NCN: [2021] UKFTT 236 (TC)

TC08185

PROCEDURE – application for disclosure following a lengthy enquiry - issue in underlying appeal - unallowable purpose - principles to be applied - possession and control - Schlumberger considered - application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00915

BETWEEN

SYNGENTA HOLDINGS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted remotely by video on 13 April 2021 with further submissions from the parties received on 30 April 2021 and 1 June 2021

Charles Bradley instructed by Ashurst LLP for the Appellant

James Henderson and Thomas Chacko instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This is a case management decision. The substantive appeal to which it relates concerns whether a loan relationship arising from the appellant's (or "**SHL**") involvement in a group transaction in January 2011 had an unallowable purpose for the purposes of section 441 Corporation Tax Act 2009 ("**CTA 2009**") ("**section 441**"). The decision that I must make is whether to, and if so to what extent, allow an application by HMRC that the appellant be required to disclose documents and information which are relevant to that substantive appeal.

2. Following the hearing, the parties reviewed the extent of those documents and information which had been discussed at the hearing and have agreed a compromise in relation to some of those documents and that information. That compromise is set out in an agreed position paper which was circulated on 30 April 2021. This decision, therefore, deals only with the documents and information which were not the subject of that compromise. They are set out in Appendix 1 to this decision but dealt with, individually, below (the "**schedule of disclosures**").

3. The parties respective positions, in a nutshell, are: HMRC believe that the documents and information which they are seeking are relevant, and the disclosure is proportionate in terms of time and cost; the application arises out of information which was disclosed by the appellant during an extensive enquiry, and is necessary not only for HMRC to formulate its case but also to enable the trial judge to comply with the overriding objective of the First-tier Tribunal ("**F-tT**") rules to deal with the appeal fairly and justly: The appellant believes that the disclosure is disproportionate in time and costs given the extensive enquiry conducted by HMRC and the information disclosed by the appellant during that enquiry; the disclosure requested is unlikely to reveal any significant amount of further relevant material; given the material disclosed during the enquiry, the default F-tT disclosure rule should apply, and the appellant has complied with that rule.

4. The appellant has also raised the point concerning its ability to comply with any decision that I make which obliges the appellant to disclose certain information and documentation which is not in its possession or control. This issue has been described by the parties in their compromise representations as the "**Schlumberger issue**" and I shall use that description in this decision. I consider it in detail at [53ff] below.

BRIEF BACKGROUND TO THE SUBSTANTIVE APPEAL

5. The Syngenta group is a multinational agri-business engaged in the research, development, production and marketing of crop protection products and the development and marketing of seeds and plants.

6. Up to 26 January 2011, Syngenta Alpha BV (**"SABV"**), a Netherlands intermediate holding company, wholly owned Syngenta Limited (**"SL"**) and the appellant. The ultimate parent company of the group was a Swiss registered company, Syngenta AG (**"SAG"**).

7. On 24 January 2011 the appellant agreed to purchase SL and its subsidiaries for a consideration of $2,208,220,000 (£1.4 billion). The transaction took place on 26 January 2011. The acquisition was funded by a mixture of debt and equity. The appellant acquired a loan of $950M pursuant to a 10-year loan note bearing interest on the basis of the 12 month USD LIBOR rate as at December

31 plus a margin of 2.87%. This loan (the "**Loan**") was provided by the Netherlands group treasury company, Syngenta Treasury NV (**"STNV"**).

8. In HMRC's view the loan interest received by STNV was taxed at a significantly lower rate than the rate at which the appellant sought that it be relieved in the UK.

9. HMRC concluded that the main purpose of entering into the Loan was to secure a tax advantage in the form of UK interest deductions. It is their view that this transaction was entirely internal to the Syngenta group and created interest deductions that were not available before.

10. HMRC opened enquiries into the appellant's tax returns for accounting periods ending 31 December 2011 to 31 December 2016. Following those enquiries, HMRC issued closure notices dated 4 October 2019 pursuant to paragraphs 32 and 34 Schedule 18 Finance Act 1998 which determined that the appellant's non-trading loan relationship debits were overstated due to the application of section 441.

11. The closure notices result in an additional (approximately) £215,000 in corporation tax being owed by the appellant and £30,483,771 potentially payable by other companies due to the reduction of group relief.

12. During the six-year enquiry, SHL provided extensive information and documentation about the reorganisation and the Loan and indeed commissioned a report, prepared by the law firm Pinsent Masons (the "**Report**") which is dated 27 July 2016 and was provided to HMRC on or shortly after that date.

13. HMRC's view is that the loan relationship arising from the appellant's involvement in the group transaction in January 2011 had an unallowable purpose for the purposes of section 441. The appellant has appealed on the grounds, inter alia, that there was no unallowable purpose.

UNALLOWABLE PURPOSE

14. The relevance of the information and documents sought to be disclosed by HMRC is, of course, an important consideration which I must take into account when reaching my decision. And relevance, in the context of this appeal, means relevance to the issue of whether the loan relationship had an unallowable purpose. I have read the relevant legislation including section 441 (and the subsequent two sections in the CTA 2009) and the F-tT decisions in *Blackrock Holdco 5 LLC v HMRC* [2020] UKFTT 0443 ("***Blackrock***"), and *Oxford instruments UK 2013 Ltd v* HMRC [2019] UKFTT 254 ("***Oxford Instruments***").

15. From these I take the following principles which in my judgment need to be considered when looking at the question of relevance in this application:

> (1) In the trial of commercial case, given the fallibility of human memory, factual findings or inferences should be based on documentary evidence and known or probable facts. This does not exonerate the trial judge from making findings of fact based upon all of the evidence (including oral evidence), but that assessment needs to be undertaken alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. [*Blackrock* at [7] and [8]].
>
> (2) A company might enter into a loan relationship which has a main purpose of securing a tax advantage for itself or for any other person. [Section 441(5) and Section 442 (5) CTA 2009 and *Oxford Instruments* at [61(3)].

(3) Whether the company has such a main purpose is a question of fact to be determined by reference to the subjective purpose of the company. [*Oxford Instruments* at [61(3)].

(4) The purpose of a company must be divined from the purpose of the directors of that company. It is their intentions which inform the intentions of the company. [*Oxford Instruments* at [99]]. I would add, however, that if it is concluded from the evidence that the authority of the directors has been usurped by another person, and so those directors do not exercise central management and control, or effective control over a company, then it is the subjective purpose of the person who has usurped such authority which must be determined as a question of fact.

(5) In a case where the parties to a loan relationship which might have an unallowable purpose are members of the same group, then the subjective purpose of both members of that group are relevant when considering whether a company has an unallowable purpose. [*Oxford Instruments* at [103] and [104].

(6) As regards the burden of proof, the general rule applies namely that where an appeal has been made against a closure notice it is for the taxpayer to show that the notice and the consequential amendments to a tax return are incorrect, so the burden of proof in an unallowable purpose case is on the appellant. [*Oxford Instruments* at [96]]. In the circumstances of this appeal, this means that the appellant must prove a negative, namely that it did not have an unallowable purpose (as opposed to HMRC needing to establish, on the balance of probabilities, that a company did have an unallowable purpose) and will need to lead evidence accordingly.

(7) Having set out those principles, I would just add that nothing therein, nor anything else in this decision, should be construed as a finding of fact in relation to the substantive appeal.

RELEVANT LAW

The F-tT Rules

16. Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") contain a specific power enabling the Tribunal to permit or require a party or another person to provide documents, information or submissions to the Tribunal or another party.

17. Rule 2(3) requires me to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

18. The default position on inter-party disclosure of documents in appeals to this Tribunal is set out in Rule 27(2) as follows:

> (1) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents
>
> (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and
>
> (b) which the party providing the list intends to rely upon or produce in the proceedings.

19. Finally, Rule16(1)(b) provides that on the application of a party or on its own initiative the Tribunal may order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

Case Law

20. I was referred to a large number of authorities, but I have found the most helpful to be the Upper Tribunal decision in ***Ingenious Games v HMRC*** [2014] UKUT 0062 ("***Ingenious Games***"), the First-tier Tribunal decision in ***Staysure.co.uk Ltd v HMRC*** [2018] UKFTT 584 ("***Staysure***"), and the Upper Tribunal decision in ***McCabe v HMRC*** [2020] UKUT 266 ("***McCabe***").

21. In *Ingenious Games* the appellant's appeal against closure notices on the basis that they were entitled to tax relief because they were carrying on a trade. Their statement of case ranged over topics and areas that had not previously been subject to detailed review by HMRC, and following receipt of that statement of case, HMRC applied for disclosure of documents held by the appellant's. Sales J granted the application and in so doing stated as follows:

> "68……..
>
> (iii) in para [15], that the requirement to disclose further documents would be an additional burden on ITP, IFP2 and Ingenious Games "that could only be justified by some special circumstance" and that there was no such circumstance in this case. I respectfully consider that in putting the matter in this way the Judge departed too far from the basic approach which the FTT is required to adopt, namely to ask in accordance with rule 2 what is required to enable it to deal with a case "justly and fairly". It is fair to say that where the FTT has issued directions for trial a good reason within the overriding objective will need to be shown to justify a departure from or supplementation of those directions; but I think that to use the phrase "special circumstance" as the Judge used it in the context of his decision indicates that he considered that some higher threshold than this had to be surmounted by HMRC. Even if one takes the phrase used by the Judge to

mean no more than the proper threshold, in my opinion he misapplied the proper test and erred in law by holding that HMRC could not satisfy it. According to the usual standards of justice in heavy civil litigation, such as these proceedings, it is just and fair for a party to see documents held by its opponent relevant to that opponent's pleaded case, in order to see whether they undermine that case or support the party's own case in opposition. The Judge was wrong to characterise this in pejorative terms as a "fishing expedition" and so discount it as a factor. The need to do justice between the parties was a ground which gave good and compelling reason to order the further disclosure sought by HMRC, or (using the Judge's phrase) a "special circumstance" requiring such disclosure."

22. In *Staysure* Judge Richards had to consider an application relating to the disclosure of documents by HMRC which related to an appeal in which HMRC consider that the appellant was liable to registration for VAT as a result of the application of the reverse charge to services whereas the appellant considered that it was making only exempt supplies. During the course of that application the Judge had to consider the decision in *Ingenious Games*, and the relevant extract from his judgment is set out below:

"16. Both parties referred me to the decision of Sales J (as he then was) in Revenue and Customs Commissioners v Ingenious Games LLP and others [2014] UKUT 62 (TCC). It is clear from that decision that the Tribunal should consider any application for disclosure in the light of the overriding objective, of dealing with cases fairly and justly, set out in Rule 2 of the FTT Rules. That will necessarily involve an assessment of whether considerations of fairness point in favour of disclosure and whether it is proportionate to direct disclosure, taking into account, among other matters the nature of the issues arising and the overall amount at stake. The relevance or otherwise of the material requested will be at the heart of the Tribunal's assessment but it does not follow that merely because material is relevant, the Tribunal will inevitably direct that it be disclosed. An assessment of proportionality may involve an examination of the costs and effort that would be involved if a party is directed to disclose documents (with a party wishing to argue that a request for disclosure is unduly burdensome being expected to provide some evidence of the burden involved). The terms of the disclosure direction sought will also be relevant in the sense that a broadly drafted direction is likely to be more burdensome to comply with than a more focused direction and may be more likely to require irrelevant material to be disclosed.

17. Ms Mitrophanous urged me to read the decision in Ingenious Games in the context of its relevant background facts: in particular the fact, as recorded at [12] to [16], that throughout HMRC's enquiries in that appeal, HMRC and the taxpayer had been proceeding on the basis that the taxpayer would provide documents and information in relation to sample films, but that this would not limit the evidence to be provided in any appeal to the Tribunal. I agree that this was background that the Upper Tribunal in Ingenious Games considered to be highly relevant (see for example paragraph [50] of the decision). However, I do not consider that the presence of that background in any way limits the principles which I summarise at [16] above which are of general application irrespective of whether HMRC and a taxpayer have reached an agreement as to how enquiries are to be conducted before Tribunal litigation commences."

23. In *McCabe* , the Upper Tribunal had this to say about relevance and disclosure:

"Principles material to determining relevance in this case

[22] First, we agree with the FTT (at [26]) that since this was a 'high-value complex dispute' the starting proposition was that HMRC should disclose relevant documents to Mr McCabe unless there was a good reason not to. The parties would also appear to agree, up to this point.

[23] Second, the FTT must exercise its discretion to order additional disclosure under r 16 so as to give effect to the overriding objective: r 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate……

[34] In this case, the FTT determined that the documents sought were of low relevance, for reasons we shall discuss shortly. This was an error of law, argues Mr Hickey, because 'the degree of relevance' is a novel test which as a matter of law does not exist. If a document is relevant, then the extent or degree of its relevance is not pertinent to the consideration by the FTT of an application for its disclosure.

[35] We have no hesitation in rejecting this argument. There is clearly a substantive difference between, say, a document which is agreed to be probative of a primary fact pleaded by one of the parties and one which might possibly prompt a train of enquiry by the other party. The FTT could not discharge its duty to take into account the overriding objective if it was forbidden to distinguish between these two examples of different degrees of relevance in considering the need for and proportionality of the disclosure sought.

[36] We have observed that the FTT is not bound by the CPR provisions relating to disclosure. However, the approach in cases governed by the CPR to different categories of document shows clearly that the way in which a document is relevant is material to the approach which should be taken by the court to a request for its disclosure. The following commentary from the *White Book* sets out the position as follows:

> '31.6.3
>
> Documents may be divided into the following four categories.
>
> > (1) *The parties' own documents*: these are documents which a party relies upon in support of their contentions in the proceedings.
> >
> > (2) *Adverse documents*: these are documents which to a material extent adversely affect a party's own case or support another party's case.
> >
> > (3) *The relevant documents*: these are documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the "story" or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case.
> >
> > (4) *Train of inquiry documents*: these are documents which may lead to a train of inquiry enabling a party to advance their own case or damage that of their opponent (as referred to by Brett LJ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (*1882–83*) *L.R. 11 Q.B.D. 55, CA*).

Rule 31.6 provides that "standard" disclosure is limited to documents falling within categories 1 and 2.

Whether a document falls into sub-paras (a) or (b) of r.31.6 is to be judged against the statements of case and not by reference to matters raised elsewhere, including in witness statements: *Paddick v Associated Newspapers Ltd [2003] EWHC 2991* (*QB*)*; [2003] All E.R.* (*D*) *179* (*Dec*) at [11].'

[37] We do not suggest that the FTT must or should categorise documents in this way. The FTT has its own rules on disclosure. However, the *White Book* categorisation is both rational and justifiable, and it demonstrates clearly why it is appropriate for the FTT to evaluate and weigh the likely effect on the determination of the case of ordering disclosure of a document. The starting point in the FTT in a complex, high-value case may be that a document which is relevant (in the broadest sense) should be disclosed unless there are good reasons to the contrary, but that is only a starting point. On an application for disclosure, the tribunal will need to consider the degree of potential relevance of the document and whether there is a need for disclosure in order to enable a fair determination of the issues to take place. Further, in taking into account the overriding objective, what might amount to 'good reasons' for refusing to order disclosure of documents that are relevant are likely to differ depending on whether a document is materially adverse to a party's case or merely a background document or one which might lead to a train of enquiry.

[38] It follows that a document is capable of being relevant in a broad sense but of low relevance in that it is not potentially adverse but only part of the background, or one capable of leading to a train of enquiry, and therefore one that may not need to be disclosed in order for a fair determination of the issues to take place."

BACKGROUND FACTS TO THE APPLICATION

24. I was provided with a substantial bundle of documents. Mr Bradley had very helpfully set out, in his response to HMRC's application, a factual background of the enquiry and of the communications with, and the information provided to, HMRC. My understanding is that Mr Henderson takes no issue with this factual background which I have set out, in full, in Appendix 2 to this decision.

25. SHL considers the key points from the history of the enquiry are as follows: (1) HMRC conducted an enquiry that lasted for almost six years. (2) In the first year of the enquiry SHL promptly provided substantial quantities of documents in response to two requests made by HMRC. (3) SHL's responses and the disclosed documents were subject to review by the case team variously described as "detailed", thorough and having been conducted "at length". They were also considered by at least three other teams/groups inside HMRC: Counter Avoidance Technical Team, the Policy Lead for the legislation under consideration and HMRC's Dispute Resolution Board. In addition to this, HMRC obtained advice from their Solicitor's Office. (4) At no stage during the enquiry did HMRC suggest that SHL's responses were materially incomplete or, following the initial two requests, that they required any further documents. (5) Indeed, HMRC considered that "all the facts [had] been established", that the evidence was "clear" and that it "strongly" supported their position. HMRC's view of the matter letter described the information provided by SHL as "a significant amount". (6) On three occasions SHL provided substantial additional information to HMRC voluntarily and not at HMRC's

request (the Report and accompanying enclosures in July 2016, the 14 November 2018 letter and the 26 April 2019 letter). (7) HMRC decided to close the enquiry over SHL's objections.

26. On the basis of this, SHL invites the Tribunal to conclude that SHL has cooperated fully with HMRC's lengthy enquiry, providing substantial quantities of documents to HMRC and making serious efforts to ensure HMRC had the relevant information available to them.

27. I am happy to draw that conclusion**.** I am in no doubt that SHL has demonstrated throughout the period of the enquiry that it has co-operated with HMRC and provided them with a substantial number of documents. And has done so in a timely fashion. SHL think that HMRC are attributing improper motives to SHL for contesting their application for disclosure. I cannot comment on this if it stems from previous communications between the parties which I have not seen, but from the evidence that I have seen regarding the conduct of the enquiry, there is nothing which suggests to me that SHL has done anything other than be wholly cooperative with the enquiry.

28. However, in simple terms, Mr Henderson submits that notwithstanding that cooperation and the volume of information provided during the enquiry, HMRC are on notice that some information which they believe to be relevant has not been disclosed and it is that information which is the subject of their application. I will deal with the detailed request for disclosure later on in this decision and consider the detailed submissions on each item of that disclosure. But I will deal first with the broader submissions by the parties relating to the application.

SUBMISSIONS

29. I am grateful to Mr Bradley and Mr Henderson for their clear and helpful submissions both written and oral. I have carefully considered their submissions in reaching my conclusions but in doing so I have not found it necessary to refer to each and every argument advanced by them.

30. I would add that in recording their general submissions, I have not included submissions which were made with the disclosures in Part One of the application in mind, given that the parties have now agreed what is to happen about those disclosures and so there is no need for me to come to a decision on them.

General submissions

31. Mr Henderson submits: in order to deal with a case fairly and justly, I should order disclosure since the documents and information sought are both relevant and the requests are reasonable and proportionate; in his view the appellant's position that HMRC have had their opportunity to obtain the relevant documents through the enquiry process and so should not have to provide further documents, even if relevant, is incorrect; the aim of the application is to seek to ensure that as many relevant documents are ultimately before the trial judge at the substantive hearing as possible; HMRC have attempted to keep their requests as proportionate and reasonable as possible; HMRC are not asking the appellant to undertake a full disclosure exercise; however the appellant should be required to search for (and disclose) relevant correspondence of the key individuals whose intentions and thinking are likely to be central to the trial judge's decision; although the appellant has submitted that the requests will involve it in disproportionate costs, those costs have not been quantified; it must be borne in mind that this is an unallowable purposes case in which everything turns on the purpose of the taxpayer and any evidence relating to any tax avoidance motive is therefore crucial; documentary evidence in such cases is highly relevant especially given the fact that HMRC cannot control

which witnesses the appellant may wish to call, and thus the extent of any oral evidence that might be given; when considering unallowable purposes, the purposes and objectives of persons other than the appellant must also be taken into account i.e. those who benefited from and/or design the arrangements; so any documents that shed light on the motives of those persons are also highly relevant; the comments made by Sales J in *Ingenious Games* that the default rule makes considerable sense in the usual type of case where HMRC have conducted a full enquiry into a taxpayer's case is subject to the caveat that the enquiry will have provided HMRC with all relevant documents which might be relevant to determine the issues arising in the appeal; that is not the case here; the documents that have been disclosed during the enquiry have put HMRC on notice that there might be other relevant documents or information, and the purpose of the application is to obtain those so that their relevance can be considered by both HMRC and the trial judge; it is not unusual in cases such as this for further disclosure to be sought of documents and information that were not obtained during an enquiry; in response to the criticism that HMRC should have followed up leads which were apparent during the enquiry, before they closed that enquiry, there is no obligation on them to do so and they are now following up those leads by dint of the application; seeking adverse documents is not unusual, unreasonable, or unprecedented.

32. Mr Bradley submits: HMRC submission that as many relevant documents should be before the trial judge as is possible is unobjectionable, but must be seen in the context that disclosure is a question of balance between relevance and an assessment of the proportionality of requiring disclosure; the default disclosure rules recognise that balance by recognising that in most cases an appeal will have been preceded by an enquiry during which information will have been elicited by HMRC; this is the context of the comments of Sales J in *Ingenious Games*; those rules also apply equally to important as well as simple cases; one of the significant factors when considering proportionality is the fact that there has been an extensive enquiry into the appellant's affairs and there has been no criticism of the taxpayer's behaviour during the conduct of that enquiry and in the provision of timely and relevant information to HMRC; the application is neither proportionate nor targeted; HMRC say that they are not asking SHL to conduct a full disclosure exercise, yet asking for documents and emails for four directors and six other individuals for a two-year period is tantamount to such an exercise; the burden in this application is on HMRC to demonstrate (by evidence) cogent reasons to believe that there are relevant communications not already contained in the disclosure made to date so as to justify putting SHL to the time and costs further disclosure exercise where HMRC have already conducted an extensive enquiry over a six-year period; HMRC have not made out their case; when considering an application for further disclosure in light of the overriding objective to deal with cases fairly and justly, the Tribunal should weigh the likely relevance of the material requested against the costs and effort imposed on the disclosing party; the considerations here all point towards the conclusion that granting the application would not be in accordance with the overriding objective; SHL has already provided HMRC with a very large number of documents during the course of the six-year enquiry and at no stage during that enquiry has HMRC suggested that such disclosure was inadequate; disclosure of the documents requested would place a very substantial burden on SHL in terms of time and costs; the disclosure exercise now envisaged is very unlikely to turn up any, or any significant amount of, further relevant material; the submissions made regarding the enquiry at [25] above are also highly relevant.

DISCUSSION AND GENERAL APPROACH

33. It seems to me that when it boils down to it the parties are in agreement over many of the points of principle which the relevant rules and cases indicate that I should consider in an

application such as this. The parties agree that I need to consider the application in the context of the overriding principle that cases should be dealt with fairly and justly. Both parties agree that when considering that I need to consider the relevance of the material for which disclosure is sought, balanced against the proportionality of directing disclosure which takes into account a number of matters such as the financial and time cost and effort to the appellant. Where the parties disagree, however, is on two points. Firstly whether this is a case to which the default disclosure position should apply and given that HMRC have undertaken an extensive enquiry, they should have the right to seek disclosure of further documents. Or whether, having undertaken that enquiry and obtained those documents, they should have no further right to disclosure. The second focuses on the trust which each party has in the self certification by the appellant regarding the relevance of the documents and information sought. In essence the appellant says that having considered the position (and commissioned the Report) it has self certified that the information and documents sought by HMRC are either irrelevant or of no relevance. HMRC say that (although not in such stark terms) that the documents sought are prima facie relevant and it is for them and the Tribunal to be the arbiter of relevance, and of course neither can be unless disclosure is made. To put it bluntly, HMRC does not trust the appellant's self certification.

34. On the first of these points, notwithstanding Mr Bradley's cogent submissions to the contrary, it is my judgment that HMRC are not bound by the default disclosure position and that it is open to them to make an application for disclosure on the basis that notwithstanding they have undertaken an extensive enquiry exercise and through that obtained much information in many documents, that information and documents have put them on notice that there may be further relevant material in possession of the appellant (or other relevant person) which they wish to consider and which they believe should be front of the trial judge. I wholly endorse the sentiments expressed by Judge Richards in *Staysure* set out at [22] above. I accept that many of the cases cited to me by Mr Henderson dealt with applications for disclosure by a taxpayer rather than by HMRC, and that *Ingenious Games* is the case which is most relevant in this appeal. But like Judge Richards, I think that the sentiments expressed in *Ingenious Games* and in particular in the extract that I have set out in [21] above are of general application, and apply even where HMRC have undertaken an extensive enquiry and through that obtained much relevant information and documentation. I do not believe that HMRC have a single bite at this particular cherry and having closed an enquiry are then not entitled to seek specific disclosure of documents and information which having considered the information which has been disclosed during the enquiry, they believe might be relevant to the issues in an appeal. It is my judgment that HMRC are entitled to make the application, but of course when doing so, the issues of relevance and proportionality are of fundamental importance.

35. In this regard I consider that the extent of the enquiry and of the information and documentation provided by SHL during it is, as submitted by Mr Bradley, relevant to the issue of proportionality. I am sympathetic to what I suspect is the appellant's view that having provided all that information and having had no comeback from HMRC during the enquiry, they could breathe a huge sigh of relief and think that there is no need to provide further information to HMRC. And if I order disclosure, they are now going to have to trawl through their paperwork at further cost and effort. And I will take that into account in my decision.

36. As regards the second point, namely self certification, then whilst self certification is not, per se, objectionable and indeed is commonplace in high value commercial litigation, its efficacy in any particular circumstance depends on the relevance of the material. The greater the relevance, the less satisfactory self certification becomes. For example, in the context of this case, if HMRC suspect that there are ten specific emails which might contain information

from relevant persons at SHL, all of which show a tax avoidance motive for the transaction, then self certification by SHL that they do not is unlikely to be satisfactory given the importance of motive in an unallowable purpose case. Relevance then, of course, needs to be tested against proportionality. But given that I need to conduct a balancing act, the greater the relevance, the greater the disproportionality which will be needed to outweigh it.

37. So taking into account the Rules, case law, and principles which I believe to be relevant when considering relevance in the context of an unallowable purpose appeal, which I have set out at [15] above, I shall approach the application for disclosure as follows:

(1) Since this is a high value complex dispute the starting point is that SHL should disclose relevant documents unless there are good reasons for it not to (*McCabe* at [22]).

(2) This includes documents which are adverse to SHL (*Ingenious Games* at [68(iii) and *McCabe* at [37]).

(3) When exercising my discretion to order additional disclosure I must give effect to the overriding objective of dealing with a case fairly and justly which includes dealing with it in a way which is proportionate (*McCabe* at [23]).

(4) I shall adopt the approach of Judge Richards at paragraph 16 of *Staysure* when considering this application.

(5) Relevance is not absolute. I am not bound by the four category approach set out in rule 31.6.3 of the CPR but that categorisation is helpful. I shall take into account the sentiments expressed in [37] and [38] of *McCabe*.

(6) Relevance in this appeal is to be tested against the principles set out in [15] above.

(7) Self certification by SHL become less appropriate than review by HMRC the greater the relevance of the material for which disclosure is sought.

(8) When considering proportionality I shall take into account the fact that there has been a six-year enquiry during which SHL has co-operated fully and provided extensive information and documentation which was not seriously challenged by HMRC during the course of that enquiry; nor (save for the odd exception) during that enquiry, did HMRC ask SHL for the additional documents and information which are the subject of this application.

THE SPECIFIC DISCLOSURES

38. Under paragraph 3(i) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "The Emails to Matthew Bayliss, Simon Perry, Peter Schreiner, Antoine Kuntschen, and Thomas Schwarb and for the period of two years leading up to the date of the approval of the loan by SHL be searched for relevant documents employing search terms to be agreed between the parties."

39. I was told at the hearing that Matthew Bayliss was, at the relevant time, the company secretary of SHL, but the first reference to his involvement to which I was referred identifies him as being a director. This reference is in a letter of 6 May 2015 from HMRC to Sarah Carter

in which HMRC refer to an exchange of emails between, amongst others, Matthew Bayliss, where he was described as a director, and which contained an extract of an email which makes it clear that "the advantage of organising the affairs of the group in this way is that SHL can gain an interest deduction for the loan interest and use this to reduce the UK taxable income……." He was clearly identified as someone involved in the project by Sarah Carter, in her letter to HMRC of 28 March 2014 ("**Sarah Carter's letter**"). He is also referred to in the Report (albeit as "Syngenta in house legal") where he is said to have attended a board meeting to approve the transaction on 24 January 2011.

40. So it seems clear that Matthew Bayliss was involved in the project, and would have been party to information relating to it in his capacity either as company secretary or as a director or as in house legal. Given the extract from the email to which I have referred above, it also seems likely that he might have been copied into documents which reflect the purpose of the transaction.

41. I consider, therefore, that emails to Matthew Bayliss are prima facie relevant to the issues in this appeal where the purpose of the board of the relevant company is of considerable significance.

42. Simon Perry, who is also referred to in Sarah Carter's letter was described therein as a UK corporate tax accountant and was identified as being principally involved in the design and implementation of the transactions. He is identified in an email of 15 December 2010 from Antoine Kuntschen as a recipient of congratulations on good feedback from a presentation relating to the project where he was told that he "can be proud not only of the outcome tax saving but on the way you managed the project".

43. It appears from this information that Simon Perry was involved in the project and that it seems likely to me that he was party to emails relating to tax.

44. Peter Schreiner was identified in Sarah Carter's letter as being head of tax. In that letter Sarah Carter tells HMRC that Deloitte mentioned the project to Peter Schreiner which is where the email trail relating to the project commences. Given his position as head of tax, I think it is inconceivable that on a project such as this, Peter Schreiner was not a pivotal figure. It is highly likely that he would have been party to emails which would have discussed the project generally and in particular what tax implications that project would have both from local and international perspective.

45. Antoine Kuntschen, like Simon Perry (and indeed Sarah Carter herself) was identified in Sarah Carter's letter as being one of the three individuals who were principally involved in the design approval and implementation of the transaction. He is described in that letter as a senior tax manager EAME. He is also referred to in the chronology of the UK reorganisation which was provided by Sarah Carter to HMRC where she tells HMRC that her involvement in this project began with a discussion with Antoine Kuntschen in 2009. It is also clear from the chronology that he was involved in the later stages of the project. In my view his emails may well shed light on the purpose for which the transactions were undertaken.

46. Christian Wierenga is described in Sarah Carter's letter as being "Netherlands legal" and as having provided legal and Treasury advice in relation to the project. He is then identified in an email trail in which he tells the SABV Board about distribution of cash and circulation of written resolutions. Whilst he is clearly involved in the project, my view is that his involvement is likely to be peripheral and mechanical, carrying out legal processes which have arisen as a result of the decision to undertake the transaction and HMRC have not made out a prima facie

case that his emails are likely to be relevant to the question of the purpose of the transaction tested at board level. I cannot see that any further information might even lead to a "train of enquiry" which might advance HMRC's case or hinder SHL's.

47. Thomas Schwarb is described in Sarah Carter's letter as "Group Treasury" providing internal legal and Treasury advice. It is clear too from extracts from an email to which I was referred by Mr Henderson that Thomas Schwarb was involved in the project, and in an email describes the project as "the group tax proposal to increase interest-bearing debt……" The counterparty to this email was Sarah Carter whose emails have been disclosed. Whilst I doubt that anything with which Group Treasury alone was involved would have influenced any tax motivation for the transaction, they may well have provided advice about interest rates which are, of course highly relevant given the deductibility of interest is at the heart of this appeal. I think that Thomas Schwarb's emails are likely to be relevant to the issues in this appeal.

48. Mr Bradley's view of this specific request is that it will involve SHL in a disproportionately costly and time-consuming exercise which is tantamount to a full-blown CPR disclosure (notwithstanding Mr Henderson's platitudes to the contrary). Essentially what HMRC are asking SHL to do is look everywhere for everything (when the other specific disclosure of requests are taken into account) of. And the disclosures sought under this head are very unlikely to turn up any or any significant amount of further relevant material.

49. As far as Christian Wierenga is concerned, I have indicated above that I think that notwithstanding he was involved in the project, that involvement is peripheral and it is highly unlikely that emails into which he was copied is going to cast light on the motives of the relevant companies. I therefore reject the application for disclosure of the emails relating to this individual.

50. However, I do think that the emails of Matthew Bayliss, Simon Perry, Peter Schreiner, Antoine Kuntschen and Thomas Schwarb may well contain information which sheds light on the motives of the relevant company at board level. Although seemingly not (this is not absolutely clear to me in relation to Matthew Bayliss) board members, they may have provided internal advice to the board on which the board came to decisions regarding the project and those emails may shed light on that advice which in turn would shed light on the basis on which the board came to those decisions.

51. As can be seen below, I have concluded that these emails are not in the possession or control of SHL and, notwithstanding *Schlumberger*, I do not have jurisdiction to order disclosure of these emails. However, in case I am wrong on that, it is my decision that in principle there should be disclosure of the emails sent to these individuals. However I need to consider whether it is proportionate to direct this disclosure given a likely cost in time and effort which it will cause the appellant and given too that Sarah Carter's letter in which the involvement of these individuals was identified was sent to HMRC in 2014, more than 7 years ago. It is one thing to say that simply because there has been an enquiry into a taxpayer's affairs, there is no embargo on seeking further documents and information at the disclosure stage. But where HMRC have had the information for that length of time, and as Mr Bradley says, it has been pored over by a number of technical groups within HMRC who appear to have indicated that no further information was required, and that the information provided was not inadequate as far as the enquiry was concerned, I am uncomfortable about directing the disclosure

requested. This is notwithstanding that, as Mr Henderson says, the cost of undertaking the disclosure exercise has not been quantified by the appellant.

52. The extent of the disclosure, too, will depend upon the search terms. These have been discussed by the parties but not agreed. In my judgment the period of two years sought by HMRC is too long and I direct that it should be reduced to one year. I further direct that the parties should discuss and if possible agree upon the search terms which should be applied and that if the parties have not reached agreement within 56 days from the date of release of this decision, either party may apply for the Tribunal to determine the appropriate search terms.

The Schlumberger issue

53. However, the appellant faces a practical difficulty with compliance with this direction given that the individuals mentioned above no longer work for the Syngenta group and were employees of non-UK group companies. Both parties are agreed that I can only direct disclosure of documents where those documents are or have been in a party's control i.e. they are or were in its physical possession, it has or has had a right to possession of it or it has or has had a right to inspect or take copies of it. This is in compliance with CPR Part 31.8. It is SHL's contention that any emails, to the extent that they are still retrievable, are not in fact in SHL's possession or control, and are not deemed to be so by virtue of the common corporate structure. And if HMRC wish to request disclosure of these emails they should do so via the competent authorities. SHL is also concerned that if I were to direct disclosure of these documents, non-compliance might mean that SHL is in contempt, something it would obviously wish to avoid.

54. Mr Henderson cites the case of *Schlumberger Holdings Ltd v Electromagnetic Geo services AS* [2008] EWHC 56 (Pat) ("***Schlumberger***") as authority for the proposition that common corporate structure is less important than general consent having been given to a party to search for documents properly disclosable in litigation. At paragraph 21 of Mr Justice Floyd's decision, the judge says this:

> "21. I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr. Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests."

55. Mr Henderson submits that it is clear that SHL, and in particular Sarah Carter has been able to provide documents to HMRC which have emanated from outside SHL, from non-UK

group companies. And she does not appear to have had any difficulty in obtaining these from those companies. This is similar to Schlumberger and I should direct disclosure on the basis that SHL appears to have a de facto general consent to obtain documents from non-UK group companies. If, however, I am reluctant to order such disclosure, I might direct that SHL should provide HMRC and the Tribunal with a full explanation as to why it was not possible to conduct searches whereby this direction will be considered to have been complied with.

56. Mr Bradley takes the view that Schlumberger is very different from the situation in this application and there is no evidence of a general consent having been given by the non-UK group companies to SHL to search the electronic records of those non-UK group companies. The documents that have been obtained by Sarah Carter have been obtained in response to specific requests by her to personnel at the non-UK group companies who provided that documentation in response to those requests. Sarah Carter was acting as agent of the appellant, and not of any of the non-UK group companies when she was providing information to HMRC during the enquiry and she had no general authority to search the electronic records of those companies to obtain information which she could then provide to HMRC during the course of that enquiry. Nor does she have that general authority to disclose the documents now sought by HMRC in this application.

57. I agree with Mr Bradley. In Schlumberger, the company had carried out searches of files at facilities in Texas which housed Schlumberger's corporate patent files and also the personal files of four individuals who were employees of non-UK Schlumberger group companies. Mr Justice Floyd said that it was clear that the search of these facilities and files had been done without reference to the specific group company. It had been undertaken with the consent of the company concerned. It is equally clear, however, that this process is very different from that undertaken by Sarah Carter who did not search the electronic records of the non-UK SHL group companies, but instead sought information from personnel at those companies for onward transmission to HMRC during the enquiry. I accept that SHL enjoyed the cooperation of those companies, but that was not to inspect and take copies of documents itself. It was to ask individuals at those companies to inspect and take copies of documents.

58. In my judgment there was no general consent given to SHL to search for documents in the possession or control of the non-UK SHL group companies, and the Schlumberger principle, therefore, does not apply to this application.

59. Accordingly, notwithstanding that for the reasons given at [52] above I would have ordered disclosure, I accept that the documents sought by HMRC are not in SHL's possession or control and I therefore do not have jurisdiction to order SHL to obtain them and/or provide them to HMRC.

60. Under paragraph 3(ii) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "The emails of the four directors of SHL at the time of the relevant transactions for a period of two years leading up to the date of approval of the loan by SHL be searched for relevant documents employing search terms to be agreed between the parties."

61. I note to start with that this disclosure does not request board minutes, but emails passing between the directors. I assume from this that HMRC are comfortable that they have all the relevant board minutes. I do not believe it is any part of HMRC's case that the decisions of the relevant companies relating to the transaction were taken outside board meetings. In other words there might have been persons who were usurping the function of the board or the

directors were making the relevant decisions outside the board meetings which the board was simply rubber stamping. So given that the purpose of the relevant companies must be tested at board level i.e. what was the purpose of the board, and the decisions regarding the project were taken at board meetings, it is the minutes of those meetings which are of primary importance and relevance in this appeal.

62. SHL have searched only the mailbox of one director, Andrew Johnson, on the basis of its submission that if its directors were discussing the proposed transaction by email they would copy all directors including Andrew Johnson. The search of Andrew Johnson's mailbox reveals (according to SHL) only two emails from the SHL directors over and above those which had been provided in Sarah Carter's letter. Those two emails have been disclosed to HMRC. HMRC's view is that searching the mailbox of only one director on the basis that he would have been copied into all emails which were circulated amongst directors, risks the possibility that that was not the case and that relevant emails will not have been disclosed. This is a fact sensitive case and it is fair and proportionate that emails of all directors should be searched subject to agreeing relevant search terms. Relying on the emails from one director in a case such as this is not sufficient.

63. In 2016 law firm Pinsent Masons were commissioned by SHL to, in their words, rigorously test the purpose of the transaction, and to do this they undertook a detailed fact-finding exercise in which they conducted formal interviews with the relevant SHL directors (including Andrew Johnson) and reviewed contemporaneous material. They also had extensive discussions with Sarah Carter and Antoine Kuntschen. This exercise culminated in the Report which was dated 27 July 2016. Mr Bradley drew my attention to footnote 5 of the Report which indicates that none of the directors were able to locate any additional documents in response to the request that the directors confirmed whether they held any other material relevant to the transaction beyond that provided in advance by Pinsent Masons. My understanding is that the information so provided by Pinsent Masons to the directors has been disclosed to HMRC.

64. Mr Bradley's point is that firstly it is clear that all relevant documentation information relating to this project would have gone through Sarah Carter as she was the project manager (my words not his) for the SHL side of the transaction. And HMRC have all Sarah Carter's emails. SHL have told HMRC that Andrew Johnson would have been party to all emails that would have been circulated between the directors and the fact that he has disclosed all his emails to HMRC means that there are no "hidden" emails which are relevant and which were circulating between members of the board other than Andrew Johnson. And finally the Report shows that when Pinson Mason asked the directors whether there was any relevant information over and above that which has been disclosed to HMRC, they answered no. In the light of this, he submits, it is very unlikely that there is anything else out there of relevance and even if there is, there is certainly not enough to justify the further disclosure exercise requested.

65. I have considerable sympathy with these submissions even though I fully appreciate that the Report could be seen as a self-serving document given that it was commissioned in order to persuade HMRC that there was no unallowable purpose. Indeed much of the Report is taken up with technical arguments as to why there was no such unallowable purpose. And furthermore, the purpose for which the Report was commissioned is very different from the purpose of this disclosure which, as HMRC have submitted, is to enable the trial judge to deal with the case fairly and justly and so needs to have access to all relevant material.

66. This is a prime example of where HMRC do not trust the self certification by SHL. Their view is that the significance of emails passing between the directors is so relevant to the motives

of the relevant company that SHL should now conduct a search using agreed search terms, and should disclose all emails. It should then up to HMRC to decide whether or not they are relevant. Self certification risks depriving HMRC of emails which might benefit its case or be adverse to SHL's case. But disclosing all documents thrown up by the search might be disproportionate in time and cost and could result in SHL disclosing emails which are not relevant.

67. Mr Bradley also makes the point that in HMRC's letter to Sarah Carter of 6 May 2015, in which HMRC explained that in their view the transaction and so the Loan did have an unallowable purpose, HMRC have set out in an appendix extracts from a number of emails which, in their view, clearly show that one of the purposes of the transaction, and so the Loan was to secure a tax advantage. In the light of all this evidence, he asks rhetorically, does HMRC really require any more given the cost in terms of time and effort of searching for these emails, and the likelihood that that search will throw up nothing of relevance.

68. I think the presumption must be that in the absence of any evidence to the contrary, disclosure by SHL has been carried out diligently and honestly. And the same is true of the exercise undertaken by Pinsent Masons when analysing contemporaneous documents. And it is true, too, of the evidence given by the directors to Pinsent Masons. Indeed HMRC have not suggested, explicitly, that the contrary is true even though it is implicit in their application for this specific disclosure. If they had full trust in the assurance given by SHL that all emails which would have been sent to all board members would have been copied to Andrew Johnson, and that the answer to the query posed by Pinsent Masons of the other directors was wholly accurate, then they would not be seeking this disclosure. They would accept that what they have seen in Andrew Johnson's emails was conclusive.

69. However, people's memory is fallible, and even with the best will in the world, they might not remember events which took place some years ago. The Report was commissioned in 2016 some five years after the transaction took place. I cannot see from the information report what material relevant to the transaction had been provided in advance of the interviews, by Pinsent Masons, what is abundantly clear from those interviews is that tax paid an integral part in the decision by SHL to enter into the transaction which appears to have been made at the board meeting on 24 January 2011. It is equally clear from those notes of interview that the directors were in contact with each other outside the formal board meetings (I would be startled if it were otherwise) and that a considerable amount of preparation was done so that board meetings went smoothly and the business which was conducted at them was concluded as anticipated by the preprepared board minutes. HMRC appear to have been suspicious that minutes were prepared before the meeting took place, but that is commonplace, and I see nothing whatsoever suspicious about it. The important point for this application, notwithstanding there is no suggestion that decisions were made outside board meetings, is that the directors may well have discussed, either orally or by email, the reasons (including any tax reasons) for SHL entering into the transaction. And these could be very relevant to the company's motives for the purposes of section 441.

70. It is possible for HMRC to apply for witness summonses for these individuals to attend the tribunal, and give evidence, even if they are not called by SHL. But to persuade a tribunal to issue a summons, HMRC will need to show that there is a real likelihood that the evidence will materially assist the tribunal in its determination of the issues. And from what HMRC has been told by SHL, HMRC might find difficulty in that given that at face value, it is SHL's position that all emails would have been seen by Andrew Johnson and none of the other directors would have been party to emails which were not in Mr Johnston's possession or

control. At face value the statements made by the directors and which are appended to the Report, whilst recognising that tax was clearly something that was taken into account when the board concluded that SHL should enter into transaction, also make clear that they had assumed that the tax side of things had been considered by specialists both within and outside the company and that those specialists had concluded that there were no tax barriers to the transaction. There is little material on which HMRC could base a cross examination suggesting that the tax benefits were, contrary to what is being suggested in those statements, the fundamental justification for the transaction and the Loan. If there were emails to which the directors were party which had not been disclosed since Andrew Johnson was not party to them, that might provide evidence that the directors recollection of events was not accurately reflected in the statements.

71. This is a situation where HMRC are entitled, I think, to test the veracity of SHL's self certification. I think it is reasonable and proportionate to direct that an appropriate search be made for a period of 2 months leading up to the board meeting, on search terms which I will direct if they have not been agreed between the parties within 56 days from the date of release of this decision. If it transpires that there were emails passing between the directors which have not been disclosed since they did not include Andrew Johnson as a party, then HMRC may wish to make an application for disclosure for an earlier period. If, to the contrary, there are no such emails thus endorsing SHL's self certification, then HMRC should be satisfied with that.

72. Under paragraph 3(iii) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "Any documents and emails that have not previously been disclosed from and to the relevant external advisers relating to the project. This should include, but not be limited to, early drafts of advice provided by EY in relation to the transaction and all documents to and from Deloitte……."

73. Mr Henderson submits that these are relevant documents, and that although SHL say that it would be disproportionate and burdensome to produce them, SHL has not quantified that burden which it might have been expected to do by way of, for example, a witness statement. Mr Bradley questions the relevance of these documents and whilst disclosure of these particular documents might not, of itself, be overly burdensome, the combined effect of these and the other disclosures requested is to impose a disproportionate burden on the appellant.

74. It is my understanding that both EY and Deloitte were instructed to provide tax advice to Syngenta group companies. Given that the issue in this case is the motive for undertaking the transactions and in particular whether the Loan had as a main purpose the securing of a tax advantage, the tax advice provided to this company is of considerable relevance. Clearly the final report providing tax advice is important, but so too are previous drafts of that advice given that they can potentially shed light on motive. It would be highly relevant if the evolution of the advice between first draft and final report shows an increased emphasis on securing a tax advantage. I believe that disclosure of these draft report therefore should be directed unless they are privileged or unless the appellant can show that such disclosure will be disproportionate. The same is true of documents to and from Deloitte which is a targeted disclosure and which may throw up information about a tax avoidance motive which is of importance in this appeal. Of itself, I do not believe that it would be disproportionate to order disclosure and certainly, whilst appreciating the submission that the cumulative effect of these disclosures might become unduly onerous, disclosure of the draft advice from EY and the documents to and from Deloitte of themselves should not be. The disclosure sought, however,

is too general. Whilst the draft advice EY itself should be disclosed, as, too, should the documents to and from Deloitte, "documents and emails that have not previously been disclosed from and to the relevant external advisers" is too untargeted. So I direct that SHL should disclose early drafts of advice provided by EY in relation to the transaction and all documents to and from Deloitte. These documents should be sent to HMRC within 56 days from the date of release of this decision.

75. Under paragraph 3(iv) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "From the Excluded Documents, the following to be provided:
>
> a. Engagement letter and advice in relation to the capital reduction.
>
> b. ……
>
> c. ……
>
> d. The fee discussions between Syngenta and the advisors."

76. HMRC's justification for the request relating to the capital reduction, is that if Deloitte thought it was relevant as evidenced in Sarah Carter's letter then it is likely to be relevant to the issues in this case. HMRC also say that they have not requested this information before. SHL questions this and Mr Bradley submitted that the capital deduction related to another company, not SHL, so how could it be relevant. As I have explained, relevance should be tested not just against the motives of SHL but also against motives of other members of the Syngenta group. But there might be any number of reasons why Deloitte wanted to see it, and its relevance might be to none of the issues in this case but to some commercial motive. I find it difficult to see that the trial judge's ability to deal with the case fairly and justly will be influenced by a document simply because Deloitte considers it to be relevant. I reject this application.

77. Mr Henderson submits that the information concerning fee discussions may be relevant if the fees relate to tax advice. But from what I have seen there is no doubt that the relevant companies have paid for tax advice. And there is no doubt that tax was clearly something which was considered prior to the transaction taking place (it would be wholly unusual if a transaction such as this was undertaken in the absence of any tax considerations). The question which the trial judge will have to decide is whether the main purpose of the relevant company of entering into the Loan was to secure a tax advantage. I cannot see that the fee discussions will shed any additional light on this and thus on the ability of the trial judge to deal with that issue. I reject this application.

78. Under paragraph 3(iv) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "Any versions of the EY valuation report (including draft versions) that have not previously been provided."

79. I did not seem to have a copy of either the final version of the EY valuation report, nor previous drafts, in the bundle, nor am I entirely sure what EY have valued (I suspect it was shares given that I have seen some reference to their involvement in the debt push down). The Report baldly states that the valuation report was "not compiled for tax purposes…" And it is

certainly clear that EY are providing advice to the Syngenta company in relation to an advance thin capitalisation agreement. I am not clear either whether the EY valuation report was separate from the step plan referred to in information provided by Sarah Carter to HMRC, but there is no doubt that EY provided advice in respect of the transaction and the Loan. HMRC say that since this advice was relied upon by the board, they are relevant to the way in which the board minutes have been framed. Early drafts of the report would not be difficult to provide and given the commercial justification for the transaction, previous reports and their evolution into the final report will give an idea of the motives for the transaction. Furthermore, they submit that it is very simple to provide those previous drafts. There will be little cost in time or money. The appellant says that the EY report valued the target company and questions its relevance given that it has never been part of HMRC's pleaded case that target was overvalued. In any event HMRC have the final version.

80. I feel the same about these draft reports as I do about the draft tax reports. It is all very well for the appellant to say that these relate to the valuation of target and an overvaluation of target has not been pleaded. And for Pinsent Masons to say in the Report that the valuation report was not compiled for tax purposes. But I think this is an area where HMRC are entitled to make up their own mind given that the advice given to Syngenta by external advisers is of considerable significance when considering unallowable purpose. Furthermore, even on a cumulative basis I cannot see that the provision of these draft reports will be disproportionate in time and financial costs to the appellant. And this is notwithstanding that HMRC had the opportunity of seeking copies of these draft reports during the conduct of their enquiry. I therefore direct that these draft reports should be sent to HMRC within 56 days from the date of release of this decision.

81. Under paragraph 3(viii) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "Any drafts of the SHL directors' board minutes which have not previously been provided."

82. In the agreed position paper of 30 April 2021, HMRC have agreed that they are only seeking drafts of the board minutes for the appellant's board meetings that took place or were due to take place in December 2010 and January 2011 discussing or approving the transaction (to the extent not previously provided).

83. Mr Henderson submits that these previous drafts are relevant and are something which should be considered by the trial judge. Mr Bradley submits that all of the amendments made in the different sets of minutes are visible from Mrs Carter's emails to HMRC (and presumably the documents attached to them) and thus HMRC should be able to point to changes in the different drafts and thus, if they consider those changes to be relevant, they can make submissions on that at the hearing. The Report also comments on previous drafts.

84. As I have said before, the relevant purpose for which the Syngenta companies undertook the transactions and entered into the Loan must be tested at board level, and thus anything that is relevant to the decisions taken by the board is of importance in a case considering unallowable purpose. Given that HMRC have now accepted that the period over which they require the draft minutes is only two months, I think it is proportionate to direct disclosure of these draft reports notwithstanding that HMRC have had the opportunity of asking for them before now. I am afraid I cannot comment on Mr Bradley's submission that Sarah Carter's emails make clear what the amendments have been to the draft minutes. I do not seem to have

the relevant documents. But as for the draft minutes themselves which HMRC now seek only for the two month period that I have mentioned above, and which have not previously been disclosed to HMRC, I think this is a sufficiently targeted and proportionate request. I direct that any draft board minutes for the appellants board meetings which took place or were due to take place in December 2010 and January 2011 discussing or approving the transaction (to the extent not previously provided) should be sent to HMRC within 56 days from the date of release of this decision.

85. Under paragraph 3(x) of Part 2 of the schedule of disclosures, HMRC request disclosure of:

> "The minutes of the TLT meeting of 10 November 2010 to be provided."

86. HMRC have been put on notice that this might be relevant since it is referred to in a letter from EY (Senior Manager Corporate Tax) to Sarah Carter which makes reference to the latter having mentioned "the tax leadership team meeting which was due to take place on 10 November" (I think 2010) and that Sarah Carter would "need an estimate of the debt that SHL will require to effect the acquisition. We'll work towards this date."

87. HMRC say that this is relevant since any meeting of the tax leadership team in November 2010, given that January 2011 was the date that the transaction was signed off, was likely to have discussed the tax implications of the transaction and, perhaps, any tax motivation for the transaction. Mr Bradley submits that TLT is a groupwide team of people based in Switzerland, and the meeting referred to was one which Sarah Carter and Simon Perry attended to make a presentation, and her slides for that presentation have already been disclosed to HMRC. And in any case any such minutes of the meeting are not within the possession or control of the appellant and thus subject to the Schlumberger issue.

88. I am assuming for the purposes of this disclosure that such minutes exist (Mr Bradley did not submit that there were none). And subject to the Schlumberger issue, I would have directed that these minutes should be provided to HMRC within 56 days from the date of release of this decision. I say this because, as I have said before, anything which sheds light on the motivation of the relevant Syngenta boards for entering into the transaction and the Loan is relevant to the issue of unallowable purpose. Notwithstanding that Sarah Carter's slides might have been disclosed, and that they will provide HMRC with a broad understanding of what might have been discussed, it provides no insight into the discussion itself. I accept that neither might the minutes, but the time and financial cost of providing these minutes is likely to be small and to my mind is proportionate to the relevance of the material. If I were the trial judge I would be interested in reading them**.**

89. However I have decided the Schlumberger issue in favour of SHL, and the same principle applies to these minutes as applies to the emails referred to at [38] above. I do not have jurisdiction to direct disclosure of these board minutes.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The

application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 25 June 2021

APPENDIX 1

Part 1

1. …….

2. ……

Part 2

3. Further disclosure as follows. For the avoidance of doubt, to the extent that this has not already occurred, the Appellant should undertake searches for, and disclose relevant documents within these categories:

(i) The Emails to Matthew Bayliss, Simon Perry, Peter Schreiner, Antoine Kuntschen, Christian Wierenga and Thomas Schwarb and for the period of two years leading up to the date of the approval of the loan by SHL be searched for relevant documents employing search terms to be agreed between the parties.

(ii) The emails of the four directors of SHL at the time of the relevant transactions for a period of two years leading up to the date of approval of the loan by SHL be searched for relevant documents employing search terms to be agreed between the parties.

(iii) Any documents and emails that have not previously been disclosed from and to the relevant external advisers relating to the project. This should include, but not be limited to, early drafts of advice provided by EY in relation to the transaction and all documents to and from Deloitte, and the attachment to the email of 20 April 2010 at 15:46 from Sarah Carter to Richard Syratt.

(iv) From the Excluded Documents, the following to be provided:

a. Engagement letter and advice in relation to the capital reduction.

b. ……..

c. ……...

d. The fee discussions between Syngenta and the advisors.

(v) Any versions of the EY valuation report (including draft versions) that have not previously been provided.

(vi) ……

(vii) …….

(viii) Any drafts of the SHL directors' board minutes which have not previously been provided.

(ix) ……...

(x) The minutes of the TLT meeting of 10 November 2010 to be provided.

(xi) ……..

Further information required.

4. …….

APPENDIX 2

1. On 26 January 2011, pursuant to an internal reorganisation of the Syngenta Group, SHL acquired Syngenta Limited ("SL") (and its subsidiaries) from Syngenta Alpha BV (the "Reorganisation"). SHL's acquisition was funded in part by the Loan.

2. In light of the "real-time working" relationship with HMRC, Sarah Carter (Syngenta Group Tax Manager for the UK) informed HMRC of the Reorganisation a few days after completion and informed HMRC that SHL would be making an application for an Advance Thin Capitalisation Agreement (an "ATCA") in respect of the Loan.

3. On 8 March 2011, SHL applied for an ATCA in respect of the Loan. The application set out the background to the Syngenta group, the Reorganisation and the Loan. Following correspondence and a meeting between Syngenta and HMRC, on 17 February 2012, HMRC signed off on the ATCA in respect of the Loan.

4. SHL submitted its corporation tax return for the accounting period ending 31 December 2011 on 18 December 2012. On 16 December 2013, HMRC opened an enquiry into SHL's corporation tax return for the accounting period ending 31 December 2011. HMRC subsequently opened enquiries into SHL's returns for all the accounting periods mentioned in paragraph 1, above.

5. On 19 December 2013, HMRC requested that SHL provide extensive information about the Reorganisation and the Loan (see Appendix 1 to this Response) including: "Copies of all communications regarding the acquisition and associated transactions, including both internal communications and those with external parties or advisors. This should include but not necessarily be restricted to all internal emails, internal submissions, proposals, explanations, requests for approval, step plans, notes of telephone calls, and minutes of meetings at which the transactions were considered."

6. On 28 March 2014, SHL replied to HMRC enclosing "the requested documents and information" (see Appendix 2 to this Response). Appendix 1 to this letter provided details of SHL's response to all the requests made in HMRC's letter dated 19 December 2013. Included with the letter were six lever-arch files containing in the region of 2000 pages of documents, much of which consisted of email correspondence.

7. The disclosure enclosed with the 28 March 2014 letter was prepared by Sarah Carter (who, as noted below, was the project manager for the Reorganisation). It consisted of all Sarah Carter's emails (including attachments to those emails) in the folder in her inbox dedicated to the Reorganisation except for those that fell into any of the limited specified categories of documents set out in Appendix 1 to the letter. Appendix 1 explained that documents in these categories were considered to be irrelevant or duplicates. As is stated in the letter, Sarah Carter was project manager for the Reorganisation and believed her emails to constitute a comprehensive record of the communications relevant to it. The letter and Appendix 1 set out the process by which the documents were obtained in considerable detail; Sarah Carter did not keep a more detailed record of the documents that she had reviewed or her reasons for determining that they were or were not relevant.

8. On 11 July 2014, HMRC responded thanking SHL for the letter and the documentation provided (See Appendix 3 of this Response). HMRC noted that there were some areas where

they required "further information and/or clarification" and requested further documents and information. The requests made by HMRC can be seen to be for clarification and further information in response to the documents and information already provided by SHL.

9. On 26 September 2014, SHL replied enclosing an appendix setting out the documents and information requested by HMRC in their letter of 11 July 2014 (See Appendix 4 to this Response). In respect of the few additional documents provided, the process by which the documents were identified is set out in the appendix to that 26 September 2014 letter. Appendix 1 to that letter set out that "Andrew Johnson has carried out a search of his emails and found only 2 emails from the SHL directors other than those already provided in our response of 28 March 2014" and that "the absence of any other relevant emails in Andrew Johnson's mailbox confirms that there is nothing further to be provided". Andrew Johnson was (at the time of the Reorganisation) and still is a director of SHL.

10. On 6 May 2015, HMRC wrote thanking SHL for the letter dated 26 September 2014. HMRC's letter stated that the officer had now considered the information provided and was writing to set out his view that SHL was not entitled to a deduction for interest paid under the Loan. The letter did not request further information or documents.

11. On 17 July 2015, SHL provided a detailed explanation of the reasons why it did not agree with HMRC's analysis of the law and evidence.

12. On 29 October 2015, HMRC provided a response to four questions raised in SHL's previous letter. The letter did not request any further information or documents.

13. On 9 February 2016, SHL wrote asking for clarification of HMRC's position. On 1 March 2016, HMRC provided a short response to SHL's letter dated 9 February 2016 HMRC did not request any further information or documents. On 17 March 2016, Syngenta wrote to inform HMRC that it had engaged Pinsent Masons LLP to assist with conducting of interviews of the directors of SHL, notes of which would be provided to HMRC.

14. On 20 April 2016, HMRC wrote to SHL following a teleconference on 1 April 2016 and enclosing their note of the teleconference. HMRC's note of the teleconference did not record any suggestion that SHL had not provided all evidence requested from it or that HMRC were requesting further evidence. HMRC stated that they were happy to receive fuller explanations of the commercial motivations for the transactions. HMRC requested that they be allowed to attend the interviews with the directors of SHL but did not request any further information or documents.

15. On 28 April 2016, SHL responded with corrections to the note of the call. SHL informed HMRC that it had considered HMRC's request to attend the interviews but considered that it would be quicker and more cost effective if they were conducted by Pinsent Masons.

16. The report prepared by Pinsent Masons (the "Report") is dated 27 July 2016 and was provided to HMRC on or shortly after that date. It set out "the facts as found by [Pinsent Masons'] detailed fact-finding exercise" and Pinsent Masons' view of how the law applies to those facts. It included notes of evidence from all four individuals who were directors of SHL at the time of the Reorganisation and further Syngenta documents. It further confirmed that, "the directors [of SHL] were also asked to confirm whether they held any other material relevant to the Transaction" but that "None of the directors were able to locate any additional documents in response to this query".

17. On 27 January 2017, HMRC wrote to Syngenta thanking it for the Report and stating that it had been reviewed. The letter did not request further information or documents but invited comments from Syngenta. On 17 March 2017, Pinsent Masons replied on behalf of SHL.

18. On 11 April 2017, HMRC wrote to Pinsent Masons stating that the "content of The Report has been thoroughly reviewed by the case team, as has the information that had previously been provided during the course of the compliance check". HMRC stated that they were "going through the governance processes required before a closure notice can be issued", which included "obtaining advice from Solicitors' Office". No further information or documents were requested.

19. On 31 May 2017, HMRC wrote to Pinsent Masons saying that HMRC "were currently seeking advice on [their] position". HMRC stated that they believed "all the facts have now been established" and outlined HMRC's understanding of both parties' positions "following a thorough review of the Report … along with other information provided". HMRC stated that they considered there to be "clear evidence to show that UK tax savings were the main purpose for the restructuring project".

20. On 27 July 2017, Pinsent Masons wrote to HMRC requesting that HMRC provide a fuller explanation of their position. On 29 September 2017, HMRC replied to the letter of 27 July 2017. HMRC stated that the case had been considered by Counter Avoidance Technical Team and the Policy Lead for the legislation under consideration and that all documents provided during the enquiry were made available to both of these groups. HMRC did not request any further documents or information.

21. On 19 January 2018, Pinsent Masons wrote with submissions for inclusion in the papers to be put before HMRC's Dispute Resolution Board.

22. On 24 August 2018, HMRC met with SHL to discuss the Reorganisation. HMRC's slides for that meeting state "The case team have conducted a detailed review of all contemporaneous documents provided during the course of the [enquiry]". The slides do not indicate that HMRC made any request for further information or documents.

23. On 7 September 2018, HMRC emailed SHL following up on a telephone call between HMRC and SHL the previous day. In the email, HMRC stated that they were interested in understanding what additional contemporaneous evidence existed to inform why the UK was restructured. This was information that SHL had asked HMRC to consider following the meeting on 24 August 2018 (as is shown in SHL's letter dated 14 November 2018).

24. On 14 November 2018, SHL wrote to HMRC thanking them for the meeting on 24 August 2018 and saying that this highlighted "important areas where HMRC's knowledge is incomplete and as such where further explanation or information is needed from [SHL]". SHL voluntarily included further contemporaneous evidence relevant to "how the group's Corporate Finance objectives and Treasury Policy informed the UK reorganisation decisions".

25. For the avoidance of doubt, and contrary to what is stated in paragraphs 14 and 20 of the Application, it is SHL's understanding that no emails were enclosed with the letter dated 14 November 2018. There were emails enclosed with, and referred to in, the letter dated 26 April 2019 (discussed below).

26. On 28 November 2018, HMRC emailed SHL saying that they had "completed a review of the information and documents that were delivered on 14 November". HMRC agreed with

Syngenta's proposal for a meeting to discuss the information and documents. HMRC did not request any further information or documents.

27. On 22 January 2019, SHL met with HMRC. SHL provided a PowerPoint presentation on the Reorganisation. HMRC indicated that they would consider further evidence provided by Syngenta but did not request any further information or documents.

28. On 13 February 2019, HMRC wrote to SHL thanking it for the information and documents provided with the 14 November 2018 letter and for the explanations provided in the meeting on 22 January 2019. HMRC invited SHL to provide more contemporaneous documents but did not request that they were provided.

29. On 26 April 2019, SHL replied providing further documents and information addressing the points HMRC had raised in the meeting on 22 January 2019 and their letter dated 13 February 2019. The letter explains that it refers to "the documents and evidence contained within the files of documents we have already provided to you, and we have also attached additional information". The emails referred to were all contained in evidence previously supplied to HMRC.

30. On 6 September 2019, HMRC replied saying they had "considered at length the evidence contained in the appendices to" SHL's letter dated 26 April 2019. HMRC stated their "view of the evidence provided is that it strongly supports a conclusion that the tax benefit arising from the loan financing was the main purpose of the transactions". HMRC concluded that they intended "to issue closure notices without further delay".

31. On 19 September 2019, SHL replied inviting HMRC to continue discussing the facts leading to their conclusion. On 2 October 2019, HMRC replied declining to set out in more detail their understanding of the facts.

32. On 4 October 2019, HMRC issued closure notices to SHL for the accounting periods set out in the body of the Decision. HMRC's conclusion was that SHL's main purpose in being a party to the Loan was an unallowable purpose and that all of the interest deduction was attributable to that unallowable purpose.

33. On 25 October 2019, SHL appealed the decisions in the closure notices and asked for an independent review of the decision in the closure notices. The review upheld the decision. HMRC's view of the matter letter of 19 December 2019 states "Throughout the course of the enquiry, a significant amount of information, documents and explanations have been provided"