Neutral Citation: **[2026] UKUT 00227 (TCC)**
Case Number: UT/2022/000081

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Royal Courts of Justice
Belfast

Heard on: 1 - 2 October 2025
Judgment date: 22 June 2026

Before

MR JUSTICE HUDDLESTON
JUDGE VINESH MANDALIA

Between

SWISS CENTRE LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Rory Mullan KC, counsel, instructed by ASM Ltd

For the Respondent: Edward Waldegrave and Calypso Blaj, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Swiss Centre Ltd ("SCL" or "the appellant") appeals against a decision of the First-tier Tribunal (Tax Chamber) ('the FtT' or 'Tribunal') released on 22 May 2023 under neutral citation [2023] UKFTT 449 (TC) ("the Decision"). The central issue in the appeal before the FtT was whether SCL is entitled to deduct an amount of approximately £33.5 million (the "Disputed Sum") in calculating its profits for corporation tax purposes for the accounting period which ended on 31 March 2012 (the "Relevant Period"). The Disputed Sum was paid by SCL to the Republic of Ireland's National Asset Management Agency ("NAMA") and SCL claims it is entitled to deduct the amount of the payment in calculating its corporation tax liabilities (whether by reference to the gain realised by SCL or pursuant to the loan relationship rules).

2. The FtT judge succinctly summarised the competing positions of the parties:

> "1. …The Appellant ("SCL") says that it is entitled to such a deduction under the "loan relationship rules" found in Part Five of the Corporation Tax Act 2009 ("CTA 2009"). Alternatively, approximately £24 million of the Disputed Sum is deductible in computing the chargeable gain on the sale of a property owned by it called the Swiss Centre, by virtue of the application s38(1)(b) of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").
>
> 2. In essence, SCL's case is that the two component parts of the Disputed Sum should be viewed as: (i) an amount which I refer to as the "Additional Sum" which SCL says was paid by it

to NAMA for the release of NAMA's security over the Swiss Centre; and (ii) a payment made in relation to a guarantee which had been given by SCL in relation to another company's debts in order to secure ongoing access to development finance for the Swiss Centre project. In both cases SCL says that it should be recognised that the amounts were paid in the very particular context of the financial crisis and its aftermath.

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

THE RELEVANT STATUTORY FRAMEWORK

3. The FtT set out the relevant legal framework at paragraphs [161] to [173] of the Decision.

"**The loan relationship rules**

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

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

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

(a) the company stands in the position of creditor or debtor as respects any money debt (whether by reference to a security or otherwise), and

(b) the debt arises from a transaction for the lending of money.

(2) References to a loan relationship and to a company being party to a loan relationship are to be read accordingly.

164. Section 303 defines a "Money debt" as follows:

(1) For the purposes of this Part a money debt is a debt which –

(a) falls to be settled –

(i) by the payment of money,

…

(3) A money debt is a debt arising from a transaction for the lending of money for the purposes of this Part if an instrument is issued by any person for the purpose of representing –

(a) security for the debt, or

(b) the rights of a creditor in respect of the debt.

165. Section 304 defines a "Related transaction" as follows:

(1) In this Part "related transaction", in relation to a loan relationship, means any disposal or acquisition (in whole or in part) of rights or liabilities under the relationship.

(2) For this purpose the cases where there is taken to be such a disposal and acquisition include those where rights or liabilities under the loan relationship are transferred or extinguished by any sale, gift, exchange, surrender, redemption or release.

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

(1) For the purposes of this Part references to payments or interest under a loan relationship are references to payments or interest paid or payable in pursuance of any of the rights or liabilities under that relationship.

(2) For the purposes of this Part references to rights or liabilities under a loan relationship are references to any of the rights or liabilities under the arrangements as a result of which that relationship subsists.

(3) For the purposes of this Part rights or liabilities under a loan relationship are taken to include the rights or liabilities attached to any security that is issued in relation to the money debt in question (and so is a security representing that relationship).

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

(1) This Part operates by reference to the accounts of companies and amounts recognised for accounting purposes.

(2) The general rule is that the amounts to be brought into account by a company as credits and debits for any period for the purposes of this Part are those that are recognised in determining the company's profit or loss for the period in accordance with generally accepted accounting practice.

(3) The credits and debits to be brought into account in respect of a company's loan relationships are the amounts that, when taken together, fairly represent for the accounting period in question –

(a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),

(b) all interest under those relationships, and

(c) all expenses incurred by the company under or for the purposes of those relationships and transactions.

(4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly –

(a) in bringing any of the loan relationships into existence,

(b) in entering into or giving effect to any of the related transactions,

(c) in making payments under any of those relationships or as a result of any of those transactions, or

(d) in taking steps to ensure the receipt of payments under any of those relationships, or in accordance with any of those transactions.

(5) For the treatment of pre-loan relationship and abortive expenses, see section 329.

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

168. In so far as relevant s 308 provides:

Amounts recognised in determining a company's profit or loss

(1) References in this Part to an amount recognised in determining a company's profit or loss for a period are references to an amount recognised in –

(a) the company's profit and loss account, income statement, or statement of comprehensive income for that period,

(b) the company's statement of total recognised gains and losses, statement of recognised income and expense, statement of changes in equity or statement of income and retained earnings for that period, or

(c) any other statement of items taken into account in calculating the company's profits and losses for that period.

169. Section 309 CTA 2009 provides that where a company's accounts are not GAAP compliant references to amounts recognised for accounting purposes are references to the amounts

that would have been recognised if GAAP-compliant accounts had been drawn up for the period of account.

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

171. Section 442 provides that:

…a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company –

(a) is a party to the relationship, or

(b) enters into transactions which are related transactions by reference to it, include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.

The taxation of chargeable gains

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

173. So far as relevant that section provides:

38. Acquisition and disposal costs etc.

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in computation of the gain accruing to a person on the disposal of an asset shall be restricted to –

…

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset…"

THE DECISION OF THE FTT

4. In summary, the FtT decided all the key factual and legal points in favour of HMRC. In particular, the FtT concluded that the Additional Sum was not paid solely because of NAMA's threat concerning the release of the DS1 as evidence of the release of the fixed charge over the Swiss Centre itself. The FtT took the view that the Additional Sum fell to be accounted for as a distribution and not as an expense. It could not be regarded as a loss "arising… from" SCL's loan relationships or related transactions, or as an expense incurred for their purposes. The FtT held that the Lavangna Sum (of €11.5m) was paid pursuant to arrangements relating to the Lavangna Guarantee (although the Guarantee was not itself called) and was unaffected by NAMA's threat in relation to the DS1. It was held that the Lavangna Guarantee was granted by SCL because that was in the interests of the MAR Connection as a whole. Like the Additional Sum, the Lavangna Sum therefore fell to be accounted for as a distribution and not

as an expense. The Lavangna Sum could not be regarded as a loss arising from SCL's loan relationships.

5. As the judge recognised, the appeal involved a complex history of transactions and interconnected parties and it is therefore appropriate for us to say a little more about the background, findings and conclusions reached by the FtT. The judge referred to the wealth of evidence before the Tribunal. The judge set out her primary findings of fact at paragraphs [23] to [157] of the Decision. She addressed a collection of companies and partnerships held directly or indirectly by Mr McAleer and Mr Laverty, members of their families and the trusts established ostensibly for the benefit of the families of Mr McAleer and Mr Laverty referred to as "the MAR Connection". She described the MAR Connection as being run as a single composite business with a centralised finance function and a "board", but with all key strategic decisions taken by Mr McAleer and Mr Laverty. The judge referred to SCL as being one of the companies in the MAR Connection having been purchased in 2004 when SCL in turn owned the property known as the Swiss Centre which the MAR Connection then redeveloped. The judge described the MAR Connection in the following way:

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

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

34. At the time of the sale of the Swiss Centre the MAR Connection had borrowings of £642 million of which £351 million had been transferred to NAMA from Irish banks. £106 million of the amount was owed by LSI under a facility used to fund the development of the Swiss Centre.

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

6. The judge noted that SCL was developing the Swiss Centre and at the time of the payment of the Disputed Sum, those involved believed that SCL had transferred the beneficial ownership of the Swiss Centre to a trust called "The Capital Trust". That was a trust set up on 4 December 2009 as a remuneration trust for the benefit of employees of SCL and their families. The judge noted:

> "41. On 24 November 2011 the Swiss Centre was sold to an independent third party. £163 million of the sale proceeds was paid to NAMA. That £163 million was identified in a deed signed with NAMA as being paid in respect of various liabilities owed by MAR Connection entities. Only an amount of approximately £33.5 million out of the £163 million is in dispute.
>
> 41. Of the Disputed Sum €11.5 million was paid in relation to the Lavangna guarantee. The Additional Sum does not relate to indebtedness of SCL, but to various MAR Connection entities carrying on development business which I refer to as the "Indebted Entities". Those entities owed amounts to NAMA significantly in excess of the value of their assets (development properties) due to the reduction in value of properties following the financial crisis.
>
> …
>
> 44. Under the terms of the NAMA agreement funds were provided to the Indebted Entities to enable them to repay stated amounts of their indebtedness to NAMA. In essence, the amount paid in excess of the value of the properties held by the Indebted

> Entities was the Additional Sum. It was viewed by the MAR Connection as a fee or premium paid to NAMA because NAMA would only have received the market value of the properties if it had enforced its security in relation to the Indebted Entities. However, the amount repaid through the Additional Sum mechanism (including the amount reflecting the value of the properties) was less than the total amount owing to NAMA.
>
> …
>
> 48. As part of the deal agreed with NAMA the company Larkmount Limited was set up as a holding company wholly-owned by the Capital Trust. The following Indebted Entities were then transferred to be held by newly formed subsidiaries of Larkmount: Flamewall, College Court Properties, Lavangna, Scelcs and M&R Estates. The Indebted Entities had negative net asset values and were therefore transferred for nominal consideration.
>
> 49. SCL was not held by the Capital Trust. It remained held by the Discretionary Trusts through LSI."

7. The judge referred to the business of SCL and its development of the Swiss Centre, funded by borrowing from AIB that was obtained by SCL's parent, Leicester Square Investments Ltd ("LSI") at paragraphs [50] to [59] of her Decision.

8. The judge referred to another of the MAR Connection companies, Lavangna, which was incorporated in the Republic of Ireland and involved in development projects on what was termed the Navan Lands in County Meath near Dublin. Lavangna borrowed sums from First

Trust (a subsidiary of AIB) which were secured on the Navan Lands. The judge noted that the loan from First Trust to Lavangna was refinanced on 29 September 2009 on terms set out in what is referred to as "the Lavangna Facility".

9. The judge recorded that in October 2009, LSI and SCL granted a joint and several guarantee in the amount of €11,500,000 in respect of the borrowing of Lavangna ("the Lavangna Guarantee"). The Lavangna Guarantee was itself secured by a charge over, inter alia, the Swiss Centre. The judge referred to the evidence of Mr Higgins in which he described the context of the Lavangna Facility and the Lavangna Guarantee. She said:

> "68. I therefore find that it was in both sides' interests for the development of the Swiss Centre to continue. While the MAR Connection did not think First Trust actually wanted to call in the LSI Facility, given the issues the bank would face as a result, it cost the MAR Connection relatively little to agree to provide a guarantee of €11.5 million over the Swiss Centre in relation to the Lavangna Facility. Lavangna could offer nothing more given the dramatic reduction in values of its properties. The "golden" asset of the Swiss Centre provided a clear alternative.
>
> 69. However, it was not simply the case that the Lavangna Guarantee was entered into by SCL and LSI in order for the Swiss Centre to be completed. The provision of the Lavangna Guarantee also ensured that the Lavangna Facility was not called. The risk under the terms of the LSI Facility of further funding not being provided continued as the "Material Adverse Event" described in that Facility was ongoing, although I recognise as a

result of the evidence of Mr Higgins that, in practice, the immediate real danger was averted given that First Trust had been provided with the additional security in relation to the Lavangna Facility.

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

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

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

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

10. The judge considered the role played by NAMA in the acquisition of debt and the arrangements for the sale of the Swiss Centre at paragraphs [76] to [111] of her Decision. She noted that NAMA acquired all of the loans owed by the MAR Connection to First Trust and AIB and some of those owed to Bank of Ireland, including the LSI Facility and Lavangna Facility, on 18 July 2010. She noted, at [80], that Mr McAleer and Mr Laverty had personally guaranteed sums owed to NAMA in the amount of approximately £21 million, with a real risk of the guarantees being called in, and Mr McAleer and Mr Lavery being made bankrupt. NAMA made clear throughout that they wished to access the sale proceeds from the sale of the Swiss Centre to reduce sums owed by the MAR Connection companies to NAMA.

Fundamentally however, the evidence was that NAMA simply wanted £163 million towards repayment of the debts owed to them and did not care about the structuring on the MAR Connection side in relation to that payment. The judge noted the evidence before the Tribunal regarding the potential implications of enforcement action by NAMA or any other lender. The judge referred to the proposals and counter-proposals considered by NAMA and the MAR Connection. The judge recorded:

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

11. On 24 November 2011 the sale of the Swiss Centre for £197.5 million to an independent third party, Al Faisal Holding Ltd ("Al Faisal"), was completed. On the same day, a Deed of Agreement ("the NAMA Deed" or "Deed") was entered into between various parties giving effect to the agreement reached with NAMA. The judge summarised the essential terms of the Deed at paragraph [113] of the Decision.

> "(1) Each of SCL, the Capital Trust and LSI agreed that immediately on receipt of the net proceeds of sale of the Swiss Centre:
>
> (a) £105,279,323.57 would be paid to an AIB account on account of the repayments of principal, interest, costs and expenses under the LSI Facility;
>
> (b) £1 million would be paid to an AIB account on account of the payment of outstanding fees under the LSI Facility;
>
> (c) €11,500,000 would be paid to an AIB NAMA account "on account of the repayments under the Lavangna Guarantee";
>
> (d) a little less than £2 million would be paid on account of repayment of all amounts outstanding in respect of an overdraft of M&R (Civil Engineering Ltd);
>
> (e) approximately £45 million would be paid to various specified lenders' accounts "on account of repayment of amounts outstanding in respect of the Vendors";

12. The judge noted that the NAMA Deed provided that LSI would pay or would procure the payment of £163 million from the net sale proceeds of the Swiss Centre to a firm of

solicitors in escrow for the amount to be released to NAMA to repay a sterling amount of nearly £151 million and a Euro amount of just over €13 million to reflect the sums set out at (a) to (e) above. The judge noted that the obligation placed on LSI makes little sense since it had no access to the funds which were being received by the Capital Trust. The primary obligation for the payment of the £163m was entered into by each of LSI, SCL and the Capital Trust. There was therefore an obligation on the Capital Trust.

13. The judge noted that there was no provision in the Deed referring to NAMA providing the DS1 for the sale of the Swiss Centre and said that it would have been perfectly possible for reference to be made for the release of security by NAMA had it been in issue. She also noted that not all of the transfers of properties from the Vendors to the Capital Trust envisaged by the Deed took place. The judge referred, at [118] to a table in which she set out, the ownership of the development properties which were stated to be transferred pursuant to the arrangements set out in the Deed, the "purchase" price as stated in the Deed, the values as at November 2011, and the relevant amounts of facilities as referred to in the Deed or accounts where those details have been provided.

14. The judge then turned to the implementation of the Deed noting that to achieve the transactions described in it a new company called Larkmount Ltd ("Larkmount") was set up as a company wholly owned by Capital Trust. The corporate Indebted Entities (vendors) were transferred to subsidiaries of Larkmount for nominal consideration and the development property owned by those Indebted Entities were then transferred intra group at the values ascribed by the Deed so that there was a Larkmount subsidiary holding one or more of the properties. The corporate Indebted Entities agreed that the proceeds of the sales of the various properties would then be applied in discharging their indebtedness to NAMA. The judge noted, at [121]:

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

15. The judge noted that Lavangna was one of the corporate Indebted Entities holding properties with a market value less than its indebtedness. Addressing the sums paid to NAMA, the judge said:

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

16. The judge recorded at paragraph [127] of her Decision that NAMA thus received an amount in excess of the then market value of the properties (which otherwise it could

potentially secure on enforcement of its security,) but less than the total amount outstanding of the NAMA debt. Nevertheless the lenders released all security over the properties referred to in the Deed.

17. The judge made secondary findings about the relevant transactions at paragraphs [138] to [157] of her Decision. Her focus was upon the sums referred to in the NAMA Deed that we have referred to at paragraph [8] above, and in particular, the sum of €11,500,000 paid on account of the repayments under the Lavangna Guarantee and the sum of approximately £45 million that she referred to as "the Additional Sum" paid to NAMA.

18. As far as the Lavangna Guarantee is concerned the judge said:

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

19. The judge concluded, at [140], that the obligation to pay the €11.5 million arose from the Lavangna Facility and so completely independently of the situation with NAMA, unaffected therefore by any issues as to the provision of the DS1. It was payable under the terms of the Lavangna Facility simply as a result of the sale of the Swiss Centre occurring. The judge explained, at [140], that the terms of the Lavangna Facility were agreed in the context of the MAR Connection needing to ensure that First Trust did not cut the funding for the development of the Swiss Centre at a time when everyone believed that the Swiss Centre was still owned by SCL.

20. Turning to the Additional Sum, the judge said at [141] that the £45M payment to NAMA represented a payment by Capital Trust of £20 million for £20 million worth of property (ignoring the value of the debt) - the remaining £25 million being the contentious amount. She noted, at [143], that both NAMA and the MAR Connection appreciated the key importance of the sale of the Swiss Centre. She referred to the competing considerations and the leverage which NAMA had because of its security. She accepted NAMA was in a different position to the resolution of debt compared with other funders, but she concluded that that did not mean that the Additional Sum was paid entirely as a condition for NAMA's consent to the sale. She said:

> "144. …The history of that additional amount is consistent with finding to the contrary. The deal with NAMA was broadly agreed from May 2011. £45m was already on the table, albeit that £8m was to be paid into escrow under the proposals at that time. The threat of problems with the DS1 did not cause that to increase."

21. Having considered the evidence before the Tribunal, the judge reached the following conclusions regarding the Additional Sum:

> "153. When considering the evidence overall and the history of the deal as shown by the evidence, I find that there was a mixture of purposes and intentions in paying the Additional Sum to NAMA:
>
> (1) to get the Swiss Centre sale completed as smoothly as possible at a time when the MAR Connection was heavily exposed in relation to the debt financing. The sale in turn enabled the setting up of the new construction business

company to focus on the area of the MAR Connection which was considered to have real value;

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

(3) to retain the development properties unencumbered by bank security. In the case of Timec and Canterbrook owned as partnerships by Mr McAleer and Mr Laverty, the relevant development properties remained with the partnerships and the transactions resulted in the partnerships holding unencumbered properties. The evidence showed that this was considered by the MAR Connection to be of value – they knew the development properties, they knew how to develop them.

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

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

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

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

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

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

22. Having considered the complex history of transactions and made her findings as to the way in which, and by whom payments were made, the judge summarised the submissions made on behalf of the parties. It serves no purpose to burden this decision with those submissions. The judge went on to set out the relevant legal framework concerning the loan relationship rules in part 5 of the CTA 2009 and the alternative analysis relied upon by SCL. That is, the Additional Sum represented a cost of enhancing the value of SCL within s38(1)(b) TCGA 1992.

23. The judge set out her analysis of whether SCL had correctly recognised amounts in respect of the Lavangna Guarantee and the Additional Sum in determining its profits in accordance with GAAP, at paragraphs [179] to [219] of the Decision. She considered the expert evidence before her and concluded that the difference in opinion between the experts was the

result of their differing views of the facts. It was common ground that the accounting treatment depended upon the substance of the transactions and that was a question for the Tribunal.

24. At paragraphs [192] to [196] of her Decision, based on her own findings, the judge identified the factual problems or errors in the analysis completed by Mr Richard Gardiner (the expert called by SCL). The judge reiterated her relevant findings at paragraph [197]:

> "I have found that there was a mixture of reasons for the provision of the Lavangna Guarantee:
>
> (1) To enable Lavangna's debt facilities to remain in place such that its development could continue;
>
> (2) To deal with the immediate threatened risk to the LSI Facility and so to the development of the Swiss Centre;
>
> (3) To enable the MAR Connection to avoid the problems for the business as a whole if the LSI Facility was called in or otherwise stopped such that the Swiss Centre development was stopped."

25. The judge also noted that the evidence of Mr Richard Jones (the expert relied upon by HMRC) was also based on certain incorrect facts as set out in paragraphs [198] and [199] of the Decision.

26. Having considered the expert evidence the judge said:

> "200. … Given the issues which go to the core nature of the Disputed Sum and the purpose for which it was paid, I find that Mr Gardner's report is insufficient for me to conclude that payment of either the Lavangna Sum or the Additional Sum by

SCL should be treated as an expense in its profit and loss account on the basis of it solely being paid to deal with the DS1 issue. **He acknowledged at the hearing that if there was a mixture of reasons for the payment of the Disputed Sum this would alter his analysis**.

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

to that development funding but extended to other MAR Connection benefits." [Emphasis added]

27. The judge concluded at paragraph [203] that SCL had not shown that the Disputed Sum should be treated as an expense in its profit and loss account. She went on to consider the alternative claim made by SCL that a debit would nevertheless need to be taken into account under the loan relationship rules in order fairly to represent the losses and/or expenses arising to SCL from its loan relationships under s307 CTA 2007.

28. The judge considered the loan between LSI and SCL. Mr Waldegrave for HMRC accepted before the FtT that there was a "loan relationship" between LSI and SCL and the release of the Charge by NAMA was a related transaction for that loan relationship. The judge went on to consider whether the Additional Sum was a loss arising to SCL from that loan relationship and/or whether the release of the Charge was a related transaction in relation to which the Additional Sum was a loss. She referred to the authorities in which reference is made to the use of the phrase "arise from", and which establish that a "direct causal connection" is required; *Union Castle Steamship Co Ltd v HMRC* [2020] EWCA Civ 547 and *Hexagon Properties Limited v HMRC* [2022] SFTD 901. The judge was not satisfied, for the reasons set out at paragraphs [214] and [215] of the Decision, that there was a sufficient causal connection between the payment of the Additional Sum and the related transaction of the release of the Charge for the payment of the Additional Sum to be considered to "arise from" that transaction. She concluded the Additional Sum was paid for a raft of reasons and further that as a proposal it had predated the sale of the Swiss Centre having been on the table for some 6 months before. She found that the Additional Sum related to a wider fact pattern and was not specifically related to the release of the Charge. The judge also considered and rejected the alternative submission made on behalf of SCL that the payment was made "as a result of" the Charge for the purposes of section 307(4)(c) CTA 2007.

29. The judge concluded that the Additional Sum:

> "219. … was a payment made as a result of the overall relations between NAMA and the MAR Connection and the indebtedness of the Indebted Entities. As said **at most it can be said to have facilitated the Swiss Centre sale, but, even stepping back from the detail, that facilitation was not a payment made under or for the purposes of SCL's loan relationships and related transactions**." [emphasis added]

30. The judge went on to consider the loan relationship arising from the LSI Guarantee and whether that created a money debt to be treated as a transaction for the lending of money for the purposes of section 303(3) CTA 2007. For reasons set out at paragraphs [220] to [224] the judge concluded that the LSI Guarantee did not qualify to be treated as a loan relationship of SCL.

31. The judge then addressed the loan relationship rules vis-à-vis the Lavangna Sum and the claim by SCL that the €11.5 million paid under the Deed was paid to settle SCL's obligations under the Lavangna Guarantee. At paragraph [227] of her Decision the judge recorded the concession made by HMRC that when SCL paid the €11.5 million (either under the Lavangna Guarantee or as an amount paid on behalf of Lavangna) it became a creditor in respect of a money debt from Lavangna. The judge noted, at [228], that HMRC, however, maintained that the conceded money debt owed by Lavangna to SCL was not a debt which arose "from a transaction for the lending of money". The judge accepted that any money debt arising as a result of the Lavangna Sum did not arise from a transaction for the lending of money by SCL to Lavangna, given the lack of evidence that the parties intended a loan to arise. SCL did not become a creditor of Lavangna having paid the €11.5 million to NAMA; the rights,

the judge said, against Lavangna were worthless. There cannot have been any value to be recognised in SCL's accounts for the rights to which a debit would have applied. The judge concluded that the Lavangna Sum was not deductible as a debit paid under the loan relationship rules without going further to address the unallowable purpose rules.

32. Finally, the judge considered whether the Additional Sum was a cost of enhancing the value of the Swiss Centre for the taxation of chargeable gains. Referring to the test set out in *Vodafone Cellular & Others v Shaw* [1997] 69 TC 376 the judge considered what the object of the payment was. She considered the evidence of the witnesses that the amount was paid as a result of the threat by NAMA to withhold the DS1 and therefore should be treated as a payment to obtain that DS1. She, however, found that the position was more nuanced. The Additional Sum was not paid in order to procure the release of the DS1. It was, the judge said, a negotiated amount for repayment of the debts owed by the Indebted Entities to NAMA. The judge said there was resultant benefit for the several companies and entities in the MAR Connection in entering into the Deed and paying the Additional Sum. She had little doubt that Mr McAleer and Mr Laverty were considering the interests of the MAR Connection overall – including their personal positions as guarantors. She had found that the threat of withholding the DS1 had focused the minds of the MAR Connection and brought them to the point of signing the deal with NAMA so that the sale of the Swiss Centre could take place with all the benefits previously identified thus secured. She concluded that SCL had, however, not shown that the Additional Sum was paid wholly and exclusively for enhancing the value of the Swiss Centre.

THE APPEAL TO THE UPPER TRIBUNAL

33. SCL has been granted permission to appeal the FtT's Decision on five grounds:

(i) The FtT made an error of law as its findings of secondary fact were contradicted by the evidence.

(ii) The FtT made an error of law in failing to give reasons for disregarding the evidence of Mr Higgins and Mr McAllister on the central issue as to the reasons for payment of the Additional Sum.

(iii) In assessing the accounting evidence the FtT failed to address the substance of the transactions and instead relied on legal form based on a misinterpretation of the relevant documents.

(iv) The FtT was wrong to conclude that the Additional Sum did not give rise to a loan relationship debit.

(v) The FtT was wrong to conclude that the Lavangna Sum did not give rise to a loan relationship debit.

34. HMRC submit, in summary, that the FtT did not err in any of the respects alleged by SCL. SCL's challenge on appeal is to the FtT's findings of fact and/or its evaluation of those findings, with a particular focus on the FtT's conclusions as to:

(i) why the Additional Sum was paid; and

(ii) why SCL entered the Lavangna Guarantee.

HMRC contend that the FtT's treatment of the evidence before it involved no significant flaws and it reached factual and evaluative conclusions which it was fully entitled to reach (and indeed which were correct).

35. In the alternative, it is argued that, if the FtT did make any of the errors alleged the relevant errors were not "material" such that the UT should not exercise its power under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007") to set aside the FTT Decision.

36. In its response (the "Response") to SCL's Notice of Appeal HMRC maintain that the FtT was right to dismiss the appeal for the reasons it gave. HMRC submit that the Decision should be upheld for four additional reasons:

(i) The FtT concluded, at [203], that SCL did not satisfy it "that the Disputed Sum should be treated as an expense in its profit and loss account". HMRC contend that this conclusion means that no part of the Disputed Sum was deductible under the loan relationship rules, regardless of whether the conditions in section 307 of the CTA 2009 were satisfied. In other words, HMRC submits that the FtT ought to have expressly rejected the Appellant's submission which it recorded at paragraph [204] of the Decision.

(ii) The FtT concluded that the payment of the Additional Sum did not "arise from" the release of the Charge: see paragraph [214] of the Decision. HMRC contend that the FtT should also have expressly concluded that the payment of the Additional Sum did not "arise from" the loan relationship which existed between LSI and SCL. The FtT appears to have identified this point as being in issue before it: see paragraph [209] of the Decision.

(iii) In relation to the Lavangna Sum, the FtT decided, at [230] and [231] that there was no relevant transaction "for the lending of money" and, furthermore, that SCL did not realise any relevant "loss". HMRC claim the FtT should also have concluded, in any event, that any loss did not "arise from" any loan relationship (or any related transaction) in terms of section 307(3)(a) of the CTA 2009.

(iv) In determining the deductibility of the Lavangna Sum under the loan relationship rules, the FtT did not consider, it necessary to address the "unallowable purpose" rules (in section 441 of the CTA 2009 and related provisions): see paragraph [233] of the

Decision. HMRC submit that the FtT should have concluded that, in any event, the unallowable purpose rules prevented the appellant from being entitled to any debit in respect of the Lavangna Sum.

OUTLINE OF THE PARTIES' SUBMISSIONS

SCL

37. SCL submits *(Ground 1)* that the FtT made secondary findings of fact that were not supported by, and in some respects were contradicted by, the evidence. In particular, SCL submits the FtT made no reference to NAMA's threat to disrupt the sale of the Swiss Centre and neither did the Tribunal refer to the witness evidence as to the reasons for paying the Additional Sum. SCL argues that the FtT downplayed the significance of NAMA's threat to refuse consent to the sale and to withhold the DS1 discharge. SCL takes issue with the characterisation of NAMA's threat as doing nothing more than focussing minds and of the threat of the sale being derailed being overstated. SCL submits the findings were inconsistent with both the primary findings of fact and the contemporaneous documents. SCL submits that on a proper interpretation of the Deed, the payment was to NAMA and not to the Indebted Entities. SCL submit the approach adopted by the FtT regarding the evidence of the two witnesses, Mr Higgins and Mr McAllister, by reference to the decision in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) as an after-the-event "narrative" was erroneous and reached without considering why either witness might want to develop a narrative. Furthermore, it is argued that there was no documentary evidence to support the FtT's analysis. The available documentary evidence, SCL says, supported the claims made in the witness statements that SCL did not want to inform the purchaser of the property (Al Faisal) that there was no binding agreement in place.

38. SCL claims *(Ground 2)* that the FtT failed to give adequate reasons for rejecting the unambiguous evidence of SCL's witnesses as to why the Additional Sum was paid. More particularly, that the FtT did not explain what evidence it was relying on to disregard the clear explanations of Mr Higgins and Mr McAllister that (i) there was never any intention to pay an additional sum to NAMA and (ii) that the only reason SCL ultimately did so was because of the threat by NAMA to withhold the form DS1. The argument is advanced that the Tribunal did not explain why it rejected that evidence, despite it being supported by contemporaneous emails.

39. SCL claims *(Ground 3)* the FtT wrongly focused on legal form rather than commercial substance, which depended on an understanding of what in fact happened. In particular, SCL suggests that the FtT mischaracterised the Additional Sum as being a payment to the Indebted Entities, despite knowing NAMA had no interest in the mechanics of the payment and just wanted sums to be repaid. The sums they say were paid directly into the client account of Hogan Lovells International LLP (NAMA's representatives). There was, in fact, no payment to Indebted Entities and as such there was no ability on their part to repay amounts of their indebtedness. SCL claims the FtT wrongly concluded that payments were not made pursuant to the Lavangna Guarantee because it had not been formally called. Throughout the negotiations, SCL claims it was recognised that SCL would be required to pay the Lavangna Sum. NAMA had the legal right to require it to pay that sum. Lavangna was insolvent and there was no prospect of it paying the sum otherwise. Regardless of whether the Lavangna Guarantee was called in or not, commercially, the payment was pursuant to the guarantee, because the Lavangna Guarantee was what compelled it. It is, SCL submits, clear from clauses 2.1 and 3.1 of the Deed that payment was made by SCL in discharge of its obligations under the Lavangna Guarantee. The FtT's analysis fixated on the technicality that the Lavangna

Guarantee had not formally been called in by NAMA. SCL argue that the FtT placed legal formalities and a misinterpretation of the Deed above the substance of the transaction.

40. SCL maintains *(Ground 4)* that the Additional Sum gives rise to a loan relationship debit because it fairly represents (our emphasis) a loss arising from a related transaction, namely the release of the charge over the property, or alternatively, it constituted an expense incurred as a result of that related transaction. When construing the words "*profits and losses of the company that arise from*" a loan relationship or related transaction, the question of whether there is a link between the profit or loss and the loan relationship or related transaction, is to be addressed by reference to the substance of what is happening. SCL claims the FtT adopted an unduly restrictive interpretation of "arise from" and that, viewed in substance, the payment flowed from NAMA's leverage of its rights under the charge. The payment was therefore properly to be regarded as an expense incurred for the purposes of SCL's loan relationships.

41. Finally, SCL maintains *(Ground 5)* that once SCL paid the Lavangna Sum it acquired NAMA's rights against Lavangna by way of subrogation. This created a money debt from a transaction from the lending of money or, alternatively, a relevant non-lending relationship. Lavangna's insolvency resulted in a real loss to SCL, giving rise to a deductible debit under the relevant provisions. SCL argue that the FtT failed to address this analysis.

HMRC

42. HMRC submit this appeal is, in substance, an impermissible challenge to findings of fact and evaluative judgments that were plainly open to the FtT on the evidence. Reference is made to the judgment of Evans LJ in *Georgiou (t/a Marios Chippery) v Customs and Excise Commissioners* [1996] S.T.C.463 in which he explained how challenges to findings of fact made by a first instance tribunal, on the basis of *Edwards v Bairstow*, should be framed. The

appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong.

43. HMRC claim *(Ground 1),* the FtT correctly directed itself on the assessment of evidence, including the fallibility of memory and the risk of retrospective "narratives", and did not misapply *Gestmin*. The suggestion that *Gestmin* should be confined to commercial cases is wrong; *Kogan v Martin* [2019] EWCA Civ 1645, at [88].

44. Responding to each of the criticisms made, HMRC submit:

(a) The FtT did not suggest that its view of Mr. Higgins' and Mr. McAllister's evidence was informed by a conclusion that it was "self-serving".

(b) The FtT did not misunderstand the relevant email exchange sent by the MAR Connection's lawyer (Simon Rutnam) to Mr. Higgins on 22 August 2011. It is correct that it summarised a discussion with NAMA, but the email (which outlined the proposal involving £45 million being paid to an escrow account) itself constituted an "internal" discussion.

(c) The FtT acknowledged that NAMA was able to put pressure/leverage on the MAR Connection by threatening to withhold the DS1. It did not regard the threat concerning the DS1 as meaningless. However, given the evidence before it to the effect that the Additional Sum had been "on the table" for months before the DS1 issue arose, the FtT was entitled to conclude (as it did) that "it related to a wider fact pattern and should not be specifically related to the release of the Swiss Centre Charge".

(d) The FtT was clearly entitled to reach the conclusion, at paragraph [152], that the purchaser was aware of major discussions with a lender which were so linked to the sale of the Swiss Centre that exchange was delayed as a result. The FtT was entitled to conclude that the extent of the concern about raising the DS1 issue is an example of the development of the narrative for this case over subsequent years.

45. Here, there was extensive contemporaneous documentary evidence, which the FtT was entitled to prefer over aspects of oral testimony. The FtT was therefore entitled to find that: (i) the £45m payment (including the Additional Sum) had been "on the table" months before the DS1 issue arose; (ii) the DS1 threat merely focused minds rather than caused the Additional Sum to be paid; and (iii) the risk of the Al Faisal sale collapsing was overstated. In that context, any minor factual errors established were not material.

46. The FtT did not simply "reject" the evidence of Mr Higgins and Mr McAllister *(Ground 2)*; rather, it evaluated their evidence in light of inconsistencies between the oral evidence, the written statements, and the contemporaneous documents. The FtT preferred the written evidence. That does not mean that it "rejected" the witnesses' evidence. Where the FtT preferred documentary evidence or written statements, the judge gave clear reasons for doing so. The judge expressly explained why she rejected SCL's case that the Additional Sum was paid solely because of the DS1 threat, including; (i) the prolonged history of negotiations having regard to the contemporaneous emails and other documents exchanged in the course of negotiations between the MAR Connection and NAMA; (ii) the contemporaneous documentary evidence did not support SCL's case that NAMA's threat concerning the DS1 could not be revealed to Al Faisal, (iii) The FtT explicitly addressed SCL's contention based on its witnesses' evidence that it only offered to pay the Additional Sum "to keep NAMA at the table" and effectively intended to renege on the offer as soon as the sale of the Swiss Centre

was secured. The reasoning amply satisfied the requirement to explain why SCL's account was not accepted.

47. HMRC claim *(Ground 3)* that the FtT correctly construed the NAMA Deed. SCL is correct that the NAMA Deed required funds to be transferred directly by SCL, LSI and/or the Capital Trust to NAMA. There was never any suggestion that funds were actually transferred to NAMA via the Larkmount Subsidiaries and the Indebted Entities. The FtT expressly recognised, at paragraph [123] that "The transactions were all affected by accounting entries with no funds flowing between the companies other than the payment made to NAMA by Capital Trust." It is unsurprising that in the circumstances, NAMA would have insisted on funds being transferred directly to it. Although payments were made directly to NAMA as a matter of mechanics, the substance of the arrangements was that value was applied for the benefit of the Indebted Entities, by reducing their debts. The FtT clearly understood and accurately summarised the obligations imposed by the relevant part of the NAMA Deed in paragraph [113] of the Decision. The Deed clearly envisaged an arrangement by which the Properties would be purchased from the Indebted Entities for amounts in excess of their market value but in order to satisfy the negotiated repayments of the overall indebtedness. The FtT was entitled, therefore, to conclude that: SCL provided value to the Indebted Entities with no expectation of repayment; and to the extent payments exceeded market value, they constituted a distribution. In any event, on the facts, SCL would still have simply been paying off some of the debt owed by other entities in the MAR Connection, rather than incurring a cost which it had to incur to sell its own asset. As far as the accounting analysis is concerned, the only question for the FtT was whether the entire Disputed Sum should be treated as an expense. SCL ran no alternative argument that some part of it should be so treated.

48. HMRC submit the FtT did not erroneously "fixate" on the fact that the Lavangna Guarantee was not formally called. The FtT did criticise Mr. Gardiner for referring to the

"calling" of the Lavangna Guarantee when this did not in fact occur, however this was only one of a number of problems which the FtT identified with Mr. Gardiner's evidence. Although framed as a "guarantee", the Lavangna Guarantee gave effect to the agreement (as reflected in the Lavangna Facility) that SCL would pay off €11.5 million of Lavangna's indebtedness out of the proceeds of the sale of the Swiss Centre. In considering how the Lavangna Sum should be dealt with for accounting purposes, therefore, the question was why SCL entered into the Lavangna Guarantee. The FtT correctly found that the guarantee was entered into for reasons extending beyond SCL's own commercial interests, including the interests of the wider MAR Connection. It was on that basis that the FtT concluded that the Lavangna Sum did not fall to be treated as an expense in calculating SCL's profits in accordance with GAAP.

49. HMRC accept *(Ground 4)* that in certain circumstances a debit may be available in respect of an amount notwithstanding that it does not fall to be treated as an expense in accordance with GAAP. However, here, the transcript of the hearing before the FtT established that it was common ground before the FtT that in this case, the "fairly represent[s]" wording in section 307(3) of the CTA 2009 added nothing to the question of whether the Disputed Sum fell to be regarded as an expense in accordance with GAAP. In any event, the FtT correctly applied the requirement for a direct causal connection between the loan relationship (or related transaction) and any loss. It is argued that the claim made by SCL fails to take account of the FtT's clear conclusions that there were also other reasons for the payment of the Additional Sum. The Additional Sum arose from a wider factual matrix, including dealing with the MAR Connection's overall indebtedness and securing unencumbered development properties. Where there are multiple inseparable causes, a loss cannot be said to arise from one qualifying transaction alone; see *Union Castle Mail Steamship Co Limited v. HMRC* [2020] EWCA Civ. 547; [2020] STC 974 (which informed the approach adopted in *Hexagon Properties Limited v. HMRC* [2022] UKFTT 137 (TC); [2022] SFTD 901). The FtT concluded that the Additional

Sum fell to be treated as a distribution, and clearly a company which makes a distribution is not entitled to a deduction in calculating its profits. The Additional Sum was, in substance, repayment of group borrowing, for which no deduction is available.

50. Finally, HMRC submit *(Ground 5)* that the FtT found (correctly) that the Lavangna Guarantee was not called. Rather SCL simply paid an amount on behalf of Lavangna, and subrogation does not occur in such circumstances. In any event, even if, as a matter of legal analysis SCL was "subrogated" to NAMA's rights against Lavangna, this does not mean that it can be said that the money debt which Lavangna owed SCL arose from a transaction for the lending of money. The FtT concluded that there was no "loss" for SCL in respect of the debt which Lavangna owed it and SCL has not explained why this conclusion was wrong.

51. After hearing submissions from Mr Mullan KC and Mr Waldegrave, we allowed the parties to file further written submissions regarding the Lavangna Sum, and the Additional Sum. We also directed the parties to address, in the form of a schedule, the factual findings relied upon by SCL to support its claim that the Additional Sum gave rise to a loan relationship debit, and the specific findings of fact that SCL submits were not reasonably open to the Tribunal.

52. The parties prepared a composite document referred to as the 'Schedule of Factual Findings'. Table A of that document sets out factual findings of the Tribunal relating to the Additional Sum that SCL claims are sufficient for it to succeed on is case regarding the Additional Sum. Table B sets out two specific inferences of fact that SCL submits were not reasonably open to the Tribunal. They are:

(a) First, that the impact of NAMA's threat and SCL's accepted negotiating strategy were irrelevant because a deal was 'on the table'; and

(b) Second, that SCL's concerns as to the sale of the Property being impacted if NAMA carried through on its threat being overstated.

DECISION

53. Before we address grounds one and two, both of which relate to the findings made by the Tribunal and its reasons, it is now well established that the Upper Tribunal is not entitled to find an error of law simply because it does not agree with the decision, or because the Tribunal thinks the decision could be more clearly expressed or another judge can produce a better one. Baroness Hale put it in this way in *AH (Sudan) v SSHD* [2007] UKHL 49 [2008] 1 AC 678), at [30]:

> "Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."

54. As to the Tribunal's assessment of the evidence, the Court of Appeal in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at [114] to [115] (per Lewison LJ), provided the following guidance;

> "(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show;
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus, even it were possible to duplicate the role of the trial judge, it cannot in practice be done."

55. In *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 W.L.R. 48, in dismissing an appeal against findings of fact, the Court of Appeal emphasised that it was not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence; the question is whether the trial judge's conclusion was rationally insupportable. Lewison LJ said:

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal

court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

56. In *The Commissioners for Her Majesty's Revenue & Customs v Procter & Gamble UK* [2009] EWCA Civ 407 (a case relating to the classification for VAT purposes of Pringles) Jacob LJ addressed the question of adequacy of reasons at [19]:

> "…It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that "the judgment must enable the appellate court to understand why the judge reached his decision" (*per* Lord Phillips MR in *English v Emery* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at 19]) and that the decision "must contain … a summary of the Tribunal's basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (*per* Thomas Bingham MR in *Meek v Birmingham City Council [1987] IRLR 250*). It is quite clear how this Tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told "why they have won or lost.'"

57. As to the adequacy of reasons, we have adopted the approach as set out in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 ("English") at [26]:

> "26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context

> of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed…"

Grounds 1 and 2

58. We begin by addressing the first two grounds of appeal that overlap and concern the findings made by the Tribunal. There are two strands to the claim made by SCL regarding the findings and conclusions reached, both of which concern payment of the Additional Sum. First, SCL claims the findings made by the Tribunal are sufficient for the Tribunal to have concluded that the Additional Sum gave rise to a loan relationship debit. SCL claims the judge made no reference to NAMA's threat to disrupt the sale. Nor did she refer to the witness evidence as to the reasons for paying the Additional Sum. SCL takes issue with the characterisation of NAMA's threat and claims the findings are contradicted by the evidence before the Tribunal. Second, SCL claims there are two specific inferences of fact made by the Tribunal that were not reasonably open to it:

(i) the inference that SCL/the MAR Connection would have agreed the deal which was 'on the table' in any event was contradicted by the evidence, and

(ii) The FtT's conclusion that the extent of SCL's concerns as to the sale of the Property being impacted if NAMA carried through on its threat was part of a narrative was not reasonably open to it to make on the evidence before it.

59. There is, as Mr Waldegrave submits, no dispute that the existence of a charge over the Swiss Centre constituted a source of leverage for NAMA.

60. Having reminded herself of the relevant authorities, the judge found that the evidence of two of the witnesses from whom she had received oral evidence, Mr Higgins (one of the key people involved in the negotiations with NAMA) and Mr McAllister, a chartered accountant and director of the accounting firm advising the MAR Connection who was involved in providing advice at the time of the relevant transactions, was generally consistent. However, she perceived that there were signs in their evidence of a tendency to develop a narrative after the event. She cites, at paragraphs [19] and [20] of the Decision, examples of each of those two witnesses rowing back from their witness statements in their oral evidence:

> "19. Mr Higgins pulled back from some statements made in his Witness Statement which he had adopted as evidence in chief. For instance, in relation to the reasons for SCL entering into the Lavangna Guarantee his evidence in his Witness Statement recognised issues such as the domino effect on the rest of the group and the impact on the construction business of the group if the lender called in another facility financing the development of the Swiss Centre. He also explained in his statement how the MAR Connection did not think the bank would deny SCL's other funding. However, in the hearing he was much less accepting of those points made in his Witness Statement and simply sought to focus on saying that the Lavangna Guarantee was entered into in order to fund the Swiss Centre.
>
> 20. …Mr McAllister's evidence may similarly have been affected by the narrative developed. In his Witness Statement he describes the entire deal with NAMA being entered into in order to ensure that NAMA did not stand in the way of the sale of the

> Swiss Centre. He does not identify the Additional Sum specifically as having been agreed in order to achieve the release of the security by NAMA. In contrast, at the hearing he focused specifically upon the Additional Sum claiming that without the Swiss Centre security issue raised by NAMA, that amount would not have been paid."

61. In our judgment, it is clear reading the Decision as a whole, that the judge carefully considered the evidence of the witnesses based on their recollection, having in mind the observations made by Mr Justice Leggatt in *Gestmin* regarding the fallibility of human memory and reconstruction. In *Kogan v Martin & Others* [2019] EWCA Civ 1645, Floyd LJ confirmed that *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. Floyd LJ said:

> "88. …[*Gestmin*] 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…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."

62. *Kogan* was a case involving two parties who were private individuals living together for much of the relevant time, and that made it inherently improbable that details of all their interactions over the creation of a screenplay would be fully recorded in documents. Here, the parties' positions were much more akin to the negotiation of commercial arrangements. The

judge had regard to the evidence of the witnesses - both written and oral. The judge gave greater weight to the evidence set out in the witness statements where that evidence was at odds with their oral evidence. She was entitled to do so. Courts and Tribunals adopt a variety of different evaluative techniques to assess the evidence. The judge was entitled to have regard to the consistency (or otherwise) of accounts given at different points in time, and the extent to which the evidence is supported by other contemporaneous evidence. In any event, the judge made it clear in paragraph [21] of the Decision that she had considered the evidence as a whole in assessing the weight to be given to the evidence of the witnesses that the Additional Sum was paid simply in order to obtain the release of security "DS1" from NAMA.

63. The judge referred, at [83], to the evidence of Mr Higgins that the MAR Connection sought to "play for time" and to keep NAMA engaged while avoiding as far as possible making commitments in relation to the Swiss Centre surplus. The judge properly noted that NAMA on the other hand was seeking commitment in relation to that surplus. The judge referred, at [100], to the "core tensions" that arose from the different results sought by the parties. At paragraphs [102] to [105] of the Decision the judge refers to the evidence of the on-going negotiations between SCL and NAMA, including the evidence of the witnesses for SCL. The evidence, in summary, was that SCL wanted to walk away from the memorandum of understanding, whereas NAMA wanted to bind SCL into paying the Additional Sum. It is clear from a careful reading of the Decision as a whole that the judge accepted that NAMA used its security as leverage. That cannot have been surprising. Equally, as the judge sets out at paragraphs [105] and [106] of the Decision the MAR Connection also wanted to avoid raising a potential issue with the Swiss Centre purchaser.

64. At paragraph [144] of the Decision, the judge referred to the evidence of Mr Higgins that compared to the resolution of other debt, NAMA leveraged its position on the security and consent to the sale of the Swiss Centre. The judge accepted NAMA was in a different position

because of the sale of the Swiss Centre, which was at the heart of the ongoing discussions. That however was not the end of the judge's consideration. She went on to say that did not mean that the Additional Sum was in fact paid for NAMA's consent to the sale. The judge said on the contrary, the deal with NAMA was broadly agreed from May 2011.

65. At paragraph [145], the judge referred to the evidence of Mr Higgins that the earlier negotiations should be discounted because the MAR Connection was simply seeking to string NAMA along so that the sale of the Swiss Centre could be completed and the MAR Connection could negotiate from a stronger position. The judge noted, at [219], that the witnesses described that the MAR Connection was otherwise seeking to sell the Swiss Centre and negotiate with NAMA from a position of strength.

66. The appellant does not challenge the findings we have referred to. Mr Mullan KC submits that having regard to these findings and a realistic view of the facts, the Additional Sum was clearly either (i) a loss which arose from the granting and release of the security or (ii) an expense which was incurred as a result of the granting and release of the security. In our judgment it does not follow from those findings that the payment of the Additional Sum "arose from" the Swiss Centre Charge alone. In addressing the loan relationship between LSI and SCL, the judge concluded, at [214]:

> "In this case **I am not satisfied that there is sufficient causal connection between** the payment of the Additional Sum and the related transaction of the release of the Charge **for the payment to be considered of the Additional Sum to "arise from" that transaction**. While I recognise that the posturing by NAMA, when it indicated that it would not provide the DS1, brought the parties to the position of finally agreeing a deal, the Additional

> Sum was paid for a raft of reasons as set out earlier and had been on the table for some 6 months." [Emphasis added]

That was a clear finding she was entitled to make.

67. At paragraph [141], the judge had noted that the payment of the Additional Sum to NAMA was on the table for some months in 2011 and long before the DS1 issue arose. SCL accept that the parties had identified terms which were acceptable to NAMA by May 2011 and in that sense, a deal was "on the table". Reading the judge's Decision regarding the Additional Sum as a whole, we accept that the judge was not saying that SCL were happy to pay the Additional Sum regardless of NAMA's threats. As Mr Waldegrave submits, the judge was properly referring to the evidence that the payment of the Additional Sum had been 'on the table' for some months and long before the issue regarding the DS1 arose. She had in mind the evidence of Mr Higgins that the MAR Connection was simply seeking to string NAMA along, but as the judge said, that does not alter the fact that the Additional Sum was on the table for some months before the parties finally reached agreement.

68. We reject the claim made by SCL that the judge downplayed the significance of the concerns as to Al Faisal Holdings walking away from the sale. The judge had noted, at [98], that on 27 July 2011, the MAR Connection became aware that there was a target exchange date of 5 August 2011 for the sale of the Swiss Centre and by 5 August 2011 the target date had been postponed to 19 August 2011. The judge referred at [105], to the email of 23 August 2011 in which Mr Higgins set out various issues including the exposure which the MAR Connection may have if contracts were exchanged and what steps could be taken after exchange to request confirmation about the DS1 in advance of completion or to seek an anticipatory breach order in the event that NAMA declined to confirm the status. As the judge noted, the MAR Connection wanted to avoid raising a potential issue with Al Faisal Holding about the DS1 prior to contracts being exchanged on the sale. The judge referred, at [106], to

what she described as the consistent evidence of Mr Higgins and Mr McAllister that the MAR Connection lawyers were not content to proceed to exchange where there was such an issue as NAMA's apparent threat to withhold the DS1.

69. It is against that background that the judge explained at paragraph [152] that the exchange of contracts for the sale of the Swiss Centre was repeatedly delayed. The judge recorded, and it is not challenged that Mr Higgins acknowledged in his evidence, that the purchaser was prepared to wait for the documentation with NAMA to be finalised. On the evidence it was open to the judge to conclude that the extent of the concern about raising the DS1 issue is an example of the development of the narrative by witnesses for this case over subsequent years.

70. The "raft of reasons" for payment of the Additional Sum were identified and addressed in paragraphs [153] and [154] of the Decision. The judge went on to explain, at [157], that with the funds obtained on the Swiss Centre sale and with the NAMA debt discharged, the MAR Connection could move on with the remaining properties and operations. The risk of problems being caused with the sale by NAMA threatening to withhold the DS1 focussed the minds of the MAR Connection and got them to agree a deal which had substantially been on the table for months. The judge recorded, at [157], that Mr Mullan KC agreed the Additional Sum was paid to get the sale away rather than the DS1 released, although accepting that raising the issue of the DS1/release of the charge was the lever which produced the result including the payment of the Additional Sum.

71. We have no hesitation in rejecting the claims made by SCL and conclude that the first two grounds of appeal have no merit. The judge was undoubtedly entitled to conclude that there was a mixture of purposes and intentions in paying the Additional Sum to NAMA for the reasons that she gave. The payment of the Additional Sum was plainly for commercial expediency when considered in the wider context of the transaction, not for reasons of

compulsion arising from the Swiss Centre Charge. The duty to give reasons is to enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues, disclosing how any issue of law or fact was resolved. The conclusion reached by the judge and her reasons are rooted in the judge's careful consideration and analysis of the evidence before the Tribunal. The implication in the first two grounds of appeal and the submissions made by Mr Mullan KC is that the evidence was considered by the judge, but not to the extent or in the way desired by SCL. The first two grounds of appeal amount to nothing more than a disagreement with the findings capable of affecting the outcome.

Ground 3: Alleged error concerning construction of the NAMA deed

72. SCL's main contention in respect of Ground 3 is that the FtT focused on what it considered to be the legal effect of the NAMA Deed and that it fell into error in construing that the Deed required SCL to provide sums to the Indebted Entities rather than the payments which were, in fact, made directly as a matter of fact to NAMA through its solicitors. It says this constitutes an error (demonstrated most particularly) at para [124] of the judgment in the following terms:

> "Given that there is no other explanation for the nature of the Additional Sum in the hands of the Indebted Entities and it was given to them by SCL with no expectation of the money being returned, I find that it was a gift or distribution in [the hands of the Indebted Entities]."

73. SCL's criticism, therefore, focuses on the fact that the NAMA Deed, as properly construed, required the Additional Sum to be paid directly to NAMA and that in construing otherwise it says the FtT made two significant errors:

(i) That it mischaracterised the payment of the Additional Sum as being a payment to the Indebted Entities – despite acknowledging that NAMA had no interest in the mechanics and just wanted the various sums (re)paid;

(ii) That it considered that payment of the Lavangna Sum was not made under the Lavangna Guarantee itself because the guarantee was not formally called in.

74. SCL's position is succinctly put in relation to the former issue at paras [97] and [98] of SCL's Skeleton Argument:

> "[97] The substance was that NAMA was being paid a premium for the purchase of properties which it de facto owned. The FtT's failure to recognise this obvious fact undermined its analysis.
>
> [98] To the extent that the FtT sought to categorise its flow of monies as resulting from accounting entries at [123], that was contradicted at [124] where the FtT noted that SCL has not identified what the Additional Sum should be shown as in the Indebted Entities' accounts."

75. To this, they say that "the correct legal position is governed by the Deed and not the accounting entries." The correct accounting treatment concerns the substance of the transactions and SCL argue that where the FtT fell into error in its interpretation, ie in finding

that the Additional Sum was a gift or distribution, led resultantly to an error in the interpretation of the expert advice.

76. On the secondary issue, the Lavangna Guarantee, SCL argues that the FtT failed to acknowledge SCL's expert evidence on the point "that [the payment] was in substance part of SCL's cost of borrowing as SCL was obliged to agree to it as a condition of AIB releasing further funds to complete the development of the Swiss Centre." And, further at [106] of its Skeleton Argument that "in rejecting that evidence the FtT placed considerable weight on the fact that the Lavangna Guarantee was not formally "called-in" and elsewhere stated that the payment was "made by Lavangna." The culmination of this argument on the part of SCL, as renewed before us, was that the FtT placed legal formalities and a misinterpretation of the NAMA Deed above the substance of the transactions and therefore fell into error.

77. We find little of substance in this argument. On a proper consideration of both the evidence and the NAMA Deed it is, as a matter of substance, quite clear that the sums in dispute were being paid to NAMA on behalf of the Indebted Entities not only to secure a reduction of their indebtedness but also to facilitate the subsequent purchase of the underlying development opportunities (of both the properties and development entities that held them) for an aggregate purchase figure and correspondingly free of future debt. For that an abated figure in respect of the face value of the overall debt was being paid. It is very clear that the FtT both clearly understood and accurately summarised what was to (and did) occur. It was clearly envisaged (and reflected in the NAMA Deed) that there was an arrangement by which the properties would be purchased from the Indebted Entities for amounts in excess of their market value. The rationale for this was not because the purchase price was a "premium" (as categorised by SCL) but rather that any excess was to facilitate the release of the charges over the Indebted Entities (at a discount to the face value of the debt) and allow the transfer of the properties for

future development whilst simultaneously securing the release of any personal and/or cross guarantees. As HMRC (in its skeleton argument at [104]) points out, this position was also reflected in SCL's own evidence. Mr Higgins' witness statement and SCL's counsel suggested "the two analyses in respect of the Additional Sum – namely that it was "either [a] capital contribution to the purchaser [ie the Larkmount subsidiary] to allow to pay for the purchase [of the Property] [or] it was simply paid to the [Indebted Entities] to complete their obligations under the [NAMA Deed]." Either way, it is patently clear that what was happening was a discharge of debt across the MAR Connection rather than the incurring of costs in respect of the sale of SCL's single asset. That was the overall determination of the FtT and it was a conclusion to which it was entitled to come.

78. Specifically, on the question of the Lavangna Guarantee, we also feel that the appellant overstates its position. The Lavangna Guarantee was entered into pursuant to a facility agreement that secured funds not just for the Swiss Centre Development but also elsewhere, as the FtT found, through the financing of its parent LSI. The facility agreement itself required payment of the €11.5m on the sale of the Swiss Centre – an obligation that was then (subsequently) enshrined (and made directly enforceable) under the provisions of the NAMA Deed. Emphasis on whether the Lavangna Guarantee was called in or not does not thereby render it a cost properly attributable to SCL – a point established by the FtT and a conclusion to which the trial judge was perfectly entitled to arrive both as a question of fact but also as a matter of interpretation of events and the NAMA Deed itself. The trial judge was entitled to conclude that neither payment was something that properly could be brought into account as a "loss" and/or an "expense" from the perspective of SCL's tax liability and as she did at [124] "that it was a gift or distribution."

79. In agreeing with the FtT on this conclusion, we are also cognisant of the fact that the only question before the FtT was whether the entire Disputed Sum should be treated as an expense. There was no alternative proposition that only some part of it should be so treated. This was a point in respect of which the appellant has been denied permission to appeal in any event, but lest there be any doubt upon it, we are of the view that it was correct to deny leave on that point also.

Ground 4: The Additional Sum and the Loan Relationship Rules

80. The starting point in this analysis is the fact that the parties accepted at trial, for the purposes of section 304 CTA, that there was a loan relationship between SCL (1) and LSI (2). Beyond that, SCL seeks to advance the contention that the payment of the Additional Sum is either:

(i) a loss "arising from that relationship" (ie on SCL's most recent submissions the payment arising from the grant or release of the Charge); or (in the alternative)

(ii) an expense which was "directly" incurred in making payments as a result of those transactions.

81. These arguments bring in point sections 307(3) and (4) of the CTA 2009 which we repeat here:

> "307(3) The credits and debits to be brought into account in respect of a company's loan relationships are the amounts that,

when taken together, fairly represent for the accounting period in question—

(a) all profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest or expenses),

(b) all interest under those relationships, and

(c) all expenses incurred by the company under or for the purposes of those relationships and transactions.

As qualified by:

(4) Expenses are only treated as incurred as mentioned in subsection (3)(c) if they are incurred directly—

(a) in bringing any of the loan relationships into existence,

(b) in entering into or giving effect to any of the related transactions,

(c) in making payments under any of those relationships or as a result of any of those transactions, or

(d) in taking steps to ensure the receipt of payments under any of those relationships or in accordance with any of those transactions."

82. As a preliminary point SCL argue that the words "fairly represent" in the introductory portion of section 307(3) mean that regard is to be had to the "totality of the relevant transaction in its factual context" (applying *Union Castle Mail Steamship Co Ltd v HMRC* [2020] 4 All ER 895 at para [52]) whilst further citing Rose LJ in the subsequent case of *Smith and Nephew Overseas Ltd v HMRC* [2020] WLR 270, in terms of the requirement [which] "is intended to operate in favour of the tax payer as well as in favour of HMRC." SCL's contention thus is that a purposive and generous interpretation of the provision is thus called for.

83. Further, it is argued that the phrase "fairly represents" is something which applies regardless of the treatment under GAAP and so the UT is in a position to determine the issues in this appeal notwithstanding the FtT's conclusions on the expert accountancy evidence.

84. Those arguments are essentially the foundation for the case made by SCL that a "strict interpretation is not appropriate" [see again [117] of the appellant's Skeleton Argument]. SCL cites as a comparator the absence within section 307 of restrictive language such as the term "exclusively" as used in other taxing legislation for its ultimate contention that the scope of "profits or losses brought into charge should not be unduly restricted or expanded." SCL says that the unallowable loss provisions in s.441 envisage the possibility of a number of operative causes and operate as the true protection against abuse.

85. In that overall context, therefore, SCL argues that the FtT placed a "restrictive gloss" on the words "arise from" in sub-para (3) and in finding that it required a "direct causal link"

(FtT at [215]) the FtT appeared to be basing itself on a "second hand" misreading of the analysis at [75] in the *Union Castle* case.

86. SCL says at Skeleton Argument [121] that taking a step back, NAMA leveraged its rights in relation to the Charge to obtain payment of the Additional Sum and was only able to do so because a sale was in prospect and SCL wanted the sale to go smoothly. It is argued that it is a necessary inference from that finding that having a smooth sale was a purpose of SCL paying NAMA had power to extract £24million. It says that the acknowledgement that NAMA could disrupt the sale was in consequence of the creation (and subsequent debate over) the release of the Charge. In those circumstances, the Additional Sum, therefore, it is argued "fairly represents" a loss which flows from the Charge over the Property.

87. SCL's position is set out at para [18] of its Closing Submissions in the following terms:

> "It is SCL's position that based on these findings and viewing the situation realistically, the loss which SCL suffered when it paid the Additional Sum arose from the grant and release of the security which NAMA held over the Property. This was not a sum which they were legally required to pay but a sum which the relevant parties considered that it was commercially prudent to pay because NAMA's security meant that it could disrupt the sales process and NAMA had threatened to do just that."

88. Seizing, however, upon the acknowledgment by the FtT that there was a wish for the sale to be "completed as smoothly as possible" [FfT at 153] does not, however, mean that there were not (as indeed the FtT found) other operative reasons. In our view, the FtT was quite

correct in looking at the matter objectively (as per the guidance in *Union Castle*) (as later adopted by *Hexagon Properties Ltd v HMRC* [2022] UKFtT 137), to the effect that where there are multiple inseparable causes for a loss it is not possible to say that the loss "arises from" one "qualifying" clause alone. The FtT having undertaken a detailed analysis concluded that payment of the Additional Sum was the result of a number of reasons and, thus, insufficiently causally connected to the issue of the release of the Charge. That was a conclusion to which it was entitled to come. It came to that conclusion due to a number of significant and cogent reasons, such as:

(i) the obvious repayment of the NAMA debt in full;

(ii) the release of the Indebted Entities - which as a consequence allowed the MAR Connection to continue with its operations through the Indebted Entities and facilitate the subsequent restructuring of the entire MAR Connection on a debt free basis;

(iii) its finding that the essence of the deal had been agreed between the relevant parties considerably (some 8 months) in advance of the issue of the DS1 itself having been raised; and

(iv) cognisant of the fact that, subject to payment of the SCL Debt, it was entirely possible for SCL to legally procure the release of the DS1 through a declaration from the court without reference to the Additional Sum.

It was entirely open to the FtT to conclude that it was as a result of all of those factors that it was not possible to say that there was sufficient causal connection for the purposes of section 307(3) to say that the payment "arose from" the release of the charge in itself.

89. Neither does the suggestion that the Additional Sum represented a "real economic loss" to SCL without more render it entitled to a deduction in respect of corporation tax. For SCL to argue otherwise ignores the other causative factors at play and to which the FtT was clearly alive.

90. In that circumstance, it was open to the FtT to conclude that the Additional Sum fell to be treated as a distribution and thus deny the deduction for Corporation Tax on the facts. Clearly, when one looks at what was happening as a whole, it is self-evident that the MAR Connection was, when it made the Additional Sum payment, also repaying some of the wider borrowing for a wider commercial benefit that accrued to the entire MAR Connection and simultaneously securing the release of the personal guarantees of Messrs McAleer and Laverty in the process. The FtT was entirely entitled to conclude on the evidence that those were important causative factors and deny the deduction.

91. On the alternative question the FtT had to determine if the Additional Sum was an expense which was paid as a result of the release of the Charge. To that, it also found that the payment "related to a wider fact pattern." Pursuant to section 307(4) it is clear that expenses are only treated as incurred for the purposes of sub-section (3)(c) "if they are incurred directly."

92. Specifically on the question of whether it was an expense "incurred directly", the FtT quite clearly found that the Charge gave "some leverage" - a point which is repeatedly made in the judgment - but that overall the predominant factor was the "indebtedness of the Indebted Entities" and what flowed from that. It was confirmed in that view in that the deal in respect of the Additional Sum with NAMA had its origins long before the DS1 issue arose and

consequently concluded on the evidence that its impact upon the sale overall was somewhat exaggerated at trial as indeed it was on appeal.

93. It is simply not the law either pursuant to section 307 or GAAP that debits are available if there is a mere connection without more. There must be a casual connection which is referrable to the debit (or credit) in respect of the profit (or loss) that arises and the FtT, quite rightly, in our view, found that it was not available here either on the facts or as a matter of law.

94. In our view, SCL has not demonstrated on appeal that the FtT was wrong on either the facts which it found or, indeed, the law. Fundamentally, the finding of a wider fact pattern – something which is not seriously challenged by SCL in this appeal - is sufficient to dispose of the fourth ground (whether under section 307(3)(c) and/or section 307(4)(c) of CTA 2009).

Ground 5: The FtT was wrong to conclude that the Lavangna sum did not give rise to a loan relationship

95. SCL's position as to the correct legal analysis in relation to the Lavangna Sum is (it contends) in compliance with HMRC's Corporate Finance Manual at CFM31100 and 31110 but is primarily focused on the legal effect of the payment. SCL's position (as outlined in its Closing Submissions) is:

(i) the Lavangna Sum was paid on account of repayments under the Lavangna Guarantee;

(ii) That the payment by SCL meant that SCL acquired NAMA's rights against Lavangna by way of subrogation under general law and/or the application of the Mercantile Law Amendment Act 1856 (section 5);

(iii) That this remained the position notwithstanding that the guarantee was not "called-in" (per *Simpson v Smyth* [1999] Ch 340) – even if HMRC were correct that by entering the NAMA Deed SCL lost its rights as surety with the consequence that SCL's claim against NAMA was based in restitution alone (on the basis that there was no assignment of rights but merely an equitable entitlement) per Goff and Jones: The Law of Unjust Enrichment 10th Edition at 39-01);

(iv) That the rights which SCL acquired gave rise to a loan relationship as the payment constituted a money debt arising from a transaction for the lending of money irrespective of the fact that the transaction for the lending of money was originally between NAMA/AIB and Lavangna (seeking to rely on *Greene King Plc v HMRC* [2017] 2 All ER 947 and *MJP Media Services Ltd v HMRC* [2010] UKFtT 298 at [91]-[92]);

(v) That when SCL acquired the rights they were worth nothing with the consequence that SCL suffered an immediate loss and that that loss arose from the loan relationship; and

(vi) That the purposes for entering into the Lavangna Guarantee were among SCL's business and/or commercial purposes so there was no unallowable purpose for the purposes of section 441 CTA 2009, and that even if there were, such purposes were so incidental that a just and reasonable appointment would not lead to any disallowance.

96. HMRC's position is that SCL did not "settle Lavangna's debt." Although that was the basis upon which both parties approached treatment of the Lavangna Sum at the hearing before the FtT, the FtT, however, found as a fact that the Lavangna Sum was not actually paid to NAMA in this way but that it was "paid by SCL to Lavangna's immediate parent company which on-lent it to Lavangna [[FtT 227]]."

97. HMRC by reference to Mr Gardiner's expert report also was able to demonstrate that the Lavangna Sum was paid to Dundrennan Ltd (ie SCL's parent) who then transferred the Lavangna Sum to NAMA "on account" of the repayment under the Lavangna Guarantee (to use the description in the Deed). These were reflected as loans in the accounting treatment of the various companies but by the time of the FtT hearing it was agreed that as there was no prospect of these amounts being recovered, they should not have been recorded as loans which led the FtT to take the view that they were, accordingly, distributions (FtT [119] and [127]).

98. From HMRC's perspective, therefore, there was no payment of the Lavangna Sum by SCL to NAMA and, therefore, no scope for it to be said that any kind of debt became owed to SCL by Lavangna.

99. Whilst HMRC admit that this was not the analysis advanced before the FtT they do argue, in this appeal, that it is that analysis which is consistent with the FtT's findings and that on a purely factual basis, based on the conclusions of the FtT, that is a complete answer to SCL's case in respect of the Lavangna Sum.

100. Even in the alternative, HMRC accept that if Lavangna (by whatever means) came to owe the Lavangna Sum to SCL (and so it is a money debt for the purposes of section 302(1)(a) of CTA 2009) HMRC argue that it is also necessary to establish that that debt arose "from a

transaction for the lending of money" (per section 302(1)(b)) and that on the facts FtT concluded that this requirement was not satisfied (FtT at [230]).

101. HMRC argue that the FtT's conclusion is supported by the case of *MJP Media Services Ltd* (supra) where the FtT (in that case) concluded that the concept of "a transaction for the lending of money … does not stretch to include payments to a third party which discharged the debt of another." On a factual analysis HMRC argue that is equivalent to the position here. In addition, if SCL did not pay the Lavangna Sum pursuant to the Lavangna Guarantee (but rather pursuant to the specific clause 3.1 in the NAMA Deed) then HMRC contend that SCL does not enjoy an automatic assignment of the rights by way of subrogation but rather enjoy an equitable right to subrogation pursuant to the principles of unjust enrichment (per Goff and Jones at 39.47). As such, SCL did not "inherit" the rights per se but rather acquired new (and independent) rights against Lavangna and so could not, therefore, rely on the original lending from AIB to Lavangna for that purpose.

102. In our view, having considered clause 3.1 of the NAMA Deed and related wording describing the payment and bearing in mind that the parties accept that the Lavangna Guarantee was not "called-in" it would seem to us that the position outlined by HMRC would appear to be the correct analysis and, as a result, there was no loan relationship between SCL and Lavangna.

103. In the alternative, if the payment was, in fact, made by SCL (which the FtT concluded was not the case) it was at a point when any rights by way of subrogation or otherwise against Lavangna were entirely worthless ab initio. In those circumstances, it is difficult to see in that context that there was, in fact, a "loan" or, indeed, a "transaction for the lending of money." Rather, and entirely consistently with the FtT's findings in this alternative case, it is clear that

the Lavangna Sum was quite clearly related to a wider fact pattern and that the Lavangna Guarantee itself was (a) entered into to ensure the continuance of the Lavangna Facility and allow the development of its properties, but also (b) to avert the problems for the MAR Connection as a whole (the alleged domino effect) which would have arisen if the LSI facility had been called-in.

104. Any loss, therefore, in those circumstances did not arise from a loan relationship between SCL and Lavangna, but from substantially wider considerations which on the particular facts resulted in the Lavangna Guarantee.

105. For completeness, we also consider the unallowable purpose rules in sections 441 and 442 CTA 2009 - which the FtT did not consider necessary to consider (given its rationale). For the avoidance of any doubt, however, we also agree with HMRC that if there was, indeed, a payment which otherwise "qualified under the loan relationship rules", it would have been disqualified on the basis of an "unallowable purpose." There was absolutely no evidence advanced that the purpose of the payment was "amongst the business or other commercial purposes of the company" (as is required by section 442(1)) particularly in a context where SCL was not in the same group as Lavangna. We acknowledge that SCL argues that any "unallowable purposes" were "so incidental that a just and reasonable proportion would not lead to any disallowance." With respect, no evidential position for this was put forward before either the FtT or, on appeal this Tribunal and, in any event, is inconsistent with the findings at first instance, for example FtT [70].

106. In all of the circumstances, the collateral purposes which the FtT found (and which this UT supports) were geared more principally to the support of the wider MAR Connection rather than the furtherance of SCL's own business purposes.

107. Bringing all of that to a conclusion, in the first place we agree with the principal conclusion of the FtT that SCL is not entitled to a debit in respect of the Lavangna Sum so that any remaining analysis is unnecessary. But even on the alternative basis advanced we do not find it could be brought into account, and, finally, even if it were, it would be disallowed by virtue of the unallowable purpose rules because SCL failed to demonstrate that it was "amongst the business or other commercial purposes of the SCL (per s.441)".

DISPOSITION

108. For all these reasons we dismiss SCL's appeal to the Upper Tribunal. Given that is our determination, we do not see the need to burden this decision further in commenting on HMRC's alternative arguments for upholding the FtT Decision.

COSTS

109. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE HUDDLESTON

JUDGE VINESH MANDALIA

Release date: 22 June 2026