24TACD2017

CORPORATION Y LTD.

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The Appellant, a Financial Institution with a history of trading in the sub-prime/near-prime residential mortgage market, claims an entitlement to carry forward trading losses of approximately €129,000,000 included on its corporation tax return ended 31 December 2012, against future trading profits in accordance with section 396(1) TCA 1997. The Respondent is of the view that the losses are not available for carry forward because the trade in which the losses arose ceased on 28 September 2012.

2. In the alternative, the Respondent contends that the carry-forward of the losses is prohibited by s.401 TCA on the grounds that there has been, within a three-year period, both a change in ownership and a major change in the nature or conduct of the company's trade.

3. By letter dated 7 February 2014 the Respondent notified the Appellant of its determination refusing the carry forward of the losses. The Appellant appealed that determination by notice in writing dated 7 March 2014, in accordance with s.949 TCA 1997.

Contents

Background

4. For years prior to 28 September 2012, the Appellant, then Company X Ltd. carried on the trade of residential mortgage lending.

5. The Appellant's business had been profitable up to 2008. Due to declining economic conditions and the collapse of the banking sector, a decision was taken in late 2008 to cease writing mortgage loans with effect from early 2009 however the Appellant continued to manage its existing mortgage book. In late 2008 the Appellant (then Company X Ltd.) announced further redundancies. Significant losses were incurred in the Appellant's business from 2009 onwards due to bad debt provisions, write-offs consequent on mortgagor defaults and delays in repayment.

6. As at 27 September 2012, the Appellant had accumulated trading losses of approximately €129,000,000 arising from its trade in residential mortgage lending. In the accounting period ended 27 September 2012, intercompany loans due by the Appellant to its parent, Company X Parent Ltd., in the sum of approximately €425,000,000 were written off.

7. On 28 September 2012, ownership of the Appellant changed. Pursuant to a Sale and Purchase Agreement dated 14 June 2012, its shareholder, Company X Shareholder Ltd., transferred the entire share capital of the Appellant to an unrelated purchaser, Corporation Y European Co. The change in ownership was followed by a change of name when, in October 2012, the Appellant's name was changed from Company X Ltd. to Corporation Y Ltd. The Appellant in this determination is referred to in its capacity as 'Company X Ltd.' and as 'Corporation Y Ltd' as the context requires.

8. At or about the same time as the change in ownership, the Appellant agreed to sell the beneficial interest in its mortgage loan book to a special purpose vehicle ('SPV') for consideration in the amount of approximately €177,000,000. The purchaser, SPV, was established solely for the purposes of acquiring the beneficial interest in the loan book from the Appellant with the proceeds of loan notes issued by SPV to a global investment bank group company ('Investment

Bank Co.'). The terms of the sale are set out in the Mortgage Sale Agreement dated 28 September 2012. As part of the sale arrangements, the Appellant agreed, *inter alia*, to hold the legal title to the mortgage loans on trust for SPV.

9. On 28 September 2012, the Appellant entered into a Portfolio Management Agreement ('PMA') with SPV. Corporation Y European Co. acted as guarantor. Under that agreement, the Appellant agreed to manage the mortgage portfolio and to deal with mortgage customers on SPV's behalf. In consideration of the services to be provided under that Agreement, SPV agreed to pay the Appellant a periodic fee, made up of various elements including a portfolio management fee, a performance fee and an incentive fee. The consideration on the transfer in 2012 was approximately €177m of which the company retained a €10m investment by way of deferred consideration, such deferred consideration becoming payable only when a certain rate of return was achieved by Investment Bank Co. on the loan notes.

10. In 2013 the Appellant entered into further servicing contracts with Financial Institution (I) and with a s.110 securitisation company funded by Financial Institution (II) in respect of loan books held by them relating to commercial real estate. In the latter case the Appellant invested in junior notes issued by the s.110 securitisation company holding the beneficial interest in the respective loan books. In 2014 the Appellant entered into new servicing contracts with other s.110 companies funded by Investment Bank Co., Financial Institution (II) and Financial Institution (III) involving a mixture of Irish residential and commercial property loans. There have also been other loan book servicing contracts involving Financial Institution (I).

11. The Appellant submitted that since August 2008, it has been the intention of the directors of the Appellant to resume lending when market conditions permit.

Legislation

Section 396 TCA 1997 - Relief for trading losses other than terminal losses

(1) *Subject to 396C, where in any accounting period a company carrying on a trade incurs a loss in the trade, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods, and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot, on that claim or on a claim (if made) under [subsection (2), section 396A(3) or 396B(2)], be relieved against income or profits of an earlier accounting period.*

Section 401 TCA 1997 – Change in ownership of company: disallowance of trading losses

(1) In this section, "major change in the nature or conduct of a trade" includes –

(a) a major change in the type of property dealt in, or services or facilities provided, in the trade, or

(b) a major change in customers, outlets or markets of the trade,

and this section shall apply even if the change is the result of a gradual process which began outside the period of 3 years mentioned in subsection (2) (a).

(2) Where –

(a) within any period of 3 years, there is both a change in the ownership of a company and (whether earlier or later in that period or at the same time) a major change in the nature or conduct of a trade carried on by the company, or

(b) at any time after the scale of the activities in a trade carried on by a company has become small or negligible and before any considerable revival of the trade, there is a change in the ownership of the company,

relief shall not be given –

(i) under section 396 by setting a loss incurred by the company in an accounting period beginning before the change of ownership against any income or other profits of an accounting period ending after the change of ownership, or

(ii) under paragraph 16 or 18 of Schedule 32 against corporation tax payable for any accounting period ending after the change of ownership.

Submissions in brief

12. The submissions of the parties can be summarised as follows;

Section 396 TCA 1997 – cessation

13. The Appellant sought to carry forward losses of approximately €129,000,000 incurred prior to 28 September 2012, arising from the trade of the provision of mortgage finance to the residential sub-prime/near-prime market, for offset against profits generated by the Appellant after that date and during a period where mortgage lending was not taking place, where there had been a change in ownership of the Appellant and where there had been a restructuring of the Appellant's business by means of a securitisation. The Respondent contended that on 28 September 2012, there had been a cessation of trade for the purposes of s.396(1) TCA 1997 and the Appellant was not entitled to carry forward the losses. The Appellant disputed the position adopted by the Respondent.

Section 401 TCA 1997 – major change

14. In the alternative, the Respondent contended that there had been a major change in the nature of the trade and in the conduct of the trade carried on by the Appellant in accordance with s.401 TCA 1997 such as to preclude the Appellant from availing of relief pursuant to section 396 TCA 1997. The Appellant contended that while there had been changes in the Appellant's trade, there had been no major change in the nature or in the conduct of the Appellant's trade within a three-year period of the change in ownership of the Appellant and that section 401 TCA 1997 did not apply.

Evidence

<u>Mr. A, [position redacted] in the Appellant company</u>

15. Mr. A. held a senior position in the Appellant company during the relevant period.

16. He stated that the Appellant commenced lending in 2004 and that the Appellant was engaged in origination, administration and collection of loans from 2004 to 2008, specialising in the near-prime market.

17. Mr. A. gave evidence that between August 2008 and December 2008 the markets declined more rapidly than anticipated and the government issued a State guarantee to the Irish banks. He stated that this put the Appellant at a significant disadvantage as the Appellant was not covered by the guarantee while at the same time, the demand for mortgages was diminishing. Restructuring and redundancies took place in the business during this period. Employees who had previously worked in sales, worked in administration and collections from late 2008 to September 2012.

18. Mr. A. stated that in mid-2008 Company X Ltd. ceased lending directly to consumers (issuing a press release to that effect) but continued lending through the broker channel and then subsequently ceased that form of lending in late 2008. Mr. A stated that the final mortgage of Company X Ltd. was originated in early 2009.

19. During direct examination Mr. A. referred to the fact that financial statements of Company X Ltd. for the year ended 31 December 2007 provided that the principal activity of the company is the provision of mortgage financing and that this characterisation remained throughout the accounts for 2008 to September 2012. He stated that in the first quarter of 2012 a sum of €424m (in relation to the intercompany loan of €570m) was forgiven by way of capital contribution from Company X Parent Ltd. He stated that '*mortgage financing*' included origination, administration and collection in respect of mortgages. During cross-examination, Mr. A. stated that in September 2012 the Appellant was involved in administration and collection but not origination but that the Appellant retained an intention to resume lending at a future date.

20. During cross-examination Mr. A. was pressed to explain how the provision of mortgage financing could be understood by a person reading the financial statements to include administration and collection but to exclude origination. Mr. A. stated that it was always the Appellant 's intention to re-engage in lending activity when the markets returned. Mr. A. stated that the company continued to provide administration and collection of the mortgages and in early 2016, recommenced the origination activity.

21. In direct examination Mr. A. was asked to comment on the financial statements for the period 28 September 2012 to 31 December 2012 in relation to a description in the accounts that the objective of the company was to become a leading loan servicer in Ireland. Mr. A. stated that the Appellant intended to re-engage in lending activities and that the Appellant had retained its licence to allow it to do so even though this meant additional administrative requirements for the Appellant in addition to a Central Bank audit. He stated that the Appellant would not have retained this licence if it didn't have an intention to re-enter the lending market. He stated that, as a non-bank lender, the Appellant was required to borrow money from capital markets and was waiting for the markets to return to allow it to do so. He stated that the reason for not lending until a significant time later was because the Appellant was unable to raise finance.

22. During cross-examination Senior Counsel for the Respondent asked: '*What was the Company's intention when it realised that its assets were being put up for sale*?' Mr. A. answered that the Appellant's intention to continue lending was contained in the 2012 press release and was evidenced by retention of the regulatory licences throughout 2008 to 2012. In relation to the 2012 press release, Senior Counsel for the Respondent emphasised the fact that it stated that it would also '*consider*' originating new mortgage business in Ireland and that the financial statements for the period 28 September 2012 to 31 December 2012 on the issue of recommencement of lending provided it would do so subject to market conditions.

23. The witness stated that post 28 September 2012 the employees carried out the same tasks as before, being the tasks of administration and collection in respect of the mortgage loans. He confirmed that the borrowers were not notified of the SPV transaction because Company X Ltd. remained the lender of record retaining the legal interest in the mortgage loans. He stated that proceedings for repossession or recovery issued in the name of the lender of record and not in the name of the SPV.

24. Mr. A. stated that SPV had an independent board, was not owned by any other structure and that the shares were held on trust for charitable purposes. On this basis he referred to SPV as an '*orphan entity*'.

25. He stated that from the Appellant's point of view the SPV securitisation transaction was a funding or financing transaction. He gave evidence in relation to a concept he termed '*bankruptcy remoteness*' to the effect that the securitisation vehicle confines the risk associated with the loans within the securitisation vehicle so that there is no call on the corporate entity itself and that any recourse would be limited to loans and assets within the entity, but could not be accessed or used by the Appellant to discharge creditors on its balance sheet. In effect, the loans and the assets associated with those loans were ring-fenced within the SPV, described as a '*bankruptcy remote vehicle*'.

26. In relation to the Portfolio Management Agreement, Mr. A. stated that it set out fees (base fee, performance fee and incentive fee) for performance in relation to the Appellant's performance as portfolio manager. Mr. A. referred to the waterfall concept within the agreement where the top of the waterfall comprised interest and collections from which fees were then deducted. Mr. A. explained the concept of deferred consideration as situated at the bottom of the waterfall. He also elaborated in relation to the concept of recycling part of the consideration of the portfolio management fee into other investments *i.e.* different junior loan notes holding section 110 companies.

27. Mr. A. stated that in his view, there was no significant difference in the services provided by the Appellant pre and post September 2012. He stated that the collection of interest and principle on the mortgage loans came through the waterfall post 28 September 2012. Post 28 September Mr. A. stated that it was business as usual, with the employees carrying out the same tasks as before in relation to administration and collection. In relation to Financial Institution (I) and other third party agreements he stated that the Appellant would deal with the inbound and outbound telephone calls and would issue the relevant correspondence but that the correspondence would be sent out on headed paper of the lender of record. He stated that many of the third party contracts were also structured via a securitisation vehicle.

28. While the financial statements pre September 2012 referred to the main activity of the company being the provision of mortgage financing and post September 2012 as comprising the provision of loan portfolio management services together with third party servicing activities, Mr. A. described the reason for this change in description as '*trying to …. align ourselves to the way Corporation Y Ltd. would describe its business*

effectively. Goes back to those three boxes of origination, administration and collections. At this point in time we are only doing the administration and collections piece…'

29. In direct examination, in answer to the question '*What were you doing up to 27th of September 2012 in terms of those three boxes?*' the witness answered: '*So we were doing the origination, the administration and the collections.*' Subsequently, Mr. A. stated that there was no origination from early 2009 and 27 September 2012. In re-examination he sought to draw back from that a little during the following exchange with Senior Counsel for the Appellant:

Q: *'What is the position, you say the position of the company with regard to the first box being origination in the period from* [early] *2009 until September 2012?*
A: *The company was just doing administration and collections during that period.*
Q: *And in terms of the first box was there an intention to re-engage in that box?*
A: *Yes, as I have said there was an intention to re-engage.*'

30. The 2015 accounts detailed how in early 2016 the Company re-entered the residential lending market in Ireland. The witness stated that the Appellant launched a product to market in 2016 and had originated some new loans.

31. Reference was made by the witness to two newspaper articles. He stated that the Appellant resumed lending and was open for business in 2016 and that the press reports followed from that. At the time of giving evidence, Mr. A. stated that the Appellant had originated about €5million in loans. Mr. A. stated that they were the first lender to come into the market since 2008 and that, in his opinion, it was difficult to raise funds between 2008 and 2012 as there was little or no market for mortgages during those years.

32. Nearing the end of direct examination Mr. A. was asked to summarise the similarities or differences in the activity of the Appellant company in the period up to 27 September 2012 and the period thereafter and he stated as follows; '*So obviously from … 2009 onwards to 28th of September 2012, the company was effectively doing the administration and collections of the mortgage book. That* (sic) *were the activity of the company in that period, there was no origination activity taking place in that period. That activity is continued from 28th of September through until …* [2016] *when*

effectively that origination box, if you will, of the three boxes has been started again. So that is the way I describe from sort of … 2009. Obviously prior to 2009 than (sic) *origination box as I talked through earlier was operating as well.'*

33. In answer to the question of whether there was any major change in the nature or conduct of the Appellant's trade in the three years before 28 September 2012, Mr. A stated: *'No, look my view and you know we touched on this when we looked at the old chart, in effect you had the same people, we have talked about the management tea* (sic) *who were there pre the sale and post the sale. Most of those were the same. You have got, they are doing the same activities, so in relation to, you know, we have done through the ASU team, the forbearance team, the resolutions team, the legal team, the REO team and then the support functions that would sit alongside those. Those activities were the same just prior to the sale as they were post the sale of the business. So my view would be very much that those activities stayed the same and the people doing those activities have stayed the same. And then the new servicing agreements we have entered into since then have again been the same activities that, you know, we did as part of the SPV Portfolio Management Agreement. I think, you know, that would be my view the trade hasn't changed just as a result of us having* (sic) *fund the loan book by way of a securitisation to a Section 110*.'

34. In terms of the risks of the business pre and post 28 September 2012, Mr. A. stated that because of the debt forgiveness transaction, Company X Parent Ltd. bore most of the risk in relation to the losses on the loan book pre September 2012. During cross-examination he accepted that funding pre September 2012 was from Company X Parent Ltd. while funding post September 2012 was from the securitisation vehicle i.e. SPV. He stated that post September 2012, the income of the Appellant came through the waterfall structure as opposed to being generated by the interest and principle collections off of the Appellant's own loan book. He stated that the company bore the same regulatory risk pre and post 28 September 2012 as it remained licenced. He stated that operational risk was no different and that reputational risk to the Appellant would have been no different.

35. Under cross-examination Mr. A. clarified that the trade which had not changed, in his view, was that of administration and collection, 3 years pre and post 28 September 2012. He stated that origination occurred prior to early 2009 and recommenced in

2016. He stated that in his opinion there were no significant changes in the nature or conduct of the trade post September 2012.

36. However, during cross-examination Mr. A. was asked to read from a letter he wrote the Respondent in 2015, containing an expression of doubt. In that letter he described the trade of the company on 31 December 2007 and prior years as '*consisted of a trade of offering and granting mortgage loans, funding those loans, holding and managing those loans and the related funding with a view to maximising profits.'*

37. During cross-examination, on the subject of a comparison of the Appellant pre and post 28 September 2012, Mr. A. accepted the following;

- Prior to the transfer, Company X Ltd. had complete beneficial and legal ownership of the loans *i.e.* it owned the assets outright. Post the transfer, it held the legal title only.
- Post execution of the various agreements of 2012, the Appellant was subject to close control by SPV, was required to account regularly to SPV and to manage the loan book in accordance with the constraints imposed by the portfolio management agreement.
- Post the transfer, the work done managing the loan book was done for SPV.
- Post the transfer, the Portfolio Management agreement imposed a large number of varied obligations on the Appellant.
- SPV was entitled to terminate the agreement prior to its five-year expiry if the Appellant breached the agreement and if the agreement was terminated, the Appellant would lose its legal title to the loans.
- Prior to September 2012 the Appellant carried the risk that the loans would be further devalued and any such losses were borne by the Appellant.
- Post September 2012, the income received was portfolio management income from SPV but prior to this date it was income received on foot of mortgages from the Appellant's customers.
- Under the Portfolio Management Agreement the business plans and budgets defined the Appellant's task in managing the loans post September 2012 and these plans and budgets were ultimately a matter for SPV.
- The reporting obligations imposed under the Portfolio Management Agreement allowed for more control over the Appellant company (by a party outside the group i.e. SPV) than was the case prior to the execution of the agreements in September 2012.

- Post the transfer, the mortgages appeared in the balance sheet of SPV and not the Appellant.
- That the Appellant is subject to very detailed accounting and record keeping requirements by the Portfolio Management Agreement.
- That the Appellant was obliged to deliver portfolio management reports in accordance with Clause X of the Portfolio Management Agreement, that the Appellant's Directors were obliged to meet with the Board of SPV four times per annum and that the Appellant must allow an independent public accountant to conduct an analysis of the accounts and produce a report and to permit the master portfolio manager to have the same right to access information as SPV has.
- That in accordance with clause 20 of the Portfolio Management Agreement, the Appellant had an obligation to provide information to SPV as is reasonably practicable from time to time.
- Mr. A. accepted that clause Y of the PMA set out 41 covenants/obligations with which the Appellant was obliged to comply. Senior Counsel for the Respondent put it to Mr. A. that this clause imposed on the Appellant, a series of contractual obligations which significantly constrained and defined what the Appellant was legally required and entitled to do vis-s-vis the assets.
- Mr. A accepted that clause Z contained a lengthy list of circumstances in which the agreement could be terminated and that if the agreement were terminated this would end the Appellant's relationship with the mortgage loans and it would also mark the end of its relationship with SPV and the end of its legal title to the loan book.
- Mr. A. accepted that if the Appellant had retained a beneficial interest in the loan assets in September to December 2012, the financial statements in respect of that period would have highlighted the credit risk attaching to those loan assets *i.e.* the possibility of customers defaulting on those loans however, as the beneficial interest in the loans was transferred to SPV on 28 September 2012, the notes to the financial statements for the period September to December 2012 did not show credit risk as a freestanding item but included it in a note in relation to Liquidity and Credit risk which referred to the risk of being unable to accommodate liability maturities, fund business growth and meet contractual obligations in contrast to the note in respect of credit risk in the financial statements for the period ended 27 September 2012 where the credit risk was described in terms of the risk of loss arising from a customer's failure to meet its contractual obligations.

38. On completion of the review of the provisions of the PMA on cross-examination, Senior Counsel for the Respondent questioned Mr. A. as to whether the agreement and its obligations entailed a major change in the nature or conduct of the trade compared with the period pre September 2012. Mr. A. stated that the Appellant did not have the capital to fund the loan book directly, that it had to be done via securitisation using capital markets and that it was the economic conditions at the time that drove this transaction. He accepted that the agreement provided SPV with a great deal of control but stated that in his view, there was no significant change in the Appellant's trade. In re-examination Mr. A. stated that in his view, a situation where a lender has advanced money and then continues to receive interest on principal repayments but doesn't advance any new monies could be referred to as the provision of financing.

39. During re-examination there were some questions directed at whether SPV was an entity in its own right *i.e.* '*So, what real existence does SPV have …?*' This point was addressed by Mr. B. in his evidence, below.

Mr. B., [senior position] of the Appellant company.

40. Mr. B. held a senior position in the Appellant company during the relevant period and was a board member of Corporation Y Group Limited, parent company of Corporation Y Ltd. His evidence can be summarised as follows;

41. Mr. B. confirmed that he was involved in the negotiations concerning the purchase by the Corporation Y Group Limited, of the Appellant company.

42. He stated that conversations commenced with Company X Ltd. in January 2012, that signing took place in June 2012 and that the transaction closed in September 2012. He stated that the Company X Ltd. acquisition was Corporation Y Group's first entry into Ireland and Europe.

43. He provided evidence in relation to the business cycle of servicing assets and originating loans. He stated *'… there is* (sic) *going to be good times and bad times. And we think of servicing as more defensive in terms of times of trouble because you're going to have more difficult portfolios to manage. When things become better economically then the opportunity is to lend. So you've got the two sides of the same coin effectively.*

It's the same people who are looking to do the opportunity, depending on where you are in the cycle. Unfortunately, Ireland had a very long cycle in terms of the negative so it took a while to get lending again.' Later on he stated: '*We position our businesses very carefully to make sure that we can swing either way depending on what the economy may be doing jurisdiction by jurisdiction and globally as well.'*

44. He stated that securitisations were a common financing structure in the European markets. Mr. B. stated that in his view the securitisation transaction on 28 September 2012 was a change in funding method, a financing tool and not a change in the trade. He stated: '*When I look at the pre and post* [SPV] *acquisition phase I see* [Company X Parent Ltd.] *funding the balance sheet of the predecessor company. And I see frankly* [Investment Bank Co.] *funding the balance sheet of the post acquisition company. So from my perspective I don't see, you know, a significant change in terms of approach. Undoubtedly of course there is a 110 vehicle there which is being used to provide that finance. But that's a method of financing verses anything else.'*

45. Mr. B. described SPV as a '*bankruptcy remote vehicle'*. He stated that although the Portfolio Management Agreement provided that SPV was the customer, he stated that from the Appellant's perspective, the underlying customer is the underlying customer, meaning the customer is the mortgagor.

46. In terms of the income of the Appellant and the comparison between income pre and post September 2012, he stated: '*I go back simply to the point that the 110 vehicle was a method of financing that portfolio .. So the resulting income flows coming from that financing methodology reflect the business post verses pre. And so effectively you're seeing interest income before flowing through directly to the balance sheet whereas effectively post you're seeing it flow through the financing vehicle first and then we have our deferred consideration … that ultimately picks up interest income after the various waterfall measurements have been achieved. And then laid on top of that obviously there is a servicing income that comes through that as well.'*

47. In relation to the Irish market his position was that securitisation was the most efficient means of achieving the transaction *i.e.* the best financing mechanism. Under cross-examination he stated that moving between servicing and lending is not always successful. He stated '*it's not a particularly easy thing to do*.'

48. During cross-examination he agreed that the business was initially that of servicing the SPV loan and thereafter, other third party loans. He agreed that the vesting of the beneficial ownership of the mortgage loan assets outside of the service provider was key because the investors must own the assets and without this component, the transaction would not work.

49. As regards the PMA, Mr. B. stated that the level of reporting required under the agreement was higher than a normal securitisation would require. He stated that Investment Bank Co. wanted to ensure they had a '*clear line of sight*' into what was happening with the underlying collateral because the situation was distressed. When asked by Senior Counsel for the Respondent whether this meant that Investment Bank Co. needed greater control Mr. B. replied '*Yes. Well greater reporting*.' He stated that pursuant to the PMA the Appellant would be required to report monthly instead of quarterly and that the agreement made provision for a master servicer with a supervisory function. He agreed that the level of security and control in the PMA was '*higher than usual'* and that this was because the Appellant was managing Investment Bank Co. 's investment in the SPV, being the SPV's asset.

50. Contrary to the questions put to Mr. A. in re-examination on the issue of whether SPV was a real entity, Mr. B. confirmed that there was nothing unreal about the SPV structures that were put in place.

51. On the issue of termination of the PMA, Mr. B. agreed that Investment Bank Co. retained under the agreement, a generous entitlement to terminate for breach. Mr. B. confirmed that in the event the agreement was terminated, the Appellant would lose its legal entitlement to the mortgages and in the event this happened, the Appellant would lose its regulatory capacity to continue the work it was doing.

52. Mr. B. was questioned on the matter of the Appellant 's perspective in 2012 in terms of when it might anticipate the recommencement of lending. He stated that it would have been heavily dependent on the return of the capital markets. He stated that he considered whether it might have been a year or two ahead but that it ended up being longer. He agreed when asked, that there had been a recovery of sorts in the Irish residential property market over the past number of years, a faster recovery than expected, albeit one from a very low base. He accepted that notwithstanding the recovery, it took three and a half to four years for the Appellant to start lending again.

53. As regards the perspective of the company in 2012, he accepted that at that point it was going to be some time before the Appellant started lending again and that the recommencement of lending was contingent on there being a market available for near-prime mortgages and capital markets available to fund the new originations. The following exchange occurred during cross -examination:

'Q: And that is why in your fair statement to the public in … 2012, you referred to considering re-entering the lending market?
A: Yes
Q: That was your frame of mind at that time.
A: That's right.'

Professor C., expert witness

54. Professor C., Professor of accountancy, [Educational Institution redacted] gave evidence on behalf of the Respondent.

55. Professor C. considered and reviewed the accounts of Company X Ltd. both before and after 28 September 2012. He gave evidence taking into account IAS 39 (extant at the time) and IFRS 9 (the current standard). He stated that in reading the accounts pre and post September 2012, it was clear from the accounts that something '*dramatic*' had happened in relation to the Appellant in the sense of changing the profile of the balance sheet and the income statement.

56. Professor C. stated that IAS 39 classifies assets of financial instruments into four categories based on motivation for holding those categories. He stated that post September 2012, IAS 39 did not apply because portfolio management income was not an IAS 39 item. He stated that the income stream was classified differently post September 2012 because it was different and it was different because the business model was different. He noted that assets of the pre 28 September entity were classified as loans to customers however post that date they were assets or accounts receivable from related parties in a much reduced amount.

57. Professor C. stated that there were three consequences to this in his opinion, namely;

i. The balance sheet was in substance, completely different.
ii. In the context of accounting standards, the motivation for holding the standards (IFRS 9) was substantively different.
iii. The accounting policies under which those assets were held were completely different.

58. He stated that the profile of risk had changed post September 2012, in part because of the transfer of the beneficial ownership of the assets and in part because the income had changed in that it had become portfolio management fees, a different dynamic of income to pre September 2012 income which was interest income from loan assets. His evidence was that accounting policies account for these types of income in different ways.

59. He stated that the assets prior to September 2012 were accounted for in a different way to the assets after September 2012 and the reason for that was because those assets were different. In response to the suggestion that the arrangements were simply financing arrangements, his evidence was that the arrangements created a different set of assets and the applicable accounting policies were different because the assets were different.

60. Professor C. stated that '*if I look at the financial statement as a reader or as an accountant I would say that the profile of assets, the profile of income, the profile of risk and the business model is different post September 2012 than it was before September 2012'* and, he continued '*The accounting standards treat the assets differently based on motivation and business model'.* He also stated: '*They are different because the accounting standards treat them differently and the accounting standards treat them differently because they are different*'

Dr. D., expert witness

61. Dr D., an economist of considerable experience, gave evidence on behalf of the Respondent. Dr. D. stated that he had reviewed the agreements in relation to the transactions on 28 September 2012 and that he was asked for his opinion as to

whether there was a cessation or a major change in the nature and conduct of the trade, occasioned by those agreements, from an economic perspective.

62. Dr. D., in referring to the model of the Appellant's business (origination, administration and collection) as submitted by the Appellant, stated that there was a fourth box; that of owning the loans. In his opinion the Appellant, having originated a mortgage, would go on to consider whether to hold that investment on its balance sheet and would face the risks and rewards involved and that the Appellant, until 28 September 2012, did precisely that. In the opinion of Dr. D., this was a critical box. In his view the boxes of administration and collection were by-products of origination and of owning the loans.

63. Dr. D. stated that from an economic point of view the losses of €129,000,000 arose as a result of two things; firstly, the fact that the mortgage assets resided on the balance sheet and secondly, the fact of the mortgage assets becoming degraded by virtue of the circumstances in the economy at that time. He stated that the day after the relevant transactions on 28 September 2012, two things had changed from an economic point of view. Firstly, the exposure of the business to the mortgage risk sitting on its balance sheet was eliminated. It was eliminated, he stated, by virtue of the securitisation transaction which transferred the economic risk from Company X Ltd.'s balance sheet to Investment Bank Co. and replaced that risk with cash. Secondly, the activities of administration and collection, previously carried out in relation to the Appellant's own mortgage assets were now carried out for a third party as the provision of professional services, for which a fee was generated and received. When pressed in cross-examination by Senior Counsel for the Appellant he summarised this point as follows; '*My point is that your delineation of boxes 1, 2 and 3* [are] *missing from an economic point of view the most important box of all. After we've originated this mortgage, are we going to take the risk on it? … And they did. And to complete your question; they did right up until the transaction took place. And then the following day that risk was removed from the balance sheet and cash was substituted*.'

64. Dr D. stated that, as a result, there had been a fundamental economic change, being the removal of the exposure of economic risk from the balance sheet of the operator, to a third party investor (Investment Bank Co.) and the pursuit of a business model which is to grow a business based on providing professional services to a very high level in terms of servicing portfolios.

65. On the issue of securitisation he stated that the function of securitisation was not financing alone. He stated that it was also used as a facility to shed risk and to create an income stream. He stated that originating and owning loans was a different economic activity to providing professional services. He stated that from an economic point of view, it was the pre 28 September economic activities which gave rise to the first loss but that it was a different set of economic activities after that date.

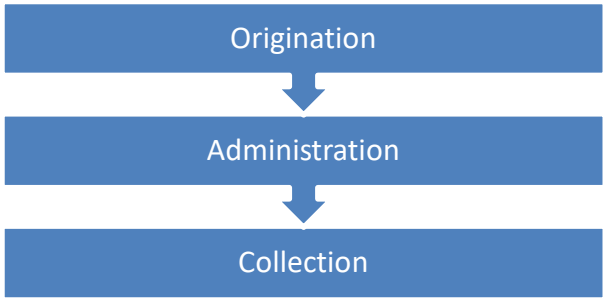
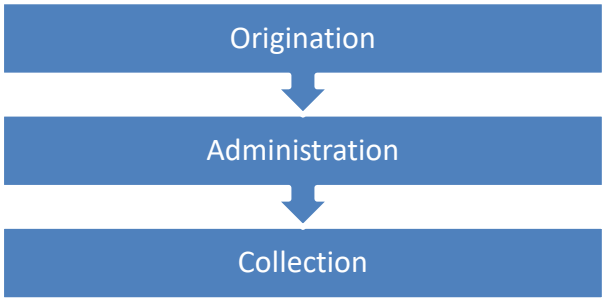
66. Under cross-examination by Senior Counsel for the Appellant, Dr D. was asked to address similarities in the forgiveness of the debt of approximately €425 million by Company X Parent Ltd. in 2012 with, post 28 September 2012, the risk transferred to Investment Bank Co. Senior Counsel for the Appellant put the question to him that; '*So in both situations you have two third parties, who on your evidence bear the economic risk. And both third parties are providing the finance at different points in time. It seems to me that that's just swapping one form of funding for another?*' Dr. D. stated that the securitisation transaction was to remove economic risk from the balance sheet of the Appellant and to place it in SPV but that even though the loan was written down by the unsecured creditor prior to the securitisation transaction, the loans were resting on the balance sheet of the Appellant until the securitisation transaction occurred.

67. The Appellant put it to Dr. D. that the company was funded up to the transaction and was then funded after the transaction and thus there was no point in time where there were different economic risks. Dr. D. stated that in keeping the mortgage book on its balance sheet up to September 2012, Company X Ltd. was exposing itself to economic risk in a particular way and since then it was doing business in a different way.

Analysis and findings

Diagrams and boxes

68. The Appellant submitted that its trade could be represented by a diagram showing three boxes titled; origination, administration and collection, represented as follows pre and post 28 September 2012:

<table>
<tr><th colspan="2">The Appellant's submission</th></tr>
<tr><th>Pre 28 September 2012</th><th>Post 28 September 2012</th></tr>
<tr><td> 
</td><td> 
</td></tr>
</table>

69. Senior Counsel for the Respondent referred to the three boxes as '*an invention of the taxpayer'* describing them as *'cleverly constructed'* and stated that there was no legal authority cited and no expert evidence adduced to show that this is how one breaks down a business of this kind.

70. The matter of how the aspect of origination formed part of the analysis from the Appellant's point of view was clarified by Mr. A. in the course of his evidence wherein he stated that origination did not form part of his definition of the trade of the Appellant within the relevant period. I note the following exchange during cross-examination with Senior Counsel for the Respondent:

'Q: Is the trade which had not changed the trade of administration an (sic) *origination or is it the trade of origination, administration and collection?*
A: It is the trade of administration and collection.

Q: Okay, thank you. Therefore, the trade of the company, before the 27th of September 2012, was administration and collection and on your case it was administration and collection after that date, is that correct?
A: That is correct.
Q: Okay. So origination has nothing to do with your definition of the trade in the three years before or after, is that correct?
A: Correct.
Q: Okay, thank you.'

71. In re-examination Mr. A sought to draw back from that somewhat during the following exchange with Senior Counsel for the Appellant:

'Q: what is the position, you say the position of the company with regard to the first box being origination in the period from [early] *2009 until September 2012?*
A: The company was just doing administration and collections during that period.
Q: And in terms of the first box was there an intention to re-engage in that box?
A: Yes, as I have said there was an intention to re-engage. '

72. Thus I will approach the issue of origination in the manner contended for by the Appellant *i.e.* that the trade pre September 2012 consisted of administration and collection with origination in a state of suspension. As regards the Appellant's position that there was an intention to re-engage origination at a future point, I will deal with this as a separate submission.

73. The Respondent contended that the diagram at paragraph 68 above was incomplete and inaccurate in a number of respects. In particular, the Respondent stated that the diagram omitted an important aspect relating to the ownership of the loans in circumstances where, pre September 2012 the Appellant owned its own loans (which were present on its balance sheet) whereas post September 2012 the loans were off the balance sheet as they were no longer owned by the Appellant.

74. The Respondent, supported by the expert evidence of Dr. D., economist, stated that a fourth box should be included on the diagram contended for by the Appellant. Inclusion of this additional component would result in an adjustment of the diagram as follows;

The Respondent's first submission *(origination in suspension)*	
Pre 28 September 2012	Post 28 September 2012
Origination in suspension ↓ Ownership of Loans ↓ Administration of own loans ↓ Collection of own loans	Administration of the loans of others ↓ Collection of the loans of others

75. Based on the Respondent's second submission *i.e.* that origination was an integral part of the trade of the Respondent, the diagram may be represented as follows;

The Respondent's second submission *(origination included analysis)*	
Pre 28 September 2012	Post 28 September 2012
Origination ↓ Ownership of Loans ↓ Administration of own loans ↓ Collection of own loans	Administration of the loans of others ↓ Collection of the loans of others

Analysis of changes pre and post September 2012

76. As regards the comparison pre and post September 2012 in terms of the trade being carried on by the Appellant, the Respondent contended that there were eight factors

which, in aggregate, demonstrated a major change in the nature and conduct of the trade post September 2012 and that the trade carried on after September 2012 was so fundamentally different from the trade carried on before that date, that it was not the same trade and that a cessation of the trade had taken place. These factors are;

(1) Post September 2012 the Appellant no longer owned the asset
(2) Post September 2012 the character of the Appellant's income changed.
(3) Post September 2012 the degree of autonomy the Appellant exercised changed.
(4) Post September 2012 the risk to which the Appellant was exposed changed from the risk of devaluation of the asset to the risk of having the PMA terminated.
(5) Prior to September 2012 the rewards available to the Appellant were that the assets might increase in value but the possibility of this reward was absent post September 2012.
(6) The evidence from an economic perspective given by Dr. D. was that the effect of the securitisation transaction was such as to fundamentally alter the trade, particularly because of the risk.
(7) The evidence of Professor C. was that post September 2012 the accounts disclosed a completely different business using different assets with a different source of income and a different risk.
(8) The trade that Corporation Y Ltd. intended to embark upon and did embark upon was defined by its ambition to become a leading loan service provider.

The eight factors are elaborated as follows;

Ownership of the asset (i)

77. The trade of administration and collection up to 28 September 2012 involved the administration and collection of the Appellant's own mortgage loans, *i.e.* mortgage loans originated by Company X Ltd. pre 2009. The administration and collection which occurred post 28 September 2012 related to loans which were owned by a third party, *i.e.* SPV. The Appellant disputed that the position was this clear cut as the PMA determined that the Appellant retained legal title to the loans post 28 September 2012 and thus remained lender of record. The Respondent emphasised the very many breach and default provisions under the PMA which if activated, would entitle SPV to terminate the agreement and become legal owner of the loan assets. Mr. B. in his evidence agreed that under the PMA, SPV retained a generous entitlement to terminate for breach.

78. In addition, the PMA provided for a 5-year period of operation in respect of the agreement, on expiry of which, legal title in the loan assets would pass to SPV. Mr. A. on behalf of the Appellant stated that he anticipated that the PMA would be renewed (it is possible that it may have been renewed since then) however Senior Counsel for the Respondent stated that as a matter of legal principle, no such eventuality could be assumed based on the legal agreements.

79. The position is that the beneficial interest in the loan assets belonged to SPV post 28 September 2012 with the Appellant retaining the legal interest on terms that were heavily qualified and conditional, for a finite period under the agreement (subject to renewal) and thus I find as a material fact that pre 28 September 2012, administration and collection in relation to the loan assets comprised administration and collection in respect of the Appellant's own loan assets whereas post 28 September it comprised administration and collections in respect of the loan assets of others, including SPV.

Character of the income (ii)

80. Post September 2012, the character of the Appellant's income changed from the income it derived from its own loans pre September 2012, to what it was paid under the PMA in respect of portfolio management fees. It changed from income derived from its own income producing assets, to a service fee with incentive fees built in. The Appellant's position was that the income received by the Appellant post September 2012 derived from the same assets *i.e.* the mortgage loans, originated by the Appellant pre 2009, albeit it those loans were owned by SPV post September 2012. I cannot accept this submission on behalf of the Appellant. To accept it would require me to treat SPV as if it were not a valid legal entity and to overlook the provisions of the PMA, a binding legal agreement, conscientiously drafted with the benefit of legal advice and validly executed by both SPV and the Appellant. Mr B. in his evidence accepted that the PMA was very much a real and valid agreement. Post September 2012, in accordance with the PMA and the other documents executed, the Appellant worked for SPV and SPV paid the Appellant for that work and thus I find as a material fact that the character of the income changed post September 2012 from being income from the Appellant's own originated loans to fees for the provision of portfolio management services under the PMA in respect of loans owned by SPV and subsequently Financial Institution (I) and others.

Degree of autonomy (iii)

81. Pre September, Company X Ltd. was the owner of its own loan assets. Post September it acted at the direction of the asset owner (SPV) and in accordance with the PMA. Post September 2012, there was no decision of consequence that could be taken in relation to the loan assets other than with the consent of the owner of the assets *i.e.* SPV. In 2013 and in 2014 Corporation Y Ltd. entered into further servicing contracts with Financial Institution (I) and with other section 110 companies funded by Investment Bank Co., namely Financial Institution (II) and Financial Institution (III).

82. When the loan assets belonged to Company X Ltd. prior to September 2012, Company X Ltd. had the freedom to release, to write down, to administer and to collect in a manner determined by its own directors or in accordance with its own policy. I find as a material fact that when Company X Ltd. sold the loans to SPV and became the service provider, agreeing to be bound by the terms of the PMA, it had much less autonomy in how it dealt with the loan assets in the context of administration and collection than it had when it was the owner of the assets pre September 2012.

Risk (iv)

83. The risk to which the Appellant was exposed pre September 2012 changed from the risk of devaluation of the loans assets as they rested on the balance sheet of Company X Ltd., to the risk of having the PMA terminated by SPV post that date. Mr. B. stated that the PMA arose in challenging economic times and he accepted that there was a high number of circumstances in which the PMA could be terminated. Thus I find as a material fact that there was a significant change in risk to which the Appellant was exposed pre and post September 2012.

Reward (v)

84. Prior to September 2012 the reward available to the Appellant was that the assets might increase in value together with an expectation of income at a level commensurate with minimal defaults. The rewards post the securitisation transaction were different in that the Appellant was limited to what could be extracted from the waterfall arrangement in the PMA in terms of fees which was necessarily capped in the manner it operated thus I find as a material fact that the rewards available to the Appellant post September 2012 were different to the rewards available pre September 2012.

Expert Evidence - Dr. D. (vi)

85. The unequivocal evidence from an economic perspective from Dr. D. was that the effect of the transaction was to fundamentally alter the trade particularly because of the risk. He proposed an additional box to the Appellant's diagram (at paragraph 68 above) being ownership of the loan assets on the balance sheet. In his opinion, the boxes of administration and collection were by-products of ownership of the loans.

86. In Dr. D's opinion, post the sale, the exposure to risk changed radically. The sale removed the economic risk from the balance sheet and the risky assets were replaced with cash. Dr. D. expressed the view that post September 2012, the Appellant pursued a business model based on the provision of professional services which was fundamentally different to a business based on the provision of mortgages. Dr. D. stated that post September 2012 the Appellant retained the low risk elements of the mortgage business and no longer exposed its capital and that this was a completely different set of economic activities.

87. Based on the evidence of Dr. D., I find as a material fact that the economic activities carried out by the Appellant prior to September 2012 were different to the economic activities carried out by the Appellant post September 2012.

Expert Evidence - Professor C. (vii)

88. Professor C's evidence from an accounting perspective was that the accounts post September 2012 communicated something very significant. He stated that post that date the accounts disclosed a completely different business using different assets with a different source of income and a different risk. His evidence was that this was not because the accountancy rules and practices gave rise to an artificial reconstruction of what the taxpayer's business looked like on its balance sheet. Professor C. stated: '*The accounting standards treat the assets differently based on motivation and business model'* and further *'They are different because the accounting standards treat them differently and the accounting standards treat them differently because they are different.'*

89. The accounting treatment is not dispositive of the legal questions involving cessation of trade and major change in trade however it is a relevant consideration to be factored into the analysis. Based on Professor C's evidence from an accounting

perspective, I find as a material fact that the accounts disclosed a different business using different assets with a different source of income and a different risk pre and post September 2012, based on accounting standards.

The trade of loan servicing (viii)

90. The trade that Corporation Y Ltd. intended to embark on and did embark on post September 2012 was defined by its ambition to become a leading loan servicer. This is a trade the Appellant did not undertake when it was Company X Ltd.

91. The manner of how these changes are described in the financial statements is significant *i.e.* the financial statements of the Appellant for the year ended 31 December 2007 refers to the principal activity of the company being the provision of mortgage financing and that description remained throughout the accounts from 2008 to September 2012 inclusive. Post execution of the PMA on 28 September 2012 the financial statements of the Appellant for the period 28 September to 31 December 2012 referred to the principal activities as being the provision of loan portfolio management services to various investment companies along with third party servicing activities. The accounts also refer to the objective of the Company, which is to become a leading loan servicer in Ireland. The means of achievement of this objective is stated to be by providing an outsourced loan servicing solution to banks and other Financial Institutions currently experiencing high levels of delinquency and arrears as well as acquiring and servicing loan portfolios. The accounts refer to re-engaging in lending activities subject to regulatory approval and to market conditions improving.

92. The position in the financial statements was corroborated by Mr. B., in his evidence, during the following exchange with Senior Counsel for the Respondent:

'Q: Did the amount of third party mortgage management, if I can use that phrase, loan portfolio management that you engaged in with [Financial Institution (I), Financial Institution (IV)*], did that exceed your expectations?*
A: Yeah, I think, the business grew well. I mean, obviously we knew the Irish market was going to be an opportunity for us, but, I think, we were happy to gain the market share that we did. And it was probably partially facilitated by, you know, the demise of [name redacted].

Q: Yes. So that objective of becoming the primary, I can't remember the exact language in the documents, primary provider of these loan portfolio management services, that was realised?
A: Yes.'

93. Therefore, post September 2012 Corporation Y Ltd. achieved its objective of becoming a leading loan service provider. The Respondent contended that what was particularly important was not the similarity between what the Appellant was doing pre September 2012 compared with what the Appellant was doing post September 2012 but the similarity between what Corporation Y Ltd. was doing with SPV post September 2012 and what it was doing with Financial Institution (I), Financial Institution (IV), Financial Institution (III) and others at that time. The Respondent contended that post September 2012 Corporation Y Ltd. was dealing in other people's loans and its trade was that of a leading loan service provider thus I find as a material fact that post September 2012 Corporation Y Ltd. pursued the objective of becoming a leading loan service provider and that Corporation Y Ltd. succeeded in meeting that objective.

Section 401(1) criteria

94. As regards the analysis of changes pre and post September 2012, some assistance can be drawn from the statutory wording of section 401 which sets out criteria for consideration in determining whether there has been a major change in the nature or conduct of a trade. Those criteria are; the property dealt in, services or facilities provided, customers and markets. The section provides;

'In this section "major change in the nature or conduct of a trade" includes –
(a) a major change in the type of property dealt in, or services or facilities provided, in the trade, or
(b) *a major change in customers, outlets or markets of the trade,…*'

95. On examination of the facts and circumstances of this case in terms of these criteria, the position is as follows;

<u>Property dealt in, services or facilities provided (ix)</u>

96. Pre September 2012 the Appellant was involved in the provision of mortgage financing *i.e.* the sale of mortgages to the near-prime market. The aspects of administration and collection arose as a consequence of loans sold/originated by the Appellant and the Appellant necessarily carried out these tasks as part of its trade. Post September 2012 the Appellant was involved in the administration and collection of those mortgage loans in circumstances where the loans were now owned by SPV and thus the aspects of administration and collection became the Appellant's main trading activities. Latterly, the Appellant expanded this business by entering into loan servicing contracts with other third party owners *i.e.* Financial Institution (I), Financial Institution (IV), Financial Institution (II) and others. The Appellant acted as agent of the third party owners of those loans in providing administration and collection in respect of the loans and the Appellant was remunerated accordingly.

97. As regards services provided, post September 2012 the Appellant provided loan portfolio management services in circumstances where prior to September 2012 it provided mortgage financing *i.e.* the sales of mortgages to the residential market.

98. I find as a material fact that in terms of services provided, pre September 2012 the Appellant was involved in the provision of mortgage finance and post September 2012 the services provided were loan portfolio management services.

Customers (x)

99. In relation to the issue of customers, the customers of the Appellant pre September 2012 were the mortgagors of the mortgages sold. In accordance with the Portfolio Management Agreement, the Appellant's customer post September 2012 was SPV. Corporation Y Ltd. contended (contrary to the Portfolio Management Agreement executed by the Appellant) that its customers were the mortgagors under the loans originally sold by Company X Ltd. for the reason that the Appellant remained lender of record on these mortgages by virtue of its retention of the bare legal title in respect of those loans. Corporation Y Ltd. submitted that from a financial services regulatory perspective the mortgagors were treated as customers of Corporation Y. Be that as it may, I cannot accept the submission that the mortgagors remained the Appellant's customers post September 2012. To accept it would require that I treat the SPV as if it were not a legal entity in its own right and would require that I overlook the provisions of the PMA, an entirely valid legal document, conscientiously drafted with

the benefit of legal advice and validly executed by both SPV and the Appellant. Mr. B. in his evidence accepted that the PMA and related agreements were very much real, legally binding and enforceable agreements.

100. In addition, the mortgagors were not customers of the Appellant post September 2012 in any real commercial sense as they did not pay any monies to the Appellant. The suggestion that the mortgagors remained the Appellant's customers post September 2012 and that SPV was not the Appellant's customer is an erroneous one. Post September 2012, in accordance with the PMA and the other documents executed, the Appellant worked for SPV and SPV paid the Appellant for that work.

101. I find as a material fact that pre September 2012 the Appellant's customers were the mortgagors of the loans previously originated by Company X Ltd. and that post September 2012 the Appellant's customer was SPV, and latterly, Financial Institution (I), Financial Institution (IV) and others.

Outlets or markets (xi)

102. On the issue of markets pre and post September 2012, pre September 2012 the Appellant sold mortgage loans to the sub-prime/near-prime mortgage market. Post that period, the market the Appellant traded in was a different market, *i.e.* the market of servicing, as agent, the loans of others. The financial statements of the Appellant for the period 28 September to 31 December 2012, referred to the objective of the Company being the ambition to become a leading loan servicer in Ireland by providing outsourced loan servicing facilities to banks and other Financial Institutions. As a result, it is clear that the market in which the Appellant operated post September 2012, was a fundamentally different market to the market in which the Appellant operated prior to that date.

103. Thus I find as a material fact that the market of the trade pre September 2012, a market for the provision of mortgage loan finance, was different to the market of the trade post September 2012, a market for the provision of loan portfolio management services.

Material findings of fact

104. In summary, I find as a material fact the following;

i. I find as a material fact that pre 28 September 2012, administration and collection in relation to the loan assets comprised administration and collection in respect of the Appellant's own loan assets whereas post 28 September it comprised administration and collections in respect of the loan assets of others, including SPV.
ii. I find as a material fact that the character of the income changed post September 2012 from being income from the Appellant's own originated loans to fees for the provision of portfolio management services under the PMA in respect of loans owned by SPV and subsequently Financial Institution (I) and others.
iii. I find as a material fact that when Company X Ltd. sold the loans to SPV and became the service provider, agreeing to be bound by the terms of the PMA, it had much less autonomy in how it dealt with the loan assets in the context of administration and collection than it had when it was the owner of the assets pre September 2012.
iv. I find as a material fact that there was a significant change in risk to which the Appellant was exposed pre and post September 2012.
v. I find as a material fact that the rewards available to the Appellant post September 2012 were different to the rewards available pre September 2012.
vi. I find as a material fact that the economic activities carried out by the Appellant prior to September 2012 were different to the economic activities carried out by the Appellant post September 2012.
vii. I find as a material fact that the accounts disclosed a different business using different assets with a different source of income and a different risk pre and post September 2012, based on accounting standards.
viii. I find as a material fact that post September 2012 Corporation Y Ltd. pursued the objective of becoming a leading loan service provider and that Corporation Y succeeded in meeting that objective.
ix. I find as a material fact that in terms of services provided, pre September 2012 the Appellant was involved in the provision of mortgage finance and post September 2012 the services provided were loan portfolio management services.

x. I find as a material fact that pre September 2012 the Appellant's customers were the mortgagors of the loans previously originated by Company X Ltd. and that post September 2012 the Appellant's customer was SPV, and latterly, Financial Institution (I), Financial Institution (IV) and others.

xi. I find as a material fact that the market of the trade pre September 2012, a market for the provision of mortgage loan finance, was different to the market of the trade post September 2012, a market for the provision of loan portfolio management services.

Origination in suspension analysis

105. As represented by the diagram at paragraph 68 above, the Appellant contended that prior to September 2012 the Appellant was carrying out administration and collection in respect of mortgage loans and post September 2012 the Appellant continued to carry out administration and collection on those same mortgage loans and therefore the Appellant was carrying on the same trade and there was no cessation of trade and no major change in the nature or conduct of the trade.

106. As regards disposing of the loan assets of the company to SPV, the Appellant's position was that it had not disposed of the loan assets as it retained the legal interest and thus remained lender of record in relation to those loans.

107. As regards the securitisation transaction, the Appellant's position was that it was a financing transaction or a funding mechanism. The Appellant submitted that prior to the securitisation, Company X Ltd. was funded by Company X Parent Ltd. (Company X Parent Ltd. forgave a €425m loan prior to the sale of the company) and therefore the securitisation transaction, the Appellant contended, being an alternative form of funding, did not terminate or affect a major change in the trade of the Appellant, it was simply an alternative form of funding. The Respondent rejected this submission out of hand stating that the analogy was completely false and that it was an attempt to shoehorn the post September 2012 position into what had occurred before. The Respondent submitted that pre September 2012 the Appellant's parent made a decision to write down loans, that this was a commercial decision undertaken by the Company X Ltd. Group, presumably because it was in their commercial interest and that it was not at all comparable to the securitisation transaction which occurred post September 2012. The Respondent stated that the submission by the Appellant that

the risk was somehow born by Company X Parent Ltd. was groundless because the losses belonged to Company X Ltd. and that was how the Appellant, as Corporation Y, was seeking to offset them. The Respondent submitted that if the losses belonged to, Company X Parent Ltd., Corporation Y would not have been able to make its case for offset. The Respondent stated that the intergroup arrangements between Company X Ltd. and its parent were different in every sense from the legally binding agreements that came into effect in September 2012 which incidentally, permitted SPV to terminate the agreement on the happening of certain events in which case the trade between Corporation Y Ltd. and SPV would be over. I accept the Respondent's submission on this point.

108. Dr. D. gave evidence that Financial Institutions securitised their loan books for a variety of reasons including to generate funds, however in this appeal the proceeds of securitisation were not used for lending. The Appellant stated that it was incorrect to suggest that because there was a securitisation, there was a cessation. The Respondent agreed with the Appellant on this point but submitted that in this case, it was the combination of the cessation of lending followed by the disposal of the beneficial interest in the loans to SPV that resulted in there being a cessation of trade. At a minimum the Respondent contended that the securitisation affected a major change in the trade.

109. As regards the sale of Company X Ltd. to Corporation Y European Co., the Appellant submitted that the intention to continue originating carried over the change in ownership of the company. The Respondent did not accept that it would be possible for such an intention to carry over a change in ownership of the Appellant company and that the evidence at its height suggested only a hope or an aspiration to recommence lending. For the purposes of this determination, the aspect of the intention to recommence lending is more fully explored under the second head of analysis *i.e.* the origination included analysis, below.

Section 396(1) analysis (origination in suspension)

110. The question under this aspect of the analysis is whether there has been a cessation of trade for the purposes of s.396(1) TCA 1997, that trade involving the administration and collection of mortgage loans up until 28 September 2012, with origination in a state of suspension.

111. The Appellant submitted that the trade pre September 2012 comprised administration and collection and the trade post September 2012 comprised administration and collection and therefore, there was no cessation of trade. This is a significant oversimplification. The trade pre September 2012 was administration and collection by the Appellant in relation to its own originated loans whereas the trade post September 2012 was administration and collection in relation to the loans of others. The Respondent's submission on this point as represented in the diagram at paragraph 74 above highlights the differences which are obscured in the Appellant's submission in diagram form at paragraph 68.

112. The Appellant advanced the proposition that the trade post September 2012 was the same as the trade pre September 2012 - but can the trade of the Appellant post September 2012 be characterised as the provision of mortgage financing? I note that Corporation Y was involved exclusively in the provision of loan portfolio management services until early 2016 when it originated some new lending. In my view. the business post September 2012 was different at its core because*, inter alia*, the income producing assets (the mortgage loans) had been disposed of. Thus the administration and collection being carried out by the Appellant post September 2012 was no longer carried out in relation to its own income producing assets. It was carried out in relation to the income producing assets of third parties and therefore, post September 2012, the Appellant was an administrator and collector of monies for which a service fee was paid by those third parties.

113. The Appellant's trade post September 2012 is the provision of portfolio management services in relation to the mortgage loans of third party owners i.e. SPV, Financial Institution (I) and others. The Appellant has become a skilled and expert service provider, a leader in its field perhaps, but a service provider still. Until early 2016, the Appellant was no longer selling assets of an income producing nature *i.e.* mortgage loans but was selling services *i.e.* portfolio management.

114. The business of the provision of mortgage financing ceases to be the business of the provision of mortgage financing when the lender suspends its lending operation and disposes of the loan assets as the Appellant has done. The transaction which took place on 28 September 2012 fundamentally transformed the character of the business and the risk associated with it and as per the dicta of Sir Raymond Evershed

in *Fredk. Smith Ltd. v CIR* 29 TC 419 quoted with approval in *Gordon & Blair Ltd v Cronin* [1962] 40 TC 358, there is a '*real and substantial difference'* between the trades in this case i.e. the trade carried on prior to September 2012 and that which followed after. This, together with the eleven material findings of fact set out above and the case law considered below, leads me to the conclusion that on 28 September 2012, there was a cessation of trade in the Appellant company.

115. Thus I determine there has been a cessation of trade for the purposes of s.396(1) TCA 1997, that trade involving the administration and collection of mortgage loans up until 28 September 2012, with origination in a state of suspension.

Section 401 analysis (origination in suspension)

116. The question under this aspect of the analysis is whether there has been a major change in the nature of the trade and/or in the conduct of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant on 14 June 2012 in accordance with s.401 TCA 1997, that trade involving the administration and collection of mortgage loans with origination in a state of suspension.

Nature

117. This appeal involves a dispute between the parties regarding whether losses generated in a trade may be offset against certain trading income. In general, losses incurred in a trade will be set off against income in the trade however the offset can arise only where the same trade is being carried on and it is necessary therefore to consider the relationship between the cause of the loss and the provenance of the income in a given trade. I have found as a material fact that post September 2012, Corporation Y pursued the objective of becoming a leading loan service provider and that Corporation Y succeeded in meeting that objective. However, prior to that date Company X Ltd. carried on the trade of the provision of mortgage finance and did not act as a loan service provider to third parties. This is significant. The loans upon which administration and collection were carried out by Company X Ltd. pre September 2012 were loans it had once originated. From that date Corporation Y no longer owned the loans. It specialised in the provision of administration and collection services in respect of the loans of others.

118. I attribute significance to the fact that post the change in ownership, the Appellant no longer held the income producing assets (i.e. the mortgage loans) on its balance sheet, no longer generated the income stream from these assets in its own right but was remunerated by third parties for carrying out a service of administration and collection in relation to the assets (i.e. mortgage loans) of others. In short, post September 2012 the Appellant was an administrator and collector of monies for which a service fee was paid.

119. I am also persuaded by the fundamental change in the risk versus reward dynamic in the Appellant's business post September 2012. Ownership of the loan assets in this case necessitated the undertaking of risk. In good economic times rewards were realised as the asset increased in value and the mortgages were paid with minimal defaults while in difficult economic times the undertaking of the risk resulted in substantial losses for Company X Ltd. However, the risk was removed from the business by the sale of the loan assets to SPV in September 2012. The risk versus reward dynamic which was present pre September 2012 was absent post September 2012 as the business no longer carried the loans. The beneficial interest in the loan assets was transferred to SPV, a bankruptcy remote special purpose vehicle. While the Appellant retained legal title, they retained it on terms that were heavily qualified and conditional.

120. It is clear that the nature, the essence, the character of this business is fundamentally different post September 2012. Thus based on the eleven material findings of fact set out above together with the observations under this heading and the case law considered below, I determine that there has been a major change in the nature of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant on 14 June 2012 in accordance with s.401 TCA 1997, that trade involving the administration and collection of mortgage loans with origination in a state of suspension.

Conduct

121. The case law supports the proposition that if you stop doing something that was an inherent part of your trade, there has been a substantial change in the conduct of your trade, see *Gordon & Blair Ltd v Cronin* [1962] 40 TC 358,

122. The conduct of the business refers to the manner in which the business is carried on. The Appellant contended that there was no change in the conduct of how the trade was carried on pre and post September 2012. The Appellant submitted that pre September 2012 the employees were carrying out administration and collection on mortgage loans and that post September 2012 the employees were carrying out administration and collection in respect of these same mortgage loans. The Appellant stated that the mortgagors were unaware of the change in ownership of the business as the Appellant remained lender of record by virtue of the fact that it retained the legal interest in the loans. The Appellant contended that the shopfront of the business remained unaffected albeit on the upper floors, preparations for a securitisation were underway and were ultimately progressed. The Respondent submitted that while the employees might be carrying out the same tasks both before and after September, that did not mean that the conduct of the business remained unchanged.

123. One matter for consideration under this sub-head of analysis relates to the question of; what is the impact on the conduct of a trade when significant decisions about the future of a business are taking place at board level? Senior Counsel for the Appellant opened the case of *Rolls-Royce v Bamford* [1976] STC 162, where, at pg 185, Judge Walton stated: *'I think it follows from this that 'the essence of the trade' … comprises every activity which goes to constitute that trade.'* Thus based on this authority, it follows that the more sophisticated a business becomes or a trade becomes, the more important these other aspects become.

124. The act of ringing up borrowers for their next instalment is an activity which forms part of the trade but that activity can only take place because another aspect of the activity has allowed that to occur, namely, the formulation of a business plan agreed by the owner of the loans (SPV) and the formulation of a budget with constraints and targets. These are all part of the activities of the trade.

125. When considering the conduct of a business, what is at issue is the business of the taxpayer not the activity of individual employees employed in a particular part of the business. A relevant observation to make concerning the employees is that while they may have been carrying out the same tasks as before, the Appellant was no longer directing them how the business was to be carried on, rather, it was acting in

accordance with the instructions of the owner as set out in the Portfolio Management Agreement. It was acting on foot of a business plan which prescribed how Corporation Y would carry on the business of managing SPV's asset (in order to earn their service fee) in circumstances where SPV had the final say as to how this was done, on the basis of a budget on which SPV had the final say and in the context of a large number of covenants as to the conduct of the business imposed by SPV, breach of which could result in a termination of the agreement or loss of income title. In truth, the conduct of the business was under SPV's control and was governed by the PMA post September 2012, in circumstances where the business of the Appellant related to an asset owned by SPV. For the purposes of the section 401 analysis, the Respondent contended that there was a major change in the conduct of the trade because there was a sharp and sudden change in the trade on 28 September 2012 due to the sale of the mortgage loans and subsequent entry into the PMA. On this point I find it helpful to refer to the dicta of Walton J. in *Rolls Royce v Bamford* where he stated '*... it appears to me that there is all the difference in the world between an organic growth of a trade and a sudden and dramatic change brought about by either the acquisition or the loss of activities on a considerable scale*'. The Respondent contended that this is what happened in this case, that the economic circumstances precipitated a dramatic change in the business of the Appellant, causing it to dispose of the asset which was central to its trade prior to the disposition. I accept this submission on behalf of the Respondent.

126. In *Gordon & Blair Ltd v Cronin* [1962] 40 TC 358, a case which involved a taxpayer company which brewed and distributed its own beer and which later changed to distribution only (the beer being brewed by a third party but according to the taxpayer's branding and specification), the customers of the business continued to consume the beer while unaware that the Appellant was no longer brewing it however the fact that everything appeared the same to the customer was considered by the Court to be immaterial to the question of whether there had been a cessation of trade, which the Court held there had been. Thus the fact that the mortgagors in this case may have been unaware of the major changes in the Appellant's business is a matter to which I attach minimal weight.

127. The Appellant also submitted that the customers of the business remained the mortgagors of the loans post September 2012 and that contrary to the PMA which defined SPV as the Appellant's customer, SPV was not the Appellant's customer. I do

not accept this submission and have set out my reasoning at paragraph 99 above. It is clear from the PMA and the manner by which the Appellant conducted its business post September 2012 in providing loan portfolio management services, that the Appellant's customers were the recipients of the loan portfolio management services i.e. SPV, Financial Institution (II), Financial Institution (I), Financial Institution (III) and others.

128. Thus for the reasons set out above and taking into account the effect of the agreements that were entered into between SPV and the taxpayer in relation to SPV's assets in September 2012, taking into consideration also, the eleven material findings of fact and the case law set out below, I determine that there has been a major change in the conduct of the trade carried on by the Appellant for the purposes of section 401 TCA 1997.

Thus in conclusion in relation to the section 401 analysis:

129. I determine that there has been a major change in the nature of the trade carried on by the Appellant and in the conduct of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant in accordance with s.401 TCA 1997, that trade involving the administration and collection of mortgage loans with origination in a state of suspension, and;

130. I am satisfied that there was a major change in the nature and conduct of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant on 14 June 2012 notwithstanding the fact that the matter of the cessation/suspension of lending which occurred in January 2009, is outside the three-year statutory period per section 401 TCA 1997. The Respondent submitted that even if it were necessary to factor in the cessation of lending in the section 401 analysis, it would be covered by the gradual change provision of section 401(1) which provides that '*this section shall apply even if the change is the result of a gradual process which began outside the period of 3 years mentioned in subsection (2)(a)*'. I do not consider it necessary to incorporate the cessation of lending in the section 401 analysis because in my view, there is a major change in both the nature and conduct of the trade notwithstanding, however I am of the view that were it to be included, it would be covered by the gradual change provision per s.401(1) TCA 1997.

Origination included analysis

131. The enquiry under this aspect of the analysis is whether there has been a cessation of trade for the purposes of s.396(1) TCA 1997, that trade involving the origination, administration and collection of mortgage loans up to 28 September 2012 with origination considered an integral component of the business. The Respondent's submission under this analysis is represented in diagram form at paragraph 75.

132. As regards the *origination in suspension analysis*, although Senior Counsel for the Respondent advanced submissions under this head in response to evidence led by the Appellant, he stated that there was an element of unreality to it because, to quote Senior Counsel '*it ignores the elephant in the room'* meaning it ignores the origination of lending, the cause of the losses. The Respondent submitted that the cause of the losses bore no relationship to the income against which the Appellant sought to offset the losses.

133. I take the view on the evidence, that there are two aspects to the *origination included analysis*: The first is the lending itself *i.e.* the creation and sale of a mortgage loan to a mortgagor. The second is the retention of the mortgages on the balance sheet of the Appellant company which begets the undertaking of risk by the owner of the loan.

134. The first question under the *origination included analysis* is; if origination is an integral component of the trade and origination ceases, has the trade ceased? Or to put it another way, has origination been suspended to the extent the trade has ceased? For the Appellant to succeed under this head of analysis, it must demonstrate that even though there was no lending for several years, the *intention* to recommence lending did not cease. This means that the Appellant must demonstrate that the intention to continue lending carried over a change in ownership of the business. A second aspect of the *origination included analysis* relates to the aspect of retention of the loans on the balance sheet of the Appellant as per the expert evidence of Dr. D. .

135. Having considered the expert evidence, both from Dr. D. and Professor C., I am satisfied that the second aspect of the retention of the loans on the balance sheet is a significant one. From the point of retention there are a number of potential outcomes;

the asset, the subject matter of the loan may increase or decrease in value, the mortgagor may discharge himself from the loan by early/accelerated payment of same, the mortgagor may comply with or default on the loan, the loan may fall into minor or more substantial arrears etc. In the event that arrears occur, an instalment arrangement may be entered into by the mortgagor which may be successful or which may lead to further defaults and if there are further defaults, court proceedings may ensue. In some cases, write downs may occur.

136. So in the context of the question of whether the trade has ceased, one consideration is whether the aspect of the retention of loans on the balance sheet has ceased. The answer is that it has and this is undisputed. The position is that the beneficial interest in the loan assets was sold to SPV on 28 September 2012 and belonged to SPV thereafter (with the Appellant retaining the bare legal interest on qualified terms for a finite period under the agreement). The evidence of Professor C. was that post September 2012 when the loan assets were no longer resting on the balance sheet of the Appellant, the accounts told you something fundamental. His evidence was that the accounts look different, they are different, radically and significantly, that post September 2012 the accounts disclosed a completely different business using different assets with a different source of income and a different risk. Professor C. stated: *'The accounting standards treat the assets differently ....and the accounting standards treat them differently because they are different.'*

137. The retention on the Appellant's balance sheet of the mortgage loan assets up to September 2012 is closely connected to the origination aspect of the business which was the essence of the Appellant's business pre September 2012. The removal from the Appellant's balance sheet of the mortgage loan assets by way of sale to SPV is central to the question of whether there was a continuation or cessation of trade in the Appellant's business pre September 2012. During the hearing, the Appellant stated that some new origination took place for the first time in 2016 which means that for the period September 2012 until early 2016, the Appellant did not retain its own originated loans on its balance sheet. Thus the aspect of the retention of loans on the balance sheet ceased entirely during this period.

138. The Appellant contended that irrespective of the sale of the company in September 2012 and the subsequent securitisation, it was always the Appellant's intention to re-

engage in lending activity when the markets returned and as a result, there was a continuation and not a cessation of trade for the purposes of s.396(1).

139. On the matter of intention, the Respondent questioned why there were no minutes or other documents evidencing the Appellant's stated intention to recommence lending. The Appellant relied on the retention of its regulatory licence, maintained throughout the period as evidence, the Appellant submitted, of its intention to recommence lending in relation to which, an additional submission was made by agent for the Appellant. Mr. A in evidence stated that the licence would have been beneficial for the Appellant in the context of new business as the Appellant could enter the market as a regulated entity. Senior Counsel for the Respondent noted that the licence conferred authority for the Appellant to engage in insurance mediation, presumably, so it could also write insurance on mortgages. Agent for the Appellant submitted that it was not necessary for Corporation Y to maintain the licence merely for the purposes of servicing the loans and submitted that its retention entailed significant compliance obligations. The Respondent contended that the cost or burden of retaining the licence remained somewhat unclear and that its retention could be explained by any number of different reasons. In my view, whatever the reasons for retention of the licence, I do not consider it dispositive on the matter of intention and, based on the authority of *Gordon & Blair Ltd v Cronin* [1962] 40 TC 358, its retention attracts only nominal weight in the analysis.

140. The Respondent made three submissions on the matter of intention under this head of analysis, set out as follows;

141. First, assuming Company X Ltd. had an intention to continue lending, the lending/origination component of the trade went into a state of suspension during difficult economic times but in such a way that the trade did not cease (these are assumptions only for the purposes of this sub-head of analysis) the Respondent submitted that once Company X Ltd. decided to dispose of its business, that intention ceased or alternatively, became so contingent, that it could not be said to have carried over the change in ownership of the Appellant company. The Respondent noted that by 28 September 2012 all agreements had been executed, the Appellant had been sold and was under new ownership, the loan assets had been transferred to SPV, the portfolio management agreement was in place to regulate payment for

administration and collection services and a new set of directors were in situ in the Appellant company.

142. The financial statements for the period ended December 2012 provided that the principal activity in the course of the financial period was the provision of loan portfolio management services to various investment companies in addition to third party servicing activities. The aim of the company, as denoted by the financial statements for this period, was to become a leading loan service provider in Ireland.

143. The financial statements of the Appellant in respect of the period to 31 December 2013 referred to the principal activities of the Company comprising the provision of loan portfolio management services to various investment companies together with third party servicing activities. In addition, the Appellant secured two significant asset management contracts during 2013 bringing its assets under management approximately €3 billion. The Appellant submitted that this represented an endorsement of its expertise in providing a unique approach to managing commercial portfolios in the Irish market. The Appellant submitted that the directors were focused on growing the business in Ireland to establish it as a leading European loan servicing and real estate asset management operation.

144. The Respondent noted there was no reference to lending in the 2013 accounts.

145. The 2014 accounts referred to the principal activities of the Company being the provision of loans, portfolio management services and third party servicing activities. The Appellant stated that the directors were focused on continuing to grow the business in Ireland and to establish it as a leading lender, loan servicer and asset manager. The Respondent took issue with the reference to the provision of loans because, as a matter of fact, no loans had been written at this point since early 2009. The Appellant contended that these words had been included in error and should refer instead to the provision of loan portfolio management services, while the Respondent took certain issue with the suggestion that this had been or could have been corrected by correspondence.

146. The Respondent submitted that the Appellant as Company X Ltd. and the Company X Ltd. directors ceased to intend to carry on the business of lending at the point where they decided to dispose of the loan assets because at that point they were out of the

business and the directors could not have known who was going to purchase the business or how it was going to be run thereafter. The Respondent submitted that one can accept the evidence of Mr. A. that they intended to recommence lending, but only

at a point in time because once the decision was made by Company X Ltd. to exit this business and to sell the business, that intention could no longer be capable of representing the carrying on of that trade. The Respondent submitted that whatever Corporation Y did months later, whatever Corporation Y intended when *their* directors came on board, that was an intention towards the future and therefore there was a cessation of the intention to continue origination and thus, a cessation in trade. In answer to the question of what would happen if there was a cessation of intention followed by a resumption of the intention, Senior Counsel for the Respondent answered: '*Well, in that circumstance there has been a cessation… It's over. It can't be brought back from the dead. It's gone.'* On this note I refer to the dicta of Lord Donovan in *Ingram v Callaghan* [1968] TC 151, at page 165, where he states; *'There is no dispute between the parties that the expression 'permanently discontinued' in relation to a trade, where it appears in s.130 of the Income Tax Act 1952, does not connote a discontinuance which is everlasting.'* Thus a cessation of trade can be permanent without being infinite.

147. In my view, it is difficult to understand that where the directors of Company X Ltd. knew their shareholder was selling the business, they nonetheless anticipated that *their* thoughts and intentions would continue through the process of identifying a buyer and through the process of the sale of the business and beyond. Whatever the directors of Company X Ltd. might have anticipated prior to the sale of the business, they had no power or control to affect such an outcome and I do not see how an intention to recommence lending, if one existed, could have carried over a change in ownership of the Appellant company, which incidentally, included a change in directors.

148. Second, the Respondent submitted that another way of regarding the facts would be to take the view that the intention of Corporation Y was not the same as the intention of Company X Ltd., that the intentions were so radically different that there was a cessation even if the intention somehow carried over into the new board of directors notwithstanding the shareholder's exit from the market (a position which the Respondent denied was possible but sustained for the purpose of this submission).

149. The Respondent submitted that one might assume that Company X Ltd.'s intention was to fund re-entry to the mortgage market at a future date using the vast reserves

available to it so that if it wanted to lend, it would simply start to lend again when the market improved. Corporation Y's intention on the other hand, the Respondent submitted, had an extra condition built in *i.e.* it depended on improved market conditions but also, on securing a funder. The Respondent submitted that it was an intention to enter into a completely different type of lending; it was going to be a securitised warehoused loan. Corporation Y was never going to be the owner of these loans, that was never its intention. Corporation Y, the Respondent submitted, was going to be entering into a totally different model, type and style of lending. This is why, the Respondent submitted, Corporation Y presented its intention in a conditional manner in its financial statements.

150. The Respondent stated that Mr. B.'s description of the taxpayers as *'the first new non-bank lender in the Irish market in 2008'* was revealing as it denoted Corporation Y as a *new entrant* to the market, not a re-entrant, but a new entrant.

151. In summary, under this heading the Respondent submitted that Corporation Y's intent was an intent to do something so fundamentally different that even if the Company X Ltd. intention carried over a change in ownership and control (a doubtful proposition), there was a cessation of trade.

152. I agree with the Respondent's submission that Corporation Y's business involved a different lending structure to that of Company X Ltd. however as I am of the view that the intention to recommence lending did not carry over a change in ownership of the Appellant company, it is not necessary to express a definitive view on this point.

153. The third submission advanced by the Respondent on the matter of intention was that the Appellant retained a hope or an aspiration but not an intention, to recommence lending. The Respondent submitted that there was a cessation of trade because post 28 September 2012, Corporation Y was administering something different and collecting something different (i.e. the loans of others and not their own loans) and they stopped doing something which was central to their business *i.e.* lending, which incidentally, was the source of the loss.

154. The Respondent questioned the credibility of the Appellant's stated position that there was an intention on their part to resume lending in circumstances where the

shareholder was exiting the business. The Respondent submitted that the departure of the shareholder meant that the intention could not amount to more than a hope or an aspiration and I have accepted this submission above.

155. Mr. B. in his evidence talked of the cyclical nature of the business, making the case, in short, that the opportunity to recommence lending would come around again when market conditions improved and that this was a feature of the Corporation Y business model. Certainly, the economic conditions in 2008 provided a context for what occurred in the Appellant's trade. The Respondent accepted that when Corporation Y acquired the loans it retained a hope that it would re-enter the mortgage lending business however entry into that business, the Respondent contended, was conditional on factors beyond Corporation Y's control and as a result, it could not constitute an intention, merely an aspiration. In support of its position in this regard the Respondent cited the 2012 press release where the Appellant discussed the opportunity of acquiring Company X Ltd. and the manner in which it affected the Appellant's business. The Appellant also discussed how it had been seeking opportunities to expand its business model into Europe. The Appellant stated that in the medium-term, market conditions permitting, it would consider originating new mortgage business in Ireland, thereby helping to broaden the choice of home lending options for Irish consumers.

156. The Respondent relied on this press release as evidence of the conditional nature of the Appellant's intention to recommence lending.

157. Turning to examine the role of origination in the trade of the Appellant, I note the following facts;

i. In mid-2008, Company X Ltd. decided to significantly reduce its lending but maintain a presence in the market.
ii. In late 2008 Company X Ltd. decided to cease lending. The press release issued at this time did not state that Company X Ltd. was intending to maintain a presence in the market or to re-enter the lending market. There was no formally recorded

decision and no board minutes evidencing an intention to recommence lending albeit the Appellant retained its licence.

iii. In early 2009 Company X Ltd. wrote its final loan. This was followed by a period when Company X Ltd. did not write any new business.

iv. Company X Ltd.'s shareholder decided to dispose of the business and in mid-2012 it did so and Company X Ltd. was out of the Irish mortgage lending business from that date.

158. The Appellant relied on *Kirk & Randall v Dunn* [1924] 8 TC 663, which involved a six-year period where no new business was achieved but where the Court held there was no cessation of the trade. However, there was material evidence of intention to continue trading during that period in addition to persistent but unsuccessful attempts by the managing director to acquire trading contracts. For this reason, I am of the view that the case can be distinguished from the within appeal.

159. In the present appeal the facts, undisputed, are that the Appellant wrote its last loan in early 2009 and did not engage in lending again until early 2016, a period of approximately seven years. There were no contemporaneous notes or documents such as board minutes or reports, to support the continuation of this intention other than retention of the licence which, on its own, I do not consider dispositive on the matter of intention, see *Gordon & Blair Ltd. v Commissioners of Inland Revenue* [1962] 40 TC 358. In my view, the fact that the lending business was suspended for approximately seven years in the circumstances in which it was suspended, leads me to conclude that there was a cessation of trade. In addition, as set out above, I do not accept that an intention to recommence lending, even if one did exist, could have carried over a change in ownership of the Appellant company based on the facts and circumstances of the within appeal.

Section 369(1) TCA 1997 analysis (origination included)

160. The intention to be ascertained in this case is an intention of a kind that means that a trade of lending where origination has ceased should be regarded as continuing over a period of approximately seven years. Establishing this intention (which would mean that the trade continued) is something in relation to which the Appellant bears a considerable onus, because the facts demonstrate that lending was not taking place at this time. The Appellant, in order to succeed in its submission, must surmount these

facts by proving a clear intention to resume. I accept that intentions can be formed with varying degrees of certainty however a point comes where an intention is so conditional on factors beyond one's control that it ceases to be an intention. Senior Counsel for the Respondent stated *'In my submission to establish an intention to resume of the kind that means the trade continues, requires a lot more than simply saying, that's what we were intending to do whenever.'*

161. In short this brings me to the question of whether the Appellant can intend something that may not be possible or, alternatively, can intend something which, although possible, is based on an unknown and indeterminate timeframe. In my view the Appellant can hope, can aspire, can will for market conditions to be right for a resumption of lending, but the Appellant cannot know if and/or when the markets conditions will be right for such activity and in the absence of better information, cannot be said to *intend* to recommence lending. The intention the Appellant speaks of is so conditional on factors beyond its control that it is not correct to characterise it as an intention. In truth, it is an aspiration or a hope.

162. In the absence of a clear intention to continue lending and bearing in mind the sale of the removal of the loan assets from the balance sheet of the business, I am of the view that the lending business was suspended to the extent that the trade ceased.

163. Thus I determine, for the reasons set out above and taking into consideration the case law considered below, that there has been a cessation of trade for the purposes of s.396(1) TCA 1997, that trade involving the origination, administration and collection of mortgage loans up until 28 September 2012 with origination considered an integral component of the Appellant's trade.

Section 401 TCA 1997 analysis (origination included)

164. The basis of the *origination included analysis* is that mortgage lending was the beating heart of the business of Company X Ltd. and that a cessation of that aspect necessarily affected a cessation of trade for the purposes of s.396(1) TCA 1997. It is somewhat hypothetical therefore to ask whether the cessation of mortgage lending also prompted a major change in the nature and conduct of the trade because it follows undoubtedly that it did. However, for completeness I propose to deal with

the s.401 question notwithstanding the determination I have reached under s.396(1) TCA 1997.

165. Section 401 TCA 1997 provides that if there has been a major change in the nature or conduct of the trade carried on by a company within 3 years of a change in ownership of a company, relief shall not be given under section 396 TCA 1997. In a section 401 analysis, change in control is the fulcrum around which that three-year period revolves and in this case the three-year period runs from the execution of the Sale and Purchase Agreement between Company X Ltd. Holdings and Company X Shareholder Ltd. and Corporation Y European Co., dated 14 June 2012.

166. To the extent that the distinction between the *origination in suspension analysis* and the *origination included analysis* turns on the matter of the cessation of lending which took place in 2009, the cessation of lending falls outside the three-year period contained in section 401 TCA 1997. Even if it were necessary to factor in the cessation of lending in the section 401 analysis under this head, I am satisfied it would be covered by the gradual change provision of section 401(1) which provides that '*this section shall apply even if the change is the result of a gradual process which began outside the period of 3 years mentioned in subsection (2)(a)*' albeit I am not of the view that it is necessary to incorporate the cessation of lending in the section 401 analysis because I am satisfied that there has been a major change in the nature and conduct of the trade notwithstanding.

167. The change in ownership occurred in this case on 14 June 2012. Mortgage loans on the balance sheet were removed and sold to SPV approximately three months later, on 28 September 2012. I am satisfied that the removal of the loans from the balance sheet via sale to SPV constituted a major change in the conduct of the business of the Appellant because in truth, the conduct of the business was under SPV's control and was governed by the PMA post September 2012, in circumstances where the business of the Appellant related to an asset owned by SPV. Thus, for the reasons set out above and taking into consideration the case law considered below, I determine that there has been a major change in the conduct of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant in accordance with s.401 TCA 1997, that trade involving the origination, administration and collection of mortgage loans up to 28 September 2012 with origination considered an integral part of the business.

168. As regards the nature of the trade carried on within three years of the change in ownership, the trade carried on post September 2012 was the trade of the provision of portfolio management services whereas prior to the change in ownership in June 2012 the trade carried on involving origination, administration and collection of mortgage loans with origination considered an integral component of the Appellant's business, was a trade in the provision of mortgage financing. There is a real and substantial difference between these two trades. Based on the many different components of each of these trades including the eleven material findings of fact set out above and taking into consideration the case law considered below, I am satisfied that there has been a major change in the nature of the trade, within three years of the change in ownership on 14 June 2012.

Case law

169. There is a substantial amount of case law on the subject of trading and cessation of trade, the most significant of which, for the purposes of the within appeal, is set out as follows;

170. The case of *Gordon & Blair Ltd v Cronin* [1962] 40 TC 358 involved a taxpayer company which brewed and distributed beer and which subsequently changed to distribution only, with the beer brewed by a third party but according to the specification of the taxpayer company. The facts are set out in chronology on page 359 of the judgment, paragraphs (g) to (i) provide as follows:

> *'(g) All advertising matter such as ash-trays, mats, service trays, wallets, cigarette cases and the like put out by the Company continued to be the same after October, 1953. Advertisement in trade papers continued in the same manner as before. It was intended to keep from the public and from trade customers the knowledge that the Company was no longer brewing its own beer, and, so far as was known, this intention succeeded. Customers acquire a taste for certain beers and will not accept other kinds. After October, 1953, the Company continued to supply the same, or similar, customers as before with beer*
>
> *(h) Stock lists of bulk beer and bottled beer, and particulars of bottled beer sold, at 25th September, 1953, and 30th October, 1953, respectively, were in evidence before us. They are annexed hereto, marked "D" and "E", and form part of this case.*
>
> *(i) After the agreement was entered into, the Company continued to use its own distinctively marked transport for the carriage of beers to the various customers. As a precautionary measure, the Company has continued to renew its brewing licence in each year since 1953.'*

171. The conclusion of the Special Commissioners which was upheld on appeal, is set out at page 360 as follows;

> *'The question we have to determine is whether the Company's trade of brewing, bottling and selling beer, which it carried on up to 1st October, 1953, is the same as its trade of buying, bottling and selling beer, which it carried on after 1st October, 1953. We are of opinion that it is not, despite the continuity of its selling organisation in the shape of tied and managed houses. It seems to us that the question is one of degree, and that the importance and size of the Company's former brewing organisation makes it inaccurate to say that it continued to carry on the same trade after the extinction of such organisation.'*

172. On page 362 of the report, Lord President Clyde described the essence of the trade as follows;

> *'The essence of that trade, as I see it, prior to 1st October, 1953, was the manufacture for sale by the Appellants of their own particular brand of beer. Their selling and distribution organisation was merely ancillary to that main trading activity. It is, in my view, quite false to suggest that their trade throughout was essentially the distribution of a special brand of beer, whoever may have been the manufacturer. After 1st October, 1953, what had been, in my view, their ancillary activity became the Appellants' sole trading activity, and instead of being brewers of beer, they became distributors of beer which they did not brew but which another firm contracted to brew for them. In these circumstances the Special Commissioners were entitled, in my view, to reach the conclusion to which they came.'*

173. On that same page is a quotation from Sir Raymond Evershed in *Fredk. Smith Ltd. v Commissioners of Inland Revenue,* 29 T.C. 419 where he states:

> *'I am persuaded by Mr. Tucker's argument that there is a real and substantial difference between the two classes of business, that conducted by Millward in regard to these houses and that conducted by Smiths, a difference substantial enough to support the finding of the Special Commissioners.'*

174. On page 363 of *Gordon & Blair,* Lord Guthrie stated as follows;

> '*The argument for the Appellants was that before and after October, 1953, the Company made its earnings by the disposal of beer of a certain quality and made according to a certain specification to managed houses, tied houses and clubs.*

Therefore it was immaterial, and indeed irrelevant, that before October, 1953, the Company made and sold beer which had been manufactured by the Company in its own premises by its own servants, while after October, 1953, it sold beer made by other brewers under a contract with the other company to supply beer according to the specification previously used by the Company. It was said that that was only a change in the method of carrying on the trade and not a change in the trade itself. In deciding what was the trade, regard should be had to that part of the business of the Company which was essential to the realisation of profits. Since it was by the distribution of a type of beer that the Company's earnings were made, and since distribution by the Company of beer of that type continued after October, 1953, there was no cessation of the trade in October, 1953.

Now it is true in a sense that a company's earnings are made by the disposal of its product and that the process of manufacture per se yields no financial return. That does not mean, however, that in considering what is the trade of a company one should have regard only to the distribution of the product sold. If it is of the essence of the business of a company that it is the disposal of a product manufactured by the company, then the discontinuance of manufacture and the disposal instead of a product made by another manufacturer is a change in the nature of the business of the company which can properly be held to be the cessation of the trade and the commencement of a new one. On the facts stated, I am of opinion that the Special Commissioners were entitled to hold that there had been a change in the essence of the business of the Appellants in October, 1953.'

175. The Appellant in the within appeal described its trade in general terms at times, referring to it as '*financial services*' and '*financial solutions*' but what is required in the analysis is a close examination of the elements of the trade as opposed to a characterisation of the trade by broad generic description. In this appeal the main trading activity of Company X Ltd. was the provision of mortgage finance and it was the lending that generated the profits and losses of the business. Administration and collection were by-products of the writing of those loans and can be described as ancillary to the main trading activity that was carried on pre September 2012. After the Appellant sold the loans in September 2012, they became specialists in collecting and administering the loans of others, expanding laterally to take on service contracts

from Financial Institution (I), Financial Institution (IV), Financial Institution (III), Financial Institution (II) and others. Indeed, they achieved their objective of becoming a leader in this market. The ancillary activities of Company X Ltd.'s trade became the main trading activity of the new trade carried on by Corporation Y. In my view, as per the dicta of Sir Raymond Evershed in *Fredk. Smith Ltd.* v CIR, there is *a real and substantial difference* between the two trades which, in the context of the relevant legislation, can be said to constitute both a major change in the nature and conduct of the trade and also a cessation of trade.

176. In *Gordon & Blair*, insofar as the customers of the business continued to consume the beer, they were unaware that the Appellant was no longer brewing the beer and it is clear that the fact that everything appeared the same to the customer was largely irrelevant. Thus the fact that the mortgagors in the within appeal may have been unaware of the major changes in the Appellant's business, is a matter which attracts minimal weight in the analysis.

177. While the taxpayer in *Gordon & Blair* retained its brewing licence as a precautionary measure, the Court attached little significance to this fact and held there was a cessation of trade notwithstanding. Thus in my view the fact of retention of the licence in the within appeal is a matter to which nominal weight is to be afforded in the analysis.

178. The case of *O'Loan v M.J. Noone & Co.* [1948]11 ITR 147 involved a trade in the distribution of fruit followed by a trade as fuel merchants. Subsequently, the taxpayer company acquired its own mine and began producing coal. The Court held that a new trade of coal mining had commenced. The case is interesting for the fact that there was some significance attached to the audited accounts of the business. On page 152 Maguire J. states:

> *'The facts, which are not in dispute, make it clear that substantial changes have been made in the respondents' business. The original wholesale fruit merchants' and importers' business was turned over to the business of fuel merchants. The fuel merchants' business was carried out by purchases of fuel and the resale of same to their customers. This business was carried on for some years prior to 1st April, 1943. The Company's colliery business had no existence prior to the 1st April, 1943. It was brought into existence by the agreements mentioned and the*

actual production of coal by mining operations on a somewhat extensive scale commencing on the 1st April, 1943. Undoubtedly a colliery business was then commenced by the respondents. The changes and differences from that date are demonstrated in the respondents' accounts, the number of their employees and the nature of the employment, their purchases, their customers, the sum claimed as written off for mine development expenditure, and the general change over to coal mining. The business earned on over the relevant period cannot be distinguished from any other coal mining concern.'

179. Thus while accounting evidence is not dispositive of the question of whether there has been a cessation of trade or a major change in the trade, it is correct to afford it due consideration in the analysis and I have attached the appropriate weight and consideration to the evidence of Professor C., summarised above at paragraphs 54-60.

180. The case of *Ingram v Callaghan* [1968] TC 151 is a case upon which the Appellant placed reliance. At page 165 Lord Donovan states as follows;

'There is no dispute between the parties that the expression "permanently discontinued" in relation to a trade, where it appears in s 130 of the Income Tax Act 1952, does not connote a discontinuance which is everlasting. Income tax being a yearly tax, the question has to be answered in relation to the year of assessment in which it arises, and must obviously be answered in the light of the facts which are known at the time when the assessment for that year comes to be made. If, in the light of those facts, the true conclusion is that the trade has been discontinued indefinitely, the Crown, and the taxpayer, would be entitled, I think, to say that it has been discontinued permanently within the meaning of the section. If, on the other hand, the true conclusion from the facts is that the trade is only temporarily in abeyance (eg to allow of extensive reconstruction or repair of the company's trading premises), then clearly it would be wrong to assert that the trade had been permanently discontinued. So far, I do not think there is any controversy between the parties. What is left then is, in my opinion, a question of fact; Was the trade carried on by the taxpayer company in period no 1 permanently discontinued in the foregoing sense, or was it merely suspended for a time?'

181. On page 166 he continues:

> *I doubt if one can, as a rule, segregate the various activities involved in carrying on a trade, select one of them as being of the essence, and then designate the one selected as being the real trade. There is, I think, an organic unity about a trade which invalidates this sort of dissection; and I think that Rowlatt J, was saying much the same thing, though more incisively, when he remarked in Graham v Green* (Inspector of Taxes) *that a trade differs from the individual acts which go to make it up, just as a bundle differs from odd sticks.*

182. I don't disagree with this statement, i.e. that a trade is greater than or different to the sum of its parts but in this case I have determined that there are two distinct trades in existence pre and post September 2012. The comparison is between two different trades, two different bundles.

183. Lord Donovan (p.166) continued:

> *'If the taxpayer company has been asked in period no 1 what its trade, was, it would have replied: 'Making and selling surgical products"—not merely "selling surgical products". And in period no 2, if asked the same question, I think the company would have replied, and properly replied, "We have changed over now simply to selling.'*

184. In the present appeal, the directors in evidence described their own commercial activities. They characterised Company X Ltd.'s trade as one involving the provision of mortgage finance while characterising Corporation Y's trade post September 2012 as the same trade, notwithstanding their detailed evidence in relation to the provision by Corporation Y of portfolio management services to several parties including SPV, supported by the descriptions of their activities in the financial statements.

185. The Appellant relied on *Kirk & Randall v Dunn* [1924] 8 TC 663, a case where, for a period of six years, no contracts were concluded or trading operations conducted and apart from capital receipts, no money was received. However, during this period, the Special Commissioners found as a matter of fact that the Appellant company persisted in efforts to obtain contracts through their managing director and that various negotiations were agitated for and entered into during the period although none

proved fruitful. The period in question also coincided with the outbreak of war which was important to the conclusion of the Court. On page 669 Rowlatt J. stated as follows;

> *'Now what are the facts? The Company was formed to take over a contractor's business. The contractor's business was not in good circumstances. That was in 1912. It carried on to completion the pending contracts of the private firm for a couple of years or so, and it was then obviously poorly off financial ly - very poorly off. It had no premises after the early years of the War when the Government took them over and bought them, and it had no plant; but during those years, to use the language of the Case, it persisted in seeking for business - business which, if they got, they would have had to finance somehow and to carry out which they would have had to acquire plant and workmen whether the business was in this country or elsewhere. But they did not get business. They had their directors all the time, and the directors drew their fees, and their secretary drew his fees; and they also had bills for typing and so on, and bills for legal services; and I see they had workmen's compensation to pay. Now the legal expenses and the stationery charges, and the directors' travelling expenses, which are a large sum, are connected with their efforts to get business, but they did not get any. That went on till 1920, and then they did get something. For the moment I say no more than that they did get something in 1920. In those circumstances the contention must be quite unarguable that on that statement only they began their business in 1920 merely because for the first time somebody yielded to their solicitations for a contract. I do not think that could be said for a moment. Because in the middle of a great career a company, or still more an individual professional man, might have a year when he was holding himself out for business, or the company was holding itself out for business, but nothing came, yet that would not effect a break in the life of the company for Income Tax purposes. And there is the further element in this case - and I cannot help thinking that this is what must have told - there was a change in the spirit and to some extent in the body of the Company, because some people with resources got interested in it and brought in some money, and they adopted a more vigorous policy. I can conceive a case in which that sort of circumstance might happen in such a striking way as clearly to indicate that there was a new business altogether. But it has not been elaborated in the Case before me to what extent there was this galvanising of the Company, but merely some more money coming in, and more energetic people getting hold of it, and they made a more moderate profit in the next year. As far as I*

understand it it is not a question that the field of business was not precisely the same. The Company solicited precisely the same class of business they did in the old days. They solicited just the same sort of business, and they got some. That is all there is.'

186. I am satisfied that this case can be distinguished from the within appeal because in *Kirk & Randall* there were many attempts to conclude contracts and to continue the trade of the company. In the Appellant's case, the company released a statement in 2008 stating that they had ceased lending. After that, the evidence is that no lending took place until 2016. The Appellant did not adduce evidence of the type adduced in *Kirk & Randall*, of repeated and persistent attempts to continue mortgage lending over the relevant period but were relying on market conditions to improve in order to recommence this aspect and in my view, while they may have harboured a hope that this would happen sooner rather than later, they did not succeed in establishing an intention to continue lending over that period.

187. The Appellant also relied upon *Cronin v Lunham Brothers Ltd* [1985] III ITR 363. In this case a business involving the curing of bacon was discontinued for a period of 16 months and the company carried out distribution only. The company in question retained its factory and its machinery and plant. An offer to purchase the assets of the company was refused and the company did not initially make its employees redundant. Instead, the employees were informed that the factory would reopen at a future date.

188. In *Cronin* the Commissioner considered, as evidence of intention, the actions of the shareholders in maintaining the plant and refusing to sell the assets. The Court held that a major change did not take place for the purposes of the Taxes Acts. By contrast in the within appeal, the intention of the shareholder of the Appellant, was to exit the business from sometime in 2011. I am satisfied that *Cronin* can be distinguished on its facts. Not only did it involve a relatively short period of discontinuance of the curing business, but strenuous efforts were made to retain the machinery of the business and to recommence trade.

189. In the case of *Rolls-Royce v Bamford* [1976] STC 162, a case which involved the question of whether Rolls-Royce Motors Ltd. carried on the same trade as Rolls-Royce Ltd. (the company which incurred the losses) following a transfer of assets of part of

the business of Rolls-Royce Ltd. to the taxpayer company, Judge Walton set out the applicable principles at page 183:

> *'Neither counsel for the taxpayer company nor counsel for the Crown has been able to refer me to any authority which is directly in point. There are some cases which have been cited and which are of assistance, and to these I shall turn shortly. Quite apart from all cases, however, it appears to me that there is all the difference in the world between an organic growth of a trade and a sudden and dramatic change brought about by either the acquisition or the loss of activities on a considerable scale. Let me illustrate what I mean by the case of a company owning a single village grocer's shop. Over the years it acquires, a few at a time, additional shops; it then organises a central system of bulk buying for them; it may then possibly organise manufacturing facilities in respect of various lines for its chain of shops to sell; and it may well move into the realms of transport and run its own fleet of vans. If it can do all this without ever having discontinued one trade and commenced another—which is the assumption which has to be made in the present case and which may well be correct—well and good. The final trade of that company will, however, as a matter of business activity, bear but little relationship to its original beginnings. Then if, as a result of some crisis, that company has to get rid of all its activities by selling them off, leaving it with only the original village shop, I would myself be under no doubt whatsoever but that there had been a violent change in the trade of that company.'*

190. At page 185 he continued as follows;

> *'I doubt if one can, as a rule, segregate the various activities involved in carrying on a trade, select one of them as being of the essence, and then designate the one selected as being the real trade. There is, I think, an organic unity about a trade which invalidates this sort of dissection; and I think that Rowlatt, J., was saying much the same thing, though more incisively, when he remarked in Graham v. Green (Inspector of Taxes) that a trade differs from the individual acts which go to make it up, just as a bundle differs from odd sticks. If the taxpayer company had been asked in period no. 1 what its trade was, it would have replied: "Making and selling surgical products"—not merely "Selling surgical products". And in period no. 2, if asked the same question, I think the company would have replied, and properly replied, "We have changed over now simply to selling".'*

I think it follows from this that 'the essence of the trade', to use the Lord President's phrase, comprises every activity which goes to constitute that trade. Or, put in another way, however the trade of Rolls-Royce Ltd in 1971 is to be defined, it included the activities, whatever they were, all ultimately directed towards making profits, whatever their actual result, in all its six divisions. Doubtless the trade of the company would remain the same trade even though, as a result of organic growth in response to every factor which might influence it, the company adopted new compatible operations and discarded portions of its old.

However, if there is in substance a complete division of the trade of the company into two separate parts, notwithstanding that trade of the same general nature is carried on thereafter by each of the two now separate entities, it appears to me that neither of them is carrying on the same trade as the composite whole formerly carried on. Counsel for the Crown refined this approach by pointing out that the opening words of the Income and Corporation Taxes Act 1970, s 177(1), focussed attention on the trade being carried on by the company in the accounting period in which the loss had been made, and it is that trade which has to be carried on for the loss relief to be available. Thus, he submitted, counsel for the taxpayer company's argument that one had to look at the whole history of the company's trading from its inception to see what was the true nature of its trade was wholly misconceived.

I think there is considerable force in that submission and I therefore conclude that the comparison which has to be made is between the trade actually carried on by the company in the accounting periods in which it was making the losses in question (1969, 1970 and a period from 1 January 1971 on) and the trade carried on by the taxpayer company, and not between the 'historic trade' of the company and that of the taxpayer company. If this is the correct approach, then it appears to me that the 'question of degree' approach, which was that adopted by the commissioners, was the correct one.'

191. The interesting parallel which can be drawn between Rolls-Royce and the within appeal is that in Corporation Y's case, the economic circumstances precipitated a dramatic change in the business, triggering substantial losses, which caused the Appellant to dispose of the asset central to its trade i.e. its mortgage loans.

192. On page 185, Judge Walton states: '*I think it follows from this that 'the essence of the trade', to use the Lord President's phrase, comprises every activity which goes to constitute that trade'.* In the present appeal this would include the activities between the Appellant and SPV post September 2012.

Conclusion

Losses

193. The losses, the subject matter of the s.396 claim in this case comprise pre September 2012 losses that arose from the loan book of the Appellant (then Company X Ltd.). The losses arose because the Appellant had lent on foot of mortgages it had originated and because it was unable to recover monies outstanding on those mortgages in circumstances where the assets, the subject of the loans, were themselves diminishing in value. The Appellant was required to make and did make significant bad debt provision in its accounts in respect of these losses. But for the mortgage lending, the losses would not have arisen. From an accounting perspective, without the mortgage book on the Appellant's balance sheet pre 2012, the losses would not have accrued to the Appellant. The income against which the Appellant sought to offset these losses is income arising post September 2012. The Appellant maintained that they flowed from the same source *i.e.* the mortgage loan book sold to SPV and previously owned by Company X Ltd. but this erroneously overlooked the fact that there was a separate legal entity between that source and the Appellant *i.e.* SPV.

194. The source of the loss pre 2012 is the writing of loans by Company X Ltd. and the retention of those loans by Company X Ltd. on its balance sheet. As regards an entitlement to offset those losses, the enquiry must examine the source of the loss and the provenance of the income. In this regard I refer to the test set out by Judge Walton in *Rolls Royce v Bamford* at pg 185 where he stated; ' *.. and I therefore conclude that the comparison which has to be made is between the trade actually carried on by the company in the accounting periods in which it was making the losses in question .... and the trade carried on by the taxpayer company, and not between the 'historic trade' of the company and that of the taxpayer company.'*

195. I have determined above that the trade that gave rise to the loss is not the same trade as the trade which gave rise to the income against which the Appellant sought to offset the loss and I have determined that loss relief is not available in accordance with s.396 TCA 1997. The trade that gave rise to the loss is a trade of the provision of mortgage finance to the sub-prime/near-prime market. The trade against which it is sought to offset the loss however is a trade in loan portfolio management services carried out by Corporation Y for a number of third parties i.e. SPV. Financial Institution (I), Financial Institution (IV), Financial Institution (III) and others, for which it received remuneration commensurate with its performance as a service provider.

196. Broadly speaking, the principle as regards set off of losses is that losses incurred in a trade will be set off against income in that trade. Where there is a fracture between the cause of the loss and the income against which a taxpayer seeks an offset, one must ask whether the trade has ceased, whether it is a different trade and/or whether there has been a major change in the nature or conduct of the trade. All of these questions have been answered in the affirmative in this case.

The Burden of Proof

197. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments are incorrect. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayer to demonstrate that it falls within the relief, see *Revenue Commissioners v Doorley* [1933] 1 IR 750 and *McGarry v Revenue Commissioners* [2009] ITR 131.

198. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'

199. Having considered the evidence and facts, the relevant legislation and related case law, I determine that the Appellant did not succeed in discharging the burden of proof in this appeal.

Determination

200. Whether the trade of the Appellant up to 28 September 2012 involves the administration and collection of mortgage loans with origination in a state of suspension or the origination, administration and collection of mortgage loans with origination as an integral component of the trade as detailed above, I am satisfied that both can be described as the trade of the provision of mortgage finance in circumstances where post 28 September 2012 the Appellant was carrying on the trade of the provision of loan portfolio management services and thus;

- I determine that on 28 September 2012 there was a cessation of trade for the purposes of s.396(1) TCA 1997 and

- I determine that there has been a major change in the nature of the trade and in the conduct of the trade carried on by the Appellant within a period of three years of the change in ownership of the Appellant in accordance with s.401 TCA 1997,

201. I determine that the written determination of the Respondent dated 7 February 2014 shall stand.

202. This appeal is hereby determined in accordance with s.949AL TCA 1997.

APPEAL COMMISSIONER

November 2017

The parties to this appeal have not requested the Appeal Commissioner to state and sign a case for the opinion of the High Court