TAX APPEALS COMMISSION

89TACD2023

Between/

AND

AND

Appellants

-v-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. These appeals are brought against amended assessments raised against , and for the accounting periods of to 28 September 29 September to 28 September and 29 September to 28 September The total amount of the assessments under appeal is €187,522,696.

2. During the times relevant to this appeal, (which was at the times relevant to these appeals) was the -listed parent of the . It was Irish-incorporated and Irish-resident. and are subsidiaries of and are parties

to this appeal because they received surrenders of losses under the group relief provisions from [redacted]. It is common case between the parties that if [redacted] suffered the losses in question, then the other Appellants are entitled to benefit from the surrender of those losses under the group relief provisions. Accordingly, this Determination is primarily concerned with [redacted]'s entitlement to the losses claimed, and the Determination will hereafter refer to [redacted] as **"the Appellant"**.

B. Summary of Issues

3. There are two main issues in dispute between the parties, namely the **Recharge Payments** issue and the **Expenses of Management** issue.

4. In relation to the Recharge Payments Issue, during the relevant accounting periods, the Appellant had only one subsidiary, namely [redacted] (hereinafter "[redacted]"). [redacted] in turn had subsidiaries and those subsidiaries had further subsidiaries. The Appellant received payments pursuant to recharge agreements in connection with a share option plan provided to the employees of [redacted]'s subsidiaries and sub-subsidiaries. The Appellant submits that these payments are capital payments for the issue of shares. The Respondent contends that these payments give rise to a charge to Corporation Tax as income assessable under Case III or, alternatively, Case IV of Schedule D.

5. In relation to the Expenses of Management Issue, the Respondent contends that certain expenses were not "*expenses of management*" for the purposes of section 83 of the Taxes Consolidation Act 1997, as amended (hereinafter **"TCA 1997"**). The expenses in dispute fall into four categories, namely **(i)** Directors and Officers Policies, Fiduciary Liability and Excess Liability insurance premia, **(ii)** Expenses of monitoring and implementing a Tax Sharing Agreement, **(iii)** '[redacted]' expenses, and **(iv)** '[redacted]' expenses. These expenses, which were disallowed by the Respondent, are, the Appellant submits, properly considered expenses of management and ought to be allowed in full. The Appellant further contends that the amount allowed as expenses of management in respect of [redacted]

[redacted] should be increased beyond the amount claimed by the Appellant in its returns, and that this Commission has the jurisdiction to do so.

C. Grounds of Appeal

6. While separate Notices of Appeal were submitted on behalf of all three Appellants for the three accounting periods under appeal, the primary grounds of appeal are as set out in the Notice of Appeal submitted on behalf of the Appellant for the period from 29 September [redacted] to 28 September 2014, which stated that the Appellant was appealing on the following grounds:-

> 1. *The tax assessed is excess of the amounts actually due, if any.*
>
> *Share Premium*
>
> *Insofar as the Respondent has assessed the Appellant to Corporation Tax on certain 'recharge payments' arising from the issue of share capital in the Appellant to employees of its subsidiaries (the "Payments"), said assessment is incorrect and/or invalid, inter alia, for the following reasons:*
>
> 2. *The Payments are 'share premium' and not a taxable receipt.*
>
> 3. *The Payments are, in law and in character, capital in nature and not income in nature and so no Corporation Tax on income arises. Moreover, as there is no disposal, no Corporation Tax on gains arises. Accordingly, the Payments are not subject to Corporation Tax.*
>
> 4. *In the alternative, if the Payments are not considered to be payment for the issue of shares (which is denied) they are compensation for loss (i.e. the receipt of less than*

market value for the issue of shares by the Appellant), such compensation arises in respect of the loss incurred on the issue of shares which is itself capital in nature and, consequently, any Payment in respect of such loss is, similarly, capital in nature.

5. *The Appellant further submits that subjecting the amounts in question to tax (other than pursuant to Part 8 of the Stamp Duties Consolidation Act 1999) would be contrary to the Capital Duties Directive as it would be an illegal indirect tax on the raising of capital. The Capital Duties Directive prohibits EU Member States from subjecting capital companies to any form of indirect tax whatsoever on the issue of shares.*

6. *The Respondent has asserted that "there is some doubt regarding the nature of the recharge payments" in letters dated 20 August 2018 and 25 July 2018 and in previous correspondence and accordingly by way of its letter dated 14 June 2019 purports to assess "two alternative charges to tax" in respect of the Payments. It is not open to the Respondent to assess to tax on alternative basis and in this respect, the assessment(s) is/are invalid.*

7. *If it is open to the Respondent to assess the Appellant to tax on two alternative basis, it is not open to the Tax Appeals Commission to uphold both assessments; the TAC must determine which of the two bases of assessment is correct and strike out the other.*

8. *If, notwithstanding the arguments set out above, the Payments are subject to Corporation Tax (which is denied), then the correct charge to tax arises under Case III in respect of dividends/distributions received from non-Irish resident employer subsidiaries and the Appellant has sufficient foreign tax credit or exemptions such that no Corporation Tax arises or the tax assessed is in excess of the amounts actually due, if any.*

9. *The position adopted by the Respondent in issuing the said assessment contradicts its policy and treatment of other taxpayers in respect of the same material issues as arise in this appeal. In the alternative, if the Respondent had adopted a policy consistent with the position adopted in its assessment, same was not conveyed to the Appellant nor to any taxpayer at the material times relevant to this appeal or at all.*

10. *The position adopted by the Respondent in correspondence is refuted by the Appellant. The parties have engaged in and remain in communication with the aim of clarifying the areas of disagreement between the parties. Pending the conclusion of that process the Appellant reserves its right to supplement, substitute or amend the grounds set out herein.*

Expenses of Management

11. *The claimed expenses are valid expenses of management within section 83 TCA ("Expenses of Management").*

12. *Without prejudice to the generality of the immediately foregoing, the basis upon which the Respondent has denied a portion of the expenses of management deduction in respect of D&O, Fiduciary Duty and EPLI insurance premiums on the basis of its calculation of the quantum of the portion denied does not reflect any commercial reality and is unknown in law. Further, the approach is arbitrary and inconsistent with the nature of the policy and the terms upon which the policies were issued (including the basis of the consideration paid). Further to the above, if and to the extent that subsidiary companies are covered by the terms of a particular D&O policy, it is submitted that the overwhelming majority of the cost of that policy is irreparable to the risk of litigation as against the directors and officers of the Appellant and the incremental cost of insuring the directors and officers of subsidiaries is negligible or, at the very least, is greatly overestimated by the impugned assessments.*

13. *The Respondent's understanding of the Tax Sharing Agreement with is not accurate and its understanding of the intentions of the in incurring costs in connection with that Agreement is wrong. The Appellant was managing the liabilities and payment flows of its subsidiaries.*

14. *It is understood that the Respondent has denied deduction of expenses of management incurred in connection with what is referred to as the " " on the basis that it was not satisfied with the level of documentation provided to support the deduction. Indeed, the Respondent has allowed $2,571,000 as deductible expenses of management in relation to the but has disallowed $6,522,331.*

15. *The related to a restructuring of how the Appellant held its business. The costs arising from the transaction did not relate to any particular investment of the Appellant but related to the business as a whole and as such came fully within the meaning of expenses of management. Indeed, Revenue having allowed the deduction of $2,571,000 has acknowledged the principle that the expenses are expenses of management.*

16. *The Respondent has in validly restricted or has incorrectly calculated the amount of excess Expenses of Management available to the Appellant to surrender to associated companies under section 420(3) TCA.*

D. Core Documents relating to the Recharge Payments Issue

7. It was common case between the parties that two types of share awards were at issue in these appeals, namely Share Options and Restricted Stock Units. The grant of an employee share option confer the right on an employee to acquire an agreed number of shares in the Appellant after the passing of an agreed period of time (the vesting period). In a Restricted

Stock Unit scheme, employees were issued with the right to shares to be delivered on the expiry of the vesting period no payments were made by employees for Restricted Stock Units or for shares delivered pursuant thereto on the expiry of the vesting period.

8. The Appellant's Stock and Incentive Plan, as amended and restated on [redacted], was opened to me in the course of the hearing. Article 1.1 recorded that:-

   "The purposes of this [redacted] Stock and Incentive Plan as amended and restated (the "Plan") are to promote the interests of [redacted] (and any successor thereto) by (i) aiding in the recruitment and retention of Directors and Employees, (ii) providing incentives to Directors and Employees by means of performance-related incentives to achieve short-term and long-term performance goals, (iii) providing Directors and Employees with an opportunity to participate in the growth and financial success of the Company, and (iv) promoting the growth and success of the Company's business by aligning the financial interests of Directors and Employees with that of the other shareholders of the Company. Towards these objectives, the Plan provides for the grant of Stock Options, Stock Appreciation Rights, Annual Performance Bonuses, Long-Term Performance Awards and Other Stock-Based Awards."

9. Among the definitions contained in Article 2 of the Plan were the following:-

   "Award Certificate" means the document issued, either in writing or an electronic medium, by the Committee or its designee to a Participant evidencing the grant of an Award and which contains, in the same or accompanying document, the terms and conditions applicable to such award.

   "Committee" means the Compensation and Human Resources Committee of the Board or any successor committee or other committee to which the Compensation and Human Resources Committee delegates its authority under this Plan.

   "Company" means [redacted], a company incorporated in Ireland under registered number [redacted], or any successor thereto.

"Employee" means any individual who performs services as an officer or employee of the Company or a Subsidiary.

"Exercise Price" means the price of a Share, as fixed by the Committee, which may be purchased under a Stock Option or with respect to which the amount of any payment pursuant to a Stock Appreciation Right is determined.

"Fair Market Value" of a Share means the closing sales price on the [redacted] [redacted] of a Share on the trading day of the grant or on the date as of which the determination of Fair Market Value is being made or, if no sale is reported for such day, on the next preceding day on which a sale of Shares is reported. Notwithstanding anything to the contrary herein, the Fair Market Value of a Share will in no event to be determined to be less than par value.

"Participant" means a Director, Employee or Acquired Grantee has been granted an Award under the Plan.

"Subsidiary" means (i) a subsidiary company (wherever incorporated) of the Company, as defined by Section 155 of the Companies Act 1963 of Ireland; (ii) any separately organised business unit, whether or not incorporated, of the Company…

10. Article 3.1 provided that the Plan was to be administered by the Committee except as otherwise provided in the Plan, and Article 3.2 provided that:-

"The Committee or, to the extent required by applicable law, the Board will have the authority, in its sole and absolute discretion and subject to the terms of the Plan, to:

…

(c) Select Employees to receive Awards under the Plan;

(d) Determine the form of an Award, the number of Shares subject to each Award, all the terms and conditions of an Award, including, without limitation, the conditions on exercise or vesting, the designation of Stock Options as Incentive Stock Options or Non-

qualified Stock Options, and the circumstances under which an Award may be settled in cash or Shares or may be cancelled, forfeited or suspended, and the terms of each Award Certificate…

11. Article 4.1 provided that all Participants and Employees were eligible to be designated to receive Awards granted under the Plan, except as otherwise provided in the Article, and Article 4.2 provided that Awards would be in the form determined by the Committee, in its discretion, and would be evidenced by an Award Certificate.

12. Article 4.3 then went on to provide that:-

"The Committee may grant Stock Options and Stock Appreciation Rights under the Plan to those Employees whom the Committee may from time to time select, and the amounts and pursuant to the other terms and conditions that the committee, in its discretion, may determine and set forth in the Award Certificate, subject to the provisions below:

…

(b) Exercise Price. The Committee will set the Exercise Price of Stock Options (other than Premium-Priced Stock Options or certain Incentive Stock Options as described below) or Stock Appreciation Rights granted under the Plan at a price that is equal to the Fair Market Value of a Share on the date of grant, subject to adjustment as provided in Section 5.3…

…

(c) Term and Timing of Exercise. Each Stock Option or Stock Appreciation Right granted under the Plan will be exercisable in whole or in part, subject to the following conditions, unless determined otherwise by the Committee:

(i) The term of each Stock Option shall be determined by the Committee and set forth in the applicable Award Certificate, but in no event shall the term of a Stock Option exceed ten (10) years from the date of its grant.

(ii) A Stock Option or Stock Appreciation Right would become exercisable at such times and in such manner as determined by the Committee and set forth in the applicable Award Certificate…

(d) Payment of Exercise Price. The Exercise Price of a Stock Option must be paid in full when the Stock Option is exercised. Shares will be issued and delivered only upon receipt of payment…

13. Article 4.6 provided for other Stock-Based Awards and subparagraph (c) provided as follows:-

"The Committee may grant Restricted Units to any Employee, which Units will be paid in cash or hold Shares or a combination of cash and Shares, in the discretion of the Committee, when the restrictions on the Units lapse and any other conditions set forth in the Award Certificate have been satisfied. For each Restricted Unit that vests, one Share will be paid an amount in cash equal to the Fair Market Value of a Share as of the date on which the Restricted Unit vests."

14. Article 5.1 governed the shares subject to the Plan and provided in subparagraph (a) that:-

"The Shares issue below under the Plan will be authorised but unissued Shares, and, to the extent permissible under applicable law, Shares acquired by the Company, any Subsidiary or any other person or entity designated by the Company and held as treasury shares."

15. Article 7.8 of the Plan dealt with the nature of payments and provided that:-

"All Awards made pursuant to the Plan are in consideration of services for the Company or a Subsidiary. Any gain realised pursuant to Awards under the Plan constitutes a special incentive payment to the Participant and will not be taken into account as compensation for purposes of any other employee benefit plan of the Company or a Subsidiary, except as the Committee otherwise provides. The adoption of the Plan will have no effect on Awards made or to be made under any other benefit plan covering an employee of the Company or a Subsidiary or any predecessor or successor of the Company or a Subsidiary."

16. I was further referred in the course of the hearing to a Recharge Agreement entered into between the Appellant (therein referred to as "Parent") and a subsidiary called [redacted]

[redacted] on [redacted] (therein referred to as "Employer"). It was agreed by the parties that this Agreement was typical and representative of the terms of the recharge agreements which the Appellant had entered into with more than [redacted] of its subsidiaries.

17. The Recitals to the Recharge Agreement recorded as follows:-

> *"WHEREAS, to encourage and reward the services of Employees to Employer, Parent has determined to authorize the grant of Awards to acquire ordinary shares of Parent to select Employees;*
>
> *WHEREAS, the Plan provides or has provided for the granting of such Awards to Employees of Employer and Employer is a Controlled Entity;*
>
> *WHEREAS, Parent has arranged to facilitate the issuance of Parent ordinary shares to Employees of its Controlled Entities, pursuant to the grant of stock options, restricted units, performance units, or other stock-based compensation under the Plans;*
>
> *WHEREAS, Parent and Employer previously agreed that the Value of Awards issued to Employees under the Plan shall be borne by Employer and, accordingly, this Agreement is entered into in order to record the terms of such agreement;*
>
> *WHEREAS, Employer agrees to the terms and conditions of this Agreement in respect of all Awards now and previously granted to Employees in consideration of Parent's agreement to facilitate the grant of future Awards to such Employees; and*
>
> *WHEREAS, Parent has determined that if Employer does not bear the costs of the Employees' participation in the Plan, then Parent may not allow Employees to participate in the Plan."*

18. Clause 1(i) of the Recharge Agreement defined "*Value*" as meaning "*the fair market value is determined by reference to the quoted price, less any amounts paid to Parent to acquire such*

shares (e.g., exercise Price), on the applicable Valuation Date, of a Parent ordinary share, on the principal securities exchange on which such shares are issued or admitted to trading…"

19. Clauses 2 and 3 of the Recharge Agreement then provided as follows:-

> *"2. Provision of Employee Awards*
>
> *Parent has agreed to make or arrange for the issuance of Parent ordinary shares in connection with such Awards to Employees, as they become entitled.*
>
> *3. Consideration for Award Provision*
>
> *In consideration of the undertaking by Parent to make or arrange for the provision of ordinary shares hereunder to Employees, Employer undertakes that, after the relevant Valuation Date in respect of any Award, it will, after receipt by Employer of an Invoice, pay to the Administrator an amount equal to the Value of the Awards granted to the Employees…"*

20. Both the Stock and Incentive Plan and the Recharge Agreement provided that they were to be governed by the laws of Ireland.

E. Evidence given on behalf of the Appellant

21. I first evidence from Mr [redacted], who was at the time of the hearing, the Vice President of Corporate Tax for [redacted] and a director of the Appellant. Mr [redacted] had furnished two detailed Witness Statements in advance of the hearing and he formally confirmed that those Statements constituted his evidence.

22. The witness gave evidence that the Appellant had at the relevant times 11 board members. One was an employee executive and the other 10 were non-employees of the company. In

addition to the directors, the Appellant had Section 16 Officers; these were the main officers of the company, including the Chief Executive Officer, the Presidents of the different business units, the General Counsel and certain other key Vice Presidents.

23. The witness testified that the reason why the Appellant, in common with almost every other public company, had a share incentive scheme was so its employees would also be shareholders. The reason for this was that the Appellant wanted its employees to make long-term decisions for the company that would help improve its overall value, and not just short-term decisions that might only benefit the employees more immediately. He further testified that it was necessary for companies to have share incentive schemes in order to be competitive in the employment marketplace and to attract talent; the schemes were part of a modern remuneration package.

24. The witness stated that share incentive schemes must be approved by a company's shareholders because awards under the schemes result in their shareholdings being diluted. He explained the Appellant also engaged in the incremental buy-back of shares from the market, with a view to ensuring that shareholders' shareholdings were actually not diluted.

25. He gave the example of an employee being given the right to purchase four shares over four years, with the right to buy one arising each year. These were designed to retain the services of the employees for the duration of the vesting periods. He said that an employee would only exercise a right when the market price is higher than the option price. He further explained that in the case of restricted stock units, the employee is not required to make any payment when he or she receives a share at the expiration of the vesting period.

26. The witness further gave evidence in relation to the possible processes when an employee decided that they would like an option to become vested, including where the employee pays the brokerage firm to buy shares on the open market for the vesting price, or an exercise in sale where the employee sells and receives the difference between the vesting price and the market price, minus any applicable withholding tax. He said that he believed that the majority of shares were sold to cover a tax obligation.

27. Regarding the Recharge Agreement, the witness stated that the reason that the awarded stocks are in the parent company is that stock in the subsidiary would be of no value on the open market. The subsidiary went to the parent and stated that it would like to acquire stock in the parent at the fair market value on the day of exercise. The employee paid the parent directly for the grant price and the subsidiary paid the remainder to the parent. He stated that it was not that the subsidiary would acquire the stock, but it would provide the stock to the employee. He called it a tripartite contractual structure because of the three parties involved, being the employee, the subsidiary and the parent plc.

28. He further testified that the recharge payment was the difference between the grant price and the fair market value on the date an option was exercised. His evidence was that the recharge payment was entirely different to the Black-Scholes value, which was a requirement of US GAAP accounting in relation to the accounting treatment of the grant of a share option.

29. The witness gave an example of an employee who was granted a share option at an option price of $100. On the date of the grant of the option, the Appellant would record the Black Scholes value of, say, $20 as a stock-based compensation expense and would also record $20 as additional paid-in capital. If the option was exercised 6 years later, when the market value of the Appellant's shares was $120, the employee would go to the brokerage, inform them that he wished to exercise the option, and pay the brokerage the option price of $100. The Appellant would receive the employee's $100 and would record this as common stock of 20c and additional paid-in capital of $99.80. At the same time, the employer subsidiary would have to pay the Appellant an additional $20 pursuant to the Recharge Agreement, being the difference between the option price and the fair market value on the date the option was exercised. The employer subsidiary would record this as an intercompany expense of $20 and a payment of cash of $20. The Appellant's accounts would then account for the cash received from the employer subsidiary and record $20 of inter-company income.

30. The witness testified that the fact that Appellant's accounts recorded the receipt of the $20 from the employer subsidiary as inter-company income was so that the intercompany

transaction netted to zero on a total company or consolidated basis. Because there was an original expense in the employer subsidiary, there had to be a contra receipt in the Appellant. The witness testified that the fact that the payments made under the Recharge Agreements were recorded as intercompany income did not, in his view, have any impact on how the payments should be treated for tax purposes; this was supported by the fact that the Black-Scholes figures recorded as book expenses were never claimed as deductions in tax returns.

31. The witness further gave evidence that the Appellant had become aware in the course of an audit that the amounts received by the Appellant on foot of the Recharge Agreements had not been reflected in the Appellant's share register. The witness stated that the Appellant's Board had agreed that the share register was consequently incorrect, had instructed [redacted] to undertake a rectification exercise, and that the updated register now reflected all of the recharge payments as payments per share.

32. Turning to the expenses of management issue, the witness first gave evidence in relation to the relevant insurance premia. He stated in relation to Directors and Officers insurance that, while he was not an expert in the area, his understanding was that most litigation was in relation to significant strategic decisions or changes, such as acquisitions, and these were the responsibility of the Appellant's directors and officers. He further testified that fiduciary insurance was to cover claims where the board made decisions concerning investments of cash or pension plans or things that could impact individuals, and that employment practices liability insurance was to cover situations where employees brought claims. He said that these insurances are different from excess casualty insurance which is for situations where the other policies had not covered all of the liabilities.

33. In relation to the Respondent's suggestion that the deductible insurance premia should be calculated by apportioning the number of directors and officers and/or employees in the Appellant as against in the group worldwide, the witness confirmed that the Appellant had received a letter from its insurance brokers which stated *inter alia* that:-

> *"Because D&O insurance programmes are designed to address liability matters as opposed to property insurance or other first-party insurance coverages, insurers do not*

typically rate premiums based on the actual number of insured persons or additional insured entities. In other words, because D&O claims typically target the top level corporate entity as well as the directors and core officers, policy premiums are established at the holding company level."

34. In relation to the Tax Sharing Agreement, the witness testified that tax sharing arrangements were extremely common in spin-offs. They were necessary because when a business is spun off, it was formerly part of the whole company but was now a separate entity. With the prior years being combined, it can be difficult to ascertain which entity should take responsibility for a tax liability arising in respect of a prior year. He stated that a tax sharing agreement provides that each party will pay an agreed percentage of such liabilities. He also noted that there will be other provisions, such as information sharing, in such agreements. He stated that it is normally the parent company that incurs the cost of administering or dealing with the issues which can arise under such agreements, and that this was [redacted] and then the Appellant in the instant appeals. He confirmed that the amounts claimed as a deduction was not a tax liability but was instead the cost of the administration of the agreement.

35. In relation to the [redacted] expenses, the witness testified that the project was the name given to the consideration by the Appellant's board of whether the spin-off of the Appellant's [redacted] business would better serve the Appellant's shareholders than continuing the [redacted] business and the [redacted] business within the same group.

36. The witness confirmed the accuracy of the minutes of a meeting of the board of the Appellant held on [redacted], which recorded the following in relation to [redacted]:-

"[redacted]

”

37. The witness further confirmed the public announcement made by the Appellant on which stated *inter alia* that:-

‘

.”

38. The witness testified that the issue of the press release was a normal thing to do in relation to a pinout, and further stated that it was normal for the evaluation process to continue up to the point of conclusion. He gave examples of cases where spin-offs had been announced but had not ultimately been proceeded with.

39. The witness further testified that the expenses included the costs of carving out or apportioning the financial statements as between the retained business and the business that may be spun off.

40. In relation to the [redacted], the witness testified that two headings of expense were being claimed. The first of these related to employee retention, and the witness confirmed the contents of a letter sent by the Appellant to an employee on [redacted] 2014. The letter stated that in connection with [redacted], the employee had been identified as holding a position which was critical to continuing operations of the company. Accordingly, the employee was offered certain retention benefits to incentivise the employee to continue with their current responsibilities and assist as needed with efforts to consummate the closing of the transaction.

41. The witness testified that, in circumstances where [redacted], there was a significant risk that if it lost certain individual employees before the acquisition was completed, the deal might not close and the Appellant might not be in a position to continue delivering its total business. Accordingly, the board had decided to put retention bonuses in place, and the business owners would decide on the employees that would receive those bonuses.

42. The witness testified that the second heading of expense was in relation to SEC filing fees in relation to a registration statement. The filing fees amounted to some $11,000,000 and the Appellant was liable to pay 30% of those fees.

43. In cross-examination, the witness stated that it was not the Appellant's board which decided which employees of subsidiaries would receive stock awards; those decisions were made by the employing subsidiaries.

44. I further heard evidence from Ms [redacted] who had served as Vice President, Assistant Corporate Controller with the Appellant from 20[redacted] until 20[redacted]. The witness had furnished a Witness Statement in advance of the hearing and she formally confirmed that the Statement constituted her evidence. She gave evidence in relation to the share incentive scheme, the Equity Recharge Billing and the financial reporting obligations of share-based payments in the consolidated and standalone financial statements.

45. Her evidence was that share based compensation is seen as part of an employee's overall remuneration and that the Appellant would have been at a disadvantage relative to its competitors if it did not offer such schemes. She noted that they are seen as commercially necessary. She went on to note that where the parent would not be expected to directly fund the salaries of subsidiary employees, it would be reimbursed by the subsidiaries for the cost of shares provided to subsidiary employees. She stated that the Appellant only received the market value of the allotted share at the time the trade was executed.

46. In relation to the vesting of equity instruments and the stock compensation expense, the witness's statement explained that the Grant Date fair value of the Equity Instruments, adjusted for estimated forfeitures, was recognised as an expense on a straight-line basis over the relevant four-year service period in 's Profit and Loss Account.

47. It further stated that , the share plan administrator, prepared a quarterly report, which would set out the figures for the cost of the Equity Instruments. calculated the effect of the current quarter's activity on the calculation for the share-based compensation expense amortisation. workings were then sent in a report to 's Group, which collated the data and produced the consolidated quarterly expense information on a top-level basis at for expe

48. The witness stated that it was important to note that no tax deduction was claimed for the stock compensation expense. The expense was included in the financial statements for financial reporting purposes.

49. She testified that the process of awarding stock options and RSUs began with the approval by the Appellant's board of the overall Stock and Incentive Plan. Then there was an annual award approval process, which provided the guidelines for the actual making of awards at employee level. The recommendations were made by the Appellant's HR team with the assistance of an outside consultant. The Appellant's board would then be presented with a package of awards, which included details of the proposed awards to the section 16(b)

officers, a summary package summarising the awards, and then a detailed book containing details of all the proposed awards. The proposed awards would be reviewed by the board and, if approved by the board, would then be implemented by the HR team. The process of making the awards generally took almost a year from approval of the SIP to the actual issuance of the award letters in early December.

50. The witness did not accept that the approval of recommendations by the board resulted in the subsidiary employing companies making commitments to the relevant employees; her firm view was that the commitments were made by the Appellant.

51. The witness confirmed that the actual award letters were issued by the Appellant and that the shares awarded were new shares issued by the Appellant. The witness further gave evidence in relation to the various journal entries and documents created both for the fair value of an option and on the option being exercised. She said that she considered Mr ’s account of the entries made to be an accurate overview. She further gave evidence in relation to the flow of information and the process to establish the fair value of options awarded.

52. The witness testified that the Appellant’s HR team and Finance team received reports from informing them what options had been exercised. The information would come to her team and they would book the entries for US GAAP purposes and then, at a month lag basis, they would book the recharge for the issuance of shares to the subsidiary. She testified that her understanding was that recharge payments were payments made to the Appellant for the issuance of shares.

53. The witness also gave evidence about insurance and how it worked within the Group. She said that the Group was self-insured for lots of their coverages. She noted that they had an internal captive insurance company which would insure subsidiaries after whatever the local coverage would be. On top of that, the internal captive insurance company and the Appellant had GAAP coverage, and finally there would additional coverage on top of that for catastrophic losses.

54. With regard to the Appellant's insurance policies, the witness testified that the Appellant paid the D&O insurance, the fiduciary insurance and the EPLI excess, and was the beneficiary of those policies. She accepted that some of the policies were in the name of companies other than the Appellant, but said that this was an error which arose as a result of the original spin-off from the Appellant's ████ parent company. She testified that the Appellant had requested that these errors be corrected by its insurance brokers. She testified that she was absolutely satisfied that at all times it was the Appellant that was insured and that was paying for the insurance.

55. In cross-examination, the witness accepted that a stock option scheme had been in place for a long period of years, including prior to the spin-off of the Appellant group in ████. The Appellant was a ████-based entity from then until ████, when it reorganised into an Irish company. She confirmed that the Appellant had considered the accounting perspective in ████, including how the scheme would be dealt with in submitting accounts to Irish Revenue, and confirmed that the Appellant filed modified consolidated accounts with the CRO under US GAAP.

56. The witness further confirmed that the Appellant was involved in terms of stock options for section 16 Officers but reiterated that the SIP was approved in its entirety by the board, and was a scheme that supported the Appellant and all of its subsidiaries. The witness testified that section 16(b) Officers are, because of their importance to the company, listed on the statutory accounts in accordance with SEC requirements.

57. The witness confirmed that the Appellant's subsidiaries recommended who would get stock options, but they did not authorise them; only the Appellant's board could do so. She said this was not a rubber-stamp approval. When asked how the board could engage with the process given the 40,000 employees involved, she referred to the terms and conditions in the board pack. The board gave guidelines and directed that different bands of employees get certain ranges of awards. This was done following an analysis carried out by the board with the assistance of ████. The board then tasked the HR organisation to go down into the organisation and get the recommendations within the guidelines the board had set. The

recommendations were then reviewed and approved by the board. Her evidence was that the board was heavily involved in the approval of awards.

58. The witness did not accept the suggestion that the approval of recommendations by the board was a pure formality, even allowing for the fact that there had been some 3,660 awards to employees in the ████ financial period. She testified that the Appellant's CEO signed a master letter once the recommendations had been approved by the board, and confirmed that an employer subsidiary could not execute an award until the entire process had been completed.

59. The witness further testified that the information in relation to recommendations flowed up the organisation and said that more often than not she would change a recommendation that was presented to her. Then it would flow up to her boss, who could change it again, and this was why the process took so long. When pressed about the role of the subsidiary versus the board in deciding who gets what, she said that the board was asking its management teams to come up with recommendations within the guidelines set by the board, and that this was a means of the subsidiary or corporate unit recommending something based on the relevant parameters and on local performance. When asked whether the subsidiary played a key role in the process, she said their role was to help the Appellant understand their employees' value to the organisation.

60. The witness was then cross-examined in relation to the Recharge Agreement. She testified that there was a number of subsidiaries who did not have a Recharge Agreement because of exchange control and similar issues, which prevented the recharge. She agreed that there was no legal obligation to have recharge agreements in place, and the Stock and Incentive scheme was still applied in countries where no recharge could take place. She further accepted that the Appellant group was in a position to save significant amounts of tax as a result of putting the recharge scheme in place across its subsidiaries.

61. When asked about the Irish situation in ████ and the accounting perspective here, the witness said she was responsible for the consolidated results on a US GAAP basis. She said that each local subsidiary was responsible for doing what they referred to as a book to

statutory reconciliation. She testified that she was not concerned about statutory accounts in the recharge process, and once the recharge was happening the statutory people had to think about the implications for their local reporting. She testified that not every subsidiary did local reporting, as a lot of entities did not require statutory accounts, only tax accounts and a requirement to report up to them on a US GAAP basis.

62. She further testified that if a location required statutory reporting and had to do a report under IFRS 2, they would come to her and her team who would write a footnote for them and a disclosure that would then be used to update the statutory accounts. She confirmed that a finance person in the Dublin team was in charge of ensuring statutory accounts were prepared. She confirmed that they submitted modified US GAAP consolidated accounts to the Company Registration Office and that that they also prepared statutory accounts, which just showed the Irish company. She could not recall if these were audited, and said that they were prepared just for tax purposes and were not filed with the CRO. She confirmed that for the year in terms of the recharge amount of $119 million, Revenue would have seen that amount in the statutory accounts submitted, but that this was not be in the consolidated accounts filed with the CRO, because it would wash out.

63. The witness confirmed that a balance sheet was also filed with the CRO. She confirmed that the Appellant's balance sheet at had been audited. She agreed that it was possible for the Respondent's expert witness, , to examine this balance sheet and reconcile it to the statutory accounts. When asked if the balance sheet therefore recognised the fact that for the financial year, $119 million had gone into the Appellant's Profit & Loss account for the recharge amount, she agreed that it did, and said it did so by virtue of the roll up to retained earnings.

64. The witness said she was unable to express a view as to whether the auditors had effectively given the Appellant some comfort that it was appropriate to put $119 million into the Profit & Loss account in respect of the recharge amount, but accepted that there was no qualification to the audit. She said that she would need to understand if the accounting treatment was done for tax purposes or statutory purposes or US GAAP purposes. Her view

was that statutory accounting was irrelevant for tax purposes. She said that she was not in a position to comment on whether the Appellant's auditors could have considered the $119 million to be share capital, given that they had approved accounts in which it was recorded in the Profit & Loss account. She stated that for statutory reporting purposes, she would have suggested that the figure should have been recorded as share premium.

65. The witness further testified that the Appellant's US GAAP accounts in consolidation were correct and the Appellant's tax returns were correct; they had always appropriately reflected the Appellant's view that the recharge payments were equity and not taxable income. She accepted that there might have been a classification error in the local, standalone statutory reporting accounts which resulted in the necessity for the rectification of the share register in 2019.

66. The witness testified that the figure of $87.296 million recorded for Stock Based Compensation Expense in the income statement in the Appellant's statutory accounts for the ████ financial year was the Black-Scholes valuation. The recharge payments of $119 million were recorded in the income statement as Stock Option Exercised Gains

67. The witness did not accept that consideration for the shares issued under the SIP was booked twice, once as estimated fair value on the issue of the award and once when the option was exercised; her evidence was that these were two separate and distinct transactions.

68. I further heard evidence from Ms ████████ who was Assistant Company Secretary of the Appellant from 20██ to 20██. Again, the witness had furnished a Witness Statement in advance of the hearing and she formally confirmed that the Statement constituted her evidence.

69. The Statement gave information in relation to the company filings and stated, *inter alia*, that during the first or second week of each month, the Company Secretary Department of the Appellant would request a spreadsheet from the HR Equity Administration group with the

allotment information for the previous calendar month for the purposes of preparing Form B5s for submission to the CRO.

70. The witness testified that she was employed by [redacted], an indirect subsidiary of the Appellant, which she said was a kind of corporate hub including legal, HR, communications, finance including tax and supply functions. She agreed that the roles were separate and she did legal work for the corporate division, including securities work and corporate governance, ensuring that the Appellant's board and its committees were in compliance with SEC rules and regulations.

71. She outlined the SEC's functions its role in protecting investors. She said that there are filings to be made to the SEC, such as the annual report on Form 10-K, the annual accounts, the 10-Q which is the quarterly report of financial accounts. There can also be an 8-K filing, along with Section 16 reports in Forms 3,4 and 5. She said that oftentimes the information she included in these forms came from other people.

72. She referred to the filing fees with the SEC, particularly for the filing of the S-4 registration statement when an offering was being made to the public, and testified that the fee is based on the securities that will be issued. The fees funded the SEC, in part. She confirmed that the filing fee in relation to the [redacted] was in the sum of $11 million.

73. She further testified that the rules and regulations around being an SEC listed entity dictated certain things, such as disclosures and proxy statements that say that directors attended meetings and committees.

74. She stated that she prepared board packs for the Appellant. She said that for board meetings, there might be third party advisors and division presidents attending some parts of the meeting. Executive session was a private board session with perhaps just one person, such as the CFO, if the board had a concern around something relevant to the CFO.

75. Asked if there was any significance between a board considering or evaluating something and a board making a decision on something, she testified that important matters would be reflected in formal resolutions documented in the minutes, and that depending on the nature of the decision there might also be SEC obligations.

76. She described the process of the board evaluating a significant transaction. It was a long process as the board had to demonstrate that it discharged its fiduciary duty to give due consideration to the best interests of the company and shareholders. The process could occur over a number of meetings and take between a year to three years. A decision was not made at the first meeting, as the board was learning and constantly evolving with each meeting. A formal resolution might also not be the end of the process, as something could still develop right up to the final decision. She said that she would not expect a board of directors to make a decision but not record it in the minutes, noting that this would unethical.

77. She discussed her witness statement which outlined her role in completing the B5 forms and went through that process. She got raw data from the HR equity group, which reflected the grant date, type, exercise date, settlement date, option price, tax price, number of shares exercised and whether any shares were withheld. She sorted all of this and included it as an attachment to the B5. She outlined that process and how she pared the data down. She agreed that the recharge payments did not feature in the B5 and the witness said that she was unaware of them. She said that none of the documents or information she received ever mentioned the Recharge Agreement or payments under same.

78. In cross-examination, the witness agreed that the B5s were filed in respect of all new allotments of shares. She said that she had probably first become aware of an issue with the filing when she heard about it from Mr a year before the hearing. She said that she was not involved with the rectification as she was no longer with the company.

79. I next heard evidence from Mr [redacted], who is a partner in the firm of [redacted]. This witness had also furnished a Witness Statement in advance of the hearing and he formally confirmed that the Statement constituted his evidence.

80. In his direct examination, the witness testified that he had advised the Appellant for many years on Irish company law matters which arose out of the spin-off of [redacted] business [redacted] and the combination of [redacted] and [redacted] He had done preparation work for board meetings, and attended some of them. He outlined the structure of [redacted] prior to [redacted], discussed the business segments and potential synergies and confirmed that the Appellant's board would have driven strategy. He described some aspects of the group being intermingled and the reorganisation, separation, spin and sale. He gave evidence in relation to the steps required for the process and the consequences of each. His evidence was that separation work was really reorganisation work; it did not of itself lead to a spin or to a sale.

81. He testified that [redacted] took a number of years between the planning and the execution. When asked by counsel for the Appellant whether there was a stage when either a spin or sale became inevitable, he said that the key in listed companies was when the directors make the final fiduciary decision; he stated that directors will want to keep their options open and that buyers may emerge even after a formal announcement has been made to the market. His evidence was that options requiring a final decision can remain live until the very last minute.

82. He was asked whether the expense incurred in the process of separating a business out makes a sale or spin inevitable. His evidence was that there can be a cost to keeping strategic options open and that the money involved was small relative to the billions of dollars that the company is worth. When asked what were the factors which could stop a separation, spin or sale from occurring, he testified that there could be internal or external factors, such as issues coming to the fore within the company, liabilities that were difficult to divide out, and so on. It depended on what was attractive to buyers, and his evidence was that it couldn't be over-

emphasised that the board was taking the "*temperature day by day of where the investors are at*".

83. The witness discussed the minutes of the Appellant's Board Meeting of which recorded . It was noted therein that if the offer was not acceptable, .

84. The witness was asked whether the record in the Board minutes of that a sale or spin of the business in two to three years was an appropriate course of action amounted to a decision to spin the business. He said it was not a decision, just the board looking at long term strategy and testified that at this stage "*absolutely anything could have happened. For this to be a spin would have needed a lot more actual concrete work and decision making*".

85. His evidence was that the board minutes of indicated that no final decision had been made; they merely recorded that the process of separation was continuing. The fact that a decision had been made to recruit a new president for the division did not alter his views in this regard; he noted that for there to be a credible standalone business, there had to be a credible management in place.

86. The witness discussed the minutes of the board meeting of where following a review of the spin timeline including the timing of a public announcement, it was noted that risks were identified which could impact implementing a transaction. The witness stated there was at this stage a huge execution risk as to what would happen and what the outcome might be. The minutes also recorded that the Appellant's investment bankers would address the board at the following meeting. The witness stated that having the investment bankers come in was significant because it was only then that the directors really began to think about and test whether it is worthwhile going forward with the plan. He testified that a

board of directors would in practice never make a decision to sell or spin without first taking advice from investment bankers.

87. The witness next considered the minutes of the board's meeting in ████ ██. He testified that the decision recorded therein to publicly announce ██████ █ █████ was not a decision to spin the business. He said it was instead giving a strategic update to investors and putting the market on notice of the possibility of a sale. He further discussed the presentation given to the board on the progress of █████ at the meeting. He said the board was informed about potential future risks to the process and was also presented with a potential timeline for a spin-off. There were a number of elements to this, including a spin audit process, preparation of the Form 10 and a review by the SEC, setting up a senior management tier for the proposed new entity, arranging the tax structuring and obtaining IRS rulings, disentangling the █████ business from the Appellant, and finally disentangling the Appellant from the spin-off entity. Each of these elements presented risks which, the witness testified, could prevent the spin-off from progressing further. The timeline indicated that the █████ business would not be disentangled from the Appellant until Q3 of ██ and the witness testified that the completion of that disentanglement was a condition precedent to a spin-off or a sale.

88. The witness further confirmed that the minutes of the board meeting recorded that the investment bankers had advised the board that the decision point for deciding on whether to proceed with planning solely for a spin-off, as opposed to continuing to also explore the possibility of a sale of the █████ business, was at the beginning of ███. The witness confirmed that the separation work which would be carried on the interim was common to both a potential spin-off and a potential sale. The witness further testified that the board was advised to begin the process of preparing a Form 10 in anticipation of a potential spin. The cost of doing this would be wasted if there was no sale or spin-off, but the witness reiterated that the amounts involved were relatively small in the context of the potential overall transaction.

89. The witness testified that the process took longer than the projected timeline presented by the investment bankers, and the preparations were not completed in ██████ but instead lasted into ████.

90. The witness next discussed the minutes of the board meeting held on █████ █████ which recorded that the board heard a presentation on the proposed post-spin business strategy. The witness testified that the board could not have made a decision on whether to sell or spin-off the ██████████ business without having received and considered this information.

91. The witness further discussed the minutes of the board meeting of █████ █████ which recorded the board considering in greater detail the viability of the ██████████ business on a stand-alone basis. After receiving further presentations on the legal considerations applicable to a spin-off and on the potential interest from buyers for a sale, the board agreed that the Appellant would continue preparing for a spin-off and would also entertain offers from prospective buyers once the Form 10 registration statement was filed with the SEC. The witness testified that this showed that the board had yet to make a final decision in relation to the ██████████ business.

92. The witness next discussed the minutes of the meeting of ███████ ████ where the board resolved that "*the Board of Directors approves of the continued pursuit of the Spin-Off, it being understood, for the avoidance of doubt, that the Board of Directors shall retain the authority to modify, delay or abandon the Spin-Off at any time.*" His evidence was that this was in substance and effect no different than the earlier decisions, and was simply a continuation of the existing strategy.

93. The board minutes of the meeting on ██████ recorded that the board considered a non-binding proposal to acquire the ██████████ business made by a potential purchaser. Having received advice on their legal and fiduciary obligations and heard from the Appellant's investment bankers, the board decided to inform the potential purchaser that the offer was inadequate and raised concerns about the timing and certainty of the proposal. The witness's

evidence was that this did not mean that the board would not entertain another proposal from the potential purchaser at a higher value.

94. The witness next discussed the minutes of the board meeting held on ██████ ████ He testified that these essentially recorded that, as the Form 10 was finalised and the reorganisation steps and approvals were largely complete, the board was satisfied to proceed with the spin-off. The board delegated to a transaction committee to progress the spin-off further, but final effectiveness was still reserved. This was the last detailed consideration of the proposal by the board, but there was still a possibility that the matter would come back to board up until the actual dividend was paid in the form of the new entity's shares. The witness testified that it was still possible that a spin-off or a sale would not go ahead, notwithstanding that the separation process was so far advanced.

95. In relation to the ████████ transaction, the witness's Statement recorded that the Appellant's board had considered the various potential strategic opportunities on ████████ ████████ authorised company management to approach ███████████ to discuss a potential combination of the two companies. The witness testified that it was his understanding that this decision was made on the grounds that ████████ was "*the best strategic fit*" with ███████.

96. The witness was referred to the Proxy Statement issued by the Appellant on ███████████ █████ and agreed that it recorded that uncertainty about the effect of the transaction on employees, customers and suppliers might have an adverse effect on ████████ and ███████, and consequently on new ████████, and that employee retention might be particularly challenging during the pendency of the transaction. The witness testified that the means of dealing with this real and material business risk is to give key employees a significant bonus to remain in place pending the completion of the acquisition. He further stated that the fact that ████████ was acquiring the Appellant would have the effect of signalling that ████████ employees might have a greater chance of retaining their positions following the completion. The witness confirmed that retention payments were made to employees of the Appellant in accordance with the retention plan approved by the takeover panel.

97. The witness further testified that shares in the US were typically held and cleared through an entity called the , which was the registered legal owner of almost all shares, which it held on trust for the underlying shareholders. He confirmed that this meant that an employee paying for a share under the SIP made a payment in respect of a share that was legally issued to someone else.

98. In relation to the rectification of the Appellant's share register, the witness testified that his firm had advised on the requirement for rectification. He stated that once it became apparent that there had been a payment made for shares that wasn't captured in share capital or share premium, the legal advice was that it was required to be captured, not least for compliance with capital maintenance requirements and also the proper maintenance of the register of shareholders in accordance with section 169 of the Companies Act 1963. The payments which necessitated the rectification were the payments made under the recharge agreements.

99. The witness further testified that it is a very common feature of employee award schemes that payments are made by various group entities to the company issuing the shares. He stated that he would always consider those payments to be payments toward share premium, consistent with the fact that section *82* of the Companies Act expressly envisaged subsidiaries paying up shares for employees under share award and share plan schemes. He further testified that his view was that payments made under recharge agreements of the difference between the strike price and the market price were payments of share premium.

100. The witness referred to the Petition to the High Court for approval of the transaction, and noted that the section dealing with the share capital reduction recorded that "*… the capital reduction to be effected pursuant to the scheme will not, in essence, affect the amount of the company's issued or authorised share capital. As such, neither the scheme nor the capital reduction is in any way prejudicial to the rights or interests of the company's creditors."* The witness testified that the scheme of arrangement dealt with the cancellation of shares but did not have any impact on the share premium account. The share premium

account was a fungible general account and, albeit it is paid up against shares, it did not continue to travel with those shares; the share premium account was untouched throughout the cancellation and reissue process. Accordingly, the [redacted] transaction did not impact on the requirement for the Appellant to rectify its share register.

101. In cross-examination, the witness stated that he would have attended the final board meeting of the Appellant in [redacted] of 20[redacted] prior to the announcement of the [redacted] transaction. He said his recollection was that the value of the [redacted] transaction was in the order of $46 billion, and included a substantial cash element to the Appellant's shareholders. He testified that [redacted] had been chosen by the Appellant's board on the grounds that it was the best strategic fit with the Appellant; this assessment was based in part on [redacted]'s ability to execute the transaction and its willingness to pay the highest price.

102. Mr [redacted] was then brought to the letter from [redacted], recording that the filing fee payable to the SEC in respect of the [redacted] transaction was $11,825,317. Counsel noted that the filing fee was based on the value of the shares that were registered and the letter included a calculation which set out the basis on which the value of the transaction (cash portion and the total) was reached. The calculation indicated that the total consideration for the Appellant was $42 billion, of which $16 billion, or 38% of the total, would be paid in cash. The witness testified that this document was not determinative of the value of the transaction; only the scheme of arrangement documents were determinative. He stated that, in an Irish context, those would be the effective documents which the Court would approve. He also noted that because a component of the consideration was [redacted] shares, that value could also change day to day. When asked by Counsel whether the document demonstrated that the cash component was in the order of 38%, he said that the document was not the appropriate document to determine percentages because it is just for calculating the filing fee. He could not recall the percentage cash element of the transaction but it would have been in the accounts. He accepted that the cash element was in the billions, and that this was a significant amount on an absolute basis.

103. In relation to the proxy statement, the witness testified that the pendency period was from the announcement of the transaction in ███ 20██ to the completion in █████ 20██, and agreed that retention efforts would have had to continue immediately after the transaction also. He agreed that bonuses were paid to effectively get the deal over the line and to protect the business subsequent to completion. He agreed that there could be redundancies at the management level, if the transaction went through, if there was duplication. Between people being dismissed and moving on after their bonuses, there would be an overall reduction in the number of employees, and he stated that this would not have occurred otherwise.

104. The witness further testified that he was very involved in the Irish aspects of █████ █████ primarily for company law and securities advice. He said that he attended at least one board meeting, and was involved in the preparation for meetings he did not attend. He confirmed that he was not present at the █████ ██████. He said that he would have been in contact with the company secretary and two others, but not the directors themselves.

105. He testified that the rough value of that transaction was between $2 and £3 billion, possibly in the region of $2.2 to $2.4 billion. He said that the value of the remainder would be the share price after the record date of the spin. He said that he would expect that the price of the Appellant post-transaction would have been lower, but that the combination of the market capitalisation of each of ██████ and post-spin Appellant was higher than the complete market capital of the Appellant, but that there would have been lots of variables.

106. Mr █████ was then brought to the press release announcing the spin-off and his witness statement which referred to the analysis done at the ███████ board meeting. He said that the strategy was that it made sense to separate the business and announce it as part of the strategic intention. He said that at this stage the Board still would have been contemplating that a sale would be an acceptable outcome if it arose. He confirmed that it was an announcement of a strategy which would allow it to see what options might emerge.

It was not a definitive decision that there would be a spin-off, but rather an announcement of a separation intention.

107. The witness stated that the announcement spoke for itself, and that it was clear that it was not a definitive announcement of a spin-off at that stage; it invited parties to come and make bids for the Appellant's [redacted] business. He agreed that it read as a plan to dispose of the [redacted] business into a standalone public company, but noted that the public market statements are very carefully calibrated to leave options open. He was asked about the market reaction, and he said there was press coverage of it and agreed that it was not surprising that the reaction was favourable, including in terms of the market value. He agreed that it would be a logical conclusion that it would reflect the market view that the planned spin-off was accepted by shareholders as a favourable plan. He said that there would be investor-relations people looking at the shareholders reactions.

108. The witness was asked whether he was tasked to advise on potential offers. He testified that there would have been limited Irish involvement, and that the Irish components would have remained unchanged regardless of which way it went. In terms of his general awareness, the only offer he was aware of was the one recorded in the minutes from [redacted]. He said that they would not have necessarily been the expected type of buyer; there could have been private equity buyers or a conglomerate.

109. He testified that the Board was considering [redacted] from [redacted] 20[redacted] onwards, and that the strategy was developing throughout. He agreed that [redacted] was discussed at board meetings and when asked about the "mechanics" of the process, he noted that a spin or three-corned spin was the most common, but there could also have been a sale through an IPO or a spin IPO, which had also been considered by the board. He was brought to the [redacted] Spin timeline which was produced for the [redacted] 20[redacted] board meeting, and asked what "*disentangle under TSA*" meant. He explained that it stands for transitional arrangements, or transitional support arrangement, a cut off point for disentangling the

business. This concerned IT integrated systems, like payroll functions, or sharing premises, which he said was different from ongoing arrangements of where liabilities sit.

110. He agreed that the timeline was superseded by events and that by the time of the launch, everything needed to be in the right place before the spin-off could be effected. He agreed that the Form 10 preparation began at an early stage once ██████ had been identified, as it took so long to prepare it. He said that a buyer would want to have a clean purchase of a business; in other words, it would want to acquire a distinct and segregated business. He testified that there would be a ██ in a private sale transaction also. He said that he would expect it to be necessary to put in place a new corporate structure, a new president and board in order to sell a business, particularly to sell it to a private equity buyer. He said this would be less important for a strategic buyer who is already in the trade and might have their own management lined up.

111. The witness agreed that obtaining rulings from the IRS was a necessary part of completing the spin, but obtaining them did not necessarily mean that a spin-off had been decided; they could equally be necessary for a reorganisation. The ruling is because you do not want to incur US tax for shareholders as part of achieving the overall benefit of holding two different shares. He said this was the important ruling for the spin.

112. When asked about the timeline prepared by the Appellant's investment bankers, the witness testified that it was a simplified one-page document to put in front of the board. He said the timeline was primarily for a spin scenario, which is what the board was most interested in at the time. There were aspects which were reorganisation specific also and if a sale opportunity came along, it would be considered by the board. He said it was more nuanced than saying it was a timetable specific to a spin-off; it was a timeline for a separation or reorganisation process, with the ability to flip from a spin to a private sale transaction, or to not carry it out. He testified that a sale was still a possibility in █████ ███, and a bid did in fact emerge at a later stage.

113. He testified that the Appellant's board was aware that once the Form 10 went out, there would be additional interest from purchasers and this did turn out to be the case. Asked if the board's approach was passive in nature, he agreed they were not actively engaging in looking for a bidder and had not launched an auction. However, issuing a Form 10 was putting a company "*in the shop window*"; he testified that this was a very well understood consequence, and noted that the minutes refer to the board being ready and standing by. He noted that the bid in was the one the board discussed the most; there were approaches in and perhaps early also, but that he was not personally involved in those.

114. The witness was next referred to the minutes of the board meeting in 2010 and asked whether they recorded a consensus that the business was no longer core to the Appellant's operations. He said it was important to be careful about the terminology, as would still be an active contributor until such a time as a decision was made either way. He said the board's discussions were quite exploratory for a long time and its view evolved over time. The 2010 minutes recorded a very early-stage strategic discussion.

115.

116. The witness accepted that from mid- to late-2011, his work for the Appellant had very much focussed on a spin-off transaction. He stated that the Appellant's US lawyers would have been more focussed on the sale opportunities as they arose, and that this was consistent with the possibility of the Appellant's board switching to a sale at any stage of the process.

117. I next heard evidence from Mr [redacted], called by the Appellant as an expert witness in relation to the insurance matters in the case. He formally confirmed the contents of his Expert Witness Statement as his evidence.

118. The witness was brought through his 30 years of expertise in the insurance industry and he stated that the type of insurance he specialised in was professional lines insurance, which was insurance for boards of directors, directors' and officers' liability, bankers, investment advisors, stockbrokers, and so on. He said that he had been involved in one role in creating premium rating plans, namely the mathematical formulae used to determine what to charge for insurance products. He discussed his experience and the books he had written. He testified that in 2010, he founded his own independent insurance consulting firm. He stated that most of his work was as an expert witness in insurance disputes, along with portfolio audits.

119. He testified that professional lines insurance encompasses insuring the acts of professionals, anybody in a regulated environment, be it financial or not, and the results of their acts. He testified that because the Appellant has US securities exposure, it needed to have professional lines insurance; virtually every publicly traded company in America purchases D&O insurance, and nobody will serve on a board without it. Board members could be personally sued if something went wrong, like the share price dropping. The most common claim is some variation of a securities violation, either misrepresentation or an omission of a critical fact that affects the stock. Shareholders would then allege that they would not have bought the shares were it not for the directors' wrongdoing. Other potential claims might be for unfair competition, anti-trust violations, environmental claims and so on. However, 85% of the claims dollars paid on a US D&O policy were paid in respect of securities violations of one sort or another.

120. He said that generally speaking the financial information giving rise to a claim would be that filed in the SEC filings, but it could also just be a press release. He referred to the obligations under Fair Disclosure. He stated that the people who make decisions about what

is filed with the SEC are the CFO, the CEO in conjunction with the audit committee or other groups of directors. It was generally the top level of the company.

121. He said that he had examined the policies the Appellant took out and said that they were the common kind of D&O. He explained that Side A coverage, under United States D&O insurance, is when a corporate policyholder either cannot indemnify their directors or officers for alleged wrongful acts because of by-laws or relegations, or because they lack the funds. In such a case, the carrier provides coverage from dollar one, there is no self-insured retention. He said that only directors and officers are covered for Side A. Side B coverage is the same, except the company is allowed to indemnify in the first instance and the insurance carrier then reimburses the policyholder for the payments. He said that Side B is also only for directors and officers.

122. Side C is coverage that applies to the corporate entity only. This is because it is possible for a company to be sued without the directors and officers being sued, such as under issuer liability pursuant to the Securities Act of 1933 in America. He gave as an example a corporation being sued for inaccurate facts in an IPO registration statement.

123. He was then asked about fiduciary liability insurance and he said it covers liability of the trustees of benefit plans, such as pension plans. These must be run for the benefit of the plan beneficiaries. FLI covers not only the managers at the company who are designated to run the plan but also outside advisors like accountants or investment advisors. He said that the rating plan was based on assets under management, the nature of the investments, the record of the advisors and so on. He said that it was generally the senior managers of the company, namely the board members and the section 16 officers, who made those decisions.

124. In relation to employment practices liability insurance, the witness testified that this covered a company and its employees, generally senior management, for any variety of employment practices violations in the US, such as discrimination or sexual harassment. He

was asked why a company such as the Appellant would need insurance that would cover the top board for someone being hired in another country and stated that it was because the parent or holding company board is responsible for overseeing the employment practices policies. He said it all emanates from the top. He further testified that parent companies are the primary targets of claimants for a number of reasons. Generally the parent company has the high profile board with the deepest pockets, and they are responsible for the entire corporation.

125. He said that an insurance company will look at different factors when calculating the premium, including the total asset size of the market capitalisation of the company, being the public float and the institutional float. The greater the market capitalisation, the greater the possible risk to an insurer, and the greater the premium will be. Insurers would also consider other factors, such as the quality of corporate governance, when calculating the premium.

126. He said that he strongly disagreed with Revenue's contention that the amount of premium to be allowed as a deduction should be determined by reference to the number of directors and employees of the Appellant as a proportion of the number of the employees in the group as a whole. He stated that this was not the way any D&O carrier would look at the risk. They do not look at how many employees there are, but at who is on the board, what decisions they are making, is there a domain and so on. He agreed that the insurance carrier was looking to analyse risk and where it lies, and testified that almost all of the risk lies with the board's actions. He said that every board decision affects the entire company, the board makes such decisions constantly and those decisions are the ones that are most likely to give rise to a significant claim. He agreed with the view expressed by the Appellant's broker that the premium was not based on a head count. He testified that he would ascribe at least 85% of liability to the Appellant's board, if not more.

127. In relation to excess casualty insurance, the witness stated that it has various meanings depending on the company and jurisdiction in question. Generally, it is insurance that sits in excess of underlying primary policies, and casualty insurance itself is insurance

that protects against damage to people or property. The Appellant had purchased insurance such as airplane liability, aviation liability, workers' compensation and so on, and excess casualty sits above these policies as an umbrella. The Appellant had about 10 or 14 different casualty policies and if any of those was totally exhausted by a bad claim, the excess casualty insurance would drop down and provide coverage.

128. When asked why a parent company would take out excess casualty insurance, the witness stated that any smart plaintiff's attorney will sue the parent company because they know that is where all the assets are controlled, and that is where you can put the most pressure to settle. The directors don't want to be named in a lawsuit so they are inclined to resolve the claim. He said that in his expert view, it would be considered poor corporate governance for a large corporation not have excess casualty insurance.

129. In relation to the fact that the wrong corporate name was listed on some of the Appellant's policies, the witness stated that it is not uncommon for brokers to not follow up when a company changes it name. He said that the carrier still honours the policy because it knows that the entity is the entity; he had never seen a carrier try to benefit from a technicality.

130. The witness disagreed when asked whether the Appellant might not have required D&O insurance, because under Irish law directors were generally not made personally liable for the debts of a company. Foreign-domiciled companies listed on the New York Stock Exchange or NASDAQ have to subject themselves to the rules of American securities law in order to be listed there. They therefore required D&O coverage, and wouldn't be able to attract or retain directors and officers without it..

131. In cross-examination, the witness testified that the largest premium was paid in respect of the D&O policies, but he had examined all three policies equally. He reiterated his evidence that roughly 85% D&O policies were paid for securities claims. He had discussed

this with two colleagues in the claims manager industry and they agreed that that number was still applicable. He said that this figure was not specific to the Appellant in particular but was rather how D&O policies were priced for companies across the board.

132. He accepted that he was not familiar with the Appellant's claims history and said that he had not been provided with any of that information for any of the policies; however, he stated that this was not surprising to him because an insured's claim history is not particularly relevant to carriers. He testified that the projection of how you apportion the risk and premium was essentially generic throughout the industry' "*little blips*" underneath do not really affect the calculation.

133. The witness disagreed with the suggestion that he could not give his opinion that the majority of claims brought against the Appellant group would be brought against the Appellant itself without having details of the Appellant's claims history. The standard approach of the insurance industry was that the parent board was the ultimate bearer of liability and bore the brunt of the risk. He testified that the making of decisions is a very generic function across D&O, and the situation is no different if the company works in [redacted] [redacted], concrete, food. He agreed that an insurer will look at the claims history in terms of pricing, but testified that it did not affect the issue of where the liability for a claim would reside. Any claim where a subsidiary was sued but not the parent company would be viewed as an outlier, and was not what a carrier takes into account when assigning the variables of risk and premium.

134. The witness was referred to the Appellant's Form 10-K annual report for [redacted] which recorded some 850 product liability claims in relation to products manufactured by its subsidiaries. The witness stated that these were product liability cases, and were irrelevant to D&O cases. Similarly, an asbestos environmental claim was excluded from cover by a pollution exclusion in the D&O policy. He was asked about the excess casualty, and he said that theoretically it could be applicable if they did not have an exclusion. A shareholder claim, included in the [redacted] Form 10-K, was put to the witness as the type of claim that would have

been part of the 85% of D&O claims and he agreed it was. The reference to the claim did not say whether the Appellant was a party or not, and the witness could not say either way.

135. The witness was referred to the section of the Form 10-K dealing with the "*Irish law difference*", which noted that there may be issues with enforcing a civil judgment in Ireland, along with other differences in director's duties. The witness stated that it appeared that this statement was only referring to Irish shareholders, as US domiciled shareholders could still bring their suit. He said that the Appellant would not be able to hide behind Irish domicile to avoid US securities law, and that they would be out of the NY stock exchange if they did. The witness could not speculate on how a prospective litigant would deal with being told that there might be issues with bringing proceedings against the Irish company. He reiterated that the Appellant was listed on the [redacted] and subject to American securities laws and could not disavow that, as doing so would be a death knell to its credibility.

136. I next heard evidence from Mr [redacted], the Appellant's expert witness in relation to accountancy matters. Again, he confirmed that his expert witness statement was his evidence in the appeal.

137. The witness stated that he was now a professional non-executive director, having worked as an accountant in [redacted] for more than 30 years, the last twenty years as partner working as audit partner on a number of major Irish companies.

138. The witness discussed the difference between management accounts and statutory financial accounts. He said that management accounts are generally prepared for use by management and sometimes follow the same lines as statutory accounts, but sometimes do not. For example, he was aware that the Appellant group looked at its various business units rather than particular statutory accounts. The rules for management accounts are set internally, not by external regulators. He said that it was common in management accounts

for a trial balance, being a set of credits and debits, to be kept in management accounts, and this had been done in the instant case.

139. He testified that the Appellant was in effect a US company, headquartered and with a parent company in Ireland, but reporting to the SEC. Its major source of funding is US capital markets. He stated that the US GAAP rules are used to prepare consolidated accounts for the Appellant and those were filed in the US, probably within three or four months of the financial year end. They were the primary accounts for external users of the information, such as investors and analysts. The Appellant's US GAAP accounts were audited, mostly in the US. He testified that the consolidated accounts for a company like the Appellant were the most important accounts.

140. The witness then discussed Modified US GAAP accounts, now permitted under the Irish Companies (Amendment) Act 2009, which changed in the law in Ireland to allow companies to file US GAAP accounts with the Irish Companies Registration Office as part of their annual filing. The accounts are called modified because there are additional notes therein which are required by Irish law, but not by the US legislation. He testified that the primary statements look exactly the same. They are filed by the annual return date, which he thought was nine months after the year end, and follow the US GAAP accounts. His view was that very few people would rely on those accounts, as potential investors would look at the US GAAP consolidated accounts. The primary purpose of the modified accounts was, in his view, to enable creditors to look at the status of the company.

141. The witness next discussed standalone statutory accounts which, notwithstanding the 2009 change to the legislation, the Appellant was still obliged to prepare pursuant to a rule carried forward from the Companies Act 1963. He stated that they are not required to be filed, but must be kept at the company's registered office. The witness stated that only the revenue authorities and people making tax returns to Revenue use the standalone accounts.

142. Moving to the issue of the standards applicable to share options, the witness stated that originally there were no standards in place. However, there was a demand from investors to be able to compare companies that offered such options to those that didn't on a 'like-for-like' basis. Accordingly, IFRS 2 was introduced as an international accounting standard, which was mirrored in Ireland as FRS 20.

143. The witness confirmed that IFRS 2 provides that:-

"*The objective of this IFRS is to specify the financial reporting by an entity when it undertakes a share-based payment transaction. In particular, it requires an entity to reflect in its profit or loss and financial position the effects of share-based payment transactions, including expenses associated with transactions in which share options are granted to employees*."

144. The witness agreed that the IFRS dealt not only with the grant of share options but also the question of how options should be valued. This valuation is done at the very beginning, when the option is granted, and values the option using Black-Scholes analysis. The analysis estimates the present value of what the employee will receive in a number of years. Because one cannot value what the employee provides as his service, the approach is to value what he receives for those services.

145. The witness confirmed that IFRS 2 recognised share option transactions within group entities and required an employer subsidiary to measure the goods or services received as either an equity-settled or a cash-settled share-based payment by assessing the nature of the awards granted and its own rights and obligations. The IFRS further stated that the amount recognised by the subsidiary employer might differ from the amount recognised by the consolidated group or the entity settling the share-based transaction, being the Appellant in the instant case. Paragraph 43C provides that the entity settling a share-based payment transaction when another entity receives the goods or services shall recognise the transaction as an equity-settled share-based payment transaction only if it is settled in the group's own equity instruments; otherwise, the transaction is to be recognised as a cash-

settled share-based transaction. The witness confirmed that this meant that both the Appellant and the subsidiary had to recognise the transaction in their accounts.

146. Paragraph 43D further stated that some group transactions involved repayment arrangements that require one group entity to pay another group entity for the provision of the share-based payments to the suppliers of goods or services. In such cases, the entity that receives the goods or services must account for the share-based payment transaction in accordance with paragraph 43B, regardless of intragroup repayment arrangements. The witness testified that the effect of this was that the subsidiary employer had to recognise in its profit and loss account the amount calculated as deemed to be paid to the employee on a year to year basis, and further had to recognise a contribution from the parent company to its capital. The IFRS did not concern itself at all with intragroup repayment arrangements, and the witness testified that this made sense, because the focus of the Standard was to upfront estimate what the cost was going to be over the period of the option, and charge that in the subsidiary's profit and loss account over that period in recognition of the cost of the employee to that company.

147. The witness agreed that an employee might never receive the shares the subject of the option, and stated that there is no adjustment to the accounts even if the option is not exercised by the employee.

148. The application guidance at Appendix B to IFRS 2 noted in paragraph B45 that the guidance in relation to transactions between group entities was not exhaustive and assumed that when the entity receiving the goods or services has no obligation to settle the transaction, the transaction is a parent's equity contribution to the subsidiary, regardless of any intragroup repayment arrangements. The witness stated in this regard that in the accounts of the parent, the debit side of the account is viewed as an investment in subsidiary and the credit side goes to equity. The opposite applied in the employer subsidiary, in that the debit goes to the profit and loss account as a charge to recognise the cost of the employee, and the credit is recorded as a balancing capital contribution from the parent. This was the theoretical

accounting treatment, even though there is never an actual purchase of shares in the subsidiary or in sub-subsidiaries by the parent.

149. Paragraph B46 recognised that an arrangement between a parent and its subsidiary might require the subsidiary to pay the parent for the provision of the equity instruments to the employees, and stated that the guidance did not address how to account for such an intragroup payment arrangement. Similarly, no such guidance was provided by the UITF 44 elaboration document in relation to Irish accounts.

150. The witness agreed that paragraph B52(a), which applies when a parent grants rights to its equity instruments directly to the employees of its subsidiary, and the parent, rather than the subsidiary, has the obligation to provide the employees of the subsidiary with the equity instruments, described the transactions in issue in these appeals. The witness further agreed that paragraph B53 stated that in such cases, the subsidiary does not have an obligation to provide its parent's equity to the subsidiary's employees. Therefore, in accordance with paragraph 43B, the subsidiary shall measure the services received from its employees in accordance with the requirements applicable to equity-settled share-based payment transactions, and recognise a corresponding increase in equity as a contribution from the parent. This applied even though there wasn't actually any increased investment in terms of a share purchase by the parent company; it was instead a deemed investment.

151. The witness testified that this approach was confirmed by IFRIC 11, and referred to paragraphs BC8 to 11 in this regard. He further stated that paragraph BC12 recorded that the IFRIC had discussed whether the Interpretation should address how to account for an intragroup payment arrangement requiring the subsidiary to pay the parent for the provision of equity instruments to employees. However, the IFRIC decided not to address that issue because it did not wish to widen the scope of the Interpretation to an issue that relates to the accounting for intragroup payment arrangements generally. The witness stated that this again showed that there was no accounting standard governing the appropriate treatment of payments made under recharge agreements such as those under consideration in the instant appeals.

152. The witness confirmed his evidence that where employees of a subsidiary company are granted shares in a parent, and the subsidiary is required by a recharge agreement to pay the parent an amount (which is usually the difference between the amount the employee pays for the share and the market price at the date of the exercise of the option), this was to ensure that the employer recognised the full cost of the service from the employee, and further to ensure that the parent does not incur a financial loss. He reiterated his view that the operation of equity compensation does not provide income or gains for the employer subsidiary or the parent company, but is instead a cost of employing an employee.

153. The witness explained that in his view, notwithstanding the Black-Scholes approach, there is an extra cost to actually providing shares, or an extra loss in value to the parent in providing the shares and in recharging the subsidiary. The accounting standards sought to measure that fully in the profit and loss account of the subsidiary. However, doing so did not mean that there was a source of revenue from the parent company; it was simply a method of ensuring that there was no loss to the parent in issuing the shares.

154. The witness gave his view, as an accountant, on how payments under the recharge agreement should be treated. He stated that the payment from the employee was one part of the contribution for equity, and the payment from the subsidiary is another part, but they both form part of the contribution for shares in the parent company. This was also logical from the employer subsidiary's perspective; the employer received the benefit of the employee's services, and part of the remuneration payable to the employee was the delivery of the option shares. This was an expense in the subsidiary company, and the expense was recognised by the recharge payment from the employer to the parent.

155. The witness further stated that the fact that the recharge payment is calculated by reference to the market value of the share at the precise moment of issue indicated strongly that the payment is a contribution for shares. The Appellant's agents went to considerable

effort to calculate exactly the value foregone, almost within 15 minutes of when the issue takes place. Nothing else (such as management charges) was charged by the Appellant, which only obtained the difference between the strike price and the market value. The witness further opined that even if I was to find that the recharge payments were not payments for shares, they were not payments for the provision of goods or the provision of services, or for selling an asset. He stated that he could not see any circumstances in which it could properly be said to be income.

156. The witness further testified that even if there had been an error in the manner in which the Appellant's accounts were presented, this would not affect the accounts giving a true and fair view. An auditor certifying that accounts give a true and fair view does not mean that each line item has been examined, and many different presentations are available for many items, so accountants can and do differ on the forms of presentation. He stated that in order for something to not be a true and fair view, it has to be material, which can depend on the view of the auditor but is generally a percentage of either net assets or turnover. He testified that something material in this context requires that that the statements be "*fundamentally misleading*".

157. The witness was then referred to the report of the Respondent's expert accounting witness, . His view was that the example given by of only taking the employees' contribution to share premium was distinguishable from the instant appeals, as did not have any recharge agreements in place. Therefore, was not, in his view, comparing like with like. The witness further stated that he had not previously encountered the word "*chargeback*" used by to describe the payments received by the Appellant from subsidiaries under the Recharge Agreements.

158. In relation to view that an option could be considered a gamble on the ultimate exercise price, and that the risk could be eliminated in frictionless financial markets, the witness opined that this was a theoretical option. There were so many variables, including whether the employee stayed with the company, that there was no market to sell the option.

159. In relation to ██████ assertion that "*In terms of a chargeback, the most obvious starting point is the amount of compensation expense associated with the grant of stock options, that is the fair value of the options*", the witness disagreed that the Black-Scholes exercise was the obvious starting point. In his view, the recharge and the Black-Scholes value were completely separate amounts. Black-Scholes is an attempt to value the cost of the option in the subsidiary as an expense over the period of employment; the recharge is in relation to the market price of the shares. He reiterated that the Black-Scholes value will exist no matter what happens, whether or not the recharge ever comes into play.

160. In relation to ██████ assertion that "*arguably, a subsidiary could reimburse the parent for the expense that it incurred in granting stock options to employees*", the witness stated that this was different to a recharge for the issue of shares. If there was an agreement to pay the Black-Scholes amount, the witness accepted that an argument could be made that such an agreement could go through the profit and loss account. However, his view was that it would be more correct to treat it as a repayment of the 'fictional' investment by the parent in the subsidiary, required by IFRS 2. The witness stated that he could not see how this could be properly considered as income.

161. In cross-examination, the witness accepted that the Appellant had accounted for the grant of stock options by debiting the profit and loss by the Black-Scholes value, and crediting the equity for ███. His view was that this was not the correct accounting treatment; he believed it would have been more appropriate to debit the expense as investment in subsidiary and credit equity. It was not an expense of the parent company but was an expense of the subsidiary employer. This treatment was, in his view, in accordance with IFRS 2 and the IFRIC.

162. The witness accepted that the ███ which he had discussed in his evidence in chief had been incorporated into the IFRS, and therefore didn't add anything to the interpretation of the latter. He further accepted that paragraphs 43A and 43B, which dealt with the entity receiving the goods and services, were not relevant to an analysis of the parent company's

accounting treatment. He did not agree with [redacted] that paragraphs 7 and 8 of IFRS 2 applied to the parent company as well as to subsidiaries; his view was that it applied to the latter only.

163. The witness further accepted that the Appellant's financial statements included an audited balance sheet and the notes thereto. He further accepted that the Appellant's profit and loss account was reflected in the balance sheet, and within that profit and loss figure was the net position having taken into account the recharge payments and the Black-Scholes expenses.

164. The witness further accepted that it appeared from the Form 10-Ks and the Modified US GAAP accounts filed in the CRO that while a Black-Scholes valuation was used in the consolidated financial statements for [redacted] the fair market value of the RSUs was determined based on the market value of the Appellant's shares on the date of the grant.

F. Evidence given on behalf of the Respondent

165. [redacted] gave expert accounting evidence on behalf of the Respondent. He confirmed that his Expert Witness Report was his evidence. He was [redacted] [redacted], focussing on US GAAP and international accounting standards.

166. The witness confirmed that his opinion was that the Appellant correctly recorded the payments it received under the recharge agreements, and that the income the Appellant recorded from its subsidiaries constituted income. He explained the reasoning and logic behind the Black-Scholes method for determining the fair value of stock options on their grant date. He further testified that the Black-Scholes methodology only applied to stock options; it did not apply to RSUs.

167. The witness stated that the grant of a stock option was best understood as a gamble between the recipient and the issuing company, and that it was important to understand that the risk could be eliminated in frictionless financial markets.

168. The witness confirmed that the Appellant's financial statements were prepared in accordance with Irish GAAP, together with the provisions of the Companies Acts, 1963 to 2013. In order to ensure that none of his conclusions were affected by differences between US GAAP and Irish GAAP, he compared the owners' equity section of the financial statements under FRS (the Parent) and US GAAP (the consolidated accounts). Note 4 of the financial statements described movements in owners' equity.

169. In relation to Mr ███'s view that the Appellant's treatment of the stock-based compensation expense was an incorrect treatment, the witness stated that he was not in the business of second guessing the company or its auditors. His view was that what they had done was in accordance with GAAP. He further pointed that accounting standards deal with financial reporting to the public, and did not deal with internal accounting for transactions that might occur within an enterprise. In his opinion, the fact that every enterprise potentially had its own completely different set of recharge agreements, and because it probably wasn't the role of financial reporting standards to address something within an enterprise, meant that the international accounting standards board probably considered it inappropriate to consider transfer pricing within multinationals.

170. He further pointed out that paragraphs in IFRS 2 with letters after the paragraph number, such as 43A or 43B, were inserted into the Standard after the standard had been written. He testified that the guidance in IFRIC 11 had been incorporated into IFRS 2 in June of 2009, and thereafter IFRIC 11 was obsolete.

171. The witness further referred to the Objective of IFRS 2 as recorded in paragraph 1, which was to specify the financial reporting by an entity when it undertakes a share-based payment transaction. In particular, it requires an entity to reflect in its profit or loss and financial position the effects of the share-based payment transactions, including expenses

associated with the transactions in which share options are granted to employees. The witness stated that it was clear from this that IFRS 2 applied to both the RSUs and to stock options.

172. Turning to paragraph 3A, he noted that this stated that a share-based payment transaction may be settled by another group entity on behalf of the entity receiving or acquiring the goods or services. He said that this covered the situation in the instant appeals, where a parent company was granting options and other stock-based compensation to the employees of a subsidiary. His view was that subparagraph 3A(a) was intended to cover a situation where a subsidiary was publishing financial statements and obtaining an opinion that those financial statements had been prepared in accordance with IFRS. The subparagraph required such a subsidiary to book compensation expense in its accounts, notwithstanding the fact that the shares were being granted by another entity.

173. Paragraph 3A(b) then provided that paragraph 2 applied to an entity that has an obligation to settle a share-based payment transaction when another entity in the same group receives the goods or services, unless the transaction is clearly for a purpose other than payment for goods and services supplied to the entity receiving them. The witness stated that this meant that IFRS 2 applied to the Appellant as the company settling the share-based transaction. The parent company had issued share-based payments in the form of stock options or RSUs to employees of its subsidiary and so, in the absence of anything else, the parent company should reflect those payments in its financial statements, and could potentially be reflected as share-based compensation.

174. Turning to paragraphs 7 and 8 of IFRS 2, the witness stated that they applied to the Appellant and required it to book share-based payment transactions as stock-based compensation expense. This was mainly because it was impossible to measure the actual services being received from the employee, so instead the fair value of the compensation offered by the parent is used to represent the value of the employee's services. Paragraph 7 provided that on receipt of goods or services, an entity had to recognise a corresponding increase in equity if the goods or services were received in an equity-settled share-based

payment transaction, or a liability if the goods or services were acquired in a cash-settled share-based payment transaction. In other words, the employee services were being booked by the Appellant as an expense, and this was in accordance with IFRS 2.

175. In relation to paragraph 10 of IFRS 2, the witness stated that the Appellant was getting services from the subsidiaries' employees, because it was the ultimate beneficiary of the employment services as the ultimate parent entity of the subsidiaries in the group.

176. The witness further stated that paragraph 43C meant that the Appellant was required to recognise these compensation payments in its accounts as equity-settled share-based payment transactions. The witness further testified that the accounting treatment adopted by the Appellant in relation to the initial expense on the grant of share options or RSUs was in keeping with the standard and the spirit of IFRS 2. The relevant paragraphs of IFRS 2 and the guidance in relation thereto were concerned with the need to account for what was going on at a subsidiary level; if the subsidiary was publishing financial statements, an amount of expense should be booked in the subsidiary's financial statements, and that should be reflected in the parent's equity in the subsidiary.

177. In relation to the recharge payments, the witness testified that his analysis showed that the Appellant had, in its parent company financial statements, accounted for stock options in accordance with GAAP. He further stated that the recharge payments were best understood as being independent of accounting for stock-based compensation. He testified that in terms of the chargeback amount, the most obvious starting point was the amount of the compensation expense associated with the grant of stock options. By granting the options, GAAP required the Appellant to amortise the fair value of the options over the vesting period. This amortisation was an income statement item.

178. He further testified that a subsidiary could arguably reimburse the Appellant for the expense the latter incurred in granting stock options. This would constitute revenue on the income statement of the parent to offset the expense incurred by the parent in granting the options. Therefore, the witness's opinion was that the recharge payments constituted income

statement items. Using the same logic, a chargeback for the grant of stock options to employees based on the intrinsic value of the options would also constitute an income statement item. The recharge payments were changes in assets and liabilities from non-owner sources, and were therefore income. Excesses between the grant date amounts and the recharge amounts arose from the Appellant's unhedged position. If the Appellant purchased shares for their fair value on the date an RSU was granted, retained those shares, and then transferred them to the employee on the vesting date, there would be no gain or loss. Any repayment charge could only result from an intrinsic value being greater than zero, for example by reason of an increase in the stock price; in other words, the Appellant would make a gain by virtue of its not having purchased a share on day one. The witness's opinion was that this was a non-owner source of income in the hands of the Appellant.

179. The witness further testified that this was standard accounting practice. If the parent company incurred legal expenses that were subsequently reimbursed by a subsidiary, the items would appear in the parent's income statement. He further stated that his view in this regard was supported by the first quarterly filing made by ██████████ following the completion of the ████████████ divestiture.

180. The witness reiterated the conclusions he had reached in his expert report, namely that:-

(i) The Appellant had correctly accounted for stock-based compensation expenses in its audited financial statements;

(ii) The essence of stock-based compensation is that a option is granted to an executive and it is the fair value of the shares on the grant date that is a primary determinant of the fair value of the options on the grant date;

(iii) The accounting involves estimating the fair value of the stock option on the grant date and amortising that amount as compensation expense during the vesting period;

(iv) On the exercise date, the proceeds from the option holder are recorded as paid-in capital arising from the exercise of the option. The amount the Appellant received on the exercise date reflected a legal agreement to sell

the shares to the option holder at some future date for consideration that reflects the share price on the grant date; and,

(v) Any subsequent chargebacks constitute additional income to the Appellant.

181. The witness further confirmed that IFRS 2 required the market value of the stock on the grant date to be used to determine the amount of stock-based compensation in the case of RSUs, and stated that the biggest determinant of the option price on the grant date of an option was also the fair value of the shares on that date. This treatment was consistent with the approach adopted by ██████. The witness agreed with the Appellant that the repayment by subsidiaries of the intrinsic value was not in any way a distribution.

182. The witness was referred to the Appellant's 2017 financial statements, which had been prepared in compliance with the Companies Act 2014 and FRS 102. Share premium was recorded in the Balance Sheet as being $4.84 billion. Note 15 then stated that the Share Premium was $5.678 billion. It stated that this total amount was presented in the balance sheet, partly in the Share Premium reserve and partly in the Profit and Loss account reserve caption in accordance with the Appellant's accounting policy. It further stated that the amount presented in the Profit and Loss reserve related to the excess of the amounts recharged to subsidiaries over the accounting amount recorded during the vesting period of the share options whose exercise resulted in the share issuances. The witness testified that the difference of some $821 million was probably quite close to the sum of the recharge payments. He said that it appeared that the footnote had potentially been prepared in anticipation of the rectification that would take place in 2019.

183. The witness further confirmed that the treatment of share-based compensation, namely the grant of share options, the grant of RSUs and the respective lapsing or vesting of those, was materially the same under US GAAP as it is under IFRS 2 in Ireland. Each accounting standard would result in very similar outcomes.

184. In cross-examination, the witness agreed that there was no IFRS dealing with the recharge payments; accounting standards steered clear of intra-group matters. Intra-group

transactions were effectively eliminated in consolidated accounts. The witness further accepted that in this jurisdiction, tax returns were made on an individual entity basis. He also accepted that transactions which were treated the same way for accounting purposes could be treated very differently for tax purposes.

185. The witness further accepted that the decision of the First Tier Tax Tribunal in ***NCL Investments Ltd –v- HMRC* [2017] UKFTT 0495 (TC)** was good authority for the proposition that there were at least three permissible methods of treating a Black-Scholes type of recharge for accounting purposes, depending on the nature of the recharge agreement.

186. The witness further clarified that his evidence was not that the Appellant received a direct benefit from the services supplied by an employee working for a subsidiary; the benefit he had referred to was very much indirect.

G. <u>Submissions of the Appellant</u>

(a) General submissions

187. Counsel for the Appellant began by submitting that it was critical to bear in mind that the Appellant was the [redacted]-listed parent of the [redacted], and was therefore SEC regulated. Because SEC regulations applied to the Appellant, the listing affected everything that was done, including its responsibilities, the way it conducted its business and the way that its directors made decisions. The fact that the Appellant was also registered and resident in Ireland meant that it also had Irish legal requirements, and the board minutes contained reference to the duties of the directors under Irish law.

188. SEC regulation had a major impact on the financial governance of the Appellant including the requirement to file a Form 10-K annually and Form 10-Qs on a quarterly basis. This was a major focus for the Appellant in terms of its financial regulation and governance.

189. In addition, the Appellant was, as an SEC regulated body, required to make regular communications to the market and to investors. Thus, once the directors had made a decision in relation to a potential spin-off, that information had to be released to the market. Similarly, Ms ████ had testified that a decision made on any material matter had to be disclosed immediately once the decision was made.

190. Furthermore, the availability and the nature of the Stock Incentive Plan was also driven and affected by the size of the Appellant and the fact that it was a listed company. The evidence was that such plans were common in similar global companies, and companies that did not have such a plan were at a disadvantage in attracting and retaining key employees and personnel. Counsel further pointed out that the Stock Incentive Plan was voted on by the shareholders as was the buyback programme.

191. Counsel further submitted that it was necessary to bear in mind that the Appellant was the holding company for the group. It is not a trading company and its business was the holding of the shares in the global group through its immediate subsidiary and all of the sub-subsidiaries. Therefore, its business was the making of investments by holding the shares in the underlying companies.

192. She submitted that, in common with many other public limited companies, the Appellant actively engaged in the management of the group. It was the ultimate decision-making body and the role of its board was far-reaching. It had a role in setting the purpose and strategy of the group, and in overseeing risk. It further had a role in monitoring performance and engaging with stakeholders. Ultimately, the board of the Appellant was accountable for the long-term sustainable success of the ████ Group, and that was in general measured by the share price.

193. Counsel submitted that the Appellant discharged these functions by taking decisions at board meetings. There were at least six board meetings per annum and they were attended by the directors as well as by the section 16 Officers, who were generally heads of the

different global business units. The section 16 Officers did not vote at board meetings but attended to provide information and updates on management progress.

194. Counsel submitted that the way in which the Appellant actively managed its investments was through its Service Agreement with [redacted]. She submitted that this was of importance in the appeals because the Respondent was seeking to make an argument that the Recharge Agreement was in some way a service. The Appellant's Service Agreement dealt with services of every possible kind, including corporate executive, business development and human resources. The human resources services were expressly stated to include the administration of benefit in equity compensation plans. Therefore, any administration or service of the Stock Incentive Plan was dealt with under the Service Agreement.

195. The Appellant's accounts clearly recorded the Services Agreement n being built for in both expense and income through a separate line item, the stewardship services fee. Counsel submitted that this was clearly distinct from the Recharge Agreement, which was not a service.

196. Counsel further submitted that the evidence of Mr [redacted], Ms [redacted] and Mr [redacted] clearly showed how the Appellant's board reached its decisions; it did so through a process of evaluation, having set strategic plans in the first instance. A constant evaluation process was carried on by the board, but only when the directors finally reached a decision or a consensus was a decision reported to the market.

197. Counsel submitted that I was required to determine the legal nature of the Recharge Agreement. She submitted that this determination could not be affected or influenced in any way by the accounting treatment. She pointed out that [redacted] had accepted in cross-examination that the accounting treatment would follow the legal treatment, and could not change it. She submitted that this had to be correct, because otherwise it would be possible to change a legal agreement simply by treating it differently in the accounts; this would obviously have the potential to give rise to anti-avoidance. Counsel further submitted that the import of the evidence given by Mr [redacted] and [redacted] was that while there were a

number of different treatments or presentations of transactions from an accounting viewpoint, there was only ever one correct presentation for tax purposes - something was either taxable or it was not.

(b) The Recharge Payment Issue

198. Counsel submitted that the Appellant's position in relation to the Recharge Agreement was very simple; it governed the payment for the issue of shares by the parent to the employees of its subsidiaries. The agreement was expressly designed to ensure that the Appellant received the market value for its shares. The market value was received from the employee on foot of the share option and from the subsidiary employer on foot of the Recharge Agreement. She further submitted that there was a logic to this analysis; the subsidiary employer got the benefit of the employee's work and services, so it was appropriate that the subsidiary pay for them.

199. Counsel further submitted that it was irrelevant that the employee might not be aware that the subsidiary employer was providing consideration for the grant of the share. The Appellant received the recharge payments on foot of its contractual entitlements under its agreements with its subsidiaries. There was no legal requirement or regulation which stipulated that the consideration for a share had to come from one source or pursuant to one agreement; it was what the Appellant actually received for its shares which was of importance. This was logical from the capital maintenance perspective, because the structure of the 1963 Act and now the 2014 Act is to ensure that whatever value a company gets for its shares is what is maintained for capital maintenance purposes.

200. Counsel submitted that there was nothing else in the Recharge Agreements that could plausibly be identified as a service. There was simply one contractual promise that if a share was issued, the subsidiary employer would pay the value or the price that was agreed.

201. Counsel further submitted that the evidence in relation to the Black-Scholes valuation of the grant of a share option, or the fair value at the grant date in the case of an RSU, was largely irrelevant. These valuations were done solely for accounting purposes, and were done whether or not the option was ever exercised or the RSU ever vested; the valuations remained in the company's books and accounts irrespective of whether or not a share was actually issued. In so far as the tax treatment of recharge payments was concerned, the method of accounting for share-based compensation did not affect in any way the nature of the Recharge Agreement.

202. Counsel submitted that the Respondent's position in relation to the recharge payments was, in effect, that the recharge payments were not related to the issue of shares; the subsidiary company did not receive the shares and so it could not pay for the shares. Counsel submitted that this was simply incorrect; there is no requirement in law that you can only pay for something if you actually receive it. She submitted that the Respondent was mistaken in interpreting the legislation as saying that only the amount paid by the person who receives the share is to be accounted for as share capital.

203. Counsel submitted that this was demonstrated by the fact that in the [redacted] spin-off, the value for the issue of the [redacted] shares to the [redacted] shareholders did not come from the shareholders themselves; instead, it went from [redacted], which transferred its [redacted] business into the [redacted] spin structure. Nonetheless, the shares in the new company were received by the [redacted] shareholders.

204. Counsel further submitted that if the Respondent's position was correct, the identity of the legal holder of the shares would be of significance. The evidence of Mr [redacted] was that 99% of the Stock Incentive Plan shares were held by [redacted] on behalf of the [redacted], which held the shares on behalf of the employee recipients.

205. Counsel submitted that the Respondent appeared to assume that if the recharge payments were not share premium, they must automatically be taxable revenue. The Respondent submitted that this was on a first principles basis, but the Appellant submitted

that the Respondent had failed to identify any first principle. It is not the case that the mere receipt of something meant that it was subject to taxation; it all depended on the nature of what was received. Counsel submitted that [redacted] had accepted in his cross-examination that just because something was required to be treated as income in an income statement for accounting purposes did not mean that it was taxable as income.

206. Counsel stated that the Respondent was now arguing that the recharge payments were payments made in return for a service. She stated that the Respondent had not really identified the service, other than to say that it was akin to any other ordinary, intra-group contractual arrangement. Counsel submitted that this was illustrated by hypothetical example of a firm of solicitors giving legal services to a subsidiary, which are paid for by its parent company. If the subsidiary then reimburses the parent company, the repayment was not income in the hands of the parent company. In the alternative, if the parent company charged a markup in addition to the amount being reimbursed, the amount of the markup would be income in its hands. It all depended on the nature of the agreement.

207. Counsel noted that the Respondent's written submissions accepted that the accounting treatment was not determinative, but contended that it was the appropriate starting point. Counsel submitted that this was simply incorrect when considering the legal nature of the Recharge Agreement. The Appellant was not a trading company, so the starting point was not section 76A.

208. Counsel noted that the Respondent had submitted that there was no legal obligation on the Appellant to put the Recharge Agreements in place. This was entirely accepted by the Appellant but it did not follow that the fact that the Appellant had elected to legally put an agreement in place resulted in the proceeds of that agreement being liable to tax. The Respondent had further stated that there is no legal obligation to fix the recharge amount at the difference between the market value and the strike price. Again, this was accepted by the Appellant; there is no legal obligation to do so, it was simply a contractual agreement between the parties.

209. It had been submitted on behalf of the Respondent that there was no difference between the steps taken by the Appellant to issue shares to employees of subsidiaries and other services supplied to the subsidiary by its parent. Counsel submitted that this approach was fundamentally mistaken.

210. Turning to the Stock Incentive Plan, Counsel submitted that the Appellant had chosen to put the SIP in place; it was common for large companies to do so which meant there was a competitive commercial imperative on the Appellant to do likewise. Counsel submitted that the [redacted] Proxy Statement showed that there was shareholder approval for the SIP and the buy-back plan was also aligned in the context of an overall strategy. It is not the case that issues of shares were matched by buybacks on a share for share basis; there is simply an internal logic to issuing shares of market value and then buying back those shares at market value to ensure that there was not over dilution.

211. Counsel submitted that under the SIP, the employees of subsidiaries were eligible but not entitled to receive share-based compensation. The Plan was administered by the Compensation and Human Resources Committee, which was appointed by the board and to which the board had delegated the necessary authority. The Committee had the power to grant share options in particular and restricted stock units; the grant of the option conferred the right on an employee to acquire an agreed number of shares in the Appellant after the passing of an agreed period of time, the vesting period, which is normally four years. Normally the strike price was the market value of the shares as of the date of the grant. The Committee also had the power to award RSUs, where employees are issued with the right to have shares delivered to them on the expiry of the vesting period without having to make any payment in respect of those shares.

212. Section 3.1 of the SIP provided that the Committee or, to the extent required by applicable law, the Board had the authority, in its sole and absolute discretion and subject to the terms of the Plan, to select employees to receive awards under the Plan, and to determine the form of the awards, the number of shares subject to each award, all the terms and conditions of the awards, including without limitation the conditions in the exercise vesting,

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the designation of stock options and the circumstances under which an award might be settled in cash or shares could be cancelled forfeited or suspended, and the terms of each Award Certificate. Counsel submitted that was absolutely clear from this that, contrary to what had been suggested by the Respondent, these decisions were not made by the employer subsidiaries but were instead reserved exclusively to the Committee and the board.

213. Counsel further submitted that it appeared that the Respondent was seeking to suggest that the Appellant in making the awards was somehow facilitating or allowing commitments of the employer subsidiary companies to be fulfilled. She stated that this was flatly contradicted by the evidence; it was clear from the terms of the SIP that the only person who could make the awards was the Appellant.

214. Counsel submitted that the position in this regard was supported by the evidence of Mr ■■■■, who had stated clearly that the process of granting awards began with the Appellant's board and flowed down; his evidence made it clear that decisions in relation to the awards were not made by the subsidiary employers. Ms ■■■■ had given like evidence, indicating that the SIP process began with board approval of guidelines which were suggested by the HR team with the assistance of outside consultants. Once the guidelines had been approved by the board, the subsidiaries made recommendations. Approval of these recommendations was anything but a formality; the recommendations flowed up the management chain and could be changed at any point. Her evidence is clear that there was no commitment by the employer subsidiary unless and until a recommendation had been approved by the Appellant's board. She had further rejected the assertion that once board approval was in place, the subsidiary employer made a commitment to its employee. It was the Appellant that committed to giving the shares to the employee. She further stated that was incorrect to state that the Appellant was facilitating the subsidiary and the making of the awards.

215. Counsel further submitted that the minutes of the meeting of the Compensation and Human Resources Committee held on ■■■■■■■■ ■■■■ were of relevance. A significant number of senior Officers of the Appellant were present at the lengthy meeting. The

attendees had reviewed trends in executive compensation before approving certain terms and conditions substantially in the form presented to and reviewed with the Committee at the meeting. The resolutions of the Committee made it absolutely clear that there had been a detailed consideration, followed by a review and finally an approval. The Committee recommended that the Appellant's board approve and amend the restated Stock Incentive Plan and submit the amended and restated Plan to shareholders for approval. The Committee had further recommended to the board that the compensation discussion and analysis be included in the Appellant's annual report and Form 10-K for the year ended [redacted] [redacted] the proxy statement for the [redacted] annual general meeting.

216. Counsel submitted that all of the evidence established that the SIP was a matter of the board's decision in the matter for which the board set the parameters. It could in no way be said that an employer subsidiary could decide who received an award; it could make recommendations but could do nothing else to implement those recommendations. The Respondent sought to recharacterise the position in support of an argument that the recharge payments or payments for a service received, but Counsel submitted that this was flatly contradicted by the evidence before me.

217. Turning to the Recharge Agreement, Counsel submitted that I should have regard to the evidence given by Mr [redacted] and Ms [redacted] in relation to their understanding of the Recharge Agreement. Their evidence was not relevant to the determination of the legal effect of the Agreement, but it did show that the Appellant had consistently believed and understood that payments made under the Agreement were payments made for the issue of shares. It was not at all the case that the Appellant was seeking to recharacterise its view of the Agreement. This was borne out by the Appellant's tax returns, which were always made on the basis that the amounts received under the Recharge Agreement were not taxable. Whatever about the accounts submitted to the Respondent with the tax return, the returns themselves clearly indicated that, as far as the Appellant was concerned, the receipts were not taxable income.

218. The Appellant accepted that errors were made in the Form B5s submitted, and the recharge payments should have been included in the share premium. It was relevant also that the evidence of Ms ███, who organised the completion of the Form B5s, was that she was completely unaware of the Recharge Agreement.

219. The evidence of Mr ███ was that the employer subsidiaries wanted to have stock provided to incentivise their employees and so they agreed to make up the difference between the grant or exercise and the market value. His understanding, which he accepted was from a layman's perspective, was that the Recharge Agreement was a tripartite contractual structure and that the payments made thereunder were for the issuance of shares. His understanding was that the employer and the employee were required to make payments in order for the shares to be issued. The Appellant had committed to issuing the shares to the employees if it received payment from the subsidiaries.

220. Similar evidence had been given by Ms ███, who testified that her understanding was that the recharge payments were for the issuance of shares. The payments under the Agreement were to make the Appellant whole for the capital issued. She had also expressly rejected an assertion that the Black-Scholes estimate in respect of share options would ultimately be part of the recharge amount.

221. Counsel referred me to the recitals contained in the Recharge Agreement and submitted that it was clear therefrom that the Agreement was part and parcel of the SIP. It was important to note that the sixth recital recorded that the Appellant had determined that if the subsidiary employer did not bear the costs of the employees' participation in the SIP, the Appellant might refuse to allow employees to participate in the Plan.

222. Counsel submitted that Clauses 2 and 3 were key to the interpretation of the agreement. The first recorded that the Appellant had agreed to make or arrange for the issuance of ordinary shares in the Appellant in connection with stock awards made to employees under the SIP. Clause 3 then went on to state that:-

"In consideration of the undertaking by Parent to make or arrange for the provision of ordinary shares hereunder to Employees, Employer undertakes that, after the relevant Valuation Date in respect of any Award, it will, after receipt by Employer of an Invoice, pay to the Administrator an amount equal to the Value of the Awards granted to the Employees. Employer's undertaking in the preceding sentence shall be effective from and after the date any Invoice is issued to Employer. The amount of the payment to Parent for the cost of Awards shall not be affected by the fact that the Award was granted prior to the date this Agreement is effective or by any tax withholding obligation of Employer with respect to the Value of the Awards, even if the obligation are satisfied by withholding a number of otherwise deliverable ordinary shares of Parent."

223. The Agreement was governed by the laws of Ireland and Counsel submitted that it simply did two things. Firstly, the Appellant agreed to arrange or issue shares in connection with SIP awards to employees of the subsidiary. In consideration of that agreement, the subsidiary agreed to pay the Appellant the difference between the strike price and the market value. There was nothing in the Agreement to indicate that a service was being provided by the Appellant to the employer or to anybody else.

224. Counsel accepted that an employee who had received an award of shares would still be entitled to receive those shares even if the subsidiary employer defaulted in the payment required under the Recharge Agreement. Counsel submitted that if the Appellant sought to recover the unpaid monies, it would do on the basis that there had been a breach of the obligation to pay the monies due, and those monies had only become due because the Appellant had issued the shares.

225. Counsel submitted there is nothing in the Agreement to indicate that any other service was provided by the Appellant to the subsidiary employer. The Appellant did administer the SIP but that service was provided for under section 3.3 of the Services Agreement. The fact that the sum payable under the Recharge Agreement was calculated by reference to the difference between the market value in the strike price, and not by reference to any service

provided, further confirmed that the payments under the Agreement were solely connected with the issuing of the shares.

226. Counsel next referred me to section 62 of the Companies Act 1963, which provides that where a company issues shares at a premium, either for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to the share premium account. Counsel submitted that the section clearly focused on the value received by the issuing company, and there is no suggestion that the share premium was limited to amounts received from the person who received the share.

227. Similarly, section 71(5) of the Companies Act 2014 provided that:-

"Subject to sections 72, 73 and 75, any value received in respect of the allotment of a share in excess of its nominal value shall be credited to and form part of under nominated capital of the company and, for that purpose, shall be transferred to an account which shall be known, and in this Act is referred to, as the "share premium account"."

228. Counsel submitted that it was again quite clear that the focus was on the value received by the issuing company in respect of the share. Section 82 of the 2014 Act also made clear that the value did not have to be received from the person to whom the share was issued; in the context of financial assistance for the acquisition of shares, section 82(6)(f) provided that subsection (2) did not prohibit:-

"… The provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription of or for shares to be held by or for the benefit of employees or former employees of the company or of any subsidiary of the company including any person who is or was a director holding a salaried employment or office in the company or any subsidiary of the company…"

229. Counsel further referred me to section 2(3) of the Companies (Amendment) Act 1983, and its replacement, section 64(3) and (4) of the 2014 Act, which now provide that:-

"(3) For the purposes of this Part a share in a company shall be taken to have been paid up (as to its nominal value or any premium on it) in cash or allotted for cash if the consideration for the allotment or the payment up is –

(a) cash received by the company; or

(b) a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid; or

(c) the release of a liability of the company for a liquidated sum; or

(d) an undertaking to pay cash to the company on demand or at an identified or identifiable future date which the directors have no reason for suspecting will not be complied with.

(4) In relation to the allotment or payment up of any shares in a company, references in this Act, other than in section 69(12)(c), to consideration other than cash and the payment up of shares and premiums on shares otherwise than in cash include references to the payment of, or an undertaking to pay, cash to any person other than the company."

230. Counsel submitted that this was clearly a very broad provision and meant that shares issued to employees under the SIP would be considered paid up even if the subsidiary employer had not paid the amount due under the Recharge Agreement.

231. Counsel next referred me to paragraph 8.152 of Courtney's *The Law of Companies* (4th ed.), which stated:-

"To constitute company capital, the consideration paid to companies need only be 'received by the company' in consideration for the shares. The test is not that the consideration is paid to the company in consideration for the allotment. Accordingly, it follows that where Party A pays consideration to a company for shares, but the company allots the shares to Party B, then that consideration will be company capital since the test is that the consideration is received by the company. It is not important who pays the consideration; provided it is received by the company in return for the allotment, that will suffice."

232. Counsel submitted that this was the only test for determining what is received on the issuing of shares; there was no different test for tax purposes. Accordingly, if a payment came within the company law test and definition, that decided the issue from a tax perspective.

233. Counsel next referred me to ***Lowry –v- Consolidated African Selection Trust Ltd* [1940] A.C. 648**, which considered whether a company which had issued shares to its employees at par, a discount to the market value, could then claim a deduction as a trading expense. Viscount Maugham stated at page 660-1 that:-

> *"In my opinion this appeal largely turns on the nature of the right of a company to issue shares at any price and on any conditions it thinks fit, provided that it does so in good faith for the benefit of the company and does not issue them at a discount... Upon an issue of shares the assets of the company are increased by the amounts obtained from the subscribers. These amounts are obviously not profits or gains of the trade, and they are not liable to be brought into the accounts for income tax. It may be said that these amounts are of the nature of capital, but I prefer for the present purpose to say that beyond all doubt they are not profits and gains arising or accruing from a trade, for that goes directly to the question which arises under Schedule D. What I have said is equally true whether the shares are allotted at par or at a premium. The sum of £11,625 which in this case the company might hypothetically have received for premiums was not an item in its profits and gains. In the ordinary course such a sum would be carried to reserve account in the balance sheet; but carrying it to some account the profit and loss account would not have affected the matter. It would not be an item of profit of the trade. Indeed the issue of shares by limited company is not a trading transaction at all. The corporate entity becomes pro tanto larger; but the receipts of the trade on the one hand and the amount of the costs and expenditure necessary for earning these receipts on the other remain unaltered; and it is the difference between these two sums which is taxable under Schedule D."*

234. Counsel submitted that the Respondent accepted that if something is a payment for the issuing of shares, it is not taxable because it is making the capital of the company larger and it cannot be a trading transaction.

235. Counsel stated that the Appellant fully accepted that there had been a very significant error in relation to the capital of the Appellant in the Form B5s. Counsel referred me to the evidence of Mr ███ to the effect that the cancellation of shares on the execution of the ███ would not have altered the amount of the share premium; the share premium in respect of those shares travelled separately and independently of the shares which were cancelled. Counsel submitted that this was reflected in the entries for share premium in the Appellant's ███ and ███ accounts. The witness's uncontested evidence was that the Appellant's share capital was unaffected by the cancellation of the shares, and the rectification was a legal requirement.

236. Counsel further pointed out that no consideration was paid by an employee when shares were issued following the vesting of an RSU. There was no suggestion that they were issued at a discount and so the 20c par value had to have been paid from somewhere. Counsel submitted that the only possible source for the payment of the par value was payments made under the Recharge Agreement, and if 20c of that payment was paid for the par value, the rest of the payment had to be a payment for the issuing of the share.

237. Counsel submitted that the Appellant's accounts and the accounting treatment could not alter the proper construction of the contractual arrangement; this was the evidence of Mr ███ and ███ had fairly accepted that this was the case. While there were a number of different ways a matter could be recognised or presented in accounts, there was only one possible treatment for tax purposes.

238. Counsel submitted that the cases relied upon by the Respondent in relation to the accounting treatment were distinguishable because they referred to trading companies, which the Appellant was not.

239. Counsel further submitted that [redacted] was probably correct in his expert evidence that the Black-Scholes treatment on the grant date went into the income statement, and therefore by analogy the chargeback received also went in to the income statement. However, while it might be possible to ascertain the correct accounting treatment by analogy, the same approach could not be applied for tax purposes.

240. Counsel submitted that the evidence in relation to the operation of IFRS 2 established that there were a number of ways in which the Black-Scholes estimate could be treated. While [redacted] had given his view in relation to the correct treatment, he had accepted that a different approach could be taken, with the contribution from the parent company being taken into the employer subsidiary, and any repayment of the Black-Scholes could be considered a repayment of that contribution. However, this was irrelevant to the issue of the Recharge Agreement, because the Black-Scholes treatment had to happen, for accounting purposes, at the grant. This did not however mean that there had to be an exercise of the option. IFRS 2 required the recognition of the grant of the option in the accounts but it was common case that there was no IFRS or other accounting standard governing the recharge arrangement. Ultimately, the accounting treatment depended on the nature of the transaction.

241. In summary, Counsel submitted that payments under the Recharge Agreement were payments for the issuing of shares, and accordingly the amounts had to be treated as share capital or share premium.

(c) Expenses of Management

242. Counsel reiterated that it was essential when considering this issue in the context of section 83, to ask what the Appellant was managing. The Appellant, as a holding company, was managing its investments in all of the subsidiaries and had to take decisions accordingly. Counsel submitted that the Respondent was incorrect in contending that references to subsidiaries meant that certain expenses could not be expenses of management. Because the Appellant was managing the subsidiary companies, it was not at all surprising to see expenses

which related to things that might affect those subsidiaries; in relation to insurance, for example, the Appellant was not insuring each individual subsidiary but was instead picking up any excess claim that might not be dealt with locally, or covering claims in respect of matters such as employee culture which had come down from the Appellant's board in the first instance.

243. Counsel referred me to ***Sun Life Assurance Company –v- Davidson (IOT)*** **[1968] AC 184**, where Lord Reid held that, looking to the purpose and content of the legislation, "*expenses of management*" had a fairly wide meaning so it appeared to him that expenses of investigation and expenses of 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.

244. Counsel further referred me to the decision in ***Hibernian Insurance Company Ltd –v- Macuimis (Inspector of Taxes)*** **[2000] 2 IR 263**, where Carroll J held in the High Court that the phrase "*expenses of management*" did not have a technical or special meaning, and were ordinary words whose application should be determined on a broad view of all relevant matters. Carroll J applied ***Sun Life*** and held that expenses so closely linked to a purchase transaction "*that they would naturally be considered as items in the total cost of a purchase*" were not expenses of management. The correct distinction was as between expenses of management as distinct from expenses by management. Simply because a sum was spent by management did not mean that it was a proper deduction; it had to be an expense of management of the investments concerned, and the court distinguished between the management of existing investments and the disposal of an investment or the acquisition of a new investment.

245. The Supreme Court upheld the decision of Carroll J, and said that a 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. Murphy J summarised the applicable caselaw saying:-

"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."

246. Murphy J pointed out that what was being attempted in the case before him was to allow a revenue deduction for a capital expense which would fly in the face of the structure of the tax legislation.

247. Barron J had approached the issue from a slightly different perspective, pointing out that an investment company is not taxed on the basis of trading and so it was inappropriate to consider the distinction between trading costs and capital costs. He held that, instead:-

"Having regard to the purpose of the section, it seems to me to be appropriate to consider those expenses which it would be unfair to disallow as against investment income.

An investment company maintains its capital in its investments. In the course of its management, its managers have to consider, not only whether such capital is best employed, but also whether it is providing the best return. I do not accept that only expenditure in relation to getting the best return from existing investments is what is intended by the expression "expenses of management". Expenditure relating to the appraisal of existing investments or the scope of new investment must equally be expenses management. However, once an appraisal becomes specific in the sense of relating to a particular investment, this is no longer management but a possible disposal or acquisition as the case may be."

248. Counsel further emphasised that Murphy J had stated that expenses of management were not confined to taking or carrying out managerial decisions. She submitted that if the phrase was not confined to taking or carrying out managerial decisions, it had to follow that the taking or carrying out of managerial decisions was an expense of management. Accordingly, all of the expenses incurred by the Appellant's board in carrying out or making

its managerial decisions had to be expenses of management, and this was of particular importance when it came to the [redacted] issue.

249. Counsel noted that the Respondent had attempted to make the case that there was a decision made by the board in 20[redacted] to begin a process of divestiture, but it was clear from all of the evidence given that the board's evaluation and investigation was continuing and a managerial decision was made at the very earliest at the [redacted] announcement of the proposed spin-off. Counsel submitted that was clear from Barron J's judgement that the appraisal of existing investments or the scope of new investments had to be expenses of management. The appraisal of existing investments included examining subsidiaries and considering whether they were yielding the best value; accordingly, the Appellant's board's consideration of whether the [redacted] business should remain as part of the Appellant group's activities was clearly an evaluation of an existing investment. All of the process leading up to the actual decision was management work and therefore any expenses incurred therein had to be expenses of management.

250. She submitted that the oral evidence and the documents opened to me all clearly demonstrated that there was an ongoing process of discussion and consideration, beginning in [redacted] with the Strategic Plan Review. At the initial stage, the evaluation was being carried out by the officers of the Appellant and the board members were not directly involved. The process continued through [redacted] and Mr [redacted] had given evidence that the Respondent was incorrect in asserting that a consensus had been reached in May of that year; there was no consensus until the board had voted to determine what to do. Counsel submitted that this was entirely consistent with the evidence given by Mr [redacted] and Ms [redacted].

251. Mr [redacted] had testified that the evaluation was ongoing as of the [redacted] 20[redacted] board meeting; the Appellant's investment bankers were now involved to advise in relation to pricing, and Mr [redacted] and Mr [redacted] testified that no decision could have been made by the board without their input.

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252. Counsel submitted that, notwithstanding that the amount originally claimed in relation to ██████ expenses was for the period up to the announcement made at the end of ███, the Appellant's case, subject to the jurisdictional issue discussed below, was now that it was entitled to claim a deduction in relation to the ██████ expenses up to the date of the actual spin-off in ███. Until that date, the Appellant's ██████ business was, as Mr ████ put it, in the shop-front window; a decision had been made to announce that the Appellant was preparing for a proposed spin-off, but the proposed spin-off was not definite, and might or might not take place. Counsel submitted that this argument was supported by the fact that it a special resolution permitting a change in the articles of association was not passed by the public shareholders until March of 20██. Without that resolution, no spin-off could take place. Counsel further submitted that ██████ was unusual in nature; there was not a straightforward acquisition or disposal. The effect of the transaction was to say that shareholders of the Appellant would continue to be such shareholders but would also become shareholders in █████. It was not a sale and it was not a share for share exchange; it was instead a restructuring of how the business was held. Accordingly, the Appellant submitted that every single expense, up to and including the spin-off, was an expense of management.

253. In relation to the tax-sharing arrangement, Counsel submitted that it was clear from the evidence that the arrangement resulted from the spin-off of the Appellant from the ██ ███ in 20██. It was obvious, she submitted, that the Appellant, as parent company with responsibility for all of the subsidiaries, would be the company to be engaged in the tax sharing agreement. The costs incurred by the Appellant were not tax costs but were instead the costs of administering the agreement. The costs could only sit with the parent company until the entity responsible for paying a particular liability was identified.

254. In relation to professional lines insurance, Counsel submitted that the uncontroverted evidence of Mr ████ was clear and compelling. He had testified that all of the insurance coverage in respect of which a claim for deduction was made was properly considered management insurances. Counsel submitted that the question to be answered was whether the taking out of the insurances was done as part of the management of the

Appellant's investments. Counsel submitted that the evidence showed that it very clearly was, because the insurances were in almost all cases acquired to protect the group against the risk posed to it by the directors and officers, who made the strategic and high-level decisions for the Appellant. Mr ███'s evidence was clear that at least 85% of the claims to be made, and consequently the risk to be considered in any assessment, arose because of SEC securities violations. In so far as certain policies purported to offer coverage for employees, the evidence of Mr ███ was that such coverage was illusory when regard was had to the extremely high levels of retention.

255. In relation to excess or umbrella insurance, Mr ███ had given evidence that it was a prudent strategy for a business to put this cover in place. Counsel submitted that if it was reasonable and prudent for the board to put the cover in place, it had to be said to be a proper expense of management.

256. In so far as it was suggested that the fact that the Appellant was Irish-registered and the fact that Irish directors did not generally have personal liability affected the need for the relevant insurance cover, Counsel submitted that it was clear from Mr ███ evidence that the Appellant was subject to SEC regulations as an entity listed on the NYSE, and was therefore liable to be sued in the US for any breach of those regulations.

257. Finally, in relation to ███, Counsel submitted that the nature of the transaction was that the Appellant would effectively be housed in under new ███. The Appellant's shareholders received cash and ███ shares as consideration. Counsel submitted that the transaction was a restructuring of how the Appellant held its business. ███ was still the same entity and still had the same subsidiaries.

258. Counsel further submitted that the decision in ***Waterloo plc –v- IRC*** **[2002] STC (SCD) 95**, which the Respondent had referred to in written submissions, was clearly distinguishable as it dealt with a very different factual scenario and considered a particular piece of English anti-avoidance legislation.

H. Submissions of the Respondent

259. Counsel for the Respondent first addressed me on the share recharge issue. He said that his case was that the payments under the Recharge Agreement were not for the issue of shares, they were not share premium and the agreement did not say that they were. He referred me to the Stock Incentive Plan and the provisions of same. He noted that an award certificate was what mattered, and these were, he submitted, plainly on their own terms between the Appellant and the individual employee in question. The subsidiary had no part in it. He said that it was clear that there is a vesting schedule, an exercise price, and so on.

260. He noted that Clause 5 provided for "*payment of the exercise price*" and that this was set out in the grant letter, examples of which had been opened to me. He submitted that there was nothing in that that referred to anything but the payment by the individual to the Appellant for the shares in question, and therefore it was a simple bipartite agreement. The RSU, he said, was similar in that it referred to restricted units and so on, and was again a bipartite agreement; there was no reference to any other entity doing the vesting. He also noted that there was an obligation on the individual to pay for the capital where it had not otherwise been paid for. There was no mention of any recharge agreement. He submitted that the award certificates set out the only terms and conditions on which the share options were awarded.

261. Counsel submitted that the Respondent was not trying to recharacterise anything, and he referred to the Appellant's own submissions which noted that "*in all relevant cases options were granted by the employee's employer company pursuant to share option scheme approved by the board of* █████". He noted that Mr █████ had said in evidence that options were granted by the employer. Regardless, he submitted that it did not affect his case whether an option was granted by the employer or by the Appellant. He submitted that the

award certificate issued to the individual employee only, and essentially provided that the exercise price was to be paid by the employee and the Appellant would thereupon issue the share.

262. Counsel further submitted that the RSUs also constituted a bipartite relationship arising from the labour services given by an employee.

263. Turning to the Recharge Agreement itself, Counsel noted that it was called a recharge, and not a charge and not a price for an issue of shares, and referred to recitals 3 and 4 in this regard. He submitted that it was an agreement concerning payments made by a subsidiary to a parent in respect of a facility provided, which facility enabled the subsidiary to remunerate employees for services.

264. The fact that the consideration was related to the value of the shares was, he submitted, irrelevant. He noted that evidence had been presented that it could be a different figure. Therefore, he submitted that it was simply incorrect to suggest that the basis for calculation of the consideration confirmed that the payment was for the issue of shares. The measure of the amount could not determine the character of the payment. He said that the agreement spoke for itself; there was no payment for the issue of shares, and to say otherwise did not reconcile with the terms and conditions under the options or the restricted stock units. He noted that Counsel for the Appellant had referred to the fact that notices were issued to the subsidiary rather than an invoice. Again, he submitted that this was not relevant; frequently in intercompany situations there were no invoices, just book entries.

265. Counsel referred me to Clause 3, which contained the undertaking by the Appellant to make or arrange for the provision of ordinary shares. He submitted it was an undertaking by the Appellant to the subsidiary, and was not an undertaking to the employees. In return for this undertaking to make available the facility, in so far as there were specific awards, the subsidiaries paid an amount. He said that this was central to the case; there were two separate, bipartite agreements, one for the issue of shares and

one for the provision of the scheme. He said that payments were not made for the issue of the specific shares; it was simply a business facility.

266. Counsel further submitted that if the subscriber was not paying, or procuring the payment to be made, for the issue of shares, then one would have to be sceptical that any other payments could be payments for the issue of shares. He said that it had to be shown clearly that the payments were payments for shares, and that was not the case under the Recharge Agreement. He reiterated that that the payments made were not for the issue of shares; while the Respondent acknowledged that they were related, because it was under the scheme and so on, there was no direct connection or exchange of promises. That was between the Appellant and the individual employee.

267. He rejected the submissions made by Counsel for the Appellant on the options available to the Appellant if the money was not paid, stating that the Appellant was not entitled to withhold issuing the shares. It could only do that if the exercise price was not paid or if the terms and conditions in the award certificates were breached. He submitted that this supported his contention that the payments made under the Recharge Agreement were not in exchange for the issue of shares.

268. Counsel stated that it can be the case that payments are made for shares by someone other than the subscriber, and said that this had been accepted in the Respondent's Outline of Arguments. However, that was not what was happening in the instant appeals, because the recharge payments were not payments for shares. Counsel submitted that this corresponded to the legal reality that there was no obligation on the subscriber to pay these amounts; accordingly the employee could not be paying in their capacity as shareholder.

269. Counsel further submitted that in relation to the transfer of [redacted] shares and the option scheme to [redacted], there was no reference to the Recharge Agreements, and said

this again demonstrated that the rights and obligations were between the Appellant and the employee. These rights and obligations transferred independently of the Recharge Agreements, because the Recharge Agreements did not affect the rights and obligations in respect of the issue of shares.

270. Counsel next referred me to the ***Lowry*** case, and emphasised the reference therein to the awarding of shares at less than market value. He said that that case was about whether the difference between the shares' par value and their market value was deductible, and it was held that it was not, with Lord Russell saying that the company had "*parted with nothing.*"

271. Counsel further referred me to the ***Waterloo*** decision, which concerned a parent company giving loans to a trust so it could make option awards to employees. If the employees exercised the option, they were given either the cash difference or the share itself at their election. The Special Commissioners held that the parent company was providing a business facility.

272. Counsel submitted that the facts of the case were very similar to the instant appeals in many regards. He took me through the decision, including how the employees were chosen and approved by the Board, how the loan was repaid, how the procedure changed slightly and so on. He pointed out that Revenue had argued that the company facilitated the remuneration by the subsidiaries of their employees. Share options were remuneration and the costs of remuneration were ordinary business expenses of an employer. Accordingly, the parent company gave the subsidiaries "*business facilities of whatever kind*" within the meaning of the relevant legislation. The Special Commissioners accepted that the phrase was a very wide description, and said that the options were clearly benefits that would incentivise employees for the benefit of the business worldwide. The ability to have those options was thus a facility given as a business facility. [redacted] submitted that the decision showed that it was important to look at a scheme or arrangement in the round.

273. Counsel next referred to Mr ██████ evidence and his reference to a dilutive effect, resulting in the need for a matching buyback. Counsel submitted that this was simply not relevant. Just because there was an undertaking to shareholders did not mean that that there was a connection between any award and the buyback. Whether the buy-back was at market price or not could not inform the decision as to the interpretation of the relationship between the parties and the exercise of the options and RSUs.

274. Counsel also referred me to the decisions in ***Henry Head & Co. –v- Ropner Holdings Ltd*** **[1952] Ch 124** and ***Shearer –v- Bercain*** **[1980] Ch 359** in relation to share premium. Counsel noted that the cases concerned monies received from subscribers and there was no question of any third party being involved. He submitted that the decisions were not of any assistance to the Appellant as they simply established that a shareholder can contribute something other than cash and the share premium account can be elevated or raised in respect of the relevant amount.

275. In relation to the Form B5s, Counsel submitted that they simply recorded the value or amounts paid by the employee or the nominal value in respect of RSUs. The contemporaneous evidence from those forms was therefore that the recharge payments were not share premium.

276. In relation to the accountancy position, Counsel submitted that there were audited financial statements for each year in question, disclosing these recharge payments in the profit and loss account as receipts of the Appellant, and he said that this had to support the Respondent's position. He submitted that the evidence and views of Mr ███ were not of material assistance; rather, it was the fact that the auditors and the directors signing off on the Appellant's accounts that was of relevance. Counsel referred to the decision in ***Johnston –v- Brittania*** **(1994) 67 TC 99** in this regard, where Knox J stated:-

> *"The Court is slow to accept that accounts prepared in accordance with accepted principles of commercial accountancy are not adequate for tax purposes as a true*

statement of the taxpayer's profits for the relevant period. In particular, it is slow to find that there is a judge-made rule of law which prevents accounts prepared in accordance with the ordinary principles of commercial accountancy from complying with the requirements of the tax legislation."

277. Counsel further referred me to ***Odeon Associated Theatres Ltd –v- Jones*** **[1973] Ch 288**, which dealt with expenses of repairs and how to measure profits for tax purposes. The Court of Appeal held that in determining what was capital and what was revenue for income tax purposes, the courts followed the ordinary principles of commercial accounting unless they conflicted with statute law. Counsel further referred me to ***Heather –v- PE Consulting*** **[1973] Ch 189** – in that case, Buckley LJ had stated that:-

> *"It is well established that the question whether a particular payment is a payment of a capital nature or of a revenue nature must be answered in accordance with sound accountancy principles. Skilled accountants may well be much better qualified than most judges to formulate and explain such principles. But nevertheless in every case of this kind it is the judge and not the witness who must decide whether a witness's evidence in fact exemplifies sound accounting principles*

278. Counsel then referred me to the decision in ***Murnaghan Brothers Ltd –v- O Maoldhomhnaigh*** **(1990) WJSC-HC 2783**. The case concerned corporation tax and trading stock, and the issue for determination was whether a deduction could be claimed in respect of an asset which had been acquired subject to a right of retention. Murphy J held that the court, in ascertaining the true profits of the appellant, was entitled to accept the evidence of an accountant that the inclusion of the full purchase price for the asset in the accounts for the relevant period was in accordance with the correct principles of commercial accountancy, and observed that the "*value of expert evidence in relation to accounting matters is well recognised*."

279. Counsel referred to the differences in opinion between Mr [redacted] and [redacted] and submitted that [redacted] gave very clear evidence that any amount in a company which was

not related to owner's equity or to the introduction of capital or funds by the owners was income, and that was why it had to be treated as income in the accounts. Counsel submitted that the auditors clearly agreed with this view, and the B5s adopted the same treatment. He accepted, however, that the Appellant's corporation tax returns had been filed on a different basis.

280. Counsel next referred me to the decision in ***IRC –v- John Lewis Properties plc*** **[2003] STC 117**. The case concerned the sale by the taxpayer of the right to receive rent, and turned on the issue of whether the lump sum received as payment for the right to receive the rents was capital or income in nature. Counsel directed me to the judgment of Arden LJ's who had observed that there was little argument addressed to the relevant accounting standard. She said it was not clear why this course was taken, because the question whether a receipt is capital or income has to be decided from a commercial point of view, and in principle the accountancy treatment was therefore a relevant consideration. Counsel further observed that the Court of Appeal had held that the way the lump sum was calculated did not shed light on how it should be classified. He submitted that this was consistent with many other authorities, and that the measurement could not determine the character. Accordingly, the Appellant's submission that it was "*made good*" by the recharge payments was not relevant.

281. Counsel submitted that the payments under the recharge agreements were for the provision of a business facility and were taxable under Case IV, the catch-all category. They were not from a trading activity, having no badges of trade, and therefore did not fall within Case I. In any event, the ***Lowry*** decision had held that the issue of shares was not a trading activity in any event.

282. Counsel next referred me to the ***Vocalspruce –v- Revenue & Customs Commissioners*** **[2015] STC 861** case, where Lewison LJ had found as follows:-

> *"A share premium is a price that exceeds the nominal value of the share. It is received wisdom that an amount paid to a company by way of share premium is profit in the*

hands of the company… However, ever since the passing of section 56 of the Companies Act 1948, where a company issues shares at a premium a sum equal to the amount or value of the premium must be transferred to an account that called the share premium account. Once transferred, the share premium account is treated as paid up share capital. This means that it cannot be distributed to the members of the company except by means of an authorised reduction in capital.

…

Whether a company issues shares at a premium will depend on the terms of the subscription agreement. In other words it depends on the terms of the bargain between the issuing company and the subscriber. If the agreed terms include the payment of a share premium, then section 130 (now s 610) applies; and the company must transfer the amount or value of the premium to the share premium account."

283. Counsel submitted that in light of this decision, whether a company issued shares at a premium depended on the terms of the subscription agreement, the bargain between the company and the subscriber. Counsel submitted that in the instant appeals, even if someone else was paying for the share, it was still an agreement between the parent and the employee, and was a bipartite relationship. He said that the SIP and the Recharge Agreements were not aligned in the manner suggested by the Appellant, as the consideration paid under the Recharge Agreement by the subsidiary could not be deemed to be for the issue of shares.

284. Counsel further submitted that it was clear from the evidence of Mr [redacted], when presented with the Form 10Ks, that there was a complete mismatch between the amount of shares purchased in the years in question and the amounts issued. More were repurchased than were issued, and it was not known if there was any match in terms of market values at all, due to movements in the market.

285. Counsel submitted that the Recharge Agreement was needed for to enable tax deductions for subsidiaries in other jurisdictions. He further submitted that the calculation

of the specific amounts, down to the quarter hour, was necessary for employment tax purposes. He stated that there was no evidence as to whether the value was mid-market or otherwise in some jurisdictions, as had been suggested by the Appellant. The only evidence provided was that it was necessary for tax purposes, and was called the "tax price" by Ms ██████ and Ms ██████. He submitted that the calculation of the intrinsic value was therefore not done for the calculation of the amount of recharge payments, but was instead done for employment tax purposes.

286. In so far as Counsel for the Appellant had suggested that there was no activity by the Appellant other than the issue of shares, the Respondent submitted that this was incorrect because there was the provision of a business facility by the Appellant.

287. Counsel noted the Appellant's submission that the *causa causans* of the recharge payment was the exercise of an option, but argued that this did not mean that the payment was made for the issue of shares; it was instead for the provision of the facility. The payments simply could not be payments for shares; the character of the payments was simply different. He referred me to Mr ██████'s evidence that it was the employer that decides who grants the options, and noted the difference in opinion between that witness and Ms ██████. He submitted, however, that this was ultimately irrelevant to his analysis. He noted Mr ██████'s evidence that the Appellant facilitated the employer's commitment to the employee and was paid for that facility; however, he submitted that this did not mean that the recharge payments were payments for shares.

288. Counsel for the Respondent submitted that there was no evidence before me that an employee could only join the Stock Incentive Plan if there was a recharge agreement in place.

289. He further noted that Mr ██████ had agreed that there was no numerical connection between the number of shares repurchased and the numbers issued. Mr ██████ had also accepted that the ██████ transaction did not refer to the Recharge Agreements.

290. Turning to Ms [redacted]'s evidence, Counsel first observed that it was now agreed by the Appellant that there was no requirement for a Recharge Agreement to be in place. He noted that Ms [redacted] could not answer questions about the reclassification of the statutory accounts. He referred me to her agreement that ascertaining the market value was necessary for employment withholding taxes, and that the Recharge Agreement gives rise to tax deductions for certain employer companies. Counsel noted that it was accepted by Ms [redacted] that there were no share issues for capital raising

291. Counsel next referred to Mr [redacted]'s evidence on section 82(6)(f) of the Companies Act 2014 regarding provisions dealing with financial assistance. Counsel referred me in this regard to section 26 of the 1983 Act, which provides that:

> *"(1) Subject to the following provisions of this Part, shares allotted by a company and any premium payable on them may be paid up in money or money's worth (including goodwill and expertise).*
>
> *...*
>
> *(5) Subsection (1) shall not prevent a company from allotting bonus shares in the company to its members or from paying up, with sums available for the purpose, any amounts for the time being unpaid on any of its shares (whether on account of the nominal value of the shares or by way of premium)."*

292. Counsel submitted that "*sums available for that purpose*" meant anything other than share capital or share premium itself. Section 60(12)(e) of the 1963 Act, which was in place at the relevant times, deals with financial assistance and it provided that:-

> *"Nothing in this section shall be taken to prohibit, subject to subsection (13), the provision by a company in accordance with any scheme for the time being in force of money for the purchase of or subscription for fully paid shares in the company or its holding company, being a purchase or subscription for shares to be held by or for the*

benefit of employees or former employees of the company or of any subsidiary of the company, including any person who is or was a director holding salaried employment of office in the company or any subsidiary of the company."

293. Section 60(13)(a) then provided that:-

"A public limited company may, in accordance with paragraph (d), (e) or (f) of subsection 12 give financial assistance to any person only if the company's net assets are not thereby reduced, or to the extent that those assets are thereby reduced, that the financial assistance is provided out of the profits which are available for dividend."

294. Counsel submitted that, contrary to what the Appellant argued, there was nothing in the Recharge Agreement which expressly stated that recharge payments were payments for shares. He reiterated that it is a payment for the provision of the facility.

295. Counsel then addressed me on the expenses of management issues. He referred to the Appellant's submission that it actively managed the group, oversees the risk, monitors performance and engages with shareholders. He submitted that there was no evidence to that effect before me, and he said that the board minutes which were opened related to ██████████ only.

296. He said that the second broad issue was an assumption by the Appellant that if an expense is validly incurred, it was automatically a management expense. He submitted that this was not sufficient, and the expense had to be concerned with the business of managing investments. This, he submitted, was manifest from the case law. He submitted that it could not be an expense associated with shareholders or shareholders receiving value or structuring their affairs; that was not a management expense of the company. A company could validly incur expenses by reference to that in addition to management expenses, but neither of the first two are management expenses.

297. Counsel further submitted that it was also important to not mix up a sale by the company or a spin by the company. A spin involved a disposal, and it was important not to involve that with what might happen at a shareholder level. A spin might not be an economic disposal by the shareholders, because they could get shares in ██████ along with retaining their shares in the original company. There was, however, a disposal by the company, and that was what is relevant; there was a disposal, regardless of whether the shareholders continued to hold it economically in another entity.

298. Counsel next referred me to ***Hibernian***, noting that the headnote recorded Carroll J's finding that "[e]*xpenses so closely linked with the transaction of purchase that they may naturally be considered as items in the total cost of a purchase were not expenses of management*". The expenses had to be closely linked with the transaction of purchase. The decision further held that "[h]*owever, costs which are not a direct and necessary part of the cost of a normal method of purchase might be severed and might properly be regarded as expenses of management.*"

299. Counsel therefore submitted that, to the extent that expenses are linked with the transaction of purchase or sale, they are not allowable. He noted that the Supreme Court had held on appeal that 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. The Respondent's position was that the ██████████ expenses could not be properly severed. He noted that Barron J had held that expenditure relating to the appraisal of existing investments or new investments was expenses of management, but that once an appraisal becomes specific in the sense of relating to a particular investment, it was no longer management, but a possible acquisition or disposal as the case might be.

300. Counsel submitted that the Respondent's position was that the appraisal by the Appellant's board of ██████████ was specific, related to the ██████████ business

investment. The issue of whether or not there were conditions to be satisfied or a concluded deal in place was, he submitted, simply not relevant.

301. Counsel referred me to the passage from the judgment of Carroll J, where she held that:-

> "*No single rule has been devised for distinguishing between capital and revenue payments. The phrase 'expenses of management' does not have a technical or special meaning. They are ordinary words whose application in a particular case should be determined on a broad view of all relevant matters. Expenses of management are not all expenses incurred by management in carrying out the business of the company. There is a distinction between expenses of management and the expenses incurred by management. Expenditure does not change its nature according to whether the project on which it is made is successful or unsuccessful. If expenses incurred for work performed by a member of the staff would be classified as management expenses, they do not cease to be management expenses because independent qualified persons were employed for the same work.*
>
> *Expenses so closely linked with the transaction of purchase that they may naturally be considered as items in the total costs of a purchase are not expenses of management.*"

302. Counsel noted that impugned expenses had to be closely linked with a transaction, and submitted that in these appeals the [redacted] separation expenses are closely linked with the transaction of disposal.

303. Carroll J had also referred to Lord Reid's position on expenses of investigation and acquisition, which she said had to be interpreted "*in the context of a life assurance company which is a trading company unlike an investment company which is not a trading company*". Carroll J had also made reference to the ***Atherton*** case, and had held that expenses of

management could not be considered without analysing whether the expenditure was so closely linked with the acquisition of assets that it could be categorised as a capital payment.

304. Counsel further took me through the judgment of Murphy J and noted his finding that it was not practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not, and that it was 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.

305. [redacted] submitted that the taxpayer in ***Hibernian*** was making the same argument as the Appellant in these appeals, regarding when a decision was made and the expenses being different either side of that decision. The Respondent submitted that they were all 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 or not the purchase was successful.

306. Murphy J had considered ***Sun Life*** and found that *"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*". Murphy J had noted the point about whether the expense was an integral part of the transaction or not, and the taxpayer's argument around the expenses incurred before and after the decision. Murphy J had held that if a transaction went ahead, all the expenses would be "*universally accepted*" as being part of the transaction, and it would be "*impossible to justify any distinction*". The Supreme Court had considered the taxpayer's proposal that a distinguishing line could be drawn and said that it could go no further than say 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.*"

307. Counsel submitted that it did not matter whether we were considering an acquisition or disposal. In this case, he said that the expenses of separation were closely related as the term is understood in these cases. It could not be said that they were not closely related, considering the timeline, the minutes, the path.

308. Murphy J went on to hold that "[i]*f expenses of management constitute capital disbursements they are not, in my view, deductible in computing profits*." Murphy J stated that he was *"... satisfied, however, that, 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 in the event of the purchase being completed and that it would not have a different characterisation simply because the plans to purchase were frustrated or aborted*." Counsel submitted that I ought to have particular regard to the phrase "*from the date on which the Group focused its attention on the acquisition of the prospective investments*".

309. Counsel submitted that in light of the evidence and the minutes provided, the Appellant's board had focused its attention on the disposal as of ███ 20██. He said this was clear from the evidence of Mr █████ and Mr ██████.

310. Counsel next directed me to the judgment of Barron J which held as follows:-

> "*An investment company maintains its capital in its investments. In the course of its management, its managers have to consider not only whether such capital is best employed but also whether it is providing the best return. I do not accept that only expenditure in relation to getting the best return from existing investments is what is intended by the expression 'expenses of management'. Expenditure relating to the appraisal of existing investments or the scope of new investment must equally be expenses of management.*"

311. Counsel submitted that even in this fairly wide description, what was permissible was the expense of the Appellant ascertaining how the best return could be achieved and the appraisal of its investments. Counsel submitted that this did not extend to what the

subsidiaries are doing, nor to what shareholders might want or how they could extract value or hold their economic holdings.

312. Barron J had gone on to say that, "*once an appraisal becomes specific in the sense of relating to a particular investment, this is not management, but possible acquisition or disposal as the case may be*." The specificity related to the particular investment, and Counsel submitted that there could be no doubt that it was the ██████ segment that was being considered here. It was not management. Therefore, he submitted that the ██████ activities from ██ 20██ onwards could not be said to be expenses of management.

313. He said that the conditions around articles of association for distribution in specie or stock exchange conditions were simply not relevant. If they were, then everything up to 10 minutes before the decision would be expenses of management, and this would make a mockery of the differences between acquisition, disposal and management. All expenses would be allowable, and that would fly in the face of the reported caselaw.

314. Counsel next referred me to the ***Dawsongroup –v- HMRC Commissioners*** **80 TC 270**, a case dealing with management expenses and the business of managing investments. 25% of the head holding company had been floated on the stock exchange, but it was decided some 12 years later to take the company back into private ownership. Money was spent on fees in considering and implementing this plan, and the question was whether those costs were a proper deduction from the profits of the company. The First Tier Tribunal held that the appellant was not an investment company and also held that the expenses were not expenses of management.

315. The Tribunal found that the expression "expenses of management" was wide or fairly wide, and the distinction is to be made between expenses of management and general expenses of business. The Tribunal found that the expenditure sought to be deducted was intended to improve the business in a broad sense, and this was still not expenses of management. The Tribunal found that "*it did so by making sure that there were more assets*

within the business, and by giving the directors more freedom in making business decisions. Those decisions did not relate to the management of the investment business. They related to the management of the investments". Mr [redacted] said the Tribunal made a distinction between expenditure on the subsidiaries, which was properly attributable to the subsidiaries, and expenditure on the business of managing them. The Tribunal found that:-

> "*The extra retained money would remain in the subsidiaries and make them more valuable, or would be applied in their growth, and again make them more valuable, or they could be retained by the holding company and applied elsewhere to improve the investments. These characterisations demonstrate that the expenditure was not incurred in managing the business; it was incurred in improving the investments of the Group. Accordingly, no deduction was permissible*."

316. The Tribunal agreed with the submission that there had to be a connection or identifiable relationship between the expenditure and the investment business of which it was supposedly an expense, and found that the expenditure in the appeal had nothing to do with investment. The question was not whether the company would derive benefit from what it was doing in terms of returns, but rather whether it was an expense of management. It was not necessarily the case that expenditure which enabled the company to exploit its subsidiaries in a better way was an expense of managing investments. Therefore, the question was not whether the expense was reasonably incurred. Counsel for the Respondent submitted that in the instant appeals, the Appellant was effectively seeking to contend that the expenses were expenses of management because they were reasonably incurred, and that this was an incorrect approach.

317. In ***Dawsongroup***, the business undertaken was found to be wholly unaffected by what was done, and Counsel submitted that the same applied to the [redacted] expenses and the costs of administering the Tax Sharing Agreement. The parent's relationship with its subsidiaries was unchanged in ***Dawsongroup*** and Counsel submitted that the same applied in the instant appeals. Counsel noted that the [redacted] expenditure was primarily to yield shareholder value, in new [redacted] shares and cash. It happened above [redacted] itself.

Alternatively, he submitted that the expense was wholly unrelated to the investment business of [redacted], because if there was a commercial benefit other than to shareholders, it was down in the group, for the subsidiaries, in synergies. Therefore, the expenditure did not relate to the busines[redacted] itself.

318. Counsel next referred me to ***Howden Joinery Group plc –v- Revenue and Customs Commissioners* [2014] UKFTT 257**, which concerned the payment of guarantee payments by a parent in respect of guarantees it had made in respect of subsidiary rental obligations. The parent company sought to deduct the payments as a deductible management expense which it had paid arising out of an administration and sale. The First Tier Tribunal found that management in this context meant "*active involvement with the assets*", and went on to state that it included "... *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*."

319. Counsel submitted that the meaning was wide within those parameters of maximising the return from investment, evaluating and so on. Once you got to the point of selecting something specific, however, then you are outside those parameters, even if the expenditure was to maximise the value of the investment. In ***Howden***, the Tribunal held that "[t]*he expenditure and the acquisition of assets and any expenditure that was laid out directly on the assets themselves was not to be treated as a management expense*". Therefore, something referrable to the assets is not a management expense.

320. Counsel submitted that the facts in ***Howden*** were similar to the tax sharing agreement in the instant appeals, as it was an ongoing expense in relation to the assets below; it had nothing to do with managing the investments, and therefore would not be allowable. The case distinguished between the investment business of the parent and the property management business of the subsidiary. Counsel submitted that it was not part of the Appellant's investment business to pay for the [redacted] tax service to defend tax audits of subsidiaries or former subsidiaries or businesses which were formerly owned or partially owned. That was not the management of investments. ***Howden*** also established that

management involves 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 after, and their return best maximised, on a day to day 'business as usual' basis*". It was about getting a return.

321. In relation to , Counsel submitted that it was plain from the judgments in ***Hibernian*** that the relevant time was 20 , and he referred to the minutes which had been opened to me. There was a meeting of minds of some sort in 20 , which was apparent in terms of the path pursued thereafter. It was a focusing on a "*prospective disposal*" in the words of Murphy J, and steps were being taken "*which may lead to a binding commitment*" and had become "*specific*" per Barron J. It was not about there being an irrevocable decision, but rather steps on a path. Therefore, it was not an allowable activity in respect of management expenses.

322. Regarding the later date of December 2011, Counsel submitted that it this was the date of a specific decision as understood in ***Hibernian***. He noted Mr evidence in relation to keeping strategic options open, but the evidence and minutes demonstrated that it was not a case of keeping options open, but rather of an appraisal becoming specific and focused. Counsel submitted that ***Hibernian*** circumscribes the availability of this privilege. Counsel referred to Mr 's evidence that in the board no longer saw the business as core, but submitted that that was the case back in 20 . He also referred to the evidence from the VAT appeal and the transcripts which had been handed in from that hearing which demonstrated that the focus on the spin began from and not .

323. Referring to the transcripts, Counsel noted that the value of was noted as being $2.2. to $2.4 billion, which was a substantial part of the company, and that Mr said that he was working on the spin workstream and reorganising steps from . There was no positive step to put the business to auction, and there was only one

bid from ▇▇▇ which was after ▇▇▇▇▇. Therefore, it was clear, in his submission, that a spin was in all practical likelihood what was going to happen. This went beyond the ***Hibernian*** test, which only required a focusing of attention on disposal. He said that Mr ▇▇▇s second statement regarding the heads of expense all concerned implementation, and these were all disallowed under ***Hibernian***.

324. In relation to the insurance expenses, Counsel submitted that there were limitations on Mr ▇▇▇ evidence as he was only provided with a selection of policies and had held a few conversations with ▇▇▇. He did not have specific information, and therefore could only give a general view.

325. Regarding the fiduciary insurance, Mr ▇▇▇ had accepted that the subsidiaries could make decisions concerning local benefit plans and on employer-practice policies, and had conceded that not all claims would be made against the parent company. He had not seen any specific ▇▇▇ data on whether it was a claim target as a parent. On excess casualty insurance, he did not know why it had not been purchased after ▇▇ or why it was not in the profit and loss. He arrived at his 85% which was in respect of D&O by reference to securities, claims or expected risks, but there was no link between that and how it might apply to employer liability or fiduciary policy or excess casualty. Counsel submitted that the witness could not establish how 85% could be the appropriate figure and the onus is on the Appellant to establish this.

326. On D&O, Counsel stated that Mr ▇▇▇ had said that they are claims relating to securities issues; he submitted that this did not relate to the investment management business of the Appellant. It was about ▇▇▇ shares, how it obtained money on the stock exchange or debt markets, and had nothing to do with investment management. It was an expense of being a listed company. Therefore, he submitted that it could not be said that these expenses, when considered in light of the evidence given, related to investment management.

327. On the employer liability insurance, Counsel referred to Mr [redacted] evidence that it was necessary because the parent was the ultimate decision maker for the subsidiaries' significant decisions. Counsel said that it is obvious that this was not managing the business of investments.

328. In respect of excess casualty, employer liability insurance and to an extent fiduciary insurance, Counsel submitted that the evidence appeared to be that these were purchased because the Appellant was the likely target of any litigation. However, he submitted that the evidence also showed that the Appellant was not involved in any way with the business of managing investments. Therefore, Mr [redacted] general evidence was not relevant to the question of the deductibility of those policies in this case.

329. Counsel next turned to [redacted] and the two items of expenditure, namely payroll and the registration fee. The registration fee was, he submitted, essentially about a change of structure, a financing fee for issuing shares in a company which was not [redacted]. [redacted] [redacted] allocated, on the basis of the value of shares it issues in respect of [redacted] shares, approximately 30% but this was not an expense of [redacted] in managing the investment. It was two levels above [redacted], therefore not related to [redacted] itself and what it did. That shareholders change their shareholding in a company is not related to the management of investments.

330. On the payroll expense, he submitted that he could not understand the Appellant's position. It is associated with keeping key persons in certain subsidiaries. It was an expense of the subsidiary as properly understand, in accordance with ***Dawsongroup*** and ***Howden***, like repeated payments under rental guarantees. Here, it was to keep the subsidiary going so that the [redacted] transaction would be completed, which had a purpose of shareholder value or synergies, and not managing the investment business.

I. Analysis & Findings

331. In relation to the Recharge Payments, I agree with the submission of the Appellant that the starting point for any consideration of this issue is the Recharge Agreement itself. The Recharge Agreement governed the nature of the payments made by the subsidiaries thereunder.

332. The wording of the Recharge Agreement is clear and unambiguous. The recitals recorded that the Appellant and the subsidiary had agreed that share options and RSUs could be granted in accordance with the Stock Incentive Plan to incentivise group employees, and that the difference between the exercise price paid by the employee and the market value of the share at the time of exercise or vesting would be borne by the subsidiary. It further recorded that if the subsidiary did not bear the costs of the employees' participation in the pan, the Appellant might not allow Employees to participate.

333. Clause 2 of the Agreement recorded the Appellant's agreement to issue or arrange for the issuance of ordinary shares in connection with awards to employees under the SIP.

334. Clause 3 then recorded that, in consideration of that undertaking by the Appellant, the subsidiary agreed that it would pay the Appellant the difference between the strike price and the market value of the shares.

335. While I understand the Respondent's argument that what was being provided by the Appellant was a facility for the grant of awards pursuant to the SIP, and its reliance on the wording of the Agreement in this regard, I do not believe that the Agreement properly interpreted resulted in the subsidiaries making payments for the grant of a business facility. I have carefully considered the evidence in relation to the operation of the SIP in coming to this finding.

336. Instead, I find that the payments made by subsidiaries under the Recharge Agreements were payments for shares, designed to ensure that the Appellant received the market value for its shares.

337. I accept that there was no obligation or requirement for the Appellant to have Recharge Agreements in place, and that in many cases the employee recipient of a share may have been unaware that an additional payment was being made to the Appellant. This does not alter my views in relation to the correct interpretation of the Agreement.

338. I believe this finding is consistent with the provisions of section 62 of the Companies Act 1963, section 2(3) of the Companies (Amendment) Act, 1983 and the passage from Courtney's *Law of Companies* quoted at paragraph 231 *supra*. I further believe that the finding is consistent with the judgment of Viscount Maughan in ***Lowry***.

339. I further accept the Appellant's submission that the accounting treatment adopted in relation to payments received on foot of the Recharge Agreements cannot alter the legal effect of the Agreement. Accordingly the learned and eloquent expert evidence and submissions I heard in relation to the proper accounting treatment are, in my view, not relevant to the determination of this issue.

340. I therefore find that the payments received by the Appellant under the Recharge Agreements during the periods the subject of these appeals were payments for the issuing of shares, and therefore the amounts constitute share capital or share premium.

341. Turning to the expenses of management issues, I accept the Respondent's submission that the primary test to be applied in considering whether the various items of expenditure are expenses of management for the purposes of section 83 of TCA 1997 is the criteria identified by the High Court and Supreme Court in ***Hibernian***.

342. I agree with the Respondent that in relation to the ████████ expenditure claimed, the documentary and oral evidence presented establishes that from ███ 20██ onwards, the Appellant's appraisal had in the words of Barron J become specific in the sense

of relating to a particular investment. I find that expenditure relating to ██████ subsequent to that date was so closely linked with the proposed separation of the Appellant's ██████ business from its ██████ business as to be considered items in the total costs of the proposed separation, and could not be severed from the costs of the proposed separation.

343. I believe that this finding is also consistent with the decisions in ***Dawsongroup*** and ***Howden***, which I believe are persuasive and of assistance in determining this issue.

344. While I accept the evidence given on behalf of the Appellant that the spin-off could have become a sale, or a decision could have been taken not to proceed with a separation, at any stage up to the final execution of the spin-off in 20██, this does not in my view mean that the ██████ expenses incurred after ██ 20██ can or should be treated as expenses of management.

345. Accordingly, I find that such expenditure was not expenses of management. It is therefore not necessary for me to consider or determine the jurisdictional issue which was so ably argued before me.

346. In relation to Directors & Officers Liability Insurance, I found the evidence of Mr ████ to be truthful and persuasive. I further agree with the Appellant's submission that D&O Insurance was an expense of management to protect the Appellant against wrongful or unprofessional acts by its directors or officers, with whom most of the risk of claims lay.

347. I therefore find that the Appellant's expenditure on Directors & Officers Liability Insurance constituted an expense of management.

348. Applying the same reasoning and approach, I am also satisfied that the Appellant's expenditure on Fiduciary Liability Insurance and on Excess Casualty Insurance were also expenses of management.

349. I agree with the Appellant that the Respondent's proposed apportionment of the amounts claimed in respect of this expenditure on the basis of the number of directors, officers and employees in the Appellant is incorrect and inappropriate. I find that the Appellant is entitled to a full deduction of the expenses it incurred in relation to Directors & Officers Liability Insurance, Fiduciary Liability Insurance and Excess Casualty Insurance during the accounting periods the subject matter of these appeals.

350. However, I am not satisfied on the evidence before me that expenditure incurred by the Appellant in relation to Employment Practices Liability Insurance was an expense of management. I agree with the Respondent that this does not appear to relate to the management by the Appellant of its investments. I therefore find that the Respondent was correct in refusing to allow the Appellant a deduction in relation to this item of expenditure.

351. In relation to the costs incurred by the Appellant in administering the Tax Sharing Agreement, I accept as correct the evidence given that this expenditure related solely to administration costs, and did not include the payment of any tax liabilities.

352. I further accept that the Appellant's administration of the Tax Sharing Agreement was with the aim of minimising the aggregate tax liabilities of the group as a whole, and was therefore incurred in the ordinary course of managing the Appellant's investment business.

353. I therefore find that the Appellant's expenditure on administering the Tax Sharing Agreement constituted an expense of management and the Appellant is entitled to a deduction in relation to that expenditure.

354. In relation to the [redacted] expenses, I agree with the Respondent's submission that the payment of the SEC filing fee was a payment made to enable the issue of shares in a new company, and did not relate to the management by the Appellant of its investments.

355. I therefore find that the payment of the [redacted] filing fee was not an expense of management and therefore the Appellant is not entitled to a deduction in relation thereto.

356. However, I believe that the position in relation to the other head of [redacted] expenditure, namely the retention costs incurred in making payments to retain the continued services of key personnel in the period leading up to and subsequent to the acquisition of the Appellant by [redacted].

357. I agree with the Appellant's submission that these payments were necessary to ensure that the group did not lose key personnel and were intended to ensure that the group companies could continue to operate fully and efficiently. I therefore accept that the [redacted] employee retention payments were made by the Appellant as part of the management of its investments and are therefore expenses of management.

358. I therefore find that the Appellant is entitled to a deduction in relation to the expenditure it incurred in making the [redacted] employee retention payments.

J. Conclusion

359. For the reasons outlined above, I have made the following findings:-

(a) the payments received by the Appellant under the Recharge Agreements during the periods the subject of these appeals were payments for the issuing of shares, and therefore the amounts constitute share capital or share premium;

(b) the [redacted] expenditure incurred by the Appellant subsequent to [redacted] 20[redacted] was not an expense of management for the purposes of section 83 of the Taxes Consolidation Act 1997 as amended;

(c) the expenditure incurred by the Appellant in relation to Director & Officer Liability, Fiduciary Liability and Excess Casualty Insurance during the periods under appeal constitutes an expense of management for the purposes of section 83, and the Appellant is entitled to a deduction in relation thereto;

(d) the expenditure incurred by the Appellant in relation to Employment Practices Liability during the periods under appeal does not constitute an expense of management for the purposes of section 83, and the Appellant is not entitled to a deduction in relation thereto;

(e) the Appellant's expenditure on administering the Tax Sharing Agreement during the periods under appeal constitutes an expense of management for the purposes of section 83 and the Appellant is entitled to a deduction in relation thereto;

(f) the payment by the Appellant of the SEC filing fee in relation to the ███████ transaction does not constitute an expense of management for the purposes of section 83, and the Appellant is not entitled to a deduction in relation thereto; and,

(g) the employee retention payments made by the Appellant in connection with the ███████ transaction constitute an expense of management for the purposes of section 83 and the Appellant is entitled to a deduction in relation thereto.

360. By reason of these findings, I determine that the Appellants have been overcharged to tax by reason of the amended assessments to Corporation Tax the subject matter of these appeals, and determine that the said amended assessments be reduced accordingly.

Dated the 20th of March 2023

MARK O'MAHONY
Appeal Commissioner

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997