



TC03396

Appeal number: TC/2012/04965 & TC/2012/04960

Corporation tax –management expenses- rental guarantee payments made by holding company –lump sum release payments - rental guarantee payments and provision for future guarantee payments – “expenses of managing the investment business” – duality of purpose – capital or revenue – held – lump sum release payments deductible management expenses – not capital in nature –guarantee payments and provision for future guarantee payments expenditure on assets not on investment business –non deductible - re-current payments – revenue in character.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**HOWDEN JOINERY GROUP PLC (1)
HOWDEN JOINERY LIMITED (2)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
MR ANDREW PERRIN**

Sitting in public at 45 Bedford Square London on 4 - 6 November 2013

Mr Jonathan Peacock QC, instructed by Deloitte LLP for the Appellant

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

DECISION

1. This is a joint appeal against (i) a closure notice and amended assessment of 9
5 February 2012 refusing to allow as deductible management expenses for Howden
Joinery PLC (HJ) for the 2008 tax year a sum of £10,258,486 of current year
management expenses and a provision of £86,233,000 representing future years'
expenses and (ii) a Direction relating to HJ's surrender of group relief of
£87,249,626 to Howden Joinery Limited, dated 16 March 2012. It was directed by
10 the Tribunal that these appeals should be heard together. The management expenses
relate to payments made or to be made by HJ in respect of parental guarantees given
over leases of properties entered into by its subsidiary, MFI Properties Limited
("Properties").

Background Facts

15 2. HJ and Howden Joinery Limited are UK incorporated and resident companies.
The Howden group supplies kitchens and joinery throughout the UK and has its
headquarters in the UK. Howden Joinery Limited is owned by Howden Joinery
Holdings Limited which is a direct subsidiary of HJ.

20 3. Until September 2006 HJ was the parent company of the MFI group of
companies, including Properties, which until 2008 held leases in a large number of
retail furniture stores in the UK. In September 2006 the MFI group, including
Properties was sold by HJ to MEP Mayflower Limited. ("Mayflower"). That
company went into administration in November 2008. Properties itself went into
administration on 6 October 2008 and as a result HJ was called upon to make
25 payments under a number of parent guarantees (the "Guarantee Payments") which it
had given over Properties' rental obligations. The guarantees given by HJ to
Properties remained in force after the sale of Properties but Mayflower did give an
indemnity to HJ in respect of its guarantee obligations.

4. HJ's tax computation for 2008 included as deductible amounts

30 (1) A payment of £8,623,248 relating to "lump sum guarantee settlements".
This comprised £3,578,495 of payments of guaranteed rent made on 36
properties for the fourth quarter of 2008 ("the Rental Guarantee Payments")
and £5,796,422 of lump sum settlements paid under "Release Agreements" over
seven properties in late 2008 ("the Release Payments"), (minus a provision for
35 "onerous leases")

(2) A payment of £1,802,341.00 being costs related to the Rental Guarantee
Payments and the Release Payments.

(3) A provision of £86,233,000.00 in respect of its future guaranteed rental
payment obligations ("the Provision").

40 For ease of reference these payments are referred to in this decision collectively
as the "Guarantee Payments"

5. It was not in dispute either that HJ was an investment company or that the £86 million provision included in its accounts for 2008 was made in accordance with UK GAAP and FRS 12 in particular. No accounting evidence was produced to the Tribunal.

5 6. For the year in which these disputed Guarantee Payments were made and the Provision was recognised, 2008, Properties was no longer a subsidiary of HJ or a member of the HJ group.

The Law

10 7. The relevant legislation relating to management expenses is at s 75 Taxes Act 1988 (TA 1988) ;

“s 75 Expenses of Management; Companies with investment business.

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

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

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

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

25 *(b) any provisions of the Tax Acts, other than this section.*

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

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

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

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

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Documentary Evidence.

8. We were told that the parental guarantees to which the disputed payments and provision related arose under 45 leases entered into by Properties throughout the UK over an extended period of time (the earliest being from 1981) and all relating to retail spaces with warehouses attached.

9. We were shown eight leases entered into by Properties which we were asked to assume were typical of the lease terms entered into and the guarantee provisions under which these payments were made. We have proceeded on this assumption but in circumstances where we have concluded that the specific drafting of the lease provisions have influenced our conclusions, we have made that clear.

We looked at these leases in detail:

10. *Ayr* – 27 May 1985. This is a lease governed by Scottish law. The guarantor gives an undertaking in respect of the Tenant's obligations, including specifically the payment of rent and is obliged to take on a replacement lease if the Tenant goes into liquidation.

11. *Birstall* – 11 July 1994. This is an English law lease, the guarantee is in the form of a covenant under which the guarantor gives an indemnity for any default of the Tenant and is obliged to accept a new lease on liquidation of the tenant if requested by the landlord within 6 months, but is otherwise only obliged to pay 6 month's rent.

12. *Bedford* – 3 May 1989. This is an English law governed lease, the guarantee is in the form of a covenant under which the guarantor must make good any losses and costs arising from failure by the tenant and is obliged to take on a new lease if the Tenant goes into liquidation if demanded by the Landlord, if no demand is made the guarantor is only obliged to pay 6 months' rent.

13. *Stamford Hill* – 3 May 1989 This is an English law governed lease, the guarantee is in the form of a covenant and is on similar terms to the Bedford lease.

14. *Grimsby* - 15 February 1989. This is an English law governed lease, the guarantee is given in the form of a covenant by the guarantor to make good any failure by the tenant including payment of rent and any other costs. The guarantor is obliged to take on a new lease if requested on the tenant's liquidation, but if no demand is made the guarantor is only obliged to pay 6 months' rent.

15. *Chesterfield* – 11 April 1986. This is an English law governed lease in which the guarantee takes the form of a surety. The surety covenants to pay rents and perform any covenants which the tenant has failed to perform. The tenant has an obligation on request to assign the remainder of the lease to the guarantor. The guarantor gives a covenant in respect of the payment of rental and is obliged to take on a new lease on the liquidation of the tenant if requested, if not so requested, the guarantor is obliged to pay a further three months' rental only.

16. *Dudley* –31 March 1989 - This is an English law governed sub under lease in which the guarantee takes the form of a surety and the guarantor guarantees the payment of rent and other obligations of the tenant under its covenants. The guarantor is obliged to take on a new lease for the remainder of the term if the
5 Tenant goes into liquidation. This lease is part of a lease and lease back arrangement.

17. *Erdington*- 29 December 1989. This is an English law governed lease with the guarantee taking the form of a surety. A guarantee is given for the payment of rents and the other matters covenanted by the tenant. The guarantor is obliged to take a
10 lease for the remainder of the term if the tenant goes into liquidation.

18. In each of these leases some form of parent guarantee was given, either in the form of a surety, a covenant or a guarantee. Although the legal form differed, the obligations operated in similar way; the guarantor was obliged to pay rent and other costs if the tenant failed to pay and in most cases, was obliged to take on a new lease
15 for the remainder of the term of the tenant’s lease if the tenant went into liquidation and on the request of the landlord. In some, but not all cases, if the landlord did not request that the guarantor took on a new lease, the guarantor was only liable for rental and other obligations under the lease for three or six months after the tenant’s liquidation (or less if a new tenant was found). It is worth stressing that the
20 guarantor was not usually in a position when it took over the existing lease of the tenant, it stepped into the tenant’s shoes only in so far as it took its own lease on terms identical to the tenant’s lease.

19. We were told that there were three leases where HJ did actually take an assignment of Properties’ existing lease, mainly to ensure that a profitable under
25 lease could be kept in place, being Stamford Hill, Dudley and Grimsby, but this was the exception rather than the rule.

The Deeds of Release

20. We were shown an example Deed of Release under which, rather than continue to make payments under the parental guarantee which had been given by HJ to
30 Properties, HJ paid an up front payment to be released from these obligations. The only example lease which we reviewed for which a release payment was negotiated during 2008 was Bedford, although we were told that this was done for seven leases in total in 2008 and that the terms of the release documents were similar in all cases. There are some provisions from this Release Deed which are worth setting out in
35 full at this stage:

Recital (C) “*the lease remains vested in MFI Properties Limited (now in administration)*”

Recital (D) “*The Landlord and the guarantor have agreed that in consideration of the payment of one million five hundred thousand pounds (£1,500,000)(exclusive of VAT, if payable) by the Guarantor to the Landlord (the Capital Payment)..... the Landlord in its capacity as Landlord under the*
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Lease will fully release the Guarantor from all of its obligations and liabilities arising under the Lease”

5 Clause 2 “*The Landlord in consideration of the Capital Payment for itself and for the avoidance of doubt its successors in title hereby releases the Guarantor from all obligations, liabilities, claims, demands, costs, damages and expenses which have arisen and may arise from the covenants, agreements, conditions and obligations (whether past present or future) contained in the Lease and any supplemental deed or document binding on the Guarantor now or at any time in the future”*

10 21. On the basis of the Deed of Release, while Properties is described as being in administration, it nevertheless remains as tenant under the lease and HJ therefore has no interest in the lease in respect of which the release payment is being made. The payment is described at Clause 2 in terms of a release of the guarantor from all of its obligations and the payment is described in the recitals as “the Capital Payment”. It is also worth referring back to the obligations under the lease itself from which this payment releases HJ; under Clause 7 of the Bedford Lease the Guarantor was obliged to pay the losses which the Landlord has suffered as the result of the Tenant’s failure and to take a new lease for the remaining term of the lease if requested by the Landlord.

20 22. HJ’s corporation tax computation for 2008 refers to the lump sum payments made of £8,623,248 as “*relating to the lump sum buy out payments in respect of the leases formerly occupied by MFI properties*” and as “*lump sum guarantee settlement payments*”.

The Provision

25 23. The Provision is referred to in HJ’s 2008 tax computation as a “provision in respect of guaranteed rental payments”. It was accepted that this was calculated by reference to the rental payments due in respect of each lease, ignoring the possibility of any early exit on the payment of a lump sum. The Provision has been calculated by extrapolating the rental due to the end of the term of each lease (other than those for which a Release Agreement had already been made) and applying a 3% discount to that amount. The Provision for rental amounts also takes account of VAT and prospective rent increases to the end of the term plus a credit for tenant income. The Provision includes some costs which are not directly related to the rental payments; rates, agents fees, strip out costs, service charges, legal fees, insurance, security costs (of keeping the properties safe) and other repair and maintenance costs. Of the total Provision (on a non discounted basis) £60,953,460 relates to rental payments, the remaining £26,270,372 relates to other fees and costs.

The Pre 1987 guarantees.

40 24. A number of the guarantees which are the subject of this appeal were entered into by the predecessor company of HJ, the then parent company of the MFI group. HJ took over these guarantee obligations as part of the group re organisation in

November 1987. The entity which originally entered into the guarantees was known variously as MFI Furniture Group Limited, MFI Furniture group Plc and Maxirace Furniture Industries Limited. The properties to which these guarantees relate are Ayr, Blackburn, Chesterfield and Wolverhampton.

5 *Oral Evidence – Mr McManus.*

25. We were provided with a witness statement of Mr McManus who also gave oral evidence before the Tribunal and was cross examined by Mr Henderson. Mr McManus was property director of Properties from June 1988 until October 2006 and had worked for MFI since 1973. Since 1998 his role involved looking for sites
10 for the company and negotiating commercial terms, although he was not involved in the detailed legal negotiations. He took the negotiations to “heads of terms” stage. It was Mr McManus who decided the location for new units, the size of the unit and the rental which should be paid. He was not involved in the negotiations for any leases prior to 1998 (including some of those in our sample set). Mr McManus was
15 clear that the main role of Properties was to enter into leases and it always held the leases for the retail premises. The standard lease term at this stage was 25 years.

26. Mr McManus had little knowledge of how the cash flow was set up between Properties and its parent company (as regards the payment of dividends) or arrangements with the entities which actually ran the retail outlets. He was not
20 involved in discussions concerning the MFI group re organisations or the MBO which took place in 1987. Mr McManus had no knowledge of how the 2008 provision was established. There are a number of leases which are the subject of this appeal which pre date Mr McManus’ appointment as a property director and on which he was not therefore able to comment (the 14 leases entered into prior to
25 1988).

27. He explained that during the late 1980s and early 1990s MFI was in expansionist mode and trying to acquire a large number of out of town sites. In order to obtain prime out of town sites, it was often necessary to obtain a parent guarantee. Mr McManus said that “*the giving of guarantees was not a policy of MFI and was only
30 done when required by the Landlord. In most cases, where a request was made by the Landlord the lease would not have been entered into or renewed if a guarantee had not been given*”.

28. In his view, the reason for giving the guarantee from HJ’s perspective was to increase turnover and profit for its subsidiary and increase dividend payments up the
35 chain. Whether a guarantee was required would depend on the site and the landlord’s view of the tenant’s covenant strength. In Mr McManus’ words “*without the guarantees being given then Properties would not get the site, Retail would not be able to trade, if they could not trade, there would be no turn over and no profits to pay dividends back up to the parent*”.

29. Mr McManus made clear that whether a guarantee was given or not was a matter
40 of commercial negotiation and HJ were more likely to be asked for a guarantee in respect of properties on prime sites. The giving of a guarantee was something which

was decided at the level of the HJ Board, but Mr McManus was not aware of a situation when a guarantee was requested but refused. Mr McManus made clear that this was a “take it or leave it” negotiation, there was nothing else which a landlord would accept (such as higher rent) in place of a parent guarantee. He estimated that
5 in 2006 about 25% of the Properties leases had a parent guarantee.

30. Mr McManus explained that the MFI sites were very different from the HJ sites, which were depots rather than retail units. There was no possibility of the MFI sites being used for the HJ business. However some Properties sites were transferred to HJ under the 2006 Agreement when the MFI Group was sold to Mayflower, mainly
10 high street locations.

31. As to the circumstances when MFI started to have financial problems in 2008, Mr McManus explained that HJ knew that MFI was not paying the rent because the landlords contacted HJ and sent them the rental invoices. HJ’s strategy was to be pro active and they would discuss the situation with any landlords who were willing to
15 deal sensibly with the situation. HJ’s main aim was to get out of the Properties leases as quickly as possible. This is reflected by the regulatory announcement made on 30 Sept 2008 concerning HJ’s position in respect of the Properties leases, which stated that

20 *“As a result it [HJ] has developed a detailed and thorough property by property plan to seek to mitigate the financial impact of it becoming liable for payments in relation to the guarantees, including negotiating the early ending of leases with landlords or the finding of new sub tenants”.*

Mr McManus said that while they asked their legal advisers to review all of the leases under which HJ had given a guarantee, it was always clear that HJ were liable
25 as guarantor.

32. Mr McManus discussed the negotiation process for each of the twelve sample leases explaining the basis on which HJ either paid to be released from the guarantee or negotiated alternative terms, although this often took some time (for example the Blackburn lease was not released until Feb 2011 and HJ managed the property in the
30 meantime and worked with the landlord to find another tenant). Payment was not always by way of rent or payment for release, the Chesterfield lease was released on the basis of nil cash payment from HJ but with HJ covering dilapidation costs. In some circumstances where an alternative tenant was found, but at a lower rent, HJ paid the rental differential (for example as at Grimsby). In other circumstances the
35 existing lease was assigned intra group to another HJ company, in order to facilitate the taking on of a new tenant (Stamford Hill is an example of this). In some circumstances no lump sum payment was made (as at Wolverhampton), in other circumstances a lump sum was paid relatively early on (as at Bedford).

33. In respect of the Birstall lease, as an example, Mr McManus described the release as
40 *“we actually paid £1.85m.... to actually lose all our liability for the site, both the guarantee and any liabilities past, present, future.....”*

34. There was no single approach to exiting from these guarantee obligations, as you would expect in these sorts of circumstances, different landlords requested different actions and HJ's obligations ranged from paying a lump sum, to transferring leases intra group, to subsidising rental of replacement tenants or paying headline rental until a new tenant was found. As part of this process HJ was involved in the day to day management of the empty properties – paying for security and other services until the deals were done. In Mr McManus' words "*we had to clean them out, secure them, maintain them, heat and light them in the winter, we had to pay the rent. So it was really just what deal we could do with a landlord at the time*" these costs are included in both the Provision for future rental and the £10,258,486 sum representing actual payments made in 2008.

Agreed points of principle

35. It was agreed between the parties that HJ should be treated as carrying on an investment business, that the expenses in question are properly referable to the 2008 tax period and are not otherwise deductible under any other provision of the Tax Acts. It was also accepted that if the expenses are treated as capital in nature, they do not fall within s 75(3)(a) or (b) TA 1988. It is common ground that none of the investments held were held for unallowable purposes so that s 75(4)(b) TA 1988 is not relevant. Finally, that the provision for management expenses in HJ's 2008 year end accounts was properly made in accordance with UK GAAP and specifically the rules in FRS 12 applying to provisions.

The Arguments

Are the Guarantee Payments management expenses under s 75?

(1) *Statutory definition should be widely applied.*

36. Mr Peacock's starting point on behalf of HJ was that the definition of management expenses at s 75(4) (a) TA 1988 should be widely defined; anything which is not specifically excluded either by case authorities or by statute should be assumed to be included with the definition of a management expense. From his perspective, if a management expense does not fall within any of the banned categories, it should be treated as deductible. He described the term as a term of art existing in the tax code for which there was no statutory definition and which should be treated as an ordinary English phrase which has not been defined and is incapable of detailed definition.

37. Mr Peacock said that the term has been described as having a "wide, or fairly wide meaning" originally in *Sun Life v Davidson* (*Sun Life Assurance Society v Davidson* [1958] AC 184) and more recently in the *Dawson* decision (*Dawsongroup PLC v HMRC* [2010] STC 1906). Moreover, it has been suggested that the intention of the management expenses rule when it was introduced was to put investment companies on the same footing as trading companies. The term should be applied to ensure that investment companies are taxed only on their true economic profits. On

that basis these Guarantee Payments were capable of being treated as deductible management expenses.

5 38. For HMRC, Mr Henderson said that neither the guarantee payments nor the provision fell within the definition of a management expense for s 75 purposes and by reference to the extensive case law, relying in particular on the *Dawson* decision. From Mr Henderson's perspective there is no general "default bucket" into which management expenses can be dropped and made deductible. If the category of management expenses is a "wide" one, it is wide in terms of the range of administrative expenses which can be covered, rather than deep by reference to the different types of payment which come within its scope. Even if these expenses could be treated as management expenses in principle, they were excluded by reasons of being capital in nature.

15 39. On Mr Peacock's approach, any expenses which are not specifically excluded from this definition should be assumed in the first instance to be deductible, on Mr Henderson's approach, every expense which is not specifically allowable should be treated as non deductible.

(2) *Excluded Categories of Management Expenses*

20 40. Mr Peacock accepted the limitations which have been made clear in the case authorities, particularly that managing investments does not include the costs of acquiring them, including in particular stamp duties, but also other costs directly related to the acquisition of assets (on the basis of *Sun Life and Capital National v Golder*, (*Capital & National Trust v Golder (1949) 31 TC 265*)), but does include the costs of holding them (on the basis of *Cook v Medway*, (*Cook v Medway Housing Society Ltd [1997] STC 90*)) and suggested that this is how these guarantee costs should be treated.

41. In contrast Mr Henderson categorised these costs as falling within the excluded category of acquisition costs because they were expended to allow Properties to enter into lease agreements.

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(3) *Duality of Purpose*

35 42. According to Mr Peacock, a dual purpose does not make a management expense disallowable (as made clear in the *Camas v Atkinson (Camas plc v Atkinson [2004] STC 260*) and *Sun Life* cases) as long as managing the investment business is one purpose of the expenditure. Unlike the rules for trading expenses, there is no "wholly and exclusively" rule which applies to management expenses, it is sufficient if the payment has as one of its purposes the management of the company's investment business, even if the payment has other purposes. Therefore these Guarantee Payments were not excluded from being deductible only because one of their purposes was to assist Properties business.

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43. Mr Henderson had a different view of this point. While accepting that there was no specific “wholly and exclusively test” in s 75 he stressed that there nevertheless had to be a clear link between the expenditure and the taxpayer’s own business, which amounted to more or less the same thing. He described management expenses as part of a sub-set of wider business expenses, not all of which are deductible for tax purposes, as is made clear in the *Dawson* decision. In particular, management expenses cannot be deductible if they are made on behalf of another entity as is the case for these guarantee payments. The fact that the payments have as a secondary effect increasing the value of HJ’s subsidiary is not enough to make them a management expense.

44. Mr Henderson agreed with the Appellants that in order to be deductible, it must be clear that expenses relate to “management” and the salient question is what is the “management of the business” which we are concerned with here. Mr Henderson viewed “management” as essentially involving only the administration and employee related costs incurred by a holding company. The investment business of a holding company is holding shares in subsidiaries, receiving dividends, acquiring and disposing of shares. A parent company has a more general role in relation to the business of its subsidiaries which cannot be treated as the management of its investment business. Here Mr Henderson gave an example of paying a premium for insurance of assets, which would be a deductible expense, compared to what was done in this case, which he described as intervening in the business of a subsidiary or doing something for the group as a whole, where the parent is acting qua parent company, when an expense would not be deductible.

(4) *Character of the payments*

45. As far as the characteristic of the payments made under the guarantees were concerned, Mr Peacock relied on the *Bank of Greece* case (*Westminster Bank Executor & Trustee Co v National Bank of Greece* (1971) 46 TC) to suggest that the payments should follow the payments which they were guaranteeing and should also be treated as rental payments, referring to the statement of Lord Hailsham in the House of Lords supporting Lord Denning in the Court of Appeal, that payments made to guarantee interest payments should themselves be treated as interest. On that basis, if a guarantor takes over a tenant’s rental obligations, what it pays is a payment of rent. Mr Henderson’s response to this was that the House of Lords decision in the *Bank of Greece* case did not directly consider the question of the treatment of the guarantee payment as interest, which had been dropped before the case got to the House of Lords and that the *Bank of Greece* case is therefore not authority for the treatment of payments under guarantees as equivalent to the payments which they replace.

(5) *Management of investments or management of investment business?*

46. The Appellants accepted that in order to be a deductible expense, the guarantee payment had to be an expense of managing the investment business carried on. Mr Peacock accepted on the basis of the existing authorities that finance costs cannot be treated as expenses of management (*Bennett v Underground Electric Railway* (1923)

8 TC 475) including when they are related to a guarantee (*Hoechst Finance v Gumbrell (1983) 56 TC 594*) nor can the costs of issuance and acquisition of investments (*London County Freehold & Leasehold Properties Ltd v Sweet (1942) 24 TC 412*), whereas the costs of managing an existing portfolio are deductible as management expenses (*Hibernian Insurance v MacUimis [2000] IESC 41*). Mr Peacock stressed that it was not correct, as suggested by HMRC, to treat the Guarantee Payments as some sort of “financing cost”. A payment made to enable a subsidiary to enter into a market rate lease could not be treated as including any element of financing.

10 47. The taxpayer also accepted that there must be a connection between the conduct of business and the expenses in question. However, the FTT decision in *Holdings (Holdings v HMRC [1997] STC (SCD) 144*) established that the costs of considering providing letters of assurance (having the same legal effect as a guarantee) could, in specific circumstances, be deductible as the normal acts of investment management on the basis that their purpose is to maintain the investment company’s income yield which is part of the company’s investment business. On that basis, according to Mr Peacock, other costs related to guarantee like payments, or guarantees themselves should also be deductible expenses of management. The costs of managing investments in order to generate investment income is capable of being deductible as a management expense.

25 48. The expenses here were to maximise value of investments, as made clear by the evidence of Mr McManus; the guarantees were given in the first place to enable HJ’s subsidiary to obtain high value retail space, so that they could trade profitably and increase dividend payments to HJ. If the guarantees had not been given, the subsidiary would not have been able to acquire these lucrative trading locations. In entering into the negotiations relating to its guarantee obligations in 2008 HJ was attempting to mitigate its costs as guarantor of the leases of its subsidiary, just like the company giving letters of assurance in the *Holdings* case.

30 49. In Mr Henderson’s view the Guarantee Payments were not expended on the management of HJ’s business but on the business of its subsidiary. There is a significant difference between preparatory costs and the costs of actually intervening in another company’s business; the Guarantee Payments fell into that latter category and can be differentiated from the payments made in the *Camas* case, which were deductible because they related to “make up your mind expenditure”.

35 50. The source of these Guarantee Payments is the wider purpose of group, not just for HJ’s business. On the facts as made clear by Mr McManus’ evidence, during 2008 the aim of HJ was to avoid becoming a tenant itself under any of the subsidiary’s leases and it made lump sum payments in order to be released from these obligations, but at that time HJ was in the same position as tenant as its subsidiary had been. Mr Henderson’s interpretation of Mr McManus’ oral evidence was that the over arching fact pattern at HJ was for lump sum deals to be done with landlords, with the exception of the three leases where HJ did actually become the tenant for very specific reasons (Dudley, Grimsby and Stamford Hill).

51. Mr Henderson characterised the Guarantee Payments as for “financial support of a subsidiary” and stressed that it is clear from the authorities that financial assistance cannot be treated as a deductible management expense. The Guarantee Payments were akin to a loan or capital contribution and this is not a deductible payment. The
5 guarantee should be treated like the financing costs which were considered in *Milnes v Beam* (*Milnes v J Beam Group Ltd* [1975] 50 TC 675) and treated as non deductible. A payment of this type would not be deductible for a trading company and so it should not be deductible for an investment company either.

52. The Guarantee Payments are not sufficiently closely linked to management of
10 HJ’s investments to be deductible, they are made for the management of its assets, being a payment which is made on investments (to allow the subsidiary to acquire the leases) and so are not deductible (and to that extent they are akin to transaction costs). As is made clear in the *Dawson* case, there is an important distinction
15 between expenditure on managing the business and expenditure to improve the investments of the business. While Mr Henderson accepted, agreeing with Mr Peacock, that there is no “wholly and exclusively rule” which applies to management expenses, in his view it still has to be clear that the payment is for the benefit of the relevant investment business, and if there is some duality of purpose, the expenditure cannot be said to be for the purpose of the investment company.

20 53. Mr Henderson distinguished the *Holdings* decision as peculiar to its own facts and incorrectly decided in that it failed to properly identify a positive basis on which the management expenses were deductible. In any event, even if *Holdings* can be respected, the deductible payment in that case related to fees, rather than to actual
25 payment under the financial obligation. The essence of Mr Henderson’s argument was that if a parent agreed to pay rent owed by a subsidiary, that would not be deductible and therefore guarantee payments which discharged the expenses and obligations of the subsidiary and should also be non deductible.

54. Mr Peacock’s response to this approach was to take a different perspective on
30 the *Dawson* decision, namely that in order for a management expense to be deductible, it has to be clearly connected with the investment business of the company. In the *Dawson* case the expenditure was for the benefit of the company’s shareholders and while the expenditure did benefit the company, there was not a sufficiently close link between this and the management of its investment business. The same could not be said of HJ’s payments under its guarantee obligations, which
35 was for the direct benefit of HJ’s investment business.

(6) *In Principle Arguments*

55. Mr Peacock referred to the fact that the payments made by HJ, being rental
40 payments, or payment in lieu of rental, would have been treated as taxable receipts in the hands of the recipient landlords in the UK and suggested that there should be a symmetry of treatment between the payments and the receipts on the basis that while it is legally possible, it is unusual for the taxes act to not relieve expenditure for a payer which is taxable in the hands of the recipient, which would be the result were these guarantee payments treated as non deductible.

56. Mr Henderson resisted Mr Peacock's suggestion that the tax acts contained any assumption of symmetry so that the fact that the receipts were taxed as rent by the landlord did not indicate that they should be deductible payments for HJ, suggesting that there was no binding authority which stipulated that payments had to provide symmetrical treatment.

57. Mr Henderson also suggested that the size of deduction being claimed for these management expenses (more than £96 million in total for 2008) was out of proportion to HJ's profits for that year and this in itself suggested that it cannot be reasonable to conclude that such a significant sum could be treated as a deductible management expense for 2008. Mr Peacock countered this by reference to the overall size of HJ's asset base in 2008 and the value of the dividends which it paid in that year.

Are the payments capital?

58. It was agreed that this point was only relevant only to extent that the Guarantee Payments are treated as deductible management expenses. If we conclude that these payments are not deductible as management expenses, then the question of whether the payments are capital does not arise.

59. Mr Peacock stressed that prior to the statutory changes introduced in 2004 there was no specific restriction in the management expenses legislation for expenditure which was capital in nature. His view was that, despite the specific exclusion for capital expenses in s 75(3) in fact the nature of a management expense tended to suggest a revenue rather than a capital type payment so that arguably the addition of the exclusionary language in 2004 (in the light of the *Camas v Atkinson* decision) was otiose.

60. In contrast, Mr Henderson's view was that the Finance Act 2004 changes to s 75 (3) added a specific rule to exclude capital deductions for management expenses. If the taxpayer's arguments are correct, this change would be otiose. It is not the case that management expenses have an intrinsically revenue character.

(1) The timing question

61. Mr Peacock and Mr Henderson's approach to the question of the time at which the character of a payment was to be determined differed; Mr Henderson suggested that it was the time when the legal obligation was entered into which was the critical point, Mr Peacock said that it was necessary to look at the payment at a number of different points in time, including in particular the time when it was actually paid.

62. Mr Henderson said that the relevant timing is when the guarantee obligations were entered into, this fixes source of profits, rather than the time at which the payments are made, or the time when the trigger for making those payments arises.

In determining the purpose of the payments, the reason for entering into the legal obligation is critical. At the time of entry into the guarantees a contingent obligation was created. (He relied on the *Cosmotron* case (*CIR v Cosmotron Manufacturing Co.Ltd* [1997] STC 1134) to support the fact that the purpose of a payment is fixed at the time when it is entered into).

63. As far as the Provision is concerned, Mr Peacock suggested that one had to determine the purpose of Provision at the time when it was recognised for accounting purposes in accordance with FRS 12 and look at the character of the underlying payments to which the provision relates, which are recurring rental payments. The fact that the deduction in question related to a provision made no difference to the approach.

(2) *The Purpose of the payments*

64. Mr Peacock's approach to the difficult question of determining whether an expense should be treated as capital or revenue was to avoid an overly legalistic approach and rely on the practical application of business common sense on the basis of *Sun Newspapers*, (*Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) CLR 337), *B P Australia* (*B P Australia Ltd v Commissioners of Taxation* [1966] AC 244) and *John Lewis* (*IRC v John Lewis Properties* [2003] STC 117). In his view, the relevant question in determining the character of a payment is to ask what is the payment calculated to effect from a business perspective, or, to put it another way, what is the character of the advantage sought? Here, that advantage was to generate dividend payments for HJ, which is a revenue income stream. The Tribunal should apply business common sense to determine whether a particular payment is revenue or capital; there are no hard and fast rules.

65. In establishing the purpose of the guarantee payments, Mr Peacock stressed that it is the purpose of the payer, HJ which is significant. The relevant question has to be asked at the level of the parent and the correct question is what is HJ's purpose for giving the guarantees, or what was the expenditure calculated to achieve for HJ? Mr Peacock took some support from the *Johnson Matthey* decision (*Lawson v Johnson Matthey PLC* [1992] STC 466) where the question as formulated by the House of Lords was what "was the purpose of the payment from the parent's perspective", the answer in that case being to rescue the banking subsidiary so that it could carry on trading. Similarly in this case the guarantee payments were the discharge of a revenue obligation, to allow the subsidiary to trade. While the effect of the guarantees was to allow the subsidiary to acquire an asset which was a capital asset from its perspective (the 25 year leases), that is not relevant to HJ's purpose in giving the guarantee.

66. In determining the character of the Guarantee Payments it was important to look at the obligations which the payments were satisfying, which were quarterly rental payments. The fact that, in some instances, a lump sum payment was made to discharge this obligation did not mean that the payment should be treated as capital.

67. In contrast, Mr Henderson argued that the true characterisation of these payments is the cost of financing a subsidiary, which is a capital cost and the cost was employed to acquire a capital asset, the leases. Leases are capital assets by their nature and therefore payments made in respect of them are also capital, as is made clear in *Tucker v Granada*. (*Tucker v Granada Motorway Services Ltd* 53 STC 92). It is not relevant that the leases were actually acquired by the subsidiary rather than the parent entity which made the payment.

(3) *Is an asset created?*

68. According to Mr Peacock, the Guarantee Payments made by HJ gave rise to no structural change in HJ's business there was no long term asset or benefit to HJ. On the basis of case authorities such as *Vallambrosa*, (*Vallambrosa Rubber Co Ltd v Farmer* [1910] 5 TC 529) this suggested that the payment was not a capital payment because no enduring advantage had been created. No new capital asset was acquired by HJ as a result of the giving of the guarantee, in fact the opposite was the case; the tenant had acquired a lease, all that the parent had acquired was a contingent liability to make a future payment under the guarantee. There is no question here of a one off payment being made for the acquisition of something which brings a once and for all, enduring advantage, at least to HJ. *Vallambrosa* is support for this approach in asking whether there has been any structural change in the payer's business as a result of an alleged capital payment. Mr Peacock was clear that here there had been no disposal of an asset by HJ, no new asset had been created and no capital asset had been disposed of or discharged.

69. On the contrary, Mr Henderson said that the legal consequences of the guarantees being called in 2008 was that HJ acquired the right of recovery from the principle debtor Properties and also a right of indemnity as against Mayflower. Therefore as a result of the guarantee payments HJ had acquired at least one capital asset, being its rights to claim against third parties (although in practice in these circumstances these rights were worthless because both companies were in administration). The payments are made in respect of an onerous asset (the leases) and are in the form of lump sum payments, therefore the principles of *Garforth Tankard* (*Garforth v Tankard Carpets Limited* [1980] 53 TC 342) apply to support the conclusion that these are capital payments.

(4) *The lease cases – Tucker v Granada*

70. The Appellants' position was that the payments made under the guarantee payments were rent, or akin to rent, they were revenue in character and not for the discharge of an enduring liability. Mr Peacock referred to the Court of Appeal decision in the *Vodafone* case (*Vodafone Cellular Limited v Shaw* [1995] STC 353) to support his approach that payments to get out of an onerous agreement can be revenue in nature. Mr Peacock distinguished the cases which dealt with the disposal

of onerous leases (mainly *Tucker v Granada*) by suggesting that these turned on the question of whether the payment was to get rid of an onerous asset, which was not true of the guarantee for HJ. Nor was it the case that the guarantees improved the capital value of the subsidiaries from HJ's perspective.

5 71. He also referred to the *Jennings v Barfield* House of Lords decision (concerning the giving of a client guarantee by a firm of solicitors, (*Jennings v Barfield* [1969] 40 TC 365)), while accepting that this was based on unusual facts, did suggest that the giving of a guarantee and payments made under it could be deductible in the context of a trading business.

10 72. Mr Henderson argued that leases are generally to be treated as capital assets, as is made clear by the *Bullrun* decision, (*Bullrun v CIR* [2000] SpC 248). As far as capital revenue distinctions are concerned leases are in a class of their own, therefore the guarantee payments, being made in respect of leases, should be treated as capital payments.

15 73. Mr Henderson accepted that it was not straightforward to analyse the Provision in terms of the usual capital revenue tests but argued that the Provision is also a capital payment, even though it was calculated by reference to future rental payments, it was clear that HJ's intention was to negotiate lump sum payments and this coloured the character of the Provision. The intention of HJ was to make lump
20 sum payments to get out of the onerous leases and this is what the Provision represents. By reference to the *RTZ Oil* decision, (*RTZ Oil & Gas Ltd v Ellis* [1987] STC 512) the fact that the payments are calculated by reference to the rental owing, is not enough to make them revenue payments themselves.

25 74. Mr Peacock suggested that the labelling of the payments to discharge the guarantee obligations as a "capital sum" in the early Deeds of Release (such as the Bedford agreement) should not be taken as determinative of its character and pointed out that in later versions of the Deeds of Release the description was altered.

Discussion

30 General Points:

75. These facts throw up a number of difficult issues and we are aware of the significance of the decision not just to the taxpayer but to a wider group of taxpayers who find themselves in a similar position.

35 76. The treatment of guarantee payments is problematic for the tax code for two reasons, first the question of how payments which are intended to replace legal payment obligations of a third party should be treated, what we are calling for these purposes payments "in lieu of rent" and whether they should be treated for tax purpose as the same as the payments which they replace, is not clear.

77. Secondly, because in circumstances where it is the intention of the payer which is relevant, the circumstances and therefore the intention at the time of entering into the guarantee and the circumstances at the time when payment is called under the guarantee will be very different, as was said in *Garforth v Tankard* “*nobody who enters into a guarantee ever does so save in the hope, however foolish, that it will not be called up*”. It was certainly the case here that circumstances had changed radically between the time when the guarantees were given and the time when they were called upon; by 2008 the company for whom the guarantees were given was not only in administration but had been sold out of the group two years previously. In the context of these guarantees, Mr Henderson was anxious that we should be apprised of all of the facts and circumstances when each of these were entered into, including in particular the guarantees entered into by the predecessor company of HJ. We agree that the question of when is the point in time at which the purpose for entering into these guarantee agreements is fixed is an important one, but do not agree with Mr Henderson that it is the original guarantee agreements that is of paramount importance here, for a number of reasons.

78. As we make clear, we think it is necessary to look at all relevant points in time in determining the purposes of the payments made under these guarantees but do think that particular significance should be given to the purpose at the time when the payments under the guarantees are actually made. We find support for this approach in the *Vodafone* decision in particular.

79. We also think that the position of a group holding company gives rise to some particular issues for a tax code which generally applies on an entity by entity basis, although for a group holding company its *raison d’être* is mainly to provide support, financial and otherwise to other members of the group. Any arguments about purpose and potential duality of purposes are thrown into harsh light by the position of a group holding company.

80. Finally, the question of how to apply the authorities in this area to something which is not actual expenditure, but is a provision made for future expenditure is not straightforward, since all of the authorities precede the provisions of s 75 which allow a deduction for a provision and concentrate on scrutinising the purpose for which actual expenditure is made. We have tried as far as possible to extrapolate from those authorities and apply them to the decisions which informed the recognition of the Provision.

35 **Findings of Fact**

81. Our interpretation of the facts as they were presented to us in the sample leases which we were shown, the Deed of Release and in the oral and written witness evidence of Mr McManus is this:

(i) *The obligations and payments under the guarantees;*

40 82. Our conclusions from this evidence are that, at least from HJ’s perspective, (and, where relevant, its predecessor company), the purpose of the giving of a parent

guarantee at the time when they were originally given was to sustain the value of their investments and the return obtained in the form of shares and dividends. The giving of the guarantees was something, which while it had to be signed off by the HJ Board, was something which was regularly done as part of HJ's activities.

5 83. In no circumstances was HJ able, nor did it actually, step into the shoes of
Properties as tenant. In the (three) circumstances in which HJ did end up as tenant
through its role as guarantor, it did so through an assignment and took a lease in its
own name. In circumstances in which it made payments in its capacity as guarantor,
10 this did not entail it taking over any of the legal rights of Properties as tenant under
the existing leases. Under the terms of the Release Agreement which we considered
in 2008, Properties remained the tenant under the leases. At the time when the
Provision was made in 2008, Properties was the tenant under all of the remaining
leases. Nevertheless, by late 2008 HJ had become involved in many of the day to
15 day aspects of managing the Properties' premises, filling the void created by
Properties' and Mayflower's financial problems.

(ii) *The Release Payments –*

84. As regards the Release Agreements in 2008, from HJ's perspective, these were a
means of managing current and future exposure of HJ and the rest of the group from
the on going expenditure arising from the giving of the parent guarantees and the
20 demise of Properties. HJ saw themselves as pro actively managing this exposure by
negotiating the Release Agreements.

85. As far as the Release Agreements are concerned, we have concluded on the basis
of the evidence provided that these payments were not made under the existing
Guarantees at all; but pursuant to new agreements negotiated by HJ in 2008.

25 86. The payments made under the Release Agreements were not payments in respect
of a right in land or to get out of a lease, but payments to get out of the guarantee
obligations contained in the lease. We consider that it is an over simplification to
describe these payments as payments by HJ to get out of the Properties' Leases; HJ
was not the tenant under the Properties' leases, on the contrary, the Release
30 Payments removed any potential obligation on HJ to take on a new lease in its own
name or make any further payments under the guarantee provisions of the existing
lease

87. We were told that seven lump sum payments were actually made in 2008 on
terms similar to the Bedford Deed of Release (which we saw). This payment was
35 calculated on the basis of HJ's future rental guarantee obligations but was negotiated
and was not necessarily simply a mathematical equivalent of the current value of
those payments. It was described by Mr McManus as a payment to get out of HJ's
guarantee obligations and that is how we think it is best characterised. This is a new
agreement with a potentially different commercial purpose than that which existed at
40 the time of the giving of the guarantees. At the time when those payments were
being negotiated, Properties was no longer part of the HJ group, did not form part of

HJ's investment assets and HJ had no interest in its business, to the extent that Properties had a business in 2008.

(iii) *The Provision* –

5 88. The Provision was calculated by reference to the future guarantee payments which HJ was legally obliged to pay, and was an estimated calculation based on the information available to HJ's auditors in 2008. From the evidence which we were given, it was clear, even on the basis of the negotiations which had come to fruition in 2008 that each settlement on each lease was likely to be different therefore we do not think it is possible to extrapolate and come to any conclusions as to the character of those payments above and beyond how the provision was described in 2008; To that extent we think the Provision is best described as a provision for future guarantee payments under the existing guarantee obligations, plus related costs, including expenditure on maintaining the leased buildings themselves.

15 89. There was no dispute that the provision was properly made under FRS 12 but it is worth rehearsing here the basis on which FRS 12 allows the recognition of a provision; under para 14 FRS 12 a provision can be recognised when “*an entity has a present obligation as a result of a past event; it is probable that a transfer of economic benefits will be required to settle the obligation; and a reliable estimate can be made of the amount of the obligation*”. Additionally, under para 62 a provision will be reviewed and adjusted at the next balance sheet date to reflect current best estimates of the correct provision.

25 90. Despite Mr Henderson's contention that HJ's main aim was to make lump sum payments to extract itself from the Properties leases, that intention is not reflected in the Provision made in 2008, which assumes that rental and other costs will be paid up to the end of the term of the remaining leases. Nor would it have been a correct application of FRS 12 to make that assumption. We were told that to the extent that lump sum settlement were actually made in respect of leases included in the 2008 Provision, then an amount would be reversed out of the provision and no tax deduction would be taken for it.

30 **Are the payments management expenses.**

35 91. On the question of the interpretation of management expenses as defined in s 75, we take as our starting point the statement in the *Sun Life* case, repeated most recently in *Dawson* that the term is to be interpreted as an ordinary English term (i.e. with no specific technical meaning) and one which has a fairly wide meaning. Lord Reid stated that “*these are ordinary words of English language and, like most such words, their application in a particular case can only be determined by a broad view of all relevant matters*”

40 92. We consider that it is important to start by establishing what it is that an investment company such as HJ undertakes as its investment activities and then move on from that to establish what expenses might be treated as managing those activities. Again, referring to *Sun Life* “*the proper interpretation is to say that*

5 *management means the conduct of the business*". An investment company's business in its most simple terms is to hold assets to generate a return. In the context of an investment company which is a holding company, the assets which are generating the return are for the main part shares in its subsidiary companies. The purpose of the holding company is to support the value of the subsidiary companies, both in terms of their capital value and in terms of the dividends which are paid intra group and ultimately out to shareholders of the parent.

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

15 94. Therefore, applying this approach to HJ; the shares in its subsidiaries, including Properties are its investment assets, its investment business it to manage those assets. It is not part of HJ's investment business to undertake any aspects of property management.

20 95. The next question is to determine what "management" means for these purposes, the authorities provide some guidance about what it means to manage assets, particularly that it excludes their acquisition, but that managing does include holding assets as made clear in *Cook v Medway*. Taking the approach of the court in *Sun Life* and applying the ordinary English meaning to the concept of management, we take this to mean some sort of active involvement with the assets which are being managed, including taking strategic decisions, not just about their acquisition and sale, but also about how they are best looked at after, and their return best maximised, on a day to day "business as usual" basis. There is support for this in cases such as *Jennings v Barfield* and, to an extent, *Dawson and Holdings* where the issue of letters of assurance were referred to as activities "*in the normal course of investment management*"

35 96. It is worth saying at this point that both parties made submissions about the extent to which it was possible to extrapolate from the types of expenditure which are deductible for trading companies to the types of expenditure which should be deductible for an investment company such as HJ, referring to statements made in *Sun Life* that the intention was to put life assurance companies on the same footing as trading companies. Mr Henderson took from this that if an item was not deductible for a trading entity, then it should not be deductible for an investment company either. We do not accept this logic. While it might be correct that in broad terms s 75 is intended to provide for deductible expenses to ensure that an investment company is taxed only on its true economic profit, we do not think this means that there should be any identity between types of expenses which should be deductible as between trading and investment companies. Investment companies are in a different category than trading companies for tax purposes for a reason, their activities and characteristics are quite different and therefore we do not think that

there is much force in any arguments which attempt to provide some sort of equality of treatment for the same type of expense.

Excluded Categories of expenditure

5 97. Our starting point here is that the s 75 definition is not intended to be such a restrictive definition as to produce an empty set of potentially deductible items and that there should be some parity between investment and trading companies at least as far as the fundamental aim to tax them only on their true economic profit is concerned. The types of expenditure which the authorities make clear cannot be treated as a management expenses, including in particular expenditure on the acquisition of assets such as in the *Sun Life* and *Bennett v UER* decisions and later cases have extended this to suggest that any expenditure which is laid out directly on the assets themselves is therefore also excluded expenditure. This has informed the distinction which was stressed in the *Dawson* decision between expenditure on the investment assets and expenditure on the investment business. This distinction is explained most clearly in *Camas* where Carnwarth J referred to the excluded class of expenses as expense on the “*mechanics of implementation*”, compared with the “*process of managerial decision making*”, costs related to which are deductible. This is a nice distinction and not one which we think is at all easy to delineate, as was recognised by Somervell in the *Sun Life* decision. However, it is a critical distinction for these purposes; when, in the context of an investment holding company, does investment management stop and asset management start ?

25 98. There is also the specific exclusion for costs of financing, as referred to in the *Hoechst* and *London County Freehold* cases, which was treated as an extension of the *Sun Life* restriction on costs of acquisition, here in the context of the commission paid as part of the costs of raising finance or (in *London County Freehold*) by reference to what the business of the entity actually was.

99. We take from this, and from *Sun Life*, that in order for an expense to be deductible as a management expense it has to be severable from the costs of acquisition, including the financing costs of acquisition.

30 100. We think that this exercise of exclusion needs to be informed by the statutory language of s 75 and that it is not correct to infer from the authorities who have tended to restrict the class of expenses which are treated as deductible, that the starting assumption is that the potential category of deductible expenses is narrow. Nevertheless, we would not go as far as Mr Peacock in suggesting that there is a default bucket into which all non specifically excluded expenses can be put and treated as deductible; it is made clear in *Sun Life* that there is a need to positively identify that an expense is expenditure on the company’s investment business.

40 101. Mr Henderson argued that the true character of the Guarantee Payments was a payment for financial assistance from a parent to its subsidiary. On this point we agree with Mr Peacock that this is not an accurate reflection of the Guarantee Payments here. No kind of financial assistance is being given to Properties by HJ, no loan or other financing is provided, all that is provided is a guarantee which is

giving a credit enhancement to Properties. The cases in which guarantee payments are treated as a means of financing can be distinguished on their facts; in *Milnes v Beam* the guarantee payments were to allow the subsidiary to obtain financing from a hire purchase company. In *Garforth* the conclusion rested on the court's
5 assumption that the guarantee payments would be re-paid by the guaranteed subsidiary, which we know did not occur here. In both cases the companies in question were trading companies, unlike HJ.

102. We consider the best way of characterising a guarantee payment is as providing credit support; HJ is using its own assets (its credit rating) to enhance the value of its
10 investment in Properties. Unlike the facts in *Hoechst*, there is no question here of HJ making on going payments for the right to have loan stock guaranteed nor any question of HJ being able to make a claim of any value against Properties once the guarantees were called.

103. Our conclusion on this point is that the payments made by an investment
15 company such as HJ in respect of guarantees given in aid of a former subsidiary which, at the time when payment is actually made is no longer a subsidiary and no longer in business, cannot realistically be characterised as a financing transaction, at least in 2008 when the payments were made (or provided for).

104. Overall we do not think that the Guarantee Payments are caught by any of the
20 specifically excluded categories of expenditure; they are not related to the acquisition of an asset for HJ's business, nor do we consider that they should be treated as relating to the financing costs of any type of acquisition for HJ. The Guarantee Payments related to assets which were already held by HJ, namely the shares in Properties.

25 *Duality of Purpose.*

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

106. Therefore we do not accept Mr Henderson's points that the Guarantee Payments were to enable a subsidiary to enter into a lease and so cannot be treated as deductible for HJ. It was certainly an effect, and also a purpose of the guarantee, at least at the time when it was entered into, to allow Properties to access prime retail sites, but that was not the only purpose for giving the parental guarantee, as was made clear by Mr McManus. HJ was happy to give the guarantee because it ensured a stronger dividend return for it and supported the value of its trading subsidiary. The decision in *Johnson Matthey* supports this approach, the conclusion reached by Templeman in that case was that "*the insolvency of JMB was a threat to the taxpayer company and the £50m was paid to remove that threat*". We think that much the same could be said of the guarantee obligations under consideration here. HJ was prepared to give parental guarantees because it needed to support the business of its subsidiary.

The Purpose of the Payments

107. It is worth turning at this stage to the point which was raised by Mr Henderson, mainly in the context of the supposed capital characterisation of the guarantee payments, that the time at which a judgement as to purpose should be made is at the time when the legal obligation is entered into, i.e. at the time when the guarantees were first given (which included in some instances, by companies which were the predecessor to HJ). Mr Peacock disagreed with this approach and it is of some importance given the very different circumstances which will always pertain at the time when a guarantee comes to be called, and bearing in mind the statement with which we started from *Garforth*, that the optimistic assumption is that a guarantee will not be called upon.

108. In the authorities which we have considered which deal with the purpose for which guarantee payments are made, reference is made both to the purpose for giving the guarantee as well as the purpose at the time when the payments is made (as for example in *Milnes v Beam*), although other authorities suggest that it is that time when the payment is made which is paramount in determining payment. This is made clear in the *Vodafone* decision and also by Millett J in *Camas*.

109. We think that it is necessary to consider the purpose of HJ both at the time when the guarantee was entered into and during 2008 when the guarantees were being called upon, particularly given the actions of HJ at that time not to just pay under the guarantees, but to negotiate settlements in respect of them. The point is relevant here of course because any suggested duality of purposes is very difficult to divine in 2008, by which time Properties had gone into administration and was no longer part of the HJ group. It is hard to see how any actions which were taken by HJ in 2008 could have been for the purpose of Properties' trade or anything to support HJ's investment in Properties, which it no longer owned. The only business which had any profitability to protect come 2008 and which HJ had any interest in by late 2008 was HJ itself and the purpose behind its attempt to negotiate away its obligations under these guarantees is made clear in their shareholder statement made in September of that year

“ HJ has developed a detailed and thorough property by property plan to seek to mitigate the financial impact of it becoming liable for payments in relation to the guarantees. ”

5 110. Our conclusion here is that, for the Release Payments made under the Deeds of
Release in 2008, the relevant time for determining their purpose can only be at the
time when they were negotiated in 2008 and that there is no basis on which these
payments could be said to be for the purpose of Properties by that stage; Properties
was no longer within the HJ group and was in any event in administration. As
10 regards the Rental Guarantee Payments actually made in late 2008 and the
Provision, we think it is necessary to consider both HJ’s purpose as the time when
the guarantees were originally given as well as HJ’s purpose as the time when the
payments were made and the Provision was recognised in 2008.

15 *The management of investments compared with the management of the investment
business.*

111. It is on the distinction between the management of the investment business and
the management of the investment assets themselves that Mr Henderson and Mr
Peacock’s disagreement is the most acute. On Mr Henderson’s analysis, relying
20 heavily on the *Dawson* decision, no expenses which touch on the assets which are
part of the investment company’s portfolio can be deductible, only the running costs
of the business itself are deductible management expenses. On his analysis, the
category of deductible expenses is wide, but not very deep; they extend to any
manner of administrative matters, from employee costs to insurance premiums, but
25 not to any actual asset management, which is either excluded because it is akin to an
acquisition cost, because it relates to the business of the subsidiary itself or because
it is a capital payment.

112. Mr Peacock took the view that as long as the expenses could properly be said to
relate to the business of the investment company, they were deductible, relying on
30 the *Holdings* decision to demonstrate that costs relating to the financial support of
subsidiaries fell the right side of the line. On Mr Henderson’s analysis the sub set of
expenses which are allowable under s 75 is a narrow class of costs relating mainly to
administrative matters. Mr Peacock’s approach arguably allows in a much wider
class of costs, subject only to the limitation that they must not be capital items.

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

Those decisions did not relate to the management of the investment business. They related to the management of the investments.”

114. A similar point about the nexus between expenditure and the company’s investment business is made in *Capital National v Golder*: “I cannot see how, giving
5 *the expression management its ordinary every day meaning, it can possibly be said with regard to an investment company that changing its investments..... can be said to be the management of the company, it is no doubt incidental to the business of an investment company.....”* There is a distinction being drawn in the authorities between the expenses of management and “*expenses incurred by the management in*
10 *carrying out the proper business of the company”*, which comprises the kind of generic expenditure which was held not to be deductible in the *Dawson* case.

115. Reference was made by Mr Henderson to the class of costs which HMRC in their guidance manuals consider to be deductible, of which Mr Peacock took an understandably jaundiced view. (we were referred to CTM 08320, 08360 and
15 08410) Nevertheless we do think there are some helpful indicators in a number of HMRC statements in this area for example, their list does include payments which are beyond the administrative class of payments to which Mr Henderson refers and they do include payments which would otherwise be the costs of a subsidiary entity, in particular (at CTM 08347) the payment of pension costs made on behalf of a
20 subsidiary sold to a third party.

116. On the basis of all of the above, our conclusion on this point is that the providing of a parent company guarantee is a common core task of a holding company. That the giving of such a guarantee is to provide credit enhancement for the benefit of the subsidiary and also for the benefit of the holding company itself.
25 That it is not the case that this duality of purpose precludes the expense from being deductible under s 75, but that this is essentially expenditure on the assets of the business, (supporting the value of the shares held in Properties by allowing it to enter into leases) rather than on the investment business of HJ itself and therefore falls on the wrong side of the line of deductible management expenses.

30 *The Rental Guarantee Payments*

117. Moving on to the time when the obligation to pay out under a guarantee arose and the Rental Guarantee Payments were paid out at the end of 2008, at this stage the Guarantee Payments were not to support the business of the subsidiary, because by now, (the end of 2008) Properties had been sold out of the group and was in
35 administration, as Mr McManus memorably stated “it had gone”, but was necessary in order to satisfy HJ’s obligations entered into at a time when Properties was a subsidiary. Other than its legal obligations under the guarantee clauses of the Properties leases, we can see no commercial reason why HJ would have made these payments in 2008 and indeed Mr McManus told us that prior to 2008 it had already
40 tried, with one or two successes, to get out of these guarantee obligations. The assets to which the payments related (the leases) remained the assets of Properties and not HJ. Stopping here, and following the line of argument in *Dawson*, we agree with Mr Henderson that this expenditure is on the assets, the leases held by Properties, which

have never been assets of HJ and are held at this time by an entity which is no longer part of HJ's investment portfolio.

118. Equally, we have concluded that it is difficult to align either the expenditure reflected in the Rental Guarantee Payments made in late 2008 with any aspect of HJ's investment business; which was the holding of shares in subsidiaries, not the entering in to leases of retail properties or any other aspect of property management.

The Release Payments

119. However, we think that the position as far as the lump sum payments made under the Deeds of Release are concerned is different. Under Release Agreements HJ did not make payments under the leases or under the guarantees, but negotiated new settlements in order to enable it to walk away from both the leases and the guarantees, as is made clear in the terms of the Bedford Deed of Release. This cannot be characterised as expenditure on either Properties' assets or its own, indeed, it is the opposite, it is to enable HJ to walk away from its contractual obligations to support those assets (the shares in Properties). The purpose of that, as was made clear in the statement made by HJ in September 2008, was to protect its own business and the impact on that business of being liable under these guarantee obligations. The financial obligations under the existing guarantees impacted the creditability of the parent company itself and the Release Payments were made to re assure its shareholders that it was not going to suffer any adverse financial impact from the plight of its former subsidiary and to support its own business. Unlike the *Dawson* case, the payments made in 2008 were not to add financial support to Properties, it was too late for that, or to do anything else to improve the shareholding in Properties; the payments were to protect HJ's own business and profits in 2008.

120. We have considered whether nevertheless, the line of logic in the cases which suggest that expenditure on the acquisition of assets cannot be treated as management expenses could also be extend to HJ's situation, where a payment is being made, arguably, to divest itself of assets. While we think that expenditure on disposing of assets would be treated as expenditure on the assets of the business rather than the investment business itself, we have concluded that the Release Payments were not expenditure, from HJ's perspective to get rid of assets, as we have discussed, HJ did not (save in three particular situations) take on any of these leases itself, and by 2008 no longer owned any shares in Properties. This expenditure was to rid HJ of contractual obligations which it had entered into as part of its former investment business (the providing of credit support to subsidiaries) in order to protect HJ's own business profits.

121. In this respect by 2008 HJ was in a position similar to the company considered in the *Holdings* decision, being involved in what was described in that case as a damage limitation exercise. To this extent we think that the lump sum payments do fulfil the requirement in *Hoechst* (High Court) that "*it is shown positively that the guarantee commission ought to be regarded as an expense to which the company is put..... in conducting its business*"

122. At this stage, it is worth going back to the statutory wording, taking the guidance from *Sun Life* that the term “expenses of management” are ordinary English words and applying them to these facts in the light of our conclusions so far; HJ’s decision and negotiations in 2008 were to protect its investment business and
5 remove the possibility of on going obligations under the Properties leases in respect of a company which was no longer in the HJ group. Those obligations arose to HJ in its capacity as investor in the Properties shares and were paid out as part of HJ’s strategy of managing its costs related to those former investments. For these reasons we have concluded that, subject to any conclusions below concerning the capital
10 nature of these payments, Release Payments made by HJ under Deeds of Release in 2008 (in a form similar to the Bedford Agreement) should be treated as deductible management expenses, as should any related legal and other costs.

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

124. We have considered whether, given the extensive involvement that HJ had in the day to day management of the properties formerly held by Properties after Properties had gone into liquidation as described by Mr MacManus, HJ should be
20 viewed as a property holding company rather than an investment company by the end of 2008. Neither party advanced this argument and we were not provided with sufficient evidence about other aspects of HJ’s activities at this time to take a view
25 on this point. Leaving that argument aside, we can see no basis on which the extensive day to day involvement in managing Properties’ assets can be treated as part of HJ’s investment business as a holding company.

The Provision

125. We have been able to come to this conclusion in respect of the Release Payments and the Rental Guarantee Payments because of the evidence we had for
30 2008 of the decisions which were made by HJ at the time about how to manage these guarantee obligations. The situation is quite different as regards the Provision which was included in the 2008 accounts. We stated at the outset that we have found
35 it problematic to apply the approach of the courts to determining whether an expense is deductible to something which is a provision rather than actual expenditure but we have to accept that the legislation envisages that it is possible for a provision for a management expense to be deductible.

126. The information which we were provided with in respect of the Provision
40 suggests that it is made up of the current value of the payments in lieu of rental which would be payable by HJ had the terms of the guarantee agreements been honoured, i.e. the assumption is that HJ would not have negotiated lump sum settlements to be released from the guarantee obligations and would have made

these payments until the end of the term of the leases, as well as a number of other related expenses. On that basis, following the same logic as we have applied in respect of the Rental Guarantee payments actually made in 2008, we have concluded that at least at the time when the Provision was made in 2008, this represents future expenditure on the assets of Properties arising from agreements made at the time when Properties was a subsidiary and this cannot be characterised as the management of HJ's investment business and for that reason we do not think that the Provision can be treated as deductible in 2008.

In Principle Arguments

127. Both HMRC and the taxpayer advanced what we have described as "in principle" arguments in support of their position. Mr Peacock suggested that we should assume that the tax legislation tends towards symmetry so that payments which are taxable in the hands of the landlord should be deductible in the hands of the payer, (HJ). We do not accept this as a general principle of tax legislation or as something which has any particular significance in this case. In any event, we were not provided with any evidence as to how the landlords were taxed in respect of the payments made to them by HJ.

128. HMRC's in principle argument was that to allow these expenses as deductible would be to open the floodgates to a large range of expenses which would not be deductible to trading companies and certainly should not be deductible for investment companies. Again we do not think there is much force in this argument, the deductibility of a particular expense will depend on the detailed facts and circumstances and the existing case authorities provide some clear boundaries for the types of expenses which should be treated as deductible. As we have made clear, the basis on which payment such as this can be treated as deductible relies on a very particular set of circumstances and therefore we are unlikely to be swept away on a flood of expense claims.

Are the payments Capital?

129. It was accepted by the parties that the question of whether these payments could be treated as capital payments under s 75 (3) TA 1988 was relevant only if the Tribunal concluded that they were deductible as management expenses under general principles. However we were asked to consider this point as a distinct issue whatever our conclusions were on the first point. In any event, the question is relevant to the 2008 Release Payments which we have decided can be treated as deductible expenses and we will also consider it in the context of the Provision and the Rental Guarantee Payments

Are the payments under the guarantee rent?

130. Before going any further we need to address the point with which Mr Peacock started his submissions, and that is what is the correct character of payments made under a guarantee. Do they follow the treatment of the payments which they replace for tax purposes, or are they treated as something different? The case which is

always cited in response to this question and which was cited by Mr Peacock is the *National Bank of Greece* case which, while not providing a definitive answer in the House of Lords, did seem to support the Court of Appeal's position that payment made under a guarantee in respect of interest were themselves interest and so should be taxed accordingly. Mr Peacock suggested that we should follow the same approach here, the guarantee payments were referable to rent and therefore the payments under the guarantee should be treated as rent. We are unwilling to follow that approach for a number of reasons. We do not think that the *National Bank of Greece* case is clear authority for the fact that guarantee payments always follow the character of the payments which they replace. In other instances the tax legislation tends not to assume that in lieu payments should be taxed in the same way as what they are proxy for, but looks to the legal source of the replacement payment (interest payments under swaps are not taxed as interest for example).

131. Secondly, rent has a very specific definition in UK law, and arises only from an interest in land. Rent, perhaps more than interest, is therefore difficult to replicate from any other source than from a tenant. As we have seen, HJ did not step into Properties' shoes as a tenant under any of these leases. In situations where HJ did end up as a tenant, it was in its own name and not Properties'. Finally, at least as regards the 2008 Release Payments under the Deeds of Release, as we have concluded above, those payments were made neither by reference to the terms of the tenancy agreements or even by reference to the guarantee agreements. For all of these reasons while we accept that the payments due under the guarantee payments were intended to be in lieu of rent, we do not think it is possible to treat them as rent for tax purposes.

132. Having said that, we do agree with Mr Peacock that the obligations under the guarantees were in lieu of payments which were of a revenue character, being rental payments under leases of on average, 25 years in length.

133. Mr Peacock also made the point that, while there is now a specific prohibition against capital management expenses, if these payments can be treated as a management expense, that is at least suggestive that they have a revenue character, the nature of a "management expense" connoting an on going, day to day expense. We do not entirely agree with this approach and consider that, given the nature of an investment company's business, it is possible to have a management expense which might be of a capital nature.

35 *The purpose & effect of the payment.*

134. From the many case authorities in this area it is clear that whether a particular payment is a capital payment depends on the facts of each individual case and is dependent upon the context in which a payment is made. While there is some guidance in the case authorities, there are no hard and fast rules. The suggestion is that the question is best addressed from a "practical and business point of view" As suggested in *Hallstroms*;

“what is an outgoing of a capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of legal rights, if any, secured, employed or exhausted in the process” (Dixon J)

5 135.Mr Peacock stressed that it is the purpose of the payment which is important
and that the purpose in question is the purpose of the payer, not the purpose, or
effect for the recipient of the payment (here Properties). We agree with this and
suspect that HMRC have elided the purpose of HJ with that of Properties in stressing
10 that these Guarantee Payments were made in respect of a capital asset; they were
made in respect of a capital asset for Properties, but the leases in question were not
capital assets for HJ itself, (even on the assumption that it is correct to characterise
the payments as relating to the leases).

.Is an asset created?

15 136.HMRC and the taxpayer both approached the question of whether these
payments were capital payments by asking whether a capital asset had been created
for HJ. In Mr Peacock’s view the answer to this was no; at the time when the
guarantees were entered into all the parent (HJ or its predecessor) had to show for
the agreement was a contingent liability. At the time when the Guarantee Payments
20 were made, there was no question of it obtaining any kind of capital asset from
Properties, which was in administration, or from Mayflower, which was in the same
position.

25 137.Mr Henderson pointed to the legal operation of a guarantee as conferring a right
of claim against Properties to suggest that this was the asset which the guarantee
created. We agree with Mr Henderson that technically a claim was created for HJ
against Properties and Mayflower, but given the situation at the time, that was not an
asset which had any value. Therefore we do not think that this approach is sufficient
to suggest that the payments made in creating this worthless asset were capital
30 payments. We think that HJ was in a position similar to the company in the *Holdings*
decision where it was held that money spent on fees for letters of assurance was not
spent on an asset which was of an “enduring nature” and did not enhance the capital
of Holdings. It is certainly not the case that the guarantee obligations, the on going
Rental Guarantee Payments or the lump sum Release Payments created any kind of
enduring asset for HJ.

The lease cases.

35 138.Mr Henderson argued that leases were intrinsically capital assets (on the basis
of *Bullring* and *Tucker v Granada*) and that these Guarantee Payments, since they
related to leases, or the attempt to get rid of onerous leases, should also be capital
payments. We do not agree with this on two counts; first, despite what is said in
Bullring, we do not think it is correct that leases always give rise to capital treatment
40 and more importantly, we think it is a mis characterisation of these payments to treat
them as payments made under a lease or to get rid of an onerous lease; the lump sum
Release Payments were neither made under a lease or under a guarantee. It was

accepted even in *Bullring* that while interests in land have a capital nature, payments made under a contractual obligation are in a different category. We think that neither the Rental Guarantee Payments nor the Release Payments can be treated as payments made for interests in land. The payments represented by the Provision were calculated by reference to rent but were not actually rent. We take notice here of the statements in *Tucker v Granada* that it is important not to confuse the measure of a payment with its character, which we think HMRC have done in this case.

139. The approach in *Tucker v Granada* was to ask whether an identifiable asset had been either created or disposed of. In that case it had, (the lease), but here, from HJ's perspective, there is no identifiable asset or payment which is closely aligned to such an asset, to use the words of Wilberforce in that decision "*once and for all expenditure on an asset designed to make it more advantageous*" is capital expenditure. Even if the guarantee could be treated as an asset for HJ, which we doubt, we do not consider that it is a capital asset. (Following the line of the dissenting Salmon LJ in the *Tucker v Granada* case).

140. We consider that it is the *Vodafone* decision which provides the best analogy to the position of HJ under these guarantee obligations. The Guarantee Payments were being made to commute or extinguish a contractual obligation to make recurring revenue payments. It was held in that case that such payments would usually be revenue in character especially if, as here, the contractual obligation which was removed was not itself a capital asset. By making the Guarantee Payments, HJ obtained a reduction in its ongoing financial obligations to honour its payments under the guarantee provisions, but this did not provide anything which was of an enduring benefit to its trade: "*it is only where such a contract is one where the cancellation of which would effectively destroy or cripple the whole structure of the taxpayer company's profit making apparatus that it falls to be treated exceptionally as capital in nature*". Our view is that neither the Release Payments nor the Rental Guarantee Payments nor the on going obligations represented by the Provision fulfilled that definition for HJ. On the basis of the criteria applied in *John Lewis*, a payment will be a capital payment if there is some diminution in an existing asset (in that case, the value of the reversionary interest in the lease), but there is no such impact on any kind of asset for HJ.

The form and labelling of the payment.

141. Mr Henderson dwelt on both the description in the Bedford Deed of Release of the payment as a "capital sum" and the fact that it was the overall intention of HJ to make lump sum payments to get out of all of these leases as sufficient to suggest that both the Release Payments actually paid and the Provision were "one off" payments to get rid of an onerous asset and so should be characterised as capital in nature. We do not think that we can accept this assumption about what the Provision might or might not have been transformed into, as we have said earlier, we believe we have to take the Provision at face value as it is described by HJ's auditors in 2008, which is as a provision against future guarantee payments calculated over the remaining life of the outstanding leases. Nor do we think that the description of the Release

Payments as capital payments is sufficient in itself to be determinative of their character if other factors point in different directions.

5 142. Our conclusion on the capital revenue point needs to be split between the Release Payments made in 2008 under the Deeds of Release and the payments actually made as Rental Guarantee payments in 2008 and the Provision. The Provision is clearly a provision against an on going obligation to make recurring payments, which while not actually rent, are representative payments in lieu of rent. For that reason we think that it is relatively straightforward to treat these as revenue and not capital payments for HJ. Equally, the Rental Guarantee Payments were replicating quarterly rental payments which were of a revenue character and it is hard to see why these should not also be treated as revenue payments.

15 143. As regards the Release Payments, these were payments made to get rid of an onerous obligation, namely the obligations under the guarantee clauses of the relevant leases, including both the obligation to make payments in lieu of rent and to take on a new lease for the Properties' lease existing term. But those obligations did not arise from a capital asset from HJ's perspective; they arose from its on going obligations as the parent company of the group to support the undertakings of its subsidiaries. For this reason and despite the fact that these payments were made in the form of lump sum payments, we have concluded that these are revenue payments which do not fall foul of s 75(3) TA 1988.

25 144. For these reasons this appeal is allowed in respect of the elements of the £10,258,486.00 of expenses which relate to the Release Payments paid in 2008, including relevant fees and costs but dismissed in respect of the Guarantee Rental Payments and the Provision made in 2008 for future guarantee payments and any expenditure which is expenditure directly on the leased buildings owned by Properties themselves.

145. Howden Joinery Limited's appeal in respect of its group relief claim is accordingly allowed to the extent that the claim relates to expenses which have been allowed to HJ.

30 **Costs**

146. In view of our decision, the parties are invited to make detailed applications in respect of costs, no later than 28 days after the date of the release of this decision, to be assessed by the Tribunal if not agreed between the parties.

35 147. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 13 March 2014