Neutral Citation: [2022] UKFTT 166 (TC)

Case Number: TC 08493

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/04496

CORPORTION TAX – sections 441 and 442 CTA 2009 – whether non-trade loan relationship debits to be disallowed – UK company incorporated to be the holding company to acquire a US group by stock purchase – cross-jurisdiction intercompany loan between US parent and UK holding – whether the loan relationship had an 'unallowable purpose' – whether securing a 'tax advantage' was not the main or one of the main purposes – whether attribution on a just and reasonable basis – appeal dismissed

Heard on: 23 to 25 March 2021 followed by written submissions on 6 and 16 April 2021

Judgment date: 19 April 2022

Before

TRIBUNAL JUDGE HEIDI POON

Between

JTI ACQUISITION COMPANY (2011) LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: John Gardiner QC, and Michael Ripley, of counsel, instructed by RPC LLP

For the Respondents: Elizabeth Wilson QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. JTI Acquisition Company (2011) Limited ('the Appellant') is a UK company, and at all material times was a member of a corporate group with its ultimate parent company in the US. The appeal concerns four closure notices issued by the respondents ('HMRC'), which disallowed the Appellant's claim of non-trade loan relationship debits in relation to four accounting periods ending 31 October 2012 to 2015 pursuant to section 441 of the Corporation Tax Act 2009 ('CTA 2009').

2. The interest debits on the borrowing claimed by the Appellant totalled £40,050,776, and the corporation tax at stake is approximately £9m.

ISSUES FOR DETERMINATION

3. The parties have agreed that the issues for determination in this appeal are:

(1) Whether the main purpose, or one of the main purposes, for which the Appellant became party to the loan relationship with its immediate US parent company was to obtain a UK tax advantage for the purposes of sections 441 and 442 of CTA 2009; and

(2) If there was an unallowable purpose, what proportion of any relevant debit is attributable to that unallowable purpose.

EVIDENCE

4. The hearing bundle of 524 pages contains 384 pages of documents (paginated 141 to 524) which were distilled by the respondents from some 17,000 documents (unindexed and unsorted)[1] served on the Appellant's behalf during the enquiry. These 384 pages of core documents represent the cohort of legal instruments in connection with the non-trade loan relationship, and the contemporaneous correspondence of the key personnel involved in structuring the financing scheme of which the non-trade loan relationship formed a part.

5. The rest of the hearing bundle comprises the parties' pleadings, Tribunal Directions, the enquiry correspondence and closure notices, inter-partes correspondence, Mr Michael Olsen's witness statement with exhibits, and three other affidavits. The authors of these affidavits (Krueger, Kulasa, Hodgetts) have not been called as witnesses for cross-examination; hence their statements have no status as evidence, and no reference is made thereto.

6. Mr Michael Olsen was the only witness called by the Appellant. From 2008 to 2012, Mr Olsen was Executive Vice President (EVP) and Chief Financial Officer ('CFO') of Joy Global Inc, which was the ultimate US parent of the Appellant. Mr Olsen was also group Treasurer from 2008 to 2011, and the US director of the Appellant from 8 June 2011 until 31 January 2013. Mr Olsen has since retired; he gave evidence as a former office-holder. Whilst parts of Mr Olsen's evidence are helpful in understanding the operation and business of the group, I find that the material aspects of Mr Olsen's testimony as respects the adoption of the acquisition and financing structure involving the Appellant represent an account of events given with the legal issues in mind. Consequently, I have accorded more weight to contemporaneous records, and the email exchanges at the material times amongst the key personnel. I consider the value of Mr Olsen's oral evidence lies chiefly in the opportunity which cross-examination afforded, by subjecting the documentary evidence to critical scrutiny, and for the Tribunal to ascertain the intentions of the relevant decision makers that represented the corporate body.

[1] Ms Wilson's skeleton argument at [62]: 'The Appellant candidly refers to the fact that it served 17,000 unindexed and unsorted documents on HMRC in purported compliance with HMRC's requests for disclosure. …. The Appellant's conduct might have been relevant to costs had the Appellant not opted out of the cost regime, ...'

AGREED FACTS, TRANSCRIPT AND POST-HEARING SUBMISSIONS

7. The Statement of Agreed Facts ('SOAF') is appended as Annex 1. The respondents' position is that the SOAF is not a full statement of all the facts which HMRC regard as relevant to the issues in this appeal. The Tribunal has made its own findings of fact in addition thereto.

8. A transcriber was in attendance throughout the proceedings, and the transcript for each day was made available soon after the day's hearing.

9. The parties made submissions on the law within the allotted time for the scheduled hearing. The submissions on Mr Olsen's evidence were made sequentially in writing post-hearing pursuant to Tribunal's Directions of 29 March 2021.

10. The respondents' 12-page submissions were lodged on 6 April 2021, together with annotated diagrams to illustrate the acquisition and finance structure in question as directed by the Tribunal. The Appellant's 14-page submissions were lodged on 16 April 2021, with two appendices: (a) excerpts of transcript the Appellant relied upon, and (b) annotations of those transcript excerpts contained in the respondents' 12-page submissions. The Appellant also lodged the additional authority of *Euromoney*.

LEGISLATIVE FRAMEWORK

Loan relationship regime

11. Part 5 of CTA 2009 sets out the provisions for the loan relationships regime. Section 441 is germane to this appeal, and provides as follows:

> '**441 Loan relationships for unallowable purposes**
>
> (1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.
>
> (2) The company may not bring into account for that period for the purposes of this Part so much of any credit in respect of exchange gains from that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
>
> (3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
>
> (4) An amount which would be brought into account for the purposes of this Part as respects any matter apart from this section is treated for the purposes of section 464(1) (amounts brought into account under this Part excluded from being otherwise brought into account) as if it were so brought into account) as if it were so brought into account.
>
> (5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.
>
> (6) For the meaning of "has an unallowable purpose" and "the unallowable purpose" in this section, see section 442.'

12. Section 442 gives the statutory definition of 'unallowable purpose' as follows:

> '**442 Meaning of "unallowable purpose"**
>
> (1) For the purposes of section 441 a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company –
>
> (a) is party to the relationship, or

> (b) enters into transactions which are related transactions by reference to it, include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.
>
> (2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.
>
> (3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company –
>
> (a) is party to a loan relationship at any time, or
>
> (b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.
>
> (4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not –
>
> (a) the main purpose for which the company is party to the loan relationship or, as the case may be, enters into the related transaction, or
>
> (b) one of the main purposes for which it is or does so.
>
> (5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person.'

13. Section 476(1) imports into Part 5 of CTA 2009 the statutory definition of 'tax advantage' under section 1139 of the Corporation Tax Act 2010 ('CTA 2010'), which states inter alia:

> '**1139 "Tax advantage"**
>
> (1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section.
>
> (2) "Tax advantage" means –
>
> (a) a relief from tax or increased relief from tax,
>
> (b) a repayment of tax or increased repayment of tax,
>
> (c) the avoidance or reduction of a charge to tax or an assessment to tax,
>
> (d) the avoidance of a possible assessment to tax,
>
> (da) the avoidance or reduction of a charge or assessment to a charge under Part 9A of TIOPA 2010 (controlled foreign companies)
>
> [(e) & (f)…]
>
> (3) For the purposes of subsection 2(c) and (d) it does not matter whether the avoidance or reduction is effected –
>
> (a) by receipts accruing in such a way that the recipient does not pay or bear tax on them, or
>
> (b) by a deduction in calculating profits or gains.'

Anti-arbitrage rules

14. The anti-arbitrage provisions under Part 6 of the Taxation (International and other Provisions) Act 2010 ('TIOPA') were introduced in 2005. The arbitrage rules as concerns this appeal were replaced with effect from 1 January 2017 by new anti-avoidance provisions under the heading of 'Hybrid and other Mismatches' as Part 6A TIOPA. The superseded Part 6 of TIOPA (in force up to 31 December 2016) would be the relevant enactment during the period of the loan relationship debits under appeal, see **Annex 3**.

15. In broad terms, the anti-arbitrage rules sought to counteract transactions involving hybrid entities, or instruments which would otherwise have given rise to a UK tax advantage, such as when a taxable deduction is not matched by a taxable receipt, or when there is a mismatch between jurisdictions in the characterisation of a related transaction. Neither party has made direct submissions that the anti-arbitrage rules are relevant to the substantive issues under appeal. The anti-arbitrage rules are here noted for reference only, as being an area of legislation featuring in the documentary evidence.

AUTHORITIES

16. The authorities lodged for the hearing, together with the additional authorities lodged by the parties, are set out in Annex 2.

THE FACTS

Background

17. The Appellant was a member of a corporate group with its ultimate parent being Joy Global Inc, whose business is in manufacturing mining machinery and equipment. The headquarters for the Joy Global group were in the United States up until April 2017, when the group was acquired by the Japanese company Komatsu Mining.

18. In the year 2011, during which the relevant transactions in relation to this appeal took place, the Joy Global group had significant operations in Australia, Brazil, Canada, Chile, China, South Africa, the US, the UK, and sales offices in numerous other locations.

Corporate entities

19. The entities involved in the funding scheme relevant to this appeal are the following:

(1) Joy Global Inc (‘**JGI**’ or ‘**Joy Global**’).

(2) Joy Technologies Inc (‘**JTI**’ or ‘**Joy Technologies**’)

(3) JTI Acquisition Company (2011) Limited (‘**the Appellant**’ or ‘**JTIAC**’)

(4) LeTourneau Technologies Inc (‘**LTT**’ or ‘**LeTourneau**’)

(5) Joy Global Cayman Finance Limited (‘**JGCF**’ or ‘**JG Cayman Finance**’)

Key personnel

20. The email exchanges of the key personnel during the crucial period of June 2011 that led to the decision and implementation of the funding scheme resulting in the non-trade loan relationship debits are important contemporaneous records for the purposes of this appeal. The surnames of the dramatis personae are used for ease of reference, and the date and time of an email is noted as an aid to establish the chronological order of the cohort of exchanges, with the time zone difference between the US and the UK being factored in where relevant.

<u>US-based</u>

(1) Edward (Ted) Doheny, President and Chief Executive Officer of JGI (‘**Doheny**’)

(2) Mike Olsen, Executive Vice President, Treasurer and Group CFO (‘**Olsen**’)

(3) Patrick O’Brien, Group Vice President of Tax (‘**O’Brien**’)

(4) John David (or Sean) Major, Group General Counsel / Attorney in Fact (‘**Major**’)

(5) Robbin Krueger, Joy US Corporate Legal (‘**Krueger**’)

(6) Kim Kodousek, Joy US Corporate Legal (‘**Kodousek**’)

(7) Paul Wagner, JGI Tax (‘**Wagner**’)

(8) Matt Kulasa, JGI Tax (‘**Kulasa**’)

(9) Erik Eighme, Clifton Davis, etc. of Deloitte US-Milwakee (‘**Deloitte-Milwakee**’)

UK-based

(10) Mike Mannion, CEO of Joy UK at the time (‘**Mannion**’)

(11) Wayne Kisten, CFO of Joy UK at the time (‘**Kisten**’)

(12) Keri Tither, Deloitte UK Tax (‘**Tither**’)

(13) Vicki Willis, then Group Accountant of Joy UK (‘**Willis**’)

(14) Catherine Hodgetts (née Leith), UK company secretary of Joy Mining Machinery Limited (‘**Leith**’ or ‘**Hodgetts**’)

Chronology of key events

21. The chronology of the key events is set out below to assist with the navigation of the substantive documents relevant to this appeal.

(1) 6 April 2011 – Project Longhorn presentation by Merrill Lynch to JGI in relation to the acquisition of LTT.

(2) 13 May 2011 – JGI as buyer entered into a Stock Purchase Agreement with Rowan Company Inc as seller in connection with the acquisition of LTT.

(3) 2 June 2011 – O’Brien emailed Olsen/Major referring to a conference call with Deloitte Milwaukee and Deloitte UK on that day to discuss ‘the global tax planning idea’ in relation to the acquisition structure for LTT, attaching a 9-step plan called ‘the Skinny’.

(4) 6 June 2011 – O’Brien emailed Kisten (UK) with extracts of 2 June email, advising that the acquisition structure ‘will provide Joy UK some fairly substantial prospective tax savings’. A Draft Workplan and a copy of Deloitte presentation were attached.

(5) 8 June 2011 – JTI incorporated a new UK Ltd (JTIAC, i.e. the Appellant), appointing Olsen, Kisten and Mannion as directors.

(6) 16 June 2011 – Doheny sent directors of JTIAC a Memo asking them to consider the LTT acquisition without regard to the broader benefits.

(7) 20 June 2011 – Directors of JTIAC held a board meeting and approved the allotment of shares, the borrowings of $500m (as interest free loan) and $550m (as loan notes), and the assignment of the purchase agreement of LTT.

(8) 21 June 2011 – Directors of JTIAC entered into the loan agreement with its US parent JTI for the loan of $550m.

(9) 22 June 2011 – Directors of JTIAC as assignee entered into the Assignment and Assumption Agreement over the rights and obligations of JGI as purchaser of LTT.

(10) 28 September 2011 – Directors of JTIAC approved the documents required in connection with the listing of the loan notes on the Channel Islands Stock Exchange.

‘Project Longhorn’ to acquire LeTourneau

I. Merrill Lynch presentation – 6 April 2011

22. A detailed presentation containing 35 slides by Bank of America Merrill Lynch to JGI was entitled Project Longhorn and comprised two parts: (a) Drilling Products Business Case, (b) Longhorn Stock Valuation Discussion, with appendices on: (i) additional valuation detail, and (ii) drilling products and systems buyers.

Drilling Products Business Case

23. The summary considerations for the business case covered: (i) macro environment, (ii) sector environment, (iii) Longhorn potential in relation to offshore products and drilling systems, and (iv) the large universe of third-party interest.

24. The business case was underpinned by a vast quantity of technical details, with slides containing high density of data, statistics, economics, historical and projected financials, stock price performance of the Longhorn shares. For example, one slide for 'Positioning for the Next Owner' in the drilling products business sector shows how to 'maximise value' by bringing together four 'building blocks' of the business, namely:

(a) Largest share of current operating Jackup Designs;

(b) Largest installed equipment bases / aftermarket;

(c) Newbuild cycle;

(d) Turnaround story and operational improvements.

25. Another slide on the business case for 'Supporting a premium valuation for a post-acquisition sale' stated that 'Third-party sales boost upon separation from Ranch' because:

> 'Ranch's competitors more likely to order jackups and equipment when Longhorn is independent;
>
> Demostrate and quantify Longhorn design advantages.'

Longhorn stock valuation discussion

26. On valuation of the Longhorn stock, the presentation slides again encapsulate a high volume of information, comprising graphs and histograms to summarise value indicators by key competitors, stock price performance, valuation multiples (e.g. public market multiples/transaction precedents) to arrive at the 'Illustrative Valuation' for Longhorn, focusing on drilling products *plus* mining.

27. The focus of the additional valuation detail on Longhorn stock shows the discounted cash flow analysed under the headings of: (i) mining with synergies, (ii) mining without synergies, (iii) offshore products and steel products, (iv) drilling systems, and (v) return on investment.

II. The Stock Purchase Agreement of Longhorn shares – 13 May 2011

28. On 13 May 2011, JGI (as Buyer) and Rowan Companies Inc (a Delaware corporation as Seller) entered into a stock purchase agreement, with the recitals stating as follows:

> 'A. Seller owns all of the outstanding common stock, par value $.001 pe share (the "Longhorn Stock") of LeTourneau Technologies Inc, a Texas corporation ("Longhorn");
>
> B. Longhorn is engaged in the business of (i) designing, manufacturing, distributing and selling equipment, and providing aftermarket parts and services, for the oil and gas drilling industry, including jack-up rig kits, complete land rigs, mud pumps, drawworks, top drives, …(ii) designing, manufacturing, distributing and selling a range of high-performance front-end loaders serving the mining industry worldwide, (iii) designing, manufacturing, distributing and selling new and refurbishing used log stackers for the forestry industry mainly in the United States, (iv) designing, manufacturing, distributing and selling high strength specialty carbon, alloy and tool steel plate products (together with any other businesses of the Longhorn Entities incidental thereto, collectively, the "Business").
>
> C. Seller desires to sell to Buyer the Longhorn Stock, and Buyer desires to purchase from Seller the Longhorn Stock, …' (underlining original)

29. The purchase consideration was stated in the agreement to be $1.1 billion. The purchase price, after working capital price adjustments, was $1.053bn dollars. Other relevant details from the Agreement for present purposes include:

(1) *Closing date*, defined under section 11.1 as:

'the date on which the Closing occurs, which shall be five Business Days following the date on which all conditions set forth in Article 6 shall have been satisfied or waived. …'

(2) Article 6 of the Agreement set out the *Conditions to Closing* whereby the various particulars of the representations and warranties required as conditions are specified, and certain covenants stipulated are to be performed.

The 'Global Tax Planning' Idea

I. Inception of the global tax planning idea – 2 June 2011

Deloitte's proposal on 'LeTourneau Acquisition Structure'

30. Deloitte made a presentation on 2 June 2011 to Joy Global, with the subject heading being '*LeTourneau Acquisition Structure*' as stated on the first slide, which also contained the caveats of it being at 'Draft' stage, and 'solely for the information and internal use of Joy Global Inc and not to be relied upon by any other person or entity'. The presentation illustrated what came to be known as the '9-step plan' with a sequence of flow chart diagrams. Each step is designated by a heading description on the slide, (italicised below with emboldened abbreviations being used for entities). The flow charts represent an entity in the shape of a rectangle, and use an arrow with annotation to denote the flow and nature of the funds.

31. The plan contained 10 steps at this stage, and the first step was concerned with the funding requirement for the acquisition of LTT. The draft plan evolved and came to be known as the 9-step plan in subsequent correspondence between Deloitte and the group, when the first step was no longer being carried in the discussion of the plan. The first step in this draft plan as presented by the slides, is re-labelled below as Step 0 to bring the step numbers in line with how subsequent correspondence made reference to these steps; (underlining below is added).

(1) Step 0: ***JGI*** *<u>borrows</u> approximately $500m from a third-party bank which will be used with available cash to fund the acquisition*; the fund flow for 3 entities shows:

(a) from Bank (with a dotted arrow) to JGI for '*$500 million note*';

(b) JGI (in brackets 'US') with '*$600m*' designated within the entity;

(c) JTI (in brackets 'US') as an entity below JGI.

(2) Step 1: ***JTI*** *<u>forms</u> a new UK Limited Company ('**UK Ltd**'), or uses an existing UK entity, which elects to be treated as a disregarded entity for US federal income tax purposes*; the flow chart has no arrow, and shows the vertical group structure of 3 entities:

(a) JGI (US) at the top;

(b) JTI at the middle; and

(c) UK Ltd at the bottom; (represented by a rectangle in dotted lines, *and* with a dotted-lined oval inserted within probably to denote its non-US jurisdiction).

(3) Step 2: ***JGI*** *<u>contributes</u> $550m to **JTI***; the flow chart is as per step 1, but with an arrow to show the funds flow of '*$550 million equity*' from JGI to JTI; (UK Ltd as an oval within a rectangle is in solid lines at Step 3).

(4) Step 3: ***JGI*** *<u>loans</u> $550 million to **JTI** in exchange for an interest bearing note*; the flow chart is identical to the one for step 3, except for the annotation of the arrow being changed to '*$550 million interest bearing note*'.

(5) Step 4: ***JTI*** *<u>contributes</u> $50 million to **UK Ltd** as equity*; the flow chart is the vertical structure of the 3 entities at step 2, with an arrow flowing from *JTI* to *UK Ltd* for '*$50 million equity*'.

(6) Step 5: ***JTI*** *transfers* *$500 million to* ***UK Ltd*** *in exchange for a dollar denominated non-interest bearing note*; the flow chart is identical to step 5, except for the description to the arrow from JTI to UK Ltd being *'$500 million non-interest bearing note*'.

(7) Step 6: ***JTI*** *loans* *$550 million to* ***UK Ltd****. The loan should be capable of being listed as a Eurobond (or in the form of multiple original issue discount notes)*; the flow chart is identical to step 6, except for the description to the arrow from JTI to UK Ltd being '*$500 million loan'*.

(8) Step 7: ***UK Ltd*** *acquires* *LeTourneau ('****LTT****') for $1.1 billion cash and makes a Section 338(h)(10) election*; the 3-entity flow chart in previous steps becomes a 4-entity chart, LTT added below UK Ltd; (LTT is represented as a rectangle in solid lines).

(9) Step 8: ***JTI*** *forms* **Finance Company** *(either a US LLC or a Cayman Islands Ltd). If a Cayman Islands Ltd is formed, an election is made to treat it as a disregarded entity for US income tax purposes*; the flow chart shows as follows:

(a) The vertical line of group structure with JGI on top of JTI;

(b) JTI with two branches: right-hand-side 2-entity branch UK Ltd, and LTT vertically below UK Ltd;

(c) JTI's left-hand-side branch in dotted line, Finance Company in a rectangle with an inserted oval in dotted line, sitting at the same level as UK Ltd.

(10) Step 9: ***JTI*** *contributes* *$550 million note* *receivable from UK Ltd* *to* ***Finance Company***; the flow chart is as Step 8, with the Finance Company is solid lines and an arrow from JTI to Finance Company for funds flow denoted as '*$550 million equity*'.

32. The presentation concluded with a slide headed 'Considerations' with 7 bullet points.

(1) UK Ltd's board of directors hold a meeting to consider the acquisition and funding of the acquisition of LTT.

(2) UK Ltd functions as a holding company (i.e. dividend exemption, capital gains exemption, no withholding tax on interest and dividends).

(3) Interest income at Finance Company is likely not subject to local income tax.

(4) Finance Company and UK Ltd are disregarded entities for US federal income tax purposes; therefore, the loans are disregarded.

(5) LTT and its US subsidiaries will be included in JGI's consolidated US tax group.

(6) Facilitates s338(h)(10) election for LTT and relevant US subsidiaries and opportunity to make s338(g) election for foreign subsidiaries.

(7) Business and tax considerations:

(a) UK Ant-arbitrage
(b) Deductibility of interest (UK and State)
(c) Timing of deduction
(d) Withholding tax
(e) Currency
(f) Accounting

The 9- step 'Skinny': O'Brien to Olsen/Major – 2 June (5:04pm)

33. On 2 June 2011, O'Brien as the Group Vice President of Tax, sent an email to Olsen and Major, with Deloitte-Milwaukee copied in, under the subject heading of '*LeTourneau Acquisition Structure (Draft Summary for Mike Olsen and Sean Major) – Please review and comment*'. The email started by referring to 'our conference call today with Deloitte Milwaukee

and Deloitte UK to discuss in more detail the global tax planning idea they have brought to our attention vis a vis LeTourneau'.

34. The 'global tax planning idea' was set out in a summary which became the 9-step plan coined as '*The skinny*' in O'Brien's email.

> '**The skinny is as follows**:
>
> 1. [JTI] will create a new [UK Ltd].
>   a. For US income tax purposes JTI will make a "check the box election" for UK Ltd.
>   b. UK Ltd will be a USD functional currency entity.
> 2. [JGI] will contribute $550 million to JTI.
> 3. JGI will loan $550 million to JTI in exchange for an interest bearing note.
> 4. JTI will contribute $50 million to UK Ltd.
> 5. JTI will transfer $550 million to UK Ltd in exchange for a dollar denominated non-interesting bearing note.
> 6. JTI will lend $550 million to UK Ltd. The loan will be listed as am Eurobond in either the Caymans Islands or the Channel Islands.
>   a. The listing of the loan as an Eurobond does not have to occur immediately.
>   b. The listing of the loan as an Eurobond would have to occur prior to the payment of any interest.
> 7. UK Ltd acquires [LTT] for $1.1 billion cash. UK Ltd makes the IRC Section 338(h)(10) election.
>   a. Since UK Ltd will be a check the box (disregarded entity) for US income tax purposes the tax attributes of the step up in [sic] the inside basis of LeTourneau will inure to JTI's benefit.
> 8. JTI will form a Cayman Islands Finance Company, Cayman Islands Ltd ('Cayman').
>   a. For US income tax purposes JTI will make a "check the box" election for Cayman.
> 9. JTI will contribute [UK Ltd] $550 million note receivable to Cayman.'

Action plan to implement the Skinny

35. After setting out the Skinny, O'Brien's email continued by setting out an action plan.

> '**Action Steps Required – Next week**
>
> 1. Create UK Ltd and fund as outlined above.
>   a. Key is to have UK Ltd created as quickly as possible.
>   b. Deloitte would guide Eversheds (or other UK law firm as directed by Sean Major) on the preparation of all documents necessary for the creation of UK Ltd.
> 2. Form BOD [i.e. Board of Directors] for UK Ltd.
>   a. BOD should be comprised of both US and UK directors.
>   b. BOD will hold a meeting in which the acquisition and funding of the acquisition of LeTourneau is considered.
> 3. Work with Ken Stark in drafting the necessary loan agreements to effect the steps outlined above.

4. Coordinate with Corporate Legal on the preparation of the necessary US documentation for the equity transactions between JGI and JTI and JTI and UK Ltd and Cayman.'

36. O'Brien's email attached a copy of 'the slides that were used in today's discussion with Deloitte' (*supra*), and ended by noting that 'Erik Eighme [of Deloitte] will be sending over their fee proposal for this project later today or early tomorrow.'

37. O'Brien's email was forwarded directly by Major at 5:11pm on the same day to Kim Kodousek of Joy Global US (Corporate Legal), marked as 'High' importance, with a one-line message: 'Pls take a look and tee up Eversheds [UK law firm] for what could be a fire drill'.

Deloitte's fee proposal: O'Brien to Olsen - 3 June (6:13pm)

38. On 3 June 2011, O'Brien emailed Olsen regarding '*Deloitte Fee Quote – LeTourneau Acquisition Structure*'. In this email, O'Brien mentioned the two options in the fee proposal 'for supporting the interest deduction'.

(1) Option 1 was to obtain an Advance Thin Capitalisation Agreement ('**ATCA**') at a total fee in the range of $280K to $340K.

(2) Option 2 was 'less costly' by $10 to $15K by asking Deloitte to prepare 'a debt defense report' (American spelling stands as in original).

39. Deloitte's fee proposal was summarised by O'Brien in this email as follows:

> 'Attached is Deloitte's fee quote in USD translated at today's spot (GBP to USD):
>
> Design, Implementation and Technical Analysis – $240 to $290K
>
> Assistance in obtaining an [ATCA] – $40 to $50K.
>
> Total quote $280 - $290K.'

40. O'Brien then set out his 'professional opinion' on the two options:

> 'If we wanted to shave $10 to $15K from the above, Deloitte could prepare a debt defense report that we could use *if HMRC later challenged the appropriateness of the interest deduction claimed in the UK that this structure creates.* In my professional opinion this would not be the way to go.
>
> At this juncture Deloitte has indicated that obtaining the ATCA would be fairly straightforward.
>
> *[Option 1] This would give us assurance that the future deductions would be honore*d and would eliminate any current or future FIN 48 issues being raised by E&Y.
>
> *[Option 2] The less costly approach would not provide the same level of comfort from a HMRC audit risk perspective*. E&Y may also raise the FIN48 Issue since they may be reluctant to accept Deloitte's debt defense report being MLTN'. (sub-paragraphing and italics added)

41. There were earlier exchanges of email between O'Brien and Olsen regarding Deloitte's fee quotation. Olsen asked O'Brien for his recommendation regarding the two options. Olsen found O'Brien's initial response 'confusing', and O'Brien's 6:13pm email sought to clarify his opinion. In his initial response to Olsen, O'Brien set out the estimated UK tax implications:

> 'The first full year anticipated income tax savings in the UK would be approximately 13 times their fee quote (conservatively computed as follows: $500 million *4% *23%). In addition we would have net state income tax savings inuring to JTI conservatively estimated to be somewhere in the range of $300 to $500K per year.'

II. Implementation of the idea: from 'Skinny' to Workplan

Informing Joy UK of UK newco: O'Brien to Kisten (of Joy UK) – 6 June (9:50am)

42. On 6 June 2011, the global tax planning idea was communicated to Kisten as the CFO of Joy UK by O'Brien in an email containing the Skinny and the Action Plan as first sent out to the US key personnel on 2 June 2011. O'Brien's email to Kisten opened with the paragraph:

> 'With the acquisition of LeTourneau we have identified an acquisition structure that will provide Joy UK with some fairly substantial prospective tax savings.'

43. The email continued by informing Kisten of the incorporation of a new UK entity.

> 'The new UK entity (Eversheds will be providing us with its formal name later today or tomorrow) … and will include [Kisten], Mike Mannion and Mike Olsen as directors. Eversheds is working up the documents to form the UK entity and may contact you … for information needed to make you and Mike Mannion directors.'

44. There were two attachments accompanying the email, one being Deloitte's presentation slides, and the other was referred to as 'the draft work plan for the steps necessary to have the acquisition structure in place prior to closing date for the LeTourneau acquisition which should occur later this month'.

UK company secretary advised of UK Newco: Krueger to Leith – 6 June (4:49pm)

45. Krueger emailed Catherine Leith (Joy UK) with the subject heading above, and advised:

> 'Just a heads up, in case you didn't already hear. We are forming a new UK company (probably tomorrow) to handle our acquisition of LeTourneau. See the attached step plan from Deloitte.
>
> … Eversheds is doing the heavy lifting on the formation. I have let them know you should be nominated as company secretary…'

46. On 7 June (7:15am), Leith replied, stating that '*this was news to me*', and gave a 10-point summary of what she knew after having spoken to Eversheds, some of which are:

> '1. Eversheds to perform the incorporation service – same day electronic incorporation with Companies House;
>
> 2. Eversheds to draft first resolution (forming company, appointing dirs., and sec, and allotting shares to JTI) and complete the appropriate registers;
>
> 3. Initial share allotment – perhaps 1 ordinary share $1,000? Fully or partly paid? We can then fill it up when the loans are in place? Whatever the business decide; ...'

Draft Workplan for status update: O'Brien to Eversheds & Deloitte team – 7 June (15:43)

47. O'Brien emailed various individuals from JGI, Deloitte (UK and US), and Eversheds with the Draft Workplan entitled '*Joy Global Inc. LeTourneau Acquisition Structuring*'. It is a 3-page Excel document to monitor the progress of the first 7 steps set out in the 9-step Skinny. The 5 column headings are: (i) Action/Document, (ii) Target/completion date, (iii) Responsible Party, (iv) Status, (v) Description/Comments.

48. From the Target/completion date column, the window of operation to complete the 7 steps spanned the 10-day period from 6 June 2011 to 15 June 2011.

49. Tax personnel was named as the sole or one of the responsible parties in Steps 1,3, 5 and 6, being the four steps related to 'UK Newco' formation and funding in the 7-Step Workplan.

(1) Step 1: *JTI forms a 'wholly owned' UK Newco and elects to treat that entity as disregarded for US income tax purposes* with 11 sub-entries, three of which named tax personnel as one of the responsible parties:

(i) Entry (d) – *Prepare information pack on the potential LTT investment for consideration by BOD members*: Joy Global Tax, along with Eversheds /Deloitte UK; with comment to entry (d) being:

> 'Deloitte UK will coordinate with JGI Tax and Eversheds to prepare package of information on the investment opportunity being considered by [JTIAC]. Board agenda and proposed minutes being progressed by Eversheds. <u>Draft of Note for Step 6 needs to be included in this package.</u>' (underlining original)

(ii) Entry (h) – *Obtain US Tax Identification number for UK Newco:* Joy Global Tax.

(iii) Entry (i) – *File US Check-the-box election to treat UK Newco as a disregarded entity*: Joy Global Tax.

(2) Step 3: *JGI loans $550M to JTI* – entry (b) and (d) in relation to the drafting and finalising the loan agreement: Joy Global Treasury/Tax; with comment to entry (b):

> 'Corporate Treasury, working with Corporate Tax, will draft loan agreement. Deloitte UK will provide a sample note with preferred terms from a UK perspective.'

(3) Step 5: *JTI contributes $500M to UK Newco as Equity in the form of USD denominated non-interest bearing note* – entry (b) and (d) in relation to drafting and finalising the loan agreement: Joy Global Treasury/Tax.

(4) Step 6: *JTI loans $550M to UK Newco in the form of a USD denominated Eurobond*: Eversheds/ JGI Treasury & Tax for the step heading, with comment to the step heading being:

> 'Eversheds will take the lead in drafting this note using terms similar to those provided by Deloitte UK for Step 5. Terms should be such that the note can be listed as a Eurobond. Note will be denominated in USD. Final interest rate to be determined. *Loan must be registered as a Eurobond by the time of the first interest payment*.' (italics added)

(5) Step 6 – entry (b) *Draft Loan Agreement* by 9 June 2011, responsible party JGI Treasury & Tax, with comment being:

> 'Corporate Treasury, working with Corporate Tax, will draft loan agreement. Deloitte UK has provided a sample note as guidance.'

UK elements update: Tither to O'Brien/Olsen etc & Deloitte US – 7 June (UK 12:09pm)

50. Tither of Deloitte-UK emailed on 7 June 2011 (12:09pm) regarding the UK elements in the 'Draft Work Plan', which was an expansion of the first 7 steps in O'Brien's 'Skinny'.

(1) Step 1d: Prepare informational package containing information on the potential LeTourneau investment for consideration by BOD members, Tither advised:

> 'The documentation … (being presentation given to the Board of Directors, prepared by Merrill Lynch, to support the business case for the transaction, and the LeTourneau company presentation) should be included in the board pack to help the directors of [JTIAC] to make a fully informed decision to proceed with the acquisition. …'

(2) Step 1d involved the circulation of the board pack, and Tither referred to further discussion with an Andy Wilde to determine whether 'to include additional information over and above the documentation received to date'.

(3) Step 1d involved the convening of an actual board meeting to approve the acquisition of LTT by JTIAC. Tither advised that 'it would be beneficial if there could be someone available at the meeting (i.e. via telephone) who could answer any questions the Board members may raise'.

(4) Step 5: *JTI contributes $500M to UK Newco as Equity in the form of a USD denominated non-interest bearing note*, Tither advised that 'a sample note' would be circulated to the group by 'tomorrow morning UK time'.

(5) Step 6: *JTI loans $550M to UK Newco in the form of a USD denominated Eurobond*, Tither attached 'a sample note in a format suitable for listing on an exchange subsequent to the transaction', and advised that the listing particulars could be circulated in due course if required.

51. In relation to Tither's point about '*someone who is key to the internal Joy discussions regarding the acquisition*' be available for the board meeting, Krueger (JGI Tax) replied (7 June, 1:08pm) to Tither as follows:

> 'Are you aware that all of the board members of [JTIAC] are employees of ours? They are well informed on our intentions and, as a matter of fact, one is Joy Global's CFO [i.e. Olsen] and a contributing architect of this plan. He is one of the two "senior management" that is updated by Pat [i.e. O'Brien] on a nightly basis.'

52. Regarding the inclusion of further documentation, Krueger responded:

> 'I'm not really in favour of presenting more paperwork to them, especially in such a formal manner. …
>
> I would like to dispense with the formality of providing a board packet…'

The jot-down list of concerns: Willis to Kisten/O'Brien/Wagner/Tither – 8 June

53. In reply to Kisten who asked Vicki Willis (Group Accountant Joy UK) 'to jot down any concerns' regarding the proposed funding for JTIAC to acquire LTT, she emailed her list:

> '1) Worldwide debt cap (we are currently trying to reduce net debt in all UK companies)
>
> 2) CFC
>
> 3) Thin Capitalisation – I understand that loans must be of an amount that a third party would be prepared to lend and at interest rates that they would be prepared to give us.
>
> 4) This appears to be being done solely for tax planning and therefore may impact our low risk rating. We have stressed to CRM[2] in the past we do not go into this type of transaction.
>
> 5) We will need to explain to our CRM why we have this new company as it will be part of our UK tax group.
>
> 6) If I understand correctly the balance sheet will be:
> Investments 1,100M
> Loans 1,050M

[2] CRM stands for 'Customer Relationship Manager' and is an HMRC officer assigned to a corporate group to liaise with the Senior Accounting Officer ('SAO') of the taxpayer company. The SAO regime is intended to be constructive and pro-active in identifying and resolving any potential issues under all heads of tax, including tax risks. (See *Castlelaw (No. 628) Ltd & Anor v HMRC* [2020] UKFTT 34 (TC) at [15]).

> Share Capital 50M
> The interest will be charged on the loan which will make the reserves negative – then there will be a dividend block. Am I missing something?'

54. Kisten replied, and asked Willis to raise the issues with O'Brien and Wagner, to whom Willis forwarded the list, with Leith, Kisten, Tither copied in. Wagner responded as follows:

> 'A lot of these questions are driven by the UK's concern in changing profile to a more aggressive structure. We went through something similar in a recent Australian transaction where Deloitte's Australian team had to do some hand holding on these types of questions/issues…'

III. O'Brien's 'Tax Planning Matrix' and the 'math' behind – 7 June 2011

Tax Planning Matrix not to go into Board Pack: Wagner to Leith/Deloitte – 10 June (3:16pm)

55. In accordance with Step 1(d) in O'Brien's Workplan (§49(1)), Leith was putting together the 'Board Pack', which contained the documents and information prepared by Deloitte UK, JGI Tax, and Eversheds for the first board meeting of JTIAC. On 10 June (3:06pm) Leith emailed the Board of Directors of JTIAC with two zipped attachments. The body of text set out the contents of the Board Pack, to cover two areas regarding: (a) Incorporation Resolutions, and (b) Allotment, Financing, and LeTourneau Acquisition Resolutions.

56. Under the heading of 'Documents in support of the resolutions', the Board Pack as collated by Leith included: (i) Bank of America Merrill Lynch Presentation, (ii) JGI Management Information presentation, and (iii) O'Brien 'Tax Planning Matrix' (of 7 June).

57. While Leith's email was to the three directors only (i.e. Olsen, Mannion, and Kisten), Wagner (JGI Tax) became privy to Leith's email, and responded, with a host of others being copied in from Deloitte-UK Manchester, as well as O'Brien and Krueger. The email was marked for '*High*' importance, and was addressed to 'Catherine and Deloitte Team'.

> 'I do not think we should include the "Tax Planning Matrix" from Pat O'Brien should be included [sic] in this correspondence. Assuming Deloitte agrees I will ask that you please re-send this email without that attachment.'

Tax Planning Matrix re-surfaced to check the 'math': Hodgetts to Kulasa – 13 Nov 2012

58. The 'Tax Planning Matrix (prepared by O'Brien) which Wagner directed Catherine Leith not to include in the Board Pack in June 2011 surfaced in a later email from Catherine Hodgetts (formerly Leith) to Matt Kulasa of JGI on 13 November 2012.

> 'Matt, attached is the tax planning document that was circulated at the time of the incorporation of JTIA – I calculate that the saving of having it in the UK is actually \$3.8m rather than the \$6.8m on the document. I just wanted to check with you as I have put \$3.8m per annum in the justification.'

59. Below her email to Kulasa, Hodgetts attached O'Brien's email of 7 June 2011, which was circulated to Hodgetts, Kisten, Willis, Mannion, Kulasa, (plus two others), and Olsen, Major, Kodousek, and Wagner, under the following subject heading, and the cover email to the attached matrix referred to 'the math' behind the tax planning.

> '***Tax Planning Matrix – LeTourneau Acquisition – Estimated Tax Savings Using 5% interest rate***
>
> As a follow up to today's call, attached is the summary of the [sic] tax planning and "the math" supporting estimated annual global tax savings which would inure to the benefit of our organization as long as the debt structure remains in place. Of course the actual tax savings will hinge on the interest rate that is used for the intercompany transactions. For now we are estimating the interest rate to be 5%.'

60. The Tax Planning Matrix itself is a succinct document with three emboldened headings:

> '**Facts**
>
> [JGI] will acquire [LTT] and its subsidiary group for approx. $1.1billion.
>
> [LTT] and subsidiary group primary manufacturing facilities are in the USA.
>
> [LTT] and subsidiary group sell product throughout the world.
>
> [LTT] and subsidiary group sell product throughout the world.
>
> [LTT] and subsidiary group manufacture OEM and parts for two key segments, mining and oil drilling.
>
> The funding of [LTT] will be a combination of US cash and US bank borrowings.
>
> **Tax Planning Structure**
>
> [The 9-Step Plan as presented in the 'Skinny' email]
>
> **At the end of the day the structure is as follows**
>
> JGI's investment in JTI will have increased by $550 million
>
> JGI has a loan receivable from JTI in the amount of $550 million
>
> JTI has a $550 million investment in UK Limited
>
> JTI has a $550 million investment in Cayman Islands Finance Company
>
> UK Limited [JTIAC] will have a loan payable to Cayman Islands Finance Company.'

61. The 'math' behind the planning matrix as referred to in O'Brien's cover email of 7 June 2011 started by stating the following assumptions:

> 'Assume interest rate on all debit within the structure is 0.05 [i.e. 5%]
> Assume UK tax rate is 23% on a prospective basis
> Assume US federal income tax rate is 35%
> Assume JTI US state income tax rate is 2% and
> JGI US state income tax rate is 0%
> Functional currency throughout global structure is USD

The 'math' as projected by O'Brien on 7 June 2011

62. A separate schedule contained the 'math' following the above assumptions. O'Brien used the full-digit figures in his email, which are tabulated below in terms of millions.

Debt		Interest Expense	US Tax	State Tax	UK Tax
JTI US	- $550M	- $27.5M	- $9.625M	- $0.5M	0
UK Ltd	- $550M	- $27.5M	0	0	- $6.325M
Loan Rec'ble		Interest Income			
JGI US	$550M	$27.5M	$9.625M		
Net reduction in income tax			$0	-$0.5M	-$6.325M
	Annual Net Reduction in global income tax				**-$6.875M**

IV. Incorporation of UK new company – 8 June 2011

63. The UK Newco was given the name JTI Acquisition Company (2011) Limited and was incorporated on 8 June 2011. Its principal activity was described as intermediate parent undertaking, and the directors appointed were Olsen, Mannion, and Kisten.[3]

64. JTIAC had no employees other than the directors, no physical business in the UK, no cash or assets until given to it at the appointed time according to the Deloitte Step plan. In Leith's email of 10 June 2011 to Olsen, Mannion, and Kisten regarding the Board Pack, she set out the contents of the 'Incorporation Resolutions' to include:

> 'Draft Minutes attached. Including Banking Resolution (JGI Standard Banking Resolution giving JGI officers permission to create and arrange bank accounts for JTI Acquisition Co (2011) Ltd. Previous consent given.'

V. JTIAC's Board meeting resolution to acquire LeTourneau – 20 June 2011

Draft Board Meeting Minutes: Krueger to Leith/Eversheds – 15 June (4:34pm)

65. Krueger (JGI Legal) emailed Eversheds in respect of the contents in the draft minutes for the upcoming UK board meeting, and referred to his attempt to 'blackline the changes' and a new draft attached for review. Krueger informed Eversheds that the letter referred to at Section 1.3 of the minutes would be signed by Doheny and distributed to the board the next day. The draft minutes were to be adopted as the minutes of the board meeting to be held by the directors of JTIAC to pass the resolution to acquire LeTourneau.

66. The letter mentioned at Section 1.3 of the Minutes was signed by Doheny as President and Chief Operating Officer and dated 16 June 2011, (the 'Memo' as it was also sent to the directors as a memorandum). The Memo was addressed to Olsen, Mannion and Kisten as directors of JTIAC. It reads as follows:

> 'As you are aware, [JTIAC] has been presented with the opportunity to acquire the shares of [LeTourneau]. As you contemplate this opportunity, and the benefits this acquisition could provide to [JTIAC], it is important that you consider this transaction on its own merits only and not give consideration to any broader benefits that may be derived by the group of the companies owned by Joy Technologies Inc.'

Minutes of the Board Meeting held in US-Milwaukee 20 June 2011 at 6:30am

67. Olsen (in the chair) and Mannion and Kisten present, with Leith, Major, Krueger, O'Brien, Kodousek in attendance. Section 1.3 of the Minutes states: 'The Directors confirmed that in advance of the meeting they had each received a letter from the Company's shareholder, [JTI], wherein they were asked to consider the Acquisition [of LTT] on its own merits, and without consideration of any broader benefit to the group of companies owned by [JTI]'.

68. Section 2.1 of the Minutes states 'the purpose of the meeting was to consider and, if thought appropriate, for the Company to approve':

(a) the allotment of 49,999 shares;

(b) the borrowing of US$500m from JTI under a loan agreement;

(c) the borrowing of US$550 from JTI by issuing loan notes;

(d) the assignment of the Stock Purchase Agreement,

(e) the acquisition of LeTourneau.

[3] All three directors were appointed on 8 June 2011. Mannion retired on 21 May 2012; Kisten retired on 15 November 2012; and Olsen retired on 1 February 2013,

VI. Financing of JTIAC to complete LTT purchase – 21 &22 June 2011

Share capital allotment - $50m: Step 4 of Skinny

69. In June, an application was made for the allotment to JTI of 49,999 Ordinary Shares in JTIAC of US$1000 in the value of $50m. This application was subsequently approved in the Board Minutes of JTIAC dated 20 June 2011.

Quasi-equity (interest free loan) - $500m: Step 5 of Skinny

70. On 21 June 2011, a non-interest bearing loan agreement (Note Number 923) between JTI and JTIAC in the sum of $500m was executed, which was informally referred to as 'quasi-equity' as no interest was payable on this loan. Sean D Major as 'Secretary' signed the 'Lender' (JTI) and John D Major as 'Attorney in Fact' signed for the 'Borrower' (the Appellant).

Intercompany debt - $550m interest bearing loan notes: Step 6 of Skinny

71. By deed executed on 21 June 2011 by John D Major as Attorney in Fact, witnessed by Kim Kodousek, consequent upon the resolution of its board of directors passed on 20 June 2011, JTIAC authorised $550m Loan Notes to be constituted by the deed (internal reference 'Loan Note Instrument 921'). The relevant clauses for the purposes of this appeal are:

(1) **Interpretation** – '**Interest Payment Date** means October 15th of each year beginning October 15, 2011 … ' (clause 1.1 amongst others definitions).

(2) **Interest –** 'The Company shall pay to the Noteholders interest on the outstanding Notes calculated using the One Year LIBOR rate plus 3.5% per annum. Interest will be paid in arrears on each Interest Payment Date' (clause 4.1).

(3) **Redemption –** 'On June 21, 2021, the Company shall redeem all the Notes at par together with all interest accrued to the date of redemption ...' (clause 5.4).

(4) **Transfer** – 'Every instrument of transfer must be signed by or on behalf of the transferor and the transferor shall remain the owner of the Notes to be transferred until the name of the transferee is entered in the Register in respect thereof' (clause 8.3).

Assignment of JGI's Stock Purchase Agreement to JTIAC to acquire LTT

72. On 22 June 2011, JGI's Stock Purchase Agreement dated 13 May 2011 with Rowan Companies Inc to acquire LeTourneau was assigned to the JTIAC, and was completed on the same day. Article 11.5 of the JGI Stock Purchase Agreement provides, *inter alia*, that:

> '… (without the consent of Seller) Buyer may assign this Agreement in whole or in part to any of its Affiliates (including, without limitation, Buyer's right to acquire the Longhorn Stock); provided further that no such assignment shall release the assignor from any of its obligations hereunder.'

73. The 'Assignment and Assumption Agreement' entered into by Joy Global (Assignor) and JTIAC (Assignee) on 22 June 2011 is a two-page document of 9 clauses, signed by: (a) Sean D Major in his capacity as 'Executive Vice President/ General Counsel and Secretary' of Joy Global Inc. and (b) John D Major in his capacity as 'Attorney in Fact' on behalf of JTIAC.

74. Olsen confirmed in evidence that John D Major was given power of attorney by the directors of the Appellant to execute all the documents necessary for the Deloitte scheme. When asked whether Sean D Major and John D Major is the same person but signing in different capacities, Olsen think it was '*the same guy'* but '*not sure why there are two different signatures … why it was John D versus Sean*'[4] (see also §70).

[4] Transcript Day1/175-176 during cross-examination of Olsen; signatures on p356 (Loan Note Instrument 925), and p359 (Note No. 923).

Flow of funds to complete LTT acquisition

75. The first bank statement for JTIAC's account with JP Morgan Chase Bank was for the period 15 to 30 June 2011, and captured the transactions to bring the Appellant into funds to complete the LTT purchase. The bank statement shows JTIAC's address at 100E Wisconsin Avenue, Suite 2780, Milwaukee in US, which is the registered address of Joy Technologies Inc. Three sums were deposited as 'Book Transfer Credit' on 21 June 2011 (the eve of the completion date) with the following description:

(1) From JTI ref: Loan 922 re LeTourneau Technologies Inc acquisition $550,000,000.

(2) From JTI ref: Loan 923 re LeTourneau Technologies Inc acquisition $500,000,000.

(3) From JTI ref: Equity contribution [reference] $50,000,000.

76. On 22 June 2011, the withdrawal took place to complete the purchase of LTT in the sum of $1,045,653,609.41, leaving a closing balance of $54,346,390.59.

VII. Assignment and Listing of the Loan Notes Receivable – 8 August 2011

77. By letter dated 8 August 2011, John David Major[5] as Director of the newly formed company Joy Global Cayman Finance Limited ('JGCF') in Cayman Islands wrote to JTIAC at its UK address in Worcester, and enclosed a transfer deed executed in relation to the assignment of the $550m interest bearing loan note receivable by JTI in favour of JGCF.

> 'We write further to the deed ("**Deed**") dated June 21, 2011 constituting the Loan Notes. … pursuant to clause 8 of the Deed, Joy Technologies Inc. … has transferred US$550,000,000 Loan Notes (being its entire holding of Loan Notes) and its rights to interest accrued thereon (US$3,100,350 at the date of transfer) to Joy Global Cayman Finance Limited.'

78. On 28 September 2011, the directors of JTIAC approved the documents required in connection with the listing of loan notes on the Channel Islands Stock Exchange.

Post-acquisition responses/ reporting/ governance issues

I. To insurer Commercial Credit – July 2011

79. On 6 July 2011, Global Commercial Credit LLC as the insurer of accounts receivables for several scrap metal suppliers to LTT wrote to Olsen to enquire about the new legal structure of LTT following its change of ownership. Olsen forwarded the enquiry to O'Brien, who replied to the insurer on 'the legal entity organisation structure post acquisition' as follows:

> '1. [JTI] is a wholly owned subsidiary of [JGI]. Joy Global Inc is the publicly traded entity (JOYG) which operates as a holding company.
>
> 2. The UK entity, [JTIA] is a disregarded entity for US federal income tax purposes.
>
> 3. *The Cayman Islands entity holds a note receivable from the UK entity, this structure is set up from a tax planning perspective and there are no employees or tangible assets in either entity other than the intercompany notes receivable/payable.*
>
> 4. The legal organisation structure of [LTT] did not change with our acquisition.' (emphasis added)

[5] See §74, the John David Major as the Director of JGCF would be 'the same guy' as Sean D or John D Major.

II. Olsen's presentation to JGI Board of Directors – 3rd quarter 2011

80. On 22 August 2011, Deloitte made a presentation to JGI on 'Global Tax Vision', which set out a global tax strategy focused on the Effective Tax Rate ('ETR'). The LeTourneau acquisition structure was included as an example.

81. Olsen's 3rd Quarter 2011 presentation to the main Board of Directors of Joy Global Inc on 'Global Tax Strategy' of the group adopted some of the key slides in the Deloitte's Global Tax Vision presentation. The contents of these slides (headings in italics) included:

(1) On *Keys to Effective Tax Rate* to deliver a Global Tax Strategy, the focus is on some 'simple principles', such as: (i) align income with low taxed jurisdictions, (ii) minimise non-US income tax, (iii) repatriate high taxed earnings, and so on. Two primary areas of strategic focus are identified as generally the driver for multinational's ETR, namely: (i) financing, and (ii) business Model optimisation.

(2) On *ETR Drivers and Key Considerations*, a comparison of the tax rates in other jurisdictions of the group entities against the US tax rates is set out, followed by an entry to highlight the UK jurisdiction with the acquisition of LTT as an example:

– Acquisition of LeTourneau results in an annual tax benefit of $6.2 million. $2.1m is reflected is reflected in the FY11 forecasted income tax rate.

(3) On *Keys to Strategic Approach* – the tax component is an important strategic focus to each of the three keys; for example:

<u>Tax</u>

– Identify opportunities for local country tax reduction

– Increase availability and predictability of foreign tax credits

<u>Treasury Management</u>

– Tax and operationally cash deployment in key jurisdictions
– Tax efficient repatriation

<u>Operating Model</u>

– Identify opportunities to improve ETR based on the relationship between the location of value drivers and the location of income streams

(4) *Vision for the Future* – 'minimise Non-US tax (Australia and UK Financing)' being the first item of the vision.

(5) *Key Benefits and Considerations* – JTIAC's acquisition of LTT is the first main reporting item, in terms as follows:

– Interest expense at [JTIAC] is likely deductible for UK tax purposes and available to offset income of Joy Global's UK group (via group relief). Initial annual benefit of approximately $6.2M ($550M*4.5% (estimated interest rate) * 25% (tax rate)). …

– Interest expense at [JTI] is likely deductible for state tax purposes…'

III. Directors' concerns about corporate governance – March 2012

82. In mid-March 2012, Kisten and Mannion expressed concerns as the UK directors of the Appellant in relation to corporate governance and the absence of any LTT performance information. In an email to O'Brien, Mannion and Hodgetts copied in, Kisten stated: 'For the sake of good governance we need to undertake board meetings and preserve the tax benefits.'

Advance Thin Capitalisation Agreement – 2 November 2011

83. On 2 November 2011, on behalf of the Appellant, Deloitte UK applied to HMRC for an Advance Thin Capitalisation Agreement ('ATCA'). The financing for the acquisition of the LTT shares by the Appellant in the sum of $1,100m was detailed in a table:

Sources	
Equity share capital	$50m
Quasi-equity	$500m
Loan from JTI (USD LOBOR + 3.5% interest)	$550m
Total	$1,100m

84. The clearance sought by the application was stated in the following terms:

> '… [to] provide confirmation that the loan notes issued by JTI AcqCo to JTI in the amount of $550m, and subsequently contributed by JTI to JGCFL, can be considered to be at arm's length for the purposes of the UK transfer pricing legislation contained at Part 4, TIOPA 2010 and that the interest arising on this debt will be deductible for tax purposes in the following accounting periods, provided the following covenants are met:

Year ended 31 October	2011	2012	2013	2014	2015
Interest Cover (EBITDA: Net Interest)	2.5x	3.0x	3.5x	4.0x	4.0x
Leverage (Net Debt: Equity)	1.5x	1.25x	1.0x	1.0x	1.0x

85. The application was granted by HMRC for the period 22 June 2011 to 31 October 2015 in accordance with section 229 TIOPA 2010.

Interest /Dividends in relevant accounting periods

86. In the accounting period ending 31 October 2011, no interest was paid by the Appellant, contrary to the terms of the deed executed for the loan notes of 21 June 2011. In an email dated 25 April 2012 in response to the discussions between Willis and Ernest Young, UK ('EY UK') as Joy UK's accountants on the deductibility of interest for JTIAC, O'Brien wrote under the subject heading of: '*Group interest payments – 12 month rule*', and gave direction <u>not</u> to include any interest for the period ending 31 October 2011.

> 'Please bear in mind that we do not want any deductible interest for the UK FY 11 filing as this would cause the UK tax rate to be less than that which was used for the purposes of determining the US FY 11 foreign tax credit. This was communicated to E&Y US and E&Y UK tax groups during FY11 close.'

87. Interest was paid from 2012 onwards, and the interest paid in 2013, 2014, 2015, and 2016 was financed by reductions in debtor balances and the issue of further loan notes to the Cayman Islands Finance Company. These interest payments represent the non-trading loan relationship debits over the four accounting periods, which were then surrendered to other Joy UK companies as group relief.

88. Up to and including 28 October 2016, no dividends have been paid up from LTT.

Enquiry to closure notices

89. By letter dated 28 September 2018, HMRC Officer Gallacher asked RPC and Deloitte to highlight and identify contemporaneous evidence that JTIAC's acquisition of LTT, and the associated finance, were driven by commercial reasons. Ten specific questions were set out for response. By letter dated 31 October 2018, the responses from RPC were general and unsupported by any contemporaneous evidence within the 17,000 documents provided.

90. Excerpts of RPC's reply of 31 October 2018 to some of the questions are as follows.

(1) The financial statements for accounting period ending 31 October 2011 show that the principal entities acquired by JTI were based in the US, Canada, Brazil, Australia and China. As there are no obvious links, can you please explain why the UK was chosen as the location for a holding company? (Qt 2)

> 'The following comments are without prejudice to our primary position … that JGI's decision to incorporate a holding company at UK level is not relevant to determining the statutory question at hand. …'

(2) How did the directors expect to service and repay the debt? Did they seek any accounting projections showing that the company can pay interest, repay principal and realise profit over the period of the lending? (Qt 4)

> '… Debt was expected to serviced by paying dividends up to the UK company. … There would also be earnings from the acquired group … Post-acquisition, however, [LTT] produced less cash than had been originally forecast …'

(3) To what extent were other options explored? Why was the target not directly acquired by a US company? Why not another territory? (Qt 5)

> 'We would again emphasise our view that any decision made at group level to incorporate a holding company in the UK is irrelevant to the question of whether JTI [sic should be JTIAC] had an unallowable purpose. …'

(4) What are the 'broader benefits' being referred to in the Memo from Doheny when the UK company were asked to consider the opportunity without taking into account broader benefits.? (Qt 6)

> '… Mr Doheny was asking board directors not to consider any broader benefits and to consider the transaction on its own merits, so the motive for raising this question is not understood.'

(5) How do the directors of the company independently monitor the LTT investment in the light of the ongoing financial commitment? How has value been extracted from it at the UK level? (Qt 8)

> 'There were periodic (quarterly) board of director meetings where updates on the [LTT] acquisition/performance were provided and discussed. …'

(6) Up to and including 28 October 2016, why were no dividends paid up? Is there any dividend block below JTIAC? (Qt 9)

> 'There was no dividend block. …Excess cash of JTI was swept to JGI … in the normal course of cash management, with JTI carrying a note receivable. No value was stripped out of the entity that would hinder any ability it otherwise would have had to service this debt. There were accordingly no reasons to pay any dividends up.'

(7) Has the loan in question since been assigned to another group company from Joy Global Cayman Finance Limited? If so, in which territory? (Qt 10)

> 'In January 2017, the loan was assigned to a Barbadian-based entity (Joy Global China Holding SRL). The loan was repaid by December 2017. There was no tax benefit generated as the UK entity was not generating taxable income (interest payments would otherwise have been deducted).'

91. On 13 November 2018, Officer Gallacher gave his view of the matter in a 13-page letter, having sieved through circa 17,000 documents provided by RPC with 'minimum levels of itemisation', Officer Gallacher gave his view that:

> ‘HMRC can find no evidence that what the directors were seeking to achieve as a result of the expenditure included a main business or commercial purpose.’

92. Officer Gallacher’s view of matter concluded by stating that HMRC ‘are conscious that we may not have had the chance to analyse everything’ within the 17,000 documents, and invited the Appellant to respond by 18 January 2019 with any key information or documents that support the view that the transaction as structured was commercial.

93. On 13 May 2019, Officer Gallacher issued closure notices for the four accounting periods ending 31 October 2012 to 2016. The conclusion given in each of the four notices is the same:

> ‘HMRC considers that the amounts of Non-Trade Loan Relationship (NTLR) debits included by [JTIAC] in its company tax returns in respect of the loan relationship which existed between [JTIAC] and Joy Global Cayman Finance Ltd in each of the periods, including this one, fall to be disallowed in full. As such, these NTLR debits cannot be brought into account in [JTIAC] for corporation tax purposes under S441 CTA 2009.’

Olsen’s witness evidence

94. The material aspects of Mr Olsen’s evidence with which I have reservations are illustrated by some of his replies during cross-examination. Olsen’s evidence was completed on Day 1 of the hearing with the Tribunal sitting later to accommodate the time zone difference with Mr Olsen attending from the USA. For ease of reference, his replies and citations of documentary evidence are italicised. All references to the transcript are from Day 1, and the page references within the Day 1 transcript are given in brackets.

On the proposal being a ‘group policy’ and ‘intercompany transaction’

95. When asked about his knowledge of the Deloitte acquisition structure as producing a tax benefit for the group, Olsen accepted that: ‘*It was an added benefit of the acquisition*’ (169).

96. In relation to Olsen acting in his capacity as a director of the Appellant, several questions were put to him.

(1) That the directors of JTIAC had no remit to negotiate some other acquisition structure, the reply was: *It was a yes or no*. (164-165)

(2) When asked about the final decision taken at the Board Meeting, and the Memo to assign the Stock Purchase Agreement, and ‘being realistic’ about his ‘fiduciary duties’:

> Q: … on the precise terms it was offered which is with the particular borrowing and on the understanding that you would then surrender the tax debits and various elections would be made, you were conscious of the fact that by taking the assignment, a benefit would be conferred to the other members of the UK group?
>
> A: *Based on the Deloitte material, yes.* (172)

(3) When asked about the wider group benefit as a ‘group policy’ (172-173) –

> Q: …that ‘Joy Global does it all the time to consider the wider group benefit as a factor in taking a decision’; that ‘you can’t ignore the fact that the [Appellant] company is a member of the group?’
>
> A: *Right, once again I will go back to the point made earlier: Joy Global would not allow tax to drive the strategic decision-making but at the same time, Joy Global will do everything in its power to exercise transactions in the most tax efficient process*.

> Q: As a director of the Appellant, you knew and understood that as a group policy?
>
> A: *It's not only a group policy, but it would be a policy for all of the Joy Global entities around the world, and once JTI Acquisition came into play, it was also their driver, to be as tax efficient as possible*.
>
> Q: And that included the benefit of the other members of the UK group?
>
> A: *That's correct*.

Board meeting decisions as the culmination of a process of thinking and consideration

97. When asked that by 20 June when the Board of Directors met to pass the resolutions, and that 'it was right that the other two [UK] directors relied on you' because 'you had done a lot of thinking and considering and analysis' and spoken to O'Brien about the Deloitte acquisition structure, and that 'you knew all of that' before 20 June, Olsen replied: '*I did*'(169).

98. Olsen's knowledge of the Deloitte plan was tested further with the following questions.

(1) That Catherine Leith had included the Tax Planning Matrix as one of the documents 'relevant' to the decisions to be taken at the Board Meeting of 20 June 2011, Olsen did not deny it: '*Yes, it is difficult for me to express an opinion on what Catherine thought, but certainly her email seems to have included it.*' (171)

(2) When asked that 'it didn't matter whether the tax matrix was included or not because you had read it and seen it and understood it': '*That's correct.*' (171)

(3) In relation to Paul Wagner's email not to include the Tax Planning Matrix –

> Q: … that the board packs were put together for presentational issues. So they didn't want the board resolution, the minutes, to record that you had had the tax matrix in front of you. That is what this email suggests? (171)
>
> A: *… Paul was a middle tax manager and I am not sure what his thought process was, but certainly the Deloitte proposal was known by Wayne [Kisten] … being the CFO, he certainly would have been aware of the Deloitte material.* (172)

On whether 7 steps or 9 steps in the plan

99. In relation to the Draft Workplan which contained the first 7 steps, Olsen was asked if anyone suggested that 'you should do anything other than steps 1 to 9' (184-185) –

> A: *I guess I wouldn't characterise myself as being happy to stop at step 7, … our objective was relative to where the debt was, you literally could stop at point 7 … I was looking at it from the perspective of placing debt outside the US. …*
>
> A: *No, I don't think that the nine-step plan was ever discussed as the alternative of stopping at step 7. …*

Replies on being cross-examined on email exchanges

100. The following email exchanges were highlighted in cross-examination.

(1) In relation to Krueger's email of 6 June 2011 to give Leith '*a heads up*' of the formation of a new UK company *'to handle our acquisition of LeTourneau. See the attached step plan from Deloitte*', Olsen was asked that Krueger provided the plan because 'that is why you are choosing the UK company' –

> '*I think it is hard to interpret what somebody was thinking whenever they communicated. But in this instance, I wouldn't come away from this saying that she believed that the UK company was strictly driven by tax rationale*.'

(2) In relation to Willis' email '*to jot down any concerns*' including the fact that '*this seems to be done solely for tax planning and therefore may impact our low risk rating*', the question was put to Olsen that the UK group was 'not enthusiastic about having the LeTourneau acquisition being placed into the UK using the Deloitte tax scheme':

> '*… Once again, ... Vicky Willis is a group accountant. I am not even sure if Vicky Willis was in the UK tax department, and so I think a lot of the issues that Vicky is raising are Vicky Willis's issues*.'
>
> '*... So, I think the issues that Vicky raises were probably very valid concerns on her part and had to be addressed.*' (underlining added)
>
> To the question that the UK group 'regarded this as an aggressive and rather unappealing transaction': '*Well, once again, was it the UK group or was it Vicky Willis?*'

Non-tax-advantage considerations for choosing a UK company to acquire LTT

101. Olsen was cross-examined on the rationale in choosing the UK as the jurisdiction to structure the LTT acquisition that was unrelated to a tax purpose.

(1) On the *Conditions to Closing* under Article 6 of the Agreement (112-113) –

> Q: … the closing of this agreement … pretty much by five days … [when] all the work [under Article 6] should really have been done under this May 2011 agreement. So all of the work behind the scenes necessary for those representations and warranties and covenants to be given. That would be quite a considerable amount of work presumably, about the financial status of the company …
>
> A: *You are talking about the due diligence?*
>
> Q Yes. ... all the representations made about the group being purchased and the purchaser, that they are all true. So things have to be evidenced; the due diligence. All that work would have been done, or the obligation waived five days before closing?
>
> A: *According to this agreement, that is correct.*
>
> Q: And all of that work would have been done either by Joy Global or teams at its direction?
>
> A: *Yes. The due diligence would have been done by the various functions of Joy Global ... treasury function ... tax function ... comptrollership organisation ... environmental issues ... a whole functional team put together to go through this due diligence exercise.*

(2) When asked that by the time of the Board Meeting on 20 June 2011, 'there was really no risk… that the sale would not go ahead' – (114)

> A: *The sale between Rowan and Joy Global –*
>
> A: – *was locked into place*. (114)

(3) Olsen continued by directing his reply towards the assignment of the agreement:

> A: *The issue now was where was Joy Global going to assign the agreement. ... those directors [of the Appellant on 20 June] ... had the ability to say stop. And they had no obligation to Rowan at this point in time.* (114)
>
> Q: And if they had done that on 20 June, Joy Global would have taken as the transfer of [the LTT] stock. It would have had to, wouldn't it –

> A: *Not sure. Not sure. My guess – I shouldn't say guess, but my assumption would be that Joy Global would then have looked to another of its non-US entities to proceed with their agreement ...'* (115)
>
> Q: But it would be one that was pre-existing?
>
> A: *No, not necessarily. ... there is almost always an entity that is created to complete the acquisition*. (115)

(4) On assignment to the Appellant being done on 'Closing date' –

> Q: … But [the assignment form JGI to the Appellant] was done on closing date, so it was just to make sure that nothing would disturb the main transaction if you like, between the group and Rowan.
>
> A: *Yes, I don't recall that, but that certainly seems logical*. (175)

(5) Regarding the professional fees to Deloitte of circa $240,000 to $290,000 for their tax advice, Olsen referred to the sum as '*pretty insignificant*', a '*relatively small number*' (136), but accepted that '*it certainly was an amount [Deloitte] were looking for in order to provide us with assistance in putting together the tax structure*' (136). Later in his evidence, he was asked about the fees in relation to the 9-step plan –

> Q: You didn't make the decision in a vacuum, did you? … you paid over ¼ of a million in fees, you knew that if the company agreed to take the assignment and take the precise funding on offer, and to do … steps 1 to 9, it would give the group the benefit that everyone had gone to all this trouble in preparing and paying fees for. You knew, didn't you, that you would get that benefit for the group? (166)
>
> A: *That certainly was one of the outcomes of the decision to acquire LeTourneau. The best outcome of acquiring LeTourneau was the business rationale for the acquisition. But this certainly was one of the outcomes*. (166)

102. In his witness statement and in his oral evidence, Olsen referred to various non-tax-advantage considerations to support the use of a UK company for the LTT acquisition. A host of questions were put to Olsen to establish what these non-tax-advantage considerations pertained by his own description.

(1) *Critical mass*: Olsen referred to 'critical mass' as a reason for preferring a jurisdiction: '*an entity that has significant critical mass and the ability to generate cash to repay debt*' (143).

(2) *Synergy perspective*: a commercial reason to buy LTT, and then the decision was taken where to place the debt (112-113) –

> A: *We are going to spend $1.1 billion and this tax piece is going to save a couple of million dollars. So the important part of the [LTT] acquisition was what it was going to be from a synergy perspective on our surface equipment business, as we had to compete with a significantly larger competitor in Caterpillar. The important piece ... was to get the product that LeTourneau brought with the acquisition. ... The tax piece was an element of the decision process after we decided where the acquisition was going to reside. ... Hindsight is always 20/20, but my suspicion is that [suppose] there was none of this [query] of US benefit down the road, we probably would have done exactly the same thing, because the key element was where was that debt going to be placed.* (124-125)

(3) *Diversifying borrowing*: to place debts outside the US because '*all of our borrowings*' had been historically '*accumulated*' in the US –

> A: … *I guess to summarise, my understanding is that in order to make sure that all of the debt associated with the acquisition of LeTourneau* *did remain* *[sic?] in the US, Joy Global made the determination that the acquisition was going to be executed outside of the US.* (121, underlining added)[6]
>
> A: *The reason we wanted the debt to be outside the US was we had accumulated all of our borrowings in the US. We had a significant acquisition on the horizon with IMM and we just wanted to be able to diversify our borrowings of the global company*. (187-188)

(4) *Repatriation of income*: a reference to the benefit of being able to defer US income tax by holding assets in non-US subsidiaries (183-184) –

> Q: … the repatriation argument doesn't run. The Deloitte plan … doesn't give you that repatriation benefit?
>
> A: *I don't know the answer to that. I can't imagine that Deloitte would come up with a proposal that would put Joy Global at a tax disadvantage.*
>
> Q: Well, it didn't… It absolutely preserved all of the US tax advantage that would come with a US company buying LeTourneau, but it added a UK tax deduction. … the US group got all of the commercial benefits of acquiring LeTourneau. It preserved all its US benefits but it just added on this UK benefit?
>
> A: *I am actually not familiar enough with the tax laws to actually address the point you are making. ...*

(5) *Ease of incorporating a new company*: in response to a question asked by the Tribunal, Olsen put forward a tentative non-tax-advantage consideration (187) –

> Judge: … If there are other kind of strategic reasons for placing an entity in a specific jurisdiction, because you said tax is secondary and it is always the strategic reasons for making the plan, so what is behind that thinking in choosing the UK jurisdiction then?
>
> A: *My suspicion – once again, we are talking about a decision that took place 10 years ago but certainly part of that decision process was probably the ease of incorporating a new company in a particular jurisdiction. That was probably part of it. As I had mentioned, we had a significant critical mass in the UK and so those were the factors that were probably driving the decision to have this acquisition corporation established in the UK.*

103. The Appellant's post-hearing submissions included four-page excerpts of Olsen's evidence (as Appendix A) to highlight essentially the same points which Olsen had repeated variously. The same points are represented by the following:

(1) that 'the tax implications associated with [the LTT] acquisition were not the primary driver of the acquisition' (105-6);

(2) 'the primary driver as to where the [LTT] acquisition took place was really where was the best place to place the debt associated with the acquisition' (133);

(3) 'the benefit was to take borrowings and put them outside the US and for this particular transaction, the UK was chosen for that purpose' (155).

[6] By email dated 24 March 2021, Mr Harry Williams of HMRC asked Opus as the provider of the transcribing service for these proceedings to check the recording that there was a 'Not' missing in Mr Olsen's statement at 121/line10 as in 'all of the debt associated with the acquisition of LeTourneau did [NOT] remain in the US'. Opus confirmed that the word 'Not' was not used in Mr Olsen's oral evidence.

APPELLANT'S CASE

104. On the first issue as to whether the Appellant had a main purpose of obtaining a tax advantage, Mr Gardiner cited Hansard on the Commons Debates of the predecessor provisions of sections 441-442, and submitted that the provisions were expressly not intended to catch a deduction for the ordinary borrowing costs for commercial investments.

(a) In particular, the borrowing cost (on commercial terms) of acquiring shares in a company at an arm's length price from an outside vendor is not and was never intended to be caught.

(b) There is nothing artificial about the financing in this case. It is standard debt/equity financing expressly agreed by HMRC to satisfy thin capitalisation requirements. HMRC's case here, in the Minister's terms, is 'clearly nonsense'.

(c) Minister's comments (in Hansard) were consistent with pre-existing law which had decided in no uncertain terms that the expectation of an ordinary deduction for incurring business expenditure is not an 'object' or 'purpose' of the transaction at all: *Kleinwort Benson* and *Newton*.

(d) This appeal is the first case in which HMRC have challenged loan relationship debits arising on debt finance where it is common ground that: (i) the finance was on arm's length terms, and (ii) the finance was directly used by that company to invest in a commercial acquisition from a third party.

(e) In such circumstances, it is frankly impossible to conclude that the interest relief is a main purpose of the loan relationship.

105. The answer to the relevant statutory question as regards issue 1 is obvious: JTIAC entered into the loan relationship in order to acquire LTT and that is exactly how the funds were used. Deloitte was engaged in part to ensure that the financing was on ordinary commercial terms and satisfied HMRC of the same in the Advance Thin Capitalisation Agreement. The only UK tax relief arising was the relief for interest paid and on that loan finance. To describe that relief as a purpose to being party to the loan relationship is, in the words of Cross J in *Kleinwort Benson* 'ridiculous' because 'a deduction for the cost of debt finance is the automatic and ordinary consequence of borrowing for a commercial acquisition'.

106. Still less could such debits have been JTIAC's <u>main</u> purpose. Those amounts represent the arm's length interest cost for an indebtedness of $550 million used as part finance for an acquisition of an asset worth roughly twice that amount. The very suggestion that JTIAC entered into the debt finance for the purchase of a company worth over $1billion so that it could obtain interest deduction of a value over the four years of less than £9m is 'absurd'.

107. Issue 1 is concerned with whether JTIAC had a main purpose of obtaining a <u>UK tax advantage</u>. Consequently, the US tax position, and in relation to what HMRC describe as a 'double dip' is irrelevant. The unallowable purpose envisaged by s 442(3) is expressly concerned with <u>UK tax</u> only. The UK already has robust rules around thin capitalisation as part of the arm's length test in ITOPA 2010 as well as the anti-arbitrage rules. It is no part of the purpose of the unallowable purpose test in ss 441-442 to act as a fall back in catching any case where a multinational is attracted to make a debt-financed acquisition through a UK company.

108. On the second issue of 'just and reasonable apportionment', Mr Gardiner submitted that the issue only arises if JTIAC had both a commercial purpose and a UK tax advantage purpose. The question is how much of the debits should JTIAC be entitled to as funding its commercial acquisition? And the answer to that must be that Parliament intended that JTIAC would receive a deduction for its funding costs at a normal commercial rate, no more and no less. Indeed, as

agreed in the Advance Thin Capitalisation Agreement, JTIAC should be entitled to the debits in full. At para 12(6) of the Appellant's skeleton, it states:

> 'The purpose of that application [i.e. ATCA] was to confirm the "*deductibility of interest arising on related party debt provided to [JTIAC] by [JTI] to facilitate the acquisition of LTT*.' (italics original)

109. Mr Gardiner's closed his submissions by summarising the material points as follows:

> (a) Section 441 is looking at a company within the charge to UK corporation tax and at the purpose of the loan relationship that the company has entered into.
>
> (b) The existence of the company and its loan relationship are givens.
>
> (c) The company is the Appellant and its loan relationship is that created by its borrowing of US$550 million from its parent JTI.
>
> (d) One is then required to ask what the Appellant's purpose is in being party to that loan relationship.
>
> (e) The answer to that question is to deploy the funds borrowed of US$550 million in buying the asset, namely the shares in LTT, and to hold the same as an investment which it did throughout.
>
> (f) The Appellant's purpose (let alone its main purpose) is not to pay the interest; that is not its purpose. The obligation to pay the interest is a cost of the funds and is an agreed commercial cost of funds since that is a consequence of the advance thin capitalisation agreement and not a purpose of the Appellant in being party to the loan relationship.
>
> (g) It follows that the tax relief for the debits constituted by the payment of the interest cannot be a purpose of the Appellant in being party to the loan relationship, let alone a main purpose.

110. Mr Gardiner then moved on to the 'subsidiary points' in his submission, which are:

> (a) Tax in sections 441 and 442 is UK tax, and all the material about US tax at 'double dip' is irrelevant.
>
> (b) It is in any event absurd to suggest that anyone would enter into a transaction to acquire an asset costing $1.053 billion for the sake of achieving a tax relief worth just under £9 million over four years and doing so by borrowing $1 billion and being liable to repay the same.
>
> (c) If all of the above were wrong and there was a main purpose of securing a tax advantage, and apportionment is an issue, then all of the debits would have to be apportioned to the cost of acquiring the asset, namely the shares in LTT.

111. The Appellant's written submissions post-hearing emphasised aspects of Olsen's witness evidence (transcript excerpts Appendix A) to state its case. 'Overwhelmingly', it was submitted, that 'the only important factor in considering where to hold the acquisition was where to place and repay debt'; that tax played no important role in the LTT acquisition and was not a strategic driver in the decision to make the acquisition in the UK; the acquisition would likely to have been held in the UK in any event. Other non-tax-advantage drivers were relevant to the decision-making process. The Appellant only approved the transaction at the board meeting on 20 June 2011 because it thought it was a good commercial deal. If any tax benefits were considered, it is only those at the US level, which are not relevant.

112. The Appellant made extensive annotations to HMRC's submissions on Olsen's evidence (as Appendix B). It serves no practical purpose to relate these annotations which are of a generic kind as illustrated by the following:

(a) 'In every case where a company is entitled to a tax relief as a result of commercial borrowing, that tax relief would be a benefit, that does not make it a purpose of the borrowing.'

(b) Knowing the loan relationship debits would arise says nothing about the purpose, and that 'HMRC are transparently conflating knowledge and purpose'.

113. The Appellant's 14-page supplemental submissions draw on *Euromoney* where the FTT found that the tax saving of £2.8m to Euromoney was large in absolute terms but not large relative to the size of the underlying transaction. The FTT in *Euromoney* accepted the taxpayer's evidence that any tax saving was merely a 'bonus', and not a main purpose, and so should this Tribunal.

HMRC'S CASE

114. Ms Wilson's submissions can be summarised under the following headings.

(1) The Deloitte 'global tax planning idea' secured a tax advantage:

(a) JTIAC was party to a loan relationship with another group company giving rise to non-trade loan relationship debits available for surrender by way of group relief to UK members of the group.

(b) JTIAC was in a better position vis-à-vis HMRC, as were the group companies to whom the debits were surrendered.

(c) It is manifestly a UK 'tax advantage' within the meaning of s 1139 CTA 2010 (s 476(1) CTA 2009) for JTIAC and for the group recipient(s) of the surrendered debits. This should be common ground.

(2) Securing the tax advantage was the main (or one of the main) purposes of JTIAC in entering into the loan relationship:

(a) HMRC's position is that the directors of JTIAC had only one main purpose in being party to the loan relationship in question. That purpose was to secure the promised UK tax advantage, namely, the ability to surrender debits by way of group relief for use by other UK members of the group.

(b) In the alternative, it was a main purpose of JTIAC in entering into the loan relationship.

(c) Accordingly, the Appellant had an unallowable purpose, and HMRC rely on all the facts including, but not limited to, the reason for the incorporation of the Appellant, the directors being well informed on the group's intentions, and JTIAC being introduced as the new purchaser into the stock purchase agreement.

(d) The acquisition of LTT cannot have been JTIAC's sole purpose in being party to the loan relationship. HMRC submit that 'this is not a permissible finding of fact on the evidence'.

(e) Some consequences are so inevitably and inextricably involved in the decision that unless merely incidental they must be taken to be a purpose for which the action or decision was taken: *Blackrock* applying *Vodafone*. Here, the UK tax advantage was the inevitable and intended consequence of every step taken by JTIAC and approved by the directors.

(3) The whole of the debits should be attributed to the unallowable purpose:

(a) The exercise under section 441(3) requires an objective consideration of all the facts and circumstances: *Versteegh*. The question is how much of the debits (not the interest) should be attributed to the unallowable purpose: *Fidex*.

(b) HMRC submit that the whole of the debits should be attributed to the unallowable purpose. But for the Deloitte tax scheme, there would have been no UK newco (JTIAC) and no 'debits' at all.

(c) JGI would have acquired LTT under the stock purchase agreement; and no element of that transaction would have created a debit under the loan relationship rules.

(d) JGI remained the party to the external borrowing. The addition of JTIAC duplicated debt and interest using intercompany debt.

(e) The Deloitte scheme was to create a UK deductible debt not matched to any taxable UK or US or Cayman Islands receipt.

115. As to the Appellant's Advance Thin Capitalisation Agreement with HMRC, whereby the relevant $550m of debt '*shall be treated as allowable for the purposes of Part 4 TIOPA 2010*', Ms Wilson submitted that the agreement post-dates the tax planning, and concerns different legislation, and in any event cannot be determinative of this statutory appeal. Ms Wilson said the Appellant's skeleton at para 12(6) (*supra* §107) acknowledges as such. Furthermore, the only relevance of the thin capitalisation rules to this particular scheme (or any similar scheme like the one in *Oxford Instruments*) is that they would determine the cap on how much of a debit the tax scheme can create or manufacture, but not whether the manufacturing of those debits subject to the thin cap rules is acceptable for s 441, which is a different question, different policy, or purposive question.

116. Ms Wilson submitted that steps 8 and 9 are critical to the Deloitte scheme; it was 'an entire cohesive arrangement', 'a single package' to avoid the anti-arbitrage rules, which are the reason why JTI lent to the Appellant that interest, and that interest gave rise to the debit. But JTI was lending to its US branch due to the 'check the box' election, so that could trigger the anti-arbitrage rules. The Cayman Islands company was in the scheme for the purpose of receiving the debt, so there was then a debt or a loan between a UK company and a Cayman company, as two separate entities. Therefore, the creation of the debit was routed through a Cayman Islands company to avoid the anti-arbitrage rules.

117. In relation to HMRC's published Manuals at CFM38180, Ms Wilson averred that nothing in these Manuals suggests that the Deloitte scheme could or should succeed. The interest payable on the external borrowings to fund the acquisition is the true economic cost of the transaction. In any event, the Tribunal must apply the law.

DISCUSSION

The burden of proof

118. The issues in this appeal are to be determined by the Tribunal making the relevant findings of fact. To that end, the party with the burden has to prove the necessary facts to the requisite standard of the balance of probabilities. HMRC submit that the burden in this case lies with the Appellant, and the Appellant raises no challenge to that being the case.

119. In *Oxford Instruments*, which concerned the applicability of s 441 to the transaction in question, the issue of burden was contended by the parties, and is addressed at [91] to [97]. I agree with the conclusion reached by Judge Beare in *Oxford Instruments* that in the absence of any express statutory provision on the issue of onus specific to ss 441-442, it is most logical to consider the issue of burden in the context of the procedural nature of the appealable decisions being in the form of closure notices. To that end, the issue of burden is settled by reference to s 50(6) of the Taxes Management Act 1970, whereby the conclusion stated in a closure notice shall stand unless the taxpayer shows that the closure notice is incorrect.

120. Furthermore, the substantive issue in this appeal concerns the Appellant's *subjective* purpose in entering into the loan relationship, and any reliance on the 'escape clause' under subsection 442(4) must be for the Appellant to prove.

First issue: the 'unallowable purpose' test

The construction of the statutory test under s 442

121. Paragraph 13 of schedule 9 to the Finance Act 1996 ('para 13 Sch 9') was headed 'Loan relationships for unallowable purposes' and rewritten as sections 441 and 442 CTA 2009. The parties have proceeded on the basis that case law interpreting the predecessor provision is equally applicable to ss 441-442. However, there are noteworthy differences in the architecture of ss 441-442 from para 13 which accentuate the nuanced emphasis in relation to onus of proof.

122. In terms of the structure of the statutory test, the definition for 'unallowable purpose' contained within the wording of para 13 Sch 9 is carved out from the main provision into the definition provision, which is s 442. In identifying the relevant purpose(s) for the statutory test, the relevant wording in section 442 that merits attention is highlighted below:

> (a) Subsection (1)(a): The purposes for which the company is party to the relationship include ***a*** purpose ('the unallowable purpose') which is not amongst the business or other commercial purposes of the company.
>
> (b) Subsection (3)(a): If a tax avoidance purpose is one of the purposes for which the company is party to a loan relationship at any time, subsection (4) applies.
>
> (c) Subsection (4) provides, *inter alia*:
>
>> For the purposes of subsection (1) the tax avoidance purpose is ***only*** regarded as a business or other commercial purpose of the company if it is ***not*** –
>>
>> (a) the main purpose for which the company is party to the loan relationship, or
>>
>> (b) one of the main purposes for which it is party to the loan relationship.
>
> (d) Subsection (5) states that the references in subsections (3) and (4) to a tax avoidance purpose are references to ***any*** purpose which consists of securing a tax advantage for the company or any other person. (all emphasis added)

123. The architecture of section 442, and the statutory conditions under each of the relevant subsections, direct my findings of fact in the following order.

> (1) *Whether there was a tax advantage* – The first statutory condition pertains to whether *any* purpose for the Appellant being party to the loan relationship consists of *securing a tax advantage*. If yes, then that is a 'tax avoidance purpose' as defined by subsection (5), and if a tax avoidance purpose, then subsections (3) and (4) are engaged.
>
> (2) *Whether securing the tax advantage was a purpose* – The second condition under subsection (3) provides that if a tax avoidance purpose is *one of the purposes* for which a company is party to a loan relationship, then a prima facie case obtains that the purpose is an unallowable purpose, unless the condition under subsection (4) also obtains.
>
> (3) *Whether the Appellant has established that securing the tax advantage was not 'the main purpose' or 'one of the main' purposes'* – The third condition under subsection (4) is a 'negative condition', as indicated by the statutory wording of '*only*' and '*not*'. If the negative condition obtains, then it negates the prima facie affirmative conclusion reached consequent upon the first two conditions being met.

124. In relation to the negative condition, the operative words are 'not' and 'main'. The prima facie affirmative conclusion reached upon the first two conditions being satisfied can only be

negated if the tax avoidance purpose is neither the main purpose, nor one of the main purposes. The focus of the fact-finding exercise moves from whether the tax avoidance purpose is *any* or *one of the purposes* (pertaining to the first two conditions) to the qualifying descriptions of '*not*' and '*main*' as pivotal to establishing the negative condition.

125. To the extent that the application of the 'unallowable purpose' test has been simplified by the rewrite, it is by making subsection 442(3) a stand-alone condition, and by clearly identifying '*a tax avoidance purpose*' as its subject matter. The corollary is that subsection (4) is expressly concerned with '*the tax avoidance purpose*' not being the (or a) main purpose. The implications of the simplified construction of the statutory conditions for my fact-findings are twofold. First, my primary focus should be on whether a tax advantage was secured by the Appellant being party to the loan relationship for there to be a tax avoidance purpose. Secondly, the focus of the negative condition under subsection (4) remains fixed on 'the tax avoidance purpose' in negating the tax avoidance purpose being the (or a) main purpose.

126. It seems to me that if the Appellant cannot establish the negative condition to the requisite standard, then the tax avoidance purpose is an 'unallowable purpose' for section 441 purposes. The fact-finding tribunal is not required to find *positively* that the tax avoidance purpose was the (or a) main purpose for which the Appellant entered into the transaction in question. In other words, the statutory wording of section 442 does not require a positive case to be established that the tax avoidance purpose was the (or a) main purpose for section 441 to apply. It is a matter of burden, to be discharged by the Appellant, in satisfying the negative condition.

127. I am aware that the formulation of the first issue agreed by the parties (see §3(1)) suggests that the Tribunal is required to make a positive finding of fact that the tax avoidance was the (or a) main purpose for the Appellant being party to the loan relationship, in order to determine the issue of attribution. However, if I were to continue with the analysis that the negative condition forms the basis for determining the second issue, then the shift in focus for the attribution test is as follows:

(1) If the Appellant fails to meet the burden under subsection 442(4), then the attribution issue falls away.

(2) If the Appellant establishes that the tax avoidance purpose is *not* the main purpose, or one of the main purposes, then the attribution issue follows.

Was there a tax advantage?

128. Section 476(1) CTA 2009 adopts the meaning of 'a tax advantage' as defined by s 1139 CTA 2010, which includes '*a relief from tax or increased relief from tax*'. The tax relief in issue is the group relief being claimed by other UK group members of Joy UK, as a result of the loan relationship debits being surrendered by the Appellant. The meaning of 'advantage' apposite to the context of 'tax advantage' includes: 'a favouring circumstance, something which gives one a better position'; 'a resulting benefit'; 'increased quantity or number, excess' (per Oxford English Dictionary).

129. By executing the deed to issue the loan notes of $550m, Step 6 in the Deloitte scheme was instrumental in bringing about the loan relationship debits. However, Step 6 was a transaction within a scheme involving interrelated transactions. The guidance to the fact-finding tribunal from Lord President Clyde in *Brebner*, (cited with approval by Lord Pearce on appeal from the Court of Session) is apt:

> 'The material question is not what was the effect of each or all of the interrelated transactions, the question is what was the main object or objects for which any of them was adopted. Section 28(1) of the Act draws a clear distinction between effect and object. It was to this latter question that the

> Special Commissioners rightly directed their attention. To do so they had to consider each particular transaction in the series in its proper setting.'

130. When looking at a scheme or arrangements, the correct approach is set out in similar terms by Lord Pearce in *Brebner* (233-4):

> 'Admittedly, an object of the carrying out of the broad scheme by way of the resolutions was a tax advantage. But that which had to be ascertained was the object (not the effect) of each interrelated transaction in its actual context and not the isolated object of each part regardless of the others. The subsection would be robbed of all practical meaning if one had to isolate one part of the carrying out of the arrangement, namely, the actual resolutions which resulted in the tax advantage, and divorce it from the object of the whole arrangement. The method of carrying it out was intended as one part of a whole which was dominated by other considerations.'

131. The findings of fact I make in relation to the interrelated transactions in the Deloitte scheme are as follows, and are summarised in diagram form as **Annex 4**.

(1) There was a funding shortfall within the group to meet the $1.1 billion purchase price for LTT, which was identified from the outset (Step 0) to be circa $500m, and was met by external borrowing from a third-party bank in the US. The group claimed deduction for US income tax on the interest payments made to service the US bank loan.

(2) The Appellant was incorporated in the UK on 8 June 2011 as a special purpose vehicle ('SPV') to be the holding company of the Longhorn shares, after the Stock Purchase Agreement was entered into on 13 May 2011 by JGI as the Buyer. By checking the box, the Appellant was disregarded for US tax purposes.

(3) The Appellant's immediate US parent was to be JTI, which was put in funds by the ultimate US parent JGI before JTI channelled the $1.1 billion to the Appellant. The funding to JTI was split 50:50, with $550m as equity, and $550m as a loan from JGI.

(4) The day before completion (21 June 2011), JTI transferred $1.1 billion to the Appellant's new bank account in three tranches, designated as $50m (share capital), $500m non-interest bearing loan (quasi equity), and $550m interest-bearing loan.

(5) On 21 June 2011, two deeds were executed by Major who was vested with authority to act for the Appellant. On the deed for the quasi-equity loan note, Major signed as Sean D (for the Lender) and John D (for the Borrower), being the one and same person.

(6) On the day of completion (22 June 2011), JGI assigned to the Appellant the Stock Purchase Agreement, which was completed on the same day. The purchase price (less working capital adjustments of circa $54m) was withdrawn from the Appellant's account.

(7) On 8 August 2011, Major acting as Director for the newly incorporated Cayman Islands company, executed a transfer deed to assign the entire holding of the $550m loan notes from JTI to JGCF. Similar to the Appellant, JGCF as a subsidiary of JTI would be treated as a branch of JTI by checking the box for US tax purposes.

(8) The creation of the Cayman Islands company and the assignment of the loan notes to JGCF were indispensable steps in the scheme, for it was necessary to create a separate corporate entity not vertically related to the Appellant to be the receiver of the loan notes in order to bypass the anti-arbitrage rules.

(9) On 28 September 2011, the $550m loan notes now held by the Cayman Islands company were listed on the Channel Islands Stock Exchange. The choice of Cayman

Islands as the jurisdiction for JGCF as the holder of the $550m loan notes was to bypass the need to deduct UK withholding tax on the Appellant's interest payments, while no income tax would arise for the interest receipts by JGCF.

(10) Whilst these debits would arise for UK tax, there would be no matching taxable receipt in the Cayman Islands, or in the US, or for UK tax purposes.

(11) Additionally, the interest payable on the external borrowings to fund the acquisition is deductible for US tax purposes.

(12) These interrelated transactions therefore resulted in the free-standing debits (in the sense of being unmatched by any taxable receipts) as a result of interest payments on the loan notes made by the Appellant to JGCF.

132. I find therefore that a tax advantage was secured by the Appellant being party to the non-trade loan relationship. It was a tax advantage in every sense of the applicable meaning for 'advantage'. Since the Appellant was a holding company without any trading profits, the debits were surrendered as group relief to other UK group companies which had taxable profits. The loan-relationship debits therefore resulted in '*a relief from tax*' for other UK group companies (i.e. '*any other person*' as defined by subsection 442(5)). The group relief arising from the loan relationship debits was 'a resulting benefit' following the implementation of the Deloitte scheme; the group relief was the 'increased' extra; its availability was 'a favouring circumstance' putting the UK group companies in 'a better position' by reducing tax liabilities.

Appellant's contentions

133. The central tenor of Mr Gardiner's submissions is that the existence of the Appellant company and its loan relationship are both 'givens'; the consequences (tax or otherwise) of JTIAC's interest payments flow from these givens. With these givens, the Appellant's case is that no tax advantage in terms as defined by subsection 442(5) could possibly be found as arising from the Appellant being party to the loan relationship.

134. Mr Gardiner urged on the Tribunal to look at the transactions as summarised in the diagram in **Annex 5**, and to characterise the loan relationship debits as arising from the funding requirement for acquiring the asset of LTT shares. He claimed that HMRC's challenge of loan relationship debits arising on debt finance is unprecedented, and this case is the first of its kind. Further, as section 442 is concerned with a UK tax advantage, none of the US tax implications or the 'double dip' argument relied upon by HMRC are of relevance.

135. Ms Wilson submitted that these 'givens' in Mr Gardiner's submissions are an 'entirely made-up principle' unsupported by the statute, and that the category of 'unallowable purpose' is not closed. I agree with Ms Wilson in these respects. The 'givens' relied upon by the Appellant have no statutory basis; nor is there any statutory embargo on section 442 applying to loan relationship debits.

136. It is not disputed that the flow of funds as summarised in Annex 5 happened as transactions in the real world, but those transactions focusing on the flow of funds are not the be-all and end-all of the factual analysis required of the Tribunal in order to determine the appeal. I am required to make findings of fact to identify if there was a UK tax advantage being secured by virtue of the Appellant entering into the loan relationship in the context of the Deloitte scheme.

137. It is common ground that section 442 is concerned with UK tax only, and the US tax implications are not directly relevant. However, the loan notes issued by the Appellant to its immediate US parent JTI would have been inter-company debts being caught by the anti-arbitrage rules. The UK tax advantage as identified in the form of those free-standing loan relationship debits to be surrendered as group relief would have been circumvented if there had

been no Cayman Islands company to function as the receiver of the $550m loan notes assigned by JTI as the original lender. Nor would it have been attractive to Joy Global as a group if the Appellant and the Cayman Islands company were not check-the-box companies so as to eliminate any downside to the group's US tax position.

138. Whilst the tax advantage was localised in the UK, the Deloitte scheme worked essentially due to the two new cross-jurisdictional entities being created, each jurisdiction chosen for the particular features in their respective tax regimes. In the Deloitte presentation slides, the 'UK Ltd' and the 'Cayman Islands Ltd' were singled out by the oval shape to highlight them as non-US entities, and the dotted lines were used to denote the non-existence of these non-US entities, unless and until the relevant steps in the scheme were implemented.

139. Contrary to the assertion that there were these two 'givens', I find that it was the Deloitte scheme that brought into existence: (a) the Appellant as a UK company, and (b) the loan relationship of which the Appellant became party. These two aspects were not the 'givens', but were the essential features that were brought into existence by implementing the scheme.

140. As to the ATCA, it functioned as the agreement to fix the quantum of the loan relationship debits. The agreement was to see the estimated interest rate of 5% being used in O'Brien's Tax Planning Matrix being revised to 3.5% as the arms-length rate of interest applicable to the $550m loan notes. Nothing turns on the ATCA as to whether sections 441 and 442 apply to the loan relationship debits. The ATCA concerns the capping of the quantum of interest payable without being challenged under transfer pricing rules. The ATCA of itself does not provide blanket clearance to other targeted anti-avoidance provisions such as section 441.

141. I conclude therefore that by being party to the loan relationship, the Appellant secured a UK tax advantage for other UK group companies. My findings of fact move on to the next condition pertaining to the purpose test.

Was securing the tax advantage a purpose?

The nexus of the purpose test

142. The importance of locating the nexus of the purpose test correctly was highlighted by Newey LJ in *TDS*. The FTT in *TDS*, having decided that para 13 Sch 9 provision applied to a deemed loan relationship, and on that footing, formulated the purpose test in terms as follows: 'it is the company's purposes in bringing about and maintaining the satisfaction of the conditions in section 91B(1) which are the relevant purposes to be tested against para 13(2)' (at [59] of *TDS* FTT, and s 91B FA1996 was concerned with non-qualifying shares). Newey LJ described the FTT's approach to the purpose test a 'misconception' because:

> '[38] … Paragraph 13 Sch 9 FA 1996 directed attention to the purposes for which the company was party to the loan relationship. It must therefore be correct to ask for what purposes the company was party to *that* relationship or, in other words, for what purposes it held the relevant shares rather than what the company's purposes were in bringing about and maintaining the satisfaction of the conditions in s 91B(1).' (italics original)

143. Similarly, section 442 directs the Tribunal's attention to the purposes for which the Appellant was *party to the loan relationship* with its immediate US parent JTI. In terms of the 9-step Skinny to implement the Deloitte plan, the focus is on Step 6, which created the loan relationship to which the Appellant was a party. The specific question I ask therefore is: What was the purpose for the Appellant in issuing the $550m loan notes to JTI?

Finding the 'subjective' object of the directing minds

144. The parties do not differ in their approach that the purpose test is to be established by ascertaining the 'subjective' intentions of the relevant decision maker(s) that resulted in the

Appellant entering into the loan relationship. In the case of a corporate body, the decision makers are normally the shareholders and/or directors.

145. In *Brebner* Lord Pearce made the following observations in relation to identifying the purpose for the relevant act in a corporate context:

> 'The "object" which has to be considered is a subjective matter of intention. It cannot be narrowed down to a mere object of a company divorced from the directors who govern its policy or the shareholders who are concerned in and vote in favour of the resolutions for the increase and reduction of capital. For the company, as such, … cannot form an intention. Thus the object is a subjective matter to be derived in this case from the intentions and acts of the various members of the group. And it would be quite unrealistic and not in accordance with the subsection to suppose that their object has to be ascertained in isolation at each step in the arrangements.'

146. I take from Lord Pearce's observation two guiding principles for my findings of fact in relation to the 'unallowable purpose' test. First, whilst the nexus of the unallowable purpose test is anchored to the act of the Appellant in issuing the $550m loan notes, thereby entering into the loan relationship, it would be 'unrealistic', and not in accordance with subsection 442(1)(b) to suppose that the object of the directing minds of the Appellant has to be ascertained in isolation at each step in the arrangements. Subsection 442(1)(b) clearly anticipates a scheme or arrangements involving interrelated transactions. Subsection 442(1)(b) therefore applies to the related transactions in the Deloitte scheme, and the object of Step 6 which brought into existence the loan relationship is to be found by reference to the overall scheme. Subsection 442(1)(b) states as follows:

> '… the purposes for which the company …
> (b) enters into transactions which are related transactions by reference to it, …

147. Secondly, the object (i.e. the purpose) is 'a subjective matter to be derived from the intentions and acts of the various members of the group'. In the instant case, the directing minds were not confined to the three directors of the Appellant who were supposedly the decision makers approving the resolution that made JTIAC a party to the loan relationship. As a corollary of the first guiding principle, the object of the directing minds necessarily included the key personnel who were directing the affairs of JGI and JTI in relation to the interconnected transactions in the 9-step 'Skinny', which had come to assume an organisational status as being an integral group plan encompassing Step 6.

148. In the present case, given that the Appellant was a UK member of a group with its ultimate parent being JGI in the US, the directing minds would not be confined to those three directors (Olsen, Mannion and Kisten) appointed to the board of the Appellant, but would extend to include the directing minds of JGI as the ultimate parent. In *Garforth*, where the three companies concerned (Carpets, JLT and Properties) were found by the Commissioners to be under common shareholdings and control, Walton J observed (at p349-I) in relation to the 'wholly and exclusively' purpose test, that 'it must require a superhuman effort of mind … to rule out entirely from consideration the possibility of benefit to one's other company when concentrating on the exclusive requirements of just one of them'. :

> 'If the interests of all there companies were considered together when the vital decision was made, then JLT's and Properties' interests must have been considered at the same time as Carpets', … it must in the nature of things be extremely difficult for any directors of two associated companies in the position of Carpets and JLT to be certain in whose best interests – or, rather, in whose exclusive interests – any step which they take is being taken. … In my judgment, Commissioners should be extremely slow in coming to any

> conclusion that the act was done solely for the benefit of the trade of one of the companies concerned and should in general do so only where there are separate finding of primary fact not depending on the say-so of the directors concerned…'

149. In the statutory context of whether a taxpayer's payment in question is 'wholly and exclusively for the purposes of the trade', and where a company within a group is involved, Millet LJ's guidance in *Vodafone* on the purpose test is as follows:

> 'In the case of an individual taxpayer, the other purpose is usually a private purpose of his own. In a case like the present where the taxpayer is a company forming part of a group, the other purpose is likely to be the purpose of the trade of one or more of the other companies in the group.'

150. In *Wildin v HMRC* [2022] UKFTT 0042 (TC) ('*Wildin*'), the taxpayer asserted his subjective intention in incurring the said expenditure under appeal was business in nature, and submitted that since the purpose test is subjective, what he asserted to be his purpose must carry the day and be determinative. It is not uncommon to encounter this line of argument to some extent whenever the adjective 'subjective' is attached to a statutory test. As I set out in *Wildin* at [216] to [217], the taxpayer's line of argument is premised on a misunderstanding of a subjective test in the legal context.

> '… A "subjective" test does not equate to adopting whatever the appellant asserts to be his intentions as the factual state of affairs without further examination. A legal test that is "subjective" means that the fact-finding tribunal is required to take into consideration the specific set of circumstances, the personal attributes, or the peculiar mindset of the person in question, namely the appellant in the present case.
>
> The contrast to a subjective test is to find the objective standards and attributes of the hypothetical, ordinary and reasonable person: 'the man on the Clapham omnibus'. When Stuart-Smith J [in *Flockton*[7]] referred to the business motive test as a "subjective" test, he was saying that the purpose in incurring a particular item of expenditure is to be found with regard to the personal attributes and mindset of the person in question, and not by reference to the objective purpose of the man on the Clapham omnibus.'

Findings of fact for the purpose test

151. The Appellant relies heavily on Olsen's evidence, with excerpts from his witness statement and oral testimony being cited in the written submissions as 'unchallenged' because Olsen was not expressly cross-examined in relation thereto. Whilst the purpose test is subjective in nature, it does not mean that I am to accept whatever Olsen stated to be the object of the Appellant in being party to the loan relationship without corroborative evidence.

152. For the reasons as stated at §6, in making my findings of fact of the true purpose for which the Appellant entered into the loan relationship, I accord more weight to the documentary evidence from the contemporaneous communications of the key personnel than to the witness evidence from Olsen. From obtainable primary facts such as the Deloitte presentation slides, the Skinny, the timing of key events, the email communications of the key personnel at the time, I make the following findings of fact as regards the purpose test.

(1) The Project Longhorn presentation to JGI by Merrill Lynch set out the business and commercial case, together with parameters for valuation for the acquisition of LTT; that was on 6 April 2011. Some 5 weeks later, on 13 May 2011, JGI entered into the

[7] *Ian Flockton Developments Ltd v Customs and Excise Commissioners* [1987] STC 394.

Stock Purchase Agreement with Rowan to acquire LTT for $1.1billion. By entering the Agreement, JGI was 'locked into' the LTT acquisition.

(2) By 2 June 2011 when Deloitte presented the LTT acquisition structure, the funding formula to meet the purchase consideration by external borrowing from an US bank of circa $500m was already clearly identified by the group, as Step 0 in the Deloitte scheme.

(3) By 5pm of the Deloitte presentation on 2 June 2011, O'Brien had distilled the Deloitte scheme into the 9-step Skinny, together with the '*Action Steps Required – Next Week*'. The Skinny became the group's template for the Deloitte scheme, and the Action Steps were expanded into the O'Brien *Draft Workplan* to map out in detail the constituent elements to implement each step.

(4) Whilst Deloitte was the architect and promoter of the scheme, it was O'Brien who cemented the Deloitte scheme for implementation by JGI by bolting the 9-step Skinny onto the LTT acquisition and funding structure that was set out as Step 0.

(5) The context in which the Skinny was introduced to the group's key personnel by O'Brien was succinctly identified as Deloitte's 'global tax planning idea' (§34).

(6) The content of the Skinny with its 'Action Steps – Next Week' included pertinent time-markers inserted by O'Brien to indicate the timing of certain steps to 'inure' the anticipated tax benefit to the group, such as:

(a) 'the listing of the loan as an Eurobond would have to occur prior to the payment of any interest': Step 6b at §34.

(b) 'Since UK Ltd will be a check the box … the tax attributes of the step … will inure to JTI's benefit': Step 7a at §34.

(c) 'Key is to have UK Ltd created as quickly as possible': at §35(1a.)

(7) In the email discussions between O'Brien and Olsen over the Deloitte fee proposal (§§38 to 41), the 'professional opinion' given to Olsen was significant in ascertaining the true purpose for which the group bought into the Deloitte scheme. O'Brien recommended to Olsen as the VEP, CFO and Treasurer the fee package to include obtaining an ATCA for an additional fee of $40-50K. The central theme in O'Brien's recommendation for the higher fee package was the tax benefit to be inured to the group, and was staked on two prominent tax reasons specific to securing the UK tax advantage, namely:

(a) An ATCA would reduce the risk of a challenge from HMRC, obtain assurance that the tax deductions would be honoured, and offer a higher level of 'comfort from a HMRC audit risk perspective' than a debt defence report.

(b) The 'anticipated income tax savings in the UK would be approximately 13 times' the Deloitte fee quote.

(8) By the time Joy UK was informed of the 9-step Skinny on 6 June 2011, the decision to implement the Deloitte scheme was already taken by its US parent. The scheme was presented by O'Brien to Joy UK as 'an acquisition that will provide Joy UK with some fairly substantial prospective tax savings' (§42).

(9) Despite the grave reservations of Joy UK as summarised by Willis' jot-down list of concerns (§53), which included dividend block and rendering the reserves negative for the UK group of companies, there was no option for Joy UK but to go along with the decision to implement the scheme. Joy UK was fully aware of the scheme being 'a more aggressive structure' (§54) as acknowledged by Willis' counterpart in the US.

(10) The Doheny memo of 16 June 2011 to the Board of Directors of JTIAC was issued as directed by Tither of Deloitte UK (§50(1)) to give the impression that the directors were given leave 'to make a fully informed decision to proceed with the acquisition'.

(11) The withdrawal of O'Biren's Tax Planning Matrix with its 'math' from the Board Pack was a gesture to remove the transparent record that securing the UK tax advantage was a driver for the decision to implement the Deloitte scheme that would involve the Appellant entering into the loan relationship by issuing the $550m loan notes.

(12) The Board Meeting of JTIAC convened on 20 June 2011 was to impart a veneer of formality to suggest that genuine decision making had taken place at the UK level. The minutes for that board meeting was pre-drafted by Eversheds for adoption by the board, and Kisten and Mannion as the UK directors were to follow the lead from Olsen in the chair, who had been through the thinking process from the inception of the 9-step Skinny as the blueprint that would lead to the Appellant becoming party to the loan relationship.

153. From the above findings of fact, I conclude that there was no genuine decision making at the UK level as regards the resolution to issue the $550m loan notes to JTI. The decision makers were at JGI level, and their object in implementing the Deloitte scheme was to bring into existence the loan relationship of which the Appellant would be a party, thereby securing a UK tax advantage by generating the free-standing loan relationship debits for the UK members of the JGI group. Pursuant to subsection 442(5), that object was 'a tax avoidance purpose', and an 'unallowable purpose' in terms of section 441.

Was the tax avoidance purpose <u>not</u> the (or a) main purpose?

154. The determination of the 'main purpose' test is by way of a multi-faceted test, and case law precepts from other statutory purpose tests relevant to my consideration include:

(1) In *Vodafone* Millet LJ summarised the propositions from cases applying the 'exclusively' test such as *Mallieu* –

> 'The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. … if securing the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.
>
> Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.'
>
> 'The primary inquiry is to ascertain the particular object which the directors sought to achieve by it. Once that is ascertained the characterisation of the object as serving the purposes of the trade of one particular company or another is not a finding of primary fact, but a conclusion based upon the primary facts.'

(2) In *Versteegh* the FTT observed that whether the subjective purpose is a main purpose of the company in being party to a loan relationship is an 'evaluative exercise', and the tribunal 'must consider all facts and circumstances'.

(3) In *TDS* at [46], Newey LJ remarked on the construction of 'main' in the context of the relative quantum of the tax advantage to the transaction in question:

> '[the taxpayer] did not dispute that [the transaction] had as a main purpose securing a very large tax advantage … the hoped-for gain was large both in

> absolute terms (more than £70m) and relative to the apparent value of TDS (some £280m). … the inescapable inference was that securing the advantage had become a main purpose of holding the shares. …'

(4) Newey LJ continued to state at [48] of *TDS* that: '"Main" has a connotation of importance.' Similarly, in *Prudential* at [84], the tax avoidance purpose being 'the main purpose' was referred to as 'more than "icing on the cake"'.

(5) In *Addy* on appeal to the High Court, the question was whether the transaction was caught by the anti-avoidance rule in the Transaction and Securities Code, and Goff J described 'the escape clause' under s28(1) of the Finance Act 1960 on which the taxpayer sought to rely in terms as follows:

> '… unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had their main object, or one of their main objects, to enable tax advantages to be obtained.'

(6) In *Brebner*, the determinative issue, as stated by the Special Commissioners, in relation to the application of s 28 of the Finance Act 1960 was 'whether section 28 did not apply to the transactions in question because they were carried out for bona fide commercial reasons and none of them had as their main object, or one of the main objects, to enable tax advantages to be obtained'. The Special Commissioners' conclusion upheld by the appellate courts was cited in the Court of Session judgment (at p21) as follows:

> 'On a consideration of all the evidence before us we found that the transactions in question had been entered into for bona fide commercial reasons. We also found that though admittedly a tax advantage had been obtained this advantage was an ancillary result of the main object, which was a bona fide commercial one, and the transactions in question did not have as their main object, or one of their main objects, to enable tax advantages to be obtained.'

(7) In *Lloyds TSB Equipment Leasing*, the Court of Appeal found that even if a transaction in the relevant series has a genuine commercial purpose, it does not follow that the tax avoidance purpose was incapable of also being a main object of the transactions, even if it was not *the* main object of the transactions (at [65]).

What evidence of business or commercial purpose?

155. Adopting the labels given by Olsen to the putative non-tax-advantage purposes (§102), I find that those 'strategic reasons' purported to be the business and commercial purposes for the Appellant being party to the loan relationship did not obtain.

156. *Critical mass* – Olsen claimed that the Appellant as a UK entity had 'significant critical mass and the ability to generate cash to repay debt'. This claim contradicts the fact that the Appellant was an empty company when established, with all its funds being obtained from the US parent, and it had no trading activities that could generate cash. As a matter of fact, the Appellant did not have the cash to service the loan either, and interest payments were financed by reductions in debtor balances and the issue of further loan notes to the JGCF (§87).

157. *Synergy perspective* – Olsen said that the commercial reason to acquire LTT preceded the decision to place the debt in the UK. I accept that there was a bona fide commercial reason to acquire LTT, and the business case was eloquently set out in Project Longhorn by the Merrill Lynch on 6 April 2011 (§22-25). However, as admitted by Olsen, the Appellant contributed nothing to the negotiation with Rowan in closing the purchase of the LTT, or to the due diligence exercise in the interim period between 6 April 2011 and 13 May 2011. Crucially, the sinews between the commercial case to acquire LTT by the group and the formation of the Appellant in order to be the 'purchaser' of LTT by assignment are absent to enable any finding

of fact that the commercial case to acquire LTT could necessarily be extended to making the Appellant the purchaser, (which entailed the assumption of the loan from JTI) a commercial purpose without more.

158. *Diversifying borrowing* – references were made to the decision to place debts outside the US as a bona fide commercial purpose. The IMM acquisition (in Australia) was alluded to as a parallel example to the LTT acquisition, and both were, as I understand from Olsen, to redress the historical fact that 'all of [the group's] borrowings' had 'accumulated' in the US. No evidence was produced as to how this IMM acquisition, along with the LTT acquisition, had diversified the group's borrowing, and why that in itself was a prima facie business purpose.

159. To place the debt outside the US was hailed as the all-important reason for the Appellant entering into the loan relationship. It was a constant refrain in Olsen's evidence, and was recited in the Appellant's written submissions as the purpose to meet subsection 442(4) condition.

160. However, whether it was Olsen unintentionally stating the truth, or a slip of the tongue, he stated in evidence that 'all of the debt associated with the LeTourneau acquisition *did remain* in the US' (see §102(3) and footnote 6). I agree with this particular statement from Olsen's evidence, and reject his various assertions that placing the debt outside the US was a bona fide commercial purpose for the Appellant entering the loan relationship for the following reasons.

(1) As a matter of fact, the external borrowing from the US bank to fund the LTT acquisition *did remain* in the US. The US bank loan of circa \$500m was the bona fide borrowing for a commercial reason to meet the funding shortfall for acquiring LTT.

(2) It is false to assert that the particular debt in question (namely the §550m loan notes issued by the Appellant to its immediate US parent JTI) had been placed outside the UK for a commercial reason, since that debt was in essence a duplication of the bona fide debt that continued to reside in the US.

(3) In terms of logic, diversifying borrowing was put forward as a self-evident reason without any justification, without any particularisation, as to why diversifying borrowing amounted to being a commercial or busines purpose in the instant case by reference to the Appellant being party to the loan relationship.

161. *Repatriation of income* – The Deloitte scheme involved the US parent JTI and the Appellant as the UK subsidiary checking the box, which meant that the Appellant was treated as a US branch of the US parent. If the Appellant were to make any profits, from a US tax perspective, those UK profits would be treated as US profits. There could have been no US tax advantage in terms of repatriation of income by deferring the taxation of any UK profits. As a matter of fact, the Appellant was incorporated to be SPV, a holding company with no trading activities to generate profits to lend any credence that repatriation of income could have been a business reason for the Appellant being party to the loan relationship. In any event, even if the Appellant did generate profits, no US tax advantage could have accrued because the profits from the Appellant were the profits of JTI due to the check the box election. There was no repatriation benefit in any sense of the arrangement. Olsen spoke of repatriation of income as a strategic reason, a non-tax-advantage purpose, but failed to explain how the Deloitte scheme would meet the objective whereby profits were to be generated outside the scope of US tax, and taxable only on 'repatriation' to the US.

162. *Ease of incorporation* – the choice of the UK jurisdiction to place the entity to be the SPV to acquire LTT due to the ease of incorporation was given as a possible candidate for the non-tax-advantage purpose for the Appellant ending up being party to the loan relationship. The ease of incorporation is not a self-evident commercial purpose, without more. In fact, the placing of the entity in the UK to acquire LTT went contrary to the business case when the

operational activities of the LTT group of companies were obviously to be integrated into the business undertakings of Joy US, both vertically and horizontally.

163. The Project Longhorn presentation highlighted the business case for incorporating the drilling products manufactured by LTT to maximise the value the group's business operation by bringing together the four 'building blocks' of the existing JGI business (§24) in jackup designs, installation of equipment bases and aftermarket, and newbuild cycles.

164. LTT was another US group and had no UK interest at the time of the purchase agreement. The US presence of LTT was evident by the description of its business in the Stock Purchase Agreement (§28), such as the design and supply of equipment for the forestry industry 'mainly in the United States'. Whilst a range of products and services was to 'the mining industry worldwide', the LTT business was based in the US, and not in the UK. It is not to say that a UK entity could not end up being the holding company of LTT whose business base was in the US, but the business and commercial case that a UK entity should be the holding company is far from self-evident. The ease of incorporation does not automatically make the business case for placing the purchasing entity in the UK, when the business case was to integrate the operation of LTT into that of JTI in the US, with US competitors such as Caterpillars in mind.

165. The Appellant relies on Olsen's evidence to establish that there were business and/or commercial purposes for the issue of the loan notes of $550m. Olsen's evidence in this respect was subject to extensive cross-examination. However, despite Ms Wilson's repeated questions from different angles to elicit the putative non-tax-advantage purposes for the Appellant being party to the loan relationship, I have found Olsen's evidence to be vague, elusive, lacking in substance, contradictory to the factual matrix, and ultimately unconvincing.

166. For the Appellant, it was submitted that 'overwhelmingly', the only important factor in considering where to hold the acquisition was where to place and repay debt as the non-tax-advantage purpose. I can make no finding of fact to that effect, nor can I find any bona fide commercial or business purposes for the Appellant being party to the loan relationship. The negative condition under section 442(4) does not obtain, and the tax avoidance purpose that has been established in terms of section 442 means that the Appellant had an 'unallowable purpose' for being party to the loan relationship for the purposes of section 441. Given the foregoing, and that the Appellant has not met the burden as regards the negative condition under subsection 442(4), my view is that the attribution issue therefore does not arise. However, in case I am wrong, I consider whether there is also a positive case that tax avoidance purpose was the (or a) main purpose as the basis for determining the attribution issue.

The positive case that obtaining the UK tax advantage was the main purpose

167. The evidence set out above in the pre-completion period captures the narrow time frame from 2 June 2011 (when Deloitte presented the global tax planning idea) to 21/22 June 2011 (when the Appellant was put in funds by JTI to complete the LTT purchase the next day). JGI was already 'locked in' to complete the Stock Purchase Agreement as at 2 June 2011, and due diligence was apace to complete the purchase agreement. The Deloitte scheme was bolted on to the LTT purchase agreement, for no other reason but to obtain the UK tax advantage.

168. The time scale to implement Steps 1 to 7 of the scheme was dictated by the completion date of the purchase agreement. The corporate decision-makers mobilised external advisers and the group's personnel with great speed and energy to ensure that Steps 1 to 7 were fully implemented before completion as directed by O'Brien Workplan: it was to be 'a fire drill' as Major anticipated upon receiving O'Brien's Skinny in the afternoon of 2 June 2011 (§37).

169. O'Brien's Workplan stated the mandatory requirement in relation to Step 6 which was the issue of loan notes by the Appellant: *Loan must be registered as a Eurobond by the time of*

the first interest payment (§49(4)). Whilst the Workplan only set out the actions for Steps 1 to 7, there was no question that Steps 8 and 9 would follow in due course to ensure that the scheme was not caught by the anti-arbitrage rules. It was a complete package from Steps 1 to 9 for the sole purpose of creating the annual debit estimated at $6.8m initially from the $550m loan notes issued by the Appellant to JTI on 21 June 2011.

170. The post-completion evidence emanating from the decision-makers who rendered the Appellant the issuer of the loan notes points overwhelmingly to the fact that to obtain the UK tax advantage was the sole purpose for the Appellant being party to the loan relationship.

(1) O'Brien explained to the LTT's insurer that the two entities JTIAC and JGCF were both empty companies, with no employees, no tangible assets other than the intercompany notes receivable and payable, and that the structure was 'set up from a tax planning perspective' (§79).

(2) Olsen's presentation to the main board of JGI in the third quarter of 2011, with slides incorporated from Deloitte's 'Global Tax Strategy' presentation, gave a coherent outlook as how tax was an important driver in the group's strategy (§81).

(3) Olsen's presentation to the JGI Board showcased the LTT acquisition structure by the Appellant as an example of this kind of tax strategy that had delivered 'an annual tax benefit of $6.2 million' (§81(2)).

(4) Olsen quantified to the JGI Board the key benefits of the LTT acquisition by the Appellant in terms of the dual deductions with the same parameters as those he had been presented with by O'Brien during the discussion of the Deloitte fee proposal (§41).

(5) The dual benefits presented by Olsen to the JGI Board were: firstly, the UK tax benefit of interest debits on the loan, with the principal of the loan being £550m (from O'Brien's $500m), estimated interest rate changed to 4.5% (from O'Brien's 4%) and the UK tax rate to 25% (from O'Brien's 23%), and secondly, the interest expense deductible for US income tax by JTI (§81(5)).

(6) Kisten as a UK director of the Appellant raised his concern of the need to show good governance such as by undertaking board meetings to preserve the tax benefits.

(7) O'Brien's email to Willis and EY-UK directed that the group 'do not want any interest for the UK FY 11 filing' (§86) because it was not beneficial to the US tax position. No interest debit arose for the accounting period to 31 October 2011 as a result, even though the loan agreement provided for the first interest payment date to be 15 October 2011 (§71(1)).

171. The lack of genuine commerciality of the loan agreement is evident not only from O'Brien's email stopping any interest payment being made for FY 2011 (despite the loan agreement), but also from the fact that the Appellant's interest payments were 'financed' by reductions in debtor balances and the issue of further loan notes, since as an empty company, it simply did not have the means to generate income to service the loan.

172. The Appellant relies on *Euromoney* where the quantum of tax advantage being £2.8m and less than 5% of the total sale consideration was found to be an indicator that the tax advantage was not a main purpose. *Euromoney* is a first-instance decision and not binding on me. What the tribunal in *Euromoney* used as an indicator to inform its finding of fact as regards the 'main purpose' condition is not directly relevant to the instant case, since the 'unallowable purpose' test is fact specific. Insofar as the quantum of tax advantage can be an indicator, the relevant comparator was O'Brien's $6.875m per annum as set out in the 'math' accompanying the Tax Planning Matrix email of 7 June 2011. O'Brien's math would be anticipating the loan

to continue for some 10 years at least, (see para 6 SOAF of a redemption date eventually set for 21 June 2021 at the time of ATCA, which also reduced the interest rate projection from O'Brien's 5% to 3.5%).

173. The directing minds in the present case on whom the purpose test is to be applied had the figure of $6.875m per annum designated as '*Annual Net Reduction in global income tax*' (§62) in their minds to inform their decision-making at the relevant time in June 2011. The directing minds would have anticipated the tax advantage to continue beyond the end of the accounting period 2016, as the acquisition of JGI by Komatsu Mining in April 2017 was not on the horizon back in June 2011. When Olsen approved the Deloitte fee proposal, he would be weighing up the costs of $240K to $290K against the *annual* tax benefits in one year alone being 13 times the quantum of the fee, and of the projected tax benefits that would accrue year on year. The relevant comparator was O'Brien's $6.875m per annum quantified on 7 June 2011, and not the eventual $3.8m per annum when Catherine Leith was checking the math on 13 November 2012. The resultant circa £9m in group relief claimed for the four accounting periods (see para 16 SOAF) was not the comparator the decision makers had in mind at the time.

174. Apart from Deloitte's fees, the cost-benefit analysis would have included the fees of other advisers such as Eversheds, of which no evidence was produced. Whilst O'Brien's $6.8m would have included the $0.5m of US tax savings, even at $6.3m per annum (in prospective rather than actual terms), the hoped-for UK tax advantage was large in absolute terms. The reduction in the eventual quantum of annual 'tax savings' was largely due to the interest rate being set at 3.5% per ATCA, instead of O'Brien's estimated interest rate of 5% in the Tax Planning Matrix. In relative terms, the comparator was not the tax advantage against the $1.1 billion purchase consideration for acquiring LTT; the relevant comparator was the tax advantage of $6.3m per annum or nothing (relative to not implementing the scheme). The size of the purchase consideration is irrelevant to any attribution test in this case, since the decision to acquire LTT and how to fund it would have proceeded as set out at Step 0, without having to implement the 9-step Skinny. In the final analysis, 'the prospective advantage was of such significance in the context that gaining it must have become a main purpose': *TDS* at [46].

175. Mr Gardiner referred me to Hansard[8] on the debate of the proposed sections 441-442 as a rewrite of the predecessor provision under para 13 Sch 9 to FA 1996. The excerpts material to Mr Gardiner's submission are appended in Annex 5. Citing ministerial comments, Mr Gardiner submitted that to apply section 441 to the loan relationship debits in question is 'clearly nonsense' since the loan notes were issued as part of 'structing a company's legitimate activities'. I have no difficulty in finding that the caveat to the ministerial comments applies to the Deloitte scheme as being the kind of 'artificial, tax-driven arrangements' which Parliament intended to be caught by the 'unallowable purpose' provisions in CTA 2009.

> 'Provided that companies are funding commercial activities or investments in a commercial way, they should have nothing to fear. If they opt for artificial, tax-driven arrangements, they may find themselves caught'.

176. From the above findings of fact, I conclude that to obtain the UK tax advantage was the main purpose for which the Appellant was party to the loan relationship in question.

Second issue: the attribution test

177. The attribution test is an objective test, and the Tribunal is required to assess how much of the debit arising in each accounting period was, on a just and reasonable apportionment, attributable to the unallowable purpose. The nexus to the attribution test is referable to the *debit* arising from the unallowable purpose.

[8] Hansard, Commons Debates, 28 March 1996, Columns 1190-1193.

178. In *Fidex*, the taxpayer company had three main purposes for holding the bonds (and so being party to the loan relationships they embodied), with two being allowable (or 'good') main purposes and one being unallowable (or 'bad') main purpose. On appeal from the Upper Tribunal, counsel for Fidex submitted that the UT was wrong to attribute the whole of the relevant debit to the bad purpose without a very good reason, such as the debit being more than it would have been if it had not been for the bad purpose. Kitchin LJ gave his judgment in this respect at [74]:

> 'I believe that the answer to all of these submissions lies in the words of para 13 [Sch 9 FA 1996]. The UT was required to assess how much of the *debit* was, on a just and reasonable apportionment, attributable to the unallowable purpose for which the bonds were held. I am content to assume that Fidex would have held the bonds from the start of 2005 irrespective of the unallowable purpose but that is nothing to the point. The question is whether and to what extent the *debit* was attributable to the unallowable purpose for which they were held. I agree with the UT that the answer to this question is quite clear. The debit arose from and was entirely attributable to Project Zephyr [with tax avoidance purpose inherent]. But for this avoidance scheme there would have been no debit at all.'

179. From Mr Gardiner's submissions, there is a suggestion that if the tax avoidance purpose is *a* main purpose and not *the* main purpose, then apportionment will have to follow. On the basis that I have found that to obtain the UK tax advantage was the main purpose for the Appellant being party to the loan relationship, no apportionment of the debit arising in each accounting period is in point. Even if I had found that to obtain the tax advantage was one of the main purposes, and not the main purpose for the Appellant being party to the loan relationship, the attribution issue would still be determined as wholly attributable to the unallowable purpose in line with *Fidex*: but for the avoidance scheme encapsulated by the 9-step Skinny, there would have been no debit at all.

180. I conclude that the loan relationship debits were wholly attributable to an 'unallowable purpose' pursuant to section 441 CTA 2009, and there is no need for any just and reasonable apportionment to be applied.

DISPOSITION

181. The appeal is accordingly dismissed. The amendments to the closure notices in relation to the four accounting periods ending 31 October 2015 to disallow the non-trade loan relationship debits pursuant to section 441 CTA 2009 are confirmed in full.

RIGHT FOR PERMISSION TO APPEAL

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

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 19 April 2022

Amended before publication on 23 May 2022 pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to remove typographical slips and omissions.

ANNEX 1

STATEMENT OF AGREED FACTS[9]

of 22 paragraphs

1. On 13 May 2011 Joy Global Inc. ("JGI") entered into a stock purchase agreement with Rowan Companies Inc. for the acquisition of LeTourneau Technologies Inc ("LTT") for $1.1bn.

2. On 8 June 2011, JTI Acquisition Company (2011) Ltd ("JTIAC") was incorporated in the UK. Wayne Kisten, Michael N. Mannion and Michael S. Olsen were appointed as directors of JTIAC. Catherine Hodgetts (née Leith) was appointed Company Secretary.

3. On 10 June 2011, the UK company secretary Catherine Hodgetts issued briefing documents to the directors of JTIAC in relation to resolutions on which they were to be asked to make a decision.

4. On 16 June 2011 Edward (Ted) Doheny (JGI's President and Chief Executive Officer) issued a memo to the directors of JTIAC relating to the acquisition.

5. On 20 June 2011 JTIAC held a board meeting. The minutes record that the board approved:

   5.1.1 The allotment of shares in JTIAC to Joy Technologies Inc ("JTI") for $50m;

   5.1.2 The borrowing of $500m (interest free) from JTI under a loan agreement (referred to as "quasi equity");

   5.1.3 The borrowing of $550m (at interest) from JTI by issuing loan notes;

   5.1.4 The assignment of the stock purchase agreement between JGI and Rowan Companies Inc relating to the acquisition of LTT; and

   5.1.5 The acquisition of LTT itself.

6. On 21 June 2011 JTIAC executed a deed constituting $550m worth of interest bearing loan notes issued to JTI.[10]

7. On 21 June 2011 a non-interest-bearing loan agreement between JTI and JTIAC in the sum of $500m was executed.

8. On 22 June 2011 JTIAC executed an Assignment and Assumption Agreement between it and JGI over the rights and obligations of JGI as purchaser of LTT.

9. Pursuant to the Assignment and Assumption Agreement, JTIAC's acquisition of LTT was completed under the stock purchase agreement on 22 June 2011 on which date the purchase price of $1.053bn was paid by JTIAC to Rowan Companies Inc out of the funds made available to JTIAC as referred to above at paragraphs 5.1.1 – 5.1.3, 6 and 7 above.

10. On 8 August 2011, the $550m worth of interest-bearing loan notes initially issued to JTI were assigned to Joy Global Cayman Finance Limited ("JGCF"), a wholly owned subsidiary of JTI, (along with the rights to accrued interest payments).

11. On 28 September 2011 the loan notes representing the borrowing of $550m at interest were listed on the Channel Islands Stock Exchange.

12. On 2 November 2011 Deloitte wrote to HMRC to apply for an Advanced Thin Capitalisation Agreement for the period 22 June 2011 to 31 October 2015. This was subsequently agreed with HMRC in July 2012.

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[9] For the avoidance of doubt this document is not a full statement of all the facts which HMRC regard as relevant to the issues in this appeal and it is subject to any findings made by the Tribunal.

[10] The interest on the loan notes is charged using the one-year Libor rate plus 3.5 per cent per annum payable in arrears and the loan notes are redeemable on 21 June 2021.

13. No interest was paid in the accounting period ending 31 October 2011, but interest was paid from 2012 onwards. Up to and including 28 October 2016, no dividends have been paid up from LTT. The interest paid in 2013, 2014, 2015 and 2016 has been financed by reductions in debtor balances and the issue of further loan notes to JGCF.

14. On 9 January 2017, the loan in question was reassigned to Joy Global China Holdings SRL, a wholly-owned subsidiary of JTI and was repaid on 31 December 2017.

15. On April 5, 2017, JGI merged with a wholly-owned U.S. subsidiary of Komatsu America Corp., which is a wholly-owned U.S. subsidiary of Komatsu Limited, a Japanese public company.

16. In the accounting periods from 2012 onwards JTIAC claimed debits representing interest payable under the loan notes in the following amounts:

period to 31 October 2012	£14,907,875
31 October 2013	£8,797,516
31 October 2014	£11,052,170
31 October 2015	£5,293,215

17. Those debits were surrendered for tax purposes to other companies in the UK corporate group of JGI.

18. As at 31 October 2015, unpaid interest not claimed as deductible debits amounted to $17,314,372 (approx. £13.3m).

19. JTIAC is resident in the UK for tax purposes. Both JTIAC and JGCF are disregarded ("check the box") entities for US tax purposes so that the interest deductions in the UK are not matched by taxable receipts elsewhere either in the Caymans (not taxable) or in the US (under the US CFC rules).

20. 20. On 21 May 2019, HMRC issued Closure Notices to JTIAC for its returns for the accounting periods ending 31 October 2012, 31 October 2013, 31 October 2014 and 31 October 2015. The returns were amended to disallow the debits claimed by JTIAC representing interest payable under the loan notes.

21. On 5 June 2019, JTIAC wrote to HMRC to appeal the Closure Notices.

22. On 28 June 2019 JTIAC appealed against the Closure Notices and the consequent amendments to their returns by notice to the First-tier Tribunal.

ANNEX 2

The authorities are listed chronologically with their short case references emboldened in brackets.

(1) *Lauri Joseph Newton and Others v the Commissioner of Taxation of the Commonwealth of Australia* [1958] UKPC 14; [1958] AC 450 (***Lauri Joseph Newton***)

(2) *Joseph L Thompson & Sons Ltd v Chamberlin* [1962] 40 TC 657 (***Thompson & Sons***)

(3) *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 (***Brebner***)

(4) *Inland Revenue Commissioners v Kleinwort Benson* [1969] 2 Ch 221 (***Kleinwort Benson***)

(5) *Addy v Inland Revenue Commissioners* [1975] STC 601 (***Addy***)

(6) *Garforth v Tankard Carpets* [1980] 53 TC 342 (***Garforth***)

(7) *Cairns v MacDiarmid (Inspector of Taxes)* [1983] BTC 188 (***Cairns***)

(8) *Mallalieu v Drummond (Inspector of Taxes)*[1983] 2 AC 861 (***Mallalieu***)

(9) *Ensign Tankers v Stokes* [1989] 1 WLR 1222 (***Ensign Tankers***)

(10) *Vodafone Cellular Ltd v Shaw* [1997] STC 734 (*Vodafone*)

(11) *IRC v Trustees of the Sema Group Pension Scheme* [2002] EWCA Civ 1857, 74 TC 693 (***Sema Group Pension***)

(12) *Peterson v IRC* [2005] UKPC 5; [2005] STC 448 (***Peterson***)

(13) *Prudential Plc v R&C Comrs* [2008] STC (SCD) 239 (***Prudential***)

(14) *AH Field (Holdings) Ltd v HMRC* [2012] UKFTT 104 (TC) (***Field Holdings***)

(15) *Explainaway Ltd & Ors v HMRC* [2012] UKUT 362 (TCC); [2012] STC 2525 (***Explainaway***)

(16) *Iliffe News and Media Ltd & Ors v HMRC* [2012] UKFTT 696 (TC); [2013] SFTD 309 (***Iliffe***)

(17) *Versteegh Ltd & Ors v HMRC* [2013] UKFTT 642 (TC); [2014] SFTD 547 (***Versteegh***)

(18) *HMRC v Lloyds TSB Equipment Leasing (No 1) Ltd* [2014] EWCA Civ 1062; [2014] STC 2770 (***Lloyds TSB Equipment Leasing- CA***)

(19) *HMRC v Lloyds TSB Equipment Leasing (No 1) Ltd* [2013] UKUT 368 (TCC); [2014] STC 191 (***Lloyds TSB Equipment Leasing- UT***)

(20) *Lloyds TSB Equipment Leasing (No 1) Ltd v HMRC* [2015] UKFTT 401 (TC); [2015] SFTD 1012 (***Lloyds TSB Equipment Leasing- FTT***)

(21) *Bilta (UK) Ltd (in liquidation) and Ors v Nazir and Ors (No 2)* [2016] AC 1 (***Bilta***)

(22) *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385; [2016] 4 All ER 1063 (***Fidex***)

(23) *Travel Documents Service & Ladbroke Group International v HMRC* [2018] EWCA Civ 549; [2018] 3 All ER 60 (***TDS***); also [2015] UKFTT 582 (TC) (***TDS FTT***)

(24) *HMRC v SSE Generation* [2019] UKUT 332 (TCC); [2021] STC 369 (***SSE Generation***)

(25) *Oxford Instruments UK 2013 Ltd v HMRC* [2019] UKFTT 254 (TC) (***Oxford Instruments***)

(26) *Blackrock Holdco 5 LLC v HMRC* [2020] UKFTT 443 (TC) (***Blackrock***)

(27) *Euromoney Institutional Investor Plc v HMRC* [2021] UKFTT 0061 (TC) (***Euromoney***)

ANNEX 3

ANTI-ARBITRAGE PROVISIONS IN OUTLINE

The anti-arbitrage provisions in outline under Part 6 TIOP 2010

(28) Section 232 '*Deduction notices*' provides that an officer of HMRC 'may give a company a notice if the company is within the charge to corporation tax, and the officer 'considers on reasonable grounds that each of the deduction scheme conditions is or may be met in relation to a transaction to which the company is party'.

(29) Section 233 '*The deduction scheme conditions*' sets out the terms of conditions:

(a) Condition A is that the transaction to which the company is party forms part of a scheme that is a deduction scheme;

(b) Condition B is that for corporation tax purposes, the company is either (i) in a position to claim an amount by way of deduction in respect of the transaction, or (ii) in a position to set off an amount relating to the transaction against profits in an accounting period;

(c) Condition C is that '*the main purpose of the scheme, or one of its main purposes, is to achieve a UK tax advantage for the company*.'

(d) Condition D is that 'the amount of the UK tax advantage is more than minimal.

(30) Section 234 states as follows:

'**234 "Schemes achieving UK tax advantage for a company**"

(1) For the purposes of section 233, a scheme achieves a UK tax advantage for a company if, in consequence of the scheme, the company is in a position to obtain, or has obtained –

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

(b) a repayment or increased repayment of corporation tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax.

(2) […]

(3) For the purposes of subsection 1(c) avoidance or reduction may, in particular, be effected –

(a) by receipts accruing in such a way that the recipient does not pay or bear tax on them, or

(b) by a reduction in calculating profits or gains.'

(31) Section 236 defines '*Schemes involving hybrid* entities' as meeting conditions A and B, where:

(a) Condition A is that the party is regarded as being a person under the tax law of any territory;

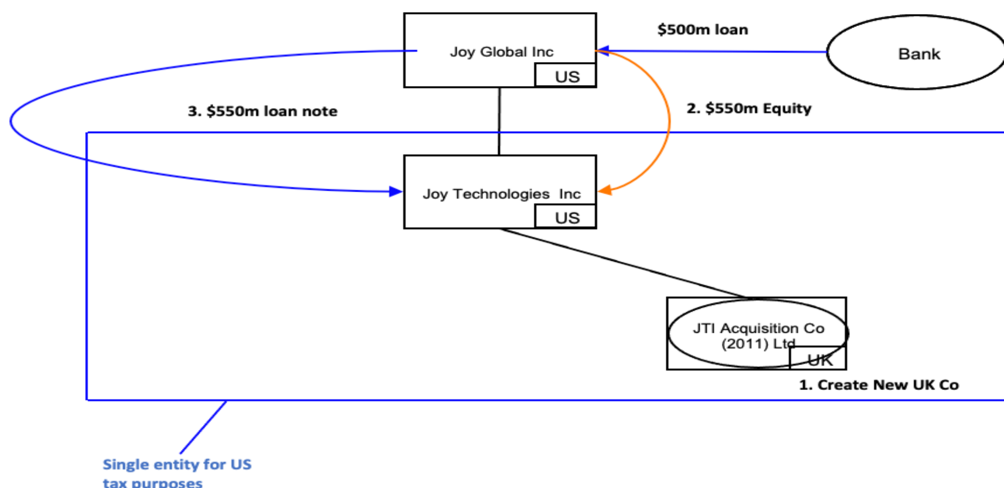
(b) Condition B is that the party's profits or gains are treated, for the purposes of a relevant tax imposed under the law of any territory, as the profits or gains of a person or persons other than the person mentioned in condition A.

(32) Section 237 defines '*Instruments of alterable character*' under s237(2): 'An instrument is within this subsection if under the law of a particular territory any party to the instrument may alter its tax characteristics.'

ANNEX 4

The flow of funds in the 'global tax planning' idea as implemented

Diagram 1: Funds flow in Step 0 to Step 3



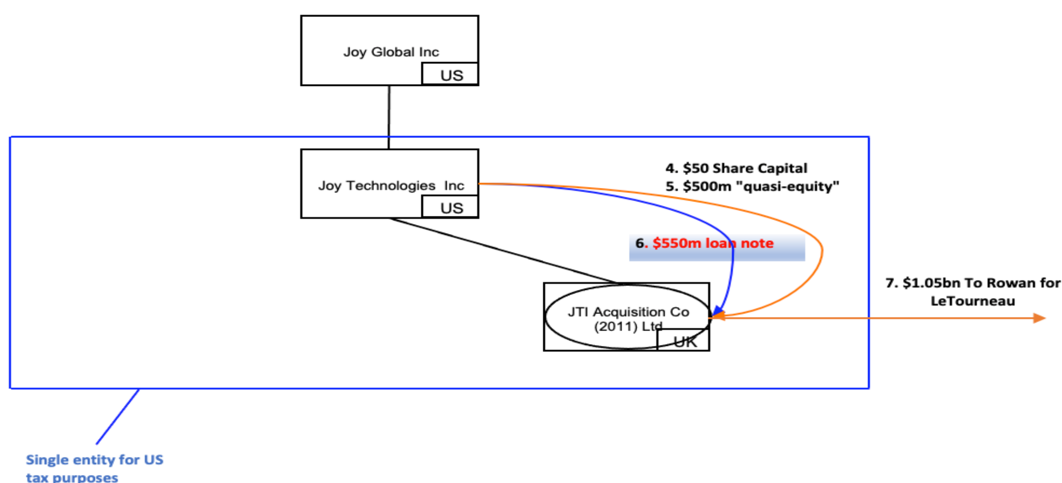
Step 0: Bank (third-party) advanced a loan of $500m to Joy Global (JGI).

Step 1: Joy Technologies (JTI) formed a new UK Ltd Co., the Appellant (JTIAC).

Step 2: JGI contributed $550m to JTI (as equity).

Step 3: JGI loaned $550m to JTI (as interest bearing note).

Diagram 2: Funds flow in Step 4 to Step 7



Step 4: JTI contributed $ 50m to the Appellant (as share capital).

Step 5: JTI transferred $500m to the Appellant (as quasi-equity) in exchange for a dollar-denominated non-interesting bearing note.

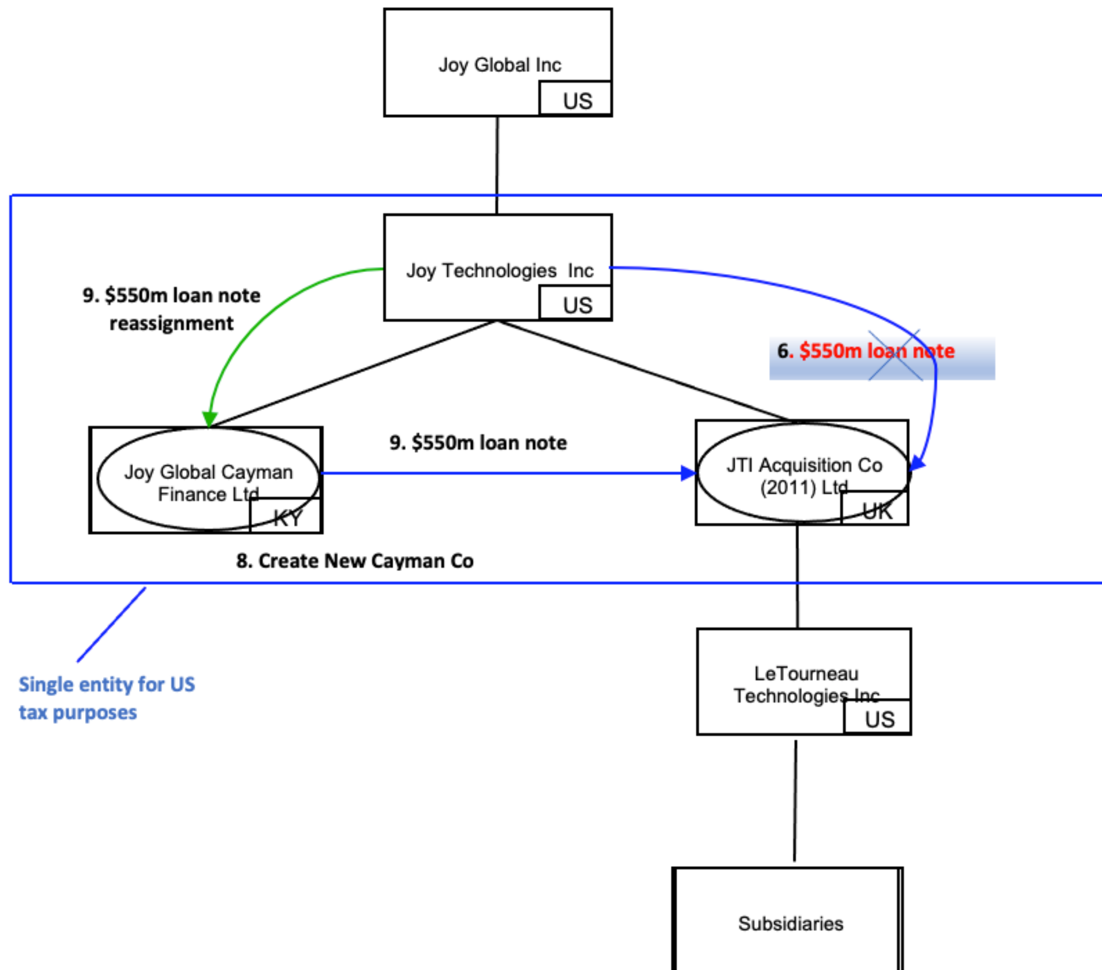
Step 6: **JTI loaned $550m to the Appellant** (to be listed as a Eurobond in the Cayman Islands).

Step 7: The Appellant acquired LeTourneau for $1.1billion cash.

ANNEX 4 (continued)

The flow of funds in the 'global tax planning' idea as implemented

Diagram 3: Funds flow in Step 8 to Step 9



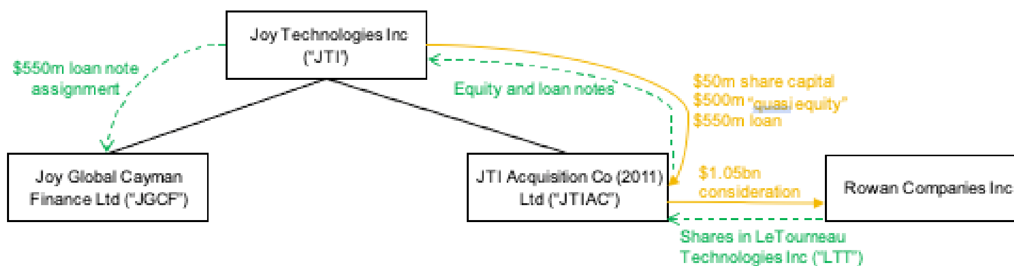
Step 8: JTI formed Joy Global Cayman Finance Ltd (JGCF).

Step 9: **JTI re-assigned the $550m loan note** (see Step 6) to JGCF.

ANNEX 5

Appellant's Diagram with the title:

'Transactions Summary reflecting the transactions of 21 and 22 June 2011'



Excerpts from Hansard, Commons Debates, 28 March 1996, Columns 1190-1193

> 'Paragraph 13 of the schedule disallows tax deductions to the extent that tax avoidance is the main motive behind a loan relationship. We have been told of concerns that this could be interpreted as preventing companies from getting tax relief for legitimate financing arrangements. I am happy to offer a reassurance that this is not the intention of the legislation. …
>
> We have been asked whether financing – which, for example, is to acquire shares in companies, whether in the United Kingdom or overseas, or to pay dividends – would be affected by the paragraph. In general terms, the answer is no, but the paragraph might bite if the financing were structured in an artificial way.
>
> It has been suggested that structuring a company's legitimate activities to attract a tax relief could bring financing within this paragraph – some have gone so far as to suggest that the paragraph might deny any tax deduction for borrowing costs. These suggestions are clearly nonsense. A large part of what the new rules are about is ensuring that companies get tax relief for the cost of their borrowing. […]
>
> Provided that companies are funding commercial activities or investments in a commercial way, they should have nothing to fear. If they opt for artificial, tax-driven arrangements, they may find themselves caught'.