125,414,252	10,855,427	123,260,696	136,914,333
TIOPA Pt & disallowance (£)	0	0	0	0
Deduction claimed (£)	**125,414,252**	**10,855,427**	**123,260,696**	**136,914,333**

	30-Nov-13	**31-Dec-14**	**31-Dec-15**	**Total**
	$	**$**	**$**	**$**
LLC5 finance expense ($)	139,337,886	128,243,284	138,688,610	1,032,356,878
TIOPA Pt 7 disallowance ($)	0	0	0	0
Deduction claimed ($)	**139,337,886**	**128,243,284**	**138,688,610**	**1,032,356,878**
FX rate USD to GBP per filed return	1.564235	1. 647604	1.528227	
	30-Nov-13	**31-Dec-14**	**31-Dec-15**	**Total**
	GBP	**GBP**	**GBP**	**GBP**
LLC5 finance expense (£)	89,077,323	77,836,230	90,751,315	654,109,576
TIOPA Pt & disallowance (£)	0	0	0	
Deduction claimed (£)	**89,077,323**	**77,836,230**	**90,751,315**	**654,109,576**

HMRC enquiries

(30) Between 2012 and the date on which LLC5 lodged the appeal HMRC issued notices of enquiry into each of the Returns (the "Enquiries") as follows:

Return period ending	**Date of Enquiry notice**
30 November 2010	29 March 2012
31 December 2010	29 March 2012 and 29 November 2012
31 December 2011	16 December 2013
31 December 2012	26 November 2014

31 December 2013	23 December 2015
31 December 2014	14 November 2016
31 December 2015	20 July 2017

(31) HMRC has issued notices of completion of its Enquiries (the "Closure Notices") as follows:

Return period ending	**Date of Closure Notice**
30 November 2010	22 November 2016
31 December 2010	22 November 2016
31 December 2011	22 November 2016
31 December 2012	22 November 2016
31 December 2013	22 November 2016
31 December 2014	22 November 2016
31 December 2015	16 August 2017

(32) For each of the returns, the Closure Notices concluded that "*no amount of the interest payable or the finance charges/or the payment to vary the terms of loan notes/or the other finance costs* [by LLC5 in respect of the Loan Notes in the return period] *is deductible for UK tax purposes and no amount may be included within the non-trade deficits arising on loan relationships as recorded on the company tax return for the period.*" Each closure notice was accompanied by a Commissioners' sanction under section 208 of TIOPA 2010.

(33) The schedule to each Closure Notice set out the amendments that the Appellant was required to make to the corresponding Return in order to give effect to the conclusions stated in the Closure Notice (the "Amendments") as follows:

"Non-trade deficits arising £0

Non-trade deficits maximum available for surrender as group relief £0"

(34) HMRC reached its conclusions and made the Amendments on the basis that:

(a) The NTLR Debits are attributable in full to loan relationships that have an unallowable purpose within the meaning of section 441 of Corporation Tax Act 2009; and

(b) Alternatively, the loan relationships that gave rise to the NTLR Debits are provisions within the scope of section 147 of Taxation (International and Other Provisions) Act 2010 and those provisions differ from the arm's length provisions that would have been made between independent enterprises.

Appeals against the Amendments

(35) LLC5 has submitted the following appeals to HMRC challenging the Amendments:

(a) On 9 December 2016, an appeal against the Amendments to the Returns for the accounting periods ending 30 November 2010 to 31 December 2014; and

(b) On 17 August 2017, an appeal against the Amendment to the Return for the accounting period ending 31 December 2015.

(36) On 20 November 2017, LLC5 lodged the present appeal proceedings against the Amendments.

Evidence and further findings of fact

5. In addition to the SOAF, I was provided with 12 lever arch files of documentary evidence. I also heard from the following witnesses of fact in support of LLC5:

(1) Nigel Fleming, who at the material time, as EMEA (Europe, Middle East and Africa) Head of Tax for the BlackRock Group, had been responsible for both product tax and corporate tax matters which included determining tax strategies and managing how the EMEA Group Structure fitted into the wider Group Strategies. Before joining the BlackRock Group Mr Fleming had been employed by Ernst and Young ("EY"), which he joined in 1987, where he was engaged in various roles in different jurisdictions. He attended the meeting (described below) of the board of managers of LLC5 on 30 November 2009; and

(2) J Richard Kushel, the Head of Multi-Asset Strategies and Global Fixed Income for BlackRock. He is a member of the BlackRock Group's Global Executive Committee, the highest level management body in the BlackRock Group, and a member of the Global Operating Committee. He was Chairman of the BlackRock Group's international business from February 2009 to August 2010. This role was classified as all business outside of the USA and Canada, which required him to move to London. He was resident in the UK between February 2009 and June 2011. Early in 2009 he was approved by the Financial Conduct Authority ("FCA") to serve as Chief Executive (Controlled Function 3) of an FCA authorised firm. Whilst Chairman of the international business Mr Kushel served as Chair of the boards of a number of BlackRock entities in the UK including BlackRock Investment Management (UK) Limited, the principal UK investment management company. He was formally appointed to the board of LLC5 on 30 November 2009 and presided, as chairman, of its board meeting on the same date.

I found both Mr Fleming and Mr Kushel to be credible, truthful witnesses who at all times sought to assist the Tribunal.

6. Although HMRC did not call any witnesses of fact, both parties, with the permission of the Tribunal, relied on expert evidence in relation to the Transfer Pricing Issue. Timothy Ashley, of Centrus Financial Advisors Limited, for LLC5, and Simon Gaysford, of Frontier Economics Limited, for HMRC. Their evidence is considered below in relation to the Transfer Pricing Issue.

Approach to the evidence

7. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) observed:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection,

the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

…

> 22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

8. However, in *Kogan v Martin & Ors* [2019] EWCA Civ 1645 Floyd LJ, giving the judgment of the Court of Appeal, said:

> "We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from The Business of Judging, Oxford 2000). But 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. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

9. Taking such an approach, as there is little between the parties in relation to the facts, I make the following additional findings of fact to expand on those as set out in the SOAF to hopefully provide a better understanding of the circumstances of the case.

Background

10. On 11 June 2009 the following press release was issued:

> "New York, June 11 June 2009, BlackRock Inc announced it had executed a purchase agreement to acquire Barclays Global Investors, BGI, including its market-leading ETF platform, iShares, from Barclays Plc. The combination of BlackRock and BGI would bring together market leaders in active indexed strategies to create the preeminent asset management firm operating under the name BlackRock Investors. …
>
> As one, BlackRock and BGI will have a world class product offering greater solutions-centred approach to retail and institutional clients. BGI's record of product innovation, risk analytics and leadership in quantitative investing, indexing and retirement solutions will complement BlackRock's expertise in active fund management, tailored solutions, innovative culture and risk management by our BlackRock's solutions.

> The firm’s products will include equity’s fixed income, cash management and alternatives, and will offer clients diversified access to global markets thorough separate accounts, common trust funds, mutual funds ETFs, hedge funds and closed ended funds.
>
> The ability to offer BlackRock’s global mutual funds alongside iShares will create an unmatched ability to tailor portfolios for retail investors. iShares is the industry leading ETF platform with over $300 billion of assets under management in more than 350 funds worldwide. iShares is a rapidly growing business ranking among the top three selling mutual fund and ETF families for the last three years.
>
> …
>
> We are incredibly excited about the potential to significantly expand the scale and scope of our work with investors throughout the world. The combination of active and passive investment products will be unsurpassed, and will enhance our ability to offer comprehensive solutions and tailored portfolios to duties and retail clients, said Laurence D Fink, BlackRock Chairman and CEO.”

The announcement also explained that,

> “Under the terms of the transaction BlackRock would acquire BGI in exchange for 37.8 million shares and common equivalents in BlackRock and $6.6 billion of case. The shares would represent a 4.9% voting interest and an aggregate of 19.9% economic interest in the combined firm which will be renamed BlackRock Global Investors.”

11. The acquisition of BGI by the BlackRock Group was described by The New York Times, on 11 June 2009, as “one of the largest deals in the money management industry, creating a juggernaut with nearly $3 trillion in assets”. Ten years later, on 11 June 2019, Pensions and Investments quoted Daniel Sondhelm, CEO of Sondhelm Partners who described the BlackRock-BGI deal as “a game changer”. Its significance was also recognised by Asset Management which, on 13 June 2019, described the transaction as having been a “once in a lifetime” deal.

12. I should remind myself at this point that, although the purchase agreement to which the press release referred related to the acquisition of BGI generally, this appeal concerns only the acquisition by the BlackRock Group of BGI US which was achieved by acquisition of the outstanding equity interests in Delaware Holdings. All subsequent references to BGI are, unless otherwise stated, to BGI US.

13. Perhaps not surprisingly, there had been much discussion as to the structure of this acquisition before the agreement was executed on 1 December 2009. Mr Fleming said that he first became aware of the BlackRock Group’s intention to acquire BGI from Barclays around May 2009. He explained that it was common practice within the BlackRock Group (and in his experience other global organisations) to delegate primary responsibility for framing capital transaction structures to the Corporate Tax Group. This was because, given the complex and global nature of the BlackRock Group, the Corporate Tax Group is the best placed function within the BlackRock Group to suggest the means through which movements of capital should be achieved while not falling foul of any unintended or inefficient tax consequences drawing on external professional advice where appropriate. At the time of the BGI acquisition EY was BlackRock’s principal external tax adviser.

14. The first discussion between BlackRock’s Corporate Tax Group and EY in relation to the structure of the BGI acquisition took place on 12 June 2009. On 27 June 2009 Mr Harris

Horowitz, the Global Head of Tax for the BlackRock Group, in an email asked EY to consider:

> "Where should [BlackRock] do debt push downs?"

Mr Fleming explained that the concept of a debt push down involves taking a debt incurred for the purpose of an acquisition and "pushing" it down through the holding structure of the acquisition vehicle or an intermediate holding company making intercompany loans, something that had been utilised by the BlackRock Group on the advice of EY in connection with the acquisition of Merrill Lynch Investment Managers in 2006.

15. EY had been given, what Mr Fleming described as, a "very broad remit" to consider the whole structure of the acquisition of BGI taking into account a wide range of options. Mr Fleming understood that EY had initially suggested that BGI should be acquired through a UK resident entity taking on intercompany debt to take advantage of the "generous tax regime for interest deductions" operating at that time. He explained that he was already aware of the concept of including a UK resident entity in an otherwise US resident holding structure having previously discussed the possibility with HMRC and the then Financial Secretary to the Treasury, Stephen Timms MP, in connection with the "worldwide debt cap" rules subsequently introduced by Part 7 of TIOPA to limit the extent to which UK tax deductions can be claimed for finance expenses incurred on loan relationships entered into between group companies.

16. However, rather than a UK limited company the decision was taken "relatively quickly" for BGI to be acquired by a US limited liability company ("LLC") that was UK resident. Mr Fleming believed that this change was because of potential changes to the US "check the box" regulations that were anticipated to operate so that non-US corporations would no longer be eligible to make an entity classification election and, if the change had come into effect, would have resulted in significant adverse US tax consequences which, if BGI had been held through a UK limited company, would have broken the US consolidated group. Although Mr Fleming understood it was possible that any amendment to the "check the box" regulations may have applied to a UK resident LLC, the risk was perceived to be much smaller.

17. Mr Fleming also recalled that there may have been some concerns as to whether the US financial regulator, the Office of the Comptroller of the Currency ("OCC") would have been "comfortable" with BGI being held through a UK limited company but was unable elaborate further.

18. In an email dated 24 July 2009 to John D Hamilton, of BlackRock's Corporate Tax Group New York whose responsibility included international tax globally including for the USA, Mr Fleming wrote:

> "JD as discussed some thoughts and talking points on the use of a US LLC resident for UK tax purposes in the UK, to acquire non-UK companies such as the US bank [ie BGI] …
>
> **Risk Rating Issues**
>
> HMRC will likely view the transaction as being aggressive, which may lead them to: (1) revisit out low risk rating; (2) seek other issues to challenge us on; (3) seek every means possible to challenge the structure itself including:
>
> - a more difficult thin cap negotiation.
> - Para 13(generally accepted to be toothless, but will need to ensure we don't create adverse evidence of intent.
>
> …

> Law Change Risk – I am somewhat wary that a "super-para 13" rule might get introduced (better grafted than toothless para 13). This was shelved by HMT/HMRC at the beginning of this year, but may come back on the table in coming years. This means that getting an arb clearance (where HMRC would have accepted that the allowed debt did not have a UK tax avoidance purpose) might be very valuable in the future."

19. As is apparent from the email, Mr Fleming had some reservations as to how HMRC might regard the transaction. He explained that the reference to "para 13" in the email was to paragraph 13 of Schedule 9 to the Finance Act 1996 (now s 441 of Corporation Tax Act 2009). As for it being "toothless" Mr Fleming explained that it was generally accepted that paragraph 13 was intended to apply to situations where loan relationships were entered into specifically for the purpose of generating tax deductible finance expenses without any other commercial purpose, and that it was not intended to apply in situations where the debt was used to finance a bona fide commercial transaction. He considered that the accepted view was that if the borrowing party to a loan relationship was using the funds raised from the loan relationship for a commercial purpose, that commercial purpose, and not any related tax considerations, was taken as the main purpose for entering into the loan relationship for the purpose of applying paragraph 13.

20. Mr Fleming also explained that by "super-para 13" he was referring to a possible extension of the scope of paragraph 13 to include the situation where a taxpayer used borrowed funds to make a bona fide commercial investment but whose decision to take on the debt might have been influenced by tax considerations which could be considered to be a "main purpose" for entering into the loan relationship notwithstanding the genuinely commercial use of the funds raised. Such a possibility had been raised by a Treasury/HMRC document, *The Taxation of Foreign Profits of Companies* dated 21 June 2007 and discussed in the 10 September 2007 edition of the *Tax Journal*. However, the proposal was not implemented.

21. By late July 2009 the Corporate Tax Group was discussing the specific implications of the acquisition model, including any potential challenges that might be raised by HMRC or internal BlackRock Group stakeholders who would scrutinise any capital transaction from a corporate governance perspective. At that time it was envisaged that BGI would be acquired by the newly established UK resident LLC which itself would be wholly owned by a newly established US resident LLC. The newly established US resident LLC was to be wholly owned by BFM.

22. This is apparent from the following extracts from an EY memorandum of 29 July 2009:

> "**Proposed Acquisition Structure for BGI US – UK Tax Discussion Paper**
>
> …
>
> **Transaction description**
>
> 1. A US entity, BFM incorporates two US Limited Liability Companies, ("LLC1") and ("LLC2") [ie the appellant in this case, LLC5], which will be by default disregarded for US Federal Tax purposes. LLC2 will be UK tax resident by virtue of its central management and control taking place in the UK.
> 2. BR Inc contributes BT Inc stock and makes a loan to BFM
> 3. BFM contributes the BR Inc stock and contributes cash to LLC1. LLC1 contributes BR Inc stock and makes a loan to LLC2 ("Loan 1").

4. LLC2 uses the BR Inc stock and the Loan 1 proceeds to acquire the BGI US entities from Barclays Plc.

The Transaction expresses diagrammatically is shown in Appendix 1 [not reproduced].

Assumptions

…

4. The directors of LLC2 have sufficient experience to determine the merits of acquiring BGI US and the appropriate funding for such an acquisition.

Executive Summary

The expected summary UK tax consequences of the transaction to fund the acquisition of BGI US are:

1. The that the interest on Loan 1 should be deductible for UK tax purposes, subject to thin capitalisation and transfer pricing limits.
2. The ‘loans for an unallowable purpose’ provisions should not apply on the basis that LLC2 is making a third party acquisition, at fair market value, after due consideration by its appropriately qualified board of directors.”

23. The EY memorandum then set out an analysis of the UK tax position which considered, transfer pricing, loans for an unallowable purpose, avoidance using arbitrage, worldwide debt cap, controlled foreign companies, dividend exemption and substantial shareholding exemption. In relation to ‘unallowable purpose’ it notes that:

> “On the assumption that the directors of LLC2 have sufficient expertise and experience to appraise the acquisition of BGI US, it should be clear that the purpose of loan one is to fund that acquisition as opposed to secure an advantage.
>
> The directors of LLC2 will be acquiring BGI US from a third party for fair value with a mixture of debt and equity. The debt being a loan one, will be no more than a third party will amend as supported by a transfer pricing Thin Cap report. In such a case the interest expense on loan one, which causes a tax advantage, as defined, to arise, should properly be described as no more than an incidence of the borrowing”

24. However, because of anticipated reservations that the OCC might have about a UK resident entity controlling a US bank, UK Treasury consent rules and concerns around the UK controlled foreign companies (“CFC”) rules, it was decided to introduce a third LLC into the holding structure. An email of 14 August 2009 to Robert Connelly at Skadden Arps Slate Meagher and Flom (“Skadden”) external lawyers to the BlackRock Group in the USA, from Mr Hamilton, after setting out the structure of the transaction under the sub-heading ‘Objectives’ explained:

> “The split ownership of the new LLC3 is intended to prevent the BGI US Group from being considered controlled foreign corporations for UK tax purposes. Although we think CFC status would be a manageable issue, there is little passive income in the group and it will be preferable to avoid as the cost/effort of future management and reporting would be reduced.”

25. The “new LLC3” referred to in that document was LLC6. Its ownership was split between LLC4 and LLC5.

LLC6 Agreement

26. Although elements of the LLC6 Agreement are summarised in the SOAF (see paragraph 4, above) a consideration of some of the provisions of the LLC6 Agreement, described by Mr Prosser as "effectively the constitutional document, like the memorandum and articles, for LLC6", which sets out the share capital in LLC6 held by LLC4 and LLC5, provides further useful background to the transaction.

27. Article V of the Agreement is headed "Capital, Structure and Contributions". Relevant sections provide:

> "Section 5.1 Share Capital. The capital structure of the Company shall initially consist of two classes of shares, a class of common shares ("Common Shares") and a class of preferred shares ("Preference Shares" and, together with the Common Shares, the "Shares"); provided, that the Board, with the approval of all of the Members, may establish additional classes of shares. Each of the Common Shares shall be identical and each of the Preference Shares shall be identical. No Shares shall be redeemable except as otherwise provided herein.
>
> Section 5.2 Common Shares
>
>> (a) The Common Shares of the Company shall be represented by the number of Shares issued initially to Member A by the Company.
>>
>> (b) Each of the Common Shares shall have a par value of $0.01 per share and the consideration paid for each Common Share shall not be less than its par value.
>>
>> (c) Authorized Common Shares. The aggregate number of Common Shares the Company shall have authorized to issue is 100,000, subject to increase by amendment of this Agreement by unanimous vote of the holders of Common Shares outstanding at the time.
>>
>> (d) Common Share Voting Rights. Common Shareholders shall have the right to attend and vote at Member meetings and shall possess voting power for the election of Board Members and for all other purposes under the Act or this Agreement. Each Common Shareholder shall be entitled to two hundred sixteen (216) votes for each Common Share standing in the Common Shareholder's name on the books and records of the Company on the record date established for such vote.
>>
>> …
>
> Section 5.3 Preference Shares
>
>> (a) the Preference Shares of the Company shall be represented by the number of Shares issued initially to Member A by the Company.
>>
>> (b) Each of the Preference Shares shall have a par value of $0.01 per share and the consideration paid for each Preference Share shall not be less than its par value.
>>
>> (c) Authorized Preference Shares. The aggregate number of Preference Shares the Company shall have authorized to issue is 2,400,000, subject to increase by amendment of this Agreement by unanimous vote of the holders of all Shares outstanding at the time.
>>
>> (d) Preference Share Voting Rights. Preference Shareholders shall have the right to attend and vote at Member meetings and shall possess voting power for the election of Board Members and for all other purposes under the Act or this Agreement. Each Preference

> Share holder shall be entitled to one (1) vote for each Preference Share standing in the Common Shareholder's name on the books and records of the Company on the record date established for such vote.
>
> …

28. Article IX of the Agreement makes provision for dissolution of the Company and at Section 9.2, under the sub-heading 'Liquidation' includes the following:

> "(a) In the event that an Event of Termination shall occur, then the Company shall be liquidated and its affairs be wound up. Subject to the provisions of this Section 9.3, all proceeds from such liquidation shall be distributed in accordance with the provisions of Section 18-804 of the Act, and all Shares in the Company shall be cancelled. Distributions to the Members shall be made upon liquidation in the following amounts and in the following order:
>
> > (i) First, pro rata to Members holding Common Shares, in an amount equal to $400 per Common Share;
> >
> > (ii) Thereafter, any amounts remaining to the Members pro rata in accordance with their respective number of Shares; <u>provided</u> that for the purposes of this Section 9.2(a)(ii), each Preference Share shall be treated as four (4) shares."

29. Finally, Article X of the Agreement 'Miscellaneous' provides that it is to be "governed by and construed in accordance with the laws in the State of Delaware without giving effect to the principles of conflicts of law."

30. The effect of these provisions is, as Mr Prosser explained, that although the holders of the preference shares have 10% of the voting rights under section 6.1 they would be entitled to 99% on a distribution and a similar proportion on the winding up of the company. As such the issue arises as to whether the Board could issue more common shares to LLC4, at par, or LLC4 use its voting power to procure the Board to do so and thereby swamp the preference shares in terms of how much they get by way of dividends or assets on a winding up. However, Mr Prosser submits that it would be precluded from doing so as a matter of Delaware law.

Delaware law

31. Section 18-1101 of the Delaware Limited Liability Company Act, which governs the regulation, structure and operation of a Delaware limited liability company provides that a limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. It states:

> "(c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.
>
> …
>
> (e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company

> agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing."

32. In *Nemec v Shrader* (2009) Chief Justice Steele, on behalf of a majority of the Delaware Supreme Court, affirmed the decision of the Court of Chancery to dismiss a plaintiffs' claim for breach of the implied contractual covenant of good faith and fair dealing in relation to the timing and price of a stock redemption that had been expressly authorised as part of an agreed stock plan. He observed that:

> "The implied covenant of good faith and fair dealing involves a "cautious enterprise," inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." We will only imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. When conducting this analysis, we must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts, the law enforces both."

33. However, I agree with Mr Ewart who contends that, *Nemec v Shrader* provides little, if any, assistance on the application of Delaware law in the present case given the express provisions of the LLC6 Agreement.

Preparations for LLC5 Board Meeting

34. On 13 October 2009 Fletcher Clark, of BlackRock's Legal Department, asked Mr Fleming to provide a briefing note to be shared with Colin Thomson (Head of BlackRock's Financial Reporting Group for the international business), Roger Tooze (Head of BlackRock's Business Finance) and James DesMarais (General Counsel for BlackRock's international business) as potential members of the LLC5 Board. Mr Fleming provided the following note on 26 October 2009:

> "Fletcher, the purpose of the LLC is to effect the acquisition of the BGI US business from Barclays. Ideally, we would have wished LLC5 to be a UK incorporated company, but, this was not possible for both US and UK tax and regulatory reasons. On that basis, it became necessary for the entity to be formed as a US LLC since (1) an LLC is a US entity and thus likely to be acceptable to the OCC, and (2) it is also transparent for US tax purposes.
>
> However, this means that the LLC must have its central management and control located in the UK. I am sure that Jim [DesMarais], Colin [Thomson] and Roger [Tooze] are all familiar with the residency policy that Tax has imposed in order to ensure that our non-UK funds and group companies are not UK resident. What we need to do with LLC5 is reverse that and ensure that all activities (that we would normally ensure are conducted outside the UK) are in fact done in the UK.
>
> On that basis, we must ensure that the central management and control of the entity is conducted in the UK, and is done through the medium of board meetings, which we will hold on a regular basis.
>
> The business of LLC5 will be relatively simple. It will hold preference shares in LLC6 which will only provide for 10% voting control. Accordingly, it will not be in a position to manage any of the underlying US

> business activities, nor will it be called upon to do so. Rather, it will be required to consider its own business of making and managing passive investments and managing its commitments in terms of issuing a Eurobond (that will be listed on the Cayman Exchange) in order to finance the acquisition. Thus, it will consider the likelihood that the business conditions pertaining in the US subsidiaries will enable the preference share dividends to be met, in order to meet its own financing costs.
>
> Let me know if you think it will be helpful for me to directly brief Jim, Colin and Roger on the specific transactions that LLC5 will conduct, but hopefully these will already be quite clear on the step plan.
>
> Please let me know when the first board meeting is scheduled, so we can work together on the agenda. We need to get this conducted asap."

35. In an email, dated 10 November 2009, to Mr Horowitz, headed "BGI US/UK Sandwich" (Mr Fleming said he used the term "sandwich" which be believed was a term of art in the USA to describe the position of the UK resident LLC between the US target, ie BGI) Mr Fleming wrote, in relation to valuation:

> "QC said that the directors should be armed with the documentation that supports the fact that they were able to make a nuanced and informed commercial decision to buy the LLC6 prefs. EY believes that this issue might be an "Achilles heel" that HMRC might be able to use to undermine the commerciality of the decision by LLC5 (on a stand-alone basis).
>
> In principle I'd agree that D&P [Duff & Phelps, who undertook the valuation] might make sense but it will be easier for the EY valuation team to quickly grasp what the tax guys want and can leverage from the data that the credit scoring guys have gathered."

36. Also on 10 November 2009, Mr Fleming met with Mr Thomson, Mr Tooze and Mr DesMarais to discuss and answer any questions that they might have ahead of the LLC5 Board meeting. He explained that within the BlackRock Group it was common practice for the Corporate Tax Group to brief members of relevant group entity boards with details of any capital transactions that those boards were being asked to enter into. He recalled that the "main focus" of these discussions was to enable him to explain the UK tax rules around deductions for interest expenses.

37. By this time the proposed transaction had already been presented to the relevant regulator (the OCC) and internal stakeholders and the briefing of the entity board members was one of the final steps in the process of agreeing the form of a capital transaction. Mr Fleming explained that in practice, once external regulatory and senior internal stakeholder agreement had been obtained, any proposed transaction is considered largely final, and will only be subject to revision in limited circumstances.

38. However, it was important, he said, that the members of any affected board were fully briefed and content that the proposed transaction was acceptable in financial, regulatory and governance terms from an entity level perspective. He explained that this was because one of the purposes of Corporate Tax Group team members from the US and the UK working on the proposal was to ensure that any potential UK regulatory or governance issues that may not have been identified by the internal stakeholders in the US were picked up and taken into account when shaping the transaction. Mr Fleming recalled that the main focus of the discussions on 10 November 2009 had been to explain how the UK tax rules around deductions for interest expenses worked to reassure those present of the "solidity of the tax analysis" and had "mirrored" to a large extent the discussions that he had himself had with

the EY Tax Partner advising the BlackRock Group in relation to the BGI acquisition in July 2009.

39. On 12 November 2009 Mr Clark advised Mr Fleming by email that Mr Kushel, Mr Thomson, Mr Tooze and Mr DesMarais had agreed to join the LLC5 Board. The email also noted that Mr Kushel would "come off the board after closing."

40. The LLC5 Board was due to meet on 27 November 2009, the date on which the other entities involved in the BGI acquisition structure, BFM, LLC4 and LLC6, resolved to enter into the transaction. However, Mr Kushel, who was in the UK, was intending to attend the meeting by telephone. This was because, as Mr Fleming said, "it was impinging with US Thanksgiving". Unable to contact Mr Kushel, by telephone Mr Fleming exchanged emails with him explaining that the meeting was important for UK tax purposes and that Mr Kushel's presence on the LLC5 Board provided the additional support and participation of a senior business leader in the decisions to be taken. This would, he explained, provide an additional layer of assurance to the other members of the LLC5 Board that the transaction was a commercially and financially sound investment.

41. When he was able to speak to him on the telephone, later on 27 November 2009, Mr Fleming recalled that Mr Kushel expressed a degree of frustration at what had appeared to be inconsistent messages from the Company Secretarial team regarding the necessity of him attending the meeting in person. However, to enable Mr Kushel to attend, the meeting was re-arranged for 30 November 2009.

LLC5 Board Meeting

42. The documents provided to the LLC5 Board Members to be approved at the board meeting included:

(1) a draft limited liability company agreement for LLC6, to be entered into between LLC4 and LLC5 as members of LLC6;

(2) a draft contribution and issue agreement to be entered into between LLC4 and LLC5, pursuant to which (a) LLC4 was to contribute cash and stock in BRI to LLC5 and (b) LLC5 was to issue 100 ordinary shares and $4 billion of debt instruments (ie the loan notes) to LLC4;

(3) a draft contribution agreement to be entered into between LLC5 and LLC6, pursuant to which (a) LLC5 was to contribute cash and the BRI stock referred to in (2) above to LLC6 and (b) LLC6 was to issue 2,400,000 preference shares to LLC5;

(4) a draft agency and custodial agreement to be entered into between various BlackRock Group entities including LLC5;

(5) a draft capital and liquidity support agreement to be entered into between various BlackRock Group entities including LLC5;

(6) a draft Capital Assurance and Liquidity Maintenance Agreement to be entered into between various BlackRock Group entities including LLC5; and

(7) a draft of the side letter to be entered into between LLC4 and LLC5.

43. In addition to these documents the following documents were tabled at the LLC5 Board meeting on 30 November 2009:

(1) a copy of the Project Onyx Step Plan, dated 20 November 2009, as prepared by EY. In evidence Mr Fleming described this as being "the roadmap for the lawyers and everybody involved in the transaction to implement it";

(2) the four intercompany loan notes to be issued by LLC5 to LLC4 that had been approved by the board of managers of LLC4 on 27 November 2009;

(3) Duff and Phelps' report, dated 23 November 2009, on the relative values of the LLC6 preference shares and ordinary shares;

(4) the draft EY credit scoring advice, dated 21 November 2009, comprising (a) the Peer Group Selection Process, (b) the Credit Rating Analysis, and (c) the Credit Scoring Matrix table; and

(5) an Opinion on the anticipated tax treatment of the proposed transaction from Kevin Prosser QC.

44. As noted in the SOAF the board meeting took place on 30 November 2009. The minutes record that the meeting was attended by Mr Kushel, who took the chair, Mr Thomson, Mr DesMarais and Mr Tooze. The meeting was also attended by Adrian Dyke the company secretary and Mr Fleming who was there to explain the role of LLC5 in the proposed acquisition of BGI.

45. Mr Kushel had worked with Mr Thomson, Mr DesMarais and Mr Tooze for "many years" and served on other boards with them. He explained that he had always known them to be "diligent and thoughtful" in all their business activities and that he considered that they would not have seen it as their role to "rubber stamp" any transaction.

46. In addition to his position with LLC5, in 2009 Mr Kushel was also chairman of a number of companies in the BlackRock Group. These included BlackRock Group Limited which was the principal holding company for the EMEA businesses, a director of BlackRock Investment Managers (UK) one of two principal operating entities through which the BlackRock Group conducted its regulated business, BlackRock Advisors Limited the second of these entities, BlackRock International Limited an insurance annuity provider and was chairman of the supervisory board of BlackRock Asset Mangers (Deutschland). He was not, however, on the boards of either LLC4 or LLC6.

47. When asked about any conflict of his fiduciary duty and whether he could properly have taken a decision in respect of one company that would have damaged any other of the companies of which he was a director Mr Kushel said that he would have to act on behalf of the company concerned "even if it was disappointing or difficult for one of the other entities". He was "quite confident" that he not only "could have done that but would have done that" and said that there were "certainly times" in his capacity at BlackRock where "I have had to do things like that. That is the nature of the business that we run."

48. Mr Kushel explained that the relevant entities board would only be asked to pass the necessary resolutions to implement a transaction if it had been reviewed, refined if necessary and approved by all internal stakeholders. He saw it as his responsibility as a board member to satisfy himself that a proposed transaction had been:

> "… properly advised on and poses no risk of reputational damage or other harm to either the entity or myself and my fellow board members. As a board member I may test a question or a proposal in terms of its anticipated financial outcomes or to ensure that all relevant regulatory considerations have been taken into account, but typically I will be able to take comfort that these matters have been considered fully by those responsible for framing and approving the transaction before it is presented to me in my capacity as a board member.

49. He considered his role as a board member was to be satisfied that a transaction was in the best interests of the entity concerned and did not see it as part of his remit to begin to

question or suggest changes to the underlying capital structure that a proposed transaction should follow. Although expressed in general terms Mr Kushel confirmed that he, and he thought all the board members, adopted such an approach in relation to LLC5. Although, in evidence Mr Kushel used the term "we" to describe the actions of the LLC5 Board he accepted that he was only giving evidence on his behalf and could not say what was in the minds of the other board members when the decision were taken.

50. Mr Fleming recalled that the meeting took place "around about lunchtime" and lasted approximately 45 minutes and that the discussion on the tax aspects took place at the beginning of the meeting and "was not very long". He explained that the meeting was "considerably longer" than the typical board meetings for holding companies within the group but "by no means as long" as the board meetings held for operating companies which he said could "run for many hours, or indeed days."

51. Mr Fleming stressed that those attending the meeting were not doing so "in a vacuum", there had already been discussions with the business finance team and the financial reporting team. However, Mr Fleming did confirm that there had been no discussion of alternative investments. He explained that this was because, at the date of the meeting, they were "days before the execution of a very complex multi-jurisdictional transaction for which a detailed 'step plan' had been prepared which we were to follow". Provided the board felt the transaction was commercially advantageous for the company it "would not have been sensible or open to the directors to consider an alternative transaction."

52. Although Mr Kushel said that there was "a chance" that he would vote against LLC5's proposed transaction at the meeting he explained that having been involved in the step plan and various elements reviewing the transaction he felt "comfortable" with it and had no concerns over its commercial viability. As such, "unless one of the advisors during the presentation had brought out new information not previously circulated" or consistent with his understanding of the transaction, this was unlikely. He also said that he had considered whether to proceed with the transaction without taking any UK tax advantage into account and although he could not now recall the details of the board meeting he had no reason to think that he would have acted contrary to Mr Fleming's advice, as recorded in the minutes of the meeting, that, "having noted that the Company itself would gain no benefit from a UK tax deduction for the interest" as it was group policy for such interests to be surrendered between group affiliates for no payment:

> "… it was necessary for the transaction to be considered by the board and viable for the Company without taking any UK tax advantage into account."

53. Mr Kushel also said that if the anticipated tax benefits of structuring the acquisition had for any reason fallen away it would have been too late to revise the structure and the acquisition would have gone ahead as planned.

54. The diagram in the appendix to this Decision shows the structure of the transaction after completion.

55. I now turn to the issues and, as Mr Prosser said, because the unallowable purpose provisions, if applicable, require debits which would otherwise have been brought into account to be left out of account, it would appear more appropriate to consider the transfer pricing issue first to ascertain whether and to what extent these loan relationship debits would be brought into account in the first place.

TRANSFER PRICING ISSUE

56. The following provisions of Part 4 of the Taxation (International and Other Provisions Act 2010 (TIOPA) apply in relation to the transfer pricing issue:

147 Tax calculations to be based on arm's length, not actual, provision

(1) For the purposes of this section “the basic pre-condition” is that—

(a) provision (“the actual provision”) has been made or imposed as between any two persons (“the affected persons”) by means of a transaction or series of transactions,

(b) the participation condition is met (see section 148),

(c) the actual provision is not within subsection (7) (oil transactions), and

(d) the actual provision differs from the provision (“the arm's length provision”) which would have been made as between independent enterprises.

(2) Subsection (3) applies if—

(a) the basic pre-condition is met, and

(b) the actual provision confers a potential advantage in relation to United Kingdom taxation on one of the affected persons.

(3) The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision …

…

148 The “participation condition”

(1) For the purposes of section 147(1)(b), the participation condition is met if—

(a) condition A is met in relation to the actual provision so far as the actual provision is provision relating to financing arrangements, and

(b) condition B is met in relation to the actual provision so far as the actual provision is not provision relating to financing arrangements.

(2) Condition A is that, at the time of making or imposition of the actual provision or within the period six months beginning with the day on which the actual provision was made or imposed-

(a) one of the affected persons was directly or indirectly participating in the management, control or capital of the other, or

(b) the same person or persons was or were directly or indirectly participating in the management, control or capital of each of the affected persons ...

…

(4) In this section “financing arrangements” means arrangements made for providing or guaranteeing, or otherwise in connection with any debt, capital or other form of finance.

…

150 “Transaction” and “series of transactions”

(1) In this Part “transaction” includes arrangements, understandings and mutual practices (whether or not they are, or are intended to be, legally enforceable).

(2) References in this Part to a series of transactions include references to a number of transactions each entered into (whether or not one after the other) in pursuance of, or in relation to, the same arrangement.

(3) A series of transactions is not prevented by reason only of one or more of the matters mentioned in subsection (4) from being regarded for the purposes of this Part as a series of transactions by means of which provision has been made or imposed as between any two persons.

(4) Those matters are—

(a) that there is no transaction in the series to which both those persons are parties,

(b) that the parties to any arrangement in pursuance of which the transactions in the series are entered into do not include one or both of those persons, and

(c) that there is one or more transactions in the series to which neither of those persons is a party.

(5) In this section "arrangement" means any scheme or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable).

151 "Arm's length provision"

(1) In this Part "the arm's length provision" has the meaning given by section 147(1).

(2) For the purposes of this Part, the cases in which provision made or imposed as between any two persons is to be taken to differ from the provision that would have been made as between independent enterprises include the case in which provision is made or imposed as between two persons but no provision would have been made as between independent enterprises; and references in this Part to the arm's length provision are to be read accordingly.

152 Arm's length provision where actual provision relates to securities

(1) This section applies where—

(a) both of the affected persons are companies, and

(b) the actual provision is provision in relation to a security issued by one of those companies ("the issuing company").

(2) Section 147(1)(d) is to be read as requiring account to be taken of all factors, including—

(a) the question whether the loan would have been made at all in the absence of the special relationship,

(b) the amount which the loan would have been in the absence of the special relationship, and

(c) the rate of interest and other terms which would have been agreed in the absence of the special relationship.

(3) Subsection (2) has effect subject to subsections (4) and (5).

(4) If—

(a) a company ("L") makes a loan to another company with which it has a special relationship, and

(b) it is not part of L's business to make loans generally, the fact that it is not part of L's business to make loans generally is to be disregarded in applying subsection (2).

(5) Section 147(1)(d) is to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.

(6) The matters are—

(a) the appropriate level or extent of the issuing company's overall indebtedness,

(b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving—

(i) the issue of a security by the issuing company, or

(ii) the making of a loan, or a loan of a particular amount, to the issuing company, and

(c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

…

154 Interpretation of sections 152 and 153

…

(3) "*Special relationship*" means any relationship by virtue of which the participation condition is met (see section 148) in the case of the affected persons concerned.

(4) Any reference to a guarantee includes—

(a) a reference to a surety, and

(b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

(5) One company ("A") has a "participatory relationship" with another ("B") if—

(a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or

(b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.

(6) "Security" includes securities not creating or evidencing a charge on assets.

(7) Any—

(a) interest payable by a company on money advanced without the issue of a security for the advance, or

(b) other consideration given by a company for the use of money so advanced, is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

57. The definition of "guarantee" in s 154(4) TIOPA is considered in HMRC's International Manual, which at INT413110 under the sub-heading 'Implicit guarantees', states:

> "The wide definition of guarantee in TIOPA10/S154 (4) recognises the possibility that whilst a guarantee may not be formally documented, the behaviour of the parties indicates that a guarantee exists.
>
> Implicit guarantees are difficult to evaluate, since their terms are not explicitly stated and motivation may be mixed and obscure. A major multinational may wish to protect its own credit status and reputation by making good any debts which its subsidiaries are unable to meet, but is it difficult to discern whether that is primarily a service provided to the subsidiary, whether it arises from a policy aimed at protecting the MNE's own credit rating, or a mixture of both.
>
> An implicit guarantee is perhaps more likely to exist where the recipient has an important role within the group or shows a close identification with the name or brand of the group.
>
> Para 7.13 of the OECD Transfer Pricing Guidelines says that
>
>> "…no service would be received where an associated enterprise by reason of affiliation alone has a credit rating higher than it would if it were unaffiliated, but an intra-group service would usually exist where the higher credit rating were due to a guarantee by another group member…"
>
> The paragraph goes on to distinguish "passive association" from "active promotion". In circumstances where mere affiliation of the borrower to its group provides comfort to a lender, and leads to an improved credit rating there is no guarantee and therefore a fee would not be charged at arm's length. Where there are intra-group guarantees, explicit or implicit, the effect that the guarantee has on the terms of the loan need to be separated from any effect that can be attributed to passive association. The track record of the group in situations where a group member is in financial distress will be instructive."

58. Returning to the TIOPA provisions, these provide:

> **155 "Potential advantage" in relation to United Kingdom taxation**
>
> (1) Subsection (2) applies for the purposes of this Part.
>
> (2) The actual provision confers a potential advantage on a person in relation to United Kingdom taxation wherever, disregarding this Part, the effect of making or imposing the actual provision, instead of the arm's length provision, would be one or both of Effects A and B.
>
> (3) Effect A is that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of the person's profits for any chargeable period.
>
> Effect B is that a larger amount (or, if there would not otherwise have been losses, any amount of more than nil) would be taken for tax purposes to be the amount for any chargeable period of any losses of the person
>
> …

156 “Losses” and “profits”

(1) In this Part “losses” includes amounts which are not losses but in respect of which relief may be given in accordance with—

(a) …

(g) Part 5 of CTA 2010 (group relief), …

(2) in this Part “*profits*” includes income.

…

164 Part to be interpreted in accordance with OECD principles

(1) This Part is to be read in such manner as best secures consistency between—

(a) the effect given to sections 147(1)(a), (b) and (d) and (2) to (6), 148 and 151(2), and

(b) the effect which, in accordance with the transfer pricing guidelines, is to be given, in cases where double taxation arrangements incorporate the whole or any part of the OECD model, to so much of the arrangements as does so.

…

(3) In this section “*the OECD model*” means—

(a) the rules which, at the passing of ICTA (which occurred on 9 February 1988), were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the Organisation for Economic Co-operation and Development, or

(b) any rules in the same or equivalent terms.

(4) In this section “the transfer pricing guidelines” means—

(a) the version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations approved by the Organisation for Economic Co-operation and Development (OECD) on 22 July 2010, or

(b) such other document approved and published by the OECD in place of that (or a later) version or in place of those Guidelines as is designated for the time being by order made by the Treasury,

including, in either case, such material published by the OECD as part of (or by way of update or supplement to) the version or other document concerned as may be so designated. …”

59. Although the 1995 OECD Guidelines, which are to be taken into account in accordance with s 164 TIOPA, were applicable in relation to LLC5’s accounting periods ended 30 November 2010, 31 December 2011 and 31 December 2012, I was referred to the 2010 OECD Guidelines which apply to all later accounting periods, the majority under appeal. No new principles are established by the 2010 Guidelines which expand on those stated in the 1995 Guidelines.

60. In relation to the arm’s length principle these Guidelines provide:

“**B. Statement of the arm’s length principle**

i) Article 9 of the OECD Model Tax Convention

> 1.6 The authoritative statement of the arm's length principle is found in paragraph 1 of Article 9 of the OECD Model Tax Convention, which forms the basis of bilateral tax treaties involving OECD Member countries and an increasing number of non-Member countries. Article 9 provides:
>
>> [Where] conditions are made or imposed between … two [associated] enterprises in the commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxes accordingly.
>
> By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances (ie in "comparable uncontrolled transactions"), the arm's length principle follows the approach of treating the members of an MNE [multinational enterprise] group as operating as separate entities rather than as inseparable parts of a single unified business. Because the separate entity approach treats the members of an MNE group as if they were independent enterprises, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. Such an analysis of the …is at the heart of the application of the arm's length principle."

61. Paragraph 1.14 of "B.2 Maintaining the arm's length principle as the international consensus" notes that:

> "… This reflects the economic realities of the controlled taxpayer's particular facts and circumstances and adopts as a benchmark the normal operation of the market."

62. Section D provides guidance for the application of the arm's length principle and includes the following:

> "***D.1 Comparability analysis***
>
> *D.1.1 Significance of the comparability analysis and meaning of "comparable"*
>
> 1.33 Application of the arm's length principle is generally based on a comparison of the conditions in a controlled transaction with the conditions in transactions between independent enterprises. In order for such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. To be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (eg price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences.
>
> 1.34 Independent enterprises, when evaluating the terms of a potential transaction, will compare the transaction to other options realistically open to them, and they will only enter into the transaction if they see no alternative that is clearly more attractive. For example, one enterprise is unlikely to accept a price if it knows that other potential customers are willing to pay more under similar conditions. This point is relevant to the question of comparability, since independent enterprises would generally take into account any economically relevant differences between the options

realistically available to them (such as differences in the level of risk or other comparability factors discussed below) when valuing those options. Therefore, when making the comparisons entailed by the application of the arm's length principle, tax administrations should also take these differences into account when establishing whether there is comparability between the situations being compared and what adjustments may be necessary to achieve comparability.

…

1.36 As noted above, in making these comparisons, material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length transactions. Attributes or "comparability factors" that may be important when determining comparability include…the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties.

…

D.1.2.2 Functional analysis

1.42 In transactions between two independent enterprises, compensation will usually reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled or uncontrolled transactions are comparable, a functional analysis is necessary. This functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions. For this purpose, it may be helpful to understand the structure and organisation of the group and how they influence the context in which the taxpayer operates. It will also be relevant to determine the legal rights and obligations of the taxpayer in performing its functions.

1.43 The functions that taxpayers and tax administrations might need to identify and compare include, eg design, manufacturing, assembling, research and development, servicing, purchasing, distribution, marketing, advertising, transportation, financing and management. The principal functions performed by the party under examination should be identified. Adjustments should be made for any material differences from the functions undertaken by any independent enterprises with which that party is being compared. While one party may provide a large number of functions relative to that of the other party to the transaction, it is the economic significance of those functions in terms of their frequency, nature, and value to the respective parties to the transactions that is important.

…

1.45 Controlled and uncontrolled transactions and entities are not comparable if there are significant differences in the risks assumed for which appropriate adjustments cannot be made. Functional analysis is incomplete unless the material risks assumed by each party have been considered since the assumption or allocation of risks would influence the conditions of transactions between the associated enterprises. Usually, in the open market, the assumption of increased risk would also be compensated by an increase in the expected return, although the actual return may or may not increase depending on the degree to which the risks are actually realised.

…

1.47 The functions carried out (taking into account the assets used and the risks assumed) will determine to some extent the allocation of risks between the parties, and therefore the conditions each party would expect in arm's length transactions. For example, when a distributor takes on responsibility for marketing and advertising by risking its own resources in these activities, its expected return from the activity would usually be commensurately higher and the conditions of the transaction would be different from when the distributor acts merely as an agent, being reimbursed for its costs and receiving the income appropriate to that activity. Similarly, a contract manufacturer or a contract research provider that takes on no meaningful risk would usually expect only a limited return.

1.48 In line with the discussion below in relation to contractual terms, it may be considered whether a purported allocation of risk is consistent with the economic substance of the transaction. In this regard, the parties' conduct should generally be taken as the best evidence concerning the true allocation of risk. If, for example, a manufacturer sells property to an associated distributor in another country and the taxpayer's contract indicates that the distributor assumes all exchange rate risks in relation to this controlled transaction, but the transfer price appears in fact to be adjusted so as to insulate the distributor from the effects of exchange rate movements, then the tax administrations may wish to challenge the purported allocation of exchange rate risk for this particular controlled transaction.

1.49 An additional factor to consider in examining the economic substance of a purported risk allocation is the consequence of such an allocation in arm's length transactions. In arm's length transactions it generally makes sense for parties to be allocated a greater share of those risks over which they have relatively more control. For example, suppose that Company A contracts to produce and ship goods to Company B, and the level of production and shipment of goods are to be at the discretion of Company B. In such a case, Company A would be unlikely to agree to take on substantial inventory risk, since it exercises no control over the inventory level while Company B does. Of course, there are many risks, such as general business cycle risks, over which typically neither party has significant control and which at arm's length could therefore be allocated to one or the other party to a transaction. Analysis is required to determine to what extent each party bears such risks in practice.

…

D.2 Recognition of the actual transactions undertaken

1.64 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapter II. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.

1.65 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterisation of the transaction and re-characterise it in accordance with its substance. An example of this circumstance would be an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterise the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long-term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as indicated in paragraph 1.11). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.66 In both sets of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions and may have been structured by the taxpayer to avoid or minimise tax. In such cases, the totality of its terms would be the result of a condition that would not have been made if the parties had been engaged in arm's length transactions. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties transacting at arm's length.

…

63. Material parts of Chapter III of the Guidelines, "Comparability Analysis", provide:

A.3.1 Evaluation of a taxpayer's separate and combined transactions

3.9 Ideally, in order to arrive at the most precise approximation of arm's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis…..Such transactions should be evaluated together using the most appropriate arm's length method.

…

> 3.11 While some separately contracted transactions between associated enterprises may need to be evaluated together in order to determine whether the conditions are arm's length…

64. Chapter 7 of the Guidelines concern "Special Considerations for Intra-Group Services", paragraph 7.13 of which states:

> "… [A]n associated enterprise should not be considered to receive an intragroup service when it obtains incidental benefits attributable solely to its being part of a larger concern, and not to any specific activity being performed. For example, no service would be received where an associated enterprise by reason of its affiliation alone has a credit-rating higher than it would if it were unaffiliated, but an intra-group service would usually exist where the higher credit rating were due to a guarantee by another group member, or where the enterprise benefitted from the group's reputation deriving from global marketing and public relations campaigns. In this respect, passive association should be distinguished from active promotion of the MNE group's attributes that positively enhances the profit- making potential of particular members of the group. Each case must be determined according to its own facts and circumstances."

65. I was also referred to paragraph 9.180 of the Guidelines which, under the sub-heading "Determining whether a transaction or arrangement has an arm's length pricing solution", provides:

> "Under the second circumstance discussed at paragraph 1.65, a second cumulative criterion is that "the actual structure practically impedes the tax administration from determining an appropriate transfer price." If an appropriate transfer price (ie an arm's length price that takes into account the comparability – including functional – analysis of both parties to the transaction or arrangement) can be arrived at in the circumstances of the case, irrespective of the fact that the transaction or arrangement may not be found between independent enterprises and that the tax administration might have doubts as to the commercial rationality of the taxpayer entering into the transaction or arrangement, the transaction or arrangement would not be disregarded under the second circumstance in paragraph 1.65. Otherwise, the tax administration may decide that this is a case for not recognising the transaction or arrangement under the second circumstance in paragraph 1.65."

66. As to the relevance of a tax purpose, paragraphs 9.181 and 9.182 provide:

> "9.181 Under Article 9 of the OECD Model Tax Convention, the fact that a business restructuring arrangement is motivated by a purpose of obtaining tax benefits does not of itself warrant a conclusion that it is a non-arm's length arrangement. The presence of a tax motive or purpose does not of itself justify non-recognition of the parties' characterisation or structuring of the arrangement under paragraphs 1.64 to 1.69.
>
> 9.182 Provided functions, assets and/or risks are actually transferred it can be commercially rational from an Article 9 perspective for an MNE group to restructure in order to obtain tax savings. However, this is not relevant to whether the arm's length principle is satisfied at the entity level for a taxpayer affected by the restructuring (see paragraph 9.178)."

Expert evidence

67. As noted above (at paragraph 6), both parties called expert evidence on the Transfer Pricing Issue. Timothy Ashley, of Centrus Financial Advisors Limited, for LLC5, and Simon

Gaysford, of Frontier Economics Limited, for HMRC who were instructed by the parties to consider the following issue:

> "Whether the loans entered into between LLC5 and LLC4 differ from those which would have been made between independent enterprises, taking account of all relevant information, including:
>
> (a) Would the parties have entered into the loans on the same terms and in the same amounts if they had been independent enterprises?
>
> (b) If the answer to question (a) is negative, would they, as independent enterprises, have entered into the loans at all, and if so, in what amounts, at what rate(s) of interest, and on what other terms?"

68. Mr Ashley has 30 years of experience in interest rate markets. His specialist areas of expertise relates to treasury management and debt capital markets and his background and experience was reflected in his approach to this issue in his report of 30 April 2019. Mr Gaysford, whose report is dated 29 March 2019, did not have experience of the debt capital markets. His experience and expertise is in economics. He explained that economics includes how competition takes place, how organisations take decisions, how prices are determined and benchmarks for pricing including "arm's length". In evidence he said:

> "The use of that economics in the clients I advise would be fairly typical , for example, in competition policy in the UK and Europe where we may be interested in certain profit recovery prices or competitive prices or indeed arm's length or for commercial purposes. So my advice to clients commercially would include situations which in the context of today we might call arm's length, how they achieve prices with external and independent parties, or indeed internal , what we might call non-arm's length or internal prices or transfer prices."

69. Although neither expert had previously considered a transaction such as that in the present case, there was nevertheless broad agreement between them on most issues, eg they agreed that an independent lender would, on the strength of the BGI business, be willing to lend $4 billion to LLC5 but would have required covenants from LLC5 to do so.

70. Mr Ashley identified these covenants in his report as follows:

> "(1) Additional debt covenant restricting the amount of debt that could be raised at LLC6 or BGI NA level to cap the amount of incremental debt that could subordinate or subvert LLC5 lenders; and/or
>
> (2) Provision of additional covenants (e.g. preference share payment covenant
>
> from LLC6); and/or
>
> (3) Restrictions on LLC6's ability to lend up cash to LLC4 or any other entity in the group.
>
> (4) Creation of an intercompany loan balance (such that LLC5 could call for a loan repayment if the LLC6 board failed to declare a preference dividend)
>
> (5) Provision of a cash reserve or liquidity facility covering 12 months of interest payments at LLC5
>
> (6) Change of control – such that the bonds would have been repayable if the voting rights moved outside the BlackRock Group
>
> (7) Negative pledge – restrictions on LLC5, LLC6 and BGI from granting security to other lenders".

71. When pressed he said, of the covenants that he had identified that the "critical ones" were 1 and 2 and that 3, 4 and 5 [in the list above] were "sort of almost redundant if you have 1 and 2." Mr Ashley also said that 6 and 7, the change of control and negative pledge covenants were "additional clauses that are common in loan agreements" as they "make sure" that the value of the assets cannot be pledged somewhere else or sold to someone else. In relation to 6, change of control, Mr Ashley clarified that he by this he was referring to common share rights held by LLC4 as the effective controller and owner of LLC6 and then BGI. He considered that it would be "normal in almost any debt transaction" to have 1, 6, and 7 and "in this particular structure" 2 was also needed. While he said that 3, 4 and 5 were probably not needed he could not be "categoric" on this as, he explained, "it would come down to a discussion with the arranging banks and possibly lenders."

72. In evidence Mr Ashley also agreed that a covenant would be required to ensure that LLC6, if it was going to do so, would pay a dividend to LLC5 first to, "make sure that it is effectively honouring the preference shares which are preferred and pay that dividend flow first." However, he confirmed that there was "nothing more" to the covenants he would be suggesting than that although he believed that it was not possible to compel LLC6 to declare a dividend.

73. In his report Mr Gaysford stated that what would be required were:

> "a. A set of covenants from LLC6 on the specific conditions that determine the pay-out of the preference shares. A set of covenants from Delaware Holdings Inc. would also be required, setting out the conditions that determine the payout of dividends from Delaware Holdings Inc. to LLC6. The combined effect of these conditions has to remove the existing uncertainty and enable the independent lender to form a view of risk (and so could include criteria such as the performance statistics of BGI US, and macroeconomic variables).
>
> b. A set of covenants from LLC6 that it will not take any actions that could reduce the value of LLC5. The range of affirmative and negative covenants contained in the BlackRock Group's ("BRG's") existing revolving credit facility agreement, as described in Annex 7, provide a starting point for the types of covenants that could be written to this effect.
>
> c. A set of covenants from LLC4 that it will not take any actions that could reduce the value of LLC5. As above, the range of affirmative and negative covenants contained in BRG's existing revolving credit facility agreement, as described in Annex 7, provide a starting point for the types of covenants that could be written to this effect."

74. While Mr Ashley considered that such covenants would be given, Mr Gaysford was of the view that not only it would be complex and costly to obtain these covenants but that because it would not be at arm's length, it is not permissible, as with a guarantee by a parent company, to postulate that LLC5's parent, LLC4, would assist it in obtaining the loan by giving covenants or procuring LLC6 and BGI to do so. Mr Gaysford explained that there would be no costs, "other than clever lawyers' fees", or complexity from the point of view of the lender. His evidence was that the covenants would impose restrictions on LLC4, LLC5 and LLC6 when viewed "as a group" in relation to the OCC arrangement, the US tax position, the cost of debt and flexibility over the flow of dividends and that the companies might choose a better commercial alternative without such restrictions. Indeed Mr Ashley agreed that the cost of borrowing would have been $40 million lower if the $4 billion had been lent to BlackRock Inc rather than LLC5.

75. However, notwithstanding their broad agreement and having met to discuss their respective reports, the experts were unable to agree a joint report as directed by the Tribunal.

76. The report titled "Joint Statement of Mr Timothy Ashley and Mr Simon Gaysford" (the "Joint Statement") was, in fact, only signed by Mr Ashley on 12 July 2019. Mr Gaysford filed a "Statement of Mr Simon Gaysford in lieu of a joint statement from the expert witnesses" (the "Gaysford Statement") also on 12 July 2019. However, as Mr Ashley explained the difference between the two is that Mr Gaysford's statement records an area of dispute between them as to the scope of issues on which they were granted permission to serve expert evidence.

77. Both the Joint Statement and the Gaysford Statement record that the experts agree that it would have been possible for LLC5 to execute a $4 billion debt transaction in December 2009 with an independent enterprise at similar interest rates to the actual transaction that took place between LLC5 and LLC4, but subject to different terms and conditions that independent lenders would have required to manage the credit risks appropriately. This is clear from the Joint Statement (at paragraphs 12-13) and the Gaysford Statement (at paragraphs 14-16), which in answer to the question "would LLC5 and an independent enterprise have entered into the loans on the same terms and in the same amounts?" state:

> "Mr Ashley and Mr Gaysford agree that the liquidity of the debt market capitals in December 2009 was sufficient to support a USD4Bn transaction. With respect to the amounts Mr Ashley's view is that the answer is 'yes' the parties could have entered into loans in the same *amounts* if they had been independent enterprises. With respect to the terms, Mr Ashley's view is that the answer is 'no', the parties would not have entered into the loans on the same terms if they had been independent enterprises. Mr Gaysford agrees that with respect to the terms the answer is 'no', and that the overall answer to the question is 'no', as the question cannot be answered by considering the amount and the terms of the loan separately.
>
> Both experts agree that in considering whether [LLC5] could have transacted with an independent lender, some alteration of terms would have been required to ensure the transaction met standard requirements if an external third-party transaction, also taking steps to address the specific credit risks of the LLC5 structure."

78. The additional terms and conditions that the experts agreed that an independent lender is likely to have required are recorded in the Joint Statement (at paragraph 14) and the Gaysford Statement (at paragraph 17) as follows:

> "The following paragraphs capture the main points on the transaction on which the experts broadly agree.
>
> …
>
> f. The preference share structure was unusual but not necessarily problematic given BGI US was already a successfully performing business. The preference shares carried an expectation that [LLC5] should receive over USD700m annually in income which would have given it a sizeable debt capacity. The main issue was that the flow of value from BGI US to LLC6 and then to [LLC5] via the preference shares was paid at the discretion of LLC4. Whilst a lender would probably be unlikely to accept this position, it should have been possible for BGI US, and LLC6 – with the explicit consent of LLC4 – to effectively ratify the legal and financial position to which [LLC5] was entitled, that is via inter-company agreements and covenants which would have formed part of [LLC5's] borrowing transaction.

Both experts agree that an independent lender would have required the protection described in this paragraph and that it probably could have been put in place. Mr Gaysford believes that it would have been costly and complex to do so. Mr Ashley believes it would have been straightforward and the associated 'cost' would have been an 'opportunity cost' (ie reduced flexibility to enter into further transactions rather than a cash cost).

g. In addition to the protections discussed in f above, the purpose of which would have been to secure the flow of value from BGI US and preference share dividends from LLC6, the experts agree that an independent lender would likely also have required other structural enhancements to the terms of the loans, to ensure the cashflow generation of BGI US could not be diverted in any way. Possible additional clauses would include (1) a negative pledge on further indebtedness within BGI US, LLC6 or indeed [LLC5], (2) a change of control clause and (3) a restriction on BGI US or LLC6 being able to lend money to any other entity – whether inside the BlackRock Group or not. These are well known standard clauses required in almost every external debt transaction – though to emphasise, one would not expect to see them in an inter-company loan transaction within a group.

h. The experts cannot say with certainty whether all of the possible additional clauses listed in paragraph g would have been required to support a USD4bn loan or bond transaction by [LLC5]. However, in view of the structural subordination of LLC5 (being 2 entities away from the generation of cashflows), the experts agree that an independent lender would have required at least some of the enhancements discussed in paragraph g.

i. Again, both experts agree that the enhancements discussed in paragraph g would have been necessary, and probably could have been achieved. Mr Ashley believes it would have been straightforward to do so and that the associated 'cost' would have been an 'opportunity cost' (ie reduced flexibility to enter into further transactions rather than a cash cost. In Mr Ashely's experience, such enhancements are very common terms in debt transactions, including the BlackRock's group own revolving credit facility. Mr Gaysford believes it would have been costly and complex to do so, and that any 'opportunity cost' would have been significant.

j. Assuming that the loans, included the protection discussed in paragraph f and the enhancements discussed in paragraph g:

(i) Mr Ashley does not believe that any formal parental support would also have been required. Mr Ashley believes independent lenders would very likely have taken comfort that the transaction was being executed within a wholly owned subsidiary of the BlackRock group, and the implied reputational impact of any failure of such a transaction would have on the BlackRock group would not have been lost from a lender's viewpoint.

(ii) Mr Gaysford does believe that an independent lender would have required some form of additional, formal parental support or guarantee. In Mr Gaysford's opinion, such support would as a minimum have needed to replicate the support that was part of

> the actual transaction (eg the letter of support issued by LLC4 to [LLC5]) and it is likely that an independent lender would have required something more."

79. Mr Ashley, in re-examination, explained that:

> "... in (f) I think we're trying to address an issue where LLC4 potentially decides it wants to have some influence over a preference share flow and make it – make the cash flow go in some other direction. (g), I think, is more ensuring that – well, it's addressing other – it's addressing other additional clauses that we would need, such as not pledging security, and, you know, the changes of control aspect. And, you know, any kind of other sort of loan balances, that might affect that same – ultimately both of these clauses 14(f) and (g) are dealing with sort of risks, in a way. They are just making sure that the cash flows are as robust as possible and, you know, are headed to LLC5 to pay preference share dividends and, you know, there's little else that can get in the way to stop that."

80. Both experts in their evidence also expanded on their conclusions in the Joint Statement (at paragraph 14) and the Gaysford Statement (paragraph 17) in relation to the need for parental support or guarantee.

81. Mr Ashley was of the "firm belief" that the business of BGI and cash flows from that business were "exceptional" and that it was only necessary to make sure that those cash flows "flowed through the subsidiaries to LLC5 to make it a "very high quality credit". While he agreed in evidence that the covenants described above were required, he continued:

> "… I am categoric that absolutely no formal parental support would have been needed to do an external market transaction, albeit, as I say, the fact that LLC5 was part of a bigger multinational corporation, you know, and a highly respected – in fact to be the world's largest fund manager would not have been lost on the lenders from a reputational viewpoint or possibly implied principle."

82. A contrary view expressed by Mr Gaysford was that a letter of support or parent company guarantee would have been required. However, he was "sure" that the short term (under one year) of the first tranche could have been restructured so that a letter of support would not have been needed. Although he considered it was "likely" that an independent lender would request "some form of guarantee" he could not say with "certainty" that without it the transaction would not have proceeded. He explained that he had come to this view as the transaction had occurred "just after the financial crisis" and that if there were a risk with BGI itself:

> "…the risk to the dividend flows is almost perfectly correlated to the value of the preference shares, and you would prefer to have security that is not perfectly correlated to the income flow."

Discussion

83. It is first necessary to consider an issue Mr Prosser raised regarding Mr Gaysford's initial report. In its introduction it not only states that Mr Gaysford has drawn on his experience but also his "interpretation of OECD guidelines" in producing the report. This is clear from the body of the report, eg after setting out paragraphs 140 – 141 of the OECD's *Base Erosion and Profit Shifting (BEPS) Public Discussion Draft, Financial transactions, 3 July-7 September 2018* Guidelines, at paragraph 284 of his report, Mr Gaysford at paragraph, 285, states, "as an economist, my interpretation of this is as follows", he then sets out his opinion as to how he considers the OECD Guidelines are to be construed.

84. Mr Prosser submits that the evidence of Mr Gaysford in relation to the interpretation of the OECD is inadmissible and should therefore be ignored. He cites *Ben Nevis (Holdings) Limited and Another v HMRC* [2013] EWCA Civ 578 ("*Ben Nevis*") in which at [35], Lloyd Jones LJ, as he then was, noted that:

> "The Appellants sought to rely on the expert evidence of Professor Dr Maria Grau Ruiz and Dr Avery Jones in relation to the interpretation of the provisions of the [UK/South Africa Double Tax] Convention and Protocol. The judge rejected this evidence as inadmissible. I consider that he was clearly correct to do so. Questions of interpretation are for the court. At the hearing before us we refused an application on behalf of the Appellants to consider this material."

At first instance HHJ Pelling QC had said:

> "I do not consider the opinion evidence of either Dr Avery Jones or Professor Grau Ruiz is admissible. Indeed adducing such material has simply increased the costs of, and extended the time necessary to determine the application. Quite simply, this material is not admissible because questions of interpretation are for the court, see Phipson on Evidence. Even in relation to documents that are to be construed in accordance with laws other than the laws of England and Wales, expert evidence is admissible only for the limited purposes of identifying the relevant principles of construction … not for the purposes of expressing an opinion as to true construction, applying those principles."

85. However, Mr Ewart contends that, as the OECD Guidelines set out economic principles and tools for determining arm's length transactions, Mr Gaysford as an economist is "extremely well placed" to assist the Tribunal in its difficult task of deciding the appeal. He attempts to distinguish *Ben Nevis* on the basis that it was concerned with double tax conventions which are incorporated into UK law by way of statutory instruments made under TIOPA and are therefore part of UK law. As such, their interpretation is clearly a matter for a court or tribunal and outside the ambit of an expert. He contrasts the position in the present case as it is, he says, "very common" for experts to give views on guidelines if it is within their field of expertise.

86. However, I agree with Mr Prosser that, as s 164 TIOPA requires that the legislation to be read so as to best secure compliance with the OECD Guidelines, the interpretation of the Guidelines is a matter of law. As such, *Ben Nevis* is applicable and the interpretation of those Guidelines is for the Tribunal and not an expert witness. I have therefore taken no account of Mr Gaysford's view on the construction of the OECD Guidelines. That said, I also agree with Mr Ewart that this is of little importance given the agreement of the experts on relevant matters.

87. Turning to the transfer pricing issue, it is common ground that a provision has been made as between two persons, LLC4 and LLC5, by means of a transaction and/or series of transactions thereby satisfying s 147(1)(a) TIOPA. Section 147(1)(b) TIOPA, the "participation condition" is also met. It is clearly a "financing arrangement" and, as LLC4 holds all the shares in LLC5, one of the affected persons is directly participating in the management, control of capital of the other. However, the parties part company in relation to s 147(1)(d) TIOPA and whether the actual provision, ie the $4 billion lending, differs from the "arm's length" provision which would have been made as between independent enterprises.

88. This is the only issue between the parties in relation to the Transfer Pricing Issue.

89. It is clear from the evidence of the experts that the transaction that was actually entered into would not have taken place in an arm's length transaction with an independent lender. It is therefore necessary to hypothesise a different transaction which independent enterprises would have entered into and, as it is for LLC5 to displace the closure notice and amendment made to its self-assessment, it can only succeed on the transfer pricing issue by positively establishing that there is a hypothetical transaction in which a hypothetical independent enterprise would lend $4 billion dollars to LLC5.

90. Mr Prosser's primary case is that although the parties to the Loans would not have entered into them on the same terms if they had been independent enterprises, independent enterprises would have entered into the transactions in the same amounts and at the same (or at no lower) rates of interest and would have agreed that LLC5, with the cooperation of LLC4, LLC6 and BGI, should give some or all of the following covenants to secure the expected dividend flow from BGI US to LLC5:

(1) covenants by BGI and LLC6 restricting the amount of debt that could be raised by them (to prevent profits to be diverted in repaying such debt);

(2) negative pledges by BGI, LLC5 and LLC6 restricting them from granting security to other lenders;

(3) a covenant by LLC4 that it would not interfere with the declaration of dividends by LLC6 and BGI;

(4) covenants by BGI and LLC6 that, without prejudice to their own discretion regarding the declaration of dividends, they would not frustrate the expected dividend flows (e.g. by making loans to LLC4); and

(5) change of control covenants by LLC4, LLC5 and LLC6 to block any sale of LLC6 or BGI.

91. Mr Prosser also says that independent enterprises would, in addition, have agreed a longer term for the first tranche, to ensure that it would be fully repaid out of the expected dividend flow and, subject only to this and the above covenants, that independent enterprises would have entered into the Loans on the same terms.

92. In essence Mr Ewart's case is that the transaction, which he submits is everything that includes LLC4, LLC5, LLC6 and (in the hypothetical transaction) the independent lender, simply would not have taken place. He contends that in its argument LLC5 fails to take account of the part played by LLC4 and through LLC4 the rest of the BlackRock Group in providing either the whole of the funding in the real transaction or part of the funding in the hypothetical transaction.

93. Both Mr Prosser and Mr Ewart contend that their preferred approach is consistent with the OECD Guidelines, as required by s 164(1) TIOPA.

94. Mr Ewart says that the situation where no provision would have been made is not something "expressly or explicitly recognised or discussed in the [OECD] transfer pricing guidelines" as they "seem to be assuming" that there are two situations as set out in 1.64 and 1.65 of the Guidelines. The first where the economic substance of a transaction differs from its form which may be re-characterised in accordance with its structure; and the second, where the transaction is not accepted and it is re-characterised as a different transaction. He contends that the present case is a "different situation" being one in which, "whatever the price", it is a transaction that would have taken place at arm's length at all.

95. Mr Prosser contends that such an approach is "plainly a misreading" of paragraphs 1.64 and 1.65 of the OECD Guidelines which provide that the loans to LLC5 may only be

disregarded in one or other of the "exceptional circumstances" set out in paragraph 1.65. However, I disagree. It is not a question of HMRC "disregarding" the structure adopted but contending that the transaction simply would not have happened had there been an independent lender.

96. Clearly the primary case advanced by Mr Prosser very much relies on the evidence of Mr Ashley. However, while Mr Ashley has experience of capital debt markets on which he could draw, as he recognised himself (see paragraph 69, above) like Mr Gaysford, he did not have any experience of an independent enterprise making a $4 billion loan to a company like LLC5 which held preference shares. Nevertheless, the experts agreed that an independent enterprise would be willing to loan $4 billion to LLC5 provided that the covenants, "protection" and "structural enhancements", as described above, could be put in place to ensure the guarantee of funds, ie the flow of dividends, from BGI to LLC6 and then from LLC6 to LLC5 via the preference shares but parted company on whether it would be possible to do so.

97. The differences between them were helpfully summarised by Mr Gaysford in his evidence as follows:

> "Now, we also agree that therefore, before the transactions happen, you would have to put in place number of covenants, some obvious ones within LLC5 but the most important covenants which are to try to secure or get more certainty over the value of those dividend flows into LLC5. We disagree somewhat on how easy it would be to write those covenants, but we both agree that, had those covenants been in place, then you could satisfy – almost certainly satisfy the concerns of an independent lender and up until there, that's largely where we agree.
>
> Where we disagree is then the implications I draw from that for the Tribunal. So the first implication I draw is that even when you have, if you can conceive of all those covenants in place, I think the resulting commercial position for BlackRock Group as a whole is worse than the simpler alternative, which is either what it did, or for it to fund internally straight to LLC4 or straight to LLC6. And I think, given that part of considering willing buyers and sellers when they're independent, and whether they're going to enter a transaction at all, involves looking at what the next viable alternative is and there clearly was a cheap and viable alternative for BlackRock Group to fund this, than the transaction we hypothesise. So that's one difference between Mr Ashley and I.
>
> The second difference between Mr Ashley and I is, I believe, even if you ignore that second point, what you would be left with is a transaction that still fails the arm's length test, either because you have a series of group covenants which are not themselves arm's length, or because you will have some form of guarantee, either the guarantee that was in the actual transaction, or some enhanced guarantee from the parent, that itself would fail the arm's length test, and Mr Ashley doesn't agree with that part as well."

98. I did not understand HMRC to be relying on the second of Mr Gaysford's differences and, as no argument was advanced by Mr Ewart on this basis, it need not be considered further.

99. In relation to the first difference, Mr Gaysford, like Mr Ewart in his submissions, is considering the BlackRock Group "as a whole" concluding that the commercial position is worse than the simple alternative. Clearly that is the case given Mr Ashley's acceptance that the borrowing costs would be some $40 million less if the lending had taken place higher up

the BlackRock Group rather than with LLC5. In such circumstances it is argued that the transaction with an independent lender would simply not have been entered into.

100. Such an approach appears consistent with OECD Guidelines, in particular paragraph 1.34 which provides:

> "Independent enterprises, when evaluating the terms of a potential transaction, will compare the transaction to other options realistically open to them, and they will only enter into the transaction if they see no alternative that is clearly more attractive"

However, although paragraph 1.42 of the OECD Guidelines recognises that, "it may be helpful to understand the structure and organisation of the group and how they influence the context in which the taxpayer operates", it is clear from paragraph 1.6 of the Guidelines (see above) that a "separate entity approach" should be adopted as this is the "heart of the application of the arm's length principle." Such an approach is also consistent with the legislation, s 147(1)(a) TIOPA concerns the transaction or series of transactions made or imposed between "any **two** persons" (emphasis added).

101. Therefore, the transactions to be compared are the actual transaction, a $4 billion loan by LLC4 to LLC5 and the hypothetical transaction, a $4 billion loan by an independent lender to LLC5 having regard to the covenants which such an independent lender would have required. It is clear from paragraphs 9.181 and 9.182 of the OECD Guidelines that for transfer pricing purposes it does not matter whether or not the arrangement was motivated by a purpose of obtaining a tax advantage (although it is something to be considered in relation to the Unallowable Purpose Issue).

102. Both experts agreed that an independent lender would have entered into an arrangement subject to it being able to obtain the necessary covenants. On balance, given that Mr Gaysford accepted that his concerns in relation to cost and complexity did not amount to "deal breakers", I prefer the evidence of Mr Ashley that the covenants would have been forthcoming. Similarly I prefer the evidence of Mr Ashley regarding parental support especially as Mr Gaysford was unable to say with "certainty" that the transaction would not have proceeded in its absence.

103. Therefore, for the reasons above I find that although an independent enterprise would not have entered into the Loan on the same terms as the actual transaction it would, subject to the covenants described above, have entered into the Loans on the same terms as the parties in the actual transaction.

104. It is therefore not necessary to address the alternative argument advanced by Mr Prosser on the basis of an independent third party, in addition to the loaning $4 billion to LLC5, subscribing for common shares in LLC6.

105. However, I would note that neither of the experts had been instructed to consider this alternative hypothetical transaction. Mr Ashley, in evidence, said that in his experience he had neither "considered" or "come across" such a transaction. Mr Gaysford, whose evidence on this issue was not challenged in cross-examination, identified "several problems" with such a scenario. First, in carrying over that set of economic circumstances other economic circumstances of the actual transaction are lost; second, the 'step plan' or "wider delineation of the transaction" is "very sensitive" to a lot of "different moving parts" including the US tax position, the OCC and the flexibility that the BlackRock Group has to move funds around its group for "perfectly acceptable" commercial reasons; third the independent lender, "if it is now part of the structure" would be required to sign up to the capital and liquidity arrangements which Mr Gaysford described as a "significant" obligation; and finally, a

"methodological point" that if the independent lender owned the common shares of LLC6 Mr Gaysford said he would "struggle" to see how that lender was "now independent".

106. Given my conclusion in relation to the Transfer Pricing Issue it is necessary to consider the Unallowable Purpose Issue and it is to this issue that I now turn.

UNALLOWABLE PURPOSE ISSUE

107. The relevant provisions of the Corporation Taxes Act 2009 ("CTA 2009"), as applicable at the time of the transaction provided:

> **441 Loan relationships for unallowable purposes**
>
> (1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.
>
> (2) The company may not bring into account for that period for the purposes of this Part so much of any credit in respect of exchange gains from that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
>
> (3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
>
> (4) An amount which would be brought into account for the purposes of this Part as respects any matter apart from this section is treated for the purposes of section 464(1)(amounts brought into account under this Part excluded from being otherwise brought into account) as if it were so brought into account.
>
> (5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.
>
> (6) For the meaning of "has an unallowable purpose" and "the unallowable purpose" in this section, see section 442
>
> **442 Meaning of 'unallowable purpose'**
>
> (1) For the purposes of section 441 a loan relationship of a company
>
> (1) For the purposes of section 441 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.
>
> (2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.
>
> (3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company—
>
>> (a) is a party to a loan relationship at any time, or
>>
>> (b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.

(4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not—

(a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or

(b) one of the main purposes for which it is or does so.

(5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person

108. The applicable definition of "tax advantage" is contained in s 1139(2) of the Corporation Taxes Act 2010 which provides:

"*Tax advantage*" means—

(a) a relief from tax or increased relief from tax ,…

109. In relation to the identification of the purpose of a company, Newey LJ in *Travel Document Service & Ladbroke Group International v HMRC* [2018] STC 723 ("*TDS*") observed, at [41], that:

"… It was the company's subjective purposes that mattered. Authority for that can be found in the decision of the House of Lords in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18, which concerned a comparable issue, viz. whether transactions had as "their main object, or one of their main objects, to enable tax advantages to be obtained". Lord Pearce concluded (at 27) that "[t]he 'object' which has to be considered is a subjective matter of intention", and Lord Upjohn (with whom Lord Reid agreed) said (at 30) that:

"the question whether one of the main objects is to obtain a tax advantage is subjective, that is, a matter of the intention of the parties"; …"

He went on to reject a submission that "main", as used in paragraph 13(4) of schedule 9 of FA 1996, meant "more than trivial, stating at [48]:

"A "main" purpose will always be a "more than trivial" one, but the converse is not the case. A purpose can be "more than trivial" without being a "main" purpose. "Main" has a connotation of importance.

110. *TDS* was followed by the Tribunal in *Oxford Instruments UK 2013 Limited v HMRC* [2019] UKFTT 254 (TC) ("*Oxford Instruments*"). The case concerned the potential application of Section 441 CTA 2009 to a loan relationship entered into in the course of a structure proposed by its advisers, Deloitte, and established for the purposes of refinancing the US sub-group of the group headed by Oxford Instruments Plc ("OI Plc"). Judge Beare observed that:

"61. Both parties agree that:

(1) a company has an unallowable purpose if its purposes include one which is "not amongst the business or other commercial purposes of the company" – see Section 442(1) of the CTA 2009;

(2) a purpose of securing a tax advantage for the company itself or for any other person "is only regarded as a business or other commercial purpose of the company if it is not …the main purpose for which the company is party to the loan relationship…or one of the main

purposes for which it is" – see Sections 442(3) and 442)4) of the CTA 2009; and

(3) whether or not a company has a main purpose of securing a tax advantage for itself or for any other person in entering into a loan relationship is a question of fact to be determined by reference to the subjective purpose of the company in so doing – see, in relation to similar language in another provision of the tax legislation, *IRC v Brebner* [1967] 2 AC 18 at pages 27 and 30.

62. The above propositions are not in dispute and are enumerated in paragraph [41] of the decision of Newey LJ in the Court of Appeal in *Travel Document Service and another v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ 549 ("*TDS*")."

111. Judge Beare who, on the facts of that case, did not consider the intentions of the company's advisers, notwithstanding their extensive involvement in the creation and implementation of the structure concerned, should be treated as "informing the intentions of the company" saying, at [101], that he had:

> "…no doubt that, if the evidence in this case pointed to the fact that the directors of the Appellant had ceded to Deloitte de facto control of the company and therefore effectively delegated to Deloitte their fiduciary responsibilities in relation to the company, then the intentions of Deloitte might well be relevant. Similarly, if the evidence pointed to the fact that the directors of the Appellant were just acting as the puppets of the directors or employees of OI Plc and simply acceding, without independent thought, to the requests made of them by the directors or employees of OI Plc, then the intentions of the directors or employees of OI Plc might well inform my findings in relation to the intentions of the Appellant."

112. When identifying a "subjective purpose" it is clear from *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 AC 861 that this can be wider than the conscious motive of the person concerned. In that case the "undisputed evidence" of Ms Mallalieu was that at the time she purchased her "working clothes" she "had nothing in her mind except the etiquette of her profession" and "had no thought of warmth and decency". However, Lord Brightman, at 875, observed:

> "Returning to the question for your Lordships' decision whether there was evidence which entitled the commissioners to reach the conclusion that the object of the taxpayer in spending this money was not only to serve the purposes of her profession, but was also to serve her private purposes of providing apparel with which to clothe herself. Slade J felt driven to answer the question in favour of the taxpayer because he felt constrained by the commissioners' finding that, in effect, the only object present in the mind of the taxpayer was the requirements of her profession. The conscious motive of the taxpayer was decisive. The reasoning of the Court of Appeal was the same. What was present in the taxpayer's mind at the time of the expenditure concluded the case.
>
> My Lords, I find myself totally unable to accept this narrow approach. Of course Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintaining her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is

> inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist. In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."

113. In *Vodafone Cellular Ltd and others v Shaw (Inspector of Taxes)* [1997] STC 734 ("*Vodafone*"), after noting, at 742, that the issue of whether a payment is made exclusively for the purpose of a company's trade or partly for that purpose and partly for another is a question of fact, Millet LJ continued:

> "The leading modern cases on the application of the exclusively test are *Mallalieu v Drummond* (*Inspector of Taxes*) [1983] STC 665, [1983] 2 AC 861 and *MacKinlay* (*Inspector of Taxes*) *v Arthur Young McClelland Moores & Co* [1989] STC 898, [1990] 2 AC 239. From these cases the following propositions may be derived. (1) … (2) …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. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the commissioners, not for the taxpayer."

114. In the event that, as a matter of fact, it is found that there are two purposes, one commercial and the other tax related, s 441(3) CTA 2009 it is necessary to consider the extent to which on a "just and reasonable apportionment" how much of any debit is attributable to an unallowable purpose. Judge Beare considered this, albeit obiter, in *Oxford Instruments*, if he had found (which he did not) that, in addition to the tax advantage main purpose the appellant on that case also had a self-standing non-tax-advantage commercial purpose or purposes saying, at [124]:

> "As for whether those different findings of fact would have affected my conclusions in relation to the amount of the debits arising in respect of the \$140m Promissory Note which should be apportioned to the unallowable purpose for the purposes of Section 441(3) of the CTA 2009, my thoughts are as follows:

(1) the question in that case would boil down to a choice between the position which was taken by the First-tier Tribunal in *Iliffe* and adopted by Mr Ghosh [counsel for the appellant] at the hearing - namely, does the fact that the relevant loan relationship debits would have been incurred even in the absence of the tax advantage main purpose mean that none of those debits should be apportioned to the tax avoidance main purpose – and the more nuanced position which was preferred by the First-tier Tribunal in *Versteegh* and adopted by Ms Wilson [counsel for HMRC] – namely, does the statutory language, construed without any gloss, require some or all of the debits to be apportioned to the tax advantage main purpose given that it is one of two (or one of three) self-standing main purposes;

(2) I do not think that the Court of Appeal decision in *Fidex* provides any insight into the correct answer to this question because, in *Fidex*, there was only one purpose for the transaction which gave rise to the debit – that is to say, the issue of the preference shares in that case – and that was the tax advantage purpose. In the absence of multiple main purposes for the transaction which gave rise to the debit, it was inevitable that the Court of Appeal would conclude, as it did, that the whole of the debit should be apportioned to that tax advantage main purpose;

(3) the Court of Appeal decision in *TDS* is potentially of greater relevance in this regard.

In that case, paragraph 13 was in point in relation to both appellants - Travel Document Service ("TD") and LGI.

So far as TD was concerned, it had argued that it did not have securing a tax advantage as one of its main purposes in holding the shares in LGI (as distinct from its purposes in entering into the total return swap (the "TRS") relating to the shares and LGI's purposes in agreeing to the novation to it of certain loans for nominal consideration) and that TD's only purposes in holding the shares in LGI were commercial in nature and unrelated to any tax advantage. However, from the decisions in *TDS* in both the Upper Tribunal and the Court of Appeal, it appears to have been accepted by TD at both hearings that, if it were to fail in that contention, then all of the debits arising in respect of the shares would fall to be disallowed, despite the fact that, in addition to its tax advantage main purpose, it had commercial main purposes unrelated to any tax advantage in holding the shares throughout the term of the TRS.

It is apparent from the decision in the Court of Appeal that, whilst the Court of Appeal considered that securing the tax advantage was a main purpose of TD in holding the shares, it was not casting doubt on the fact that TD also retained, throughout the period of the TRS, main purposes which did not relate to the tax advantage and were instead, in the words of Newey LJ, "exclusively commercial" – see paragraphs [40] et seq. and, in particular, the references in paragraphs [45] and [46] of the decision to "a main purpose" and not "the main purpose".

It is therefore implicit in the Court of Appeal's decision in *TDS*, so far as it relates to the debit arising in TD, that the Court considered that TD had multiple main purposes in continuing to hold the shares in LGI during the term of the TRS. Notwithstanding that conclusion, the Court went on to dismiss TD's appeal – see paragraph [49] in *TDS*. It did not adopt the approach that, as the non-tax-advantage commercial main purposes in holding the shares meant that TD would have held the relevant shares throughout the term of the TRS even in the absence of the tax advantage main purpose, none of the debits should be attributed to the tax advantage main purpose in holding the shares.

Although it was not expressly articulated by either the Upper Tribunal or the Court of Appeal in relation to TD's appeal in *TDS*, presumably because it was not argued on behalf of TD that the non-tax-advantage main purposes in holding the shares should prevent all or part of the debit from being disallowed, I believe that the reason for this is the same as the reason for the decision of the Court of Appeal in *Fidex*. The grounds for this belief are to be found in paragraph [71] of the decision of the First-tier Tribunal in *TDS FTT*, where the following was said:

> 'Finally, on whichever basis it is decided that paragraph 13(1) applies, we consider that the whole of the debits claimed by TDS are, on a just and reasonable apportionment, attributable the unallowable purpose. The debits accrued as a result of the completion of the Novations, following the establishment of the deemed loan relationship by virtue of the Swap. So far as TDS was concerned there was no significant business or commercial purpose to the Novation that we can discern – all that happened was that the net assets of its subsidiary LGI were depressed by £253 million, with a corresponding increase in the net assets of Sponsio, another of its subsidiaries. Mr Turner did not seek to assert otherwise. The furthest he could go in his evidence was to say that the Novations represented a more tax-efficient way (for the group) of extracting the reserves of LGI as a precursor to making it dormant. In the context of a scheme specifically devised to create these debits, once an unallowable purpose is found to exist for the (deemed) loan relationships giving rise to them as a result of, effectively, that scheme, we have no doubt that the debits should be attributed entirely to that unallowable purpose.'

In other words, in *TDS*, the position of TD was the same as the position of the appellant in *Fidex*. TD may have had mixed main purposes in holding the shares throughout the relevant period but the debit which arose in respect of the shares was wholly attributable to the existence of the TRS and the novation of the loans to LGI, both of which were wholly attributable to a tax advantage main purpose and had no non-tax-advantage commercial purpose. Thus, the whole of the debit was attributable to the tax advantage main purpose of TD.

If my analysis of the Court of Appeal decision in *TDS* in relation to the appeal of TD is right, then that part of the decision provides no guidance as to how to apply the apportionment test in a case where the debits in question are attributable to a loan relationship into which the appellant has entered, and to which it remains party, for a combination of self-standing main purposes, only one of which is a tax advantage main purpose.

On the other hand, the analysis adopted by the Court of Appeal in *TDS* in relation to LGI – see paragraphs [50] to [54] – does shed some light on this question and, in doing so, tends to support the position advanced by Mr Ghosh. In those paragraphs of the decision, the Court plainly accepted the proposition made by Mr Peacock, as counsel for LGI, to the effect that, where a company has entered into, and remains party to, a loan relationship for a tax advantage main purpose, as long as it can show that the tax advantage main purpose has not increased the debits arising in the company from those which would have arisen in any event even in the absence of the tax advantage main purpose, none of the debits should be attributed to that tax advantage main purpose. Whilst LGI ultimately failed to persuade the Court of Appeal in *TDS* that the debits in its case should not be apportioned to its tax advantage main purpose, that was not because the Court rejected the underlying proposition described above but rather because the Court considered that LGI had failed to adduce sufficient evidence to establish that the debits had not been increased as a result of the tax advantage main purpose;

(4) whilst the Court of Appeal decision in relation to LGI's appeal in *TDS* technically does not bind me to apply the position advanced by Mr Ghosh - because the ratio of the Court in relation to LGI's appeal was simply that LGI had failed to establish that its debits had not been increased by its tax advantage main purpose in accepting the novation of the relevant loans – I believe that it supports the view that, in a case where the debits in question arise solely as a result of the company's being party to a loan relationship (and not as a result of some extraneous transaction or transactions), as long as the company can show that it had one or more commercial main purposes unrelated to any tax advantage in entering into, and remaining party to, that loan relationship, and that the relevant debits would have been incurred in any event, even in the absence of the company's tax advantage main purpose in so doing, then none of the relevant debits should be apportioned to the tax advantage main purpose; and

(5) it therefore follows that, if I had concluded that, in addition to its tax advantage main purpose for issuing, and remaining party to, the \$140m Promissory Note, the Appellant had had either or both of the non-tax-advantage commercial main purposes described above as self-standing purposes for issuing, and remaining party to, the note, then, in my view, none of the debits arising in respect of the note would be apportionable to the tax advantage main purpose, on a just and reasonable basis, and therefore the Appellant would be entitled to succeed in its appeal. However, I should reiterate that this conclusion has no bearing on the reasoning or conclusion set out in paragraph 120 above, which relate to a quite different factual scenario."

Discussion

115. It is common ground that the deduction of loan relationship debits in respect of the Interest is a tax advantage. It is also common ground that it is the subjective purpose of LLC5 that is to be considered in order to determine whether securing a tax advantage was the "main purpose" or "one of the main purposes" of its loan relationship with LLC4. As it is agreed that as this did not change in later accounting periods it is only necessary to consider, this question of fact in relation to the initial accounting period to 30 November 2010.

116. Mr Prosser contends LLC5's only purpose in entering into the Loans with LLC4 was commercial, namely to facilitate its acquisition of the preference shares and invest, via LLC6, in BGI. Mr Ewart, however, submits that it entered into the transaction for an unallowable tax avoidance purpose.

117. As a company is a legal construct, as is clear from *Oxford Instruments*, its intentions are, in the absence of evidence that they are acting as a puppet, being usurped or by-passed in the decision making process, those of its directors. In the present case there is nothing to suggest that, despite their significant involvement in the creation and advice on the implementation of the transaction, LLC5 ceded control to its advisers or other parts of the BlackRock Group. As such it is necessary to ascertain the subjective intentions and purpose of LLC5's directors in respect of the transaction.

118. In this regard there is the contemporaneous documentary evidence contained in the minutes of the 30 November 2009 board meeting as well as the evidence of Mr Kushel in relation to that meeting. However, as he accepted, he could not speak on behalf of the other board members.

119. Although, and perhaps not surprisingly as it was some ten years before the hearing, Mr Kushel could not recall the details of the board meeting held on 30 November 2009 but said that he had not taken account of any UK tax advantage into account in making the decision to proceed with the transaction. Minutes of the meeting confirm that Mr Fleming advised that such an approach should be taken and Mr Kushel believed he had followed this advice and the minutes do not record that any of the other Board members had not done so. Also, Mr Kushel said that as he was comfortable with it and had not concerns over its commercial viability the transaction would have proceeded even if, at the last minute, the tax advantage had ceased to exist. Additionally, he confirmed that, in making the decision to approve LLC5 entering into the Loans, he considered his fiduciary duty was satisfied.

120. Mr Kushel did not go so far as Ms Mallalieu, who "had no thought of warmth and decency" when she bought her "working clothes", and say that a tax advantage was not an object or purpose of LLC5. However, adopting the reasoning of the House of Lords in *Mallalieu v Drummond* as further explained in *Vodafone* to the present case it is necessary to look beyond the conscious motives of LLC5 and take account of the inevitable and inextricable consequences of it entering the loan relationship with LLC4. Having regard to all the circumstances of the case it is, in my judgment, clear that the securing of a tax advantage is an inevitable and inextricable consequence of the Loan between LLC4 and LLC5.

121. This cannot be described as merely incidental and, as such, is clearly an important purpose, so much so that I consider it to be a main purpose of LLC5 in entering into the Loans. However, the evidence is that LLC5 entered into the Loans in the furtherance of the commercial purpose of its business of making and managing passive investments. This too is clearly an important purpose and, as such, is to be regarded as a main purpose also.

122. Having come to the conclusion that there was a commercial and a tax purpose, it is therefore necessary to consider a "just and reasonable apportionment", as required by s 441 CTA 2009. In doing so I have adopted the approach taken by Judge Beare in *Oxford Instruments*.

123. The evidence of Mr Kushel is that LLC5 would have entered into the Loans with LLC4 even if there had been no tax advantage in doing so. Like Judge Beare, and as the tax advantage purpose has not increased the debits, I consider that, on a just and reasonable basis, that all of the relevant debits arising in respect of the Loans should be apportioned to the commercial main purpose rather than the tax advantage main purpose.

DECISION

124. Therefore, for the above reasons, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

125. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 3 November 2020

APPENDIX

Structure of transaction after completion