[2020] UKFTT 197 (TC)

TC07683

Appeal number: TC/2017/03594

CORPORATION TAX– investment company - deduction of expenditure - whether expenditure expenses of management or expenses of disposal of assets - whether expenditure expenses of the appellant's investment business - whether expenditure capital in nature- contingent fees

FIRST-TIER TRIBUNAL
TAX CHAMBER

CENTRICA OVERSEAS HOLDINGS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21 to 23 May and 14 to 15 October 2019

Mr James Rivett QC and Mr Ronan Magee, Counsel, instructed by Pinsent Masons LLP, for the Appellant

Mr James Henderson, Counsel and Ms Barbara Belgrano, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case concerns whether Centrica Overseas Holdings Limited (which I shall refer to as "COHL") is entitled to deduct the sum of £2,529,697 from its profits for Corporation Tax purposes for the period ended 31 December 2011 as "expenses of management" under section 1219 Corporation Tax Act 2009 ("CTA") ("section 1219").

2. COHL is a company in the Centrica plc group ("Centrica" or "Plc").

3. The expenditure ("the disputed expenditure") relates to fees paid to three professional firms, Deutsche Bank AG, London ("Deutsche Bank"), PricewaterhouseCoopers ("PwC") and De Brauw Blackstone Westbroek ("De Brauw") in connection with the disposal of certain companies owning gas and power businesses.

4. On 19 December 2016, HMRC issued a closure notice amending COHL's company tax return on the basis that none of the disputed expenditure was deductible under section 1219. The Appellant appealed against this decision on 11 May 2017.

5. I had before me five bundles of documents and a further bundle of authorities. I also heard witness evidence from Ms Charlotte Radcliffe, Centrica plc's Group Head of Tax, Mr Richard McCord, Finance Director of Centrica plc and Mr Christophe Defert, the Centrica Innovations Director in Centrica's ventures team in San Francisco.

6. The hearing in May 2019 was part heard and after that hearing, both parties prepared Notes on the Evidence. Following the resumed hearing in October 2019 HMRC produced written submissions on the legislation and the Appellant submitted a written reply.

The Legislation

7. The relevant legislation is set out in Part 16 CTA which relates to companies with investment business. The terms "company with investment business" and "investment business" are defined in section 1218 CTA:

> **"1218 "Company with investment business" and "investment business"**
> (1) In this Part "company with investment business" means a company whose business consists wholly or partly of making investments.
> (2) But a credit union is not a company with investment business for the purposes of this Part.
> (3) References in this Part to a company's investment business are to be construed in accordance with section 1219(2).
> But this subsection does not affect the interpretation of the expression "company with investment business"."

8. The crucial provision is section 2019 which confers the relief for the expenses of management which the Appellant claims. It provides, so far as material:

"1219 Expenses of management of a company's investment business
[(1) In calculating the corporation tax to which a company with investment business is liable for an accounting period, expenses of management of the company's investment business which are referable to that period are allowed as a deduction from the company's total profits.
(1A) A deduction under subsection (1) is to be made before any other deduction at Step 2 in section 4(2) of CTA 2010 (deductions from total profits).]
(2) For the purposes of this section expenses of management are expenses of management of a company's investment business so far as—
(a) they are in respect of so much of the company's investment business as consists of making investments, and
(b) the investments concerned are not held for an unallowable purpose during the accounting period to which the expenses are referable.
(3) But—
(a) no deduction is allowed under this section for expenses of a capital nature, and
(b) no deduction is allowed under this section for expenses so far as they are otherwise deductible from total profits, or in calculating any component of total profits…."

9. Certain items are treated, under section 1221 and Chapter 3 of Part 16 of the CTA as being expenses of management. These include matters such as excess capital allowances, costs in connection with payroll deduction schemes, costs of outplacement services and redundancy payments.

10. Rules restricting deductions are contained in Chapter 4 of Part 16. These prohibit the deduction of such items as costs in connection with arrangements to obtain a tax advantage, unpaid remuneration, and business entertainment and gifts.

11. It is not suggested that the special rules apply in this case. The issue here is the correct construction of section 2019 and whether the disputed expenditure falls within that provision.

12. That provision and its predecessors have been the subject of extensive judicial commentary and I will consider the case law below.

The background facts

13. It is common ground that COHL is an investment holding company. It is a subsidiary of BG Gas Holdings Limited, which is itself a subsidiary of Centrica.

14. The Centrica Group is well known as a major participant in the energy market. It operates in the UK, North America and elsewhere and its activities include energy supply, gas and oil exploration, development and production and the operation of power stations in the UK. It is the biggest supplier of energy to the UK domestic market.

15. COHL was and is a substantial intermediate holding company holding the Group's investments outside the USA. As at 31 December 2009, the company's book value was £1,264,917,000. Its investments included shares in and loans to companies in the UK, Spain, Canada, Norway, India and Germany and other European countries.

16. This case is about COHL's 100% holding in Oxxio BV (Oxxio), a Netherlands company which itself owned four different subsidiaries.

17. COHL acquired Oxxio on 1 July 2005 for £88,364,000. At the time, it was considered that increasing deregulation in the European energy market would provide opportunities for expansion and it was intended to hold the Oxxio group as a long term investment. The investment was not a success. From the time of its acquisition, the group generated losses on a year-by-year basis. In 2008 alone, it made a loss of over €100m.

18. COHL provided financial support to Oxxio throughout the period from 2005 to 2011. It provided debt financing through an inter-group revolving loan facility. As at 31 December 2009, the balance outstanding on the loans (which were interest bearing) was €91,000,000. In addition, COHL provided an equity injection in 2009 of €190,000,000. By the end of June 2010, the existing facility had expired. On 1 July 2010 COHL's directors approved a new facility of with a limit of €250,000,000 expiring on 31 December 2011.

19. Ms Radcliffe and Mr McCord explained that in 2009 Centrica was reviewing its involvement in the European energy market generally. The anticipated deregulation in the market had not happened and it was considered that this would limit the future opportunities for operating profitable businesses in the region. Strategic decisions of this nature would be taken at the level of the Plc board. Such strategic decisions would generally relate to "businesses" rather than the specific legal entities which might carry on those businesses.

20. The future of the Oxxio businesses was considered as part of this general review. Centrica's annual report and accounts for 2009 states "In June 2009…management approved and initiated a plan to sell Oxxio BV in the Netherlands. …It is anticipated that the sale of Oxxio…will complete by 30 June 2010." The report went on to say that "Oxxio…was classified as a discontinued operation from 30 June 2009".

21. A so-called "kick-off meeting" was held on 10 July 2009 at which the disposal of the group was discussed. The "transaction objective" was to achieve a "going concern sale" of the Oxxio Group (codenamed "Project Erasmus") although the agenda also included different possible transaction structures. Representatives of Deutsche Bank, PwC and De Brauw attended the kick-off meeting although they were not yet formally engaged. According to Ms Radcliffe, this did not represent the beginning of a sales process, but was "*a much earlier stage when teams are only exploring the viability and possibility of a sale*".

22. The Accounts state that Oxxio was to be treated as a discontinued business as from 30 June 2009 and Ms Radcliffe's evidence was that the actual decision to sell the Oxxio group was taken before the kick-off meeting. However, it seems that the formal decision was taken on 28 July 2009, the date of a meeting of the board of Plc at which it was decided that Oxxio and two other European businesses "would be treated as discontinued businesses held for sale". Plc's half yearly accounts released on 30 July 2009 also state that management had approved and initiated a plan to sell Oxxio and later referred to Oxxio as a discontinued business held for sale.

23. "Held for sale" is an accounting term of art and is defined by IFRS5. A "disposal group" is to be classified as "held for sale" if its value is to be recovered principally through a sale transaction. The disposal group must be "available for

immediate sale in its current condition" and a sale must be "highly probable". For this to apply, management must be committed to a plan to sell the asset and must have initiated an active programme to locate a buyer and complete the plan. It must be actively marketed for sale at a price which is reasonable in relation to its current fair value. It should be expected that the sale will complete within a year.

24. Clearly, the board of Centrica had decided, in June 2009, that it wanted to sell the Oxxio business and it was taking steps to do so.

25. The sale proved not to be easy. A transaction did not take place until March 2011 and it was not the straightforward sale of the shares in Oxxio which Plc had initially hoped for. Oxxio was itself a holding company with four subsidiaries carrying on a diverse range of businesses. Oxxio Nederland BV entered into gas and power purchasing contracts with third parties and had 620,000 residential and business customers and 180 employees. Oxxio Tolling BV held the lease of a power plant at Rijnmond under a long term "tolling" agreement. Essentially "tolling" involves the company buying gas and providing it to the power plant which is owned by a third party which uses the gas to produce electricity. The company then sells the electricity in the market and pays the third party a fee for producing it. Oxxio Metering BV managed a smart meter energy business with 200,000 smart meters. Centrica Energy Netherlands BV ("CEN") had a supply agreement with another company to provide power to 140,000 residential customers.

26. The problem for COHL was that a prospective purchaser would not necessarily want to buy all of these businesses. This was compounded by the fact that there were problems with management and financial controls which made a share purchase unattractive from the buyer's point of view.

27. In the event, it was not possible to sell the whole group and the transaction consisted of an asset sale by means of a partial de-merger to a company called Eneco. Eneco first made an indicative offer in September 2010 which was rejected and may have made another offer, which was also rejected in December 2010. Eneco made a final offer in January 2011 and the board of Centrica approved this transaction with Eneco in principle at a meeting on 22 February 2011 and delegated authority to agree the final terms of the deal to certain board members including the CEO, CFO and General Counsel. The Appellant's case is that this constituted the decision to sell the Oxxio group such that expenses incurred after that date were expenses of the sale and not expenses of management.

28. The actual transaction, which was completed in March 2011 proceeded as follows:

    (1) Oxxio Nederland BV formed a subsidiary "Demerged Company A" and transferred to it certain assets which Eneco wished to acquire

    (2) CEN formed a subsidiary "Demerged Company B" and transferred to it certain assets which Eneco wished to acquire

    (3) Eneco purchased the entire shareholding in Demerged Company A and Demerged Company B.

(4) Eneco also acquired the entire shareholding in Oxxio Metering from Oxxio.

29. Following these transactions, COHL continued to own Oxxio and to provide financial support to Oxxio Tolling which remained part of the Centrica Group.

30. Deutsche Bank, PwC and De Brauw were involved throughout the process. Each firm was engaged by Plc to provide certain services. In the first instance, the fees were paid by Plc as COHL does not have a bank account. I was informed that this was usual practice within the group and costs incurred in this way would then be charged to what was considered the appropriate entity by means of book entries. The disputed expenditure was included as an accrual in the financial statements of COHL for the period ended 31 December 2011 and it was accepted by HMRC that COHL had borne the cost of the fees.

31. The total fees mounted to £3,806,722 (when converted into sterling which is the functional currency of the Centrica Group).These fees were paid by Plc pursuant to the following invoices:

(1) PwC: invoice dated 28 January 2011 for £172,423

(2) De Brauw: invoices dated 23 February 2011 and 3 August 2011 for €162,578.62 and €603,750 respectively

(3) Deutsche Bank: invoice dated 22 September 2011 for €3,550,515.32

32. Deutsche Bank's fees consisted of a fee of €2,500,000 which was to be payable "in the event the Oxxio Transaction [a defined term] is completed" and "at the time of completion". An "additional incentivisation fee" was payable in the event that a Transaction was consummated in Centrica's sole discretion. Mr McCord gave evidence that this sort of fee model was standard for investment banking services. Essentially, if the transaction completed, the investment bank receives a large sum of money. If it fails to secure a transaction it is entitled to nothing, although Mr McCord indicated that the company would sometimes pay some of the fees if the services had been useful to it.

33. COHL did not claim any deduction for the additional incentivisation fee which was paid to Deutsche Bank.

34. Mr Rivett conceded that fees incurred after the Plc board decision on 22 February 2011 were not "expenses of management" but expenses related to the sale. The fees were then apportioned on the basis that the period from the Plc board's "in principle" decision to dispose of the Oxxio group on 28 July 2009 to the completion of the sale on 1 June 2011 was 22 months, the period up to 22 February 2011 was 19 months and therefore 19/22 of the fees should be regarded as expenses of management, a total of £2,529,697.

Decision making in the Centrica Group

35. Ms Redcliffe gave evidence as to how decisions were made by and for entities within the Centrica Group. Ms Redcliffe was the Group Head of Tax and was employed by Centrica. She was also a director of COHL and a number of other subsidiaries within the Centrica group. She is currently a director of 13 other

group companies. The other directors of COHL at the relevant time were a Mr I G Dawson and a Mr J Bell who were also senior employees with the group.

36. Strategic decisions for the group were made by Centrica. This was facilitated by various central teams who would provide advice and support for the group in areas such as, legal, tax, accounting, regulatory matters, finance and mergers and acquisitions. Individual companies within the group did not have their own teams dealing with these matters but would be provided with support by the central, group-wide teams. Most of the employees of the group were employed by a small number of companies within the group, and many of the subsidiaries, such as COHL, had no employees of their own. The operating companies did, of course, have their own employees. The directors of the subsidiaries would be employees of Centrica (or another employing company) and would often, as in Ms Redcliffe's case, be director of several companies.

37. Ms Redcliffe described herself and her fellow directors of COHL as being in "senior positions within the group's corporate centre." This is a group of people whose activities covered the whole of the group rather than a single division in it. This group of people monitored the activities of the subsidiaries owned by COHL. Members of the legal, tax and finance teams would provide reports. If they considered that a decision needed to be made, for example to provide more financing, they would have a meeting which might be formal or informal to make the decision.

38. Ms Redcliffe said that it was always difficult to determine in exactly what capacity such decisions were taken. Typically, the initial information or briefing would come to her in her capacity as Head of Tax and she would have discussions in her capacity as Head of Tax and also in her capacity as director. She asserted that the ultimate decision would be taken as a director.

39. There does not seem to have been any clear delineation between the various roles in which the people who were the directors of COHL were acting. They were all senior people carrying out group roles, they worked together, many in the same building and they would receive information and discuss matters relevant to COHL in their group capacities. There was, accordingly, no need to brief the directors of COHL or inform them how the transaction was progressing as they (as directors of COHL) would already know these things in their respective group capacities.

40. Ms Redcliffe had said in her witness statement that the knowledge gained by the directors of COHL in their group roles enabled them to make informed decisions and to "challenge decisions made by Plc". Ms Redcliffe clarified this in cross-examination. "Challenge" was not intended to convey a confrontational situation where COHL would decide that a strategic decision taken by Centrica was wrong, but the COHL board would raise issues which might not have been considered when the decision was taken and highlight potential problems which might arise from decisions. For example, when the group decided to pursue activities in Germany, the directors highlighted the fact that in order to operate legally, a large amount of equity would have to be provided to the company. Or the directors might raise tax issues which had not been thought about or would warn that cash might be trapped offshore if a particular decision was implemented. These

conversations tended to be on an informal basis but the conversations would be had and could challenge the thinking behind the original decision.

41. A distinction was drawn between strategic decisions which would be taken by the board of Plc, such as a decision to pursue the Dutch market and decisions following on from that about the organisation of the investments and how they were run, financed and managed. The latter decisions would effectively be made at group level with input from the various group teams, which would include, but not be limited to the directors of COHL. Apart from Ms Radcliffe, as group Head of Tax, the directors of COHL included key members of the finance team so they would have been heavily involved in the Oxxio transaction and regularly briefed about the progress of the deal in those capacities.

42. At the point where a formal decision had to be taken, a COHL board minute would be produced. It was group practice to keep minutes "short and to the point". Minutes were prepared by the group Company Secretariat and would follow discussions by the relevant group teams, which included the directors of COHL.

43. It is unclear what sort of decisions were considered worthy of a formal minute. In the five bundles of documents presented for the hearing, there were only three extracts from minutes of board decisions by COHL.

44. The first related to a meeting held on 19 March 2009. It related to the injection of €110 million of equity capital into Oxxio. It was noted that Oxxio's balance sheet showed losses of €100.1 million and that "the Centrica group finance department believe that €110 million should provided sufficient cushion". The new equity would enable Oxxio to repay some of its debt to COHL. Ms Redcliffe confirmed that it would be the responsibility of the group finance team to monitor this kind of thing but that a member of the COHL board, who headed up the team would have been involved and she was involved in the discussions about the Dutch thin capitalisation rules in her capacity as Head of Tax. The directors of COHL, as such, then decided to subscribe for new shares in Oxxio. The funds would have come from the group treasury function.

45. The second minute was dated 30 September 2009 and recorded a loan made to Oxxio Tolling BV to provide working capital. The third minute related to a meeting held on 1 July 2010. This minute concerned the expiry of a loan facility provided by COHL to Oxxio and the grant of a new loan facility with a limit of €250,000,000. It was stated that Oxxio's request for group funding had been reviewed and approved by Group Legal and the Group Treasury Department. The loan was to be in a form similar to that used by the Group.

46. In terms of process, it seems that the group teams would identify something which needs to be done in relation to a group company. Ms Redcliffe confirmed that the strategic decisions as to whether to provide additional funding were taken at Plc level and stated that the directors of COHL, as the relevant holding company, with the knowledge they had from their group functions took the operational decision.

47. There would not necessarily be a formal meeting of the board of directors. As the individuals were physically in the same place, they would discuss matters as required on a regular basis. Perhaps twice a year there would be a review of the accounts and the position of the company and there would be a discussion with

members of the tax team or the finance team and appropriate minutes would be prepared. The directors were guided by the group secretariat as to what needed to be recorded.

48. The July 2010 minute contained no mention of the progress of the Oxxio transaction although this was very much ongoing at the time. Ms Redcliffe said that the directors of COHL, in their group capacities had been briefed and provided with detailed information about progress.

49. Ms Redcliffe stated that she was not aware of any COHL board minutes noting or implementing the strategic decision to sell the Oxxio businesses. Nor was I taken to any other board minutes of COHL relating to the sale, the difficulties being encountered, the possible purchasers, the alternatives considered or the the ultimate agreed transaction which was entered into by Eneco.

The services provided by Deutsche Bank, PwC and De Brauw

50. It is important to establish the nature of the services which were provided and to or for whom they were provided. Mr McCord's evidence examined the engagements of each of the three advisors and the work that they actually did.

51. Centrica took the decision to divest the Oxxio group in June 2009. The "kick-off" meeting was held on 10 July 2009 to start the divestment process. The agenda was wide ranging and included such matters as the transaction objectives, possible transaction structures, due diligence, legal and tax issues, people considerations and process and timing. Teams from Deutsche Bank, PwC and De Brauw participated in the meeting. No fewer than twelve people from Centrica group functions attended the meeting. These included individuals from the Mergers and Acquisition (M&A) team, Finance, Commercial, Legal Tax and Human Resources. Mr McCord attended as a member of the M&A team. None of the directors of COHL attended. This illustrates that the advisors were involved from the outset.

52. I will look at each engagement below, but note here that in each case they were with Centrica and, in the first instance, paid for by Centrica. There was no agreement in advance by COHL to bear the cost of the advice.

53. Mr McCord stated that Centrica would routinely procure services for entities elsewhere in the group with the cost being borne by the ultimate "consumer" of those services ie the entity that benefited from them "such as the appellant in respect of the Oxxio disposal". In cross-examination, Mr McCord clarified this. The group would decide what an intermediate holding company like COHL would do. A decision by the board in relation to COHL would, as is typical in a large group result in COHL carrying out activities in accordance with that decision. The work of the specialists at group level in relation to that decision would ultimately enure for the benefit of COHL. Mr McCord stated that the economic benefit of the transactions flowed back to COHL as the disposal, even though not a direct sale by it, resulted in its loans being repaid.

54. The same point was made by Ms Redcliffe, who explained that the M&A team, along with other central group functions would provide services for all companies within the group as required.

> "The M&A team were working to realise the value of the Oxxio investment which was an investment of COHL. So although Deutsche Bank didn't directly work for COHL, because they worked for the M&A team who were supporting COHL,…that's how it comes together. We don't necessarily carve everything up by legal entity."

55. She considered that although a number of entities might be regarded as benefiting from the advisors' work, the main beneficiary was COHL which realised the value of Oxxio through repayment of its loans. That was therefore considered to be the appropriate entity to bear the cost of the advice that was given. She put it like this:

> "…it's a sort of Goldilocks thing. Plc, although it is responsible for the strategic decisions is too far removed from the transactions and Oxxio is the thing being sold, so it's …right in the middle of the transactions. Whereas Overseas Holdings is the company that holds the investments and should receive the value that is realised on that investments, whether it is by distribution or by, as it's turned out, repayment of loans…the principal company that was benefiting [from the advice] was Overseas Holdings.. I think that…was the most natural company…to pick up the cost, be (sic) treated as benefiting from the advice that was given."

56. Mr McCord explained that it was not strictly necessary to employ advisors such as investment banks, accountants or lawyers to carry out transactions and Centrica could, and did, carry them out using their own in house teams.

57. In large and difficult transactions such as the present one, an investment bank would be brought in because of a lack of "bandwidth" to do the "heavy lifting". In other words, a transaction like this involved a great deal of work over an extended period and the Centrica staff did not have the capacity to deal with it. Mr McCord also commented that using an investment bank was a standard procedure and having a respected name as lead advisor would give credibility in the market and they were used because they were likely to obtain a better outcome than if the company had used its own resources.

58. He also made clear that Centrica was deeply involved in the process and was the decision maker. So Centrica would brief the advisors on what they wanted to achieve, what work they wanted them to do and how they wanted them to go about it, and then the advisors would go and do the "heavy lifting". Deutsche Bank's role was to advise, provide information and make recommendations, but Centrica makes all the decisions. They would not, for example, approach a potential counterparty without Centrica's approval.

59. A number of investment banks pitched for the work and Deutsche Bank was chosen because they could demonstrate good contacts with energy companies which might be interested in Oxxio, had good knowledge of the Dutch energy market and the relevant team had a good track record. It was felt they would do a good job and provide the best advice about the options available for the future of the Oxxio business.

60. I now turn to the specific engagements and work done by the three advisors.

Deutsche Bank

61. A formal engagement letter between Deutsche Bank and Centrica was signed on 23 July 2009 but Deutsche Bank was already involved and had done a good deal

of work even before the kick-off meeting. On 24 June 2009, Deutsche Bank produced a document evaluating the "buyer universe" for Project Erasmus, the code name for the disposal of the Oxxio Group. Similar documents were produced throughout the process of divestment. It looked at a selection of possible counterparties who might be interested in purchasing the Oxxio business or entering into an asset swap. Potential interest in "Erasmus" ie Oxxio and Rijnmond was considered separately.

62. A presentation dated 2 July 2009 set out the "key workstreams and time line". Again, similar documents were produced at various stages in the process. This document set out the key steps such as assessing the sale structure, preparing Vendor Due Diligence (VDD), targeted marketing and a sales process leading to the final bids and completion. It allocated responsibility for the steps to the entities involved and established an indicative timetable. This is a fairly standard part of any sale and would be revised as matters progressed, or did not progress.

63. Following the kick-off meeting, an engagement letter was sent to Centrica for the Attention of Nick Luff who was the Group Finance Director. Given the scale of the fees the letter had to be signed off by a very senior person. There were three elements to the engagement, each described as a "Transaction". The letter stated:

> "Centrica has engaged Deutsche Bank as:
>
> A. Its exclusive financial advisor in relation to the strategic alternatives for the Oxxio customer supply business the may lead to a possible transaction, through sale (whether by way of share or asset sale), customer assignment, asset swap or otherwise, whether effected in a single transaction or a series of related transactions (the "Oxxio Transaction");
>
> B. Its exclusive financial advisor in relation to the strategic alternatives for the Rijnmond 2 tolling agreement entered into by Oxxio Tolling BV (the "Rijnmond Business") that may lead to a possible transaction in respect of the Rijnmond Business, whether in conjunction with, as part of, or independently from the Oxxio Transaction (the (Rijnmond Transaction"); and
>
> C. Its financial advisor in respect of the exploration of strategic alternatives for certain gas pipeline capacity in the Netherlands…"

64. The services to be provided were wide ranging and included the provision of :

> "…financial advice and assistance in connection with the Transactions, which may include if appropriate advice and assistance with respect to defining objectives, performing valuation analysis, structuring, negotiating, planning and managing the process of the Transactions…Deutsche Bank will:
>
> (a) Familiarise itself…with the business, operations, financial condition and prospects of Oxxio and the Rijnmond business;
>
> (b) …
>
> (c) Assist Centrica in identifying and evaluating counterparties for potential Transactions;

(d) Assist Centrica in identifying and evaluating potential assets held by a counterpart which could be of interest to Centrica under and asset swap structure;

(e) Contact potential counterparties..meet with representatives of such potential counterparts and provide such representatives with such information about Centrica and Oxxio as may be appropriate and acceptable to Centrica, subject to customary business confidentiality;

(f) Advise on the structuring, pricing, size and timing of the Transactions;

(g) Advise on the external presentation of the Transactions and the likely reaction of the stockmarket…;

(h) Advise on the marketing of the Transactions including…preparation and co-ordination of presentation and other sales documents;

(i) Assist in the production of any announcements, circulars or documents necessary to implement the Transactions;

(j) …

(k) Render such other advice, assistance and services as may… be reasonably and specifically requested by Centrica in connection with the Transactions.

65. The letter went on to state:

> "Deutsche Bank has been engaged only by Centrica and Centrica's engagement of Deutsche Bank is not deemed to be on behalf of and is not intended to confer rights upon any person not a party to this Letter….No one other than Centrica is authorised to rely upon any statements, advice or opinions of Deutsche Bank."

66. Deutsche Bank's fees comprised two elements, in addition to its reasonable expenses. The fees to be paid to Deutsche Bank for its services were:

(a) "In the event the Oxxio Transaction is completed, a fee, payable at the time of completion, of €2,500,000; and

(b) An additional incentivisation fee, payable at Centrica's sole discretion for services thereunder following consummation fo a Transaction."

67. There was also a provision that if Centrica terminated the engagement without cause and then completed a Transaction within 12 months, Deutsche Bank's fees would remain payable.

68. Mr McCord explained that this kind of fee structure was typical in a sale transaction and was intended to incentivise the investment bank to get the best deal they could for the client and to get it over the line. He said that a very high proportion of M&A transactions failed, often at the last minute. If the investment bank did not get paid unless a transaction was completed it was obviously in their interests to try and make sure the deal went ahead. Although the payment was **made** only on completion (if that happened), the payment was compensation for all the work put into the transaction by a team of people from juniors to very senior investment bankers, in this case, over a period of two years.

69. He commented that even where transactions did not proceed, Centrica would sometimes pay the fees, or some of them, if the advice provided by the investment

bank had been useful to it. Alternatively, Centrica might award the bank the next mandate.

70. This fee was payment for the work done, although conditional on completion and was to be contrasted with the incentivisation fee which was a true incentive payment made at Centrica's discretion. In this case, €1,000,000 was paid to Deutsche Bank.

71. An important part of Deutsche Bank's role was to evaluate the options available in relation to Oxxio. The strategic decision to divest had already been taken, but the options as to how to achieve this were wider than in normal transactions because of the diversity of the businesses within the Oxxio sub-group and the problems which emerged in the finances and management of the main customer business. It was not clear what appetite the potential purchasers in the market might have for the different elements in the business. There was even the possibility that the business would prove unsellable and would have to be closed down.

72. Another major part of Deutsche Bank's engagement was to identify possible buyers and to evaluate the level of interest they might have in the different parts of Oxxio's business. In June 2009, they produced a document for "Project Erasmus" which considered the "buyer universe" of energy companies who might want to buy or to enter into an asset swap. A number of similar documents were produced in the course of the transaction as the range of potential buyers narrowed and other options, such as a sale to private equity investors were considered.

73. Deutsche Bank produced a paper on "key workstreams and timeline" in July 2009. Again, a number of similar documents were produced as the transaction progressed setting out the steps in the process, who was to be responsible for what and the indicative timetable for carrying out the steps. The process and stages set out would be standard in any M&A transaction. The document set out the sort of things Deutsche Bank would deal with (on their own or in conjunction with Centrica or the legal advisors). The initial stage was aimed at gauging market interest before a full scale sales process was launched. This phase included:

- Reviewing Oxxio's business plan
- Agreeing a detailed process and work plan
- Making a valuation assessment
- Defining the scope of the Vendor Due Diligence excercise
- Assessing the sale structure
- Initial approaches to potential selected buyers
- Preparing a draft investment presentation
- Preparing a draft non-disclosure agreement

74. The next stage would be to finalise he investment presentation and carry out a targeted marketing exercise. This would be followed by bidder due diligence with Deutsche Bank assisting with the question and answer process and collating final offers. This would then lead (hopefully) to the final negotiations with one or two bidders and completion.

75. Mr McCord made the point that all such plans tend to be optimistic and in the present case, the process did not go according to plan at all. Although they might have gone through most of the stages, there was a point where they seriously considered abandoning the sale process altogether because it looked as if the business might not be sellable. They considered retaining the business and trying to turn it round then either keeping it as a good business or selling it as a solid proposition. Further, the ultimate transaction was not the clean share sale Centrica had hoped for but a partial asset sale and they failed to sell the Rijnmond plant at all which was originally intended to be sold along with the rest of the Oxxio business.

76. A further document dated 31 July and headed "Workstreams and Call Agenda" set out the detailed steps which were envisaged to get as far as an agreed investor presentation. Deutsche Bank was involved in three main areas: structuring, investor presentation and valuation. These workstreams require a lot of man hours and are part of the "heavy lifting" Deutsche Bank were employed to do.

77. In August 2009 Deutsche Bank produced a presentation on possible structures. Centrica's preferred option, from the outset and throughout the course of the transaction, was to achieve a going concern sale of the Oxxio shares. Even at this stage, it was thought necessary to consider other options and the paper also considered the assignment of customers, which would be more attractive to a buyer as it would enable them to "cherry pick" the assets they wanted, the retention by Centrica of working capital and a transaction which carved out the Rijnmond business and/or the pipeline capacity.

78. As the process evolved in the course of 2009, the possibility of a share sale began to look more difficult as Centrica gained a greater understanding of problems in the Oxxio business.

79. Oxxio had been making losses for a number of years which was quite common for a new business. However the scale of the loss in 2008 was unexpectedly large and as they investigated the reasons for the loss, they discovered other problems in the business which were a barrier to sale. The issues arose in the core customer business. There were accounting irregularities, a lack of hedging led to major losses, there were poor risk management practices, unidentified tax exposures and the company did not have a clean audit opinion. As Mr McCord described it, there was potentially "a whole lot of murky mess in that legal company". This made an asset sale much more attractive for a purchaser as they could take the parts of the business they wanted and leave the "murky mess" behind.

80. In August 2009, Deutsche Bank was working with Centrica on a script which would be used to make initial contact with some of Deutsche Bank's contacts in the industry to gauge what interest there might be in Oxxio. This was very much part of the job they had been engaged to do.

81. Reports were made to Centrica about the stage the transaction had reached.

82. In November 2009 Deutsche Bank were considering whether, as a matter of process it was better to approach all potential buyer and choose who to go ahead with or to carry out a two stage process obtaining expressions of interest from a broad range of potential buyers then having more targeted conversations with the front runners.

83. By 25 March 2010, Deutsche Bank had prepared a draft presentation for potential buyers. Essentially this was a marketing document. A further draft was prepared in June.

84. Also by June the "buyer universe" had been whittled down to those who might be interested following initial conversations with Deutsche Bank. Deutsche Bank included comments about the strategic fit and perceived interest under the heading "Key will be to gain meaningful engagement from a lukewarm buyer universe".Eneco was on the list with the comment that they had registered interest and wanted to explore things further with Centrica.

85. Eneco and Centrica made contact some time in the summer and by August the latest timetable was looking at a dual process whereby there was an indicative timetable for a transaction with Eneco and a parallel timetable for an auction process in case Eneco decided not to go ahead. Mr McCord put the possibility of an Eneco transaction succeeding as 30% at the time.

86. In September Centrica was in correspondence with Deutsche Bank about providing due diligence information to Eneco.

87. In October 2010 a virtual data room was set up to provide information which would have been used for both Eneco and the possible auction process. Deutsche Bank were involved with logistics and co-ordination of the data room. The information would have been provided by Centrica or Oxxio.

88. Towards the end of 2010, Deutsche Bank prepared a template letter incorporating a confidentiality undertaking and asking for indicative proposals. The draft set out that Centrica was looking for a clean exit via a share sale. A prospective purchaser was required to address matters such as price, structure of the proposed transaction, how they had valued the business, the strategy and rationale for their interest and other matters.

89. At this point, in November 2010, Mr McCord was transferred to another role in Centrica and Mr Defert took over the Oxxio transaction. Mr Defert recalled that when he joined the team, Centrica was still receiving advice about the auction process and its other options.

90. Although an initial, and disappointing, offer had been received from Eneco in September 2010, work continued on the basis that the Eneco transaction might not succeed. Deutsche Bank maintained and regularly updated a list and analysis of potential buyers right up until the time the Eneco transaction was completed on 24 March 2011.

91. On 19 January 2011, Deutsche Bank produced a document entitled "Key Transaction Terms". This set out the headline terms, but many matters remained to be negotiated. Further indicative timetables were produced.

92. Deutsche Bank continued to be involved into February as illustrated by emails between Mr Defert and others and Deutsche Bank relating to detailed due diligence questions.

93. As noted, Mr Defert indicated they remained involved and exploring the options right up to completion.

PwC

94. PwC's engagement letter was addressed to Centrica, for the attention of Mr McCord, and was dated 23 November 2009.

95. The main service to be provided by PwC was the preparation of "a report, the purpose of which is to assist a potential purchaser in its due diligence with a view to buying the Business". That is, they were to prepare a Vendor Due Diligence (VDD) report. As Mr McCord indicated, this was not uncommon, but not standard. The VDD report could be made available to potential purchasers and PwC would discuss the report with them. At a later stage, PwC might assume a duty of care to the preferred bidder.

96. Centrica would arrange for PwC to have full access to Oxxio's senior management, its financial records and its operations. The letter recognises that "the Report may provide you with information which assists you in forming or refining your view of the Business and in preparing to negotiate a sale" but makes it clear that PwC is not providing financial advice to Centrica or acting as an advocate for them to help them sell the Business. PwC is acting as an independent accountant providing a due diligence report for use by a purchaser.

97. PwC had begun work on 11 November 2009 and expected a draft report to be available by the end of February 2010. They would then meet with Centrica and its advisors to discuss the report and finalise it before it was released to potential purchasers nominated by Centrica. PwC would discuss the Report with potential purchasers. Centrica would identify a "Preferred Bidder", the report would be finalised and addressed to Centrica, but, at Centrica's request, PwC would enter into an agreement with the preferred bidder so that they owed them a duty of care.

98. The matters to be covered by the Report were set out in an appendix and included; business overview, business operations, including marketing, customer acquisition and retention and costs, accounting policies, historical trading performance, historical cash flows, historical assets and liabilities, current trading performance, projections, accounting records and management information systems, internal controls, management and employees and taxation. So it would be a very thorough review of the business.

99. PwC's fees would be based on the time spent in producing the report and were payable whether or not any transaction proceeded.

100. Mr McCord indicated that a VDD report was more likely to be commissioned where there were difficulties in the business. As they began to get into the transaction it became apparent that the Oxxio business had some problems and the financial information was confusing. It was felt that a VDD report would help to analyse what had happened. Although VDD is primarily for the benefit of a prospective purchaser, Mr McCord said that in this case, it helped Centrica to

understand what was going on in the business and also to decide how to proceed. Should they carry on with the sale now or stop and try and resolve the issues before attempting to sell Oxxio? It informed Centrica's thinking and provided insight in to the problems.

101. PwC carried out their work over a twelve month period from November 2009. The management of Oxxio were well aware that there were problems before then; the auditor had issued a disclaimer of opinion in respect of the 2008 and 2009 accounts. The VDD report notes that "Due to historic deficiencies and financial controls in accounting methodology, management launched a project in 2009 to address these deficiencies and put in place a new accounting process".

102. Despite the declaration in Centrica's 2009 half-yearly accounts that Oxxio was now a discontinued business held for sale, with the technical meaning set out in paragraphs 22 and 23 above, an extract of a Minute from a Centrica board meeting held on 7 May 2010 states that "the sale process for Oxxio had been put on hold to allow the local team to focus on the work required for completing the 2008 and 2009 statutory audits".

103. As PwC began their work, the scale of the problems emerged. As a result, they made a site visit to Oxxio's headquarters on 8 July 2010 and produced a report for Centrica called the "Project Erasmus Deep Dive". The purpose of the report was to enable Centrica to understand just how bad the problems were and to inform their decisions about the options available in the context of a sale and, indeed, whether the problems were so bad that the business was unsellable.The Report was sent to Centrica's M&A team and board members. Although it was not sent to COHL, Ms Redcliffe would have been aware of it in her role as Head of Tax. This report was dated 21 July 2010. The executive summary stated "Deep rooted process and control issues exposed, with significant effort required to address weaknesses in advance of a sale process". The report went on to identify the issues, suggest actions with a time-frame and whether the actions were to be completed pre-sale or post-sale.

104. Notwithstanding the serious problems which had been identified, the 2010 half-yearly accounts of Centrica stated "The Group intends to dispose of Oxxio as soon as practicable. Certain system and reporting issues have been identified and are being addressed prior to the launch of an auction process for the planned sale of the business. Accordingly, Oxxio continues to be reported within discontinued operations at 30 June 2010". Mr McCord admitted that the M&A team had had private discussion with members of the board about whether the sale process should be put on hold or abandoned given the issues.

105. The final VDD report was produced on 20 January 2011. It provided a detailed analysis of the business and financial affairs of the Oxxio group. Although produced primarily for prospective purchasers, it also benefitted the board of Plc as it gave an insight into the problems, including the management weaknesses, which the Oxxio management were unlikely to have identified themselves, and helped them understand what action needed to be taken.

106. PwC submitted bills on account as the matter progressed. Their final invoice, totalling £206,907.60 was issued on 28 January 2011, shortly after they had submitted the final VDD report as that marked the completion of their work.

De Brauw

107. De Brauw's engagement letter was addressed to Centrica for the attention of Mr McCord and was dated 9 October 2009. It began "We are pleased to assist Centrica in regard to the envisaged divestment of the Oxxio group as a whole or in parts, by way of a sale of shares and/or sale of business or pursuant to an auction sale (the "Transaction")". Although Centrica, from the outset wanted to effect a share sale, there was no assumption this would be the nature of the "Transaction".

108. The scope of De Brauw's services was to act as lead counsel and to advice Centrica on matters of Dutch law in specified areas including:

    (1) Employment law including works council advice

    (2) Competition law

    (3) Tax matters relating to the potential structures for the Transaction

    (4) Reviewing material contracts which might be affected by the Transaction

    (5) Preparation of an auction draft Sale and Purchase Agreement ("SPA"), reviewing, changing it and producing the final SPA as well as other documents required in the sale

    (6) General assistance including preparation of process letters/confidentiality agreements and assisting with matters relevant to signing the SPA and completion of the Transaction.

109. Their role was, essentially, to provide legal advice on matters such as competition law and tax, which might affect how the Transaction was carried out and to produce and negotiate the documents needed to implement the Transaction.

110. De Brauw's fees were based on the actual time spent on the matter and they were entitled to bill on a monthly basis. There were two copy invoices in the bundle, although Mr McCord thought that there had been more. The first was dated 23 February 2011 and was for the period up to 31 December 2010, totalling €162,578.62. The work covered was in the "attached specification" which was not in the bundle.The second invoice was dated 3 August 2011 and covered the period up to 10 June 2011 (although it did not give a start point). That invoice was for €603,750.00.

111. De Brauw were involved from an early stage and produced a draft SPA as early as November 2009. Mr McCord's evidence indicates that it was usual to front load the legal work and prepare a draft SPA so that the documents are ready if a prospective purchaser shows an interest. He agreed that, although they would have been advising on matters such as competition law which were necessary to prepare for any transaction, most of the work was done in the lead up to the actual transaction and their role is more specific to the deal and so the work increases as the deal approaches completion.

112. I was taken to one of the many "action lists" which set out the various work streams and things to be done, when it was hoped they might happen and who

was responsible for doing them. This document was dated 1 February 2010 and indicated that De Brauw's main roles were in relation to "Process and due diligence preparation" which was largely to do with the preparation of the data room and the preparation and negotiation of the documents such as the SPA and Non-disclosure Agreements.

113. De Brauw prepared a draft Term Sheet which was undated but, Mr McCord thought was likely to have been produced in the second half of 2010 or the first half of 2011. The Parties were Centrica and Eneco, although there was a note that "We have assumed that Oxxio BV as actual seller should also be a party to this term sheet". The transaction which was contemplated at this stage was not the sale by COHL of the Oxxio group but a sale by Oxxio BV of the customer supply businesses of Oxxio Nederland BV and Centrica Energy Netherlands BV and the shares in Oxxio Metering BV and Oxxio Tolling BV. Although this was quite detailed, it still represents only the broad terms of the transaction and there remain many important points to be negotiated.

114. I was also taken to a number of documents which were concerned with the detailed requirements for carrying out the transaction with Eneco as it evolved. They produced a letter dated 10 November 2010 which was a memorandum on the auditor's statements required in connection with the legal demerger of Oxxio Nederland BV. This was to do with the separation of the assets, which were to go to Newco I and Newco II, from the liabilities which remained with COHL. A further letter of the same date provided legal advice in relation to licences and so on which the demerged business would need in order to operate.

115. De Brauw produced a document dated 12 November 2010 entitled "Project Erasmus Step Plan, Demerger Oxxio Nederland BV, Demerger Centrica Energy Netherlands BV". This contained a detailed explanation of all the steps which needed to be taken to achieve the proposed demerger including the creation of new companies, transfer of assets to them and the regulatory and legal processes that were required, right up to the registration of the Buyer as shareholder in the shareholders' register of Oxxio Metering- what Mr McCord called the "detailed corporate plumbing that needs to happen". This is very much a transaction focussed document. In fact, the demerger which took place was slightly different from the process described in the step plan.

116. On the same date, De Brauw sent a letter to Centrica assessing whether there were likely to be any Dutch competition law issues. This was based on the sale transaction with Eneco as it was envisaged at that point.

117. On 24 November 2010, they produced a report headed "Overview Transaction Issues". This looked at the various matters that had to be addressed on the basis that the transaction was structured as an asset sale and not a share sale.

118. De Brauw also produced and helped negotiate the final SPA which was dated 24 March 2011 relating to the shares in the two Newcos and Oxxio Metering BV. The parties were Oxxio BV as Seller, Centrica as "Seller Parent", Eneco Supply BV as Purchaser and Eneco BV as "Purchaser Parent".

Transaction timeline

119. This was clearly a difficult transaction and I now turn to consider how it evolved. I have already considered some of the steps along the way in looking at the work actually carried out by the advisors.

120. There seem to me to be four key events.

121. The first was the strategic decision to sell the Oxxio business which was taken in June 2009 by Plc. One assumes that the accounts of a public company were correctly prepared and that it was considered that Oxxio could correctly be presented as a "discontinued business" despite the fact that Centrica knew the business had problems as it had made unexpectedly large losses and the audit opinions for 2008 and 2009 were qualified. From the outset, Centrica's preferred option was to achieve a clean, going concern share sale although, as the transaction progressed, this option became an aspiration rather than a likely outcome. It is clear that from an early stage it was recognised that an entity sale might prove difficult and that at times it was thought that they would not necessarily be able to sell the business at all.

122. The second is the offer made by Eneco in January 2011 which formed the basis of the subsequent negotiations and the eventual sale. Centrica had been talking to Eneco for some time and the likely shape of a transaction (if one happened) had already evolved before then, but Centrica was not prepared to sell on the terms of the indicative offers which Eneco had previously made. It was not until January 2011 that Eneco offered a price that Centrica was prepared to accept. There were still many parts of the deal that remained to be negotiated and there remained a high risk that the deal would fail.

123. The third is the Centrica board meeting of 22 February 2011 at which the board approved the specific proposed transaction with Eneco in principle and delegated authority to negotiate the details of the deal to senior individuals. This is the point at which the Appellant accepts that the management of COHL's investment in Oxxio ceased and the implementation phase started. As Mr Defert made clear, even after this negotiations continued to finalise the terms of the deal, there was still a high possibility that the transaction might fail and Centrica continued to prepare for a "Plan B" if the sale to Eneco did not go through.

124. The fourth is the signing of the SPA on 24 March 2011. That marked the binding completion of the transaction. It was a very different transaction from that envisaged at the outset. It was not a sale by COHL of the shares in Oxxio BV and accordingly the group. Indeed, COHL was not a party to the SPA at all. As we have seen, Oxxio BV sold its shares in the metering company, demerged the assets of the customer supply business into two Newcos which it then sold and retained the original companies. The Rijnmond tolling business was not part of the transaction and is still owned by COHL

125. Throughout the periods linking these events, Deutsche Bank, PwC and De Brauw carried out their roles and did the work set out above and their charges for it constitute the disputed expenditure. What they did can be seen from the documents on which I have commented above and I do not need to repeat that here. Mr Defert commented that the documents in my bundles probably represented less than 10% of the documents generated in the transaction. Some were undated and some were drafts, so it can be difficult to pinpoint exactly when

something happened. He also emphasised that there would have been a large number of some types of document, such as timetables, step plans and sale progress presentations. This was usual in an M&A transactions and they would necessarily be updated and changed as a transaction progressed.

126. A number of themes emerged from the witness evidence.

127. Until the deal completed, it was uncertain whether a deal would actually happen. Mr Defert commented that 70-90% of M&A transactions failed and that even at the final negotiation stage (in this case after the 22 February 2011 board minute) 50% of deals failed to complete. For this reason, even after Eneco showed interest in acquiring Oxxio and up until completion, Centrica continued to explore other possibilities. For example, a document headed "Eneco Call Script" dated 11 October, which would have been prepared by Deutsche Bank, refers to continuing preparation for an auction. In a briefing note prepared for Nick Luff (Centrica's CFO) around November/December 2010 before a call with Eneco's CEO, one of the "key messages" to be delivered was that although Eneco had been a front runner to date, Centrica was now ready to launch an auction in the new year. In November 2010, Centrica was considering whether to take forward negotiations with a Danish company called DONG and/or another company, NEM which was financially supported by DONG. It was ultimately decided that this was not a viable proposal. Mr Defert gave evidence that even after 22 February 2011 and up to completion, Deutsche Bank was continuing to explore the market for possible alternative buyers in case the Eneco transaction did not go ahead.

128. Although Centrica would have preferred a share sale, they considered all the possible options throughout the period of the transaction. In July 2009 Mr McCord emailed colleagues assessing a share sale v asset sale. A presentation entitled "Erasmus Disposal Options" dated 22 February 2010 considered the pros and cons of Plan A, a legal entity sale as a going concern, Plan B, the sale of customers and Plan C, the "last resort" option, a controlled closure of the business. Mr McCord said that the sale process was put on pause pending the outcome of PwC's Deep Dive and a further possibility was to retain the business, deal with the problems and then try and sell it. A draft confidentiality agreement dated 10 May 2010 was drafted on the basis that the disposal would be a legal entity sale. The actual confidentiality agreement entered into between Centrica and Eneco on 5 August 2010 related to "the proposed disposal of some or all of the assets (including, without limitation customer contracts) or issued share capital of Oxxio BV and its subsidiaries by the relevant members of the Provider's Group [the "Provider" being Centrica] …(whether implemented as a single or a number of transactions, either through asset or share sale…)". So all options remained open, although Centrica recognised that a share sale was unlikely.

129. Following on from this, there was a difference between documents intended for an external audience and documents intended for an internal audience. So the May 2010 draft confidentiality agreement and various draft buyer presentations prepared by Deutsche Bank in June 2010 referred to a share sale, even though Centrica realised this was unlikely to happen. Documents such as the briefing note for Nick Luff were intended to update the senior people about what Eneco had been told and to ensure that the right messages were delivered.

130. Both Mr McCord and his successor Mr Defert, who were senior people in Centrica's M&A team, were focussed on businesses as opposed to legal entities. They saw the role of the M&A team as obtaining the maximum value from the Oxxio businesses in whatever way was feasible. They recognised that the lawyers would need to do some "corporate plumbing" to complete the transaction, but the aim was always to realise the value of the business. In the event, COHL received value, not by way of the proceeds of sale of the Oxxio shares, but by way of the repayment of much of the loans it had made to Oxxio, following Oxxio's disposal of its underlying businesses achieved by way of asset sale and demerger.

131. Eneco first expressed interest in August 2010. As noted, they entered into a confidentiality agreement on 5 August 2010.

132. I was taken to several emails and notes dated early September which indicated that discussions with Eneco were continuing and Centrica was preparing information about the Oxxio business to be provided to Eneco to enable it to evaluate the value of the business and decide whether it wanted to make an offer. This involved collating information internally and liasing with Deutsche Bank and PwC about the information to be provided. Oxxio was also finalising its three year business plan which would be available to potential purchasers.

133. The briefing note for Nick Luff indicated that Eneco had made an initial bid on 17 September 2010. The details were redacted but Mr McCord stated that this bid was in the range €70m- €90m. The offer excluded the Rijnmond tolling agreement. This indicative price was regarded as "disappointing"

134. The briefing note was intended to prepare Nick Luff for a call with the CEO of Eneco to confirm Eneco's commitment to the deal in advance of a meeting of the Centrica board. Eneco had been told that they needed to make a binding bid by 14 December but Eneco had resisted this as they felt that crucial information had been provided late in the day and they wanted to defer the bid until January. Although it was acknowledged there had been some delay, Centrica considered that Eneco had all the data it needed to make a binding bid. They had received more information than was usual in a sales process and had had intensive access to management as well as access to the data room.

135. The briefing note indicated that the Centrica board was "extremely impatient" to resolve the sale of Oxxio. It also recorded that there were rumours of the bilateral discussions in the market and that various considerations meant that if the M&A team were unable to present a compelling bid to the board there was a risk that Centrica would lose patience and move to launch a full sales process.

136. An undated draft term sheet, "non-binding and subject to contract", which Mr McCord recalled was prepared towards the end of 2010, set out the terms of a "Contemplated Transaction" and was between COHL, Oxxio (as the actual seller) and Eneco. At this point, the Contemplated Transaction consisted of the acquisition by Eneco of the customer supply business, Oxxio Metering BV and Oxxio Tolling BV. The transaction structure was still being discussed "and [the parties] will continue to discuss the most appropriate transaction structure to transfer the Business", but at the date of the draft term sheet, it was contemplated that there would be:

(1) A demerger of Oxxio Nederland BV and Centrica Energy Netherlands BV involving a transfer of the customer supply business to a single Newco

(2) A transfer of the shares in Newco

(3) A transfer of the shares in Oxxio Metering BV and Oxxio Tolling BV.

137. It was stated that the parties intended to achieve "an economic and operational outcome that will be as close as possible in nature to a transfer of the shares in Oxxio BV" and it was acknowledged that the terms might have to change.

138. It is unclear whether this draft term sheet was prepared before or after a Centrica board meeting of 16 November 2010. The Minutes recorded that bilateral discussions for the sale of Oxxio continued with the aim of reaching a binding offer by early December. Despite the terms of the Contemplated Transaction, the Minute stated that the Rijnmond Tolling Agreement was not part of the bilateral discussions.

139. I was taken to a copy of a confidential draft memo dated November 2010 which was from the head of the M&A team to Sam Laidlaw, the CEO of Centrica at the time. The memo was intended to brief Mr Laidlaw in advance of his discussions with his counterpart at a Danish energy company called DONG. DONG had, in October 2010, announced a "co-operation" with a company called NEM which was a competitor of Oxxio's in the dutch energy retail market. At around this time, NEM had approached Centrica as a potential cash buyer of Oxxio in the light of its ability to access financial support from DONG. By November DONG and NEM were showing serious interest in Oxxio and Centrica was considering whether to engage further with them. A crossed out part of the memo indicates that, having evaluated the potential buyers in the market, Eneco was the most likely buyer but that the M&A team was still preparing for an auction in case the negotiations with Eneco failed or their offer was unacceptable. Mr McCord and Mr Defert agreed that Eneco remained the most likely purchaser all along, but that efforts continued to find an alternative purchaser and that any expression of interest in the business was welcome because of the difficulties of selling Oxxio. In the event, the discussions with DONG/NEM did not proceed.

140. Mr McCord was transferred to another role in Centrica and Mr Defert took over in November 2010 following a handover period between September and November. He gave evidence about the final stages of the transaction.

141. Eneco made an offer in January 2011. The key transaction terms were set out in a document prepared by Deutsche Bank on 19 January 2011. The price was €72m. The transaction was to be an asset sale although the relevant assets were to be transferred to Newcos as part of a demerger. The Rijnmond Tolling Agreement was not included in the deal. There remained various conditions to be satisfied and negotiation points to be resolved.

142. The negotiations continued into February 2011. On 14 February, there was an update presented to the Investment Sub-Committee of the Centrica Board regarding the Oxxio disposal. The Minutes noted that commercial negotiations with Eneco were ongoing. The main outstanding issues were losses in the value of the customer base, the need for Eneco board approval and the timing of the transfer of economic risk.

143. Eneco sent a sale and purchase agreement to Centrica on 19 February which they stated was their "final offer". On the same day, Centrica reverted with a revised agreement. Eneco's reaction was of "disappointment" as they had made what they considered their final offer. Centrica prepared an "issues grid" of the outstanding points for negotiation. Eneco sent a further draft agreement on the evening of 20 February 2011 which represented their "final position".

144. A document dated 22 February 2011, entitled "Project Erasmus, Board Update" was presumably presented to the board of Centrica. This document contained the key proposed terms of the transaction with Eneco and requested board approval to the transaction, with certain senior employees being authorised to negotiate the final details and sign the documents. The document summarised the background to the transaction and set out, the price offered by Eneco, the structure of the transaction, the key commercial and legal points outstanding, and the risks, why a bilateral deal with Eneco was favoured and what was not included in the sale.

145. Also on 22 February, the board of Centrica authorised the sale to Eneco and approved the terms of the transaction in principle "in line with the terms presented to the meeting". The Minute of the decision specified that it was an asset sale by means of a partial demerger and it also specified the price. The board delegated authority to certain board members, including Grant Dawson who was a director of COHL, to agree the final terms of the disposal and to sign the agreement.

146. Following the board decision there was a period of due diligence and intense negotiation of the details of the transaction such as the warranties and indemnities, liability issues and so on. The contract for the sale of the Oxxio businesses to Enenco was finally signed on 24 March 2011. Mr Defert stated that he remembered the final negotiations, which went on until three o'clock in the morning, well because they were so difficult to the extent that one used tactics like not providing the other side with dinner in order to tire them out!

147. Notwithstanding the board agreement, until the contract was actually signed, there was a significant possibility that the deal would fail and Centrica, with Deutsche Bank were continuing to make plans for an alternative sale process in case it was needed until the time when the deal closed.

The Respondent's Submissions

148. As the Appellant's submissions were largely a response to the Respondent's submissions on the issues it identified, I will summarise Mr Henderson's arguments first.

149. He submits that the disputed expenditure was not an expense of COHL's investment business at all as it was not provided to COHL and was not used by COHL to make any decisions. Nor did COHL actually sell any investments; Oxxio BV made the disposals which occurred.

150. The disputed expenditure did not represent expenses of management of COHL's investment business as it represented expenses of implementing a decision already taken.

151. Deutsche Bank's contingent fee was a success fee inextricably linked to the completion of the deal and so could not be an expense of management.

152. The disputed expenditure was capital in nature, being incurred in order to rid Centrica of an onerous asset and was therefore non-deductible by virtue of section 1291(3) CTA 2009.

153. I emphasise that HMRC do **not** argue that COHL did not incur the expenditure. Actual payment was made by Plc (COHL does not, itself, have a bank account) and COHL "paid" for the expenses by way of an expense accrual ie its accounts recording that it owed the money to Plc. It was accepted that this constituted payment of the expenses. HMRC's contentions are focussed on whether or not the expenses incurred were deductible in computing its profits.

The Appellant's submissions

154. Mr Rivett submitted, first that HMRC's case was based on an unduly restrictive construction of the legislation.

155. He contends that the disputed expenditure **was** incurred in the management of COHL's investment business. Although Plc engaged the advisors and initially paid for the advice, the cost was properly recharged to COHL. The advice was for the benefit of COHL. The directors of COHL, through their group functions, were aware of the advice and able to provide input into decisions from the perspective of COHL. Whilst there was not always a clear cut distinction as to the capacity in which the individuals were acting, Mr Rivett submits that information was received and decisions were made on behalf of COHL.

156. In response to Mr Henderson's contention that, to the extent that the expenditure was incurred on managing an investment business it was incurred in managing Oxxio's investment business, Mr Rivett submits that we must look at the wider context of COHL's investment business and take account of the large loans which Oxxio owed to COHL. Further, throughout the period in question, COHL used the advice to consider the options available to it to deal with its investment in the Oxxio group, whether that was by sale of all the shares in Oxxio BV or, as ultimately happened, in some other way.

157. Mr Rivett submits that the expenditure was incurred on advice which was preparatory to making a firm decision to sell the Oxxio business, that is a decision in relation to a specific deal for the disposal of the Oxxio business. He argues that that is management expenditure and it is only after the specific decision has been taken that the expenditure is attributable to implementation of that decision.

158. Deutsche Bank's fixed fee of €2.5m was an expense of management because it was payment for the two years' work and advice they had carried out before the decision to enter into the Eneco deal. The fact that it was contingent on, and payable on, completion did not alter its character. This was to be distinguished from the discretionary "incentivisation" fee, which was ultimately paid at €1m which was accepted as being a "success fee" inseparable from the sale itself.

159. The disputed expenditure is of a revenue, not a capital nature. In order for section 1219(3) to be relevant at all, the expense must first be an expense of management, and it is difficult to think of expenditure which qualifies as an expense of management which is capital in nature. We must also look at the expense in the context of COHL's wider investment business. This is not the isolated disposal

of an asset; it is what the company does and the activities of COHL did not fundamentally change as a result of the disposal.

Construction of the legislation

160. At the hearing, Mr Rivett argued for a wide interpretation of section 1219. He said that the draftsman had adopted a "conspicuously expansive" approach. Mr Henderson submitted that the provisions were more restrictive. After the hearing I received written submissions on the legislation on behalf of HMRC and the Appellant.

161. Mr Henderson's Skeleton Argument stated that tax law works on an entity basis and in order to be deductible, expenses must relate only to the business of a specific entity. He described section 1219 as "a closely targeted relief aimed at expenses incurred in managing the investments held as part of a specific investment business".

162. Mr Rivett took the view that all that section 1219 requires is that the management expenses are "in respect of" the company's investment business. He submits that, as a matter of construction, section 1219(2)(a) makes it clear that for the purposes of section 1219(1) only some connection (however limited) is required between the relevant expenses and the relevant investment business for an expense to constitute an expense of management of a company's investment business. There is no requirement that the expenses be wholly and exclusively incurred on management. The business of the company need not be wholly that of investment. It does not even require the management to be by the company itself (although he submits that in this case it was). All that is required is that there is an investment business and the expenses must relate, in some way, to the management of that business.

163. Mr Rivett points out that the purpose of the legislation when it was originally introduced was to put investment companies (which could not deduct their expenses) on an equal footing with trading companies so as to tax only the company's economic profit. As it was put in *Howden Joinery Limited v HMRC* [2014] UKFTT 257 (*Howden*) at paragraph 97:

> "Our starting point here is that the s75 [the predecessor of section 1219] definition is not intended to be such a restrictive definition as to produce an empty set of potentially deductible items and that there should be some parity between investment and trading companies at least as far as the fundamental aim to tax them only on their true economic profit is concerned."

164. Whilst acknowledging that a particular phrase must be construed in its statutory setting, Mr Rivett found support for his proposition that "in respect of" has a very wide meaning and signifies that only some connection is needed between the expenses and the management of the investment business to qualify for relief in the case of *Albion (T/A NA Carriage Co) v Naza Motor Trading Sdn Bhd and another* [2007] 1 WLR 2489 where Lightman J commented:

> "27 Accordingly the formula of words in CPR r 6.20(5) "in respect of a contract" does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract. That is the clear and unambiguous meaning of the words used. No reference is necessary for this

purpose to authority and none were cited beyond *Tatam v Reeve* [1893] 1 QB 44. If such reference were needed, I would find support in a passage, which I found after I had reserved judgment, in the judgment of Mann CJ in *Trustees Executors and Agency Co Ltd v Reilly* [1941] VLR 110, 111:

> *"The words "in respect of" are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer.""*

165. Mr Rivett further argues that section 1219 is broadly drafted in that it recognises that corporate groups are not necessarily tied to legal entities and that if one adopts the narrower construction advanced by HMRC, it will be almost impossible in many group situations to obtain relief under section 1219. If relief is not available under that section there will be no relief at all in respect of the expenses, which would defeat the purpose of the legislation to tax the economic profit arising from the transaction.

166. Section 1219 provides:

> "(1) In calculating the corporation tax to which a company with investment business is liable for an accounting period, expenses of management of the company's investment business which are referable to that period are allowed as a deduction from the company's total profits."

167. Section 1219(2)(a), the wording of which was introduced by Finance Act 2004 before being consolidated in CTA 2009, provides:

> "(2) For the purposes of this section expenses of management are expenses of management of a company's investment business so far as—
> (a) they are in respect of so much of the company's investment business as consists of making investments, …"

168. Mr Henderson sought to use the history of this provision to inform its construction and found support in the explanatory notes that accompanied the relevant legislation.

169. Section 1219 is derived from section 75(1) Income and Corporation Tax Act 1988 ("ICTA"). Before Finance Act 2004 ("FA04"), it provided as follows:

> **"Expenses of management: investment companies**
> (1) In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the United Kingdom there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing profits apart from this section."

170. Section 130 ICTA defined an "investment company" in the following terms:

> "'investment company" means any company whose business consists wholly or mainly in the making of investments…"

171. One of the major changes made by FA04 was that a company whose business consisted only partly of the making of investments (as opposed to wholly or mainly) was permitted to claim relief for expenses of management. This extended the category of companies which could claim relief to those which had both trading and investment activity. Section 75 then provided:

“75 Expenses of management: companies with investment business]

[(1) In computing for the purposes of corporation tax the total profits for an accounting period of a company with investment business (see section 130) a deduction is to be allowed for any expenses of management of the company’s investment business (see subsection (4) below) which are referable to that accounting period in accordance with section 75A.That is subject to the following provisions of this section.

(2) A deduction is not to be allowed under subsection (1) above for any expenses to the extent that those expenses are deductible in computing profits apart from this section.

(3) Expenses of a capital nature are not expenses of management for the purposes of this section except to the extent that they fall to be treated as expenses of management for those purposes by virtue of—

(a) subsection (7) below (capital allowances), or

(b) any provision of the Tax Acts, other than this section.

(4) For the purposes of this section, expenses of management are “expenses of management of the company’s investment business” to the extent that—

(a) the expenses are in respect of so much of the company’s business as consists in the making of investments, and

(b) the investments concerned are not held by the company for an unallowable purpose during the accounting period (see subsection (5) below),

and references in this section to the company’s investment business shall be construed accordingly.”

172. Section 130 ICTA was amended so that a “company with investment business” was “…any company whose business consists wholly or partly in the making of investments”.

173. Section 75(3) introduced the disallowance of capital expenditure and new sub-section (4) introduced the wording which is now section 1219(2). In the light of the wider categories of company which could now claim relief, Mr Henderson submitted that section 75(4)(a) was included to make it clear that expenses of management had to be expenses of management of the investment business carried on by the relevant company. He suggested that this was a natural consequence of the pre-2004 wording. I agree with Mr Rivett that this is not the case. The pre-2004 wording required only that the expenses related to the management of the business of the company and the business of the company had to be wholly or mainly an investment business, but could include some other activities (as long as they did not impinge on the “mainly” requirement).

174. Whatever the position pre-FA04, Mr Henderson submitted that the new wording in sub-section (4)(a) was intended to make clear that that expenses of management were deductible as expenses of management of a company’s investment business only to the extent that they were “in respect of so much of the company’s business as consists in the making of investments”. He argued that in this context, the expression “in respect of” was to be construed as a restriction (to expenses incurred by reference to a particular part of the company’s business) and he denied that the draftsman intended to be “conspicuously expansive” and require only a loose connection between the expenses and the investment business.

175. Mr Henderson’s note also included the “Explanatory Notes” which accompanied the Finance Bill 2004 and the Corporation Tax Act 2009.

176. The Explanatory Notes to clause 38 Finance Bill 2004 (which replaced the old section 75 ICTA) stated, so far as material:

> "CLAUSE 38: EXPENSES OF MANAGEMENT: COMPANIES WITH INVESTMENT BUSINESS
>
> SUMMARY
>
> 1. This clause replaces section 75 of the Income and Corporation Taxes Act 1988 ("ICTA") which deals with the expenses of management of investment companies. It also amends section 130 ICTA which defines investment companies. The changes extend eligibility for the relief given by section 75 to companies with some investment business, and not just those within the current definition of investment companies whereby a company's investment activities must be the predominant part of its business. This will be of particular importance to companies which manage investments consisting of shares in subsidiaries but also carry on a trade.
>
> DETAILS OF THE CLAUSE
>
> 2. Clause 38(1) replaces the existing section 75 with a new section 75.
>
> 3. New section 75(1) sets out the basic rule. Subject to the provisions which follow, expenses of management are deductible from the total profits of a company with investment business for an accounting period so long as they are expenses of the company's investment business and are referable to the accounting period in question. …
>
> 4. Like the existing rules, the proposed new rules do not seek to set out a comprehensive definition of "expenses of management". The principles developed by the courts will therefore continue to apply generally. But the term is glossed in the further provisions of the new section. In addition, the various provisions in the Taxes Acts which direct that particular types of expenditure are treated as expenses of management continue to apply.
>
> 5. A "company with investment business" is the subject of the definition inserted into section 130 ICTA by Clause 38(3).
>
> 6. The requirement that expenses should be expenses "of the company's investment business" is defined in subsections (4) and (5) of the new section 75.
>
> …
>
> 12. New section 75(4) explains what is meant by expenses having to be expenses of management "of the company's investment business", the term used in the basic rule in subsection (1). Expenses meet this test to the extent that they meet both of two conditions. Any apportionment of expenses which only partly meet these requirements is to be made on a just and reasonable basis in accordance with new section 75(10).
>
> 13. The two conditions are these. First, the expenses must be incurred in respect of so much of the company's business as consists in the making of investments. Secondly, the investments must not be held for an "unallowable purpose"."

177. The summary explains the extension of eligibility and gives, as an example of the sort of company now included, a holding company which also has trading activities. It is therefore clear that the provision is intended to cater for group situations. Paragraph 4 makes clear that the new rules do not seek to define the

expression "expenses of management" and the meaning developed in the case law continues to apply. It is noteworthy that paragraph 12 states that expenses are only expenses of management of "the company's investment business" (the wording in sub-section (1)) if two *conditions* are met (emphasis added). This is consistent with Mr Henderson's contention that what is now section 1219(2)(a) imposes restrictions on the expenses which are deductible.

178. The Explanatory Notes to CTA 2009 state:

> "**Section 1219: Expenses of management of a company's investment business**
>
> 3086. This section sets out what are "expenses of management". It is based on section 75 of ICTA.
>
> 3087. There is no explicit definition of "expenses of management" either in the source legislation or in this Act. Instead, the limits of the expression are set by:
>
> • case law, in which the expression (retained in this Act) has been considered;
>
> • general exclusions set out in this section;
>
> • specific reliefs set out in Chapter 3 of this Part; and
>
> • specific restrictions set out in Chapter 4 of this Part.
>
> 3088. Subsection (1) ties the expenses to the management of the company's investment business (defined in section 1218), and to the accounting period to which the expenses are "referable" (see section 1224).
>
> 3089. The section provides that the expenses are allowed as a deduction, echoing the words of Part 3 (trading income). HMRC guidance (see paragraph 8580 of the Company Taxation Manual) suggests that the deduction of management expenses is mandatory. But this amounts to the same thing.
>
> 3090. Both restrictions in subsection (2) apply for the purposes of this Part (see section 1218).
>
> 3091. Subsection (3) excludes capital expenditure, in terms that follow closely the trading income rule. It also prevents a deduction as management expenses for anything that is otherwise allowable for tax purposes."

179. I observe that paragraph 3088 refers to sub-section (1) "tying" the expenses to the management of the company's investment business and that the provisions in sub-section (2) of section 1219 are referred to as "restrictions". While I would not describe this as a "closely targeted" relief, this is more consistent with Mr Henderson's arguments that the relevant expenses must be incurred in managing the investments held as part of a specific investment business than Mr Rivett's contention for an "expansive" interpretation.

180. Mr Rivett submits that it is impermissible to seek to construe the provisions of section 1219 CTA by engaging in legislative archeology by reference to the history of the antecedent enactments and the changes to them which result in the current provisions. He referred me to the recent decision of the Supreme Court in *R (Derry) v Revenue and Customs Commissioners*[2019] UKSC 19 which

commented on the approach to construction of legislation resulting from the Tax Law Rewrite Project. Lord Carnwath said:

> "**[9]** In *Eclipse Film Partners (No 35) LLP v Comrs of Her Majesty's Revenue and Customs* [2013] UKUT 639 (TCC); [2014] STC 1114 Sales J, likened the correct approach to statutory interpretation to that appropriate to a consolidation statute (as explained by the House of Lords in *Farrell v Alexander* [1977] AC 59):
> "When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions. … An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them …" (para 97)
> **[10]** I would respectfully endorse this guidance, which should be read with Lady Arden's comments (paras 84-90) on the relevance of prior case law. At the same time I would emphasise that the task should be approached from the standpoint that the resulting statutes are intended to be relatively easy to use, not just by professionals but also by the reasonably informed taxpayer, and that the signposts are there for a purpose, in particular to give clear pointers to each stage of the taxpayer's journey to fiscal enlightenment."

181. The passage from Lady Arden's speech referred to above states:

> "**[84]** On Issue 1, while agreeing with all that Lord Carnwath has said, I add some observations about the approach to interpretation of the ITA and consolidation statutes in general to provide the context in which the passage from the judgment of Sales J approved by this court should be applied.
> **[85]** In deciding how the court should interpret a statute, the type of statute as set out in the statute's preamble is a relevant consideration. In the case of the Income Tax Act 2007 ("ITA"), the preamble provides that the Act is
> *"*to restate, with minor changes, certain enactments relating to income tax; and for connected purposes.*"*
> **[86]** So, ITA is not a pure or "straight" consolidation Act. However, as the Explanatory Notes cited by Lord Carnwath confirm, it is not (except for the minor changes) intended to change the law. That is a matter which the courts must in my judgment respect when interpreting the new legislation. In this regard it is of some significance in interpreting consolidation statutes that they receive less Parliamentary scrutiny than other primary legislation. The respect to which I have referred for giving effect to Parliament's intention where it is possible to do so is often expressed in terms of a presumption, in relation to consolidating statutes, that Parliament did not intend to change the law.
> **[87]** It would often be laborious for a court to investigate what provisions had been consolidated in any particular provision of a consolidating statute. It would be wrong in general for it to do so. The process of drafting a consolidation statute requires specialist techniques and skills and can be very complex.
> **[88]** But the position is different in relation to prior case law. …
> **[90]** Reference back to the earlier case law does not undo the good work done by the consolidation, or run counter to it, since Parliament is likely to have had the previous case law in mind in any event when enacting the consolidating statute without any pre-consolidation amendment."

182. In my view, Mr Henderson's submissions do not offend the principles articulated in *Derry*. He is not seeking to "interpret the consolidating legislation, [by referring] back to the previous disparate provisions and constru[ing] them …".

Instead, he is seeking to place the current wording in context by explaining how it was introduced as a consequence of earlier changes to the scope of the provisions in question.

183. Mr Rivett also objects to the use of the Explanatory Notes as an aid to construction. He directed me to the Court of Appeal decision in in *GDF Suez Teeside Ltd v HMRC* [2018] EWCA Civ 2075 where Henderson LJ said:
"46. The status of Explanatory Notes, and the extent to which it is permissible to have regard to them in construing a statute, were considered by Lord Steyn in R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 1 WLR 2956, at [2] to [6]. He explained that since 1999 Explanatory Notes have been published in conjunction with the majority of public Bills introduced in either House of Parliament by a Government minister. He observed, at [4], that:
"The texts of such notes are prepared by the Government department responsible for the legislation. The Explanatory Notes do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. The notes are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and to ease the task of assimilating the law."
47. Lord Steyn continued, at [5]:
"The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen… In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible…"
48. At [6], Lord Steyn added this salutory warning:
"What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."
49. The observations of Lord Steyn in the National Asylum Service case were not commented upon by the other members of the court, but he returned to the same theme, more briefly, in R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39, [2004] 1 WLR 2196, at [4], in a speech with the reasoning of which Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood all agreed: see [63], [80] and [85]. Lord Steyn there said:
"Explanatory notes are not endorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material that other aids regularly used by the courts, such as Law Commission Reports, Government Committee reports, Green Papers and so forth."
See too Tarlochan Singh Flora v Wakom (Heathrow) Limited [2006] EWCA Civ 1103, at [15] to [17] per Brooke LJ.
50. With the benefit of this guidance, I think it is permissible to take account of the Explanatory Notes which I have quoted in identifying the anti-avoidance purpose of the 2006 amendment to section 85A(1) and the mischief at which it was aimed, namely

> making it absolutely clear that the "fairly represent" rule in section 84(1) takes priority over, and may override, the accounting treatment mandated by section 85A(1). As I have explained, these are inferences which I would anyway be disposed to draw in the absence of the Explanatory Notes, and I emphasise that in the present case I regard the value of the Explanatory Notes as no more than confirmatory. I also recognise that the final two sentences of paragraph 59 of the Notes are not admissible to the extent that they reflect the wishes and desires of the Government about the scope and effect of the amendment; but that recognition does not in my view invalidate the inference to be drawn from Parliament's decision to single out section 84(1) as a provision to which section 85A(1) is expressly made subject."

184. In the present case, it is not necessary to use the Explanatory Notes to try and discern the intention of Parliament, which *GDF Suez Teeside* makes clear is not permitted. The Notes do however provide helpful context to the new FA04 provisions and explain that the legislation is intended to extend eligibility for the relief for management expenses to a wider range of companies. The notes then simply set out the conditions for the extended relief to apply. The Notes to the CTA do not really add anything to this. I consider that it is permissible to consider the Explanatory Notes to FA04 in order to understand the context of the changes which that Act introduced.

185. Even without the historical background, it seems to me that the plain words of sub-section (2) of section 1219 indicate that it is intended to limit, rather than expand, the meaning of "expenses of management of a company's investment business". Sub-section (1) makes clear that where a company has investment business, what is deductible is the expenses of management of that particular company's investment business. It does not include the expenses of management of any other business which the company may carry on.

186. Sub-section (2) goes on to say that for these purposes, expenses of management are expenses of management of the company's investment business "so far as (a) they are in respect of so much of the company's investments business as consists of making investments…". The words "so far as" indicate that not all expenses of management of the company's investment business are deductible. Only those that satisfy the provisions of paragraphs (a) and (b) are included. Paragraph (b) relates to unallowable purposes and it is not suggested that that is relevant here. Paragraph (a) requires the expenses to be "in respect of so much of the company's investment business as consists of making investments". I construe "in respect of" to mean that there must be a close link between the expenses in question and that part of the company's business which consists of making investments. That is reinforced by the words "so much of" which focusses on the part of the business which consist of making investments.

187. In the context of the section and the relief as a whole, I am unable to interpret section 1219(2)(a) as requiring only some sort of loose connection between the expenses and the investment business.

188. This does not prevent the relief applying in a group situation. Indeed, the example in the Explanatory Notes to FA04 of the kind of company which would be able to take advantage of the newly expanded provisions was a holding company which managed the shares of subsidiary companies while also carrying on a trade.

189. With that in mind, I will now consider how section 1219, interpreted as above, and in the light of the case law, applies in the context of COHL's investment business.

Was the expenditure incurred in respect of COHL's investment business?

190. HMRC's first point is that the disputed expenditure is not expenditure on the management of COHL's investment business.

191. HMRC accepts that COHL is an investment company. Mr Henderson does not seek to argue that COHL did not incur the expenditure and he does not seek to argue that the mere fact there was no agreement between Centrica and COHL that COHL would bear the cost of the advice means, of itself, that the expenses are not deductible. He does take the point that the expenses were not expenses of managing *COHL's* investment business. He submits that the expenses have to be linked to the relevant investment business.

192. He referred to two cases as support for this general principle. I will return to these cases when I come to consider the meaning of "expenses of management". The first case is *Dawsongroup plc v Revenue and Customs Commissioners* [2010] EWCH 1061 (Ch) ("*Dawson*"). Dawsongroup was a holding company of a trading group which carried on the business of renting trucks trailers and other vehicles. This was a case on the pre-2004 legislation and the company had to show that it was wholly or mainly an investment company. Mann J made comments which are helpful in the present context about the nature of the investment business of a holding company of a trading group. He said, at paragraph 39:

> "I think that the overall picture is of a company which is primarily a holding company and which also happens to provide services to the rest of the group. In other words its main activity is being a holding company with a degree of real control over the rest of the group. Mr Gear said in cross-examination that Dawsongroup could have been just a holding company without providing the services, but then the group would not have got the benefits of the central provision of services. This gives the flavour of a company whose main function is that of a holding company and which, for the benefit of the group, also provided the services, and that makes the latter ancillary to the former, or at least it makes them very much subsidiary to the former. Most of the activities of the company which do not fall under the head of chargeable services fall within what can be treated as the making of investments. … A responsible holding company will take steps to make sure that its investments (its shares in its subsidiaries) are producing proper returns and maintaining their value. That means that the board will be concerned about certain aspects of the management of the group below. A great deal of the activities of the board members of Dawsongroup (so far as they were described in this case) involved such supervision. That is probably what the judge below meant when he described the principal activity of Dawsongroup as being "controlling a trading group" in paragraph 23 of his decision. Most of those controls fall to be characterised as holding investments for these purposes."

193. The company floated 25% of its shares on the London Stock Exchange in 1988. The share price subsequently declined and it was felt that this was because of the illiquidity of the shares and outside shareholders looking for short term profits rather than allowing profits to remain in the group for the longer term benefit of the business. For this and other reasons, the company delisted in 2000 and

claimed that it was an investment company and sought to deduct the costs of the delisting exercise as "expenses of management".

194. The Court held that its activities in managing its subsidiaries to maintain their value and produce proper returns made it an investment company under the definition then in force.

195. In considering whether the delisting costs were "expenses of management" the Court made a distinction between the expenses of management and the general expenses of the business. The management concerned had to be the management of the business of the company and that business had (at the time) to be an investment business or mainly an investment business. The delisting costs were intended to improve the business in a broad sense by ensuring there were more assets in the business and giving the directors more freedom in making business decisions. The Court held that these decisions did not relate to the management of the business, but to the management of the investments ie the subsidiaries.The expenditure was not incurred in the management of the business but to improve the investments. Accordingly, they were not deductible as expenses of management. In considering the nature of expenses of management, Mann J said this at paragraph 49:

> "**[49]** Thus the relevant principles in considering the point:
> i) The expression 'expenses of management' is to be treated as an ordinary English expression, which is incapable of detailed definition.
> ii) It is that expression, and that concept, which needs to be considered. The question is whether the expenditure falls within that category, and not whether it fails to fall within some other and thereby qualifies by default (as it were).
> iii) The expression is a wide or fairly wide one (the difference probably makes no practical difference).
> iv) There is a distinction between the expenses of management and the general expenses of the business. An expense can fall within the latter category and not be within the former. The emphasis must be on 'management.'
> **[50]** I would also add this. If one asks 'management of what', it must be management of the business of the company, which has to be investment business or mainly investment business. This point acquires some significance in considering the nature and purpose of the expenditure in this case."

196. For present purposes, the relevant points are those at 49 iv) and, in particular, paragraph 50 which emphasises the need for the expenditure to be on the management of the [investment] business of the particular company.

197. Mr Henderson found further support in the First Tier Tribunal case of *Howden Joinery Group plc v Revenue and Customs Commissioners* [2014] UKFTT 257 (TC) ("*Howden*"). At paragraph 47, the taxpayer accepted that "there must be a connection between the conduct of the business and the expenses in question".

198. The *Howden* case arose from the sale by Howden Joinery of the MFI group including a property company which was a subsidiary of MFI. The purchaser and the property company went into administration and Howden Joinery made payments in relation to the leases owned by the property company as follows: guaranteed rent payments, lump sum payments by was of settlement to get out of guarantee obligations in relation to certain leases and a provision in respect of future guaranteed rent payments. The company sought to deduct these payments as expenses of management.

199. Mr Henderson took me to a number of passages in the case. I do not need to repeat them all here, but the Tribunal drew an important distinction between expenditure on the assets themselves and expenditure on managing the investment business. So at paragraph 123

> "…our conclusion is that any expenditure directly on the leased assets themselves, including both the actual payments of the Rental Guarantee amounts, the servicing, dilapidation and security and other similar costs to which Mr McManus referred, should not be treated as deductible management expenses, being expenditure on the assets themselves and not being for the purposes of HJ's investment business; HJ investment business was as a holding company and not a property management company."

200. On the other hand, the release payments made to get out of the guarantee payments were expenses of Howden Joinery's investment business because it was a strategy to manage its costs in relation to its investments. At paragraph 122:

> "HJ's decision and negotiations in 2008 were to protect its investment business and remove the possibility of ongoing obligations under the Properties leases in respect of a company which was no longer in the HJ group. Those obligations arose to HJ in its capacity as investor in the Properties shares and were paid out as part of HJ's strategy of managing its costs related to those former investments. For these reasons we have concluded that, subject to any conclusions below concerning the capital nature of these payments, Release Payments made by HJ under Deeds of Release in 2008 (in a form similar to the Bedford Agreement) should be treated as deductible management expenses, as should any related legal and other costs."

201. And at paragraph 113:

> "We take from the Dawson decision that expenditure to remove a regulatory burden (the listing of the shares) was not sufficiently closely related to the investment business of the company to be deductible. While regulatory costs were reduced for the company, this was not the main motivation for de listing, which was to sustain the company's share price "the expenditure was intended to improve the business in a broad sense, it did so by making sure that there were more assets in the business and by giving the directors more freedom to make business decisions. Those decisions did not relate to the management of the investment business. They related to the management of the investments.""

202. Whilst recognising that the facts of these cases are very different from ours, Mr Henderson draws from them the proposition that in order to be deductible the expenses of management have to be in relation to the management of a particular company's investment business and in this case the company is COHL.

203. He submitted that it was clear that the expenditure was arranged by Centrica and that the investments were disposed of by Oxxio and not by COHL. He recognised that there was no wholly or exclusively test in section 1219 but the expenses must still be expenses of COHL's investment business.

204. A significant difference between Dawsongroup and Howden Joinery on the one hand and COHL on the other is that the former were each the top holding company of the group, the company which made and implemented the strategic decisions. There was therefore no doubt about whose business was the subject of the relevant decisions and the relevant expenditure. In our case, COHL is an

intermediate holding company and the strategic decisions were taken at the Plc level.

205. Mr Henderson acknowledged that in large groups such as Centrica, management tends to focus on businesses and does not necessarily approach things strictly on a legal entity by legal entity basis. He submits that the tax code does focus on legal entities and in the present case it is necessary to show that the expenses were incurred on the management of the investment business of the specific legal entity concerned, namely, COHL.

206. He had two main points on this. First, that COHL did not actually do any management at all as everything was done at Plc level and secondly that from an early stage it was clear that a sale by COHL of the shares in Oxxio was unlikely and COHL did not own the businesses which were ultimately sold so that the deal which was done could not be regarded as part of the management of COHL's own investment business.

207. Mr Rivett acknowledged that Centrica's board is the entity which makes strategic decisions for the group, as one would expect and, as is also common, the operational structure of the group does not correspond precisely to the legal structure. Within Plc itself, were central teams dealing with M&A, legal, regulatory, tax, finance and other functions and these services were made available in relation to all those members of the group which needed them. It would not be expected that each subsidiary would have its own team. Nor did each subsidiary employ its own staff. I was informed that most of the employees of the group (other than those of the operational companies) were employed by Centrica and a few other companies. The senior employees within Plc would often have multiple roles within the group. As we have seen, Ms Radcliffe was an employee of Centrica and Head of Tax, but she was also a director of COHL and, in total, 14 companies within the group. Grant Dawson was a board member of Plc and its general counsel. He was also a director of COHL and, doubtless a number of other companies.

208. Mr Rivett went on to submit that the directors of COHL would typically first be informed of relevant information in their Plc capacities and would have discussions and make decisions in their group capacities and/or as directors of Plc, but where decisions were needed in relation to COHL, they would also take the decisions in their capacity as directors of COHL. It was acknowledged that no real distinction was made as to which role an individual was fulfilling at a particular time or in what capacity the individuals held meetings, had discussions or made decisions. Mr Rivett asserted that what mattered was that the information was received and decisions made on behalf of COHL. The Centrica group roles held by the directors (of COHL) allowed them, as directors of COHL, to provide input to strategic decisions at group level which were relevant to COHL and to provide feedback on those decisions.

209. In this context, Mr Rivett made three points on the legislation: the business of the company does not need to be wholly an investment business (although COHL is wholly an investment business), the relevant expenditure does not need to be wholly and exclusively incurred in the management of the investment business and the management does not need to be undertaken by the company itself.

210. It is common ground that COHL was carrying on an investment business and Mr Rivett pointed out that it was not right just to focus on COHL which was only one of the investments. COHL held investments in multiple jurisdictions with a book value of £1.2bn. It did not just own shares, it also made loans to its subsidiaries including term loans and revolving credit facilities. COHL provided very substantial loans to Oxxio BV by way of a revolving credit facility. By definition, the amount outstanding fluctuated, but in December 2009, December 2010 and May 2011, the outstanding balances were respectively: €91m, €103m and €137.5m. It was through the repayment of a substantial part of that loan that COHL received value from the Oxxio transaction.

211. He argued that all that section 1219 requires is that the expenses are in respect of the investment business even if they were also in respect of other purposes as well. The expenses related to the Oxxio businesses which were indirectly owned by COHL through its subsidiary. Mr Henderson made the point that COHL did not, in fact, make any disposals. Mr Rivett submitted that it does not matter who disposed of the businesses. What is important is that Centrica explored a number of different options for dealing with this investment and ultimately, COHL realised the value of the investment through the repayment of its loans even though the actual transactions were carried out within the Oxxio group and COHL retained the Oxxio BV shares.

212. HMRC's key point under this heading was that the legislation, supported by the authorities requires that to be deductible, expenses have to be the expenses of management of a specific company's investment business. In the present case, the disputed expenditure was not sufficiently connected to COHL's investment business to constitute expenses of management of COHL's investment business. In reality, COHL did not make any decisions at all about the transactions. The advice obtained by Plc was not used by COHL to understand the problems with the Oxxio business or to decide on the action to take. The advice was arranged by and initially paid for by Centrica. Although groups do not necessarily focus on legal entities, the tax code and this legislation does focus on the business of the legal entity concerned. There were no board minutes of COHL which considered or acknowledge the Oxxio transaction.

213. In response, Mr Rivett submitted that the legislation did not state that the management had to be carried out by the company in question. As to the lack of COHL board minutes, the witnesses had indicated that decisions were only recorded where there was a need for corporate decision making, for example, where there is a need for a formal audit trail. In any event, such minutes would not record the difficult process of evaluating information and considering possibilities leading to a decision and only the final decision or action points would be recorded. That the individuals wore different "hats" and that the that no distinction was made as to which hat was being worn when a decision was made did not detract from the fact that the directors of COHL made decisions about COHL.

214. At a practical level, Mr Rivett emphasised the necessity of section 1219 being made to work in a group situation. Even though the legislation was introduced at a time when the main beneficiaries of it would have been insurance companies or single investment companies, there is nothing in the legislation which suggests it should be confined to such companies. The purpose of the legislation was and is

to enable investment companies of any kind to deduct their expenses of management so that they are taxed on their true economic profit. He pointed out that there is no "wholly and exclusively" requirement, the section is not concerned with who is doing the managing and there can be a duality of purpose. He argued that if HMRC are right, it would be difficult, if not impossible, for intermediate holding companies to obtain relief in this sort of situation.

215. I will deal with Mr Henderson's second point first: that the expenditure cannot be attributed to COHL's investment business because COHL did not dispose of anything and the transactions were all carried out within the Oxxio group.

216. I am not persuaded by that argument. An investment business does not consist solely of the purchase and sale of shares. The aim of an investment business is to maximise the value of, and/or returns from, its investments. In the context of a holding company, whether the "topco" of a group or an intermediate holding company, its investments are its subsidiaries. Whilst *Howden* and *Dawson* draw a distinction between expenditure on the investments and expenditure on the investment business, in principle, expenditure which is directed at maintaining and improving the value of a subsidiary or better enabling it to pay dividends or repay its debts, would normally be expenses of managing the investment business. There are some useful comments on this in *Howden*, where the Tribunal commented:

> **"91.**
> On the question of the interpretation of management expenses as defined in s 75, we take as our starting point the statement in the *Sun Life* case, repeated most recently in *Dawson* that the term is to be interpreted as an ordinary English term (i.e. with no specific technical meaning) and one which has a fairly wide meaning. Lord Reid stated that "*these are ordinary words of English language and, like most such words, their application in a particular case can only be determined by a broad view of all relevant matters"*
> **92.**
> We consider that it is important to start by establishing what it is that an investment company such as HJ undertakes as its investment activities and then move on from that to establish what expenses might be treated as managing those activities. Again, referring to *Sun Life* "*the proper interpretation is to say that management means the conduct of the business"*. An investment company's business in its most simple terms is to hold assets to generate a return. In the context of an investment company which is a holding company, the assets which are generating the return are for the main part shares in its subsidiary companies. The purpose of the holding company is to support the value of the subsidiary companies, both in terms of their capital value and in terms of the dividends which are paid intra group and ultimately out to shareholders of the parent.
> …
> **94.**
> Therefore, applying this approach to HJ; the shares in its subsidiaries, including Properties are its investment assets, its investment business it to manage those assets. It is not part of HJ's investment business to undertake any aspects of property management.
> **95.**
> The next question is to determine what "management" means for these purposes, the authorities provide some guidance about what it means to manage assets, particularly that it excludes their acquisition, but that managing does include holding assets as made clear in *Cook v Medway*. Taking the approach of the court in *Sun Life* and applying the ordinary English meaning to the concept of management, we take this to

> mean some sort of active involvement with the assets which are being managed, including taking strategic decisions, not just about their acquisition and sale, but also about how they are best looked at after, and their return best maximised, on a day to day "business as usual" basis."

217. The Tribunal also considered the duality of purpose point at paragraph 105:

> "We do not think that we are doing a dis-service to HMRC if we say that in large part their objection to treating these Guarantee Payments as deductible management expenses is because they were primarily for the purposes of the subsidiary's activities, as Mr Henderson described, they represented HJ interfering in the trading activities of a subsidiary company, and therefore could not be deductible as the expenses of HJ itself. In contrast the taxpayer was at pains to point out that there is no specific rule against duality of purpose for investment companies, unlike for trading companies. On this point we agree with the taxpayer, and more so in the context of a holding company like HJ. There is nothing in the authorities or the legislation to suggest that to be deductible management expenses have to be exclusively for the investment business of the investment company itself (and in fact cases such as *Camas* clearly suggest otherwise). Moreover, to attempt to apply an exclusivity rule to an investment company such as HJ would be to remove the possibility of allowing almost all expenses, since, as we have said, it is in the nature of a holding company that its business is the maintenance of the value of its subsidiaries. We do not think it is correct to approach the statutory language or the authorities to end up with a set of management expenses which is empty by definition."

218. In the present case, the initial intention was for COHL to sell the shares in Oxxio BV. If this had happened, no doubt HMRC would have agreed that such a transaction was part of the management of an investment business. In fact, it became clear fairly early on that the sale of the shares was more of an aspiration than an intention. Although that aspiration continued until the time of the Eneco transaction, the evidence shows that consideration was, from an early stage, given to other ways of realising value from the Oxxio business and those alternatives continued to be considered. We heard that options included selling the assets of the business, rectifying the problems in the business with a view to a future share sale and not selling the business at all but winding it down. Whilst Centrica had taken a strategic decision to exit the Dutch market, this was not something to be done at any price. The aim was to realise as much value as possible from the investment in a commercial way. The investment business of an "ordinary" investment company such as a unit trust might consist mainly of buying and selling the investments, but there is more to the investment business of the holding company of a group of operating/trading businesses. In this context, the management of the holding company's investment business includes the procuring of transactions by the company's subsidiaries where those transactions inure for the benefit of the holding company by preserving or increasing the value of the subsidiaries or enabling the subsidiaries to provide better returns for the holding company or, as in this case, enabling the subsidiary to repay loans it owes to the holding company.

219. Although the Eneco transaction did not involve the full disposal of the Oxxio businesses, it did result in Oxxio BV selling, via the partial demerger, its customer business and other assets. This benefitted COHL's investment business in two ways. First COHL's costs were reduced as it no longer needed to provide the financial support by way of equity and debt investment which it had previously done in order to try and stem the large losses. Secondly, COHL received a

substantial amount of money out of the proceeds of the transaction by way of repayment of its loans.

220. In conclusion, the fact that COHL itself did not dispose of anything is not, of itself, a bar to the disputed expenditure being an expense of management of COHL's investment business.

221. Returning to Mr Henderson's first point: he submitted that the requirements of section 1219 were not satisfied because COHL did not manage anything at all. All the relevant decisions were taken by Plc.

222. It is clear that the Board of Plc took the strategic decisions in relation to the businesses of the group. That is hardly surprising. It is what ultimate holding companies do. It is also not surprising that functions like legal, finance and tax were provided by teams at Plc level which then provided their services in relation to the various subsidiaries in the group which needed them. In *Howden*, the Tribunal observed at paragraph 93:

> "It is undoubtedly the case that a significant part of the role of an investment holding company is to provide services to the group as a whole, including financial support. We think it is important to stress at this stage that it is intrinsic to the way that many groups, including the HJ group were set up that only the parent company can provide this sort of financial, capital support because this is where the capital of the group is held. In providing this, it is providing something which a subsidiary could not provide itself."

223. That must be the case whether the subsidiary is a direct subsidiary, an operating subsidiary or, as in this case, an intermediate holding company.

224. There is no reason why a subsidiary should not pay for services provided or procured by its "Topco", but in order to determine if those payments are deductible, we must return to the words of section 1219. To recap the relevant parts:

> "(1) In calculating the corporation tax to which *a company* with investment business is liable for an accounting period, expenses of management of *the company's* investment business … are allowed as a deduction from the company's total profits.
> (2) For the purposes of this section expenses of management are expenses of management of *a company's i*nvestment business so far as—
> (a) they are in respect of so much of *the company's* investment business as consists of making investments, …" (emphasis added).

225. As I concluded above, and as indicated in *Dawson* and *Howden,* there is a requirement that the expenses incurred by a specific company must be linked to the management of that company's investment business in order for that company to deduct the expenses from its profits.

226. Mr Rivett contends that the section does not require the management to be carried out by the company itself. It is true that section 1219 does not say so in so many words, but it is implicit that it must be the company itself which manages its own business. One has to focus on the investment business of a specific company and on the management of that business. The only body which is authorised to carry on the management of a company's business is the board of directors of that company. The shareholders of a company may have influence over a company's actions and may be able to procure a company to do certain things by exercising

their voting rights as shareholders, but the day-to-day management of a company's business is, legally, the province, I would say the exclusive province, of the board of directors of the company (or people to whom the board has delegated authority).

227. In order for expenses incurred by a company to be deductible therefore, they must be expenses linked to the management of the company's investment business and the management must be carried out by the company, acting by its directors, as they are the only people who are authorised to manage the company's business.

228. The disputed expenditure was arranged by Centrica. It entered into the engagements with the advisors and in the first instance, it paid the fees. There was no initial agreement between Centrica and COHL that Centrica would obtain such advice on COHL's behalf. This is not, of itself, fatal to the Appellant's case. It is not disputed that the cost was ultimately borne by COHL and the advice was in connection with investments owned by COHL.

229. The real difficulty, as Mr Henderson pointed out, is that COHL was not actually managing anything. Taking a realistic view of the facts it was Plc which made all the decisions, strategic and otherwise. The various group functions did not think of themselves as providing services to COHL, they were working to give effect to Plc's strategic decision to divest itself of the Oxxio businesses and exit the Dutch energy market. Although Ms Redcliffe and Mr Dawson were directors of COHL as well as senior employees within the group functions, the evidence indicates that throughout the Eneco transaction they received information, provided advice and made decisions with their Plc Head of Tax/General Counsel hats on. It was admitted that there was no real distinction between the capacities in which they were acting and there is no evidence to show that they changed hats and took decisions in their capacity as directors of COHL.

230. In the five lever arch files of documents I had before me there were only three extracts from minutes of meetings of COHL's directors. The first was dated 19 March 2009 and related to an increase in Oxxio BV's equity of €110m with a view to Oxxio repaying some of its loan to COHL. The second was dated 30 September 2009 and related to the provision of working capital to Oxxio Tolling BV by way of a loan. The third, dated 1 July 2010, was to replace the expired revolving loan facility provided by COHL to Oxxio with a new revolving loan facility with a limit of €250m. These decisions were made shortly before or during the disposal process but there was no mention of the proposed disposal in the minutes. Nor were there any other resolutions by COHL dealing with the disposal of the Oxxio businesses, or if there were, they were not before the Tribunal.

231. It was clear from Mr McCord's and Mr Defert's evidence that Centrica approached its management of the group on the basis of businesses, rather than legal entities. As members of the group M&A function, their focus was on a disposal of the Oxxio business, however that might best be achieved. While there was a desire to do this by a "clean" share sale, it was recognised that this was unlikely to be feasible and other options had to be explored which ultimately led to the demerger and sale of the demerged companies. So far as Mr McCord and Mr Defert were concerned, that achieved the objective. The process by which the new entities were formed and assets transferred to them was, as Mr McCord put

it "detailed corporate plumbing that needs to happen". They simply did not think in terms of legal entities. That is not a criticism of them. As part of the M&A team their job was to make the deal happen. The "corporate plumbing" was the job of transaction lawyers like De Brauw.

232. As Mr Henderson submitted, tax law operates at the level of the legal entity. If COHL wishes to deduct expenditure as expenses of management of its investment business, it has to show that it, acting by its board of directors, carried out the management of the investment business as a result of which it incurred the expenditure. COHL has not done this. To the extent that the people who were directors of COHL participated in managing the process of the disposal of the Oxxio business they did so in their group capacities and there is no evidence to show that they took any relevant decisions as directors of COHL or that the advice from Deutsche Bank, PwC and De Brauw, the cost of which they incurred, was used by them as directors of COHL in conducting COHL's investment business.

233. Mr Rivett submitted that section 1219 must be capable of working in the context of groups and if a deduction was denied in this case it would mean that it would be virtually impossible for an intermediate holding company to obtain a deduction for its expenses of management and that the object of the legislation, to tax investment companies on their true economic profit, would be defeated. I disagree. Mr Rivett tried to explain the lack of minutes for COHL by saying that they were only produced where there was a need for corporate decision making, for example where there was a need for a formal audit trail. It seems to me that a decision to dispose of a significant investment, especially such a difficult one, is more than worthy of a corporate decision. There were a number of minutes of Plc and committees of its Board dealing with the progress of the Oxxio transaction and making decisions about it. The few minutes of COHL that were in my bundles acknowledged the roles of the group functions in recommending/approving the proposed actions and preparing the relevant documents. Had the directors of COHL, in that capacity, considered the actions recommended by Plc and made decisions, as directors of COHL, about the Oxxio transaction recorded in minutes of the meetings of COHL's board, it might have been possible to say that COHL was managing its investment business.

234. *Dawson* and *Howden* were both cases involving groups of companies, although the relevant investment business was that of the topco in each case. The explanatory note to Finance Act 2004, in setting out the background to the changes, made it clear that they were intended to allow group holding companies to obtain relief. It is not the case that section 1219 does not allow relief in group situations, but in order to obtain relief, group companies must be conscious of the need for the "corporate plumbing" to be properly installed and must ensure that the relevant investment company manages its own investment business, even if strategic decisions are taken elsewhere in the group.

235. I have decided that COHL did not itself carry out the management activities in relation to which the disputed expenditure was incurred. The conditions for relief in section 1219 are not therefore satisfied as the expenditure was not expenses of management of COHL's investment business.

236. That disposes of the appeal, but in case I am wrong, I will now consider the other issues raised by HMRC.

237. I am assuming, for the purposes of considering the remaining issues that, contrary to my finding above, the disputed expenditure was an expense of COHL's investment business. In this context I will sometimes refer to COHL below as doing things which were in fact done by Centrica.

Was the disputed expenditure "expenses of management"?

238. As we shall see from the authorities, "expenses of management" is a wide term, but there is a fundamental distinction between expenses which are essentially, part of the costs of buying or selling and expenses which are severable from the sale or purchase itself. The former are costs of implementation and not deductible. The latter are expenses of management and deductible (unless they are part of the general expenses of the company and do not constitute expenses of management, or are capital in nature).

The authorities

239. The applicable principles were summarised by Mann J. in *Dawson* at paragraph 49 where he said:

> "Thus the relevant principles in considering the point:
> i) The expression 'expenses of management' is to be treated as an ordinary English expression, which is incapable of detailed definition.
> ii) It is that expression, and that concept, which needs to be considered. The question is whether the expenditure falls within that category, and not whether it fails to fall within some other and thereby qualifies by default (as it were).
> iii) The expression is a wide or fairly wide one (the difference probably makes no practical difference).
> iv) There is a distinction between the expenses of management and the general expenses of the business. An expense can fall within the latter category and not be within the former. The emphasis must be on 'management.'"

240. Further, expenses can be deductible expenses of management even where they have a duality of purpose. In the case of *Camas Plc v Atkinson* [2004] EWCA Civ 541 (2004) TC 641 ("*Camas*") the Court of Appeal said at paragraph 26:

> "…it was common ground (in the *Sun Life* case considered below) that the process of reaching a decision to purchase was management in the ordinary sense. There is nothing in the speeches which supports the view that an activity which is part of that decision-making process ceases to be management, merely because it may also assist in the purchase if that is decided upon—still less if it is not. Unlike the provisions relating to Sch D expenses, there is no requirement that the expense should be "wholly and exclusively" related to management."

241. It is, of course, necessary to apply these principles to the particular facts and circumstances of the case and to bear in mind the context in which certain comments were made in the cases.

242. The first of the authorities we need to look at is the House of Lords case; *Sun Life Assurance Society v Davidson* 37 TC 330 ("*Sun Life*"). This concerned section 33 of the Income Tax Act 1918, the ancestor of section 1219, which provided:

> "(1) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, … the company or bank shall be entitled to

> repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: …"

243. Although *Sun Life* concerned an insurance company, the provision also applied to investment companies. The question was "whether sums disbursed by them by way of brokerage and stamp duties in connection with the purchase and sale of investments in the ordinary course of carrying on their business are expenses of management in respect of which they are entitled to relief under Section 33".

244. *Sun Life* was carrying on an insurance business, which is a trade. It also carried on an investment business, investing the life insurance premiums paid in order to enable it to meet its obligations under its policies and to provide profits for its policyholders and shareholders. The Inland Revenue, as it then was, had elected to charge the company tax on the income from its investments rather than its trading profits. In these circumstances, the company was entitled to claim relief for its "expenses of management". As is often the case, the judges came to slightly different conclusions, or came to the same conclusion by slightly different routes. I want to deal with two points of variance before turning to the general principles on which their Lordships were agreed and which were relied on in the subsequent cases.

245. Counsel for the company had conceded that the cost of the investments themselves could not be an expense of management. Viscount Simmonds questioned that concession and thought that the purchase costs might be expenses of management. Mr Henderson pointed out that the other judges took a different view. Lord Reid said "Admittedly, the price paid for an investment is not an expense of management…" and Lord Somervell: "The purchase price of the investment cannot enter into he computation as an expense". Mr Rivett was not seeking to argue that such costs could be an expense of management, but he considered that the fact that Viscount Simmonds had doubts about the matter indicated the width of the concept. I do not think this point takes us any further in the present case.

246. All their Lordships decided that Stamp Duty was not an expense of management and all except Lord Reid decided that the brokerage fees were not expenses of management. Lord Reid found that the brokerage expenses were expenses of management. He compared them to the costs which would have been incurred on staff wages (which would have been expenses of management) had it been possible for the employees to arrange the buying and selling of investments instead of the company having to buy them on the stock exchange.

247. These points arise from the facts and context of *Sun Life*. More important, are the general principles to be derived from the case.

248. The first of these is that the expression "expenses of management" has a wide or fairly wide meaning.

249. The second is the necessary linkage between the expenses and the purchase itself so that expenses which are, essentially part of the costs of purchase cannot be expenses of management.

250. Viscount Simmonds found the formulation of the Special Commissioners helpful which he quoted at page 354 of the report:

> ""We have come to the conclusion," they said, "and we so hold, that the brokerage and stamp duties payable on the purchase of an investment, being not general expenses of conducting the Society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of management. If we draw a line between the moneys admittedly laid out

by the Society for expenses of management and the moneys laid out for the price of an investment, we hold that the brokerage and stamp duties fall on the same side of the line as the latter. The fact that the purchase is necessarily made in the ordinary course of carrying on the Society's business does not of itself determine whether the sums in question are expenses of management of that business. in our view the disputed items are so closely linked with the transaction of purchase (being necessarily incurred in the course thereof) as to be considered part of the expenses of the purchase and not expenses of management of the Society's business. We hold also that the brokerage and stamp duties paid by the society on the sale of an investment are not expenses of management."'

251. In other words, the Stamp Duty and brokerage fees were an integral part of the cost of acquisition and could not therefore be expenses of management.

252. Lord Morton put it in similar terms:

"It has been common ground between the parties throughout all Courts that "expenses of management" do not include the price of investments bought by the Society in the course of its business. Now it is clear that the sums now in question are not part of the price, for the price of an investment, purchased or sold, is the sum which is paid by the purchaser to the seller. These expenses are, however, so closely linked with the transaction of purchase that they may naturally be considered as items in the total cost of a purchase which has already been resolved upon by the management of the company, and not as expenses of management."

253. Again he is looking at the expenses as part of the total costs of the purchase, but he also introduces the idea that they are part of the costs of implementing a decision which has already been made by the management of the company.

254. Lord Somervell considered it to be "plainly a possible view" that the Stamp Duty and brokerage fees were expenses of management and stated that the Inland Revenue had previously taken that view, but he went on to conclude.

"I am, however, impressed by the arguments on the other side as restricted to these two particular items. The brokerage and stamp duty, though not, as the Commissioners held in Golder's case, an integral part of the purchase price, are a direct and necessary part of the cost of a normal method of purchase. I therefore, with some hesitation, agree that they should not be treated as expenses of management and that the appeals should be dismissed."

255. Lord Reid drew all the points together in his speech and set out what might be regarded as the "test" for whether expenditure constitutes expenses of management:

"I do not think that it is possible to define precisely what is meant by "expenses of management". It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the Appellants that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are admittedly not expenses of management, such as payments to policy holders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management. But looking to the purpose and content of the Section it appears to me that the phrase has a fairly wide meaning, so that, for example, expenses of investigation and consideration whether to pay out

money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management. And the collocation of the words "(including commissions)" shows that a sum can be an expense of management whether the work in question is done by the company's staff or done by someone else on a commission basis, and it must follow that if work of an appropriate kind is done for a fixed fee that fee may also be an, expense of management.

Admittedly the price paid for an investment is not an expense of management, and Counsel for the Appellants did not and could not reasonably withhold the admission that a sum spent on enhancing the value of a trading asset is not an expense of management. I do not think that it is practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not. For example, if a call is, made in respect of shares not fully paid, paying the sum necessary would not be an expense of management, although there have been cases where shares remained of no value after becoming fully paid. It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management."

256. Extracting the principles:

(1) "Expenses of management" is not a term of art. They are ordinary English words.

(2) The meaning they have in a particular context depends on the facts and circumstances of the particular case.

(3) Not every payment by an investment company is an expense of management and it must be positively shown that it falls within that definition.

(4) The expression has a fairly wide meaning.

(5) It includes the cost of investigating and considering whether to buy an investment.

(6) In order to be an expense of management a payment must not be part of the cost of acquisition but must be something severable from the cost of acquisition.

257. *Sun Life* was applied in the case of *Hoechst Finance v Gumbrell* (1983) 56 TC 594. In this case, the appellant, was a member of an international group of trading companies, and its principal object was to finance other group companies operating within the United Kingdom. To raise money for that purpose the appellant placed on the Stock Exchange an issue of guaranteed unsecured loan stock. To attract investors it included the offer of a conversion into shares of its parent company. The appellant having been advised that the issue could only be placed successfully if the stock was unconditionally guaranteed by the parent, obtained that guarantee in return for a commission of 0.25 per cent. per annum payable half yearly on the amount of the loan stock for the time being outstanding. It was a requirement of German law, to which the parent was subject, that such a guarantee could only be given on arm's length terms. The appellant sought to deduct the commission payments as expenses of management.

258. The Special Commissioners rejected the claim on the basis that the guarantee payments were part of the cost of raising the finance:

> "The parent company's guarantee, like the inclusion of the equity conversion rights, was an essential feature of the issue of the loan stock. If the consideration for that guarantee had been a single lump sum there would, in our view, have been no doubt but that it formed an integral part of the issue expenses. The fact that the consideration for the guarantee was not a lump sum but a recurring sum, payable year by year and variable in amount, once the stockholders have started to exercise their conversion rights, is a relevant factor to be taken into consideration. We cannot however, regard it as so important a factor that it changes the nature of the payment upon a true analysis. It was not part of the cost of managing the Company's business year by year; it remained, in our opinion, part of the cost of raising the initial finance even though it fell to be paid year by year."

259. In the Court of Appeal, Dillon LJ approved this statement saying:

> "In the present case it seems to me that the guarantee had to be obtained by the company from its parent in order to raise the money to invest by advances to the other United Kingdom subsidiaries and the company had to agree to pay the parent the continuing commission in order to obtain the guarantee and therefore realistically as part of the price of raising the money. The commission cannot be severed from the cost of acquisition and so equally the annual payments of the commission cannot be severed from the cost of acquisition. It is unreal to regard each annual payment as merely a payment for the current year or the current six months to keep the guarantee on foot as part of the continuing management of the company's business, because the whole obligation in respect of the loan stock and the obligation of the guarantee was undertaken once and for all when the stock was raised and the guarantee was entered into, and, as document 5 shows, the commission was charged by the parent company for giving the guarantee. It all relates back to the giving of the guarantee.
> In my judgment, therefore, with all respect to the learned Judge, the Special Commissioners were entirely right in the paragraph of their decision which I have read. I would, therefore, allow this appeal and restore the determinations of the Special Commissioners."

260. Again the Court focusses on the idea that expenses of management must be something severable from the costs of implementing the decision to issue the loan stock.

261. The next relevant case is the decision of the Irish Supreme Court in *Hibernian Insurance Company Ltd v MacUimis* [2000] IESC 41 ("*Hibernian*"). Although not binding on me, it is relevant because it was referred to (and rejected) in the critical Court of Appeal case of *Camas plc v Atkinson* [2004] EWCA Civ 541 ("*Camas*") and Mr Rivett submitted that Mr Henderson's arguments were an attempt to reinstate *Hibernian*.

262. Hibernian was an investment company. Over a four year period, it incurred over £400,000 costs in pursuing three investment opportunities; the acquisition of PMPA and ICI and the purchase of 80% of the shares in a Spanish company called Vimar. In the event, none of the transactions happened. The company employed professional advisors to carry out a detailed appraisal and evaluation of he target companies.The advisors included an investment bank, lawyers and accountants. Hibernian sought to deduct the advisors' fees as expenses of management. The Irish Supreme Court started from the principle established in *Sun Life* that a particular disbursement would fail to qualify for a deduction as a management expense if it could not be severed from the costs of acquisition of an investment. In applying that test, the Irish Court took the view that once a particular target

had been identified, any costs incurred in appraising and investigating the possible acquisition were costs of acquisition (or disposal as the case may be) and not expenses of management.

263. Murphy J said at page 289:

> "The essence of [the appellant's] argument is, and has been, that no costs or expenses which the Group might have incurred in respect of any of the potential investments subsequent to the date upon which the Board of Directors decided to purchase the particular investment would qualify as expenses of management, but all expenditure prior to that date would so qualify. The respondent on the other hand contended that all of the expenses of investigating and evaluating the potential investments were so closely linked with the proposed purchase that they would fall to be considered as the cost of purchase if the transactions had proceeded. The respondent contended that the character of the expenditure could not alter depending upon whether the purchase was successful or not. …
>
> Unquestionably, the respondent is correct in saying that different judges, and in particular Lord Reid in *Sun Life Assurance Society v Davidson (Inspector of Taxes)* [1958] AC 184, had referred to the severability of certain items from the cost of purchase. Other judges spoke of "divorcing" particular sums from the price paid or the amount received when changes took place in the investments of a tax payer company. There is no doubt that such distinctions can be made. In fact, it must be possible to identify a variety of phases between the stage when one company considers the desirability of acquiring all of or a substantial shareholding in another company and the ultimate completion of such an acquisition. The question arises, however, as to why one should classify differently work of the same character but carried on in different phases or stages of such an acquisition. Undoubtedly, the Group is entitled to pray in aid the observations of Lord Reid both as to the severability and deductibility of the costs incurred in relation to such activities. The other judges in *Sun Life Assurance Society v Davidson (Inspector of Taxes)* placed a different emphasis on the relationship between expenditure and acquisition. Their views might be summarised by saying that a particular expenditure could not constitute an expense of management if it formed an "integral part" of the acquisition of an asset. Whilst taxes and duties imposed on transactions are inescapably associated with such transactions and professional advice in relation thereto are, in theory at any rate, optional, it would be impossible in practice to suggest that the legal costs of, say, investigating the title to land the subject matter of a contract for sale or professional advice in relation to a "due diligence" investigation for a take over could be dispensed with. Indeed, the appellant would not suggest otherwise. The argument on its behalf is that such costs and expenses are deductible when incurred before the decision to purchase but not if incurred after it. In my view, such a decision cannot change the nature of the service provided. *If a purchase were completed, I do not doubt that it would be universally accepted that all of the costs incurred in relation to the exploration, evaluation and investigation of the company to be acquired, would be "costs of the purchase". I believe that it would be impossible to justify any distinction as to the nature of those costs depending upon whether the work done on behalf of the purchaser was carried out before any agreement was reached, after an option had been obtained, or before or after a conditional or unconditional agreement signed.* … [emphasis added]
>
> It would seem that, even on the test proposed by the Group, at least some of the costs would have been incurred after a decision was made to acquire the shares in question, but, more particularly, the facts illustrate how difficult it would be to rely on such an imprecise event to differentiate between the nature of an expenditure incurred. In my view, one cannot go further than saying that a close relationship between a proposed acquisition and expenditure incurred in respect thereof would necessarily deprive that expenditure of the characteristics of a management disbursement. The relationship

between the disputed expenses in the present case and the potential purchases was such as to deprive that expenditure of the character of expenses of management."

264. He went on to say:

> "In my view the very substantial costs incurred by the Group in procuring the expert and specific evaluation of the three investment opportunities referred to in the case stated did not constitute management expenses. …from the date on which the Group focused its attention on the acquisition of the prospective investments, the expenditure incurred in respect of them would properly have been considered to be costs of acquisition of an investment…"

265. Barron J took a similar view concluding:

> "The decision which it is submitted creates the dividing line between costs of management and costs of acquisition was in fact taken before any other disputed expenditure was incurred. It may be part of day to day management to appraise the possibility of acquisitions or disposals, but it ceases to be such when a specific situation is pursued.
> The costs of management come to an end when a decision is taken to acquire or dispose of an investment as the case may be. This does not relate to the entering into of a binding commitment. Once steps are taken which may lead to a binding commitment and which are necessary for management to make a full and informed decision then management ceases and acquisition or disposal as the case may be commences."

266. This approach was rejected by Patten J in the High Court and by the Court of Appeal in *Camas*.

267. Patten J said, commenting on the italicised passage from Murphy J's judgement in paragraph 263 above:

> "I think that I need say no more than that, with great respect to the learned Judge, I do not accept that it would be universally accepted in the context of Lord Reid's test that the expenses he refers to would be costs of the purchase, and there is nothing in the reasoning of the Irish Supreme Court which has caused me to take a different view of this matter."

268. Carnwath LJ in the Court of Appeal also rejected the conclusion and reasoning in *Hibernian*.

> "26. I shall comment on these issues below in the context of the present case. As will become apparent, I am unable, with respect, fully to accept the [Irish] Supreme Court's application of the principles in the *Sun Life* …case. It has to be borne in mind that the costs of purchase came into the debate in *Sun Life*, not as part of a statutory test, but simply because, by common agreement, it was accepted that the act of purchase as such was not within the ordinary meaning of "management". It therefore became necessary to determine what expenses were an integral part of such a purchase. By contrast, it was common ground that the process of reaching a decision to purchase was management in the ordinary sense. There is nothing in the speeches which supports the view that an activity which is part of that decision-making process ceases to be management, merely because it may also assist in the purchase if that is decided upon—still less if it is not. Unlike the provisions relating to Sch D expenses, there is no requirement that the expense should be "wholly and exclusively" related to management.
> …
> 30. Before us, Mr. Henderson supports the Commissioners' reasoning. He accepts that expenditure in deciding on what sort of company to acquire is not excluded.

However, expenditure ceases to be on "management" once a particular company has been identified:
"The starting point is when a particular target has been identified and where expenditure is directed to acquisition of that particular target."
(This formulation is similar to that of Barron J. in the *Hibernian* case.)
31. On this issue I agree, respectfully, with Patten J. It is a short point. If my analysis of the speeches in *Sun Life* is correct, the activities in this case were all part of the process of managerial decision-making. I see nothing in *Sun Life*, or in the ordinary meaning of"management", which provides any support for Mr. Henderson's suggested distinction between the process of deciding on the sort of company to acquire, and that of deciding on the acquisition of a particular company.
32. On the facts of this case, unlike *Sun Life*, no final decision to purchase was ever made. As Asquith L.J. put it in another context, the project never:
"…moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision" (*Cunliffe* v. *Goodman* [1950] 2 KB 237, at p 254).
The Revenue's argument might have been stronger if the stage had been reached of a "firm intention to make an offer", triggering the "strict timetable" described by Mr. Reed. Even then, I would not necessarily conclude that any expenditure thereafter, even if the purchase proceeded, would have to be treated as costs of acquisition, rather than management. It must depend on the circumstances. Between such a triggering event and a final purchase there may be many chances and changes, requiring what can properly be regarded as "managerial" consideration. How one should categorise particular expenses in any such case must depend on the particular facts."

269. So the Court of Appeal firmly rejected the suggestion that management stops and acquisition starts when a company identifies a specific target.

270. Both sides relied on *Camas* as the pivotal authority relating to this case. Whilst every case has to be considered on its own facts, the facts in *Camas* are important and I will set them out in some detail.

271. Camas plc ("Camas") was a listed company which owned an intermediate holding company ("Holdco") which, in turn, owned a number of trading subsidiaries involved in the quarrying and manufacture of products used in the construction industry. It was accepted that Camas plc was an investment company. It's investments consisted of the shares in Holdco and various substantial loans to the trading subsidiaries.

272. The board of Camas was looking to acquire new investments in the same market as itself and in March 1995, it identified another listed company, Bardon Group plc ("Bardon"), as a suitable target and embarked on what was called "Project Bardon". I set out below a summary of the timeline of Project Bardon taken from the judgement of Patten J in the High Court.

- 28 April 1995: the Chief Executive and the Director of Finance of Camas met representatives of Schroders at which Schroders produced a paper indicating various ways in which an acquisition or merger could be effected.

- 12 May: Schroders sent the Finance Director revised schedules showing a further range of scenarios.

- 23 August: first meeting between the Chief Executives of Camas and Bardon.

- Early September: the Chairmen and Chief Executives of Camas and Bardon agreed there was “industrial logic” for a merger but Bardon wanted to review.

- 14 September: Camas board meeting reviewed progress of Project Bardon and considered a paper from Schroders comparing recommended offer/merger/hostile bid.

- 29 September: Schroder advised that, tactically, Camas should indicate to Bardon that a merger was the strongly preferred option.

- The Bardon share price fell

- 26 October: Camas board decided recommended offer was preferable.

- Schroders and other external advisors prepared a paper on Project Bardon including “background technical work”.

- 16 November: Paper considered at Camas board meeting. It was agreed to pursue the acquisition of Bardon and a meeting was arranged with Bardon to discuss a recommended bid. If terms could not be agreed, Camas would take further advice about making a unilateral bid. As an offer was likely, Schroders prepared a paper advising the directors of Camas of their responsibilities in the event that a public offer was made for Bardon.

- 20 November: Meeting between Chairmen and Chief Executives of Camas and Bardon. Camas said they wanted to agree a recommended offer and made an “indicative offer” of 35/37p per share to be discussed at a Bardon board meeting on 14 December.

- 29 November: Camas meeting with Schroders.

- 30 November: Camas board meeting. The board agreed to make “twin track preparations” for a bid on either a friendly or hostile basis, Camas’ banks to be approached to provide finance for the bid and for working capital for the enlarged group and there should be a meeting with the external advisors in preparation for the next board meeting.

- 7 December: Camas board meeting attended by Schroders, Warburgs (its brokers) and Clifford Chance. Schroders presented briefing paper on alternatives for pursuing the acquisition and questions about management of the enlarged group.

- 28 November-12 December: KPMG prepared draft reports comparing financial information on Camas and Bardon and on working capital and “synergies”.

- 14 December: Camas board meeting attended by the advisors. It was agreed to have further discussions with Bardon and an "Offers Committee" was formed. To mount a bid, Camas had to have funding on a certain funds basis and a draft facility agreement with the bank was approved. Warburgs presented a report analysing how Bardon's major shareholders might react to a hostile bid.

- 19 December: Schroders sent Bardon's merchant bank an offer from Camas of 40p per share "subject to due diligence". The Offers Committee met twice to approve the final banking arrangements.

- 20 December: Bardon board meeting to discuss the Camas offer. The offer was rejected as Bardon considered the price inadequate and were not persuaded that the deal would produce the promised "synergies" or that Camas' management would be able to lead a merged group to future growth.

- 21 December: Camas board meeting at which Schroders and Warburgs provided advice. It was decided there was no possibility of a recommended bid at a price Camas would be prepared to offer and that " the success of a unilateral bid was too uncertain to warrant proceeding".

- Project Bardon ended at that point.

273. The disputed professional fees amounted to £509,695. The breakdown of the fees, and what they were for is set out in paragraphs 13 and 14 of Patten J's judgement:

"…the fees disbursed are set out as follows:

	Schroders	185,000	
	Warburgs	25,531	
	KPMG	226,684	
	Clifford Chance	121,753	
	Shearman & Sterling	11,878	
	FPC Greenaway	12,649	
	Subtotal	£583,495	
	Less: Proportion of fees which have been agreed as incidental costs of loan finance		
	Schroders	(40,000)	
	Clifford Chance	(33,800)	
	Expenses incurred	£509,695	

14. Schroders' fees relate to their work as the financial adviser to Camas in respect of the takeover. This includes advice on strategy and tactics throughout the process. It includes the formulation of alternative strategies in relation to a possible merger or a takeover, advice on the methods of financing any offer, and an appraisal of the

financial impact of successful offers for Bardon over a range of prices. I have already referred to their attendance at board and other meetings and to the papers which they prepared. Warburgs as brokers also gave advice on strategy, as well as carrying out an analysis of the register of Bardon shareholders. The fees of KPMG relate to a comparison of the financial performance and accounting policies of the Camas and Bardon groups, a review of the benefits of integrating the two businesses, and a review of the profit forecast for the Bardon group. They also carried out an assessment of the borrowing requirements in the event that the takeover offer succeeded. Clifford Chance advised on the impact on the proposed transaction of competition laws and on what information would need to be submitted to the Office of Fair Trading. They also advised on the information that would require to be included in any circular, and gave advice to the directors of Camas on their responsibilities under the City Takeover Code and the Stock Exchange Yellow Book. Together with Schroders and Warburgs they attended a number of board meetings. Shearman & Sterling advised on US anti-trust issues and provided an analysis of the impact of US securities laws. FPC Greenaway are printers and their services related to printing the offer documentation, listing particulars, circulars to shareholders and some press releases. All of this expenditure was charged by Camas to the profit and loss account in accordance with commercial accounting practice."

274. Patten J's decision also set out the uncontested expert evidence of an investment banker who explained the process of making a public offer and the input which would be needed from professional advisors before such a bid could be made. The relevant passage of the advice is at paragraph 15:

""3.3 A strict timetable must be followed once a firm intention to make an offer is announced. Also, if the offeror and the target company are public companies, both are vulnerable to approaches from other offerors once an announcement of a firm intention to make an offer has been made. Speed in launching and completing an offer is, therefore, of utmost importance and this requires the prior contingent preparation of documentation.
3.4 The net effect is that considerable preparation is required before contemplating a public offer. This is to ensure that the largely irreversible offer process is not put in train until the offeror has completed its appraisal process and is certain that it wishes to make the offer and that the necessary documentation is sufficiently advanced so that, once implemented, the offer process can be executed as quickly as possible.
3.5 The offer process therefore essentially consists of three steps:
(a) the appraisal process;
(b) the decision whether or not to make an offer; and, if positive,
(c) the communication of this decision to the offeree.
Market circumstances can change very rapidly and very little time will usually elapse between decision and communication.
3.6 The initial consideration of a potential acquisition target will usually be conducted by the company itself and will be similar whether the target is a public or private company. However, for a public company target, once the potential attractiveness in business terms has been established, the nature and the complexity of the process means that it is necessary to involve the company's outside advisers to analyse all aspects of the situation and the feasibility of a public offer. These advisers both assist in the appraisal process aimed at establishing whether or not company wishes to make an offer and in the contingent preparation of the documentation that has to be issued in due course if an offer is made. Both these processes involve costs and expenditure on fees…
3.9 An offeror will initially try to seek a recommendation from the offeree's board. However, if the offeror is prepared to mount a hostile bid, then it will always keep this option in reserve, in case negotiations fail.
3.10 It is an unfortunate and costly consequence of undertaking a public offer that an extensive level of preparation is required while no decision has yet been taken to

make an offer. Maintaining the option of mounting either a hostile or recommended offer is particularly onerous in terms of the preparations that are required, especially if part of the consideration is in shares. Different sets of arguments need to be marshalled and reflected in the drafting of the offer documentation. This drafting has to be done in advance to allow the offer to be pushed forward as quickly as possible once it has been announced.

3.11 I have reviewed various documents relating to Camas's consideration of an offer for Bardon. From these documents, it would appear that Camas took all the steps I would have expected from a company responsibly contemplating a public offer. The steps were typical of such a process and incorporated the possibility of a hostile offer being made with the consideration being partly in shares…'"

As this evidence indicates, the timing of the steps required to mount a bid means that at the decision stage referred to in para 3.5(b) of the statement, the work necessary to formulate the potential offer will already have been done. Indeed in para 4.22 of his report Mr. Reed says that, in his experience, many potential offers are aborted during this consideration phase and that the act of working up a potential offer is in itself part of the decision-making process. It is only possible for a company to decide that it wishes to proceed once it is in possession of all the relevant facts. The present case is a good example of this. It can be seen from the summary of facts earlier in this judgment that it was only once an indicative offer had been made to Bardon and rejected that a decision was made by the board of Camas not to proceed. The process was described by Mr. Reed in his oral evidence to the Commissioners as a "continuum". As they recorded in their decision, the various steps ran into one another."

275. It is important to note that the expert's reference to a "firm intention to make an offer" refers to the making of a public offer in relation to a listed company which the expert described as triggering a "strict timetable" and as "largely irreversible". It is not referring to a decision that it wanted to acquire another company in the same business, or a decision that it wanted to acquire Bardon. During the period April to December 1995, no other acquisition was contemplated. Camas made an indicative offer to Bardon on 20 November and a further offer "subject to due diligence" on 19 December. Although one might think that the Board of Camas had decided it wanted to make an offer for Bardon, these offers did not constitute the formal public announcement contemplated by the expert which had to be made in the case of a listed company.

HMRC's submissions

276. Turning now to Mr Henderson's submissions, he rejected the suggestion that he is seeking to re-run the arguments put forward in *Hibernian*. He does not seek to say that once a particular investment has been identified for disposal, that is the end of management. His argument is that *Camas* determines the dividing line between deductible management expenses and non-deductible implementation expenses. Whilst he agrees that expenditure on deciding whether to buy or sell an investment, what he called "making your mind up expenditure" may be an expense of management he contends that expenditure on implementing a decision which has already been taken to buy or (as in this case) to sell, is on the wrong side of the line and that which side of the line an expense falls on is a question of fact.

277. Mr Henderson submitted that the factual matrix in *Camas* was very different from the facts of this case. He emphasised the necessity of focussing on what the advisors had actually done and that in *Camas*, the expenditure was concerned with advice which assisted the board in making decisions as to whether to go

ahead with the Bardon transaction. He quotes Patten J at paragraph 17 who, after setting out the Special Commissioners' comments on what the professional fees were for, said:

> "17. These findings of fact are not open to challenge on this appeal. They do, in any event, accurately analyse the role of the professional advisers in relation to the events leading up to the board meeting of 21 December 1995. The essential points seem to be: (a) that all the expenditure was relevant and necessary to Project Bardon; (b) that all the costs (apart from the printing costs) related to advice given to assist the board of Camas in making decisions about a possible bid; and (c) that most of the expenditure also had the dual function of providing the necessary starting-point for a bid and would have to be incurred by a potential bidder in mounting a bid."

278. Mr Henderson argues that in our case, the work done by the professional advisors was not to help Centrical decide whether or not to sell Oxxio-it was not "make you mind up" expenditure- it was work to bring about the sale, that is implementation expenditure. The decision to sell was, he submits taken in 2009 when Centrica announced to the world its intention to divest the Oxxio business.

279. Patten J set out the test in paragraph 36:

> "Mr. Prosser Q.C., for Camas, invites me to accept as the correct test the question posed by Lord Reid as to whether the costs under review should be regarded as part of the costs of acquisition or something severable from it, which can properly be regarded as an expense of management, and the Crown has accepted in its skeleton argument that this is the true test, or at least the most helpful formulation of the test in the present context. I agree with that, but the real difficulties of course arise in its application to the facts. In a sense *Sun Life* was the easy case to decide. Both stamp duty and brokerage fees only arise and become payable as part of the costs of sale and purchase of the investments. In the case of stamp duty the tax is payable by reference to, and as a charge on, the purchase price. Neither was any less consequential on the exercise of a management investment decision than the costs of purchase themselves, and it was therefore relatively easy to draw the line."

280. At paragraphs 43 and 44, he set out his conclusions.

> "43. In my judgment the Special Commissioners have misapplied the *Sun Life* test to the facts of this case and appear to have asked themselves a different question. The speeches in *Sun Life* indicate that the correct approach is to draw a line distinguishing between management expenses and expenses or costs which are properly to be regarded as part of the costs of acquisition: i.e. the purchase price. An expense is, to use Lord Reid's words, "severable" from the cost of acquisition if, objectively viewed, it is not "part of" the purchase price. That is a matter of judgment in every case. But it does not follow, merely because expenditure which predates a possible or actual acquisition was prerequisite to, or, to use the Special Commissioners' words, "directed at" the acquisition, that it falls automatically to be regarded as part of the costs of acquisition. The logic of that view would mean that any expenditure relating to a management decision to invest would be disallowed on the basis that it was an essential part of the process leading up to the acquisition itself. This is in direct contradiction to Lord Reid's own speech, which at [1958] AC 184 p 205 (see above) refers in terms to the expenses of investigating and considering whether to acquire an investment being an expense of management. I accept Mr. Prosser's submission that the Special Commissioners have constructed a causative test of their own, rather than simply asking themselves whether the expenses are or are not part of the incidental costs of acquisition. But neither do I in fact accept the causative argument which they advance. Although the advice, and therefore its cost, was a prerequisite to any acquisition, it was in fact rendered to enable Camas to reach a decision as to whether or not to make an acquisition, and was therefore necessary and payable regardless of

whether the purchase took place. This is confirmed by the fact that no transaction proceeded in this case. One can contrast this with a success fee which can only become payable in the event that the acquisition proceeds to completion. …
44. It seems to me that the correct answer to Lord Reid's question is that the expenses under consideration are not part of the costs of acquisition. On the Special Commissioners' own findings of fact, the services of Schroders and the other professionals were needed and were used in order to obtain advice on a possible investment in the form of the acquisition of the Bardon group, and to decide whether to go ahead. The work stopped when, on advice, the decision was taken to abort any possible acquisition. But even if the acquisition had gone ahead, the nature of the services would have been the same. Although one element of the professional services involved the working up of the bid, Mr. Reed's evidence indicated that this was part of the decision-making process, and the Commissioners accepted that. I am unable to see how the cost of any of this can fairly be described as part of the cost of acquisition in the sense that brokerage fees, payments for financing and stamp duty obviously are, and the Special Commissioners have reached their conclusion, in my judgment, by asking themselves the wrong question."

281. Mr Henderson again emphasised that these comments show the importance of looking at what the fees were actually "for" and that to be regarded as expenses of management they had to be payment for services which assisted the company to decide whether or not to buy or sell an investment.

282. Moving on to the Court of Appeal decision in *Camas*, Mr Henderson took me to Carnwath LJ's summary of the type of expenditure which falls on the wrong side of the line as implementation expenditure. Beginning at paragraph 20, he says:

"20. In the extracts cited above, I have emphasised the words which seem to me best to encapsulate the effect of the various judgments. All stress the closeness of the link between the expenditure in that case and the process of acquisition:
"part of the expenses of purchase";
"an integral part of the cost of acquisition";
"items in the total cost of a purchase which has already been resolved upon";
"a direct and necessary part of the cost of a normal method of purchase".
21. Conversely, expenditure is not excluded merely because it relates to activities carried out in contemplation of acquisition. Lord Reid said that the expenses of "investigation and consideration" whether to pay out money in acquisition of an investment should be treated as expenses of management. Although these words were not in terms adopted by the other members of the House, they are consistent with the "wide" view advocated by Lords Morton and Somervell. In the context of the arguments before the House, the "width" there referred to concerned the extent to which the concept should be taken as including activities going beyond managerial decision-making. The same idea is implicit in Lord Morton's exclusion of items in the cost of "a purchase which *has already been resolved upon*". Nothing in *Sun Life* ; (1957) supports the exclusion of the cost of investigations and other activities which are part of the process leading to the decision to purchase. As Mr. Prosser says, what is excluded by *Sun Life* is expenditure on "the mechanics of implementation''."

283. Mr Henderson particularly drew my attention to the final part of paragraph 21 which refers to the exclusion of items relating to a purchase which has already been resolved upon and the inclusion of the costs of the process leading to the decision to purchase. He submits that the expenditure in the present case falls within the categories set out in paragraph 20.

284. The core of the Court of Appeal judgement is at paragraphs 31 to 34, where Carnwath LJ said:

"31. On this issue I agree, respectfully, with Patten J. It is a short point. If my analysis of the speeches in *Sun Life* is correct, the activities in this case were all part of the process of managerial decision-making. I see nothing in *Sun Life*, or in the ordinary meaning of "management", which provides any support for Mr. Henderson's suggested distinction between the process of deciding on the sort of company to acquire, and that of deciding on the acquisition of a particular company.
32. On the facts of this case, unlike *Sun Life*, no final decision to purchase was ever made. As Asquith L.J. put it in another context, the project never:
"…moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision" (*Cunliffe* v. *Goodman* [1950] 2 KB 237, at p 254).
The Revenue's argument might have been stronger if the stage had been reached of a "firm intention to make an offer", triggering the "strict timetable" described by Mr. Reed. Even then, I would not necessarily conclude that any expenditure thereafter, even if the purchase proceeded, would have to be treated as costs of acquisition, rather than management. It must depend on the circumstances. Between such a triggering event and a final purchase there may be many chances and changes, requiring what can properly be regarded as "managerial" consideration. How one should categorise particular expenses in any such case must depend on the particular facts.
33. Like the Judge, I do not see this conclusion as involving any disagreement with the Commissioners on their findings of fact. They held that, on the evidence relating to acquisitions of this scale, "the act of working up a potential offer is part of the decision-making process", and that in this case the work was "wholly directed at the projected acquisition". They saw these findings as leading to the conclusion that it was "a direct and necessary part" of the proposed acquisition in this case. That formula reflects the words of Lord Somervell in *Sun Life* adopted by May L.J. in *Hoechst* (1983). With respect to the Commissioners, however, I think they misapplied the formula. Lord Somervell made clear that he regarded that expression as a very narrow one, not intended to be wider than the particular items in issue in that case. The fact that the work was part of "the decision-making process" supports its categorisation as managerial. That is not affected by the fact that it was also a "necessary" prerequisite to acquisition, and directed to that possibility. It was preparatory to the making of a decision to purchase, not part of the implementation of a purchase already decided upon.
34. It is unnecessary to express a concluded view whether the fact that no acquisition occurred is in itself determinative. One can imagine cases where, following a firm commitment to purchase, expense is incurred in carrying it out, but some wholly unexpected event requires it to be aborted. If at the time it is incurred such expenditure is not an "expense of management", it may be difficult to see why it should change its character thereafter. However, in this case, the lack of an actual purchase merely confirms the fact that there never was a firm decision to buy."

285. Mr Henderson's position is that these extracts show that the Court of Appeal in Camas places a heavy focus on the process of decision making and in particular, the decision whether to buy (or as in our case) sell.

286. Ultimately, the Court of Appeal decided that the facts in Camas showed that the transaction had never reached the stage of a "final decision to purchase". There was no "firm intention to make an offer". Accordingly, the professional fees of the investment bank, accountants and lawyers were deductible expenses of management (although the printing costs were not).

287. He submits that the costs incurred by COHL were spent on the process of achieving the sale, that is, on implementation of a previous decision to sell. The work carried out by the advisors was about getting the deal done. In short, the

disputed expenditure was on the implementation side of the line (and/or the Appellant has not produced sufficient evidence to demonstrate otherwise).

288. Mr Henderson does not seek to argue that there will necessarily be a point in time where expenditure ceases to be an expense of management and becomes an expense of implementation. One has to see what a particular item of expenditure was for and consider whether that item is deductible. For example, he contends that the legal costs of drafting a sale and purchase agreement before the date a deal is certain is a transaction cost on the implementation side of the line. He warns that to accept the appellant's contention that everything up to the Centrica board decision of February 2011 is an expense of management is to risk giving a deduction for all the expenditure of an investment company. He reminded me that one of Mann J's principles set out in *Dawson* is that one has to draw a distinction between expenses of management and the general expenses of the business.

289. Having said that, Mr Henderson agreed that there has to be some dividing line and in his view that is whether it can realistically be said that the expenditure was incurred on the company making up its mind what to do with its investment. Once it has decided to sell, further expenditure is on implementation and is not deductible.

290. He then considered the evidence which he contended showed that Centrica had decided to sell Oxxio before any of the advisors became involved.

291. Centrica was considering the timing of a disposal of Oxxio from as early as 25 April 2009 as evidenced by a paper prepared by Colin Bolt (a Centrical employee on secondment to Oxxio) for Ian Wood (Centrica's commercial director). A draft presentation to Plc's board's investment sub-committee dated 11 February 2011 which set out the timeline of "Project Erasmus" records that work commenced on the disposal of Oxxio on 11 May 2009, before any of Deutsche Bank, PwC or De Brauw were involved.

292. As we have seen, Centrica's annual report and accounts for 2009 stated "In June 2009…management approved and initiated a plan to sell Oxxio BV in the Netherlands… . It is anticipated that the sale of Oxxio …will complete by 30 June 2010." In those accounts, Oxxio was classified as a "discontinued operation held for sale". As we have also seen, these are technical terms. Under IFRS 5 a sale must be "highly probable" and that means that "the appropriate level of management must be committed to a plan to sell the asset (or disposal group) and an active programme to locate a buyer and complete the plan must have been initiated. … In addition, the sale should be expected to qualify for recognition as a completed sale within one year from the date of classification." One must assume that the accounts of a public company comply with the appropriate accounting standards.

293. Ms Redcliffe's evidence indicated that the "kick-off meeting" on 10 July 2009 was to initiate the sales process, to set out a timetable and identify the work streams which were needed. The meeting was attended by Deutsche Bank, PwC and De Brauw as well as senior people from the various Centrica group functions.

294. Mr Henderson submits that the three firms were engaged to implement the plan to sell the Oxxio business and their key work streams were the classic steps in an M&A transaction. He referred to a Deutsche Bank document dated July 2009

setting out the work streams and "key steps in the sales process". There were a series of "action lists" setting out the steps needed to prepare the business for sale and execute the sale. For example, Deutsche Bank were to contact pre-agreed potential parties, PwC was to prepare the Vendor Due Diligence and De Brauw were to collate the data room. Mr McCord, when asked to comment on this agreed that these were all steps which were needed to prepare the business for sale or start taking steps to execute the sale.

295. I have considered the work which was actually being done by each of Deutsche Bank, PwC and De Brauw in some detail above, so I do not need to repeat it. Mr Henderson's position is that these actions were all part of implementing the decision to sell. He acknowledged that this was a difficult transaction and that it was not necessarily known that there would be a transaction, but this was all on the implementation side of the line.

296. As further evidence of the intention to sell, Mr Henderson referred to various articles which followed the announcement in Centrica's annual report. The Gaslicht website, on 31 July 2009 stated "The British energy group Centrica is to sell its Dutch low-cost energy supplier Oxxio" and a Reuters article of 29 October 2009 stated "…Centrica expects to launch a formal competitive process for the sale of the Dutch energy supply unit Oxxio in 2010….A Centrica spokesman confirmed the sale…" . A draft Sale and Purchase Agreement had been prepared by 15 December 2009. There are many other documents including Centrica board minutes, timetables, the term sheet for discussions with Eneco, the engagement letters and board briefing notes which refer to "the sale of Oxxio" or "the sales process".

297. In summary, Mr Henderson submits that the position was that Centrica decided to sell the Oxxio business and and it engaged the three professional firms to assist them in doing so.

The Appellant's submissions

298. Mr Rivett referred to most of the same authorities and passages in them as Mr Henderson, but draws different conclusions as to their application to the facts in the present case.

299. Mr Rivett submits that the expenditure in this case is indistinguishable from the sort of expenditure which the Court of Appeal found to be expenses of management in *Camas* and that HMRC's interpretation of the phrase is too narrow and not reconcilable with the authorities.

300. In *Sun Life*, their Lordships identified the expression "expenses of management" as having a "wide" or "fairly wide" meaning and Lord Reid specifically included the expenses of "investigation or consideration". The only limit is expenses which are unseverable from the cost of a transaction such as stamp duty and brokerage fees.

301. Mr Rivett submits that there is no justification in statute or the authorities for HMRC's assertion that expenses can only be management expenses where they are concerned with decision making and, in particular, "make your mind up" decision making, at least in the sense put forward by Mr Henderson.

302. He took me to the passage from Patten J's decision in *Camas* which is set out at paragraph 277 above and applied the comments to the present case. As in *Camas*, he submits, the expenditure on the professional advisors' fees "was relevant and necessary" to the ultimate sale of Oxxio and that it was related to COHL's investment business. Patten J also found that "All the costs (apart from the printing costs) related to advice given to assist the board of Camas in making decisions about a possible bid". Mr Rivett pointed out the width of the services which were included and which were found to be expenses of management. These are set out at paragraph 273 above. Schroders gave advice on tactics and strategy, pricing and alternative forms of acquisition. Warburgs analysed the likely attitude of the shareholder vendors to a bid. KPMG looked at the benefits of integrating the businesses and financing. Clifford Chance advised on competition and regulatory matters and Shearman & Sterling advised on US competition and securities law. Mr Rivett argues that the services provided by Deutsche Bank, PwC and De Brauw are, taking account of the fact this was a sale and not a purchase, the same categories of expense.

303. Mr Rivett also emphasised the high threshold set in *Sun Life* and endorsed in *Camas* at which management changes to implementation of a decision already made. He quoted Carnwath LJ:

> "20. In the extracts cited above, I have emphasised the words which seem to me best to encapsulate the effect of the various judgments. All stress the closeness of the link between the expenditure in that case and the process of acquisition:
> "part of the expenses of purchase";
> "an integral part of the cost of acquisition";
> "items in the total cost of a purchase which has already been resolved upon";
> "a direct and necessary part of the cost of a normal method of purchase".
> 21. Conversely, expenditure is not excluded merely because it relates to activities carried out in contemplation of acquisition. Lord Reid said that the expenses of "investigation and consideration" whether to pay out money in acquisition of an investment should be treated as expenses of management…"

304. And at paragraph 26 of Carnwath LJ's decision:

> "…it was common ground that the process of reaching a decision to purchase was management in the ordinary sense. There is nothing in the speeches which supports the view that an activity which is part of that decision-making process ceases to be management, merely because it may also assist in the purchase if that is decided upon—still less if it is not. Unlike the provisions relating to Sch D expenses, there is no requirement that the expense should be "wholly and exclusively" related to management."

305. Patten J also makes the point at paragraph 17 of his decision that expenditure which has a duality of purpose can be expenses of management.

306. Mr Rivett submits that the dividing line between management and implementation is the "firm intention" to transact which he derives from Carnwath LJ's decision, although even after that point of firm intention has been reached their may be circumstances and "chances and changes" which require managerial consideration. This is at paragraphs 32 and 34 of Carnwath LJ's decision set out at paragraph 284 above.

307. In relation to HMRC's contention that it is not seeking to re-run the arguments in *Hibernian* Mr Rivett argues that whilst that may be the case, Mr Henderson is

interpreting the meaning of a "firm intention" in a way which is inconsistent with the Court of Appeal's decision in *Camas*. In his submission Carnwath LJ's interpretation of a firm decision to pursue a particular transaction requires a high degree of certainty as to the actual transaction. HMRC's test seems only to require a general intention to sell before any purchaser, price or transaction structure has been identified.

308. In the Appellant's submission, the test requires one to identify the specific asset to be sold, the price and terms of sale (which one must be content with) and a suitable, credible purchaser. The point at which these elements came together in the present case was when the Centrica board approved the Eneco transaction on 22 February 2011on the basis of the "update" provided to them with the same date. The Appellant accepts this date as the "cut off point" but submits that there were still managerial decisions to be made after that.

Discussion

309. Although the authorities all seem to relate to proposed purchases, the principles apply equally to a sale transaction. Despite the fact that it went to the House of Lords, *Sun Life* is in some ways a straightforward case. It focussed on whether certain expenses were or were not part of the cost of buying quoted shares. In a "normal" investment company which is buying and selling shares or real properties, it is relatively easy to identify the expenses of managing the investment business. The company employs people to provide advice or takes external advice about what investment strategy to adopt and whether to buy or sell particular assets and the costs of that advice are clearly expenses of management. Having decided to buy or sell, the costs incurred in the process of transfer or conveyancing are clearly implementation costs.

310. The dividing line is much more difficult in cases like *Camas* and this case where the investment company is part of a trading group and its investments are shares and loans in underlying operating companies. Its investment business is not about the active buying and selling of assets as such, but about maximising the value of its subsidiaries and/or the returns to its shareholders (or in COHL's case, indirectly the shareholders of Centrica). This involves strategic decisions to enter or leave, expand or contract operations in particular markets which may involve the acquisition or disposal of investments in the form of trading companies or groups.

311. The Tribunal in *Howden* described the investment activities of a holding company as follows:

> "92. We consider that it is important to start by establishing what it is that an investment company such as HJ undertakes as its investment activities and then move on from that to establish what expenses might be treated as managing those activities. Again, referring to *Sun Life* "*the proper interpretation is to say that management means the conduct of the business"*. An investment company's business in its most simple terms is to hold assets to generate a return. In the context of an investment company which is a holding company, the assets which are generating the return are for the main part shares in its subsidiary companies. The purpose of the holding company is to support the value of the subsidiary companies, both in terms of their capital value and in terms of the dividends which are paid intra group and ultimately out to shareholders of the parent."

312. COHL's job is, essentially, to preserve and realise value for the shareholders of Centrica. As in this case, that may require it to divest itself of a particular investment and it is not just a question of keeping or selling an investment, it is a question of realising the maximum value from it. In an ideal world, COHL would have sold the shares in Oxxio BV, but the world is not ideal and after a tortuous two years of working towards a transaction, the value was realised by restructuring the Oxxio group, selling some of its businesses and procuring the repayment of the substantial loans that COHL had made to Oxxio.

313. In this context, investment and investment advice is not just about *whether* to buy or sell, but also *how* to buy or sell or otherwise realise the maximum value from an investment.

314. Lord Reid in *Sun Life* tells us that the expenses of "investigation and consideration" in relation to dealing with investments are expenses of managing the investment business. In *Camas*, Carnwath LJ, quoting Patten J endorses the proposition that "the act of working up a potential offer is part of the decision making process". Both those judges also emphasised that the fact that the expenses would have to be incurred in the actual transaction process in any event does not prevent them being expenses of management where they are incurred as part of the decision making process.

315. The advisors' fees in the present case will be expenses of management if the work carried out by the advisors was directed at helping COHL to evaluate the Oxxio businesses and/or make decisions, not just about whether to divest itself of the Oxxio group, but also about how best to realise value from it. That is, whether they were expenses of "investigation and consideration".

316. In considering, in the light of the authorities, whether the particular expenses in this case are COHL's expenses of management, there are two related questions:

(1) When was the decision to sell made? This, to a large extent, determines whether the expenses are part of the cost of sale itself or whether they were they "severable" from the cost of sale. That is, were the costs management costs or the costs of implementing a transaction which had been decided upon?

(2) What were the expenses "for"? What work was carried out to earn those fees and was that work on the implementation side of the line or not?

317. The fact that the work was prerequisite to or "directed at" a sale, does not automatically make the fees for it part the expenses of the sale. Carnwath LJ approved Patten J's comments on this in paragraphs 28 and 29 of his judgement where he says:

> "…In his [Patten J's] view, the Commissioners had asked the wrong question:
> "…The speeches in *Sun Life* indicate that the correct approach is to draw a line distinguishing between management expenses and expenses or costs which are properly to be regarded as part of the costs of acquisition: i.e. the purchase price. An expense is, to use Lord Reid's words, 'severable' from the cost of acquisition if, objectively viewed, it is not 'part of the purchase price. That is a matter of judgment in every case. But it does not follow, merely because expenditure which predates a possible or actual acquisition was prerequisite to, or, to use the Special

> Commissioners' words, 'directed at' the acquisition, that it falls automatically to be regarded as part of the costs of acquisition." (para 43)
>
> …
>
> "44… On the Special Commissioners' own findings of fact, the services of Schroders and the other professionals were needed and were used in order to obtain advice on a possible investment in the form of the acquisition of the Bardon group, and to decide whether to go ahead. The work stopped when, on advice, the decision was taken to abort any possible acquisition. But even if the acquisition had gone ahead, the nature of the services would have been the same. Although one element of the professional services involved the working up of the bid, Mr. Reed's evidence indicated that this was part of the decision-making process, and the Commissioners accepted that. I am unable to see how the cost of any of this can fairly be described as part of the cost of acquisition in the sense that brokerage fees, payments for financing and stamp duty obviously are, and the Special Commissioners have reached their conclusion, in my judgment, by asking themselves the wrong question.'"

318. Carnwath LJ agreed with Patten J that the activities in the *Camas* case were all part of managerial decision-making.

319. Returning to the present case I consider first, the question when a decision to sell was made which the Appellant has conceded marks the boundary between management expenses and implementation expenses.

320. There was much reference in the submissions to a "firm intention to sell". The converse, a "firm intention to buy" is taken from *Camas* and is a term of art. The firm intention to buy there involved passing the "point of no return" of making a public offer for a listed company which triggers a strict process and requires the offeror to be ready to go ahead with the purchase with all its finance in place. That stage was never reached in *Camas*, but the company had clearly made the strategic decision that it wanted to buy Bardon, on the right terms, and got as far as putting forward specific offers to the management of Bardon in an attempt to agree a recommended offer. The expenditure on the advice they obtained to get them that far was found to be expenses of management and that included the strategic and tactical advice on alternative routes to acquisition by the investment bank and broker, financial reports on the target and reviews of what the finances of the combined group might look like from the accountants and legal, regulatory and procedural advice from the lawyers. Although Camas had been looking to expand its business by a merger or acquisition, it did not matter that it had identified a specific target and conducted protracted bilateral negotiations with Bardon alone. There were no other proposed acquisitions during the period of Project Bardon.

321. There is no technical meaning of "firm intention to sell". The question in our case is when did COHL/Centrica make the decision to sell the Oxxio business, such that the subsequent work was work on implementing that decision.

322. The Appellant has conceded that the "cut off point" is when the board of Centrica decided to go ahead with the disposal of parts of the Oxxio business to Eneco at the board meeting of 22 February 2011, notwithstanding that there may have been other managerial decisions after that date.

323. HMRC contend that the decision was taken in mid-2009 when Centrica declared to the world that it intended to divest the Oxxio group and it became a discontinued business held for sale. After that, there was no "make your mind up" expenditure and all the work carried out implemented that decision.

324. Centrica undeniably made a strategic decision to divest the Oxxio group in mid-2009 and one might say it had a firm intention to dispose of the business. There is, however, a world of difference between making that kind of strategic decision and getting to the point where a specific decision is made to enter into a specific disposal transaction.

325. Equally, if not more, important than the decision whether to dispose of the business was the decision how to dispose of it, or indeed, whether it could be sold at that time.

326. In the facts and timeline sections of this decision I have set out the history of the transaction. The starting point for Centrica was that it wanted to sell the shares in Oxxio BV. It quickly became clear that this was not going to be feasible and alternatives had to be considered including the possibility of keeping the group and winding it down. The transaction which was finally agreed was the result of a long and hard negotiation which required many managerial decisions.

327. Centrica was not prepared to sell at any price. It needed to achieve a certain level of proceeds as evidenced by the fact that it considered trying to cure the fundamental problems in the Oxxio business so as to try and sell later at a better price and by the fact that it rejected at least one and possibly two offers by Eneco before approving the deal on 22 February 2011.

328. Nor was there a particular purchaser in view at the outset. Part of Deutsche Bank's role was to consider the "buyer universe" and this expanded and contracted as the process progressed with ten or more potential buyers in the energy sector being put forward at various times and even private equity investors being considered.

329. I agree with Mr Rivett that in order to have the kind of decision to sell which marks the transition from managing the investments to implementing the decision already made:

(1) There must be an identified purchaser who the seller has concluded is satisfactory. That is the seller must be content that the purchaser is credible and has the funds available or can obtain the funds to go through with the purchase

(2) The price must be acceptable

(3) The broad structure of the transaction must be agreed

(4) The other terms of the deal must be broadly satisfactory.

330. In other words, the seller must have decided to go ahead with a specific transaction with a specific purchaser on specific terms. That is not to say that every last detail must be agreed or that subsequent changes to the terms would vitiate the nature of the decision. It is inevitable in an M&A transaction that negotiations continue, important matters are agreed and changes are made even after detailed Heads of Terms have been agreed. What is important is that a decision to enter into a specific transaction is taken. Even that is not an absolute cut-off point. Undoubtedly most of the work will then become implementation, but there may still be decisions made which constitute management. Although the Appellant does not seek to recover the costs of Deutsche Bank's work after

22 February 2011 on other potential options for a bilateral sale or an auction process in case the Eneco transaction failed, they might well be considered not to be implementation expenses.

331. The Project Erasmus Board Update dated 22 February 2011 which was presented to the Centrica board requests the board to approve “this transaction” and to delegate authority to certain senior employees to agree the final terms of the Oxxio disposal and to give authority to sign all the necessary agreements and documents. The document summarised the offer terms including the scope of the disposal-the customer business and smart meter business, what was excluded, the consideration to be paid for each element including an earn out structure for the smart meter cash flows and the demerger process. At that point it was envisaged there would be one Newco, although the final transaction involved two. It also set out the key risks and matters which had not yet been decided. These included the fact that the board of Eneco had not yet approved the deal and various matters relating to working capital, procurement book transfer and the Sale and Purchase Agreement warranties and indemnities remained to be agreed. All these are important things. It also explained why a deal with Eneco was favoured.

332. The board minutes record that:

> “Agreement was being sought for an asset sale by means of a partial de-merger to Eneco from whom an indicative offer had been received in December 2010…. The current position on SPA warranties and indemnities was noted. The Board approved the transaction in line with the terms presented to the meeting.”

333. The board also delegated signing authority and authority to negotiate and agree the final terms of the deal as requested in the “update”.

334. I have concluded that this was the point at which Centrica took the necessary type of decision to sell the Oxxio business.

335. In order to decide whether the expenses which predated this were expenses of management, I now need to consider whether the work which was actually carried out by each of the advisors was to assist Centrica in getting to the point where it could make that decision, or whether it was something else such as general expenses of the business.

Deutsche Bank

336. The services that Deutsche Bank were engaged to provided and the services they actually performed are set out in some detail starting at paragraph 61 above.

337. Its main roles were to advise on strategy and tactics in relation to structuring the transaction, “investor presentation” which involved preparing marketing materials, identifying potential purchasers and making approaches to them and pricing. It also assisted in managing the evolution of the transaction and assisting with the due diligence process.

338. The options for structuring the transaction were wider than in the normal case because of the problems with the Oxxio business and it was an important part of Deutsche Bank’s role to advise on those options and also the tactics of how they might be achieved. They advised on bilateral negotiations versus an auction

approach and continued to look at a possible auction process and/or other suitable buyers even after the negotiations with Eneco began in earnest because the bilateral discussions could have failed at any point. Indeed, this process continued after 22 February 2011. It was Deutsche Bank which evaluated the potential purchasers and with Centrica's approval approached them to discuss Oxxio.

339. They prepared the timetables and work stream documents and managed the progress of the sale process leading up to and beyond the decision by the Plc board to enter into the transaction with Eneco.

340. In summary their advice was directed to the "how" to get the most value out of the Oxxio business. Its advice informed Centrica as to the options available to them and assisted the company in deciding how best to divest Oxxio and whether to enter into that particular transaction with Eneco. Accordingly the expenditure incurred on the Deutsche Bank fees were expenses of management.

341. As noted, Deutsche Bank continued to perform services right up to the completion of the Eneco transaction. Mr Rivett has conceded that the work after 22 February 2011 was implementation although it would be arguable that at least some of it was not. Deutsche Bank's fee was a fixed fee established at the outset and payable on completion if that happened, irrespective of the time from engagement to completion. It is not therefore possible to allocate specific costs to the period up to 22 February and other costs to the period after that. Time apportionment therefore seems to be a reasonable method of allocating the fees between expenses of management and expenses of implementation.

342. I find that the proportion of Deutsche Bank's fees attributed to the pre-22 February 2011 period were expenses of management, subject to the contingent fee point discussed below.

PwC

343. An analysis of PwC's services is set out above beginning at paragraph 94.

344. PwC's main role was to produce the Vendor Due Diligence ("VDD") report. Mr McCord told us this was not routine and was generally used where the sale was problematical. PwC's engagement letter stated that the report could be provided to potential purchasers generally (subject to certain conditions) and that PwC would discuss the report with them. In addition, PwC was prepared to accept a duty of care towards the Preferred Bidder (a defined term). PwC was not advising Centrica. Its role was to act as an independent accountant providing a due diligence due diligence report for use by a purchaser.

345. The VDD report was therefore something which could be used both before and after a decision to enter in to a specific sale transaction had been decided on.

346. Although PwC expressly stated that it was not advising Centrica, its engagement letter acknowledged that "The Report may provide you with information which assists you in forming or refining your view of the Business and in preparing to negotiate a sale.". So the VDD report was capable of serving a dual purpose: helping the management of Centrica make decisions about a sale as well as being used in the sale itself. As the authorities confirm, there is no "wholly and

exclusively" test for expenses of management and advice which has a duality of purpose can still qualify for deduction.

347. In this case, the VDD report did indeed assist Centrica to understand the business. As a result of the problems revealed when PwC began its work, it prepared the "Deep Dive" report for Centrica which provided information about the nature and extent of the problems with the Oxxio business which informed Centrica's decisions about the options available for a sale transaction.

348. The VDD report, although prepared for a prospective purchase did, along with the Deep Dive report assist Centrica with its decision making process and I find that PwC's fees were also expenses of management.

349. PwC's final report was dated 20 January 2011, before the Centrica board decision and arguably, the whole of their fees might be regarded as deductible although COHL has only claimed a time apportioned part of them.

De Brauw

350. The services provided by De Brauw are set out above beginning at paragraph 107.

351. De Brauw were engaged to do two types of work. First, to provide Dutch legal advice on matters such as competition law, tax in relation to structuring and employment. Secondly, it was to prepare and negotiate the SPA and other documents needed to complete the transaction.

352. De Brauw were involved at an early stage and prepared a draft SPA as early as November 2009 this related to a sale of the Oxxio shares. Mr McCord indicated that it was usual to front load the legal work as it gave an advantage to the party who was able to produce the first SPA. De Brauw was also involved in collating the due diligence materials and preparing the data room.

353. This was all general preparation for a potential sale. It was needed to prepare Centrical to go ahead when an actual sale was identified and was not transaction specific.

354. The advisory work on competition law etc would have helped inform Centrica's decisions in relation to the disposal. For example, if selling to Eneco created competition law issues, they might have had to rethink how to do the sale. The preparation of the data room might not have assisted with Centrica's decision making, but it was a necessary part of the process of preparing for a sale. By definition, the costs of preparing the data room are not part of the expenses of implementing a sale because that work is preparation for the due diligence which needs to be done before the sale is agreed.

355. This type of work is analogous with the work carried out by Clifford Chance in *Camas* which was not only advice on matters such as competition law, but about the information which would have to be provided to the Office of Fair Trading and the information which would have to be included in any Circular should the offer be made. All this was found to be expenses of management.

356. Whilst the costs of general advice on legal issues might be regarded as expenses of management as it could be used by COHL in evaluating potential structures

for a transaction, it is difficult to see how the costs of preparing the data room and dealing with due diligence could be regarded as expenditure incurred in conducting the investment business. I find that these expenses are part of the general expenses of the business and not expenses of management of the investment business.

357. De Brauw were also the transaction lawyers and the second part of their role was to draft and negotiate the SPA and other documents relating to the disposal.

358. My bundles contained a number of documents from the middle of November 2010 by which De Brauw provided Centrica with advice specific to the Eneco transaction. This included the competition law assessment, but also memoranda about processes involved in the transaction as envisaged at that time. At this stage, it was proposed that there would be a demerger of Oxxio Nederland BV by a transfer of all the assets and liabilities of Oxxio Nederland BV to two Newcos and the demerger of Centrica Netherlands BV to a further two Newcos. The final demerger was slightly different in that there was only one Newco for each company. There was a memorandum on the auditor's statements which would be required under Dutch law in connection with the demerger. A further letter dealt with the licences and "EAN codes" which Newco would need to operate legally following the demerger. Another letter, which was redacted, appeared to deal with the accounting requirements applicable to Oxxio Nederland BV. On 12 November 2010, De Brauw prepared a detailed step plan of the proposed transaction starting with the pre-demerger structure and ending with the registration of the buyer as the sole shareholder of Newco I and CEN I (the demerged companies) and Oxxio Metering with all the pipes, taps and nuts and bolts of the corporate plumbing in between. The final transaction was in fact, as noted, slightly different. On 14 November 2010, De Brauw produced a discussion paper setting out an overview of the issues they had identified with this transaction structure. This considered such matters a the possibility of creditors exercising their right to oppose a demerger, the impact of works council advice, the need for merger clearance and the potential problems with the transfer of customer contracts.

359. All this is very detailed, "nitty gritty" transaction specific work. It cannot perhaps technically be described as implementation of a decision already taken as no decision had, at that point been taken to go ahead with the transaction. However, it also cannot be described as advice which enabled COHL to evaluate its investments or which informed its decisions about how to deal with its investments. As we have seen, Eneco did not make an acceptable offer until January 2011 and there were further negotiation with Eneco making a "final offer" on 19 February, but all this detailed transaction related work was going on in the background.

360. The work was not done to assist COHL to consider its investments or in connection with decisions about them or in connection with the conduct of the investment business. It was work carried out in preparation for proceeding with this specific disposal transaction even if no final decision to go ahead with it had been taken. In my view it cannot be regarded as expenses of management.

361. Mr McCord acknowledge that De Brauw did most of its work in the run up to closing because most of their advice was specific to the deal. This is reflected in

the invoices I saw. There was an invoice dated 23 February 2011 for services to 31 December 2010 for €162,578.62 and an invoice dated 3 August 2011 for services to 10 June 2011 for €813,750.00.

362. Even if some of De Brauw's fees could be considered to be deductible expenses of management, a relatively small amount of the firm's total work was carried out before 22 February 2011.

363. Most of its work was the detailed transactional work concerned with the documentation and processes involved in implementing the specific transaction with Eneco, and I infer that most of that would have been carried out after the final board decision to proceed was taken. This would be on the implementation side of the line in any event and is not deductible.

364. The division of the expenses into deductible and non-deductible costs by a time apportionment method is clearly not appropriate for this expenditure even assuming that some of it is indeed deductible.

365. Should it be required, the Appellant would need to provide a list of the actual items of expenditure which it contends are deductible, applying the above principles, and agree it with HMRC.

The contingent fee issue

366. Mr Henderson submits that the Deutsche Bank fee is in any event not an expense of management because it is in essence a "success fee" payable for achieving a completed transaction and therefore cannot be severed from the costs of the sale.

367. The fees payable to Deutsche Bank was in two parts; a fixed fee and an additional "incentivisation fee" payable at Centrica's sole discretion following consumation of a Transaction. In fact, Centrica paid €1,000,000 in this case. COHL does not seek a deduction for the incentivisation fee.

368. Mr Rivett submits that whether a particular item of expenditure constitutes a management expense depends on the precise factual circumstances and if, in substance, the fee relates to services that were used for management decisions, which he submits, they were in this case, they should be deductible.

369. One must focus on what the fees were "for". The Deutsche Bank engagement letter states:

> "Centrica shall pay Deutsche Bank for its services:
>
> (a) in the event the Oxxio Transaction is completed, a fee, payable at the time of completion, of €2,500,000; and
>
> (b) an additional incentivisation fee, payable at Centrica's sole discretion for services hereunder following consumation of a Transaction."

370. Mr Rivett points out that there was a separate fee by way of incentivisation which could be said to be a "success fee" but no claim was made in respect of that. He acknowledged the obiter statement in *Camas* where Patten J said at paragraph 43:

> "Although the advice, and therefore its cost, was a prerequisite to any acquisition, it was in fact rendered to enable Camas to reach a decision as to whether or not to make an acquisition, and was therefore necessary and payable regardless of whether the purchase took place. This is confirmed by the fact that no transaction proceeded in this case. One can contrast this with a success fee which can only become payable in the event that the acquisition proceeds to completion. Although not a matter for decision on this appeal, I accept Mr. Prosser's submission that success fees would not be expenses of management, but would fall into the category of expenses (like brokerage fees) which cannot be severed from the costs of the acquisition itself."

371. He submitted that *Camas* turned on its facts and in that case, the fees of the advisors had already been paid, so the success fee which would have been payable had the acquisition gone ahead was something in addition to the payment for the advisors' services.

372. The fixed fee in this case represented the compensation paid for the services rendered over the two year period leading to the disposal, and completion was merely the trigger for payment. The "services" to be provided and set out in the engagement letter were wide in scope consisted in various types of advice and assistance (see paragraph 64 above). The fixed fee was payment for the advice, not for achieving completion.

373. He sought, secondly, to distinguish *Camas* on the grounds that in COHL's case, the "Oxxio Transaction" was widely defined to cover a variety of possible types of transaction whereas in *Camas*, the success fee was payable only in the event of a successful acquisition of Bardon.

374. Mr Rivett's third argument was that the Deutsche Bank fees were typical of the charging structure used by investment banks for this sort of advice. It helps to align the bank's interests with that of the client. Both sides are taking a risk. If the transaction proved easy, Deutsche Bank might have been paid €2.5m for doing only a little work. If there had been no transaction, it might not have been paid at all, however much work it had done. Mr McCord said that Centrica, and presumably other companies, did sometimes pay part of the fees as a gesture of goodwill even if a transaction did not proceed.

375. Finally, Mr Rivett pointed out that there was no "wholly and exclusively" test and even if there was some element of success fee in the payment it was in substance a payment for services and so should be deductible.

376. Mr Henderson, relying on Patten J's comment set out above, which he regarded as a generally applicable comment, submitted that the contingent fee was not an expense of management because it was essentially a success fee. Deutsche Bank were being rewarded for achieving the sale of the Oxxio business. To this extent, it was inextricably linked to and unseverable from the costs of disposal of the Oxxio business.

377. Even though there was also the separate "incentivisation fee", the fixed fee could still aptly be described as a success fee. Mr Henderson did not consider Mr Rivett's second point to be based on a difference of principle but was simply a reflection of the different facts in each case.

378. Although Centrica might have paid some money to Deutsche Bank had the deal failed, Mr Henderson observed that the deal did go through and the fee was paid and, as a success fee, is not deductible.

379. Both the fixed fee and the additional incentivisation fee are what "Centrica shall pay Deutsche Bank for its services" according to the engagement letter. On the face of it, both types of payment would be for services. The fixed fee is payable "in the event the Oxxio Transaction is completed". The "Oxxio Transaction" is a defined term and means broadly, some sort of disposal of the Oxxio customer supply business. The incentivisation fee is an additional fee payable following consummation of a "Transaction". "Transaction" is also a defined term and relates to any of the Oxxio Transaction, a transaction in respect of the Rijnmond Tolling business or a transaction relating to certain Dutch gas pipelines. So Deutsche Bank might (or might not) have been paid the incentivisation fee if it had succeeded in putting together a deal for Rijnmond but not Oxxio and would not, in this event, have been paid the fixed fee.

380. *Camas* was the only authority I was taken to which referred to a success fee and it was an *obiter* comment. The first question is what did the Court mean by a "success fee"? In saying that although it was not a matter he needed to decide, he accepted Mr Prosser's submission that success fees would not be expenses of management, Patten J must have been referring to the circumstances of the case before him. He would not otherwise have needed to make the comment at all.

381. The only other reference to success fees in *Camas* that I could see was the remark at paragraph 38 of the Special Commissioners' decision. They had set out the amounts paid to the various advisors and summarised what the costs had related to. They then added:

> "If a successful bid had gone ahead there would have been "a success fee" element which would have significantly increased the costs".

382. That is all. It is not stated what the success fee would have been or how it would have been computed, although I infer that it would have been a large amount of money if it would have "significantly increased" the costs which totalled over £580,000. It is not even clear who would have received the success fee but presumably it was Schroders, whose fees amounted to £185,000.

383. What is clear, and in my view, significant, is that the success fee was an additional amount over and above the cost of the work done which was paid for separately and formed part of *Camas*' claim for deduction which was ultimately successful.

384. In the present case, Deutsche Bank received no separate fee for its two years of work. The €2,500,000 *was* its fee for the work it had done in providing the advisory services set out in its engagement letter.

385. It was, however, payable contingent on completion. The question is whether that changes the nature of the payment and makes it an unseverable part of the cost of sale, such that it cannot qualify as an expense of management.

386. Returning to Patten J's judgement in Camas, at paragraph 37 he quotes May LJ in the *Hoechst* case:

> "May L.J. agreed with Dillon L.J. and added this ((1983) 56 TC 594 at p 615):
> "In my opinion, the result of that case is that in this type of situation one has to ask whether the relevant payment can be regarded as properly severable from the costs of acquisition of an investment or the issue of loan stock, on the one hand, or a direct and necessary part of the cost of a normal method of purchase or issue, on the other. If, posing that question, the answer is that it is the latter, then the payment is not an expense of management."
> As in the *Sun Life* [1958] AC 184 case, everything points to the cost of the guarantee being part of the cost of obtaining the finance.
> 38. In the present case, however, Camas submits that none of the costs of obtaining professional advice was an incidental cost of the purchase itself."

387. This indicates that an expense is not "severable" where it is an inherent incident of the purchase (or in COHL's case, sale). The cost is not severable where it is a "direct and necessary" part of the cost of a "normal method of purchase" or issue.

388. This is also reflected in Carnwath LJ's summary of the words which, to him, encapsulated the effect of the various decisions at paragraph 20 of the Court of Appeal decision in *Camas*:

> "20. In the extracts cited above, I have emphasised the words which seem to me best to encapsulate the effect of the various judgments. All stress the closeness of the link between the expenditure in that case and the process of acquisition:
> "part of the expenses of purchase";
> "an integral part of the cost of acquisition";
> "items in the total cost of a purchase which has already been resolved upon";
> "a direct and necessary part of the cost of a normal method of purchase''."

389. These comments suggest that an item of expenditure will be non-deductible where there is a close link between it and the process of purchase or sale. It is not enough that it is payable on the sale or even only payable if a sale takes place, it has to be a cost which is inherent in a purchase or sale or issue of the kind in question.

390. I can see the argument that a success fee of the type in *Camas* could be regarded as falling within the descriptions in paragraph 388 above, although it is still difficult to say it is a "direct and necessary part of the cost of a normal method of sale". It is, however, a stand alone payment, independent of any work done and paid purely as a reward for the completion of the transaction itself, and so might be said to be part of the cost of the sale.

391. Deutsche Bank's fixed fee was payable for the work done, even though it was contingent on an Oxxio Transaction taking place. That it was for the work and not for achieving completion is suggested by the fact that Centrica would sometimes pay some of the fees or promise the next deal to an investment bank even if a transaction fell through. This type of fee is not something necessitated by a sale or an inherent part of the process of sale in the same way that stamp duty and brokerage fees are necessitated by a purchase of shares. And Lord Reid in *Sun Life* did not even exclude brokerage fees. The parties could have agreed that Deutsche Bank was to be paid for its services on an hourly basis, or by way of a fixed fee payable come what may, but they did not. In accordance with the normal practice in the sector, the fee was contingent.

392. I conclude that Deutsche Bank's fees were not excluded from being expenses of management because they were contingent on completion of the Oxxio disposal.

The Capital expenditure issue

393. Section 1219(3) provides “no deduction is allowed under this section for expenses of a capital nature”. The prohibition on the deduction of capital expenses was introduced in Finance Act 2004 with effect for chargeable periods beginning after 31 March 2004. *Camas* had considered whether the predecessor provisions were to be interpreted as excluding capital expenditure but decided there was no inherent bar on the deduction of capital expenditure. It was not therefore necessary to determine whether the costs in question were capital costs.

394. Mr Henderson submitted that the well known cases on the distinction between capital and income expenditure were the starting point for considering this issue. He also took me to an extract from Bramwell on the Taxation of Companies and Company Reconstructions at paragraph A.8.2.3. He acknowledged this was not in any way binding but thought it a helpful commentary and gave an interesting take on how the capital exclusion might work.

395. Bramwell has this to say about expenses of a capital nature:

> “The disallowance of capital expenditure requires a purposive construction if it is not to preclude all expenditure from qualifying. That is to say “capital expenditure” could be said to encompass all the expenditure of an investment business given that all the assets are held on capital account. However, the contrast intended to be drawn appears to be between routine care and maintenance (allowable) and expenditure on actual or intended acquisitions (not allowable). The difficulty is where to draw the line, as where an investment company is considering expansion by acquisition but has not decided on any particular target. HMRC guidance on the point [CTM08250] states:
>
> > “No relief is given for expenditure of a capital nature… .Before the disallowance of capital expenditure it had been held in *Camas plc v Atkinson* that the costs of appraising a take over target were expenses of management. It has long been established that the incidental costs of an investment (brokerage and stamp duty) are not in any case expenses of management.
> >
> > The fact that the investments of a company with investment business are likely to be held on capital account does not create a presumption that the expenses of managing those investments are themselves capital. Ordinary recurring expenditure which otherwise satisfies the tests in Section 1219 is very unlikely to be of a capital nature. For example, we would generally expect regular, ongoing costs of employment of staff in a department managing a company’s investment business to be non-capital.””

396. This commentary appears to rely on HMRC’s own view of the matter.

397. The cases on the capital/income distinction referred to by Mr Henderson all related to trading companies and, as he acknowledged, were all very fact specific, but he relies on them for the general principles.

398. The House of Lords case of *Atherton v British Insulated and Helsby Cables Ltd* 10 TC 155 involved a payment made by a company to establish a pension scheme for its employees.The distinction between capital and income expenditure was set out in the well known passage from Viscount Cave’s judgement:

> “…when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I

think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

399. In *Mallet v Staveley Coal and Iron Co Ltd* 13 TC 772 a colliery company sought to deduct from profits a payment it made in order to surrender an unprofitable mining lease. Rowlatt J was quite clear that even though nothing was acquired for the expenditure, a payment to rid the company of an onerous capital asset was capital. He said, at page 777:

> "It is abundantly clear that when a colliery company acquires a lease the expense of acquiring the lease is the expense of acquiring a capital asset and is a capital expenditure, and it has frequently been remarked that it is very hard that there is no provision for allowing the company a sinking fund or anything of that sort to replace that capital expenditure. But there it is; it is a capital expenditure. If they sell the lease that they have acquired, or part of it, at an advantage, I cannot but think that that is a receipt on account of capital, and here what they have done is to get rid of some areas which they thought would be unremunerative; they thought it well to pay for it. In my judgment all receipts and payments in connection with acquiring and disposing of leaseholds of minerals to be worked by collieries in this way are capital transactions for this purpose. I cannot see any other way of looking at it."

400. Mr Henderson submits that in COHL's case, the disputed expenditure was not recurrent expenditure to meet a continuous demand of management of COHL's investment business but something that was incurred once and for all in order to dispose of an onerous asset-the Oxxio business. It was incurred to effect a capital disposal and should therefore be on capital account.

401. A further important principle is that one needs to look at the *effect* of expenditure and not the *purpose* or motive of the payer. Mr Henderson cited two cases in support of this.The first was *Strick v Regent Oil Co Ltd* [1965] 43 TC which involved the payment of a premium on a lease taken by the oil company of a petrol station, followed by a lease back on terms which required the retailer to sell only the company's petrol. Lord Wilberforce, approving a statement by Dixon J in *Hallstrom's Pty. Ltd. v Federal Commissioner of Taxation* 72 C.L.R. 634, at page 648 said:

> "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process."

402. A similar point is made in *Tucker v Granada Motorway Services Ltd* 53 TC 92. This case concerned a payment by Granada to the the Ministry of Transport as landlord to amend an onerous provision in a lease of a motorway service area. It was held that this was a once and for all payment to make a capital asset more advantageous and was capital. In the House of Lords, Lord Edmund-Davies said, at page 113:

> "…Sir David Cairns considered that they actually confined themselves to that test ([1979] 1 WLR, at page 93E [1]), while Stamp L.J. [1] concluded that: [1] Page 105 ante.
> "… so far as the Special Commissioners … decided the case on the ground that the payment was in their view not made with a view to bringing into existence some assets or advantage for the enduring benefit of the trade, they misdirected themselves. The question that ought to have been asked was whether the payment did bring some

asset or advantage into existence, was it an enduring asset and advantage, enduring in the same way that fixed capital endures."

If I may respectfully say so, these words commended themselves to me and they conform to the warning given by Lord Radcliffe in Nchanga (ante, at page 95-8) about "the undesirability of determining the nature of a payment by the motive or object of the payer …" To apply that as the sole or principal test is unsatisfactory, for, as the Crown have rightly submitted, the purpose of any payment will generally be to improve a company's trading profits, even if the purchase is of an obvious capital asset. This could lead to the conclusion (contrary to many long-standing decisions in this field) that the purchase of any asset must be regarded as involving revenue expenditure if it be made in order to reduce recurrent expenditure charged against profits."

403. Lord Wilberforce, in the same case added at page 107:

> "I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure."

404. Taking the principles from these cases, Mr Henderson submits that the disputed expenditure was incurred once and for all to bring about a capital disposal-the sale of the Oxxio business. On the basis of its effect, the expenditure was of a capital nature.

405. An alternative way of putting this proposition, which echoes the expenses of management cases, is to say that expenditure incidental to a capital transaction is itself capital. Mr Henderson cited *Texas Land and Mortgage Company v Holtham* 3 TC 255 in support. A mortgage company raised money by issuing debentures and sought to deduct the fees and commissions paid to agents and brokers and stamps on the debentures and postage from profits. It was held these were not deductible as they were costs of raising capital. This is the trading equivalent of *Hoescht*. Similarly, in *Pendleton v Mitchells & Butlers Ltd* 45 TC 341 it was held that the legal costs on transferring liquor licences (capital items) were not deductible as a revenue expense.

406. Mr Henderson's final proposition is that the fact that the transaction is abortive does not alter the nature of the expenditure. He cited *ECC Quarries Ltd v Watkis* [1975] STC 578 where the costs of applying for a planning permission which was ultimately refused was held to be capital. This was once and for all expenditure to obtain a permanent alteration to the land which was advantageous to the company's trade.

407. In summary, Mr Henderson relies on these cases as establishing that incidental expenditure on a capital transaction is itself capital in nature whether the transaction goes ahead or not. He then submits that the disputed expenditure is expenditure incidental to the capital transaction which is the disposal of the Oxxio business. It is a similar question to whether expenses are expenses of management or costs of acquisition/disposal, although different principles apply.

408. Mr Rivett began by emphasising that the bar on capital expenditure only applies where the costs in question qualify as expenses of management in the first place.

He suggested that this would be a narrow category of expenses and cited the Court of Appeal in *Camas* at paragraph 42:

> "42. In the House of Lords, [in *Sun Life*] the Revenue in argument appears to have accepted the view of Macnaghten J. The submissions of the Attorney-General, as recorded, included the following:
> "If it were possible to have a capital expense of management (which is doubtful), there would be nothing in section 33 to exclude it…"

409. This comment was, however, made in the context of a discussion about whether the pre-2004 version of section 75 inherently barred capital expenditure.

410. Mr Rivett submitted that if HMRC are right in their contention that these expenses are excluded by section 1219(3) it would strip the relief of its value as there would be few circumstances where an investment company would be able to claim relief for its expenditure, and the services paid for by COHL are exactly the services that an investment business of this type needs to manage its investment business.

411. He put forward a number of factors which, he submitted, point to the fact the expenditure was not capital in nature. First, as mentioned, the expenses must be incurred in managing the business to get within section 1219 and such expenses are likely to be revenue in nature. Second, the expenditure must be considered in the wider context of COHL's investment business. COHL had and has a large number of investments of which Oxxio is only one. This was not a "one off" transaction but part of COHL's overall management of its investments. In any event, COHL did not even sell the shares but generated within Oxxio (an investment) sufficient cash to repay the loan that was another of its investments. Thirdly, the nature of the services provided were not transaction costs comparable with brokers' fees which cannot be dissociated from the disposal itself. Fourthly, the transaction did not effect any fundamental change in the activities of COHL. Fifthly, the nature of the transactions carried out by Oxxio does not affect the nature of COHL's expenditure.

412. Mr Rivett considered that section 1219(3) would apply only to a narrow range of expenses giving as examples the transaction costs considered in *Sun Life*, the cost of new premises to house the investment company's investment managers or the acquisition of the investment team from another institution.

413. Mr Rivett accepts the principles established by the various income v capital cases noted above but disputes their applicability in the context of management expenses which are capital.

414. The expenses in the present case were payments for services, which are generally not intrinsically of a capital nature.

415. Mr Rivett contends that the *effect* of COHL's expenditure was not to dispose of its shareholding in Oxxio, but to facilitate the repayment of its loans by Oxxio.

416. Nor did COHL's business change in any fundamental was as a result of the transaction.

417. Mr Rivett further contended that the sort of expenses dealt with in the *Texas Land* and *Pendleton* cases were the sort of things which, applying *Sun Life,* would not be regarded as expenses of management in the first place.

418. In summary, Mr Rivett submits that COHL did not sell assets; it bought services, which went to management by definition and the transactions did not materially alter the nature of COHL's business. The history of section 1219 and its predecessors indicates that at least in part, the intention was to align the treatment of investment companies with that of trading companies by taxing them on their economic profits. If COHL does not obtain relief, it will be taxed on more than its economic profits.

419. The relief for the expenses of management of an investment company was introduced in the Income Tax Act 1918. From 1918 to 2004 there was no express bar on the deduction of expenses of management of a capital nature. Such a bar was introduced by Finance Act 2004 and must have been intended to have some effect. For this purpose, capital expenses must go beyond the sort of intrinsic costs of an acquisition or disposal which are part of the capital cost of purchasing an asset or a deduction from the proceeds of selling an asset which have been identified in *Sun Life* and subsequent cases as not being expenses of management in any event. As Mr Rivett says, if the expenditure is not an expense of management it is not within section 1219 at all and so sub-section (3) cannot operate.

420. As Mr Rivett also argues, the bar cannot apply, as it might be suggested it did, to *all* expenses connected with an investment company's investments (which are its capital assets) or the relief would have little or no benefit. Mr Henderson did not, of course, go this far. The question is where to draw the line and HMRC seek to draw it at the point where a company decides to sell the asset which, in this case, it is argued, is when Centrica declared its strategic decision to divest the Oxxio business. I have found that that was much too early a point in considering whether the disputed expenditure was an expense of management or expense of implementation.

421. As the cases make clear, one has to consider all the facts of the particular matter under consideration and I do not find cases such as *British Insulated and Helsby Cables* and *Staveley Coal and Iron Co* particularly helpful in the current context. The principles that once and for all expenditure to create an asset of enduring benefit to a trade or to free a trade from an onerous asset is capital expenditure are not readily applicable to an investment company. British Insulated and Helsby Cables Ltd was not in the business of setting up pension schemes. To do so was a one off action of a capital nature. Staveley Coal and Iron Co was not a property company. The acquisition of a lease on which to carry on its business was clearly a capital purchase and the court found that a payment to get rid of an onerous lease was equally on capital account. The business of an investment company is to manage investments which are capital assets. Taking the principles to the extreme, all an investment company's expenditure must be incidental to capital transactions and so of a capital nature itself. HMRC have conceded that not all expenditure on an investment company's investments is capital expenditure. That must be right, but an application of the trading company cases would suggest they were.

422. The management of investments involves buying and selling investments, possibly doing things to maintain and support their value and, importantly, considering how to maximise the value of the company's funds, which might involve acquiring new assets or disposing of other assets. An investment company might dispose of an asset to crystallise a profit or to limit the loss on an underperforming investment. It will require advice to assist in the management and that may be provided by an internal team of analysts and managers or an external institution. The position is perhaps clearer in the case of a "normal" investment company building value by managing portfolio investments. The costs of the advice needed to run its business and maximise the value of its assets would be revenue expenditure, whether the advice is provided by an investment institution or the company's in house team. The extract from HMRC's manual quoted in *Bramwell* confirms this is HMRC's view:

> "For example, we would generally expect regular, ongoing costs of employment of staff in a department managing a company's investment business to be non-capital."

423. Mr McCord's evidence indicated that much of the sort of advisory work which is in issue in the present case could be, and often was, provided by the group functions and that Centrica would buy in assistance of advisors like Deutsche Bank for various reasons, but including their ability to do the "heavy lifting" where there was insufficient in house capacity. There is no suggestion that the costs of the in-house teams involved in the Oxxio transaction should be disallowed.

424. I have already commented that investment management, especially in the context of a holding company of a trading group, involves not just a consideration of whether to sell or buy an asset but how to sell or buy, or more pertinently, how to realise the maximum value from an investment which, as in this case, might not involve selling the investment at all.

425. Considering the *Regent Oil* type of cases, the *effect* of the advice which Centrica obtained was not to bring about a disposal of the Oxxio businesses, but to inform the management decisions about how best to do so. Lord Wilberforce commented at page 54 of *Regent Oil*:

> "In the course of the numerous decisions which have distinguished between capital and revenue expenditure in relation to widely different trades and varying circumstances, certain "tests" have emerged. These may be useful, so long as it is recognised that they have emerged a posteriori from the facts of a given situation and that they may not always be suitable as guiding lines in other situations. I begin by asking two questions, which may be said to be generally relevant: What is the nature of the payment, and for what was the payment made? These. together with a third question, namely, how that for which the payment was made was to be used, were stated by Dixon J. in his classic judgment in Sun Newspapers Ltd. v Federal Commissioner of Taxation 61 C.L.R. 337."

426. In the case of Deutsche Bank and PwC at least, the payments were made for services, that is, advice and the advice was to be used to enable COHL to make decisions about its investment in Oxxio. In the case of Deutsche Bank, that was strategic advice on the options for disposing of this difficult asset and assistance in finding a purchaser who would be prepared to make an adequate offer for at least some aspects of the Oxxio business. In my view, the costs of such advice

and assistance were part of the ongoing management expenses of COHL as it enabled the company to make decisions about how it might realise value from its investments in Oxxio.

427. The PwC VDD report and, in particular, the Deep Dive was advice which gave the management of COHL an insight into the nature and extent of the problems in the Oxxio business and informed the decisions about how to deal with its investment.

428. The Deutsche Bank and PwC advice was used by COHL in conducting its investment business and was, in my view, of a revenue nature.

429. The De Brauw advice and other work was different in nature in that it was directed, not to enabling the company to conduct its business of managing investments, but to preparing to carry out a transaction, once the nature of the transaction had been determined, and once a decision had been made, carrying out the transaction.

430. The line between income and capital management expenses is to be drawn between expenses which are incurred in connection with an investment company's consideration of and decisions about managing its investments, and expenses incurred in connection with an actual or potential capital transaction. I acknowledge that the line may not always be easy to draw.

431. In the present case, the disposal of the Oxxio business was a capital transaction. It does not matter that COHL did not sell anything. It had made loans, which were capital transactions, and the repayment of those loans, which was how it realised value from Oxxio, were capital transactions. Expenditure which was "incidental to" the transaction, in a wider sense than the "inseverable" costs of purchase in *Sun Life*, would accordingly also be capital in nature.

432. The investment decisions which an investment company like COHL has to make are not just whether to sell an investment. It also needs to decide who to sell it to and how to sell it. If it cannot be sold outright it needs to decide how otherwise value can be realised, and how much value it needs to obtain or whether the asset should be retained after all and improved or wound down. All these decisions are management decisions and the cost of advice and assistance in connection with them will be expenses of management of the investment business.

433. However, if there comes a point at which those questions have been answered, at least in principle, so that there is a potential transaction, with a credible offeror, having made an acceptable offer to do an acceptable kind of deal, the subsequent expenditure on bringing that potential deal (being a capital transaction) to fruition is more closely connected with the capital transaction than with the decision making process and will itself be capital in nature. Clearly, many further decisions will be needed as a result of the ongoing negotiations. The price may be refined. The precise nature of the transaction may change. How exactly should the asset sale be effected, should there be one demerged company or two and so on? Many of these may be management decisions, but the expenditure in relation to them will be capital in nature.

434. In the present case, Eneco was for a significant period the most likely purchaser. At the point where COHL decided to pursue Eneco's offer to buy the customer

supply business and certain assets of Oxxio by way of a partial demerger, there was a transaction in view and the expenditure after that point became incidental to the transaction and, accordingly, capital expenditure. The cost of the work carried out by the advisors before that point would be revenue expenses of management and deductible. Although Eneco made a "disappointing" initial bid in September 2010 it was not clear that Eneco was committed to the transaction at that point and in November 2010, Centrica was considering DONG/NEM as an alternative purchaser and the possibility of an auction process. They were trying to put pressure on Eneco to make an offer. It seems to me that the "cut off point" was when Eneco make the initial offer in January 2011 and COHL decided that it was an acceptable offer. The costs of Deutsche Bank and PwC up to this point were revenue expenses of management and deductible under section 1219.

435. the *EEC Quarries* case tells us, the nature of the expenditure does not change if the transaction is abortive. On this basis, any capital expenditure would remain capital expenditure if the Eneco deal had failed. If COHL had had to seek a new purchaser to do a new deal, it may be that the costs of the further advice would be revenue in nature.

436. The work done by De Brauw is in a different category. Their work was all, or mostly, to do with a potential, or the actual, transaction. I did not see any evidence that they had provided general advice to inform the decision making process. Their engagement letter did provide that they were to provide employment law, competition law and tax law advice, but it was not clear to what extent, if at all, they provided generic advice to help with the decision making process. For example, had they provided competition law advice at an early stage which enabled COHL to rule out certain potential purchasers, that might be regarded as a management expense of a revenue nature. The advice letters on competition law and other matters which were included in the bundle were specific to a proposed Eneco transaction even though the transaction which ultimately took place had not at that point been finalised.

437. It is difficult to see that the De Brauw fees were revenue expenses of management for work done in assisting COHL in considering how to deal with its Oxxio investment, in the same way that the fees of Deutsche Bank and PwC were, at least up to the point where an "in principle" transaction was being pursued. Except to the extent it may have provided generic legal advice, the *effect* of De Brauw's work was to bring about a disposal of the Oxxio business. Accordingly, I find that, De Brauw's fees were capital expenses, even to the extent they could be considered expenses of management. Accordingly, they are not deductible under section 1219.

Decision

438. I have decided that the disputed expenditure was not expenses of management of COHL's investment business because COHL itself failed to take any relevant management decisions. If that is wrong, I have also decided that most of Deutsche Bank's and PwC's, and possibly some of De Brauw's costs were expenses of management rather than expenses of implementation in the *Sun Life* sense, including the relevant part of Deutsche Bank's fixed contingent fee. Further, I have decided that some of Deutsche Bank's and PwC's fees were capital expenses

of management and that De Brauw's fees were capital in nature so that they are not deductible.

439. For the reasons set out above I have decided that the disputed expenditure was not deductible under section 1219.

440. Accordingly, I dismiss the appeal.

441. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 23 APRIL 2020