Neutral Citation: [2024] UKFTT 00998 (TC)

Case Number: TC09346

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2020/00915

Corporation tax – loan relationships – unallowable purpose – Corporation Tax Act 2009 section 441 – Corporation Tax Act 2009 section 442 – intra-group acquisition – appeal dismissed

Heard on: 29 April – 3 May and 29 July 2024
Judgment date: 01 November 2024

Before

TRIBUNAL JUDGE MICHAEL BLACKWELL
SONIA GABLE

Between

SYNGENTA HOLDINGS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Julian Ghosh KC, Mr Charles Bradley, Mr Quinlan Windle and Mrs Laura Ruxandu, instructed by Ashurst LLP.

For the Respondents: Mr Francis Fitzpatrick KC, Mr Thomas Chacko, Mr Emile Simpson, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. On 26 January 2011, Syngenta Holdings Limited ("SHL") acquired the entire issued share capital of Syngenta Limited ("SL") from its parent company, Syngenta Alpha BV ("SABV"). This reorganised the main UK subsidiaries of the corporate group headed (at that time) by Syngenta AG ("SAG") (the "Syngenta Group") so that they formed a single subgroup headed by SHL. The consideration provided by SHL consisted of: (i) a payment in cash, which was funded by way of a loan (the "Loan") from Syngenta Treasury NV ("STNV"); and (ii) the issue and allotment of shares to SABV.

2. In the accounting periods ending 31 December 2011 to 31 December 2016, SHL treated the interest on the Loan as giving rise to deductible debits for corporation tax purposes in accordance with Part 5, Corporation Tax Act 2009 ("CTA 2009"). The Commissioners for His Majesty's Revenue and Customs ("HMRC") opened enquiries into SHL's company tax returns for these accounting periods and, on 4 October 2019, sent closure notices to SHL closing those enquiries. The closure notices concluded that the main purpose of SHL being party to the Loan was an unallowable purpose within the meaning of s 442 CTA 2009 and therefore that SHL was not entitled to a deduction for interest paid under the Loan. The closure notices amended SHL's returns to give effect to that conclusion.

3. SHL appeals against the amendments made by the closure notices. In outline, SHL's case is that it did not have an unallowable purpose or alternatively that, if it did, none of the debits are attributable to the unallowable purpose on a just and reasonable apportionment.

BACKGROUND

4. The Syngenta Group is a global agriculture business operating in the crop protection and seeds markets. The Syngenta group is headquartered in Switzerland. The Syngenta group has operations worldwide, including in the United Kingdom.

5. In 2010 and immediately prior to the Transaction (as defined below), a simplified version of the structure of the UK sub-group of Syngenta was as shown in the structure chart at Appendix 2.

6. On 26 January 2011, SHL acquired the entire issued share capital of SL from SABV for consideration of US$2,208,220,000 (the "Transaction") which included the following steps:

(1) SHL and STNV entered into a loan agreement pursuant to which SHL borrowed US$950,000,000 from STNV (the Loan). The Loan was for a ten year term with the interest rate to be fixed annually on the basis of the 12 month USD LIBOR rate as at 31 December plus a margin of 2.87%.

(2) SHL acquired the entire issued share capital of SL from SABV for US$2,208,220,000. The consideration provided by SHL comprised:

(a) payment in cash of US$950,000,000, funded by way of the Loan; and

(b) the issue and allotment of 2,751 B ordinary shares of US$1 each in the capital of SHL to SABV, having a total value of $1,258,220,000.

(3) SABV made an interim distribution of EUR 698,734,922 (being the EUR equivalent of US$950,000,000) to its parent.

7. Following the Transaction, the simplified version of the structure of the UK sub-group of Syngenta is shown in the chart at Appendix 2.

8. An Advance Thin Capitalisation Agreement ("ATCA") was entered into between SHL and HMRC in respect of the Loan on 17 February 2012.

9. On 16 December 2013, HMRC opened an enquiry into the corporation tax returns submitted by SHL and SL for the accounting period ending 31 December 2011 (the Enquiry). HMRC subsequently opened enquiries into the corporation tax returns submitted by SHL for the accounting periods ending 31 December 2012, 31 December 2013, 31 December 2014, 31 December 2015 and 31 December 2016.

10. On 4 October 2019, HMRC issued closure notices to SHL in respect of the accounting periods ending 31 December 2011, 31 December 2012, 31 December 2013, 31 December 2014, 31 December 2015 and 31 December 2016. The closure notices were issued on the basis that, in HMRC's view, section 441 CTA 2009 applies to SHL's Loan and the entirety of the debits arising to SHL from the Loan should not be allowable for corporation tax purposes.

11. On 25 October 2019, SHL appealed the closure notices on the basis, in SHL's view, that the Loan did not have an unallowable purpose. In November 2019, SHL requested an independent review of the closure notices. On 18 February 2020, HMRC confirmed that, following the independent review, the decision was upheld. On 2 March 2020, SHL submitted a notice of appeal to the First-tier Tribunal (Tax Chamber).

12. The foregoing is taken from the statement of agreed facts and, as such, is agreed by the parties.

13. It was also established at the start of the hearing that it is not HMRC's case that the board of directors of SHL were bypassed or operating on instruction. It is therefore agreed that it is the purpose of the board of directors of SHL in entering into the Loan that is relevant.

14. For ease of reference a dramatis personae of individuals referred to in this decision appears in Appendix 1.

LEGISLATION

15. The legislation governing the taxation of loan relationships is set out in Part 5, CTA 2009, which sets out how profits and deficits arising to a company from its loan relationships are brought into account for corporation tax purposes (s 292(1) CTA 2009). It provides that the general rule is that all profits arising to a company from its loan relationships are chargeable to corporation tax as income in accordance with Part 5, CTA 2009 (s 295(1) CTA 2009) and that profits and deficits arising to a company from its loan relationships are to be calculated using the credits and debits given by Part 5 (s 296 CTA 2009).

16. Section 299(1) provides that the charge to corporation tax on income applies to any non-trading profits which a company has in respect of its loan relationships. Section 300(1) provides that any non-trading deficit which a company has from its loan relationships must be brought into account in accordance with Chapter 16, Part 5, CTA 2009.

17. At all relevant times, s 301 CTA 2009 set out the process for determining whether a company has non-trading profits or a non-trading deficit from its loan relationships. It provided that a company has a non-trading deficit for an accounting period from its loan relationships if the non-trading debits for the period exceed the non-trading credits for the period or there are no such credits.

18. Chapter 16, Part 5, CTA 2009 applies if for any accounting period a company has a non-trading deficit from its loan relationships (s 456(1) CTA 2009). It provides that the deficit may be set against profits of the company (of whatever description) for the accounting period in which the deficit arose, carried back to be set off against profits for earlier accounting periods or carried forward and set off against non-trading profits of the company for later accounting

periods. Further, s 99(1) Corporation Tax Act 2010 ("CTA 2010") applies if a company has a non-trading loan relationship deficit and provides that the company may also surrender the deficit so that other companies in the same corporate group can obtain group relief in respect of it.

19. Chapter 15, Part 5, CTA 2009 contains rules connected with tax avoidance. Section 441 CTA 2009 relevantly provides:

> "**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.
>
> …
>
> (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.
>
> …
>
> (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."

20. Section 442 CTA 2009 relevantly provides:

> "**442 Meaning of 'unallowable purpose'**
>
> (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.
>
> …
>
> (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."

21. Section 476(1) CTA 2009 provides that "tax advantage" has the meaning given by s 1139 CTA 2010, which on enactment provided:

> "**'Tax Advantage'**
>
> (1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section.
>
> (2) 'Tax advantage' means—
>
> (a) a relief from tax or increased relief from tax,
>
> (b) a repayment of tax or increased repayment of tax,
>
> (c) the avoidance or reduction of a charge to tax or an assessment to tax, or
>
> (d) the avoidance of a possible assessment to tax.
>
> (3) For the purposes of subsection (2)(c) and (d) it does not matter whether the avoidance or reduction is effected—
>
> (a) by receipts accruing in such a way that the recipient does not pay or bear tax on them, or
>
> (b) by a deduction in calculating profits or gains.
>
> (4) In this section "relief from tax" includes—
>
> (a) a tax credit under section 1109 for the purposes of corporation tax, and
>
> (b) a tax credit under section 397(1) or 397A(1) of ITTOIA 2005 for the purposes of income tax."

22. Section 1139 CTA 2010 was amended several times during the period covered by the appeal to add further definitions of "tax advantage" that are not relevant to this appeal.

23. SHL accepted at the outset of the hearing that there was a "tax advantage" within s 1139(2)(a) or s 1139(2)(c) CTA 2010.

CASE LAW

24. Sections 441 and 442 CTA 2009 and their predecessors have been considered by the courts and tribunals on a number of occasions, including five times relatively recently by the Court of Appeal: *Fidex Ltd v HMRC* [2016] EWCA Civ 385, [2016] STC 1920 ("*Fidex*"); *Travel Document Service and anr v HMRC* [2018] EWCA Civ 549, [2018] STC 723 ("*TDS*"); *BlackRock Holdco 5 LLC v HMRC* [2024] EWCA Civ 330, [2024] STC 740 ("*BlackRock*"); *Kwik-Fit Group Ltd & ors v HMRC* [2024] EWCA Civ 434, [2024] STC 897 ("*Kwik-Fit*") and *JTI Acquisition Company (2011) Ltd v HMRC* [2024] EWCA Civ 652, [2024] STC 1179 ("*JTI*").

25. In *TDS* at [41], Newey LJ, commenting on the predecessor legislation in para 13 of Sch 9 Finance Act 1996, stated:

> "The following points bear, as it seems to me, on when a company should be considered to have held shares for an "unallowable purpose":
>
> i) A company had an 'unallowable purpose' if its purposes included one that was 'not amongst the business or other commercial purposes of the company' (see paragraph 13(2) of schedule 9 to FA 1996);
>
> ii) A tax avoidance purpose was not necessarily fatal. It was to be taken to be a 'business or other commercial purpose' unless it was 'the main purpose, or one of the main purposes, for which the company is a party to the relationship' (see paragraph 13(4));

> iii) 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'; and
>
> iv) When determining what the company's purposes were, it can be relevant to look at what use was made of the shares. As the Upper Tribunal (Barling J and Judge Charles Hellier) noted in *Fidex v HMRC* [2014] UKUT 454 (TCC), [2015] STC 702 (at paragraph 110):
>
> > 'what you do with an asset may be evidence of your purpose in holding it, but it need not be determinative of that purpose. The benefits you hope to derive as a result of holding an asset may also evidence your purpose in holding it'."

26. In relation to iv) Newey LJ referred to "shares" as the transaction concerned a total return swap. Applying the reasoning to a conventional loan, it can be relevant to look at what use is made of the borrowed money.

27. Further guidance was provided by Falk LJ in *BlackRock*. At [107] she said:

> "The parties were quite right not to dispute the fact that what matters is the company's subjective purpose or purposes in being a party to the loan relationship in question. The purpose or purposes for which a company is a party to a loan relationship may or may not be the same as, for example, the purpose or purposes for which the company exists, or the purpose or purposes of a wider scheme or arrangements of which the loan relationship forms part. Those other purposes may, for example, encompass the purposes of other actors. There is a contrast here between the unallowable purpose rule and the 'targeted anti-avoidance rule' introduced by Finance (No.2) Act 2015 as ss. 455B-455D CTA 2009. That rule requires consideration of the main purpose or purposes of 'arrangements'."

28. At [108], so far as is relevant, she continued:

> "It was also common ground that for a corporate entity…, which can only act through human agents, it is necessary to consider the subjective purpose of the relevant decision makers. Unless they have been bypassed or are effectively acting on instruction, that will normally be the board of directors…"

29. In addition to the principles derived from *TDS*, Falk noted that it was appropriate to consider other case law and, in particular, *Mallalieu v Drummond* [1983] 2 AC 861, [1983] STC 665 ("*Mallalieu*"); *MacKinlay v Arthur Young McClelland Moores & Co* [1990] 2 AC 239, [1989] STC 898 ("*MacKinlay*") and *Vodafone Cellular Ltd v Shaw* [1997] STC 734 ("*Vodafone*"). She discussed that case law at [110] to [123]. At [124] she stated that "object" can be regarded as synonymous with "purpose" and summarised the case law as follows:

> "a) Save in 'obvious' cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.
>
> b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.

c) Subjective intentions are not limited to conscious motives.

d) Further, motives are not necessarily the same as objects or purposes.

e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental, they must be a purpose for it.'

f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."

30. Falk LJ remarked at [162] that:

> "As Nugee LJ suggested in argument, a simple starting point in ascertaining a person's purpose for doing something is to consider 'why' they did it. While this will not cover all the nuances – and in particular the potential distinction between purpose and motives discussed in *MacKinlay* – it is a sensible starting point."

31. At [150] Falk LJ stated:

> "How then should this point be addressed in the context of s.442? The unallowable purpose rule forms part of a code, contained in Part 5 of CTA 2009, which governs the treatment of loan relationships for corporation tax purposes, and which among other things specifically contemplates tax relief for interest and other expenses of raising debt. The corporation tax relief available is obviously a valuable relief. It is unrealistic to suppose that it will not form part of ordinary decision-making processes about methods of funding a company. Indeed, it might well be wrong for directors to ignore that consideration in deciding what is in the best interests of the company concerned. I agree with Mr Prosser's submission that it cannot have been Parliament's intention that the inevitable consequence of taking out a loan should engage the unallowable purpose rules, subject only to consideration of whether the value of the tax relief is sufficient to make it a 'main' purpose. Something more is needed."

32. This was reiterated by her in *Kwik-Fit*, where she stated that:

> "As I explained in *BlackRock* at [150], it cannot have been Parliament's intention that the unallowable purpose rule will be engaged as an inevitable consequence of taking out (or, I would add, maintaining) a loan, or indeed charging interest on it at a commercial rate, subject only to consideration of whether the value of the tax benefits are sufficient to make it a 'main' purpose. The mere fact that a group organises its affairs in a manner that makes use of brought forward non-trading deficits and that it expects to obtain relief for interest and other expenses of loan relationships, in each case as the legislation contemplates, cannot be enough to engage the unallowable purpose rule."

33. In *Kwik-Fit*, considering the main purpose test, Falk LJ quoted Cross J in *IRC v Kleinwort Benson* [1969] 2 Ch 221 ("*Kleinwort Benson*") and *IRC v Sema Group Pension Scheme Trustees* [2002] EWCA Civ 1857, [2003] STC 95 ("*Sema*"). In *Kleinwort Benson* Cross J stated:

> "Here there was only a single indivisible transaction and it was an ordinary commercial transaction, a simple purchase of debenture stock. As the purchaser was a dealer he was entitled to keep the interest element out of his tax return and so was able to pay a higher price than an ordinary taxpayer would have been able to pay. Similarly, a charity, because it would have been able to reclaim the tax, would have been able to pay an equally large price and

> still make a profit. But it is to my mind an abuse of language to say that the object of a dealer or a charity in entering into such a transaction is to obtain a tax advantage.
>
> When a trader buys goods for £20 and sells them for £30, he intends to bring in the £20 as a deduction in computing his gross receipts for tax purposes. If one chooses to describe his right to deduct the £20 (very tendentiously be it said) as a 'tax advantage' one may say that he intended from the first to secure this tax advantage. But it would be ridiculous to say that his object in entering into the transaction was to obtain this tax advantage. In the same way I do not think that one can fairly say that the object of a charity or a dealer in shares who buys a security with arrears of interest accruing on it, is to obtain a tax advantage, simply because the charity or the dealer in calculating the price which they are prepared to pay proceed on the footing that they will have the right which the law gives them either to recover the tax or to exclude the interest as the case may be."

34. Lightman J's comments on this, which were approved by the Court of Appeal in *Sema*, were as follows:

> "53. The observations of Cross J call attention to the need when determining whether the obtaining of a tax advantage was a main object of an ordinary commercial transaction, to consider with care the significance to the taxpayer of the tax advantage. The tax advantage may not be a relevant factor in the decision to purchase or sell or in the decision to purchase or sell at a particular price. Obviously if the tax advantage is mere 'icing on the cake' it will not constitute a main object. Nor will it necessarily do so merely because it is a feature of the transaction or a relevant factor in the decision to buy or sell. The statutory criterion is that the tax advantage shall be more than relevant or indeed an object; it must be a main object. The question whether it is so is a question of fact for the commissioners in every case. Unless the commissioners misdirect themselves in law as to the test to be applied (as Cross J plainly thought was the case in Kleinwort) their decision cannot be challenged. It is plain that the commissioners correctly directed themselves in law in this case and that their decision was one which they could reasonably reach. I therefore do not think that invocation of the judgment of Cross J in *Kleinwort* assists the trustees."

35. Commenting on these passages in *Kwik-Fit*, Falk LJ noted at [87]:

> "However, as this Court recognised in *Sema*, Cross J's comments in *Kleinwort Benson* must be understood in the light of the facts of that case. Lightman J rightly emphasised at [53] of his decision in *Sema* (the paragraph approved by the Court of Appeal in that case) that the significance of the tax advantage to the taxpayer must be considered with care. I would add that it should also be considered in the context of the relevant legislative code. As Lightman J also explained, there is a range of possibilities. The possibilities include that the tax advantage may be a 'feature' or a 'relevant factor' without being a main object. (I would take the opportunity to clarify that Lightman J was not saying in the preceding sentence that anything that is more than 'icing on the cake' will be a main object, rather that if it is no more than that then the answer is obvious that it will not be.) But the important point is that whether a purpose is a main purpose is a question of fact for the fact-finding tribunal, which cannot be interfered with in the absence of an error of law."

36. Similarly, in *TDS* we recall Newey LJ said at [48]:

> "I would add, however, that I do not accept that, as was submitted by Mr Ghosh, 'main', as used in paragraph 13(4) of schedule 9 of FA 1996, means

> 'more than trivial'. 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."

37. In *JTI* Newey LJ offered the following guidance on the unallowable purpose test:

> "i) Even where a company entering into a loan relationship was brought into being to further a wider scheme, the company's purposes in becoming a party to the relationship are not necessarily those for which it was created or those of the wider scheme;
>
> ii) On the other hand, the context, and in particular the purposes of the wider scheme which the company was intended to advance, may, depending on the facts, bear on the company's purposes in entering into the loan relationship;
>
> iii) The company will have a 'tax avoidance purpose' within the meaning of section 442 of CTA 2009 if it is seeking to play its part in a scheme which, to the knowledge of the relevant decision-makers, was designed to secure a tax advantage;
>
> iv) If it can be said that the company wishes to go along with such a scheme whatever its purposes might be, it may well be that the company has an unallowable purpose regardless of whether it appreciates that the scheme was designed to secure a tax advantage. It may suffice that those promoting the scheme have that intention;
>
> v) The fact that the decision-makers consider that entering into the loan relationship is in the company's interests for other reasons does not preclude them from having a 'tax advantage purpose'; and
>
> vi) A Tribunal determining whether a company had a 'tax avoidance purpose' is not required to adopt a "tunnel-visioned" approach looking simply at how the company was proposing to use the money it was borrowing."

THE HEARING

38. The first sitting of the hearing took place between 29 April and 3 May 2024. During that hearing we heard submissions in relation to *BlackRock*. *JTI* had not yet been heard by the Court of Appeal at the time of the first sitting and while *Kwik-Fit* had been heard by the Court of Appeal at that time, the judgment in that case had not been handed down at the start of the hearing, so we did not hear submissions in relation to it. The judgment in *Kwik-Fit* was handed down on 3 May 2024 and the judgment in *JTI* was handed down on 13 June 2024. A further sitting was held on 29 July 2024 to hear submissions in relation to those judgments.

39. The documentary evidence before us comprised of:

(1) a core bundle (402 pages);

(2) twelve supplementary bundles (totalling 8,159 pages); and

(3) clips of the Syngenta UK group relief summary returns the year ended 31 December 2006 through to the year ended 31 December 2011 (32 pages).

40. In addition we were provided with a joint authorities bundle (795 pages) and a supplementary bundle of authorities (77 pages) for the hearing on 29 July 2024.

41. We heard live witness testimony from Andrew Johnson, the Head of Finance Operations for UK and Ireland legal entities of the Syngenta Group and a director of both SHL and SL, and Antoine Kuntschen, who was at the time of the Transaction a Senior Group Tax Manager in the Syngenta Group. Mr Kuntschen retired from that position on 31 December 2017. Mr Johnson gave his evidence on 29 and 30 April 2024 and Mr Kuntschen gave his evidence on 30 April and 1 May 2024.

42. We are grateful to both parties for paying for a transcript of the hearing. This has been of great assistance in preparing this decision.

43. We also greatly benefited from the written pleadings of both parties. These included a statement of agreed facts and issues (four pages, including the two diagrams in Appendix 2 of this decision), skeleton arguments (SHL's 20 pages; HMRC's 34 pages), written closing/note on evidence (SHL's 31 pages; HMRC's 41 pages) and the skeleton arguments for the hearing on 29 July 2024 (SHL's 6 pages; HMRC's 12 pages). We are grateful to both parties for the thoroughness and detail of the submissions they made.

ARGUMENTS OF THE PARTIES

SHL's case

44. In summary, SHL's main case is that the SHL directors were independent and took their role seriously. To the extent that they were aware of the reasons why the Syngenta Group wanted the Transaction to proceed, that simply formed part of their background understanding. They did not assume the purposes of the wider Syngenta Group. The main purpose of SHL's directors in entering into the Loan was to obtain the funds necessary to acquire SL, which they did because they considered that doing so was a good investment that would allow them to achieve a good return for their shareholders. The directors believed SL was a good investment because they expected dividend income from the shares to exceed interest on the Loan and the value of SL to grow.

45. If and to the extent that, contrary to the above submissions, the purposes of Mr Kuntschen or the Syngenta Group are relevant, in summary SHL submits that their main purpose was to achieve a corporate structure in the UK in which all legal entities were in a single subgroup headed by a UK holding company.

46. If, contrary to the above submissions, SHL did have a tax avoidance main purpose as well as its commercial main purpose for becoming party to the Loan, none of the debits arising from the Loan are attributable to the tax avoidance purpose on a just and reasonable apportionment. On this assumption, the directors of SHL would still have had a main purpose of funding the acquisition of a good investment and their ability to do so was offered as a largely "take it or leave it" proposition. Entering into the Loan on its terms was therefore necessary for them to achieve their commercial purpose. In these circumstances an approach to just and reasonable apportionment that denied SHL a deduction would undermine the purpose of Part 5, CTA 2009.

HMRC's case

47. It is HMRC's case that the Loan had an unallowable purpose because:

(1) throughout the preparation for the Transaction, those designing the Transaction understood the predominant reason why they were working on the Transaction was to obtain non-trading loan relationship ("NTLR") debits under the loan relationship rules for the interest it paid at UK corporation tax rates (at the time 28%) which were to be surrendered to UK companies with taxable profits, which were members of the same UK group, and those UK companies were to use the NTLR deficits to reduce their liability to tax;

(2) it was clear both to those designing the Transaction and to the directors of SHL that the predominant reason SHL was being offered SL was to obtain the tax advantage, discussed at (1) above;

(3) SL was offered to the directors of SHL as a package, an intrinsic part of which was the Loan, on a take it or leave it basis;

(4) the availability and quantum of the tax advantage was the most significant area of concern during the preparation for the debt push down;

(5) the reason the Transaction was being carried out at this time was because the tax advantage was available as UK tax losses had been fully utilised so that the deductions arising to SHL could be surrendered to other UK group members (as in fact occurred, all of the NTLR deficits were surrendered); and

(6) the manner in which, and the form in which, and the time at which, the Transaction was carried out were designed to maximise the tax advantage.

48. HMRC do not accept that the purpose of the Transaction was either (1) legal entity simplification or (2) simplification of the dividend planning process, these being the two rationales given for the Transaction other than tax savings.

49. HMRC's case is that the whole of the debits claimed are on a just and reasonable apportionment attributable to the unallowable purpose.

FINDINGS OF FACT

50. In this section we first discuss our approach to the evidence (at [51] to [60]). We then consider the most significant parts of the documentary evidence in a broadly chronological fashion (at [61] to [236]), before drawing together the evidence in relation to particular issues. We discuss particular instances where we find the tax saving to the group is being downplayed, we find they have a broader indicative value that goes beyond those particular instances (at [237] to [243]). We then consider the purpose of the Transaction from the group perspective, considering the suggested purposes of legal entity simplification (at [244] to [268]), dividend planning (at [269] to [275]) and obtaining a tax advantage (at [276] to [321]). We find the only group purpose of the Transaction was obtaining a tax advantage. We then consider the purpose of the Transaction from the perspective of the directors of SHL (at [321] to [376]). We conclude with consideration of the key question, namely the purpose of the SHL directors of entering into the Loan. We find the sole purpose (and sole main purpose) to be obtaining the tax advantage.

Approach to evidence

51. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) ("*Gestmin*") Leggatt J discussed the challenges of evidence based on recollection and the unreliability of human memory in relation to events which occurred several years ago.

52. Leggatt J noted, at [19] that:

> "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."

53. In that context we note that both witnesses were, at the time of the Transaction, employees of the Syngenta Group, and Mr Johnson is a director of SHL. They were both called by SHL. Leggatt J then continued:

> "[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 or 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.
>
> [21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> [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."

54. However, that is not to say that all the evidence, including the oral evidence, should not be taken into account. Floyd LJ in *Kogan v Martin* [2019] EWCA Civ 1645, at [88], said:

> "88. …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."

55. In closing submissions SHL suggests that *Gestmin* is less relevant as this is not a case that turns on "recollections of what was said in meetings and conversations" (quoting [22] of *Gestmin*) but rather witnesses' recollections of their subjective purposes in entering into highly significant transactions. However, that is a partial reading of *Gestmin* since at [18] Leggatt J had stated:

> "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*".
>
> [our emphasis]

Similarly in paragraph [22] Leggatt refers to gauging "motivations". Hence we consider the guidance in *Gestmin* is equally relevant to this case.

56. We note also how in *Ingenious Games LLP v HMRC* [2019] UKUT 226 (TCC) at [344] Falk J (as she then was) commented:

> "in determining whether there is the requisite subjective intention, all the evidence must be considered. As mentioned in *Gestmin v Credit Suisse* at [22] …, contemporaneous documentary evidence will always be highly relevant. Objective evidence is also relevant and, depending on the context, it may be significant".

57. We note also that *Gestmin* at [22] refers to a "commercial case". The significance of that is there can be expected to be significant documentary records. That can be contrasted to the domestic context of *Kogan v Martin and others* [2019] EWCA Civ 1645 where (at [89]) Floyd LJ noted "the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents."

58. While this is a tax case, not one in the Commercial Court, it is one where there is a substantial amount of documentary evidence. We acknowledge that in his witness statement Mr Johnson explained that he and Ms Carter sat "about 5 yards apart, which meant we usually dealt with small or routine matters by having a chat". He goes on to say:

> "Sarah kept me informed about the progress of the Reorganisation and we would generally have had catch up meetings with the key project team members. There were many teleconference calls to monitor progress. If I had a concern, I would quite often discuss it with Sarah in person and only sometimes put it in an email. In part this is a practical thing because I am slow at typing but I also prefer talking through matters. This explains why there are not emails between me and Sarah on all aspects of the Reorganisation. I would probably only choose to put something in an email where I wanted to copy several people to make them all aware of it."

59. However we note that there were in total 8,561 pages of evidence before us: comprised of a core bundle of 402 pages and 12 supplementary bundles totalling 8,159 pages. We acknowledge that it may slightly overstate the volume of evidence, due to some overlap between the core and supplementary bundles. However, we consider there to be abundant relevant documentary evidence.

60. We therefore consider the guidance in *Gestmin* to be useful and relevant to the assessment of the witness evidence that we heard. We therefore are alive in our decision as to 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.

Chronological discussion of documentary evidence with regard to the Transaction

61. We have considered the evidence in the round. However, to assist with presenting a structured decision we find it helpful to first consider the most significant parts of the documentary evidence in a broadly chronological fashion, prior to drawing together the evidence in relation to particular issues.

62. We acknowledge at the outset that our consideration goes broader than the core issue: which is what was the purpose of the directors of SHL in taking out the Loan. Our reason for doing so is to give context for that decision, which did not take place in a vacuum.

63. When quoting the evidence and transcript we do so verbatim: in doing so choosing to prioritise accuracy over elegance.

2010 projects list: Simon Perry email to Sarah Carter – 1 February 2010

64. On 1 February 2010 Simon Perry sent Ms Carter an email titled "2010 projects". He attached a document referred to in the email as the "projects list", the attachment being named "UK tax projects 2010 010210.xls". At the top of the projects list is a title – "2010 UK Corporate Tax Project List". It has five sections with the following headings: "1. Tax projects first half 2010"; "2. Tax projects 2nd half 2010"; "3. Other projects with tax involvement"; "4. Maybe 2010"; "5. Complete".

65. The "Debt push down" project is listed in the first section "1. Tax projects first half 2010". Listed against this project the "Project tax lead" is "SC" and "Other internal team members" are "AJ/AK". The key at the bottom explains these initials are those of Ms Carter, Mr Kuntschen and Mr Johnson.

66. This document was put before Mr Johnson who in cross-examination was asked if he knew it was a tax project. He answered:

> "A. I don't recollect seeing this one, but it doesn't –– this actual schedule, but, yes, I would say driven by –– well, it's back to this term about driven by tax, you know, tax heavily involved in it and obviously when the project team was pulled together, it's, you know, multiple functions involved in it. And, you know, when it gets to Syngenta Holdings board meeting, there we're not dealing with it necessarily as a tax project, we're looking at the acquisition of this investment, which I would assume you'll come on to later probably."

67. Here we note that the project was initially on a list of "tax projects". The name of the project, from its inception, of "debt push down" suggests it is concerned with the creation of debt in the UK, rather than entity simplification or dividend planning. Mr Johnson appears to acknowledge that his perception was that it was "tax driven" at group level.

UK Projects: Ms Carter email to Mr Kuntschen – 5 February 2010

68. On 5 February 2010 Ms Carter sent Mr Kuntschen an email titled "Projects". That email began:

> "Further to our call yesterday the following summarises the main projects which we will be bringing to the table from the UK."

69. The email had three numbered headings: "1. Tax optimisation project"; "2. Allocation of resources"; "3. Corporation Finance projects". Under the heading "Tax optimisation project" there were four sub-headings of different projects being: "a. Debt push down - Insertion of debt into the UK to fund purchase of Syngenta Limited"; "b. UK Patent Box"; "c. Asset taxation"; "d. Profit repatriation".

70. The text under this first heading, "a. Debt push down - Insertion of debt into the UK to fund purchase of Syngenta Limited", states:

> "i. Benefits
>
> 1. Reduction of UK tax which is now payable (e.g. value of SL £200m, debt of £100m, interest rate of 2% equals interest expense of 2 million saving tax of £460k (23% difference between UK and NV rates)
>
> 2. Interest rates low at present but will rise in future
>
> ii. Costs
>
> 1. Estimated at between £115k and £155k tax opinion, transfer pricing documentation, legal and valuation services"

71. When this email was put to Mr Kuntschen he first suggested that this was not initiating the project, but "a kind of working out one way to do the reorganisation" which was already "on the list of the legal entity simplification project". When he was asked why it was under the heading of "Tax optimisation project" he suggested that when one tax person spoke to another tax person they focus on the tax without "bring[ing] in addition legal or whatsoever consideration; we look at our tax project."

72. We do not find Mr Kuntschen's explanation plausible. This Tribunal is, of course, a specialist tax tribunal. In general tax professionals are highly commercial individuals, in addition to being knowledgeable about tax. This is all the more so for tax advisors who work in-house. We do not believe that such individuals would only discuss tax and disregard other commercial considerations, if there were any. Mr Kuntschen's suggestion is fanciful.

73. Here we note that the name of the project is "Debt push down - Insertion of debt into the UK to fund purchase of Syngenta Limited". The emphasis is on pushing debt into the UK. Further the stated "benefits" are solely stated to be tax benefits, arising from the interest on the debt.

74. The email is followed up by Ms Carter on the same day, with what she describes as a "small change after talking to Andy on the debt push down project". That change is shown in blue in the email and adds, after "1. Estimated at between £115k and £155k tax opinion, transfer pricing documentation, legal and valuation services":

> "; £100 - £150 for forecasting to satisfy directors that long term commitments could be satisfied and additional resource would be required as there is no capacity this year due to SBS"

75. We assume there is a typo and the reference to "£100 - £150" should be "£100k - £150k".

76. In cross-examination Mr Johnson confirmed that the reference to Andy would be to him and, although he did not recall the amendment, it was "the sort of thing" he would add.

77. It was put to Mr Johnson that he would have been aware from this discussion the Transaction was a tax optimisation project. He answered:

> "A. My main recollection of the driver for the transaction was around the − you know, from a group angle now, so, you know, I sort of wear multiple hats, as I say, looking at a group angle was this differential tax rate between Holland and the UK. And rather than the UK tax saving, as it were, in its own right."

78. It is therefore apparent that, from at least 5 February 2010, Mr Johnson was aware that this was a tax project from the group perspective. It is also apparent that the desire to get an external valuation originated from Mr Johnson.

Debt push down: Ms Carter email to Mr Kuntschen – 9 April 2010

79. On 9 April 2010 Ms Carter sent Mr Kuntschen an email titled "Debt push down". The email stated that Ms Carter had met with Deloitte "to discuss the debt push down at a high level last week". She explains that:

> "I plan to put together a slide pack for you next week to walk through the idea, highlight concerns, list costs as they stand and tax benefits. This should hopefully provide a good platform for us to start discussions with the relevant stakeholders".

80. Thus, in Ms Carter's mind, the "tax benefits" would appear to be the sole benefits, as they are contrasted to the "costs".

81. Referencing the call with Deloitte, she lists the "main concerns" with the project arising from that call. The first listed concern is:

> "Forex - The loan for the purchase of Syngenta Limited will end up being with Syngenta Holdings and Treasury NV (at least the way things are currently structured). The loan will most likely be in sterling and this will create a forex issue. This is likely to be quite a large forex issue given the loan could be £500m or more. I know that Treasury had a big problem with this last time so I think we should set up a call with perhaps Bas and Mark to discuss the issues. Deloitte said that there are lots of ways to get around this but this will clearly need some thought."

82. We note foreign exchange ("Forex", or "FX") is clearly a major concern. Specifically it is stated to have been a "big problem last time". However, it is clearly not thought insurmountable – "Deloitte said there are lots of ways to get around this" – although, from the fact that it was a big problem on the last occasion, we infer that solving it cannot have been thought a trivial task.

Request for Proposals to Deloitte and EY – 20 April 2010

83. On 20 April 2010 Ms Carter sent emails to Richard Syratt (of Deloitte) and Ian Beer (of EY) essentially to invite them to tender for advising on the Transaction. Both emails are titled "Debt push down proposal". The email attaches an MS Word document and a slide pack.

84. Both emails also state that "our Treasury function has moved from Luxembourg to the Netherlands and the rate of effective taxation in Treasury NV is approximately 5%."

85. The MS Word document is titled "Request for Proposal UK Debt Push Down For Syngenta" and dated April 2010.

86. Section 6 of the document is headed "Service Requirements". Section 6.1 is a diagram of the structure of the group. Section 6.2 is headed "Objectives" and states:

> "• To simplify the UK group structure by reorganising the group to make Syngenta Holdings the holding company of all UK entities.
>
> • For Syngenta Holdings to purchase Syngenta Limited from SABV using a mixture of debt and equity, ensuring that the level and pricing of the debt can be supported and signed off on by HMRC using an ATCA.
>
> • To avoid any forex exposure as far as possible. The loan financing will be provided by Syngenta Treasury NV and will be in Great Britain Pound (GBP).
>
> • To ensure a deduction is available for the interest expense arising in Syngenta Holdings, a dividend trap situation is avoided and all tax legislation is complied with.

> • To ensure that the UK group can support the level of debt without adversely affecting its credit rating and avoid withholding tax on the interest payments.
>
> • To ensure all legal requirements are met."

87. We note that the second and fourth bullet points indicate that obtaining a UK deduction for the debt is an objective. We also note here the references to the objectives of having a single UK holding company and avoiding Forex difficulties. We note the reference to "a dividend trap situation", however that does not appear to indicate dividend planning is an objective. Rather, it is indicating that the existing ability to pay dividends should not be worsened by the Transaction.

88. An email from Ms Carter to Mr Kuntschen, titled "Proposal", dated 16 April 2010, records that Mr Johnson requested the EY valuation report contain:

> "an opinion to the effect that the valuation is materially correct and the assumptions made are reasonable, with an appropriate indemnity reflecting the magnitude of the transaction."

89. We note these words are then included, at the end of the section "6.3.1 Valuation of Syngenta Limited", of the Request for Proposal document.

90. From this email Mr Johnson accepted, in his witness statement, that he must have seen the Request for Proposal document. From this we find that Mr Johnson will have been aware of the objectives of the Transaction that are listed in the Request for Proposal document.

91. With regard to the reference to "Debt Push Down", in the title of the Request for Proposal document, Mr Johnson says in his witness statement:

> "As I understand it, 'debt push down' is a generic term that means some of the debt owed by companies in the top of the Group being put into subsidiaries further down the Group structure ('pushed down' the Group)."

92. He was asked about this in cross-examination:

> "Q. … But it is correct, isn't it, there was no transfer of an existing debt; this was the creation of a debt, was it not?
>
> A. Yes. Well, I don't know whether it was − there might have been debt at the top at the time as well. You know, the company − the group, rather, has been heavily geared.
>
> Q. But it wasn't, so far as you're aware, an assignment of a debt from up the group down to SHL?
>
> A. Not one particular debt, no."

93. We find from this, together with the "Objectives" in the Request for Proposal document, that Mr Johnson will have been aware that the insertion of debt into SHL was an "Objective" of the Transaction. Mr Johnson will also have been aware of the other "Objectives" in the Request for Proposal document.

94. Ultimately the contract was awarded to EY. The reason appears to be cost and the fact that the EY proposal "came up with a simple solution to the Forex issue which fitted well with [Syngenta's] business needs" (email of Ms Carter to Mr Syratt, undated).

95. On 14 July 2010 Julian Fletcher, a senior manager (corporate tax) at EY, sent to Ms Carter a draft "Master Services Agreement" and a draft "Statement of Work". Mr Fletcher noted that these documents had been approved by Lawrence Hall and Rene Rothlisberger (both also EY tax partners), and that Stuart Reid (an EY audit partner) was aware of what was being proposed.

Response to questions: Ms Carter email to Mr Syratt – 6 May 2010

96. On 6 May 2010 Ms Carter responded to questions raised by Deloitte and EY in response to the Request for Proposal. In an attachment to that email the question "What commercial issues are driving the proposal to introduce debt into the UK?" received the answer "Simplification of the UK companies so all are held under one holding company."

97. SHL's written closing submissions suggest this is an example of the true commercial purpose in a document which cannot realistically have been written in the expectation that it would be scrutinised by HMRC or in judicial proceedings. However we note this is an exchange between a senior manager (corporate tax) at EY and a tax manager at Syngenta. In this context, viewing the evidence as a whole (including the matters in the "Entity simplification" section below), we consider both parties to the correspondence will have likely understood what was being asked is what can be said to be the commercial justification for the Transaction, for the purpose of the unallowable purpose test. We therefore approach that correspondence with caution.

98. We note there is no reference to simplifying the dividend planning process or the creation of distributable reserves.

UK Debt Push Down: Thomas Schwarb email to Ms Carter – 6 May 2010

99. On 6 May 2010 Thomas Schwarb wrote to Ms Carter, following an earlier phone call, an email titled "UK Debt Push Down". Mr Schwarb stated that the email was to summarise "the NFE, Tax and Net Income effects of the Group Tax proposal to increase interest bearing debt in the UK by transferring G8090 from N1092 to G8062". We assume this refers to transferring SL from SABV to SHL. The email contains various calculations. Under the heading "Outcome" and subheading "Tax" it refers to a "Positive contribution to net income (on average USD 6m income per year)".

100. We note that the quoted text indicates the objective of the proposal is the "increase [of] interest bearing debt in the UK". The means is "by transferring G8090 from N1092 to G8062". We note that of itself increasing debt is inherently uncommercial as an end in itself. We therefore find, in the overall factual context, that the implicit reason is the anticipated tax deduction.

101. This email was put to Mr Kuntschen in cross-examination. Mr Kuntschen argued that this had nothing to do with the "origination" of the project: it was all "detailed review" of the reorganisation. This would seem implausible: the tax benefit is clearly discussed under "[o]utcome", and is the first item under "[o]utcome". In this context we consider listing it as a first item signifies it is prime in order of importance.

Email of Ms Carter to Mr Kuntschen – 24 September 2010

102. On 24 September 2010 Ms Carter wrote an email to Mr Kuntschen, titled "Debt push down project". It began:

> "I am just going through the information we have with regard to the debt push down project. As you know the fact that the Syngenta group has been streamlining over the last few years helps with our business purpose arguments in that there has clearly been a group drive to get rid of dormant companies and to get common entities to sit together."

103. Here we note there is a recognition of transactions in the entity simplification project at group level, both of reducing entities and creating a single holding company structure. That project did exist. However, implicit in this email is an acknowledgement that simplification is not the object of this transaction, but the aim is rather to bolster "business purpose arguments".

Email of Ms Carter to Mr Kuntschen – 14 October 2010

104. On 14 October 2010 Ms Carter wrote an email to Mr Kuntschen titled "Debt push down". It began:

> "I am worried about the status of the debt push down project and wanted to put together a quick update of my concerns in this area and how we are addressing them."

105. Mr Kuntschen responded on the same day. His comments were inserted in blue into the body of Ms Carter's email. The first comment, under the heading "How we are addressing these points" states:

> "I already mentioned to Ed while being in Basel that I will escalate this issue within the organization in case Angela does not provide the required level of support & comfort during tomorrow's phone call with Ed given the compelling tax savings at stake which should not be prevented due to resources issue, this being even more the case in view of the limited involvement expected from Shanghai finance team."

106. When the reference to "compelling tax savings at stake" was put to Mr Kuntschen he was evasive. He first sought to explain the background, namely that SL was the parent of Chinese subsidiaries that were "quite difficult to value". He then said that this was about finding "arguments to have this Shanghai finance team finally [do] what they were supposed to do", and deflected the question by going into the detail of the context. He then sought further to deflect the question through a discussion of the advance pricing agreement ("APA"). Ultimately he appeared to accept it was the compelling tax saving at group level that led him to put "additional pressure" on the Shanghai finance team.

107. We find that this email shows the object of the Transaction was the tax savings. Mr Kuntschen's response in cross-examination shows that, when plain speaking internally within the group was required, to get other teams to do "what they were supposed to do", it was necessary to justify it by the "compelling tax savings at stake" – rather than entity simplification or the dividend planning process.

Email of Ms Carter to Kirsten Elce – 22 October 2010

108. On 22 October 2010 Ms Carter wrote an email to Kirsten Elce titled "FW: UnitEntityRequest_Form". Ms Elce had a group role in addition to being a director of SHL. The email, which we reproduce in full to give context and due to the significance of Ms Elce being a director of SHL, stated:

> "Please find attached a request for a new Hyperion reporting unit. We apologise that this was not sent in before the time limit but we weren't aware that the deadline was so early.
>
> We need a new Hyperion reporting unit as we are performing a debt push down project in the UK. This project involves Syngenta Holdings purchasing Syngenta Limited for a mixture of debt and equity. Part of the project also involves Holdings becoming a US $ denominated entity as per the attached accounting note written by Alaster, ok'd by Simon Nardecchia and approved by the auditors. As we can't change the currency of the existing Holdings unit on the system I believe we need to create a new Hyperion unit which is going to be US $ denominated to record the transactions which are going to take place. This project is a high priority due to the substantial tax savings which will be made by its implementation.
>
> We were told by Phil that we need your approval to get this new unit approved as the deadline has now passed so I am writing to ask you if you can please

> authorise this. I am in on Tuesday next week if you wish to discuss further or if you had any questions about the request."

109. We infer from the full description of the project here that Ms Elce was unaware of the project before this email. We consider that a reasonable person coming to the email fresh, without background, such as Ms Elce, would infer that the purpose of the Transaction was to achieve tax savings – "This project is a high priority due to the substantial tax savings which will be made by its implementation". No mention is made of entity simplification or dividend planning.

Presentation to Group's Tax Leadership Team ("TLT") – 10 November 2010

110. Mr Johnson explained in his witness statement that:

> "Before the finalisation of the Corporate Finance Proposal, Sarah was involved in the preparation of the presentation on the Reorganisation to the Group's Tax Leadership Team ("TLT"). This is an important step in the process; TLT sign off gives confidence that there are no major tax problems arising from a proposal. I have not been involved in this or any other TLT meetings and cannot comment on how they are conducted."

111. Mr Johnson exhibited to his witness statement the slides from that meeting. Those slides are dated 10 November 2010. Several of those slides are similar to those presented to the Finance Leadership Team (FLT), discussed below, including the slide "UK reorganisation – tax savings".

112. There is also a slide headed "UK Reorganisation – Executive Summary", which states:

> "**• Objectives**
>
> - Restructuring of UK group by purchase of Syngenta Limited (SL) shares so all UK entities are held under Syngenta Holdings Limited ('SHL') leading to structure simplification
>
> - Financing is required to achieve this objective and the restructuring will therefore result in an interest deduction in SHL
>
> - DCF valuation approach proposed to be used for valuation of SL shares
>
> **• Savings**
>
> - Anticipated tax saving of approx $6.9 million per year (subject to the timing of the debt repayments) and based on a value of SL shares of $1,000m, a 50/50 debt equity split and an interest rate of 5%
>
> **• Costs**
>
> - Total cost: £170k (Ernst & Young £79,500 / Mayer Brown £25,000 - £30,000 / valuation of SCIC shares by PWC China circa £50,000"

113. It is noteworthy here that while the interest deduction is phrased as a "result", it is listed under the heading objective. It is also notable that the savings only relate to the interest deduction. No benefits are listed in respect of the restructuring objective. We therefore consider there to be good grounds to approach with caution the idea that entity simplification is driving the Transaction here.

Valuation report emails – 30 November 2010

114. On Tuesday 30 November 2010, at 17:19, Ms Carter wrote to Mr Johnson an email entitled "Valuation report". She attached the valuation report which she says will be issued by EY in final form "on Friday". She asked for Mr Johnson's comments.

115. Mr Johnson responded on the same day at 20:13 with extensive comments. These included that he asked that the phrase "for tax purposes" be deleted from the following passages:

> "Purpose
>
> We understand the valuation is for tax purposes to enable the directors of Syngenta Holdings Limited ("SHL") to establish the purchase price for the equity shares in Syngenta Limited as part of a proposed group reorganisation."
>
> (page 1 of the report)
>
> "We understand that the valuation is for tax purposes to enable the directors of SHL to determine the purchase price for the equity shares of SL as part of a proposed group reorganisation."
>
> (second paragraph under "Executive summary")
>
> "We understand that the valuation is for tax purposes to enable the directors of SHL to establish the purchase price for the equity shares of SL as part of a proposed group reorganisation"
>
> (second paragraph under "Introduction")

He also requested deletion of the following paragraph about discussions with tax authorities:

> "You will appreciate that we cannot, of course, guarantee that a value within the above range will be accepted by local tax authorities in any potential negotiations, but this range represents our best estimate of value based on the information provided and on our experience of valuation."
>
> (final paragraph under "Executive summary")

116. Commenting in his witness statement on these requests for deletion of tax references, Mr Johnson comments:

> "I am not sure why I considered this important, but I expect it was because the valuation was primarily to determine the purchase price SHL would pay for SL."

117. In his oral evidence Mr Johnson was more confident in his view, first stating that this was done because the purpose was valuation: so as not to buy a bad investment and so the directors would be protected if the investment proved unsuccessful. Those words were removed because it "gave the wrong impression" and was "just misleading". When he was pressed in cross-examination about these deletion requests he commented:

> "A. Yes, well, say if we had paid too much and Syngenta Holdings had gone into liquidation as a result and there had been other parties that then, you know, third parties that came back and challenged the directors on what they'd done at the time. For example, you know, it's a fundamental transaction and you want to get the price right.
>
> Q. And that's what EY were doing, isn't it? They were − if someone challenged you, you could say: well we went to EY and we had a very accurate, you know, valuation, third party valuation, an outstanding firm, you know, what's the problem?
>
> A. Yes, so that's why we − that's what I wanted it to say, and hence have an appropriate indemnity as well, you know, we were relying upon their valuation for whatever challenge we may have had in the future from whatever source."

118. Here we note Mr Johnson's concerns about liabilities to third parties in the event of insolvency, which we return to below, when we consider the cautious approach of the directors of SHL.

119. This was followed up in cross-examination with the following exchange:

> "Q. Would you accept that by removing the references to tax, as you requested and they were removed in the final valuation report, would you accept that that would affect the manner in which the transaction might appear to HMRC? It would look more just like a straight commercial valuation, no mention of tax anywhere?
>
> A. Yes, I don't think that was at the forefront of my mind."

120. Viewing the evidence in the round, we accept Mr Johnson's explanation that he asked for the slides to be amended because he viewed the valuation, primarily, as a safeguard to the directors in connection with the purchase. We consider this consistent with the overall evidence, discussed below, which shows that Mr Johnson was concerned not to make a loss on the Transaction and concerned with potential liability for the directors. Whilst he may have been aware of such changes altering how HMRC perceive the Transaction we accept that it was not at the "forefront of [his] mind".

Directors' briefing email and tax savings slide – 30 November and 1 December 2010

121. On Tuesday, 30 November 2010 Ms Carter wrote to Mr Johnson an email entitled "UK Reorganisation – notification of steps". The purpose of the email was to provide the directors of SHL with an overview in advance of the board meeting which would consider the acquisition. The email had three attachments, the first one being a document entitled "UK Reorganisation – tax savings.pptx".

122. Under the heading of "UK reorganisation" the email states:

> "The advantage of organising the affairs of the group in this way is that was SHL can gain an interest deduction for the loan interest and use this to reduce the UK taxable group income. I attach a slide which sets out the savings based on a $500,000,000 loan then the tax savings would be $7,000,000 per year." [sic]

123. Two paragraphs up from this, there is a paragraph that discusses how the acquisition is funded, which begins: "The proposal, which we are seeking support from the Group Finance Leadership Team for, is to simplify the UK group by SHL purchasing SL from SABV".

124. The attached slide is headed "UK Reorganisation – tax savings". The slide is divided into three boxes. Each box has a side heading of a tax saving (number in brackets) or a tax cost (number without brackets). The uppermost box deals with the position of SHL. The side heading indicates a tax saving of $7,000,000. The contents of the box says:

> "• SHL – deduction for interest expenses on $500,000,000 loan with STNV
>
> • Assuming an interest rate of 5% on the loan.
>
> • Tax rate of 28% used (In the UK the tax rate is due to reduce by 1% for the next 4 years)".

125. The middle box has a side heading of a tax cost of $63,750. This relates to the interest received by STNV. The lowermost box has a side heading of a tax cost of $7,000. This relates to the interest received by Syngenta Participations AG ("SPARTAG").

126. Beneath these three boxes the slide states "$6,929,250 Total tax savings", which is the amount obtained if we net the amounts in the three subheadings.

127. The slide has an accompanying notes page which begins "This slide shows the benefits of the transaction". We note the only benefits are tax ones. The slide also explains certain assumptions on which the calculations are premised.

128. Mr Johnson forwarded the email and the slide to the other directors of SHL on 1 December 2010. In that email he states:

> "This is to give you some advance notice that a Board Meeting of Syngenta Holdings Limited will be arranged just before Christmas to approve the acquisition of the Syngenta Limited by Syngenta Holdings Ltd and the refinancing of SHL in order that it has the funds to make the acquisition. This is a tax driven project and the necessary approvals from Basel will be obtained before the meeting. It will have no impact on employees – they will all remain working for their existing legal entities.
>
> The note from Sarah Carter, the UK Tax Manager, summarises the proposal."

129. "The note from Sarah Carter" refers to her email, which Mr Johnson forwarded below his own. There was therefore the expectation that his fellow directors would read Ms Carter's email. They would therefore be aware of the matters discussed in it.

130. Regarding the phrase "This is a tax driven project…" in his witness statement Mr Johnson explains:

> "I cannot remember why I used this phrase, however, having reviewed the slide that was attached to the email I think this is a reference to the tax saving for the Group as a whole."

131. When, in cross-examination, Mr Johnson was asked why he used this phrase in this context, he responded:

> "A. No, well, as I mentioned, there were various reasons we I think could refer to it as tax-driven: there's the saving, there's the fact the tax team have been involved, you know, with the project manager role, so various reasons."

132. This was followed-up in cross-examination when he was asked if the "most likely explanation" of the Transaction being described as "tax driven" was because of the tax savings for the group as a whole. Mr Johnson responded "Yes". We find that, in this context, Mr Johnson will have used the phrase to refer to the tax savings.

133. Mr Johnson stated that he could not "recollect for sure" whether the slides were discussed at the SHL board meeting which approved the acquisition.

134. When these calculations were put to Mr Johnson he stated that he did not recollect the slide but just remembered there was "the saving, not exactly how it was arrived at". It was put to him in cross-examination that:

> "on the basis of what Sarah says in that letter to you, you would have been aware that the advantage of organising the affairs of the group in that manner was the tax saving."

He responded "Yes".

135. When the slide and email were put to Mr Johnson in cross-examination, the following exchange took place:

> "Q… So in quite stark terms Sarah is saying: well, this slide which shows the tax saving, that's the benefits of the transaction. So you would have understood from that the benefit of this transaction was the tax savings of $6.9 million?

> A. For the group, and again, to put the sort of this − when I've asked for Sarah to draft an email, which I can send out giving the directors the overview, you know, the directors are all curious folk, you know, Mark Peacock, you know, is at the very senior level within the group, or was, and they're curious to know the group purpose as well as Syngenta Holdings' purpose but it's one of those where, you know, we all wear multiple hats, when we get to the board meeting we're putting on the Syngenta Holdings hat and looking at it from that view, where obviously for that meeting this was pure background, you know, it wasn't relevant to their decision directly."

136. From this email and the accompanying slide we find it clear that Mr Johnson understood that the benefit to the group of the Transaction was obtaining the tax saving. Ms Carter's email describes the interest deduction as "the advantage" of the Transaction. The slide shows how the "$6,929,250 Total tax savings" is calculated. The accompanying notes page describes this saving as "the benefits of the transaction". When he forwards the email to his fellow directors, he says "[t]his is a tax driven project", which he accepted (after some attempts at equivocation) refers to the tax saving for the group.

137. There is no mention of legal entity simplification or of the dividend planning process in Mr Johnson's email. We infer that Mr Johnson did not consider these to be major drivers of the Transaction from a group perspective. We acknowledge that in Ms Carter's email (which Mr Johnson forwards to the other directors) she says "The proposal, which we are seeking support from the Group Finance Leadership Team for, is to simplify the UK group by SHL purchasing SL from SABV". This is the only reference to simplification in this correspondence and it is not expanded upon. Given the emphasis on the tax saving in other parts of the correspondence, including the cover email which will have framed the consideration of other content, we do not consider that the directors would have inferred that simplification was a significant driver of the Transaction.

138. We note, that when in cross-examination Mr Johnson was asked whether this gave the directors the overview of why there was support for the Transaction from a group angle he accepted this to be so. He accepted that the decision was not made in a vacuum, but when the SHL directors made the decision they were putting on their "hats" as directors of SHL.

Emails concerning PwC draft tax advisory opinion – 30 November 2010

139. The PwC draft tax advisory opinion, which relates to People's Republic of China ("PRC") tax issues, dated 26 November 2010 states:

> "With an aim to realign the group structure and facilitate U.K. debt push down, management is contemplating a restructuring plan and would like our comments on relevant PRC tax and regulatory implications"
>
> (under "I. Background")

> "Based on the information provided, we were given to understand that your proposed transfer plan is for the purpose of group structure realignment as well as to facilitate the U.K. debt push down. This could somehow act as the arguments to justify 'commercial purpose'. Besides, U.K., where the intermediate holding company (i.e. SL) is incorporated, might not be the priority location for the tax authorities to detect the cross-border tax avoidance. Having said that, the purpose of achieving overseas tax saving cannot be served as a strong argument for "reasonable commercial purpose".
>
> (under 3.3 "PRC Tax Implications on the Indirect Share Transfer")

140. In an email to PwC, dated 30 November 2010, Ms Carter asks:

> "A few small points

> - Page 2 para 1 under background can I please ask you to take out the reference to 'facilitate UK debt push down' and just leave the sentence to read - 'with an aim to realign the group structure management is contemplating a restructuring plan'. The main aim is the UK reorganisation and not the debt, which is a consequence of the reorganisation in that SHL need to fund the purchase in some way. I would like that to be clear - thank you. It is also mentioned in page 6."

141. Mr Kuntschen responded to the email chain on the same day, beginning his email with "I fully subscribe to Sarah's comments." Mr Kuntschen was referred to this email correspondence in cross-examination where the following exchange took place:

> "Q. So you agree with that. And that was so even though throughout this project has been described as a debt pushdown. So why would you want that removed, because this has always been described, has it not, as a debt pushdown?
>
> A. Because for me it left one part of the equation out which was a realignment of the group structure, and −
>
> Q. Thank you
>
> A. − my worry was always that the tax adviser would be too much focusing on this kind of − by not understanding where we were coming from."

142. We find this explanation unconvincing. Mr Kuntschen says he wanted the reference to debt removed because it "left one part of the equation out which was a realignment of the group structure". However that was in the original draft, not "left out". We consider this to be part of a general approach of downplaying any tax avoidance purpose, which we discuss further below.

Simon Nardecchia emails – 4 and 7 December 2010

143. On Saturday 4 December 2010, ahead of circulating the corporate finance proposal, Ms Carter wrote to Mr Nardecchia an email entitled "UK Reorganisation and debt push down", asking for background as to why the UK group was structured as it was. Mr Nardecchia replied on Tuesday 7 December 2010 in an email to Ms Carter, copying in Mr Johnson (who was not included in the original email) saying:

> "… The formation of Syngenta was an extremely complex transaction. To avoid further complications at that time, it was decided not to try to combine the two entity hierarchies immediately after spin-off, this was left to subsequent Syngenta legal entity structure projects/processes. One of the very first such projects I was asked to review for reporting impact was a UK debt push down proposal, in late 2000, which would have achieved similar results to the one being presented now, but this was not implemented. The reason why the entity hierarchies have remained separate for so long is, I believe, mainly because there has never been an opportune moment to carry out the transfer until now. The UK group underwent significant restructuring in the early years, and the related costs were borne in the UK and not recharged to Basel. A tax deduction was available for at least some of these costs. This meant that there were periods when the UK entities' combined forecast taxable profits would not have been high enough to allow them to take advantage of the interest deduction.
>
> I am copying Andy in case he wishes to comment further as he has similar experience to mine in both Syngenta and Zeneca organisations."

144. When this email was put to Mr Johnson he said he could only recall the email from very recently, preparing for this case. He said this was "Simon's view at the time. It's not one that I necessarily recollect personally."

145. When this email was put to Mr Kuntschen he stated:

> "Simon has probably closer history, you know, recollection of what happened, but I cannot opine to this."

146. We consider this strong evidence to support the proposition that the Transaction was entered into to obtain the tax deduction on interest payments made on the Loan. When the taxable profits of the UK group would have been insufficient to absorb the deductions on interest payments, that transaction was not proceeded with. Although Mr Johnson was copied into the email he could not recall it. This reinforces the advantage, noted in *Gestmin*, in cases such as these, of documentary evidence over live witness testimony.

147. We also note the passage where Mr Nardecchia says "it was decided not to try to combine the two entity hierarchies immediately after spin-off, this was left to subsequent Syngenta legal entity structure projects/processes". This suggests that the legal entity simplification project was not just about reducing the number of entities, but also creating a single holding company in each jurisdiction.

Corporate Finance Proposal – 13 December 2010

148. On 13 December 2010 the corporate finance proposal was sent to John Ramsay, Syngenta's CFO at the time. This was an important step in the group level sign-off of the Transaction.

149. The corporate finance proposal was sent to Mr Ramsay by an email from Mark Nijhof, dated 13 December 2010. The subject of the email is "UK reorganization - debt push down proposal paper". The cover email, after describing the steps of the Transaction states:

> "The main benefit of the proposal is to simplify the UK corporate structure and to streamline the internal dividend planning process. Moreover, the interest expenses for SHL resulting from the debt financing of the share purchase is tax deductible and leading to estimated annual net tax savings of USD 9.5m per annum currently."

150. We note this differs from the "Objectives and benefits" in the proposal itself, discussed below, as here the tax savings are not described as a mere consequence. We consider this is because when presenting the proposal to a senior executive it was thought desirable to be more open about what was the true object of the Transaction: being the tax saving.

151. The proposal was in the name of individuals from group tax (including Mr Kuntschen) and group treasury. Mr Johnson was copied in. He states in his witness statement that he will have seen earlier drafts, but in his finance role rather than as a director of SHL.

152. Under the heading "Objectives and benefits" the corporate finance proposal states:

> "The main benefit of the proposal is to simplify the UK corporate structure and to simplify the dividend planning process. SHL will require debt financing in order to finance the purchase and as a consequence of this an interest expense will arise for which a tax deduction will be available leading to estimated net tax savings of USD 9.5m per annum."

153. The earliest draft of the corporate finance proposal we have is of 28 October 2010. In that earlier draft the relevant passage is:

> "The main benefit of the proposal is to simplify the UK corporate structure and to simplify dividend planning. As a consequence of this we will take the opportunity to introduce a share of debt into the UK and a subsequent benefit of this will be to obtain a tax deduction for the interest cost that results from the debt needed to fund this purchase. We hereby kindly seek agreement to transfer Syngenta Limited, along with its subsidiaries, to Syngenta Holdings."

154. We note that the draft corporate finance proposal of 28 October 2010 is the earliest documented reference that has been put before us suggesting a purpose of the Transaction was to simplify the dividend planning process. We note also that in the final document the tax deduction has become a "consequence", rather than the debt being a "consequence" with the tax deduction being a "benefit". Given the other documents which emphasise the tax driven nature of the Transaction, we find that it likely that the proposal – and especially the final version – is phrased to downplay the tax purpose of the Transaction, due to an awareness of the unallowable purpose test. We find it striking that the document itself does not explain the benefit of the Transaction to the dividend planning process or benefit of legal entity simplification. In that context a tax saving of "USD 9.5m per annum" strikes us as a clear benefit and purpose – rather than just a consequence. We find it likely that Mr Ramsay, to whom the proposal was addressed, would have understood it in this way.

155. Mr Johnson was referred to the "Objectives and benefits" section of the corporate finance proposal in cross-examination, as it appeared in the final version, and was asked:

> "Q. I just wanted to ask you about your understanding of that because from your point of view that wasn't a tax saving for SHL because you didn't have any taxable profits. Did you understand that that would be a saving for the group as a whole?
>
> A. Yes, yes. My general view − it may not have been that precise number, but my general view from the various looks at this reorganisation were that it was due to this difference between the UK and Dutch tax rates."

156. In his witness statement Mr Kuntschen noted that the structure of the document was "a very short section on benefits followed by a long technical analysis of, amongst other things, the tax considerations". He commented that this:

> "can give the wrong impression about how the Group viewed the benefits of the Reorganisation. It is important to understand that the structure is the same in every Corporate Finance Proposal: a short section on the benefits and then pages of technical analysis. It was clearly understood within the Group that this proposal was about simplification and achieving a single holding company. We didn't need to repeat to the CFO the detail of the benefits every time there was a proposal for a country simplification because we had done lots of them and he knew the benefits. However, the Corporate Finance Proposal needed to go into the technicalities of the various functions involved for the CFO to understand and assess the potential issues."

157. We find this implausible. While we accept there was a legal entity simplification project, if the primary purpose of this transaction was to be part of it we would expect that to be more explicit, perhaps referring to an earlier or framework document setting out the benefits of legal entity simplification. We might also expect some indication of how the project was going, for example "This is the [nth] such project globally and the [nth] in the UK. So far the project has reduced the number of legal entities from [n] to [n], and increased the number of jurisdictions where there is a single holding company from [n] to [n]." There is no such discussion in the document. Nor is there any attempt at financial quantification of these supposed benefits.

158. Aside from the EY draft Tax Opinion, we also note there to be no mention of legal entity simplification or simplifying the dividend planning process in any of the various appendices to the corporate finance proposal. We accept that Appendix D, the EY draft Tax Opinion, says:

> "Broadly Syngenta Group has sought to simplify the Group Structure since its formation. As such the UK Reorganisation should be considered in this context. Accordingly the acquisition will facilitate this simplification."

We consider the final sentence meaningless. The previous two sentences do not add to the assertion, in the "Objectives and benefits" section of the corporate finance proposal, that the Transaction was motivated by legal entity simplification.

159. We note that the corporate finance proposal does not elaborate on the stated "main benefit" of "streamlin[ing] the internal dividend planning process". If this were a main purpose we consider it would be exactly the sort of issue that would be included in the "pages of technical analysis", which Mr Kuntschen referred to. The absence of such discussion, and the fact that this is the first mention of this benefit, suggests that it is not a main purpose of the Transaction.

160. Moving on from the "Objectives and benefits" section, we note that in the (immediately preceding) "Proposal" section the corporate finance proposal says:

> "SHL will finance the purchase of SL by getting a USD loan from STNV and by issuing shares. SL has been valued externally by Ernst & Young at £1.4bn (the valuation report is contained in Appendix B). The level of debt to equity will be £600m of debt to £800m of equity. Advice was provided by EY in relation to this proposed split. Whereas HMRC may well not accept a level of Debt to EBITDA of 6:1 it is likely that they will accept either a 5.5:1 or 5:1 ratio provided the interest cover is around 3."

161. The "advice provided by EY" is explained in an earlier email of 3 December 2010 from Ms Carter to Bas Coolen (Syngenta Treasury) that:

> "We have provisionally agreed on a debt to EBITDA of 5.5 as we think 5 was too safe and 6 was stretching things too far. This was also the advice from EY".

162. The debt figure of £600m is a rounding down of an earlier draft of the corporate finance proposal, dated 7 December 2010, which gave the level of debt as £606,403,000. The figure of £600m (rounded down) is in turn derived from the debt to EBITDA ratio of 5.5, as stated in EY's draft Tax Opinion of 6 December.

163. From the above we find that the ratio of debt to equity was set at the maximum possible level of debt that the group, realistically, thought HMRC would permit. This again is further evidence that achieving a tax deduction for interest was the group purpose in entering into the Transaction.

Presentation to Group's Finance Leadership Team ("FLT") – 14 December 2010

164. This presentation took place on 14 December 2010. In his witness statement, which exhibits the slides, Mr Johnson explains that the presentation was by Ms Carter to the Group's Finance Leadership Team. We had the slides in evidence before us. On the first slide, under the heading "Timing – Why now?" it says:

> "• APA finalised in 2010
>
> • UK Tax losses utilised fully in 2009".

165. In his witness statement Mr Kuntschen explained that:

> "Finally, I have also seen the slide in the Finance Leadership Team presentation which states 'Timing – Why now? – APA finalised in 2010 – UK Tax losses utilised fully in 2009' (Exhibit AK1 Tab 6). However, my recollection is that the timing was a pure coincidence. We needed to resolve the APA and foreign exchange concerns. By the time these were resolved, the UK tax losses had been fully utilised. This was not a result of any planning on our part that I can recall, it was simply when we could solve these problems."

166. This was put to Mr Kuntschen again in cross-examination:

> "Q … Now, the significance of losses being fully utilised was that if they were not fully utilised, then there might not have been sufficient profits against which to set deductions arising from the payment of interest on the loan. So that's the significance of the losses being fully utilised, isn't it?
>
> A. That is, but at the time there was − what I want to reiterate, or maybe say clearly, there was no whatsoever planification with the management of the use of the tax losses. This project started when we had − when we knew how to structure this project through the APA and the change of the functional currency, and then it got the okay from corporate finance, then was implemented, and would have dealt with whatsoever tax losses were there or not there, and they happened not to be there, but that was simply a pure coincidence."

167. The next slide is headed "Syngenta UK The balance sheet tax optimization journey" and says:

> "• 2008 - Capital reduction
>
> • £380m distribution to Syngenta Alpha B.V.('SABV')/SPARTAG financed through cash reserves
>
> • 2009/2010 - Profit repatriation streams
>
> • £16.5m dividend distributed in 2009 and £50m dividend proposed for distribution in Dec 2010
>
> • Early 2011 - UK reorganisation and Debt push down
>
> - £600m/$950m debt introduced in Syngenta UK"

168. The following slide is entitled "UK Reorganisation – Step plan". The slide recounts the steps to be undertaken and concludes with:

> "To maximise tax savings and avoid foreign exchange exposure project proposed to be implemented on 20th January 2011".

169. A further slide entitled "UK reorganisation – tax savings" contains a calculation of the anticipated savings, stated to net as "£6,047,100 ($9.5m approx) Total tax savings per annum". It is similar to the slide of the same title in the briefing slides to the SHL directors, discussed below, although the values are different. This further slide was likely included at the suggestion of Mr Kuntschen, who wrote in an email to Ms Carter, titled "RE: Presentation to FLT" on 2 December 2010:

> "To underline the strategic aspect, it may also be a good idea to include a slide showing the aggregate est. tax savings resulting from the three stages approach (if this can be done nicely and without too much work and trouble)."

170. Following the FLT meeting Mr Kuntschen wrote, on 15 December 2010, to Ms Carter and Mr Perry, in an email titled "UK debt push down- Yesterday's presentation to FLT and Today's conference call":

> "First of all apologies for not having been in a position to say you goodbye yesterday having to attend a meeting on divestment project in a time critical stage which took much longer than expected. In the meantime I received many feed-backs and echoes on your presentation made to the FLT which all were very positive including John Ramsay's one who walked late afternoon into my office. Well done, you both can be proud not only of the outcome tax savings but also on the way you manage this project successfully towards its

implementation stage while having to address so many different stakeholders."

171. We note there is no mention of benefits of simplifying the UK corporate structure or to streamlining the internal dividend planning process. Rather the Transaction is presented as part of a "tax optimization journey" whereby "debt [is] introduced in Syngenta UK". The motivation for completing the Transaction by 20 January 2011 is to "maximise tax savings". A slide calculates how annual tax savings of £6,047,100 are anticipated – this was included at the suggestion of Mr Kuntschen to "underline the strategic aspect" of the Transaction. In his email following the meeting, the first item that Mr Kuntschen suggests that Ms Carter and Mr Perry can be "proud" of is the "tax savings". In this context we consider listing it as a first item signifies it is prime in order of importance.

SHL Board meeting – 14 January 2011

172. On 7 January 2011, Mr Johnson emailed the other directors of SHL explaining that due to an unforeseen issue they would not be in a position to approve the reorganisation in the board meeting scheduled for 14 January 2011 (assuming they decided to do so) and proposing that they used the time on that day to meet and discuss the reorganisation.

173. Attached to this email were:

(1) a PowerPoint presentation, which summarised the project. In the email this was said to be prepared by Ms Carter. However in his witness statement Mr Johnson said he prepared the PowerPoint slide on the risks involved in the reorganisation;

(2) the final signed EY Valuation Report for SL; and

(3) draft minutes for the SHL board meeting.

174. These documents are considered in the following paragraphs.

175. We recall that the directors will already have received the directors' briefing email and tax savings slide (30 November 2010).

SHL directors' briefing slides – January 2011

176. The slides are entitled "UK Reorganisation – Director's Briefing" and dated January 2010. However it is accepted that the date is incorrect, it should have been January 2011.

177. In his witness statement Mr Johnson explained that the slides were needed to "show the Reorganisation holistically and explain its consequences from a Group perspective". He stated this was important for three reasons. First, the directors wanted to ensure that they were operating in the best interests of their shareholders and other key stakeholders (including the pension fund and employees). Second, because while they were making a decision based on the financial situation of SHL the directors would have wanted to know the benefit to the group. SHL is part of the group and they would not want to approve something that had adverse consequences for the group because it might be adverse for SHL in the longer term. Third, even when the directors do not need to know the reasons for decisions taken above them, they are usually curious and want to be aware of how a proposal will affect the group.

178. The first substantive slide, titled "Background" (which is the same in the FLT slides) states:

"• UK — Syngenta Limited

• Two UK sub groups requiring legal entity structuring

• Excess cash in the UK

• Balance sheet position strong

• Timing - Why now?

• APA finalised in 2010

• UK Tax losses utilised fully in 2009"

179. In his witness statement Mr Johnson stated:

> "I see that the final bullet point on the second page of the Director's briefing slides states "UK Tax losses utilised fully in 2009". I had not remembered this bullet point until I reread the slide preparing to give this statement. I cannot add to what is stated in the slide and expect that I would just have taken Sarah's word that it was true. With hindsight, I assume that this meant that tax losses from previous years had been used and the debt would generate more costs. I cannot remember what I understood about it at the time."

180. The actual time when losses were used, and the significance of that for the group, is discussed below, at paragraphs [302] to [311]. Here, however, we find that Mr Johnson's *perception* was that those losses were exhausted: he would "just have taken Sarah's word that it was true". He states "[w]ith hindsight" he assumes this means "debt would generate more costs". We understand "costs", in this context, to refer to deductible amounts for tax purposes. Although Mr Johnson says, "with hindsight", we consider there is no reason he would have not formed that view at the time. We summarise below, at [325], the matters he was aware of at this point, which indicate the Transaction was tax driven from a group perspective. We consider that, with this background knowledge, Mr Johnson would have concluded at the time from this slide that the exhaustion of the losses would allow the debits in respect of the interest payments on the Loan to be utilised.

181. We also note the reference to "Two UK sub groups requiring legal entity structuring". We accept that is a reference to legal entity simplification. However we note that it is somewhat background information and not expanded upon. In the overall context of the slides as a whole, the reference is minimal and somewhat in passing and does not suggest creating a single holding company is a significant driver for the Transaction.

182. The second slide is a group structure chart, of the pre- and post- reorganisation structure. The third slide titled "UK Reorganisation - Background ctd" (which does not appear in the FLT slides) states:

> "• Transaction approved by FLT, Group Legal, Group Tax etc
>
> • Main benefit is a group tax saving of £6m pa based on current interest rates taking advantage of low tax rates in Holland".

183. When these slides were put to Mr Johnson, in cross-examination, he emphasised there were other advantages to the group, as set out in the corporate finance proposal, but conceded that "we didn't mention them at the time". Accordingly, in the absence of evidence to the contrary, we infer that the other directors would not have been aware of them.

184. The fourth slide titled "UK Reorganisation - Step plan" (a similar slide is in the FLT slides) states:

> "• SHL to become USD denominated company to avoid group functional currency exposure (since the loan will be in USD).
>
> • Syngenta Treasury NV ('STNV') to lend $950m to SHL.
>
> • SHL to purchase SL shares from SABV for $2.2bn with consideration paid by issuing $1.25bn of shares and drawing the $950m loan granted by STNV.
>
> • To maximise tax savings and avoid foreign exchange exposure project proposed to be implemented ASAP."

185. When this slide was put to Mr Johnson he emphasised that any urgency was "from the group angle, rather than the Syngenta Holdings angle".

186. The fifth slide is titled "Syngenta Holdings Limited – Debt Capacity Calculation" and states that (on the basis of EY modelling) debt capacity is proposed at $950m (£600m), subject to an Advance Thin Capitalisation Agreement with the UK Tax authorities.

187. This slide was put before Mr Johnson in cross-examination. The following exchange took place:

> "Q. … So the amount of the debt, then, from the directors' point of view would be determined by what EY thought was acceptable under the thin cap rules; is that a fair statement?
>
> A. Well, also primarily that they can pay it, so I think back to paying $2.2 billion, you know, for an investment, they want − and they've got to be able to service the interest, so priority one is being able to service the interest."

188. There is then a table of risks and mitigations, which Mr Johnson testified that he prepared. We reproduce that table below:

Risk	Mitigation
SHL pays too much for SL	-EY valuation -Reassurance from Global Marketing on sales forecasts -Adopted low end of valuation range
Directors obligations to shareholder	SHL is acquiring SL from its shareholder and hence there is implicit approval of the transaction
SHL cannot pay interest on loan	-Expected dividend income stream from SL and other subsidiaries provides very prudent level of interest cover (4:1) at current interest rates -Even at rates of 9% there is adequate cover. -Could switch to fixed rate loan
SHL cannot refinance the loan at the end of the 10 year term	SHL holds valuable investments which it could use as collateral to raise finance.

189. The final substantive slide is titled "Disaster scenario" which states:

> "• If for any reason SL's profits reduced drastically this could result in:
>
> - An impairment of SHL investment value in SL
>
> - Tax deduction for interest being restricted
>
> - Inability to pay interest
>
> • In this scenario SHL could:
>
> - Issue more shares and use funds to repay part of loan
>
> - Convert share into reserves to offset impairment loss ('capital reduction')"

190. In the absence of other information, we consider that the directors would have understood from these slides that the Transaction was being proposed by the group for tax purposes. The "Background" slide indicates that the Transaction is being proposed now because "UK Tax losses utilised fully in 2009" – the implication is that the ability to use the tax deductions for interest payments is driving the proposal. This is reinforced by the slide "UK Reorganisation - Background ctd", which states "Main benefit is a group tax saving of £6m pa based on current interest rates taking advantage of low tax rates in Holland". It is further reinforced by the slide titled "UK Reorganisation - Step plan", which states that "[t]o maximise tax savings and avoid foreign exchange exposure project proposed to be implemented ASAP". We note that a "[d]isaster scenario", as specified on the final substantive slide, includes "[t]ax deduction for interest being restricted". Similarly to our discussion at [180] above, we note that the directors' perception of the significance of "UK Tax losses utilised fully in 2009", may differ from the actual significance, discussed below at [302] to [311].

191. We also consider these slides suggest a (wholly reasonable) cautious approach by the directors, which might be characterised as a wish to avoid making a loss on the Transaction, especially a loss that would cause SHL to become insolvent. In cross-examination Mr Johnson referred to how "priority one is being able to service the interest". Mr Johnson testified that he prepared the table of risks and mitigations, which again shows as a risk (to mitigate) that "SHL cannot pay interest on [the] loan" or an inability to "refinance the loan at the end of the 10 year term".

192. The risk of paying too much for SL is said to be mitigated by, amongst other things, the "EY valuation". This reinforces our finding that Mr Johnson's request to remove "for tax purposes" from the valuation report was genuinely because he regarded its primary purpose as being to give reassurance to the directors for valuation, not for tax purposes.

193. We note that there is not perceived to be a risk of breaching fiduciary duties to the shareholder, as the shareholder is a counterparty to the Transaction and so there is implicit approval.

194. The cautious approach is shown also by how the presentation ends on the slide "[d]isaster scenario".

195. While Mr Johnson's witness statement suggests that the slides are for background, to "show the Reorganisation holistically and explain its consequences from a Group perspective", they do more. They provide a detailed discussion for SHL of the risks of entering into the Transaction (and how they are mitigated). In terms of the benefit of the Transaction, what they discuss are the tax benefits to the group.

196. None of these slides are about SHL making a *good* investment, in the sense of enhanced profits by SHL. They emphasise the risks and the (tax) benefits to the group, however they do not suggest that SHL may wish to acquire SL due to capital growth or the dividend income exceeding loan repayments.

197. Overall, this would be consistent with a willingness of SHL to play its part in assisting the group secure the tax benefit (acting in the "best interests of their shareholders" – the first of the reasons given by Mr Johnson), provided that SHL does not make a *bad* investment.

EY valuation report – dated 17 December 2010

198. In his witness statement, considering the valuation report, Mr Johnson says:

> "The Valuation Report was prepared to give the directors of SHL an external expert view on the valuation of SL. It was the key document in my mind. This was a massive transaction from the directors' point of view, the directors were not experts in valuing companies and I wanted an external specialist to have

> approved the valuation. I did not want an in-house valuation; I wanted the valuation to have EY's 'seal'. The directors wanted to be sure they were fulfilling their legal duties as directors of SHL under s.172 Companies Act 2006 (e.g. the duty to act in the way that would be most likely to promote the success of the company for the benefit of its members as a whole). These duties extended beyond the interests of the shareholders. If the directors were ever challenged about their decision by anyone, the Valuation Report showed that they had taken proper advice at the time. That is why I drew EY's attention to the extract in the engagement letter outlining their responsibilities (Exhibit ADJ1 Tab 10). I was also aware that HMRC might review the valuation because it was my understanding, albeit as someone not in the tax team, that HMRC normally ask for evidence to support the valuation of large intra-Group transactions."

199. This passage reinforces the findings made regarding the cautious approach of the SHL directors. He wants to be "sure" he is fulfilling his duties. Mr Johnson stresses that this was a "massive transaction from the directors' point of view". He was concerned about liability should he (or the other directors) be "challenged". Those potential liabilities extended to third parties, "beyond the interests of the shareholders". Indeed, elsewhere in his witness statement, Mr Johnson commented that:

> "It was the biggest transaction I had been involved with and was probably the biggest that most of the directors had been involved with. Directors ultimately have some personal liability in these matters if something goes wrong and the size of the transaction meant that any potential issue would be more serious for the directors."

200. This again fortifies our finding that Mr Johnson's request to remove "for tax purposes" from the valuation report was genuinely because he regarded its primary purpose as being to give reassurance to the directors, regarding the valuation, due to their "personal liability… if something goes wrong".

201. When Mr Johnson discusses his fiduciary duties it is not surprising he stresses obligations to third parties – we have already noted that he wrote the slide containing the table of risks and mitigations, which suggests that in proceeding with the Transaction "there is implicit approval of the transaction" by SHL's sole shareholder, who was the counterparty to the sale.

202. This is consistent with SHL seeking to play its part in the Transaction, provided it does not make a *bad* investment, rather than entering into the Transaction because it sees the opportunity for a *good* investment, in the sense of enhanced profits by SHL.

203. We discuss the contents of the valuation report in more detail at paragraphs [227] to [235] below, as it is pertinent in relation to the matters considered in that section ("Minutes of board meeting on 24 January 2011").

Emails concerning draft minutes – 19 and 21 January 2011

204. On 19 January Mr Fletcher emailed Ms Carter (title "RE: Minutes of SHL meeting") stating he had reviewed the minutes of the SHL meeting and made comments. Ms Carter replied the same day, stating that she had made "another few small tweaks" to the minutes.

205. On 21 January Andrew Sharples circulated to a number of individuals including Ms Carter, Mr Johnson and Mr Kuntschen what he understood "to be the latest version of the SHL board minutes". Mr Kuntschen responded to Ms Carter, in an email of the same day titled "FW: UK reorganisation", saying:

> "Wondering whether it would not be appropriate to include one sentence about the overall merit of the transaction for SHL such as the concentration of

> shareholding in all UK companies into one hand, thereby further reinforcing SHL role & purpose as UK holding co. which could be used as further (defense) argument in case being challenged by the UK authorities about the purpose and benefits of the transaction."

206. Ms Carter responded to Mr Kuntschen:

> "Thanks for this. Julian has been through the minutes and is happy from a tax perspective but happy to add this in, it is an important point. I will liaise with Andy who is amending anyway."

207. Ms Carter forwarded the email from Mr Kuntschen to Mr Johnson the same day. The email from Ms Carter contains no text. Accordingly we expect that she had either spoken to Mr Johnson or regarded the email from Mr Kuntschen as self-explanatory.

208. It is clear to us that Ms Carter, Mr Fletcher and Mr Kuntschen were all reviewing the minutes from a tax perspective. This is expressly stated by Ms Carter in respect of Mr Fletcher's review. Ms Carter's response to Mr Kuntschen's email is to raise the "tax perspective" – showing that she understands the comment to relate to the unallowable purpose test.

209. We find this is the reason for the inclusion of the words "and the purchase of Syngenta Limited would result in a more streamlined UK group legal entity structure" in the final minutes (see following section of this decision). Those words do not appear in the draft minutes that Mr Johnson exhibited to his witness statement.

210. In his witness statement Mr Kuntschen explains the justification for adding these additional words to be that:

> "This relates to another point that it is important to clarify. I am aware of a couple emails in which I suggested that information for SHL's directors place more focus on structure simplification and less on the tax benefits… I knew that the Reorganisation was expected to result in a substantial tax benefit and that this was a benefit that was quantifiable and easy to understand. I also knew that several UK people including Andy Johnson had spent a lot of time focusing on the valuation of SL and the amount that SHL could borrow, which was likely to result in too much focus on quantifiable figures. In these emails I was trying to ensure that the UK people, including SHL's directors, who were less familiar with previous LES [ie Legal Entity Simplification] projects in other jurisdictions, remembered that the starting point and overall purpose of the Reorganisation was a within country reorganisation to produce a single holding company structure. I wanted this to be remembered to ensure that the reasons for the Reorganisation were well understood and considered by SHL's directors and because as a Senior Group Tax Manager I was aware of potential difficulties that could follow if HMRC got the wrong impression."

211. We find this explanation by Mr Kuntschen unconvincing. If the purpose was to help the directors understand the group objectives from the Transaction, then the appropriate place would surely have been as an addition to the directors' briefing slides. This could have been done by giving some background to the legal simplification project and indication of how the project was going, such as we suggested in relation to the corporate finance proposal at [157] above. However, as we have already noted, there is minimal discussion of simplification benefits in the directors' briefing slides.

212. Rather than being added as an explanation of the transaction, it is expressly added, to quote Mr Kuntschen, as a:

> "(defense) argument in case being challenged by the UK authorities about the purpose and benefits of the transaction".

It is clear that the "UK authorities" that Mr Kuntschen had in mind are HMRC and, should the matter be litigated, this Tribunal. We therefore view this passage of the minutes with caution. We do not consider it reliably reflects the understanding of the directors of SHL when entering into the Transaction.

213. We note that an "argument" to be used when "challenged" does not suggest a genuine purpose, but rather an underlying (in this case, tax) purpose that the author may wish to conceal.

214. We also note Ms Carter's comment that the minutes had been checked by Julian, who was "happy from a tax perspective". We find it likely that "Julian" is Mr Fletcher, to whom Ms Carter sent her email of 19 January 2011. It will be recalled that Mr Fletcher was a senior manager (corporate tax) at EY. In the context of the evidence discussed in this section, we therefore find it likely that those minutes were checked with an eye to reducing the likelihood of a challenge by HMRC. This causes us to approach these minutes generally with caution, not just the paragraph added as a "(defense) argument". They may not fairly reflect the purposes of the directors when entering into the Transaction.

Minutes of board meeting on 24 January 2011

215. Mr Johnson states in his witness statement:

> "SHL held the board meeting at which the Reorganisation was approved on 24 January 2011 (Exhibit ADJ1 Tab 22). I chaired the meeting, as I normally did at SHL board meetings. The key consideration for the SHL board was whether SL was a good investment for SHL. By a good investment I mean one that would give a good return and had a fair price and was therefore a sensible acquisition. At the time we were focussed on whether SL was worth what we were considering paying for it and that the dividend stream from the investment would exceed the interest cost."

216. Reflecting on this passage, although Mr Johnson uses the phrase "good investment", what he describes this to be could more aptly be expressed as "not a bad investment": one which is "sensible", in that it is worth the purchase price and where the dividend income would meet the cost of borrowing.

217. Commenting on the process of drafting the minutes, Mr Johnson says in his witness statement:

> "We tend to draft board minutes in advance for the UK companies in the Group…, but these will be amended if any significant points are raised. For the avoidance of doubt, I expect that no amendments were made to the draft SHL board meetings following the meeting on 24 January 2011 that approved the Reorganisation (which is discussed in detail starting at paragraph 81, below) because we had had a management meeting earlier the same month and amendments had been made to draft minutes following that meeting, which I expect reflected some of the comments made at the "pre-meeting" and that no other new significant points were raised at the meeting on 24 January)."

218. We assume that "SHL board meetings" should read "SHL board minutes".

219. It will be recalled that the pre-meeting was on 14 January 2011, the previous date scheduled for the board meeting which was then postponed. However, we have seen in the previous section of this decision that the draft minutes were being amended, at the instigation of Mr Kuntschen and Mr Carter (both members of the tax team) and Mr Fletcher (senior manager, corporate tax, at EY) after that meeting, on 19 and 21 January 2011. Accordingly, these changes were made following the pre-meeting where the directors had discussed the merits of the Transaction.

220. The final minutes of the meeting record:

> "The meeting considered the profitability of Syngenta Limited over the last five years and the forecast profits in the Ernst & Young valuation report for the next five years. The forecasts for the profits of Syngenta Limited were prepared using data from Syngenta Global Marketing.
>
> This information was then used to complete forecasts for Syngenta Limited. It is noted that further discussions were had with key product managers, in particular the product manager for Azoxystrobin (a key product owned by Syngenta Limited). These discussions provided additional comfort that the level of forecast sales was reasonable and represented the best estimate. The forecasts show that Syngenta Limited is a company showing good prospects for growth over the next five years and the acquisition of Syngenta Limited would therefore provide the prospect for dividends in the future and a good return on investment.
>
> It was also reported that Syngenta Limited participated in a funded pension scheme, the Syngenta UK Pension Fund ("SUKPF"), covering the majority of employees in either a defined contribution section or a defined benefit section. The SUKPF was, on a number of valuation bases, currently underfunded (albeit that in late December 2010, Syngenta Limited made a payment of US$100 million to the SUKPF which had reduced such deficit and indeed may eliminate the deficit on certain bases). Syngenta Limited will be required (whilst the SUKPF is in deficit) to obtain the approval of the Pension Fund Trustee for future dividend payments. The Pension Fund Trustee directors had not expressed any concerns in principle about the possibility of reasonably sized dividend payments but had asked to be advised each autumn of the probable dividend payment so it could comment or raise any questions in a timely manner.
>
> On the basis of the anticipated growth, opportunities and dividend prospects of Syngenta Limited it was concluded that the acquisition of Syngenta Limited would be a good investment and the purchase of the share capital of Syngenta Limited should take place.
>
> Words and expressions used but not defined in these minutes shall have the meanings given to them in the Sale Agreement.
>
> It was noted that the Company and Syngenta Limited are both part of the Syngenta group of companies (the "Syngenta Group") and the purchase of Syngenta Limited would result in a more streamlined UK group legal entity structure."

221. Here we note the references to "good prospects for growth over the next five years and the acquisition of Syngenta Limited would therefore provide the prospect for dividends in the future and a good return on investment" and "anticipated growth, opportunities and dividend prospects [being] a good investment". We however approach these passages with caution. We know from Mr Johnson's evidence that the directors placed substantial weight on the valuation report. However, these passages are inconsistent with the nuanced and more cautious approach of the valuation report, discussed at [227] to [235]. We also approach these passages of the minutes with caution due to the involvement of tax professionals in the drafting of the minutes for the reasons stated at [214].

222. Mr Johnson's witness statement states:

> "86. The key paragraph in the consideration of the proposal is the one on the third page that starts: 'On the basis of…'. This paragraph was added between 7 January 2011 and 24 January 2011. What was really paramount was whether

SL was a good investment and if we went through with the transaction whether SHL could pay the interest. The directors of SHL considered that we were buying an investment and wanted to make sure that all our homework had been done.

87. We were all familiar with SL's business and believed in its growth prospects (as I discuss below), which meant that determining whether SL was a good investment for SHL was mainly based around getting comfortable with the valuation. This situation is always difficult with two group companies transferring an asset and determining free market value; if the price set is a good deal for one it is liable to be a bad deal for the other. However, we noted that the proposed price was at the low end of the valuation.

88. The directors had received the valuation report in advance and had been left to go through it on their own. It helped that EY had signed off the valuation. Despite this, during the board meeting or the meeting on 14 January 2011, we considered some of the key assumptions in the valuation. In another paragraph added between 7 January 2011 and 24 January 2011, the board minutes mention the discussions that Sarah and I had met with product managers (which I have referred to in paragraph 46, above). This looks like the sort of explanation that I would have given to SHL's directors when I briefed them at the meeting on 14 January 2011. We discussed how to make sure that the forecasts had good substance behind them; people can sometimes be optimistic when preparing forecasts and we wanted to make sure these forecasts were realistic. I had confirmed that the forecasts were realistic by speaking to the product managers and testing their assumptions.

89. I considered that SL was a good investment for SHL for three reasons. First, the price was at the lower end of the valuation range given by the DCF valuation. I had spent a lot of time on the valuations and had formed my own view of their reliability. Second, the price compared favourably with the valuations given by the comparable valuation. Third, there was a lot of positivity at the time about the future for Syngenta and I thought there was the potential for SL to achieve more growth and higher profits than was factored into the valuation.

90. The Board's positivity about the prospects for SL arose from our pre-existing knowledge about SL, the Group and the agrochemical market. For example, in 2008 workshops were held across Syngenta as part of a brand initiative which included presentations about the Group's expectations of sales growth resulting from increased demand for food, feed and fuel together with global population growth. This was backed up by Group crop protection sales growth in 2007 and 2008 of 11% and 22% respectively at constant exchange rates. We as directors would not have had the personal knowledge to be able to feel the same about an acquisition in a different sector (although in the unlikely circumstances that the Group asked us to consider an acquisition in a different sector, I expect Syngenta would then have engaged external advisors on that sector). With the benefit of hindsight, SL profit growth has not been as strong as we had expected until recently. While the factors that led to our positivity have not changed, what has changed is the desire, particularly in Europe, to grow crops using less chemicals. However, recent Group sales growth has been excellent. In 2021 Group crop protection sales increased by 19% and by 30% for the first 9 months of 2022."

223. We note here the reference to Mr Johnson's concern as to "whether SHL could pay the interest" (in [86] of Mr Johnson's witness statement), this is consistent with avoiding a bad investment. So too is the scrutiny of the key assumptions in the valuation (in [86]-[87] of Mr Johnson's witness statement).

224. However, we also note here Mr Johnson's view that the purchase was a "good investment" as it was "at the low end of the valuation", coupled with the positivity for growth going forward. That is more consistent with an acquisition for the purpose of making a profit.

225. Mr Johnson was referred to paragraph [89] of his witness statement in questioning during evidence in-chief and asked to elaborate on the meaning of "good investment". With regard to his second point, he explained that comparables, such as price:earnings ratios were favourable. On the third point he explained that there was a pressure to grow more on farming land, with population growth and people shifting from vegetarian to more meat based diets in India and China, as those countries became wealthier. Also there was then demand for farming to produce biofuel for cars in Brazil. Hence, he said, there was the potential for the valuation to be out performed. He concluded that part of his evidence-in-chief saying:

> "So that also came into the − my rationale for it being a good investment as well, because when we looked at all of the projections for the dividend flow versus the interest, it appeared that we could − we had a lot of leeway, you know, we'd run scenarios on the interest payments with optimistic scenarios and pessimistic, and the base scenario, and all the scenarios showed that there would be plenty of dividend income with which to pay the interest, we wouldn't have any problems repaying it.
>
> So not only did it look like a good investment, one that could outperform what we were paying for it, but it also looked that we were financing it in a way that wasn't going to give us as directors any issues."

226. In that passage, we see Mr Johnson returning to the concern of "problems repaying" and avoiding issues for "us as directors". Indeed, the reference to "good investment" appears here again to be one that is not bad – one without "problems repaying".

227. We note here also that the factors that Mr Johnson relies on for his optimistic outlook for growth are consistent with parts of the valuation report (third paragraph, under headings "Market overview", "Crop protection market") which states:

> "From an outlook perspective, escalating demand for food, feed and renewable fuel across the globe has led to depleting stocks of agricultural commodities and rising food prices. As food prices rise, farmers may be willing to invest more in crop protection as the cost relative to their potential revenue decreases."

228. However, that section of the valuation report focusses more on the risks that are summarised in the final paragraph of that section as:

> "Principal risks for SL in the crop protection market include: royalty erosion due to increased competition upon expiry of patent protection; changes in the regulatory framework in key territories; and political changes with respect to policy on agricultural matters. SL also faces risks in relation to R&D due to the significant expense, the uncertainty and the delay between discovery, and potential revenue generation. Furthermore, products currently under development may not be commercially viable, nor comply with the regulations in place at the time of launch."

229. Furthermore, we note from the earlier passages of this section of the valuation report that certain of these concerns originate from beliefs of the management of SL or SHL:

> "Management believe that pricing pressure in the area of crop protection has historically contributed to eroding margins in the sector, with SAG reporting a 7% annual fall in prices in established crop protection products in Q3 2010. Management anticipate long term trends on pricing to be very competitive and note that price erosion is common in the market."

230. In the "Abbreviations" section of the valuation report "Management" is defined as "Management of Syngenta Holdings Limited or Syngenta Limited". Under the heading "Limitations of Scope" on the first page of the valuation report it states:

> "Our view on value is based on the information provided to us by Syngenta management ("Management"). In the context of the valuation assignment, we have not sought to verify the accuracy or completeness of the data, information and explanations provided by Management, who are responsible for this information."

231. Similarly, in the "Executive summary", under the heading "Limitations of Scope", the second paragraph states:

> "*We relied upon the information supplied and our discussions with Management in arriving at our views on value.* As part of our work we have reviewed Management's assumptions and the information provided for reasonableness in the context of the historic performance of the business as part of the valuation process. This was a summary level review of Management's information, *but we have not expressed any opinion on the information provided to us including any profit forecasts or views of future prospects, and responsibility for these matters remains entirely the responsibility of Management*. The scope of our work is therefore limited in this respect."
>
> [our emphasis]

232. We therefore note that the views expressed as to the risks on "future performance" would all appear to originate from Management concerns.

233. We note that Mr Johnson was a director of both SL and SHL and (in his group role) Head of Finance Operations for UK and Ireland. We also note, as Mr Johnson explains in his witness statement, his "main involvement in the Reorganisation, in addition to considering it as a director of SHL, was in assisting with the preparation of the Valuation Report". He did this as part of his group role of Head of Finance Operations, rather than as director. We infer from this that Mr Johnson will, at the time of the valuation report, have been aware of the concerns with potential growth. Indeed, given his role in assisting with the preparation of the valuation report, we find these concerns are likely to have been held by Mr Johnson at the time. Such concerns would further explain why he was concerned about personal liability for the directors of SHL and why he sought to gain assurance from the valuation report.

234. We do not doubt that Mr Johnson was seeking to assist the Tribunal by acting honestly as a witness before us. Nevertheless, there is an inconsistency between his witness statement and (even more so) his oral evidence that expresses an unqualified optimistic attitude to the growth prospects of SL, and the contemporary documentary evidence of the valuation report that suggests he had concerns with risks to the growth prospects of SL. That concern with risks to growth is also consistent with his emphasis on mitigating risks to the directors: which is both evidenced in his testimony before us and in the contemporary documentation, for example the directors' briefing slides.

235. We acknowledge that the (contemporary) SHL board minutes refer to "anticipated growth" making the acquisition of SL a "good investment". However, as we have noted above, the drafts of those minutes were checked by tax professionals with an eye to avoiding challenge by HMRC. They do not appear to reflect the balanced approach of the valuation report – which all the SHL directors were sent and Mr Johnson assisted with the preparation of – which in addition to seeing opportunities for growth also identified risks. Accordingly, we approach that passage in the minutes with caution.

236. We therefore view, with caution, Mr Johnson's testimony before us that the Transaction was entered into by the directors of SHL to acquire a "good investment". When recalling events of a decade ago even an honest witness may be unreliable, for the reasons summarised in *Gestmin*. We consider this conclusion of Mr Johnson not to be generally supported by the contemporary documentary evidence and prefer the contemporary documentary evidence.

Downplaying any tax avoidance purpose

237. We have already discussed what we consider to be downplaying of a tax avoidance purpose in the context of emails concerning the PwC draft tax advisory opinion (30 November 2010).

238. We have seen with regard to the corporate finance proposal, the cover email (Mr Nijhof to Mr Ramsay,13 December 2010) is more open about the tax saving being the object of the Transaction than the proposal document. We considered this to be because when presenting the proposal to a senior executive it was thought desirable to be more open about what was the real object of the Transaction: being the tax saving.

239. Similarly we find in relation to the email "Debt Push Down" (14 October 2010, email of Ms Carter to Mr Kuntschen) when plain speaking internally within the group was required, to get other teams to do "what they were supposed to do", it was necessary to justify it by the "compelling tax savings at stake" – rather than entity simplification or the dividend planning process.

240. Conversely, we have found it likely that the minutes of the SHL board meeting (24 January 2011) that approved the Transaction were checked by tax professionals with an eye to reducing the likelihood of a challenge by HMRC. This causes us to approach these minutes generally with caution, not just the paragraph Mr Kuntschen had added as a "(defense) argument", (to quote the email "FW: UK reorganisation" (Mr Kuntschen to Ms Carter, 21 January 2011).

241. We recall the reference to legal entity simplification being used to help "with our business purpose arguments" (Ms Carter to Mr Kuntschen, 24 September 2010). We found this shows an awareness of the unallowable purpose rules and a desire to construct an evidential base that supports arguments that the Transaction has a commercial purpose.

242. We recall also how in the version of the corporate finance proposal the tax deduction has become a "consequence", rather than the debt being a "consequence" with the tax deduction being a "benefit". Given the other documents which emphasise the tax driven nature of the Transaction, we found that it is likely that the proposal – and especially the final version – is phrased to downplay the tax purpose of the Transaction, due to an awareness of the unallowable purpose test.

243. These are all particular instances where we consider the tax saving to the group is being downplayed. We do not consider they are isolated instances, but of broader indicative value.

Entity simplification

Documentary evidence

244. We recall the Request for Proposals to Deloitte and EY (20 April 2010) in which a stated objective is "To simplify the UK group structure by reorganising the group to make Syngenta Holdings the holding company of all UK entities". (The first reference to entity simplification in the Transaction correspondence is a draft of this part of the document, attached in an email from Ms Carter to Mr Kuntschen, titled "Debt push down", dated 14 April 2010.)

245. We note also the references to entity simplification in the following documents related to this transaction. Some of these we have already discussed. In respect of documents we have not already discussed, we briefly quote what they say:

(1) the "Response to questions" email (Ms Carter email to Mr Syratt, 6 May 2010);

(2) an email titled "Syngenta Holdings" (Ms Carter to Matthew Bayliss, 10 June 2010) which said: "We are currently looking at a reorganisation of the UK group to simplify the UK group structure which as you are aware is held below two separate UK entities";

(3) the "Accounting Issues Note" prepared by Alaster Ndlovu on or around 28 July 2010, which describes the background as "simplifying the ownership structure of UK Syngenta group companies";

(4) the presentation to the group's Tax Leadership Team (10 November 2010);

(5) the email "UK Reorganisation – notification of steps" (Ms Carter to Mr Johnson, 30 November 2010);[1]

(6) the emails prepared by Ms Carter on 1 December 2010, to be sent to the directors of STNV, SABV and SPARTAG, which described the proposal as "to simplify the UK group by SHL purchasing SL from SABV". That was also the phrase used in Ms Carter's email mentioned immediately above;

(7) an email titled "FW: UK Corporate Re-organisation" (Mr Bayliss to Tobias Meili, copying in Ms Carter, 6 December 2010) to brief him about the reorganisation, describing the purpose of the reorganisation as "to simplify this UK group by SHL purchasing SL from SABV". Given the very similar wording to the emails mentioned immediately above, the proximity in time and Ms Carter being copied in, we consider it likely that Ms Carter may have been involved in the drafting or that an earlier email of hers was used as the basis to crib from;

(8) the email "UK reorganization – debt push down proposal paper" (Mr Ramsay to Mr Nijhof, 13 December 2010);

(9) the corporate finance proposal (13 December 2010);

(10) the SHL directors' briefing slides (January 2011);

(11) the SPARTAG board resolution (10 January 2011) which states that the restructuring proposal is "for simplifying the UK corporate structure and the dividend planning process";

(12) the slides for the presentation made to the LES Steering Group meeting on 10 January 2011, which list under "Achievements 2010": "Simplification UK corporate structure: debt pushdown for Jan 2011". We consider this to have significant weight since it is a part of the legal entity simplification project, not part of this transaction. This suggests that the Transaction was viewed as an "achievement" of the legal entity simplification project. We do not consider that it follows that it was necessarily the

[1] SHL's written closing submissions describe this as "the email sent by Mr Johnson to the other directors of SHL on 1 December 2010 which described the proposal as 'to simplify the UK group by SHL purchasing SL from SABV'". However that email does not say those words, but forwards this email, of Ms Carter, which does. The forwarded email is not the subject of optical character recognition, although the *First-Tier Tribunal (Tax Chamber) General Guidance on PDF Bundles* requires this. Hence it was, initially, difficult to identify what SHL's written closing submissions were referring to on this point. We mention this to stress helpfulness to the Tribunal of following the *First-Tier Tribunal (Tax Chamber) General Guidance on PDF Bundles*.

purpose of the project, but could alternatively have been merely a benefit arising from the project;

(13) the "Written Resolution of the Managing Board of [SABV]" with a final signature on 12 January 2011 stating: "It has been proposed to simplify the UK group by SHL purchasing SL from SABV".

246. We note that many of these documents originate from Ms Carter. We recall her remark suggesting that simplification was being used to help "with our business purpose arguments" (Ms Carter to Mr Kuntschen, 24 September 2010). We therefore approach those documents with some circumspection.

247. We also view with some circumspection the board resolutions/written resolutions. We earlier stated why we approach the SHL board minutes with some caution. We have not been presented with evidence as to how those other board resolutions/written resolutions were drafted, but as the companies were all in the same group we consider it likely they too may have been drafted with an eye to downplaying any tax avoidance purpose.

248. We note that several of the key documents omitted any reference to entity simplification. Such documents that omit any such references include:

(1) the 2010 projects list (1 February 2010), which initiated the project;

(2) the "UK Projects" email (Ms Carter email to Mr Kuntschen, 5 February 2010);

(3) the email "FW: UnitEntityRequest_Form" (Ms Carter to Ms Elce, 22 October 2010); and

(4) the SHL directors' briefing email and tax savings slide (30 November), although the chain that was forwarded states that the proposal "is to simplify the UK group".

249. While the corporate finance proposal refers to a "main benefit of the proposal [being] to simplify the UK corporate structure", it does not elaborate on this, as might (as we have discussed) be expected if it were a genuine purpose of the Transaction.

250. We were also referred to a number of documents concerning earlier proposals, which were not followed through, for restructuring in the UK. We consider these have significantly less probative value as they do not relate to the specific transaction we are considering and in some instances occurred a decade before. Nonetheless they have some probative value. These documents include:

(1) the LES project list from 2000/01 which includes as an ongoing project "SHL buys Syngenta Ltd from SHBV – borrows from Luxembourg" (this document has a last edit date of 9 January 2002);

(2) the "Issues Paper" prepared by Karen Young on 9 August 2001 which notes as the first "key point" that "The transaction results in a UK holding company that owns all UK companies of the Syngenta Group… This will assist in delivering the synergy benefits for the group and allow the UK group to be managed as a whole." (As we note, at [293] below, this paper also discusses the tax benefits);

(3) the 2003 memo titled "UK Issues for Resolution – Syngenta Limited and UK Restructuring" which states that "From the creation of Syngenta it has been the intention to merge the two UK groups into one entity… It may still be beneficial to resurrect the plan for SHL to acquire SL". (As we note, at [309] below, this memo also suggests that a "debt push down into the UK" is "pointless" for "the foreseeable future" as it is "unlikely the UK group will generate any taxable profits");

(4) the 2006 PowerPoint presentation titled "UK debt push down – Swiss repatriation route" which gives as the third of the listed "key objectives": "Unification of the shareholding structure for the UK group of companies" (the first listed key objective is "UK tax optimisation").

251. We note also the LES Steering Group Meeting slides (10 January 2011). Those slides under the heading "Objectives and deliverables" state:

> "• Simplify and optimize the group legal structure by streamlining the number of legal entities
>
> • Identify those entities needed for business purposes, regulatory requirements and other special purposes versus those that can be subject to dissolution
>
> • Set agenda for Corporate Finance projects supporting the Legal Entity Simplification process
>
> • Structure those projects via a standardized procedure involving various Corporate functions and country organizations"

252. Here the emphasis would appear to be on reducing the number of entities. However we have already noted that the "Simplification UK corporate structure: debt push down for Jan 2011" is listed under the heading "Achievements 2010", later on in the same slide deck.

253. We find that that at group level the entity simplification project included both reducing entities and creating a single holding company structure. This is evident from the email "Debt push down project" (24 September 2010, Ms Carter to Mr Kuntschen). It is also evident from the email of Mr Nardecchia (7 December 2010) where it says "it was decided not to try to combine the two entity hierarchies immediately after spin-off, this was left to subsequent Syngenta legal entity structure projects/processes". This suggests that the legal entity simplification project was not just about reducing the number of entities, but also creating a single holding company in each jurisdiction.

Witness evidence

254. In his witness statement Mr Kuntschen explained how Syngenta was formed by a merger of the Zeneca agrochemicals business with the Novartis agribusiness. As a result there were often multiple legal entities in one jurisdiction performing similar tasks. Initially, as the management team was small, KPMG was retained to identify duplicate entities and prepare a proposal for reorganisations. The list of entities identified by KPMG was reviewed on a yearly basis. Part of Mr Kuntschen's role, in group tax, was to review this work of KPMG from a tax perspective. As the corporate finance team expanded, this work was brought back within the group. A LES Steering Group was established to determine which projects to take forward each year. Due to finite resources projects had to be prioritised. Mr Kuntschen exhibited a slide titled "Legal entity structuring – process and governance flow", which he said broadly set out the process.

255. We note however that slide does not deal with the sort of transaction which took place in the UK, whereby a single holding company is put in place and there is no reduction in the number of legal entities. Rather that slide deals with transactions that reduce the number of legal entities. That is evident from the references to "merger" and the final implementation step to "liquidate, merge or eliminate legal/[d]ormant entities" to "[a]chieve the optimal structure". We recall however there is evidence to suggest the LES project included creating a single holding company. This is the email of Ms Carter to Mr Kuntschen (24 September 2010, above at [103]) and the email of Mr Nardecchia (7 December 2010, above at [147]).

256. In his oral testimony Mr Kuntschen explained the benefits of legal entity simplification as follows:

> "To my recall, it started with some reorganisation in countries like in Germany where we, for the first time, applied a simplified corporate structure, the single holding company set up, which was made in Germany in order to have a consolidated account, consolidated tax account, one fiscal unity, meaning could you offset tax losses with profits within the fiscal unity, which allowed you also to have consolidated thin cap rules, and in Germany, even I would say better, VAT exemptions on all the transactions which would happen between the member of the VAT fiscal unity, being under the German holding company.
>
> From that, we moved to other countries and applied the same structure, having similar merits. That was the France tax consolidation, that was Spain as well tax consolidation.
>
> The group found it beneficial to have this simplified structure being implemented in all of the countries where there are reorganisations because they also had some administrative benefits next to the ones I mentioned before, because in all of these legal entity simplification projects there were not always tax merits, there were more costs. The merits, they were different from one country to the other, but overall they lead to a simplification of the group, and the simplification of the group is not only, as I understood it, through my years working with Syngenta by the reduction of the number of entities, I hope you had a look at the chart, not to look at the fancy colours within the chart, but basically the number of entities.
>
> We started I remember was in the early days of Syngenta 232 entities. Then Syngenta was trying to grow through acquisitions, mainly in the seeds area, this is where Syngenta was less strong than in agrochemical sector, something like 74 additional companies came in, we arrive to a total of, if you make it to the sum, 312, from 2001 to 2010, but in 2010 we reduced it to 191. That's 121 entities less. That's close to 40% less.
>
> So this was a first concern, and the second concern was to have a lean structure in order to have in the organisation optimised from a business and administrative perspective, and the single holding company structure had the idea, very simple idea basically, from organisational perspective, holding entities to the holding activities, operation do only operations, and we had within the group many entities which had participations here, participations there, doing a little bit of business. So everyone is focused on what it's supposed to do."

257. Here we note that, on Mr Kuntschen's account, the early simplification projects, in Germany, France and Spain, were all influenced by tax considerations. They were not, to be clear, tax avoidance considerations: but rather taking advantage of the local laws relating to corporate groups. In his witness statement Mr Kuntschen says "The reorganisations that created the single holding company structures in France, Germany, Italy and Spain did not have any tax benefits". That (excluding Italy) is clearly contradictory to his oral testimony that we have quoted. This leads us to approach his evidence on this topic with some caution.

258. We have already noted that the Transaction did not reduce the number of legal entities, so it was relevant to the project with regard to Mr Kuntschen's "first concern". We accept, however, that there was a project to reduce the number of legal entities in the group. That is evident from comparing the group structure charts of 13 November 2000 and 31 December 2011, which were in evidence before us.

259. With regard to the "second concern", when asked in cross-examination if there was a "particular problem" in the UK, Mr Kuntschen admitted that he was "not aware" of one.

260. In his witness statement Mr Johnson discusses the benefits of group simplification, in the context of Mr Kuntschen's "second concern" saying:

> "I understood there to be simplification benefits arising from the Reorganisation. For example, if there were contracts that related to all our UK sites, they could be signed on behalf of SHL rather than each entity thus reducing administration. A similar thing applied to the share incentive plan where it had been the case that one contract had to be signed for SHL and one for SL. The Reorganisation also offered the minor benefit of making it easier to manage the relationship with the Dutch holding company, SABV, because there would only be one set of directors dealing with it."

261. Asked about this in cross-examination Mr Johnson said:

> "Q. So of those two simplification benefits that you refer to of SL being owned by SHL, it's fair to say that neither of those benefits were particularly important?
>
> A. They're relatively small benefits. I mean, we have had some other benefits, we've recently got a UK president, a new UK president, who's a director and have been appointed to the holding company one, SHL, you know rather than being appointed to all of them, which has been a useful benefit for him because he's not had to join − be director on multiple companies, and I think that we've had some other smaller benefits as well.
>
> Q. And is it fair to say that the benefits of what have been referred to as legal entity simplification weren't that relevant to you as a director of SHL because they benefited the group rather than SHL?
>
> A. Possibly.
>
> …
>
> Q. The absence of those two factors, those two benefits of legal entity simplification were not something which had unduly impeded the business of either SHL or SL?
>
> A. Yes, that's correct."

262. Mr Johnson was asked about this the following day during his cross-examination. He was referred to the part of the corporate finance proposal under the heading "proposal", where it discussed simplifying the group holding structure and the dividend planning process. The exchange was as follows:

> "Q. … I think what we've established in our questions yesterday, and indeed, it's what you say in your witness statement, is that the benefits of this exercise weren't a significant benefit for SHL.
>
> A. As perceived by me."

263. Mr Johnson was a director of both SL and SHL. Therefore he would have been well placed to identify if having two UK holding companies was problematic. He did not identify particular issues and did not perceive there to be significant benefits of a single holding company structure. Nor was Mr Kuntschen able to identify a particular problem in the UK. We find there were not significant benefits to SL, SHL or the wider group.

264. In his witness statement Mr Kuntschen explained that:

> "At the time we carried out the Reorganisation we still had lots of country reorganisation projects to do. We knew we needed to do all these projects, but we had limited resources which meant they had to be prioritised. Often the country reorganisations had more costs than immediate tangible benefits.

> Where there was a clear additional benefit, like the interest deduction in the UK, it was easier to push the project up the priority list of projects, but there were always times when the Group had room for these sorts of projects. The overall aim for the Reorganisation was to have the single holding company structure, but without the interest deduction, the Reorganisation would have happened later and other projects on the list would have been prioritised."

265. Similarly, in his oral evidence, Mr Kuntschen referred to how the tax deductions would help a project "going up the list… up the ladder… to [an] earlier conclusion". However he said it would have, eventually, been done even if it was a "100% equity contribution" so there would be no tax deduction.

266. We note here that Mr Kuntschen accepts the tax benefits acted as a catalyst to accelerate the project. However, given the "limited resources", which he acknowledges, and our findings as to the limited (non-tax) benefits of legal entity simplification in the UK, we do not accept his view that the acquisition of SL by SHL would have happened in any event. There was no evidence before us of a transaction that was entered into purely to create a single holding company structure without significant additional benefits of any kind. For example, we note the references to creating a "fiscal unity" in Germany and "tax consolidation" in Spain and France. Although these are examples of tax benefits, we acknowledge that in some jurisdictions there may have been significant administrative and other benefits too. Those various potential benefits are evident, in addition to Mr Kuntschen's testimony, from a slide "Why Legal Entity Simplification" in a slide deck "Legal Entity Structuring: EAME workshop" (23 April 2012). In his oral testimony Mr Kuntschen gave Italy as an example of a country where there were no tax benefits, but it does not follow that there were no administrative or other benefits there.

Conclusion

267. We recall the email of Ms Carter to Mr Kuntschen (24 September 2010) which refers to the recent entity simplification projects in the group being used to "help with our business purpose arguments". We note that several of the key documents omitted any reference to legal entity simplification. Viewing the evidence in the round, this suggests to us that legal entity simplification is being used as a "cover", to minimise any perception that the Transaction was entered into for tax purposes.

268. We note the significant costs expended on professional advisors for the Transaction. We also note the significant amount of employees' time consumed (for example the spreadsheet in relation to Ms Carter's time). Given these costs, we do not consider that the purpose of the Transaction, from a group perspective, was to achieve the benefits of simplification: which seem to have been minimal in comparison to the cost, and also minimal in comparison to the very large anticipated tax benefit. We acknowledge however that there was a legal entity simplification project and that achieving a single holding company structure in the UK contributed towards that. This was a benefit of the project, albeit a relatively minor one, given that in the UK the benefits of having a single holding company structure were relatively minor.

Dividend planning

Documentary evidence

269. As with entity simplification, we note that several of the key documents omitted any reference to dividend planning. Such documents that omit any such references include:

(1) the 2010 projects list (1 February 2010), which initiated the project;

(2) the "UK Projects" email (Ms Carter email to Mr Kuntschen, 5 February 2010);

(3) the Request for Proposals to Deloitte and EY (20 April 2010), where we have found the reference to the "dividend trap" not to be an objective of the Transaction, but a problem to be avoided;

(4) the "Response to questions" email of Ms Carter email to Mr Syratt (6 May 2010);

(5) the "FW: UnitEntityRequest_Form" email (Ms Carter to Ms Elce, 22 October 2010);

(6) the SHL directors' briefing email and tax savings slide (30 November 2010); and

(7) the SHL directors' briefing slides (January 2011).

270. The draft corporate finance proposal of 28 October 2010 is the earliest documented reference put before us of a benefit of the Transaction being to simplify the dividend planning process. As we have noted, at [159] above, it merely states this and does not elaborate the point, as would reasonably be expected if it was a main purpose of the Transaction.

Witness evidence

271. In his witness statement Mr Kuntschen explained the dividend point as follows:

> "Second, the sale of SL shares resulted in a significant capital gain for SABV which translated into an extraordinary profit. The profit released reserves that could be distributed up the Syngenta Group. In order to pay an interim dividend, an amount in cash equal to the dividend needed to be available. Using debt funding meant that SABV had the cash to pay an interim dividend, which would not have been the case if only equity funding had been used. Around this time, the agrochemical industry was returning lots of cash to shareholders and Syngenta was looking for big pockets of profit to fund large dividends from SAG. This made the Reorganisation of even more interest to the Group because it solved one concern about having enough capacity for SAG to pay dividends. I can see from a slide pack titled "Dividends 2012 & Dividend Planning 2013-2017" that in 2011 SABV paid a dividend of $933m to its parent company ("SPartAG") and SPartAG paid a dividend of $1,194m to SAG (Exhibit AK1 Tab 7 – page 24). By comparison, in 2012 it was not proposed that SABV pay a dividend (Exhibit AK1 Tab 7– page 15), while SPartAG still had to fund a proposed dividend of $1,531m."

272. In cross-examination Mr Kuntschen admitted that there was no explicit reference to the dividend in the corporate finance proposal, but suggested it was covered by the phrase "simplify the dividend planning process", commenting:

> "It's a wider, it's a wider definition. So it's not precisely the wording you're mentioning, but for me this was kind of a broader, how could I say, reference to what was going to happen in terms of a dividend and dividend distribution."

273. We find Mr Kuntschen's testimony on this issue unpersuasive. Given his testimony as to the importance of generating distributable profits to allow a dividend to be paid, we find such vague and general words in the corporate finance proposal ("simplify the dividend planning process") inapt to convey the idea of generating distributable profits. Furthermore, we find the phrase "simplify the dividend planning process" suggests a reform to the dividend planning process on an ongoing basis. However, a one-off generation of distributable reserves by the Transaction would not generate such an ongoing reform.

274. SHL's written submissions suggest that while the words "distributable reserves" do not appear as such in the corporate finance proposal, the interim dividend is identified as important and you needed distributable reserves to pay that dividend. They further note that this accords with the contemporaneous evidence which shows the group was very conscientiously planning

dividend distributions, and the value of the distributable reserves in SABV in 2008 was only about $93m. Due to the Transaction and the crystallisation of the capital gain described by Mr Kuntschen, SABV's distributable reserves were increased to around $933m. We acknowledge that this is a significant benefit of the Transaction. But if that was what motivated the Transaction we would expect to see a greater emphasis on, and indeed express reference to, this in contemporary documentation. The absence of such mention leads us to conclude that it was only a benefit, and not a purpose, of the Transaction.

Conclusion

275. In conclusion, we accept that the Transaction allowed a dividend to be paid by creating distributable profits. It was a benefit. However, due to the absence of supporting contemporary documentary evidence, and the unpersuasive nature of Mr Kuntschen's testimony on the point, we do not accept that this was a purpose of the Transaction.

A tax driven transaction at group level

Documentary evidence

276. To recap the documentary evidence that the Transaction was tax driven at group level:

(1) on the 2010 projects list (1 February 2010) the project was initially on a list of "tax projects". The name of the project, from its inception, of "debt push down" suggests it is concerned with the creation of debt in the UK, rather than entity simplification or dividend planning. When the list was put to him, Mr Johnson acknowledged that it was "tax driven" at group level. In this sense we find tax driven means carried out to achieve a tax benefit, rather than (for example) managed by group tax.

(2) in the "UK Projects" email (Ms Carter email to Mr Kuntschen, 5 February 2010) we note that the name of the project is "Debt push down - Insertion of debt into the UK to fund purchase of Syngenta Limited". The emphasis is on debt into the UK. Further the stated "benefits" are solely stated to be tax benefits, arising from the interest on the debt.

(3) in the Request for Proposals to Deloitte and EY (20 April 2010) it is clear that an "objective" is to secure a tax deduction in the UK for interest payments.

(4) in the "UK Debt Push Down" email (Mr Schwarb to Ms Carter, 6 May 2010) the first item under "Outcome" is a "positive contribution to net income of on average USD 6m income per year". In this context we consider listing it as a first item signifies it is prime in order of importance.

(5) in the "Debt push down" email (Mr Kuntschen to Ms Carter, 14 October 2010) Mr Kuntschen seeks to get the "Shanghai finance team finally [to do] what they were supposed to do" by referring to the "compelling tax savings at stake" – rather than entity simplification or the dividend planning process.

(6) in the "FW: UnitEntityRequest_Form" email (Ms Carter to Ms Elce, 22 October 2010) Ms Carter states "This project is a high priority due to the substantial tax savings which will be made by its implementation".

(7) the directors' briefing email (30 November 2010) describes the interest deduction as "the advantage" of the Transaction. The accompanying slide shows how the "$6,929,250 Total tax savings" is calculated. The accompanying notes page describes this saving as "the benefits of the transaction". When Mr Johnson forwards the email to his fellow directors, he says "[t]his is a tax driven project": which he accepted (after some attempts at equivocation) refers to the tax saving for the group.

(8) in the "UK Reorganisation and debt push down" email (Mr Nardecchia to Ms Carter, Mr Johnson included in copy, 7 December 2010) it is stated that when the taxable

profits of the UK group would have been insufficient to absorb the deductions on interest payments, a similar transaction was not proceeded with.

(9) the Corporate Finance Proposal (13 December 2010) refers to a tax saving of "USD 9.5m per annum" in the "Objectives and benefits" section. We have found that this document sought to downplay the tax benefits, although Mr Nijhof was more frank about these in his email to Mr Ramsay, Syngenta's CFO at the time. The document indicates that the ratio of debt to equity was set at the maximum possible level of debt that the group, realistically, thought HMRC would permit. This again is further evidence that achieving a tax deduction for interest was the group purpose in entering into the Transaction.

(10) in the Presentation to Group's FLT (14 December 2010) the Transaction is presented as part of a "tax optimization journey" whereby "debt [is] introduced in Syngenta UK". The motivation for completing the Transaction by 20 January 2011 is to "maximise tax savings". A slide calculates how annual tax savings of £6,047,100 are anticipated – this was included at the suggestion of Mr Kuntschen to "underline the strategic aspect" of the Transaction. In his email following the meeting (titled "UK debt push down - Yesterday's presentation to FLT and Today's conference call", 15 December 2010), the first item that Mr Kuntschen suggests that Ms Carter and Mr Perry can be "proud" of is the "tax savings".

(11) in the SHL directors' briefing slides (January 2011) the slide "UK Reorganisation - Background ctd", states "Main benefit is a group tax saving of £6m pa based on current interest rates taking advantage of low tax rates in Holland". This is further reinforced by the slide titled "UK Reorganisation - Step plan", which states that "[t]o maximise tax savings and avoid foreign exchange exposure project proposed to be implemented ASAP". We note that a "[d] isaster scenario", as specified on the final substantive slide, includes "[t]ax deduction for interest being restricted".

(12) the email "FW: UK reorganisation" (Mr Kuntschen to Ms Carter, 21 January 2011) in which Mr Kuntschen refers to a "(defense) argument in case being challenged by the UK authorities about the purpose and benefits of the transaction", which we find suggestive of an underlying tax purpose that the author may wish to conceal.

277. We also note that the Transaction was project managed by Ms Carter, the UK Tax Manager. We consider this indicative of tax considerations being the object of the project. We note Mr Kuntschen's evidence that she was chosen because she was close to the UK legal and finance functions and had time. He said in his witness statement "[i]t did not matter that Sarah Carter was in the tax team". We note that is at odds with the witness statement of Mr Johnson, who says, commenting on the decision to appoint Ms Carter as project manager:

> "Sarah was the project manager for the Reorganisation. I was not involved in the decision that Sarah be the project manager, but it made sense for several reasons. Sarah had played a key role in an earlier restructuring. One of the key risks identified in the Reorganisation was ensuring HMRC was happy with the transaction from a tax perspective and that SHL could get a deduction for its interest payments (in my experience, the most common risks in transactions and acquisitions are tax, pensions and environmental)."

We acknowledge that Mr Kuntschen will have been involved in the decision to appoint Ms Carter as project manager, unlike Mr Johnson. Nonetheless, we find it implausible that the decision had nothing to do with her tax expertise, viewing the evidence in the round, given the substantial tax benefits of the Transaction. Rather, in the overall context, we find the fact the

Transaction was project managed by the UK Tax Manager is suggestive that tax considerations were an object of the Transaction.

278. We accept that the funds (£600m/USD 950m) moved around the group on the same day. HMRC suggest that this is potentially relevant to whether the Transaction was tax motivated. We disagree. As with many multinationals the group has a treasury company that effectively operates as a bank for the group. It is therefore not surprising that for a transaction that is internal to the group the cash flows are circular.

Timing as an indication of tax motivation?

The parties' arguments

279. It will be recalled that both the presentation to FLT (14 December 2010) and the SHL directors' briefing slides (January 2011) say, under the heading "Why now?":

> "• APA finalised in 2010
>
> • UK Tax losses utilised fully in 2009"

280. Further the email "UK Reorganisation and debt push down" (Mr Nardecchia to Ms Carter, copying in Mr Johnson, 7 December 2010) says:

> "The reason why the entity hierarchies have remained separate for so long is, I believe, mainly because there has never been an opportune moment to carry out the transfer until now. The UK group underwent significant restructuring in the early years, and the related costs were borne in the UK and not recharged to Basel. A tax deduction was available for at least some of these costs. This meant that there were periods when the UK entities' combined forecast taxable profits would not have been high enough to allow them to take advantage of the interest deduction."

281. It is HMRC's case that as SHL did not have significant taxable profits, it was essential that SHL should be able to surrender its NTLR deficits to other companies within the UK group. At the time,[2] the rules on surrender of NTLR deficits intra-group only permitted the surrender of current year NTLR deficits where the surrendering and the claimant companies had an overlapping accounting period: s 99 and s 130 Corporation Tax Act 2010 (CTA 2010). Hence, if the other UK companies were not profitable and so could not use the losses, the losses would be stranded in SHL which had little or no taxable profits. HMRC say the evidence shows that one of the reasons the Transaction occurred when it did was owing to UK tax losses being fully utilised in 2009, meaning that until that point there would have been little benefit in accumulating NTLR deficits as they could not be surrendered to other UK companies.

282. SHL says that this was not the case. They say that the agreement of a new APA in 2009 and resolving Forex issues were previously dealbreakers. They also observe that the group did make taxable profits in the UK in the year ended 31 December 2007, and subsequent years.

The 2009 APA

283. In cross examination Mr Johnson explained that the 2009 APA assisted with valuation of SL, since it was based on sales rather than (with the previous APA) the profitability of the Swiss companies. Sales were easier to forecast than profits.

284. In his witness statement Mr Kuntschen explained that the UK reorganisation was delayed due to Forex considerations and also because of the absence of a UK APA. With regard to the issue of the APA, Mr Kuntschen says in his witness statement:

[2] Finance (No2) Act 2017 modified the rules by amending CTA 2009 but is not material to these appeals. These provisions are discussed in *Kwik-Fit Group Limited and Others v HMRC* [2022] UKUT 00314 [9]-[13].

> "at the time Syngenta was formed in 2001 there was no advance pricing agreement ("APA") with the UK tax authorities. This made it difficult for the UK tax team to prepare returns and for Swiss headquarters to understand the profits of the UK sub-group. It also made it very difficult to estimate business and profit forecasts, which were important for valuing SL. For the Reorganisation to take place, a reliable valuation of SL was required for the boards of SHL and SABV and for transfer pricing. When SL's second APA was agreed in 2009, this in a large part simplified the necessary valuation of SL, which made it possible to carry out the Reorganisation.
>
> An APA was required for SL regardless of any reorganisation plans for SL. This is because SL generates a lot of revenue, but all of its transactions are with Group entities. Most of those transactions relate to IP, much, but not all of which, SL owns. Without an APA these factors made it very difficult to determine SL's taxable profits after transfer pricing considerations. SL needed an APA to provide simplicity and certainty for the UK tax team, regardless of the Reorganisation. The first APA that SL agreed with the UK tax authorities was partly based on the residual profits of Syngenta Supply AG. This was complex to administer and did not provide certainty and simplification. The second APA was instead based on a defined royalty reward on the Syngenta Group's sales, which made arm's length profit easier to define."

285. We accept that the 2009 APA made valuing SL easier. It is clear that the directors of SHL placed great weight on getting (so far as possible) an accurate valuation. Accordingly, we find that the 2009 APA did contribute to the Transaction happening when it did.

Forex

286. We recall the email "Debt push down" (Ms Carter email to Mr Kuntschen, 9 April 2010). This was the first mention of Forex in the documents before us. Forex is stated to be a major concern, arising from discussions between Ms Carter and Deloitte. Specifically, it is stated to have been a "big problem last time". However, it is clearly not thought insurmountable – "Deloitte said there are lots of ways to get around this" – although, from the fact that it was stated in the email to be a big problem on the last occasion, we infer that solving it cannot have been thought a trivial task.

287. We also recall the Request for Proposals to Deloitte and EY (20 April 2010) in which a stated objective is "[t]o avoid any forex exposure as far as possible".

288. We note how on 1 September 2010 the Syngenta Group's group auditors (being EY in Switzerland) confirmed that SHL could change its functional currency from GBP to USD, which dealt with the Forex issue.

289. Mr Kuntschen explained in cross-examination how previously foreign exchange considerations had prevented the project proceeding:

> "We could find a way to reorganise which was pretty much similar to what finally happened, but the group always basically at the end of the day made a stop to the project, and it's relatively easy to understand because when you had such a big numbers and you have a portion of this number is debt, and you have a group which is US dollar denominated and you are in a debt which is going to be raised in pounds sterling because the UK entity is based in the UK, you have a mismatch, and a mismatch of about, in currency, half a billion, 600 million, over years with interest to come on it. I hardly see any group treasurer who would say we go ahead with the project because it means that if you don't hedge the risk is much too big, so the CFO would say no, and if you do hedge it means the project costs a fortune. Hedging, as always, it's cost, and it's not cheap, especially at the time there was I think a gap in interest rate between

> the pound sterling and the US dollar, and this is what drive the price and the cost of a swap, so the higher the differential the more basically you pay."

290. In cross-examination Mr Kuntschen vividly explained that foreign exchange exposure could be a "showstopper" because:

> "Being a position of a CFO, correct, and you come and you tell 'I have a 600 million unhedged pounds sterling position, can we live with it?' If you find one, I had to call many of them, right. Why? Because the magnitude of the risk is simply too big. So no group would do that, and secondly, if I recall well, on the group treasury policy which was one of these documents published by the group treasury, there is foreign risk management, correct, policy, part of it, which is of course to hedge, and I don't know if they mention the two hedges, natural or with external hedges, but it has to be hedged. It has to be hedged one way or the other. So that was a key request from group treasury a part of their policy."

291. With regard to the potential for Forex to be a "showstopper", we were referred to evidence relating to a number of similar reorganisations that the group had previously considered.

2001 Issues Paper – 9 August 2001

292. Mr Johnson exhibited to his witness statement a draft document titled "Issues Paper: Local integration UK", dated 9 August 2001, prepared by Ms Young who was on secondment to Syngenta from a "big four" accountancy firm. In his witness statement Mr Johnson says: "I cannot remember having read this paper at the time, but I think I probably would have".

293. This paper discusses, as an alternative model, a share for share acquisition but states:

> "This however, would not provide the benefit of the leverage which the preferred option will bring; see the treasury consideration section."

That section ("Treasury considerations"), immediately referred to above, states:

> "7. Treasury considerations
>
> 7.1 Leverage
>
> This transaction leverages the UK group by introducing debt of $555m. This provides a tax benefit to the group of $12m (debt of $555m at interest rate of 7% deducted at tax rate of 30%).
>
> It is therefore important that the UK group has the capacity to cover the interest deduction. There are 2 elements to this:
>
> - Profitability
> - Thin capitalisation requirements"

294. Section 7.4 discusses hedging. In cross-examination it was put to Mr Johnson that there does not seem to be a suggestion in the paper that foreign exchange is a showstopper. He responded that he was not "absolutely sure" and had understood foreign exchange to be "one of the blockers" why the earlier transaction did not proceed.

UK debt push down: Swiss repatriation route slides – October 2006

295. In cross-examination Mr Kuntschen was referred to slides titled "UK debt push down: Swiss repatriation route", dated October 2006. The author is said to be "Group Tax/AK". Mr Kuntschen confirmed that AK was a reference to himself. The slides describe a more complex transaction than the eventual transaction, in which SL becomes a subsidiary of SHL.

296. The first slide headed "Key Objectives" states:

"• UK tax optimisation

• Reduction of the Group long GBP position

• Unification of the shareholding structure for the UK group of companies"

297. The final slide headed "Summary Conclusions" contains the following text:

"• No FX exposure resulting from implementation of the UK debt push down project

• FX issue in connection with long GBP hedge position solved"

298. Mr Kuntschen suggested that this was a project at an "early stage" and an idea to "go round". While it was his "perception" that Forex could be managed, that was "maybe not absolutely correct". It was his idea and was subject to review by other functional groups of the company.

Email regarding forex from Mr Syratt (Deloitte) – 8 September 2009

299. Mr Kuntschen was referred to an email from Mr Syratt, a tax partner at Deloitte, dated 8 September 2009 and titled "UK debt pushdown e-mails" in which he said:

"I don't think it is particularly difficult to manage the forex, but I think it would help to have people involved from the UK with a track record of doing this. We would be happy to re-engage in conversations with Antoine, treasury and the UK to develop a plan that meets everyone's needs, and I'm confident that this can be done in a relatively straightforward manner."

300. Mr Kuntschen dismissed this email as Mr Syratt "fishing business", by suggesting that a simple solution could be found.

Conclusion on Forex

301. Overall, viewing the evidence in the round, we accept Mr Kuntschen's view that foreign exchange issues could be a showstopper. However, on this occasion they were able to be solved. Whilst we accept that foreign exchange issues could be a dealbreaker, we do not consider that they were difficult to solve. The eventual solution of changing the functional currency seems to have been a simple one and there is no reason in the evidence before us why it could not have been implemented before. We accept Mr Kuntschen's evidence that he did not previously think it possible to change a company's functional currency, but we note when the group invested in professional advice they discovered it to be possible. Further the documentary evidence of both Mr Kuntschen himself (in the slides) and Mr Syratt suggests that a solution was possible.

Losses used

302. At the hearing we were provided, by HMRC, with clips of the Syngenta UK group relief summary returns. They were for the year ended 31 December 2006 through to the year ended 31 December 2011. Mr Windle took us through these in submissions.

303. These clips showed that there were carried forward trading losses in SL, however in the year ended 31 December 2009, the carried forward trading losses were exhausted.

304. The clips also showed that in every year after 2006 there were substantial net profits in the UK group companies. It also showed that in years where there were carried forward trading losses, there was substantial non-trading income, even in SL.

305. By way of illustration, the net taxable profits of the UK group were £nil (2006); £23,332,505 (2007); £24,023,825 (2008); £44,474,673 (2009); £56,897,866 (2010); and £48,975,209 (2011).

306. These amounts are substantial, by reference to the amounts surrendered by SHL in the years 2011 to 2016, which were £20,094,991 (2011); £24,286,257 (2012); £23,028,790 (2013); £22,267,88 (2014); £22,407,934 (2015); and £24,901,428 (2016), and so varied between £20,094,991 and £24,901,428.

307. Accordingly, if the Transaction had been implemented in any year post-2006 it appears there would have been sufficient profits to utilise any non-trading loan relationship deficits.

308. It follows that we do not consider the fact that carried forward trading losses in SL were exhausted was likely to be a reason why the Transaction took place when it did.

309. We note however that the email from Mr Nardecchia refers to a transaction in late 2000. We have no UK group relief summary returns for around that period. It may well be that there would have been insufficient profits to relieve any NTLR deficits at that time. It therefore is plausible that that particular transaction did not take place due to insufficient profit in the UK group. That would be consistent with a document Mr Johnson exhibited to his witness statement titled "UK issues for resolution – Syngenta Limited and UK restructuring", produced in 2003, which says:

> "Plant Science Research and Development and IP ownership
>
> A major factor will be how the company decides to fund the Plant Science (PS) research carried out in the UK in future. If the costs (and therefore the ownership of any IP generated) is to remain here, then it is unlikely that the UK group will generate any taxable profits for the foreseeable future. This renders any debt push down into the UK pointless."

310. Against this context, we find that it was likely the case that the transaction in late 2000 did not proceed for the reason given by Mr Nardecchia.

Conclusion on timing

311. We find that the timing of the Transaction is not an indicator of a tax purpose. There were profits that could have been group relieved in earlier periods – so tax considerations do not of themselves explain why the Transaction was implemented when it was. (It does not, however, follow that they did not motivate the Transaction.) We accept the 2009 APA was a contributory factor to the timing of the Transaction. The Forex issue was solved when it was decided to pursue the Transaction. We accept that it could have been a dealbreaker, but consider that as a solution was found (several other solutions were offered) it was not an especially difficult hurdle to overcome.

Witness evidence

312. In his witness statement Mr Johnson stated:

> "I understood from the slides prepared for SHL's directors that the Reorganisation and the resulting interest deduction would have tax benefits for the Group. The Group tax benefits may have been mentioned during the board meeting as background information for the directors. It gave us the bigger picture and contributed to our understanding of why the Group wanted this transaction to take place."

313. Similarly, in cross-examination Mr Johnson accepted that the main purpose of the Transaction for the group was to achieve the tax benefit:

> "Q. Which, as we explored earlier, state the main benefit of the reorganisation was the tax saving of £6 million for the group.
>
> A. Yes, but, as I keep saying − sorry to be a broken record − you know, that was the background, you know, when we were making the decision with our

> directors' hats on for Syngenta Holdings it was around did we want to buy this investment.
>
> Q. Yes, and there's no mention of this in the detailed minutes. Now, we can turn those up. They're at your exhibit ADJ1, tab 22, which is core bundle tab 10, page 329. If you scroll down and turn to page 330 is where the minutes are. There's no mention in those minutes of the main benefit of this being a tax saving of £6 million.
>
> A. Well, it's not a benefit for Holdings. That was background from the group. The benefit for Holdings is getting this valuable investment."

314. We acknowledge Mr Johnson will have had less insight into the group objectives than Mr Kuntschen. However, that does not mean that his views must be entirely discounted. It is just a question of weight.

315. Commenting on why the Transaction was funded by a mixture of debt and equity, the first reason given by Mr Kuntschen in his witness statement was:

> "based upon my experience, sizable acquisitions are never funded entirely by equity, and I cannot remember a scenario where a sizable acquisition would have been funded this way."

316. However, in cross-examination Mr Kuntschen conceded that there were a number of transactions that took place as share-for-share exchanges (in the USA, UK, Brazil, Italy, Argentina and Japan). Later on in his cross-examination Mr Kuntschen suggested that in his witness statement he was "more referring to third party acquisitions". We do not find this plausible, since Mr Kuntschen is discussing why SHL funded the acquisition of SL through a mixture of debt and equity (and that acquisition is from a related party, not a third party). We view this as a strong reason to approach Mr Kuntschen's testimony on this matter with significant caution. We do not find him a reliable witness on this matter.

317. Mr Kuntschen's second reason for the use of some debt funding was to provide cash to allow a dividend to be paid. For the reasons we have given, above, in relation to dividend planning, we consider this to be only a benefit, not a purpose, of the Transaction from the group perspective.

318. The third reason Mr Kuntschen gives, which he characterises only as a "benefit", is the deductibility of interest for tax purposes by SHL.

319. In his witness statement Mr Kuntschen acknowledged the "substantial tax benefit", but suggested the "overall purpose" of the Transaction was achieving a single holding company structure. Given the overwhelming weight of documentary evidence, summarised above, which indicates a tax purpose of the Transaction, and Mr Johnson's testimony, viewing the evidence in the round, we find this implausible.

Conclusion

320. Viewing the evidence in the round we find that tax considerations were why the group implemented the Transaction. The NTLR debits were not a mere benefit, but were the reason why the Transaction was entered into. In reaching this view we place particular weight on the documentary evidence and on the oral testimony of Mr Johnson. We place little weight on the testimony of Mr Kuntschen, whom we do not regard as a reliable witness on this issue.

SHL Directors

Identity of directors

321. In his witness statement, Mr Johnson discusses the identities of the SHL directors at the relevant time:

> "The directors of SHL at the time of the Reorganisation were me, Kirsten Elce, Ronnie Hendrie and Mark Peacock. Mark, Ronnie and I were also directors of SL. Ronnie had detailed knowledge of the site at Grangemouth. Kirsten's main role was a global one but she was invited to the UK finance leadership meetings, which kept her up to date with UK matters."

322. In his witness statement Mr Johnson also explains that Mr Peacock could not attend the meeting on 24 January 2011, however he attended the pre-meeting on 14 January 2011. Mr Peacock was Head of Production and Supply for the group.

323. We accept all this to be the case.

Information before directors as to group purpose

324. In his witness statement, Mr Johnson refers to the SHL directors' briefing slides (January 2011) and states:

> "I only understood why the Group wanted to do the Reorganisation from the context of those slides and the Corporate Finance Proposal."

325. We do not accept this to be the case in the light of the documentary evidence that we have already reviewed. To recap:

(1) from at least 5 February 2010, Mr Johnson was aware that the Transaction was a tax project from the group perspective (see [78] above);

(2) Mr Johnson saw the Request for Proposals to Deloitte and EY (20 April 2010), which stated that the insertion of debt into SHL, in order to obtain interest deductions for tax purposes, was an "objective" of the Transaction. The document also lists having a single UK holding company as an "objective" of the Transaction. Mr Johnson will have been aware of this (see [90]-[93] above); and

(3) Mr Johnson will also have seen the directors' briefing email (30 November 2010), which he references in his witness statement, and the accompanying tax savings slide.

326. We consider this to be an apt illustration of the appropriateness of the *Gestmin* approach in this appeal.

327. In cross examination when Mr Johnson was referred to the part of his witness statement we have quoted above, at [324], and asked about the knowledge of his fellow directors, the following exchange took place:

> "Q. Would that have been the same for your fellow directors, do you think? That's the information they had as well, was it?
>
> A. Yes, they'd have had less information than me. Kirsten may have had a little bit more information as well.
>
> Q. Did she have a post at group level as well, as I recall?
>
> A. Yes, yes, and she's very familiar with these transactions or, you know, the − being done for lots of different countries within Syngenta, so she'll have been more, perhaps probably, you know, in a broader context, more familiar than I was. But certainly Ronnie, whose background was, you know, production site manager, he would've had no background on this, you know. Mark, I think, probably would have had some with his broad background."

328. We recall the "FW: UnitEntityRequest_Form" email (Ms Carter to Ms Elce, 22 October 2010), in which Ms Elce is told the Transaction was to achieve tax savings – "This project is a high priority due to the substantial tax savings which will be made by its implementation". No mention is made of entity simplification or dividend planning. We find that Ms Elce will also

have been aware of the tax saving purpose of the Transaction, from a group perspective, from this email.

General approach of SHL directors to group purpose

329. Mr Johnson also explained in his witness statement that understanding the group purpose was relevant to the directors because (i) they wanted to ensure that they were operating in the best interests of their shareholders; (ii) they would not want to approve something that had adverse consequences for the Group because it might be adverse for SHL in the longer term; and (iii) they are curious. He continues in his witness statement:

> "While it depends on the proposal under consideration, these points show how the directors' considerations interact with the Group's purpose. Generally, if something is beneficial for the company it is beneficial for the Group and vice versa. However, this is not always the case, and where it is not, the directors act in the interest of the company. If there had been an issue with the proposal, we would have worked with the Group to tweak the proposal to ensure that it benefitted SHL. If there was a fundamental disagreement, for example, if SHL was being asked to pay a price substantially above the independent valuation for SL, then in my view the directors would not have approved the transaction. I would rather have resigned as a director of SHL. However, that was extremely unlikely to occur because of the process that Syngenta goes through in preparing a proposal like the Reorganisation."

330. We note when Mr Johnson says "and vice versa", this suggests that a group benefit can be sufficient to motivate action for the SHL directors. Where he says "to ensure that it benefitted SHL", it appears from what follows that it could have been more aptly characterised as "does not prejudice SHL".

331. He provided the following example of pushback from UK directors (of SL, of which he was also director, rather than SHL):

> "An example where the board of a UK company identified a major problem with a proposal suggested by the Group was the planned relocation in 2015 of functions performed by more than 200 people from Basel to the UK. The Group had considered basing these functions in various locations in different countries and had decided on Manchester in the UK. The board of SL was asked to approve a lease of office space and, separately, a contract for the provision of intra-Group services (to be provided by the employees who would be based at the Manchester site). The intra-Group services were going to be charged to Basel at cost plus 5 – 5.5%. The contract and lease were considered by the board. The board of SL identified a problem with the termination clauses in the services agreement. The notice period in the intra-Group services contract was shorter than the notice period for the lease, which meant SL could have been left paying rent for office space for which it no longer had any use. The board sent the contracts back asking for the termination clauses to be amended. As a result of the board's concerns the contract was amended to say that if the service recipient terminated the contract prior to the 7th anniversary and SL was unable to negotiate an early exit from the premises or sub-let the premises, then the service recipient would pay SL a sum equal to the rent until SL could end the lease."

332. We note this to be another example of (wholly reasonable) cautiousness in Mr Johnson's approach as a director (albeit of SL in this instance, not SHL).

333. We have already noted Mr Johnson's evidence considered at [135] above, that the tax calculation in the directors' briefing slides (30 November 2010) was "pure background" as the

directors were "curious" about the group purpose. As noted at [329] above, on Mr Johnson's own account, the group purpose extends beyond being "pure background".

334. Regarding the group benefit, Mr Johnson says in his witness statement:

> "I understood from the slides prepared for SHL's directors that the Reorganisation and the resulting interest deduction would have tax benefits for the Group. The Group tax benefits may have been mentioned during the board meeting as background information for the directors. It gave us the bigger picture and contributed to our understanding of why the Group wanted this transaction to take place. However, aside from being a reason for Group support, I don't think the tax benefits made any difference to how the directors of SHL approached the decision because the concern of the SHL directors was acting in the best interests of SHL. The tax benefits were a Group benefit, not a benefit to SHL, who would be making interest payments. As a consequence, if there was no tax deduction for the interest but the Reorganisation was still supported by the Group for another reason and SHL could still meet the interest payments I expect the board would still have approved the Reorganisation.
>
> The board minutes referred to the fact the Reorganisation would result in a more streamlined UK group legal entity structure which I believe was referring to the benefits of legal entity simplification. In my role as a director of SHL the benefits of the legal entity simplification were either mostly not relevant, because they benefitted the Group rather than SHL, or relatively minor.
>
> If the Reorganisation had the same level of Group support for other reasons, I think we would still have approved it. The senior support is relevant because, as directors, we want to be confident that we are acting in the best interests of our shareholders. Similarly, I think the Reorganisation would have gone ahead if SHL's shareholder was broadly neutral about the transaction although in that case SHL's directors might have wanted a more explicit statement of their position.

335. We particularly note three parts of this passage. The first is where Mr Johnson says:

> "if there was no tax deduction for the interest but the Reorganisation was still supported by the Group for another reason and SHL could still meet the interest payments I expect the board would still have approved the Reorganisation."

336. Implicit here is a recognition that the board of SHL would be willing to enter into a transaction if it is supported by the group provided it is not a *bad* investment, in the sense that it would risk insolvency (and potential liability for the directors). The second part of the passage we note is:

> "If the Reorganisation had the same level of Group support for other reasons, I think we would still have approved it. The senior support is relevant because, as directors, we want to be confident that we are acting in the best interests of our shareholders.

337. Here we note that "best interests" of shareholders is used broadly. It goes beyond merely making a good financial return on the investment through dividends and capital growth. Here Mr Johnson implicitly acknowledges that, in this instance, the senior support (which he earlier stated was due to the interest deduction) made the board confident that they were acting in the best interests of their shareholders. The last part of this passage we note is:

> "Similarly, I think the Reorganisation would have gone ahead if SHL's shareholder was broadly neutral about the transaction although in that case SHL's directors might have wanted a more explicit statement of their position."

338. Presumably a "more explicit statement" would be a written resolution of the shareholder. It would seem that the Transaction has the highest form of implicit consent, as the shareholder is the vendor (as Mr Johnson noted in the table of risks and mitigations, which Mr Johnson testified that he prepared, see above at [188]). Indeed, we note that he had earlier stated in his witness statement:

> "… SHL's shareholder, SABV, was the other party to the sale, which constituted implicit approval. We still thought about getting explicit shareholder approval because of the size of the transaction and because we had agonised about the valuation. Even though shareholder approval gives us confidence in a proposal we still have to make sure the plan works for the other key stakeholders (e.g. pension fund, employees, etc.)."

339. The fact that Mr Johnson suggests a "more explicit statement", would seem at odds with the "positivity" of his testimony elsewhere (eg [222] to [236] above) about the growth and dividend prospects for SL. This gives further reason to doubt the reliability of that part of his testimony. Indeed, the comment that the directors "agonised" over the valuation also suggests a tension with such "positivity".

340. The final paragraph of the extended passage quoted at [334] above was put to Mr Johnson in cross-examination. The following exchange took place:

> "Q. So I think what you're saying here is that, as directors, you were concerned to act in the best interests of your shareholders having regard to your fiduciary responsibilities, and the group wanted this transaction to go ahead, it led to a significant group tax benefit, and provided you were satisfied about all the various issues which were specific to SHL, then you would be happy to accommodate them?
>
> A. Yes, or to paraphrase my own words, you know, as long as it was in the interests of − it was a good decision for Syngenta Holdings, it was in the best interests of the company.
>
> Q. So again, this is just to really be clear about this, so provided that you and your fellow directors were comfortable with the proposed acquisition from the point of view of SHL, all those factors we've looked at, then you were happy for SHL to play its part in this group project?
>
> A. In essence, yes, you know, we were looking at it from an SHL angle. We could see benefits, you know, lot of benefit, so why not go ahead? It made perfect sense."

341. Viewing the evidence in the round, we find that the directors of SHL were willing to play their part in the Transaction, to support the group purpose, provided that they were not making a *bad* investment. A bad investment would be one where either SHL could not either pay interest on the Loan or refinance the Loan at the end of the 10 year term (both events being identified in Mr Johnson's table of risks and mitigations, see above at [188]). In either case that could potentially trigger an insolvency event for SHL, which the directors would obviously wish to avoid.

342. It was stated by SHL in closing submissions that it was never put to Mr Johnson that the group purpose of achieving a group tax benefit was or became his purpose or one of his purposes for SHL entering into the Loan and there is no basis for making such a finding. We

do however consider it clear that this was put to him, with the suggestion that the directors were willing to "play their part". In any event, we note the guidance of the Court of Appeal in *Kwik-Fit*, at [83], that it is "for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker". It is for the Tribunal "to reach its own decision on whether there was an unallowable purpose based on all the evidence before it". This does not "depend on obtaining a concession in particular terms in cross-examination, or indeed on framing a question to a witness in a particular way". See also the discussion by Judges Raghavan and Brannan in *JTI Acquisition Company (2011) Ltd v HMRC* [2023] UKUT 194 (TCC); [2023] STC 1459 at [125]. No allegation (or finding of) fraud or dishonesty is made. The Tribunal is therefore not required uncritically to accept witness evidence.

343. Mr Johnson testified that he would have been equally happy to acquire SL purely for equity. We accept this as it would have removed the risks, which clearly concerned him, of being unable to service the Loan or repay the principal on maturity. Mr Ghosh submitted that this showed that for Mr Johnson, as a director of SHL, the tax advantage obtained by the group was not important. We disagree. Mr Johnson's evidence must be seen in the round. Implicit in the counterfactual share-for-share exchange is that it had group support: as SABV would not have exchanged the shares in SL for shares in SHL if there had not been group support. The counterfactual would have been a situation where the "Reorganisation had the same level of Group support for other reasons" (see [336] above). The evidence discussed above clearly demonstrates the importance of group support for Mr Johnson and the other directors of SHL. The counterfactual would be perfectly consistent with the directors acting to play their part in a group scheme, provided they are not exposed to risk.

344. Further, in his witness statement Mr Johnson said that he found it "hard to imagine a situation in which the Group offered SHL all equity funding because of the benefits that arose to the Group from the debt". This is unsurprising because, as we have found, obtaining the tax advantage was the group's object in entering into the Transaction. The counterfactual is thus at fundamental odds with the reality. We consider answers in respect of such counterfactuals to be of somewhat limited value in discerning the purpose of the directors in entering into the Loan that they actually were a party to.

Belief of the directors as to the group purpose of the Transaction

345. We recall that the directors, as a body, will have been informed of the purposes of the Transaction by the following documents which they were sent:

(1) directors' briefing email and tax savings slide (30 November and 1 December 2010);

(2) SHL directors' briefing slides (January 2011);

(3) the final signed EY Valuation Report for SL; and

(4) draft minutes for the SHL board meeting.

346. In addition Mr Johnson, who chaired the meeting, will have brought his knowledge from his involvement in the Transaction in his group role. Similarly Ms Elce will have had some awareness from her global role, including the email from Ms Carter (22 October 2010) that explained "This project is a high priority due to the substantial tax savings which will be made by its implementation."

Tax motivation

347. We recall that in the briefing email (30 November 2010) Mr Johnson stated: "This is a tax driven project" in the cover email, which he accepted referred to the tax saving. The email

of Ms Carter, which he forwarded to his fellow directors, stated that the UK taxable group income could be reduced by the interest deduction, generating tax savings of $7,000,000 per year. The accompanying slide contained a calculation of the tax benefits to the group. The notes page to the slide stated: "This slide shows the benefits of the transaction". Mr Johnson accepted in cross-examination that this communication gave the directors the overview of why there was support for the Transaction from a group angle. This initial contact will have been important as it will have framed how the directors saw the Transaction.

348. Turning to the SHL directors' briefing slides (January 2011), we have already concluded (above [190]) that in the absence of other information, we consider that the directors would have understood from these slides that the Transaction was being proposed by the group for tax purposes. We recall that under "Timing – Why now?", the second bullet point was "UK Tax losses utilised fully in 2009". This would have created a perception that losses being exhausted was a tax motive for the timing: although we have discussed that this is not accurate. Under the heading "UK Reorganisation – Background ctd" the second bullet stated "Main benefit is a group tax saving of £6m pa…" The final bullet on the slide titled "UK Reorganisation - Step plan" stated "To maximise tax savings and avoid foreign exchange exposure project proposed to be implemented ASAP." In cross-examination Mr Johnson emphasised that the urgency was from the "group angle", not SHL's. The final substantive slide, titled "Disaster scenario" lists, as one such disaster scenario, "Tax deduction for interest being restricted".

349. It will be recalled that the minutes of the SHL meeting did not mention the tax benefit.

350. We recall the email to Ms Elce from Ms Carter (22 October 2010).

351. It is clear from Mr Johnson's testimony that he considered that the main benefit for the group of the Transaction was the tax saving (above [312] and [313]). That is also apparent from other parts of his testimony. In cross-examination Mr Johnson said:

> "A. My main recollection of the driver for the transaction was around the − you know, from a group angle now, so, you know, I sort of wear multiple hats, as I say, looking at a group angle was this differential tax rate between Holland and the UK. And rather than the UK tax saving, as it were, in its own right"

and (the following day):

> "I just wanted to ask you about your understanding of that because from your point of view that wasn't a tax saving for SHL because you didn't have any taxable profits. Did you understand that that would be a saving for the group as a whole?
>
> A. Yes, yes. My general view − it may not have been that precise number, but my general view from the various looks at this reorganisation were that it was due to this difference between the UK and Dutch tax rates."

352. Considering the evidence in the round (including taking account of the information before the SHL directors which might arguably have suggested other motivations, discussed below) it is clear to us that the overwhelming weight of the evidence before them will have led the directors to believe that the sole group purpose of the Transaction was to achieve the tax saving. SHL's role in achieving that group purpose, which the SHL directors understood to be the case, was to obtain the NTLR debits by paying interest on the Loan.

Legal entity simplification

353. We recall that the SHL directors' briefing email and tax savings slide (30 November 2010) omitted any reference to legal entity simplification, although the chain that was forwarded states that the proposal "is to simplify the UK group". The SHL directors' briefing

slides (January 2011) mentioned "Two UK sub groups requiring legal entity structuring". The minutes refer to how the "purchase of Syngenta Limited would result in a more streamlined UK group legal entity structure."

354. The relatively minimal mention of legal entity simplification in these core briefing documents makes it unlikely that the directors will have concluded legal entity simplification formed part of the group purpose.

355. We discussed Mr Johnson's evidence in relation to legal entity simplification above at [260] to [263]. We recall that Mr Johnson's comment about the benefits of legal entity simplification being "relatively minor" was put to him in cross-examination. The following exchange took place:

> "A. Yes, so there are benefits, but they're not great.
>
> Q. They're not huge.
>
> A. As perceived by me as well as (inaudible)."

356. Given Mr Johnson's perceptions of the benefit to the group being minor, we do not believe that the directors will have considered a group purpose of the Transaction was legal entity simplification.

Creating distributable reserves

357. We find that the directors were not aware of the benefit of the Transaction generating distributable reserves for SABV. That is apparent from Mr Johnson's witness statement, where he refers to being aware of this benefit in consequence of reading Mr Kuntschen's witness statement. It follows that they cannot have believed it to be the group purpose of the Transaction.

358. In cross examination it was put to Mr Johnson:

> "Q. …you say:
>
> > 'and I understand from having seen Antoine Kuntschen's witness statement in draft, the ability to generate distributable reserves for SABV.'
>
> But again, just to clarify, that's something that you only understand from having seen Antoine Kuntschen's witness statement in draft?"

To which he answered:

> "A. And I think also looking back at it, it was in a corporate finance proposal, so I was probably aware of it at the time, but it wasn't foremost."

359. We recall that (at [183] above) we discussed how when the SHL directors' briefing slides that referred to the tax benefit (January 2011) were put to Mr Johnson in cross-examination, he emphasised there were "other advantages" to the group, as set out in the corporate finance proposal, but conceded that "we didn't mention them at the time". Accordingly, in the absence of evidence to the contrary, we inferred that the other directors would not have been aware of the Transaction creating distributable reserves. It follows that for the directors as a body, they will not have considered creating distributable reserves as a purpose of the Transaction for the group.

360. Even for Mr Johnson, on his own account, "it wasn't foremost". Viewing Mr Johnson's evidence in totality we do not consider he regarded creating distributable reserves as a main purpose, or even a purpose, of the Transaction for the group. It was not why the directors entered into the Transaction. However from his knowledge of the corporate finance proposal he may have considered it a benefit (an "advantage"), albeit a subsidiary one.

Conclusion

361. As indicated in our discussion above, it is clear to us that the overwhelming weight of the evidence will have led the directors to believe that the sole group purpose of the Transaction was to achieve the tax saving, and that SHL's role in achieving this was through obtaining the NTLR debits via interest payments on the Loan.

Acquiring a "good investment"?

362. In SHL's skeleton argument Mr Ghosh says:

> "The main purpose of SHL's directors in entering into the Loan was to obtain the funds necessary to acquire SL, which they did because they considered that doing so was a good investment that would allow them to achieve a good return for their shareholders. The directors believed SL was a good investment because they expected dividend income from the shares to exceed interest on the Loan and the value of SL to grow."

363. We acknowledge the passage in the SHL board minutes that refer to "anticipated growth" making the acquisition of SL a "good investment". Mr Johnson said that was the "key paragraph" in his witness statement. However, we view those minutes with caution as we have found they were checked by tax professionals with an eye to avoiding challenge by HMRC. Further, they do not appear to reflect the balanced approach of the valuation report – which all the SHL directors were sent and of which Mr Johnson assisted with the preparation – which in addition to seeing opportunities for growth also identified risks.

364. Furthermore, we approach with caution Mr Johnson's evidence before us in his witness statement and oral testimony that expressed an unqualified optimistic attitude to the growth prospects of SL, and which he therefore regarded as a "good investment". This is because of the lack of reliable contemporary documentation to support such a view and the fact that the valuation report suggests he had concerns with risks to the growth prospects of SL (discussed extensively at [227] to [235] above). Such a concern with risks to growth is also consistent with his emphasis on mitigating risks to the directors: which is evidenced both in his testimony before us and in the contemporary documentation, for example the directors' briefing slides.

365. We have already discussed how the SHL directors' briefing slides (January 2011), and Mr Johnson's commentary on them, are consistent with a willingness of SHL to play its part in assisting the group secure the tax benefit (acting in the "best interests of their shareholders" – the first of the reasons given by Mr Johnson), provided that SHL does not make a *bad* investment, rather than making a *good* investment, in the sense of enhanced profits by SHL (see discussion above at [176] to [197]). To briefly recap some of the evidence, "priority one" was to service the interest. The table of risks and mitigations clearly evidences a wish to avoid losses and liabilities. The discussion of the "disaster scenario" shows a – completely rational – wish to avoid insolvency if SL's profits unexpectedly fall. The slides thus discuss the commercial risks to SHL by the acquisition. They are not just, as Mr Johnson claimed, to "show the Reorganisation holistically and explain its consequences from a Group perspective". They do more. However, none of these slides are about SHL making a *good* investment, in the sense of enhanced profits by SHL. They do not suggest that SHL may wish to acquire SL due to capital growth or the dividend income exceeding loan repayments. That is strongly suggestive that acquiring a *good* investment was not the purpose of the directors in acquiring SL.

366. Likewise, we have discussed how Mr Johnson's commentary on the valuation report is consistent with such a finding. Specifically Mr Johnson emphasised it was a "massive transaction" and "probably the biggest that most of the directors had been involved with". The directors were understandably concerned about "personal liability… if something goes wrong". Mr Johnson was concerned about liabilities to third parties. He regarded the valuation report

as a source of reassurance. We have already considered evidence from Mr Johnson, above at [117], which suggests that the directors of SHL were keen to avoid making a bad investment because of potential liabilities to third parties. That was a major motivation behind requesting the valuation report.

367. We recall also:

(1) that the request for the forecasting to satisfy directors that long term commitments could be satisfied, (email 5 February 2010), which is anticipated to cost £100k to £150k, came from Mr Johnson.

(2) when Mr Johnson was cross-examined in respect of the valuation, he discussed the risks of "third parties that came back and challenged the directors" if SL underperformed and how he had sought the indemnity from EY to protect himself.

368. After reviewing all the evidence we have concluded that the concern of SHL's directors was that SHL did not make a *bad* investment: where either SHL could not pay interest on the Loan or could not refinance the Loan at the end of the 10 year term.

369. Of course, the easiest way to avoid such a *bad* investment would have been not to enter into the Transaction in the first place. The fact that they did shows that something else must have caused them to do so. We find that something else is a wish to play their part in assisting the group purpose (discussed at [329] to [341] above).

Entry into the Loan

370. We turn now to the key issue: the purpose of the directors in entering into the Loan. Our findings on this issue are, of course, informed by our previous findings. The decision did not take place in a vacuum.

371. Mr Johnson's witness statement states:

> "92. Once satisfied that the price for SHL was good we turned to consider the loan. The opportunity to acquire SL was effectively offered to SHL packaged together with the loan. The SHL directors did not really have a choice of funding because the structure had been signed off after going through the Corporate Finance Proposal process, which I had been involved with. However, if we had objected for a valid reason, I would have expected the funding structure to have been changed. For example, if we had looked and said the debt would be too high to service. This did happen in respect of the timing of interest payments. Early drafts of the loan agreement had interest being paid quarterly. At my request… this was changed to an annual payment, which was a useful change because dividends were usually paid at the end of the year and SHL would otherwise have had to use a facility agreement to fund interest payments.
>
> 93. As this shows, by the time of the meeting I had commented on the loan agreement and been involved in reviewing SHL's ability to make interest payments, so I was unlikely to have any serious concerns by the time of the meeting. If one of the other directors had looked at the calculations and spotted a significant flaw then we would not have approved the draft board minutes. The Group may then have come back to us with a lower valuation or a lower level of debt. I find it hard to imagine a situation in which the Group offered SHL all equity funding because of the benefits that arose to the Group from the debt (being the differential tax saving and, I understand from having seen Antoine Kuntschen's witness statement in draft, the ability to generate distributable reserves for SABV), but if the Group had offered such a structure, then I expect that SHL's directors would have approved it.

> 94. When considering the loan, we were primarily concerned with the ability to pay interest and the leeway SHL had if there were interest rate increases."

372. It is thus clear that SHL was being offered the Loan and the opportunity to buy SL as a package. There was room for negotiation concerning details, such as when the interest was paid. But the directors understood the Loan and acquisition of SHL was a package. In these circumstances we find that the use that was made of the funds (to buy SHL) is less informative than if the borrowing had not been packaged with the acquisition.

373. The directors did not enter into the Loan to purchase a good investment. The Loan was indeed used to purchase SL, but the object of the directors in taking out the Loan was to play their part in the Transaction. They were understandably keen to avoid a bad investment, but that was not their *purpose* (see [369] above).

374. In this instance we find the purpose of the SHL directors entering into the Loan was the same as their purpose in entering into the Transaction. It was why they entered into the Loan. That purpose was to play their part in what they understood to be the group project, by obtaining NTLR debits through making interest payments on the Loan. That purpose was the main purpose, indeed the only purpose, of the SHL directors in entering into the Loan. That purpose was a tax avoidance purpose as it was to secure a tax advantage. It was not a business or other commercial purpose as it was the main purpose for being party to the Loan. It follows that it was an unallowable purpose.

375. In his submissions Mr Ghosh frequently referred to the need for "something more", the fact that the directors expect or want a deduction for the interest expense being required. That is clearly correct, as Falk LJ explained in *BlackRock*. In the present case the evidence shows the only object of the directors entering into the Loan (and transaction) was to secure the interest deduction.

376. This is what Falk LJ in *BlackRock* (at [180]) referred to as a "straightforward" case, in which all the debits are properly attributable to a tax avoidance main purpose. There is only one main purpose: the unallowable purpose. That is the only reason why the Loan was entered into. It follows that all the debits must be disallowed under s 441 CTA 2009. The taxpayer's appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

377. 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.

MICHAEL BLACKWELL
TRIBUNAL JUDGE

Release date: 01st NOVEMBER 2024

APPENDIX 1 – DRAMATIS PERSONAE

SHL Directors

Kirsten Elce	Group Financial Reporting and director of SHL
Ronnie Hendrie	Site Manager of Grangemouth Manufacturing Centre and a director of both SHL and SL
Andrew Johnson	Head of Finance Operations for UK and Ireland legal entities of the Syngenta AG group and a director of both SHL and SL
Mark Peacock	Head of Global Operations and a director of both SHL and SL

Syngenta UK based

Matthew Bayliss	Senior Counsel UK and Ireland and a director of SL
Sarah Carter	UK Tax Manager
Alaster Ndlovu	UK Finance
Simon Perry	UK Corporate Tax Accountant until sometime in 2010 then Global Tax Compliance Manager

Syngenta non-UK based (predominantly Switzerland and the Netherlands)

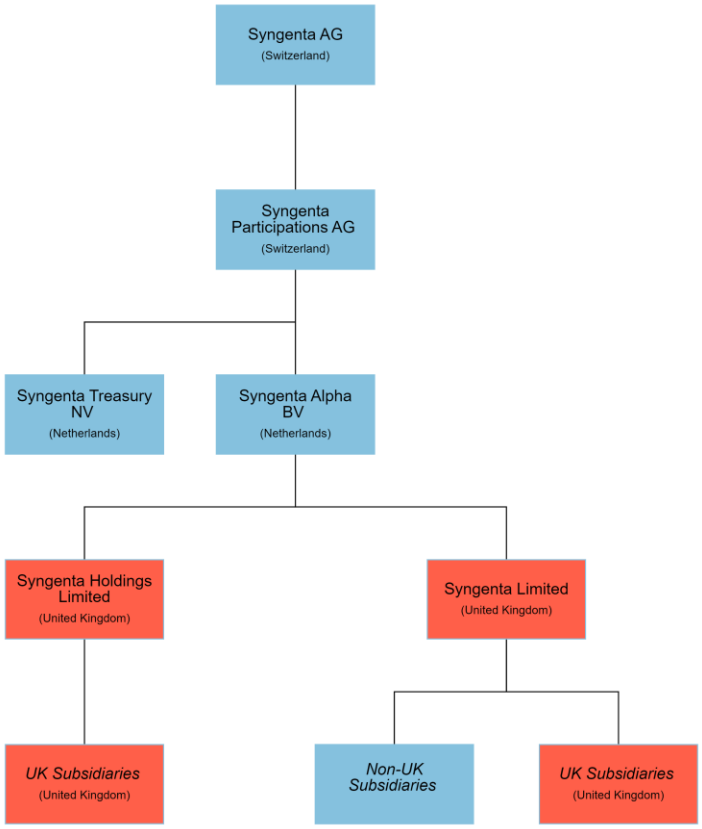
Bas Coolen	Head of Treasury International
Antoine Kuntschen	Senior Group Tax Manager EAME and director of SABV
Simon Nardecchia	Group Financial Report - Technical
Mark Nijhof	Group Treasury
John Ramsay	Syngenta Group Chief Financial Officer and a director of SL
Thomas Schwarb	Affiliate Finance Manager, Syngenta Group Treasury

External advisers

Julian Fletcher	EY, Senior Manager, Corporate Tax
Andrew Sharples	Mayer Brown, Partner in the Corporate Group

APPENDIX 2 – SIMPLIFIED UK SUBGROUP

Before the Transaction



After the Transaction