Acornwood LLP, Bastionspark LLP, Edgedale LLP, Starbrooke LLP, Hawksbridge LLP v The Commissioners for Her Majesty's Revenue & Customs

Seven Individuals v The Commissioners for Her Majesty's Revenue & Customs

TC03545, Appeal numbers: SC/3082/2009, TC/2011/02724, TC/2011/02714, TC/2012/05914, TC/2012/05915 & TC/2013/01980

First-Tier Tribunal Tax Chamber

7 May 2014

[2014] UKFTT 416 (TC)

2014 WL 1220157

Tribunal: Judge Colin Bishopp Mr Richard Law FCA

Release Date: 7 May 2014

In the Matter of a Joint Reference Under Section 28Za of the Taxes Management Act 1970

Sitting in public in London on 1, 2, 5 to 9, 12 to 14, 19 to 23 and 26 to 28 November 2012

Representation

Mr Jonathan Peacock QC and Ms Hui Ling McCarthy , counsel, instructed by Deloitte LLP , for the appellants.

Mr Jolyon Maugham , counsel, instructed by Michael Simpkins LLP , for the seven individual referrers.

Mr Peter Blair QC , Mr Jonathan Davey and Mr Imran Afzal , counsel, instructed by The General Counsel and Solicitor to HM Revenue and Customs, for the Respondents and Joint referrers.

Decision

Colin Bishopp

Introduction

1 This decision relates to two discrete but linked matters: the appeals of five limited liability partnerships, Acornwood LLP, Bastionspark LLP, Edgedale LLP, Starbrooke LLP and Hawksbridge LLP, to which we shall refer together as “the appellant partnerships”, against various decisions of the respondent Commissioners (“HMRC”); and to a joint reference to the tribunal of a number of questions by seven individuals who are or were members of the appellant partnerships or other, similar, partnerships, and HMRC. Although the relevant legislation generally uses the term “partner” we shall, like counsel before us, adopt the more usual practice and refer to the partners or members (which words are for present purposes synonymous) of the various partnerships as “members”, and shall call those members who are parties to the reference the “individual referrers”. The reference was made in accordance with s 28ZA of the Taxes Management Act 1970 (“TMA”) during the course of enquiries opened pursuant to s 9A of TMA . The appeals and the reference all arise from essentially the same facts and for that reason it was directed that they be heard together.

2 The appeals and references relate to arrangements, to adopt a neutral term which we shall continue to use in much of what follows, adopted by the appellant partnerships in the tax years from 2005–06 to 2009–10. In very brief summary, each partnership entered into various agreements for the acquisition and exploitation of certain intellectual property rights. Each partnership acquired a set of such rights, for relatively modest sums, and for much larger payments agreed with an exploitation company that it would exploit the rights so acquired on its behalf. The revenue from the exploitation was to be shared between the partnership and the exploitation company, which was required in addition, as part of the arrangements, to pay certain guaranteed sums to the partnership.

3 In addition each partnership entered into agreements with the promoter of the arrangements by which, in return for substantial payments, the promoter rendered, or was to render, various services to the partnership. The members' capital injections which financed the payments were in each case derived in part from their own resources and in part from secured borrowings from a bank; the borrowing and security arrangements represent a significant feature of the case with which we deal in detail at a later stage.

4 The arrangements have two other features in common. One is that the expenditure we have outlined was incurred in each partnership's first accounting period and commonly, though not invariably, immediately after the members joined. The second lies in the guaranteed returns the members were to receive; those returns were sufficient to enable them to service and repay their secured borrowings.

5 The ultimate underlying difference between the parties relates to the extent, if at all, to which the first-year expenditure gives rise to an accounting loss which the members of each partnership may utilise, in their respective shares, by way of sideways relief against their income tax or capital gains tax liabilities in accordance with one or more of the Income and Corporation Taxes Act 1988 (“ICTA”) ss 380 and 381 , the Taxation of Chargeable Gains Act 1992 (“TCGA”) s 261B and the Income Tax Act 2007 (“ITA”) ss 64, 71 and 72 . HMRC's position is that the appellant partnerships and the arrangements into which they entered were, and were marketed as, tax avoidance schemes. They accept that the partnerships were engaged in trade, with a view to profit, but argue that the earning of a trading profit was a mere incidental to the partnerships' true purpose, which was the manufacture of artificial losses, not matched by true economic losses, with the aim of generating relief against tax.

6 The disputed decisions, although they vary in their individual particulars, are to essentially the same effect: that the losses suffered, or supposedly suffered, by the partnerships in their first accounting period are not properly allowable, save to a very modest extent, for tax purposes. HMRC's first argument is that the schemes did not work: the expenditure which gave rise to the supposed losses was not incurred wholly and exclusively for the purposes of the partnerships' trade; their accounts were not prepared in accordance with Generally Accepted Accounting Practice, or GAAP; and the expenditure was in any event of a capital rather than revenue nature. We shall refer to this line of reasoning as “the ineffective argument”.

7 HMRC's second contention is that, if the schemes do succeed in generating a tax advantage, that fiscal effect is to be disregarded for the reasons developed by the *House of Lords in W T Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300* (“ Ramsay ”), principally though not exclusively because the arrangements by which the members borrowed a large part of their respective contributions were contrived, in that they were not designed to raise capital for the purposes of the partnerships' supposed business, but were in reality a device whose sole purpose was to increase the size of the apparent losses. We shall refer to this as “the Ramsay argument”.

8 The appellant partnerships resist both of those arguments.

9 It is not suggested that any part of the arrangements was a sham, or that the claimed payments were not made (although, as we explain later, the netting off of one of the payments which features in the overall structure against another is said by HMRC to be a matter of some significance). Thus the issues which arise in the appeals, in very brief summary, are:

(1) What were the relevant payments made *for* ?

(2) In the light of the answer to that question, was each of the payments of a revenue or capital nature?

(3) Do the appellant partnerships' accounts reflect those conclusions?

(4) What are the tax consequences of the arrangements, as we find them?

(5) If the arrangements succeed in their alleged purpose, are the tax consequences to be disregarded on Ramsay grounds?

10 The appeals are, in formal terms, against closure notices made in accordance with s 28B of TMA , following the opening of enquiries pursuant to TMA s 12AC , effecting amendments to the appellant partnerships' respective self-assessment returns, so as to reflect HMRC's view of the matter, as follows:

Acornwood claimed to have incurred losses during the tax year 2005–06 of £5,199,166. The return was amended to show profits of £12,963.

Bastionspark claimed to have incurred losses during the tax year 2006–07 of £4,883,792. The return was amended to show a loss of £8,130.

Edgedale claimed to have incurred losses during the tax year 2007–08 of £6,496,686. The return was amended to show a loss of £6,935.

Starbrooke claimed to have incurred losses during the tax year 2008–09 of £6,820,283. The return was amended to show a loss of £8,864.

Hawksbridge claimed to have incurred losses during the tax year 2009–10 of £5,628,653. The return was amended to show a loss of £8,054.

11 We are not required at this stage to consider the detail of the amendments, but merely the principle. Nothing turns on the manner in which the enquiries were opened and closed, and we do not need to deal with TMA ss 12AC(1) and 28B .

12 Each of the appellant partnerships represents one of the tax years which together make up the period with which we are concerned. They have been chosen in order to provide a chronological spread; there was no material change in the applicable legislation, nor in the essential structure of the arrangements which were adopted, during that time, although there were some changes of detail with which we deal below. In addition a direction was made, in accordance with rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 , that the five appeals should be lead cases; the names of the further 46 partnerships which are the appellants in the related cases are set out in the appendix to this decision. Collectively, and for reasons which will become clear, the 51 partnerships may conveniently be referred to as the “Icebreaker Partnerships”. In some contexts, the term may include other, similar, partnerships pre-dating those with which we are concerned. We record for completeness that, depending on the findings we make, it may be necessary to make a consequential direction that some of the related cases should be attached to different lead cases but that is not a matter with which we shall deal in this decision.

13 It is common ground that, even if the partnerships succeed in the appeals, various further conditions must be met if sideways relief is to be available to the members. The joint reference is, therefore, designed to ascertain whether, in that eventuality, the individual referrers satisfy those conditions. The questions referred, which are lengthy, are set out in full as we deal with them but they were put in a more digestible form by counsel for the individual referrers in his skeleton argument as follows (with some minor re-phrasing):

(1) in respect of each individual referrer, whether his or her partnership's trade was carried on on a commercial basis and with a view to profit (the “commercial basis question”);

(2) in respect of each individual referrer, whether he or she was active (the "active partner question");

(3) in respect of each individual referrer, whether the Partnerships (Restrictions on Contributions to a Trade) Regulations 2005 ("the Restrictions Regulations") apply to him or her (the "Restrictions Regulations question"); and

(4) in respect of the individual referrer who was, or is, a member of Hawksbridge, whether the arrangements to which he was a party had a main tax avoidance purpose (the "s 74ZA question"). The remaining individual referrers are not affected by this question, since the relevant provision, ITA s 74ZA , affects only arrangements entered into on or after 21 October 2009 (see Finance Act 2010, Sch 3, para 11).

14 The individuals who are parties to the reference (that is, the individual referrers) have been selected, with the agreement of HMRC, as a representative cross-section of the members of the Icebreaker Partnerships, of whom there are or were approximately a thousand in all. A large number of the members, including the individual referrers, have formed the Icebreaker Members' Action Group, or IMAG, in order to join with the partnerships in challenging HMRC's decisions. We were told that all of the members of IMAG have agreed to be bound (subject to onward appeal) by the decision we reach on the reference, although there is not (and cannot be) a rule 18 direction in respect of it. Those of the members who have not joined IMAG will not be formally bound by our decision, but the outcome of the appeal and the reference will necessarily be as relevant to them as it will be to those who have done so.

15 The individual referrers argue that it was they who decided in advance which one (and in some cases more than one) of the Icebreaker Partnerships each wished to join, a choice made in some cases by reference to the differing nature of the intellectual property rights the partnerships intended to acquire and exploit, that they all took a serious and genuine interest in their exploitation and played an active part in the conduct of the partnership business, that they were aiming to make a profit from their activities in the longer term and that, although tax planning featured in their decisions, the tax advantages were incidental to and not the principal reason for their having decided to join a partnership. Thus the restrictions on the availability of relief imposed by the legislative provisions are, they say, not engaged.

16 Much of what follows will seem familiar to those who have read the decision of Vos J, sitting in the *Upper Tribunal, in Icebreaker 1 LLP v Revenue and Customs Commissioners [2011] STC 1078* (" Icebreaker 1 "). It is common ground that the basic structure of the arrangements we describe is similar to the structure adopted in that case. It is a matter of contention whether, as HMRC argue, there is in reality no material difference between the arrangements adopted there and those we must consider here, with the consequence that we should follow the judgment of Vos J in that case, adverse to Icebreaker 1 as it was; or, as the appellant partnerships argue, we can and should distinguish it, and reach a different conclusion. In addition, there are questions before us in the references which were not before Vos J. For those reasons we have felt it necessary to set out in some detail the evidence and arguments we heard before coming, at para 240, to an examination of the facts of Icebreaker 1 and Vos J's conclusions from those facts.

17 We directed that the names of the individual referrers, all but one of whom gave evidence at the hearing, should not be published without permission of the tribunal. The purpose of that direction is not to provide them with anonymity (since the names of the members of each partnership may be readily discovered by search) but on the basis that they have been selected as typical of all in order that, collectively, they represent a fair cross-section of the membership of the Icebreaker Partnerships, and there is no good reason why the personal details they gave, which serve to illustrate the case but are not individually determinative, should be linked to identified partners while all the other partners escape such scrutiny. We emphasise that we place no restriction on the public identification of the members of the Icebreaker Partnerships; our direction extends only to the identification as witnesses of those of the members who gave evidence to us. In this decision we have referred to them by courtesy title followed by the name of the partnership of which the witness is or was a member.

18 The appellant partnerships were represented before us by Mr Jonathan Peacock QC leading Ms Hui Ling McCarthy, the individual referrers by Mr Jolyon Maugham and HMRC by Mr Peter Blair QC leading Mr Jonathan Davey and Mr Imran Afzal.

19 Before coming to the detail of the case we must deal, if only for completeness, with Mr Maugham's complaint that HMRC's position, as it is set out in the statement of case served in the references, lacked clarity and particularity. There was, he said, little correspondence between the individual referrers and their advisers, on the one hand, and HMRC on the other in which the parties' respective positions were set out; there was no reasoned closure notice; and there had been no review. Thus the individual referrers were in the dark about the nature of the case they must meet. Mr Blair's response was that there was nothing in the material produced for the hearing which should take the individual referrers, or Mr Maugham, by surprise; HMRC's position was clearly set out in the statement of case and Mr Maugham had been able to deal with all the issues in his skeleton argument. If anything remained unclear it could be resolved in the course of what was certain to be a long hearing.

20 We are bound to say we found Mr Maugham's complaint surprising against the background of a statement of case running to 68 pages which, though repetitious because it deals with each individual referrer's case separately, seems to us to set out HMRC's case in quite sufficient detail for it to be clear what is said in respect of each of the individual referrers, and we do not accept that Mr Maugham or the individual referrers have been put at any material disadvantage for want of particularity in the statement of case. Even if they did not fully understand the legal arguments on which HMRC rely, the witnesses could not realistically have been under any illusion about the underlying factual arguments which HMRC advance (whether or not they are justified). Indeed, each of the individual referrers gave evidence directed to all the issues about which he or she could speak—and much of it was in their witness statements. We also did not detect that there was any matter of significance which was not addressed in Mr Maugham's skeleton argument. We are not, therefore, persuaded that there is any substance to the complaint.

21 We should also mention one further matter. It will not have escaped notice that the interval between the end of the hearing and the release of this decision is lengthy, and much more so than is the norm. In part the responsibility for the delay must rest on the judge, who is expected to produce the written decision, and nothing which follows is intended to relieve him of blame where it is due. However, a major factor contributing to the delay has been the sheer volume of material: the oral evidence of twelve witnesses, and documentary evidence (including the witnesses' statements) running to approximately 130 lever arch files. Even allowing for some duplication, the bulk of that evidence was formidable. The parties' various written submissions ran, in all, to about 600 pages. There were five separate appeals, with slightly different facts; although many of the differences were of no significance it has been necessary to consider in each case whether or not that is so. The references, too, raised questions to which the answers might differ depending on the facts applicable to each of the individual referrers, or the tax year to which the question related.

22 Against that background the task of producing a decision of manageable length but which (one hopes) deals adequately with all of the relevant issues in a manner which is understandable both to the parties and to others coming to it without any prior knowledge of the case presents obvious difficulties. We say that not by way of an excuse, but as a warning for the future: although, at first sight, the gathering together of several similar cases so that they can be heard together seems to be an economical course, in practice it creates real difficulties and leads to delay. It would, we think, have been better not to link the appeals with the references, to identify fewer lead cases or to focus, in the references, on one tax year.

The Evidence and Facts

23 We were provided with an agreed statement of facts in respect of three of the appellant partnerships (Acornwood, Bastionspark and Edgedale), and a very large quantity of documentary evidence. We heard the oral evidence of twelve witnesses, in the following order:

Ms Caroline Hamilton, who is the creator of the Icebreaker Partnership concept and promoter of the partnerships to prospective members;

Mr Christopher Hutton, the director of a company, Shamrock Solutions Ltd ("Shamrock"), which was involved in the exploitation of the intellectual property rights which the majority of the Icebreaker Partnerships acquired;

Mr Richard Cannon;

Ms Fiona Hotston Moore;

A member of Hawksbridge whom we shall identify, as we have indicated, as "Mr Hawksbridge";

"Mrs Starbrooke";

Mr Michael Andrews;

"Mr Bastionspark";

"Mr Edgedale";

A member of a partnership which is not a party to the present appeal, but whose appeal is stood over behind it, "Mr Ironmoat";

A member of another such partnership, "Mr Moondale"; and

A further such member, "Mr Keepstone".

24 Ms Hotston Moore and Mr Cannon are accounting experts relied on by, respectively, the appellant partnerships and HMRC, and Mr Andrews was put forward by the individual referrers as an expert on the music industry. We accept all three as experts in their respective fields. We had written statements, in some cases several, from all of the witnesses or, in the case of the experts, reports and much of what was said in those statements and reports was not controversial, or at least was not challenged. In what follows we shall not set out the evidence given by the witnesses, one by one, but shall deal with the factual disputes by topic, and where appropriate chronologically, referring to the witnesses individually only when necessary for understanding.

25 The details, both of the agreed facts and those which were the subject of evidence, differ from one partnership to another in their dates, in the nature of the rights acquired, in the amounts paid, and in various other, similar, ways, but the structure of the arrangements into which each of the appellant partnerships (and, by extension, the Icebreaker Partnerships) entered is substantially the same in each case, and with limited exceptions none of the differences between them is material to the outcome of the appeals. In the generic description of the arrangements set out below, in order to avoid repetition, we have taken two of the appellant partnerships, Acornwood and Hawksbridge, as typical of all the Icebreaker Partnerships, as in most respects they are. We have selected these two partnerships because they are the earliest and latest of the appellant partnerships, and thus comparison of their details demonstrates the evolution of the structure, because Acornwood differs in some ways from the others and because, as we shall relate, Hawksbridge's case is in part affected by some issues which do not affect the other appellant partnerships, but all those which affect the others are relevant to Hawksbridge's case. The differences in the Acornwood structure lead to a slightly different outcome in its case, as we shall explain, but with that exception there is, overall, little distinction to be drawn between Acornwood and Hawksbridge.

26 We did not detect any difference in the arrangements adopted by the other appellant partnerships which it is necessary to explore in any detail for the purposes of this decision although we have added some brief comments on the differences where required for clarity or proper understanding. We also make a few observations about the nature of the intellectual property rights acquired by the remaining partnerships, some of them not among the appellant partnerships, when we come to deal with the evidence of the individual referrers, since some of them, as we have said, told us that the nature of those rights influenced their decisions about the partnership they wished to join. However, differences between those rights, too, do not seem to us to be of any lasting relevance to the issues we must decide.

27 There are several interlocking strands which need to be understood before the complete structure of the arrangements can become clear, and there is scope for debate about the order in

which those strands should be described. We have decided to begin with the genesis of the arrangements, which is factually largely uncontroversial even if the inferences to be drawn from the facts are not. We next embark on a detailed examination of the contracts entered into by the Icebreaker Partnerships and their members, using as examples, for the reasons we have given, the various agreements which came into existence in respect of Acornwood and Hawksbridge. We follow this part of our decision with a description of the borrowing and security arrangements which play a central part in the structure, and demand a detailed analysis of their own. That analysis leads to an examination of the purpose of those arrangement, and of the manner in which the amounts of the various payments were determined. We then come to the manner in which the partnerships were promoted to potential members, the means by which those who decided to join did so, features which HMRC say are significant, and the evidence we heard from the individual referrers about their reasons for entering into a partnership, their understanding of and attitude to the borrowing arrangements, and their perception of the risks they assumed. We conclude this section of our decision with the expert evidence relating to the accounting treatment of the transactions.

28 At the next stage we embark on a comparison, in three respects, with the decision in Icebreaker 1 , before drawing together our conclusions about the ineffective argument. We then turn to the Ramsay argument, on which some further assistance is to be drawn from Icebreaker 1 , before coming to the referred questions. In the course of determining them we consider the evidence relating to the potential for profit, in the course of which we examine what Mr Andrews told us as well as the evidence on this topic of Ms Hamilton and Mr Hutton, and the outcome, so far, of the partnerships' activities; and we set out and consider the individual referrers' evidence of their activities once they had joined a partnership.

29 We have drawn from the agreed statements of fact in what follows but do not think it necessary to set them out. For convenience and ease of understanding we refer to the submissions in respect of the facts made by the parties and, where convenient, set out our conclusions about the evidence and the findings of fact we make in the course of the narrative. Accordingly, and unless we state otherwise, what follows in this section of our decision represents our findings of fact.

The genesis of the arrangements

30 The Icebreaker Partnerships are the “brainchild” of Ms Hamilton, and were designed by her, though with the aid of professional advice. She is herself a member of some of the Icebreaker Partnerships. Ms Hamilton's evidence on this and other topics was set out in several statements, one in respect of each appeal but all of them covering much of the same ground, and was developed orally at some length.

31 She described her background of about ten years spent in the film and television industry, when she had been primarily engaged in raising insurance-backed finance for independent producers; more detail of that background can be found in the decision of this tribunal in the appeal of Icebreaker 1, reported at [2101] UKFTT 6 (TC), at paras 23 to 26. The structure of the financing arrangements she put in place at that time included various features which were later incorporated in the arrangements adopted by the Icebreaker Partnerships. In particular, as she emphasised, under those arrangements the lending banks were certain of recovering their money since they had a charge over the gross revenue generated by each project and, if that proved insufficient, the insurance policy was in place in order to make up the shortfall. She emphasised too that HMRC had not challenged the structure used at that time as one driven by fiscal rather than commercial motives. However, in about 2003, for reasons we do not need to explore, the insurers participating in the finance model Ms Hamilton had been employing withdrew from the relevant market, and she concluded that it would be necessary to attract investment by different means if independent studios were to continue to make films and television programmes.

32 She told us that she had also become somewhat disenchanted with the manner in which large studios treated other participants in film productions, particularly in the arrangements for the allocation of revenue. The system by which (she said) all manner of expenses were charged against the revenue before the net profit was determined frequently left participants other than the studio with little, if any, profit to share. Although the Icebreaker Partnerships were to follow what she told us was the same basic financing model, she resolved to use a rather different

revenue sharing approach. We do not find this particular detail of great importance in view of the findings we make about the true potential for profit but we accept that, had the Icebreaker Partnerships generated significant revenue from their trading activities, the members might have seen a greater share of the resultant profit than investors in the projects in which Ms Hamilton had previously been involved, as she described them.

33 The enhanced share of profit available to members was, she said, a feature of the Icebreaker Partnerships which was attractive to prospective investors while at the same time the risks to the investors were reduced by the inclusion within the arrangements of provisions for ensuring that certain guaranteed payments would be made to them. She went to considerable pains in her witness statements and in her oral evidence to emphasise the potential for profit which, she said, was the primary aim in every case, and we accept from the evidence as a whole that any of the partnerships could have succeeded in identifying a project with potential and in making substantial profits from its exploitation although, for reasons we shall develop at a later stage, we have no real doubt that for all of the partnerships failure was significantly more likely than success.

34 The essential components of the Icebreaker concept, as Ms Hamilton described them, included the evaluation of the projects each of the partnerships was to take on, the important feature of a guarantee to investors of certain minimum payments, full recourse but fully secured borrowings, and assurances of future income streams. They do not differ in their fundamental features from the arrangements used by Ms Hamilton in her previous role and, she said, were commercially driven, and commercially structured.

35 The objective of the partnerships, as Ms Hamilton put it, was “to bring together into partnerships groups of individuals from a variety of backgrounds to provide development and seed finance for a range of innovative and creative projects … they all share a common characteristic of supporting entrepreneurs and others and of providing finance at an early stage in the development of a project with the intention of creating a product and bringing it to market to generate revenue”. She added that the creative industries contribute more than £50 billion annually to the UK economy, and that continued investment was to be encouraged for that reason.

36 We accept that Ms Hamilton is experienced in the exploitation of intellectual property rights. Historically, by her own account, her experience was limited to film and television, and the earlier Icebreaker Partnerships too focused on film and television projects although, Ms Hamilton said, it soon became apparent to her that the same approach could be adopted in other areas, and later Icebreaker Partnerships took on projects ranging from popular music acts, through publishing to the production and sale of technical devices, such as personal alarms; the appellant partnerships took on a few film or television productions but most of the projects of which we had details related to the exploitation of other types of intellectual property. Some of the music artists supported were already well-known—an example about whom we heard evidence is Sinead O'Connor—while others were at the beginning of their careers, or hoped-for careers.

37 Some of those starting out in the creative industries, Ms Hamilton said, are able to secure backing from a major studio, or similar organisation, but others are not, and must look to independent financial backers such as the Icebreaker Partnerships. It is not possible, she added, to determine in advance who the next successful person, or which the next successful project, might be, “therefore in order to ensure a steady flow of entrepreneurs and innovators, I believe it is essential to foster and support as many talented people as possible”, and that, she said, was the function of the Icebreaker Partnerships. She gave several examples of successful ventures which had been financed in this way (though not by Icebreaker Partnerships)—the film *Four Weddings and a Funeral* , the singer Adele, Sir James Dyson, Skype and Facebook. “The potential rewards … are immense”, she said, and “[f]or people involved with these projects, success on this scale is likely to have compensated for numerous failures they may have suffered before and since.”

38 She maintained that the members of the partnerships went to considerable lengths to explore the viability of the projects to be exploited by the partnership they were considering joining and, later, had joined. Mr Hutton too gave evidence about his discussions with independent financial advisers (“IFAs”) who were advising prospective members about the proposed projects. They were interested on behalf of their clients, he said, in the nature as well as the potential profitability of the projects. We shall deal with this point, that is the level of interest shown by the individual

referrers in the projects to which each partnership committed itself, in more detail when we come to their evidence.

39 We record at this point that we heard extensive evidence from Ms Hamilton and Mr Hutton about the time and effort expended by both Icebreaker Management Ltd (see para 45 below) and Shamrock in the appraisal of potential projects. We were told there were many more proposals than the Icebreaker Partnerships could possibly have taken on, and we were provided with a considerable amount of detail which we do not think it necessary to set out. It is sufficient to say that we accept, with some reservations we shall mention later, that Mr Hutton in particular spent a significant amount of time in undertaking due diligence into those proposals which merited consideration, and that he did so for the serious purpose of identifying those which he thought had a realistic prospect of succeeding, and of eliminating those (by his account the vast majority) which did not. We also accept that even if a potentially successful project was identified, its adoption by an Icebreaker Partnership was by no means certain, since satisfactory contractual terms might not be obtainable. It was, for example, an essential feature of the Icebreaker model, on which Ms Hamilton told us she would not compromise, that the partnership took an assignment of the intellectual property rights in the project. If the creator was not willing to give up those rights, the negotiations were called off.

40 Ms Hamilton said that the various contracts with which we deal below between the partnerships and the owners of the intellectual property rights and between Shamrock and the companies which were to produce the books, records and other items were keenly negotiated, sometimes over a prolonged period. We will describe the relevant features of these agreements in more detail later but can deal with this aspect of Ms Hamilton's evidence now. It is not, we think, a matter for any surprise that the owners of the rights—the songwriters, inventors and others who had created them—were anxious to see that their work was exploited in the best and most profitable way possible. There is, indeed, no reason to think that they had any motive other than the successful exploitation of their work in mind. As we shall explain, they usually, though perhaps not always, also had an interest in the production companies. Those companies, too, had a commercial interest in the success of the projects and it does not seem to us (nor, as we understand their case, do HMRC contend) that there is any reason to suppose they had other than ordinary commercial motives for entering into the agreements. Similarly, it is not a matter for surprise that the creators and the production companies wished to maximise their shares of the resultant revenues, if the projects turned out to be successful.

41 Despite Ms Hamilton's evidence that the aim of the Icebreaker Partnerships was to make profits for their members, it is common ground that none of them did so during the period with which we are concerned, and that each of them incurred very significant expenditure in its first accounting period. We shall provide some more detail of the revenue later. Ms Hamilton explained, in a paragraph of her witness statements adopted for all the appeals, that

> “There is often a long development phase for these types of projects. During this period, Icebreaker partnerships have made trading losses on their expenditure and members of the partnerships have usually claimed loss relief against other sources of income or gains. However, this usually only represents a deferment of tax for members since all the partnerships have generated revenue.”

42 That passage, and particularly its concluding sentence, is a matter of considerable contention. In essence HMRC's case is that the statement is disingenuous and designed to conceal the fact that the Icebreaker Partnerships had no true purpose other than tax avoidance, that the prospect of future profits, the tax on which would make up for the relief claimed by the members in the first year, was remote if not illusory, and that not only Ms Hamilton but also the members were well aware of that fact. We shall have a good deal to say about the prospects of trading profits later in this decision.

The structure of the agreements

43 Before establishing any of the Icebreaker Partnerships Ms Hamilton obtained professional help; the agreements to which we refer below were prepared by solicitors, and their efficacy was the subject of leading counsel's opinion. We should make it clear that we accept, in case there should be any doubt about it even in the absence of an argument to the contrary by HMRC, that

the various agreements all did precisely what they purported to do, and that those which related to the production and sale of the records, books and other projects for which the appellant partnerships had acquired the intellectual property rights were designed to facilitate their effective exploitation. We were provided with examples of the CDs, books and other products for which the partnerships had secured the rights and which resulted from these agreements, and accept that in physical respects they were produced to a high standard. The CDs, for example, were exactly as one would expect music CDs held out for sale in a shop to be, while the books contained artwork of high quality and were bound in the conventional style of a hardback book.

44 There were some differences of substance and some of detail between the earlier and the later agreements in the manner in which they dealt with the arrangements into which the partnerships entered. We shall describe the differences of substance below, but will not deal with the differences of detail as we do not think anything of significance turns on them; they reflect evolutionary improvement (and possibly changes in the identity of the solicitors preparing the agreements) but, it seems, nothing more. There were also other contemporaneous, subsidiary, agreements dealing with a number of ancillary matters, again of no evident relevance to the issues we must decide, and for that reason we shall not deal with those documents either.

45 In December 2003 Ms Hamilton instructed a firm of chartered accountants, Cheesmans, to arrange for a company called Icebreaker Management Limited ("IML") to be incorporated. The company was formed in the same month. Ms Hamilton has at all times been the sole shareholder and director of IML, which played a central role in the structure of the arrangements, and was the vehicle used for the promotion and management of each partnership, until July 2009 when it transferred its business to Icebreaker Management Services Limited ("IMSL"), a company of which Ms Hamilton is one of the two directors and shareholders; the other is or was Timothy Jeynes, who played a part in some of the events we describe below. We had no evidence from Mr Jeynes, though the nature and extent of most of what he did was apparent from the documents produced to us. In later iterations of the arrangements the role of IML was taken by IMSL, but nothing of substance turns on that change and as there is no reason to differentiate between them we shall refer to both companies as IML. Cheesmans have, throughout, been auditors to IML, IMSL and all of the Icebreaker Partnerships.

46 Since 2004 a number of limited liability partnerships ("LLPs"), at first bearing the name "Icebreaker" followed by a sequential number, have been incorporated. The first, Icebreaker 1 LLP ("Icebreaker 1"), was incorporated on 4 February 2004; the arrangements into which it entered were the subject of the appeal to which we have already referred.

47 The initial members of Icebreaker 1 were Polar Associates Limited and Resolute Finance Limited, which have also been the initial members of several of the other Icebreaker Partnerships; in some cases the initial members were instead Basinghall Limited and Lothbury Finance Limited. Nothing turns on the identity in any case of the "designated members", as they were described in the agreements with which we deal below, a term which reflects their role as the members designated to carry out various administrative functions on behalf of the partnerships, and which we shall also adopt. Ms Hamilton and Mr Jeynes have at all material times been the directors of all the designated members. As in the case of the other Icebreaker Partnerships, the designated members of Icebreaker 1 made only nominal financial contributions, while the individuals who became members made substantial capital contributions on doing so. The manner in which they were encouraged to join—in most but it seems not all cases the members of Icebreaker Partnerships were introduced to IML by IFAs, accountants and other similar intermediaries—was the subject of extensive evidence which will become more easily understood if we deal with it after describing the arrangements into which the Icebreaker Partnerships entered.

48 In November 2005, Ms Hamilton told us, she met an entrepreneur, Paul Duffen, who was at that time the chief executive officer of a substantial company engaged in developing and exploiting intellectual property, particularly in the field of technology; he does not appear to have had any experience in music, publishing or similar projects. She was impressed by Mr Duffen and encouraged him to form Centipede Ventures Limited ("Centipede"), a company which it is accepted was at arm's length from IML and the Icebreaker Partnerships. Its role in the arrangements was to act as the "principal exploitation company", effectively controlling the exploitation of the intellectual property rights acquired by each partnership; we shall say more about this role later. Centipede acted as the principal exploitation company in some iterations of the Icebreaker arrangements, including that of Acornwood. At first, Ms Hamilton was pleased

with the contribution made by Centipede, without whose expertise, she told us, it would have been difficult if not impossible for the partnerships to exploit the intellectual property rights they had acquired to best effect. However, she said, it later became clear to her that Centipede was after all not able, or willing, to perform its function adequately and IML and Centipede parted company in somewhat acrimonious circumstances. One consequence was that the Acornwood partnership and a number of others were brought to an end rather earlier than had originally been intended. The circumstances in which relations between Centipede and IML broke down no doubt account for the fact that we had no evidence from Mr Duffen or from anyone else on behalf of Centipede.

49 In later iterations of the arrangements the role of Centipede was taken by Shamrock, an Irish company of which, as we have said, Mr Hutton is the principal director, or by its UK subsidiary, Shamrock Solutions UK Limited. We shall generally refer to both as “Shamrock”, since there is for most purposes no need to distinguish between them. Mr Hutton gave lengthy evidence of Shamrock's activities, with which we deal, though rather more briefly, below. Although Mr Hutton had had apparently quite extensive previous dealings with Ms Hamilton, IML and some of the earlier Icebreaker Partnerships, primarily as an introducer of potential projects, and in some documents he was described as IML's “head of sales”, Shamrock seems also to have been at arm's length to IML and the Icebreaker Partnerships. It appears that Mr Hutton's experience, unlike Mr Duffen's, was largely in the music industry, but there was no difference relevant to the issues we must decide in the essential nature of the functions of Centipede and Shamrock or in their more fundamental rights and obligations, and in most respects what we say in relation to one applies, for all practical purposes, also to the other. There were, however, some differences of detail with which we deal in the following description of the various arrangements adopted by Acornwood and, later, by Hawksbridge.

Acornwood

50 Acornwood was incorporated on 10 November 2005, originally as Icebreaker 7 LLP, later changing its name when the policy of using the name “Icebreaker” followed by a sequential number was abandoned. A succession of agreements was then entered into on 16 February 2006, the date on which the partnership “closed”; it was undisputed that they were pre-planned. A partnership closed—that is, the various documents were executed and exchanged and the initial payments were made—when sufficient funding, in the shape of members' contributions, to finance a chosen batch of projects had been found.

51 Agreements equivalent to those described below were entered into by the other Icebreaker Partnerships, also on a single day. There were various differences of detail, and, as we have said, a certain amount of evolutionary development in the form of the agreements. It will also be apparent from what follows that the exact order into which the agreements were entered is unclear. However, the sequence does not seem to be of any present significance and, in particular, although the fact that all of the primary agreements were concluded on the same day emphasises the pre-arrangement of the structure of each partnership, it is not suggested by HMRC that there is anything untoward about the timing of the execution of the various agreements.

52 The first such agreement (adopting a logical rather than what may have been the chronological order) was the partnership agreement. The initial members, as in the case of Icebreaker 1, were its designated members, in this case Polar Associates Limited and Resolute Finance Limited, each of which contributed a nominal £1; that contribution did not increase later. The partnership agreement contains numerous provisions which one might expect in an agreement of its kind, most of them of no present consequence, and we shall deal only with those of its provisions which are of any relevance to the issues we must decide.

53 The agreement provided that day-to-day management of Acornwood rested with its members, and the role of the two designated members was to carry out the wishes of the individual members, for example by signing contracts, accounts and tax returns on Acornwood's behalf once the individual members had approved them. Eleven individuals joined the partnership as members later on the same day by executing deeds of accession, and they together contributed a total amount of £5,355,000, of which 75% was provided by means of loans to the members from Bank of Scotland (“BoS”). The remainder came from the members' own resources or a separate borrowing the member arranged himself.

54 Like those of all the other Icebreaker Partnerships, Acornwood's partnership agreement described its main objects as:

> “licensing Exploitation Rights [defined as ‘all forms of rights to exploit any interest, right, know-how or creative material, including copyright and all other rights in Intellectual Property’] from inventors, writers and other third parties, incurring expenditure for the purposes of exploitation of such licences and deriving income from the worldwide distribution or licensing of products, know-how or intellectual property relating to the licences.”

55 The agreement also provided that Acornwood, described in the various agreements as “the LLP”, was to

> “carry on the Business in a manner approved by the Members from time to time with the sole objective of providing the LLP with satisfactory returns in terms of income whilst not exposing the LLP to undue speculative risk.”

56 Profits and losses were to be shared by the members, as one would expect, proportionately to their capital and there were also provisions, in broadly standard form, for the distribution of profits and gains as they arose, and for management of the partnerships. Members were permitted to deal with their partnership interests, subject to a right of pre-emption by the other members. We were not, however, made aware of any occasion on which such a dealing had taken place in respect of any of the Icebreaker Partnerships.

57 The members were required to meet regularly, and at least six times a year; in some cases, we were told, meetings were more frequent. Ordinary resolutions required a 60% (by share of capital) majority, while special resolutions for more significant changes required 75%. There was copious documentary evidence of resolutions on a variety of matters, in relation to all of the appellant partnerships. Most are of no particular relevance to the matters we must decide, and we do not need to deal with them, save that we describe events including resolutions relating to the sale by Edgedale of its rights in a project known as Far-fetch, at para 396 below. It is sufficient at this point to say that we accept that the members did not simply “rubber stamp” whatever IML put before them: although some resolutions were of a routine or non-controversial nature, the evidence shows that there was a good deal of discussion between the members, and between them and IML, Centipede or Shamrock, before decisions of significance were taken. There was, however, no evidence before us that an IML recommendation had in fact ever been rejected.

58 While members were permitted to, and did, delegate the more routine administrative tasks (which were in practice undertaken by IML through the medium of the designated members) they were required by the partnership agreement to devote a “necessary” part of their time to their duties under the agreement and to perform those duties to the best of their abilities. We heard extensive evidence from the members who gave evidence of their activities, and will describe that evidence and the conclusions we draw from it at a later stage.

59 Acornwood also entered into two agreements with IML, an administrative agreement and a separate advisory agreement; Ms Hamilton signed both agreements on behalf of Acornwood (in her capacity as a director of the designated members) as well as IML. The fees payable in accordance with the former (the “administration fees”) consisted of an initial payment equivalent to 4% of the members' capital contributions (no date for payment was specified, but it is plain from the context that immediate payment was expected and it was in fact made) plus an annual charge of 0.2% of the capital contributions to be paid, in arrears, on receipt of an annual invoice. The services to be rendered by IML were, in essence, to undertake the administrative services any business of this nature would require. We shall need to return to the terms of the agreement later, though nothing turns on the detail. The advisory agreement required IML to provide “advisory services relating to the acquisition, licensing and exploitation of distribution rights in all forms of intellectual property”. The fees (the “advisory fees”) payable—again, on an unspecified date but they too were invoiced and paid immediately—amounted to 2.5% of the capital contributions, with no subsequent annual charge. The total amount paid by Acornwood to IML on 16 February 2006 was therefore £348,075. We shall refer to the administration and advisory

fees, including the annual charge, paid by the appellant partnerships to IML in accordance with these agreements collectively as “the IML fees”.

60 We interpose, in order that some of what follows may more easily be understood, that the parties disagree about precisely what it was for which the IML fees were the consideration. Ms Hamilton told us that the initial payments represented the fees for work already undertaken, and the annual administration charge the fee for work carried out thereafter, and her evidence, in summary, was that the greater part of IML's work was undertaken before or as each partnership closed, and that the services rendered by IML thereafter were relatively modest. HMRC do not accept that view: they say that a proportion, in each case, of the immediate IML fees represented the fee for future work, while a further proportion represented, in reality, a payment for the right to enter into a tax avoidance scheme. There are different, but again opposing, arguments about the sums paid by each partnership to Shamrock, to the detail of which we come shortly. At this stage we deal only with the evidence we heard which is relevant to those disagreements; we deal with the parties' submissions later.

61 We add in passing that as we understand Ms Hamilton's evidence the IML fees represented IML's reward for advising on, organising and administering the arrangements; there were no other charges and IML had no pecuniary interest in the success of the projects in which the partnership engaged, nor was it at risk should losses be made (though Ms Hamilton and Mr Jeynes were members of some of the partnerships). Some of the fees paid by the appellant partnerships to IML and others—initial and recurring—attracted VAT in addition but the incidence of VAT is not a consideration in this case and we shall assume the arrangements were broadly VAT-neutral, though the partnerships may have incurred some irrecoverable input tax. The various amounts mentioned below are all net of any VAT which may have been payable in addition.

62 The third of the agreements entered into by Acornwood on 16 February 2006 was between it and Dream Concerts Limited (“Dream Concerts”). By this agreement, Acornwood acquired “an exclusive licence to the Rights” which were defined as “the exclusive right to distribute and otherwise deal with” certain intellectual property rights held by Dream Concerts in relation to various musical productions, identified as *Ultimate Earth, Wind & Fire, Classical Extravaganza* and *An' That's Jazz* , until 30 September 2007. In essence, the agreement conferred on Acornwood the right to exploit the projects commercially. Dream Concerts immediately issued an invoice for the price of £7,500 for the rights so acquired, and it too was paid forthwith.

63 Neither Acornwood nor IML had the resources to undertake the exploitation of the intellectual property rights Acornwood had acquired, and Acornwood immediately entered into a further agreement, a “principal exploitation agreement”, with Centipede. Like Shamrock in the later cases, Centipede undertook on the partnership's behalf all of the work of identifying suitable projects, negotiating the acquisition of the necessary intellectual property rights, securing the production—for example by the recording of songs and the manufacture of the CDs to be sold—marketing and distribution.

64 The principal exploitation agreement was to run for ten years subject to agreed extension although, as we shall explain, there were provisions allowing for termination after four years. The agreement recited the (logically) earlier acquisition of the Dream Concerts rights, making provision for the possible acquisition of further rights, collectively defined as the Rights. A substantial part of the agreement is devoted to administrative provisions with which it is unnecessary to deal. Centipede's principal obligation appears in clause 2.2:

> “Centipede hereby agrees to exploit the Rights, procure Materials and seek to maximise Revenue to the best of its skill and ability. Centipede will incur Exploitation Costs and enter into Service Agreements and Licence Agreements for this purpose.”

65 The Rights were those acquired by Acornwood from Dream Concerts, Materials were “materials and/or rights … which may be acquired by Centipede to assist in the exploitation of the Rights”, Exploitation Costs included all the costs incurred in the exploitation of the Rights, Service Agreements were any agreements with third parties into which Centipede might enter in the course of exploiting the Rights, and Licence Agreements were agreements by which Centipede granted licences to third parties in respect of the Rights. We deal with the meaning of Revenue in the next paragraph. In order that Centipede could deal with the Rights, including by entering into

Licence Agreements, an exploitation right in respect of the finished products was granted to it. In return for Centipede's obligations, Acornwood was required to pay the Exploitation Costs. Acornwood was able to limit the extent of those expenses by provisions which entitled it “to have joint signature control over any bank account which is intended for the payment of Exploitation Costs” and which limited the total to be expended “to a maximum amount to be agreed”. Acornwood undertook, however, to pay an initial amount of £1,315,000 immediately, and Centipede issued, and Acornwood paid, an invoice for that sum.

66 In addition to the initial amount Centipede was to be entitled to Commission of 30% of Revenue, which was, in essence, the gross income derived from the exploitation of the Rights, less certain defined expenses (principally sums payable to third parties in order that the Rights could be exploited). The commission was to be paid to Centipede as the Revenue was received; although the principal exploitation agreement provided for what was to happen if Revenue was paid directly to Centipede, it was plainly intended that it should all be received by Acornwood.

67 The balance of the Revenue was due to Acornwood, but that was not its only entitlement: Centipede was also required to make certain guaranteed payments to it, irrespective of the income generated from the Rights, and to provide security for those payments in a form acceptable to Acornwood. That obligation appeared at clause 3.5 of the principal exploitation agreement, in these terms:

> “In consideration of the privileges and benefits obtained by Centipede under this Agreement, including the right to exploit the Rights, earn Commission and acquire the entire business and assets of [Acornwood] as set out in Clause 6, Centipede shall pay the Advances and Final Minimum Sum to [Acornwood] on the dates specified in column 1 of Appendix II.”

68 The purpose of this provision, as it was explained to us by Ms Hamilton, was to ensure that the members were certain of some return on their investments. It is more convenient to deal with the detail of Centipede's payment obligations and its right to acquire the business within our description of the borrowing arrangements beginning at para 103 below, after we have dealt with the remainder of the agreements for the exploitation of the intellectual property rights. We should nevertheless mention, so that what follows may be understood, that the advances and final minimum sum set out in Appendix II were ascertainable amounts payable, respectively, quarterly and (nominally) on the tenth anniversary of the principal exploitation agreement. It is clear from further provisions we describe below that the understanding on all sides, however, was that the final minimum sum would in fact be paid on or about the fourth anniversary. There were provisions dealing with early termination which, as we have mentioned, in fact occurred in Acornwood's case. The agreement included security arrangements, designed to ensure that the advances and final minimum sum were duly paid, with which we also deal later.

69 In addition, two further agreements to which Acornwood was not a party were concluded on 16 February 2006. The first was an Exploitation and Licence Agreement between Centipede and Brickhouse Management Limited (“Brickhouse”) by which Brickhouse agreed to produce recordings of the musical works the rights to which Acornwood had acquired from Dream Concerts, and to procure that the distribution rights in those recordings were granted to Centipede for a period of ten years. The agreement provided that Centipede was to receive 95% of the gross receipts; Brickhouse's reward consisted of the remaining 5%, plus a “purchase price” of £1,280,000. It contained various detailed obligations regarding the exploitation of the rights which are of no immediate relevance save that they show, as we accept, that there was a commercial basis to the arrangements. The second agreement was also between Centipede and Brickhouse, and it was described as an Assignment of Revenues Agreement . In return for £1,112,500 paid by Brickhouse to Centipede, the apportionment of the gross receipts for which the first agreement had provided was changed so that the first £250,000 was to be allocated as to 20% to Brickhouse and 80% to Centipede, the next £250,000 as to 40% to Brickhouse and 60% to Centipede, and the remainder as to 80% to Brickhouse and 20% to Centipede. The purchase price payable by Centipede pursuant to the first agreement was set off against the consideration payable by Brickhouse in accordance with the second agreement and the net sum payable by Centipede to Brickhouse immediately was, therefore, £167,500.

70 Brickhouse and Dream Concerts appear to have been in common control. As we have

mentioned, it was typical of the arrangements, although it may not invariably have been the case, that the owner of the intellectual property rights and the production company were in that or a similar relationship, and it was equally typical that the partnership purchased the intellectual property rights, but the principal exploitation company entered into the agreement with the company in the position of Brickhouse. It might instead have been possible, as HMRC suggested, for Acornwood and the other partnerships themselves to enter into agreements with production companies such as Brickhouse and to engage a company such as Centipede or Shamrock to provide management or consultancy services. There was, they say, a reason for the partnerships not to do so; we shall return to this point later.

71 We should add, if only for completeness, that the agreements relating to musical products (and possibly some others) commonly included a provision conferring on the partnership the right to “first refusal” of a second album, and provisions about the sharing of revenue from later products, referred to as “override”, if the partnership chose not to finance them. These provisions were intended, we were told, to reflect what was commonly accepted in the industry: that those who financed a first album earned the right, if they chose to do so, to finance a second; and that a successful first album made it more likely that a second or subsequent album would succeed, to the extent that it was industry practice to pay a share of the revenue derived from the later albums to those who had provided the finance for the first. We have no reason to doubt that evidence, nor that the supplementary agreements were commercially driven. However, save to a very limited extent we shall explain below, they do not seem to us to be relevant to the issues we have to decide and they represent a complication we can leave to one side.

72 There were no further developments of present significance in Acornwood's case until 23 March 2006, when Acornwood entered into another suite of agreements; again, the exact chronology is unclear but probably insignificant. We should mention that the pattern of one set of agreements followed a few weeks later by another set was not repeated by the other appellant partnerships; in their cases all the agreements with which we are concerned were concluded on the same day. That difference is reflected in the movements of money to which we come later, but appears to have no other significance.

73 The first, logically, of the second set of Acornwood contracts of 23 March were made between Acornwood and the owners of certain further intellectual property rights, and provided for Acornwood to obtain the exploitation rights in a manner similar to that in which it had acquired rights from Dream Concerts. It paid £5,000 to Mark Frith for the rights to what was described as a “treatment” though it was in fact a proposed documentary film entitled **Do you believe in Heaven, Do you want to go to Hell** ; £10,000 to Axiom Films (NYC) Limited in respect of rights in a screenplay for a film provisionally entitled **Born and Bred** ; and £2,500 to Simon McGivern for the rights in a proposed device intended to replace wired systems in domestic and commercial premises by a wire-free network. The invoices were issued one or two days before 23 March and paid on that day; as before, the acquisitions had plainly been arranged in advance.

74 There was, next, a supplemental agreement between Acornwood and Centipede amending the principal exploitation agreement. The amendments extended the scope of the agreement to include the additional rights just acquired, in exchange for what was described as an increase in the maximum amount of the Exploitation Costs but which in fact led to an immediate payment of an additional £3,552,325, making a total for the Exploitation Costs of £4,867,325. The supplemental agreement also amended Appendix II to the principal exploitation agreement, in essence by increasing the amounts payable by way of advances and final minimum sum proportionately to the increase in the Exploitation Costs.

75 Centipede simultaneously entered into a Services Agreement with Decameron Films Limited (“Decameron”, controlled by Mr Frith) for the development of the rights in **Do you believe in Heaven, Do you want to go to Hell** which Acornwood had acquired from Mr Frith; there were various provisions of detail but in essence Decameron was to create the film and allow Centipede to exploit the finished product. The agreement provided for the payment by Centipede to Decameron of a production fee of £898,000, but by a second agreement of the same date and between the same parties Decameron agreed to buy from Centipede a share of any revenues generated from the exploitation of the rights in the film, for a consideration of £643,000. As in the case of the agreement with Brickhouse, the payments were set off against each other, and the net payment actually made amounted to £255,000. The revenues to be shared were those remaining after deduction of withholding taxes and “sales commissions and expenses”, and of an initial amount of £350,000 to be paid by Decameron to Centipede. The share due to Decameron

differed depending on the source of the revenue, but that detail is of no present importance.

76 Centipede made similar arrangements with others for the development and exploitation of the remaining products in which Acornwood had acquired intellectual property rights. It contracted with Axiom Films International Limited (which appears to have been under the same control as Axiom Films (NYC) Limited) for the production of the film in return for a fee of £800,000. The agreement contains some rather obscure provisions but it appears that all the revenues from the exploitation were intended by this agreement to belong to Acornwood. However, on the same day a second agreement was executed by the same parties by which, in return for £660,000, Axiom Films International became entitled to receive 20% of the first £200,000 of revenue and 85% of the remainder. As before, a net payment of the difference, in this case £140,000, was made.

77 Also on 23 March Centipede entered into a Development Agreement with Locca Design and Development Limited ("Locca DD"), which provided for the assignment of the intellectual property rights acquired by Acornwood from Mr McGivern (and which it had assigned to Centipede) to Locca DD, and for the development and manufacture by the latter of the device to which those rights related, while Centipede retained the right to exploit the manufactured product. The fee payable by Centipede to Locca DD was £650,000. The same parties executed a further agreement, described as an Assignment of Revenues and Manufacturing Agreement , which provided that Locca DD was to be the sole manufacturer of the developed product and that it was to receive 50% of the Revenues payable to Centipede from the exploitation of the product for a period of ten years: by contrast with others, this agreement did not make it clear whether the Revenues were gross or net, but that omission is probably of little importance for present purposes. The consideration payable by Locca DD for that share was £532,500, payable forthwith—again, by set-off against the fee of £650,000, leaving a net payment by Centipede of £117,500. On the same day Centipede entered into a Distribution Agreement with Locca Distribution Limited ("Locca Distribution") which, like Locca DD, seems to have been controlled by Mr McGivern. This agreement appointed Locca Distribution as the "exclusive worldwide distributor" of the device for the same period of ten years, in exchange for the payment to Centipede of 12% of Gross Revenue, which in this case meant exactly that.

78 It is, we think, worth pausing to examine, by way of example, the overall effect of the three agreements which related to Mr McGivern's device. In exchange for a total net payment by Centipede of nearly £120,000 to Mr McGivern and companies controlled by him, Centipede became entitled to 6% of the Gross Revenue generated from the exploitation of the product (after allowing for the payment to Locca DD of 50% of the Revenues payable to Centipede, and assuming for this purpose that Gross Revenue and Revenues mean the same thing). Thus, disregarding tax and expenses, the Gross Revenues had to amount to £2,000,000 if Centipede was to recover its capital injection; if tax and expenses are taken into account the total is inevitably significantly greater.

79 We shall describe the evidence about the success or otherwise of Acornwood's and other Icebreaker Partnerships' projects, and the income they generated for the partnerships, at a later stage. Save for those relating to the borrowing arrangements, there are no further agreements relating to Acornwood that we need to describe and we come, therefore, to Hawksbridge.

Hawksbridge

80 Hawksbridge was incorporated on 18 February 2010. A partnership agreement dated 31 March 2010 was entered into by the designated members, in this case Basinghall Limited and Lothbury Finance Limited. Its main provisions were materially identical to those of the Acornwood agreement, and we do not set them out again. The 18 individual members joined on the same day; one of them was Mr Jeynes. Collectively they contributed a total capital sum of £5,795,750, of which 80% was provided by means of secured loans from Barclays Bank plc ("Barclays").

81 Various further agreements were then entered into, also on 31 March 2010; it was undisputed that they too were pre-planned. The first two were an administrative services agreement and an advisory services agreement, in each case between IML and Hawksbridge, and in similar form to those into which Acornwood had entered. The fee structure was a little different: Hawksbridge was required by the administrative services agreement to make an initial payment of £50,000 "in consideration for the Services already provided" and in respect of future services to pay to IML an annual fee of £6,500, while the advisory services agreement specified a fee of £384,681 for

advice already rendered and £5,000 per annum for the future. We did not have any clear evidence about the reasons why the fee structure changed, nor how the amounts payable were determined. We return to the point, though somewhat peripherally, when we come to deal with the negotiation of the various payments which were made.

82 Hawksbridge then entered into three agreements for the acquisition of various intellectual property rights. One was with Michael Sawyer in respect of a projected book about a band known as "Kiss". In return for a single payment of £5,000 Hawksbridge obtained the right to exploit Mr Sawyer's idea for an extendable period of ten years. The proposed book, of extremely large format, was to relate the band's history, illustrated by numerous photographs. The second was an agreement with a singer and songwriter, Julian Velard, by which Mr Velard was to provide between 20 and 22 compositions which he was then to record; Hawksbridge was given the right to exploit the recordings. The fee was again a single payment of £5,000. We observe in passing that the agreement imposed no obligation on Mr Velard to produce the compositions or the recordings by any particular date, and nothing was said about the quality of either. The third agreement was with the well-known singer Sinead O'Connor, in similar terms to those of the agreement with Mr Velard, and again in consideration of £5,000. All those fees were invoiced and paid immediately.

83 As in the case of Acornwood, neither Hawksbridge nor IML had the resources to undertake the exploitation of the intellectual property rights Hawksbridge had acquired, and Hawksbridge immediately entered into a principal exploitation agreement with Shamrock. The agreement recited the three agreements for the acquisition of the rights we have mentioned, making provision for the possible acquisition of further such rights, collectively defined as the Rights. In this case, no further rights were acquired. Hawksbridge was to pay to Shamrock, immediately, a fee of £5,188,500. The relevant clause of the agreement, 4.1, described Hawksbridge's obligation in these terms:

> "The LLP will pay to Shamrock immediately upon signature of this Agreement a fee, being a non-refundable amount of £5,188,500 ("the Fee"). The Fee shall be solely in consideration of Shamrock's services under Clause 2.1.1 of this Agreement. It is acknowledged that Shamrock has already provided services in advance of and in expectation of this Agreement."

84 Clause 2 of the agreement, headed "Shamrock role", contained in all eight sub-clauses. Clause 2.1 identified Shamrock's principal tasks, while the remainder of the clause dealt with broadly administrative arrangements for the carrying out of those tasks. It is necessary, for reasons which will emerge later, to set out the whole of clause 2.1:

> "Shamrock hereby agrees to exploit the Rights by:

2.1.1 arranging for the production of Materials with a view to maximising Total Revenue to the best of its skill and ability. For this purpose, Shamrock on its behalf has already entered into Service Agreements and incurred Exploitation Costs, may incur further Exploitation Costs, and may enter into further Service Agreements;

2.1.2 exploiting Materials with a view to maximising Total Revenue to the best of its skill and ability. For this purpose, Shamrock may already have entered into arrangements with third parties and, subject to clause 2.4, may enter into Licence Agreements in the future."

85 Materials were defined as the products resulting from exploitation of the Rights, Total Revenue was the money received by Hawksbridge or Shamrock, after expenses, from exploitation of the Rights, Service Agreements were agreements between Shamrock and the various production companies, Exploitation Costs encompassed all of Shamrock's expenditure on the projects and Licence Agreements included any arrangement by which Shamrock licensed the Rights or Materials to third parties. In order that Shamrock could exploit the Rights effectively on Hawksbridge's behalf an exploitation right was granted to it. Clause 2.4 provided that Hawksbridge's consent was required before Shamrock could enter into a Licence Agreement . Save that the definition of Materials is different and that the wording has been refined and

developed, the substance of the obligation imposed on Shamrock by this agreement is materially the same as that imposed on Centipede, described at para 64 above.

86 In addition, Shamrock was obliged to make certain guaranteed payments, identified as quarterly amounts (rather than, as in Acornwood's case, advances) and a final minimum sum, again set out in an appendix, to Hawksbridge, irrespective of the income generated from the exploitation of the Rights, and to provide security for those payments in a form acceptable to Hawksbridge. This agreement, too, was to run for ten years subject to agreed extension although, as in the case of the Acornwood agreement, it could be brought to an end after four years if Shamrock purchased the business. Thus far, the agreement was materially the same, therefore, as the principal exploitation agreement into which Acornwood and Centipede had entered, although some of the terminology is slightly different.

87 However, the agreement contained some provisions which did not appear in Acornwood's agreement, or which were put in a different way. It recorded that Shamrock made no representations about the amount of revenue which might be generated, which it was acknowledged was "entirely speculative". The reason why it was required to make the guaranteed payments was put in this, rather different, way:

> "Since the LLP wishes to be paid Quarterly Amounts and the Final Minimum Sum on the dates specified in column 1 of Appendix I I, it agrees that Shamrock shall be entitled to assign for its own benefit a share of Total Revenue to third parties. In consideration of this right and the right to earn the Shamrock Share and acquire the LLP Business in accordance with this Agreement and subject to the LLP's continued performance under Clause 3, Shamrock undertakes to pay the Quarterly Amounts and Final Minimum Sum on the dates specified in column 1 of Appendix II."

88 "Total Revenue", as we have said, represented the gross income earned by Shamrock and Hawksbridge from exploitation of the rights; the agreement did not apportion the receipts between them. There was no restriction on the proportion of the Total Revenue which Shamrock might assign to third parties, and it could therefore amount to 100%. "Available Revenue" was Total Revenue less any part of it assigned by Shamrock to third parties pursuant to the provision set out above. Available Revenue, if there was any, was to be shared: the "Shamrock Share", as the principal exploitation agreement defined it, was 15% in respect of Julian Velard and Sinead O'Connor, and 10% (subsequently changed to 88%) in respect of the Kiss publication, and the "LLP Share" was the remaining 85% or 90% (subsequently 12%). Clause 3 required Hawksbridge, in essence, to cooperate with Shamrock and assist it when appropriate. As in the case of Acornwood, we shall deal with the quarterly amounts and final minimum sum, and with Shamrock's right to acquire the business, later.

89 Mr Hutton's evidence, like that of Ms Hamilton, was that the sum Hawksbridge was required to pay immediately represented payment for the work that had been undertaken already, in identifying the intellectual property rights to be acquired by the partnership, negotiating agreements with the owners of those rights and with the production companies, undertaking due diligence and putting all the arrangements in place in time for the closure of the partnership. Shamrock's reward for the later work, of supervising the production and marketing of the finished product, and its distribution, came from the Shamrock Share. Again, we shall need to return to this point later.

90 Although we had no evidence from Mr Duffen or anyone else about Centipede's activities (save for Ms Hamilton's understanding of what it did), we had a considerable amount of evidence from Mr Hutton about Shamrock and its activities. Much of it is not, as we see it, of particular relevance to the issues we must decide, but we should record, to eliminate any possible doubt, that we are satisfied that Shamrock, in the person of Mr Hutton and its employees, undertook work which Mr Hutton's experience qualified him to undertake or direct, and that it was carried out in a professional manner. Indeed, we were left with the impression that Mr Hutton worked very hard and, despite the marked lack of success to which we come later, that he endeavoured to identify and secure projects with potential, and to eliminate those without it. He told us that most, if not all, of the work for which the fee paid pursuant to the principal exploitation agreement was the consideration was undertaken before Shamrock entered into that agreement, not only because it was desirable to have a ready-made "package" to be presented to intending

members, but also in order that there was no risk to Shamrock that it would have insufficient projects available when any partnership closed. Although the agreements into which Hawksbridge entered as we have described them were worded as if it acquired intellectual property rights and then engaged Shamrock to exploit them, in reality it (and all the other partnerships) acquired the intellectual property rights which the principal exploitation company and IML had already identified for them and put together as a package.

91 Mr Hutton resisted the suggestion that Shamrock viewed its reward as the amount which remained from the initial sum paid by each partnership after payment of the production costs and the various guaranteed sums. In most cases there was a surplus, but in the case of Hawksbridge, as we shall explain, there was a shortfall. Mr Hutton viewed the initial fee and the Shamrock Share as distinct items, he said, and as the reward for two distinct activities, of putting together the package of intellectual property rights to be acquired by the partnership, and of exploiting those rights thereafter, respectively. Moreover, although the principal exploitation agreement with Hawksbridge (and other partnerships) described the prospect of future revenue streams as “entirely speculative”, Shamrock had, he said, already earned hundreds of thousands of pounds from its shares of revenues, and he was confident that it would earn considerably more from them in the future.

92 It was a common feature of the agreements between Shamrock and the production companies that Shamrock was allowed to charge what was referred to as a monitoring fee. It seems that Centipede did not have an equivalent arrangement. The monitoring fee, as Mr Hutton explained it, was the consideration for Shamrock's continuing input into the project, aimed, as we understood it, at ensuring the production proceeded according to plan, that marketing was effective and that, so far as possible, the project was a success. The fees, round sums rather than percentages, varied from project to project and represented additional remuneration for Shamrock payable by the production companies rather than the partnerships. One can only presume that the incidence of the monitoring fees was taken into account in the fixing of the various amounts payable by one party to the other; the evidence we had on this topic was rather limited. There was, however, no evident direct link between the monitoring fees and the sum payable by each partnership to Shamrock and we can, we think, leave them out of account. To what extent, if at all, the fees contributed to the “hundreds of thousands of pounds” to which Mr Hutton referred did not become clear.

93 It is an obvious conclusion, from the fact that almost invariably all the agreements relevant to a partnership were finalised on the same day, that each partnership was presented with a package and that Shamrock had, of necessity, undertaken the work of assembling that package in advance. The sequential acquisition of intellectual property rights in which Acornwood engaged, though apparently not unique, appears to have been the exception. Mr Blair, for HMRC, did not dispute that a substantial amount of work had been done, and done in advance; his argument, as we understand it, was that Mr Hutton's perception as he had explained it was incorrect. The work of assembling the package, undertaken in the past save in the few exceptional cases, was necessary in order to induce the partnership to enter into a principal exploitation agreement, and it was for the work of exploiting the rights and distribution, necessarily undertaken in the future, that the fee paid to Shamrock by the partnership was the consideration.

94 This is an issue in respect of which it is more convenient to deal with the parties' submissions and our conclusions later. We should, however record the evidence we had about the manner in which Shamrock accounted for the payment it received from the partnership on execution of the principal exploitation agreement. The whole amount was treated, said Mr Hutton, as Shamrock's income in the year of receipt; its auditors, Grant Thornton, considered that to be the correct treatment. Mr Blair pointed out that for tax purposes only 10% was treated as income in the year of receipt while all of the payment to the production company was treated as an expense. We record the difference only for completeness, since we heard some argument about it, but it does not seem to us to be relevant to the partnerships' tax position, or that of the individual referrers.

95 Like Centipede, Shamrock entered into further agreements with companies which were to perform the work necessary for the effective exploitation of the Rights acquired by Hawksbridge—that is of printing and publishing the book, or recording and reproducing the songs, and of marketing the resulting products. The agreements relating to the music projects, each styled a Services and Licensing Agreement, were made on 1 April 2010 . Planeteer Records Ltd (“Planeteer”), a company apparently controlled by Julian Velard, was engaged in

respect of his songs, and Dreamac Ltd, which it appears was controlled by Sinead O'Connor, in respect of her songs. On 5 April Shamrock entered into a Product Development and Production Agreement with First Light Publishing Ltd, again a company apparently controlled at least in part by Mr Sawyer, in respect of the Kiss project. At the same time, Shamrock entered into an Assignment of Revenues Agreement with each of Planeteer, Dreamac Ltd and First Light Publishing Ltd.

96 We deal with the form of the Assignment of Revenues Agreements shortly. The purpose of sharing the income stream, as Mr Hutton explained it, was to give the company which was to develop the project an incentive by allowing it to share in the revenues which the project generated. Ms Hamilton said that such an arrangement was commonplace in the creative industries, and it allowed the production companies to allocate part of their own share to others, as a means of spreading the incentive, or of securing work or goods in return for a future share of profit rather than an immediate payment. Indeed, some of those engaged in the industry would not work for immediate payment alone, but insisted on a share of profit. In a practical sense, therefore, the Icebreaker Partnerships had all to assign some of the future revenue to the principal exploitation company in part in order that that company would have some incentive itself, but in part because, without shares of revenue which it could assign, it would not be able to secure the participation of others. We accept that sharing of revenue in this manner is common practice, though there was a dispute about the manner in which the sharing was effected.

97 We take the agreements—that is the Services and Licensing Agreement and the Assignment of Revenues Agreement —between Shamrock and Planeteer as typical. As elsewhere, the details of the equivalent agreements vary from one partnership to another, and between the agreements of this kind entered into by the principal exploitation companies in relation to different projects, but the essential structure is the same in each case.

98 The Services and Licensing Agreement provided for Planeteer to produce a record with at least twelve of Mr Velard's songs, various subsidiary products and any additional products which might later be agreed upon in exchange for a fee described at clause 7.1 of the agreement in this way:

> “The Fee for the Services and the rights granted hereunder shall be paid to [Planeteer] in accordance with a schedule to be agreed, provided that [Shamrock] has first approved the budget and cashflow of the Project, insurances and such other variables as reasonably requested by [Shamrock]. [Planeteer] shall invoice [Shamrock] for all or part of the Fee in accordance with the schedule to be agreed, and [Shamrock] shall pay each such invoice properly due, issued and submitted to it by [Planeteer] within thirty (30) Business Days of its receipt.”

99 There was no evidence before us that a schedule of payments had ever been agreed. Instead, a Schedule to the agreement set out a breakdown of costs leading to a total of £1,800,000. It did not become at all clear to us from the evidence what the source of the various figures, all round sums, set out in that breakdown was, nor how reliable or accurate they were; we found Mr Hutton's evidence on the point so vague that we can attach little weight to it. We cannot go so far as to make a finding that the figures were artificial in the sense that they merely served the purpose of adding up to a target total of £1,800,000, but there is equally no basis on which we could make a finding that the figures were based on calculated projections or some other firm foundation.

100 The agreement contained clauses setting out warranties and dealing with termination for breach and other similar matters, of no present moment, and it provided that the intellectual property rights in the finished products were to be assigned to Shamrock.

101 The Assignment of Revenues Agreement was, again, parasitic upon the assignment to Shamrock by the Services and Licensing Agreement of the intellectual property rights in the products since it provided for Planeteer to acquire a 50% share of the revenues derived from their exploitation in return for a payment of £1,640,000. We had no plausible evidence of the manner in which that sum was determined. Like Centipede before it, Shamrock paid to Planeteer only the difference between the two figures, in this case £160,000. Despite the indication in the agreement that the sum due from Shamrock would be payable on delivery of invoices, rendered periodically as work progressed, Planeteer and Shamrock each issued a single invoice for the full

amount a few days after the agreement was concluded. It seems that payment of the net amount had in fact been made already.

102 The agreements with Dreamac and First Light Publishing were similar in their effect, if not in every detail. We need to record only that Shamrock paid £2,950,000 to Dreamac for the production and marketing of Ms O'Connor's record, against which was set the price of the assignment of revenues, amounting to £2,625,000, leaving a net payment of £325,000; and £2,250,000 to First Light for production of the Kiss books, against which was set an assignment of revenues fee of £1,852,000, leaving a net payment of £398,000. We should, however, add that at the time the agreements with First Light were concluded and, indeed, for some time thereafter, there was considerable uncertainty about the number of Kiss books which might be produced, their format and content, and their selling price.

The borrowing and security arrangements

103 As we have explained, it was a common feature of the Icebreaker Partnerships that each member (apart from the designated members) borrowed under a pre-arranged facility a substantial part of his or her contribution to the partnership. In some cases the proportion borrowed under the facility was 70%, in others, and more frequently, 75% or 80%. We heard evidence that some members arranged a further personal borrowing to support some or all of the remainder of the contribution to the partnership It was also a common feature that in every case the partners of any given partnership all borrowed under the facility the same proportion of their capital (thus as the partners' gross capital injections differed, so too did the amounts they borrowed), all borrowed from the same bank, and all borrowed the money on precisely the same terms in respect of security, interest and repayment. We interpose that, although the fact that the members borrowed at all is a matter of significance which we shall explore further, if it is assumed that borrowing was necessary we recognise that the structure of the arrangements would have made it impractical for the members to borrow different proportions of their capital, or to do so from different banks, since provisions catering for such differences (for example in the event that security needed to be called upon) would have been extremely complicated, if not unmanageable.

104 Three banks participated at various times during the period with which we are concerned: in chronological order, BoS, Société Générale Hambros Bank (“SGHB”) and Barclays. There was a proposal at an early stage that two different banks might be used, one to provide the loans and the other the security we describe below. It seems that did not happen, for reasons which did not become clear. We accept, though it does not seem that anything turns on it, that the structure of the loan and security arrangements was influenced by the banks themselves, and not simply dictated by IML.

105 Nevertheless, although the banks' loan documentation and procedures differed, since it seems they used their own standard forms for the applications, money laundering and status checks and similar purposes, and had the agreements documenting the loans and the security arrangements drawn up by their own solicitors, all of the banks entered into what was essentially the same arrangement in every case and, save in one respect to which we come later, the differences of detail are immaterial to the questions we must decide. For that reason we can take Hawksbridge as the single typical example.

106 The lending bank in this case was Barclays. The agreements between Barclays and each of the members of Hawksbridge provided for Barclays to lend to the relevant member a sum equal to a maximum of 80% of his or her capital contribution to Hawksbridge; despite this phrasing all the members drew down the full facility, and it was plainly always expected that they would. Thus of the total capital injected into Hawksbridge of £5,795,750, £1,159,150 was provided by the members from their own resources or from borrowings they had arranged themselves, and £4,636,600 by Barclays. The loan documentation was put in place a few days before the members joined the partnership, plainly in order that the funds could be made available at the appropriate time.

107 We were shown completed application forms including statements of income and assets, money laundering forms and similar documents and should make it clear that we have no reason to think that Barclays (or BoS or SGHB when they were the participating banks) adopted a procedure they would not have adopted in respect of any other similar loan arrangement or that, despite the security provisions to which we come shortly, they did not apply their ordinary lending

criteria. Indeed, Ms Hamilton told us that some would-be investors were turned down by the lending bank. The material produced to us, particularly emails but also some more formal documents we describe below, showed that IML was closely involved with the lending bank in the assembling of the relevant paperwork and the coordination of the payments which followed from the drawing down of the loans, and it was (the appellant partnerships say) in part for this work, which we accept was of considerable scale, that the IML fees were paid. It was IML which issued all of the instructions to the bank which led to the payment of the correct sum of money, at the correct time, from one account to another. Each member of Hawksbridge, and of the other appellant partnerships, was required to execute a power of attorney enabling IML to undertake various tasks, including the issuing of such instructions, on his or her behalf. It seems that IML also had Shamrock's authority to issue instructions to the bank on its behalf, though we think that a matter of convenience rather than one of any significance. We shall describe the payments in more detail shortly.

108 The loan to each member was conditional on the payment of an arrangement fee on drawdown of the loan, set at 0.4% of the amount advanced. That fee represented an irrecoverable cost to the member. The loan attracted interest which was payable in part at drawdown and in part by quarterly instalments. The rate of interest was pre-determined in a manner we describe at para 111 below. Each loan was repayable in one sum on the fourth anniversary of drawdown, although the members were granted an option to propose that the loan be restructured so as to extend the repayment date until the tenth anniversary of drawdown. That option seems to us to have been of somewhat limited value since, in this case as in the others, the lending bank had the right to decline an extension, and if it did agree to an extension it could vary the terms of the loan. It will be observed (see para 86 above) that the four-year period coincides with the date on which Shamrock was able to purchase the business pursuant to the principal exploitation agreement Hawksbridge had entered into with it, and the ten-year period with the duration of that agreement, if the business should not be sold. Earlier repayment was permitted, but only if the whole loan and any accrued interest was paid in one sum. We understand that this did happen in the case of Acornwood, following the disagreement between IML and Centipede to which we have referred.

109 The Barclays loan documentation relating to Hawksbridge is dated 31 March 2010, to coincide with the dates of the various agreements into which Hawksbridge entered. Barclays provided a letter to each of the members of Hawksbridge (as they were to become later that day) offering a loan of the required amount. The member was required to return a signed copy of the letter as evidence of his or her acceptance of the terms set out in it; the signed copy letter was the only agreement between the bank and the member relating to the loan. It is clear that the letters were provided and signed by the members in advance, and dated only on the day the arrangements were to be implemented, consistently with the conclusion of all the relevant agreements on the date on which each partnership closed. We accept that the documents created full recourse loans, and that, had the security arrangements with which we deal shortly failed, each member would have been liable to repay Barclays from his or her own resources.

110 The use of the loan was limited to a subscription to Hawksbridge; the member could not use it for any other purpose and in practice, as will be seen, it would have been impossible for him to do so. The offer letter set out numerous provisions of the kind, and in the form, one would expect in any bank borrowing arrangement, catering for such eventualities as late payment of interest, death or insolvency of the member, or dissolution of Hawksbridge, and we need to deal only with two provisions, those relating to interest and security.

111 The provisions which governed the rate of interest read as follows:

> “5.2 Interest will be payable at a rate equal to the sum of:
>
> i) a margin of 0.50% per annum (the ‘Margin’); and
>
> ii) a fixed rate of interest (the ‘Rate of Interest’) agreed on the Borrower's behalf by the Attorney, as will be calculated on the principles set out in paragraph 5.3 below.
>
> 5.3 The Rate of Interest will be a fixed rate per annum for the period of the Facility … as agreed by (i) the Bank and (ii) the Attorney in a document executed under the Power of Attorney on or not more than two days before the date of making of the Relevant Loans. The Rate of Interest will be calculated based on the fixed rate of interest offered by the

> Bank for a loan of an amount equal to the sum of (a) the Amount of the Facility to be advanced and (b) the amount of Relevant Loans to be advanced, for a period from the making of such advance of the Facility and the Relevant Loans to the Repayment Date."

112 The Attorney was IML; agreement of the interest rate was one of the tasks for which the members' powers of attorney provided. It will be observed that the interest was to be calculated by reference to the rate which the bank would ordinarily charge on a loan of an amount equal to the aggregate of the member's loan (the "Facility") and the loans made to the other members of Hawksbridge (the "Relevant Loans"). This feature is, of course, consistent with the fact that all of the members borrowed the same percentage of their capital from the same bank. As we shall explain, the rate of interest fixed in accordance with clause 5.2(ii) and 5.3 always matched the rate of interest payable by the bank on a deposit made with it, interest of which the member indirectly received the benefit. As we understand it, that rate was invariably base rate on the day on which the arrangements were finalised (the provisions for agreement between the bank and the attorney being included in order to accommodate movements in the rate in the period between preparation and finalisation of the documents). We should add that the calculation of the arrangement fee, the percentage of the margin and other minor details differed in respect of the borrowings made by members of other Icebreaker Partnerships, but it is the common structure, in substance the same in every case, which matters and differences of detail are of no present importance.

113 The clause providing for the security for each member's borrowing was as follows:

> "As continuing security for this Facility and for all liabilities/obligations whether present and/or future that the Borrower may have to the Bank, the Bank will require the following:
>
> i) A blocked account to be opened by the LLP with the Bank into which all income of the LLP and capital contributions to the LLP, unless otherwise agreed by the Bank, will be paid (the 'Blocked Account'); and
>
> ii) A debenture duly executed by the LLP incorporating fixed and floating charges and assignments of the contracts and assets of the LLP, including, without limitation, the Blocked Account and all documentation ancillary thereto."

114 Consistently with that requirement, the instruction to the bank signed by each member and also dated 31 March 2010 authorised the transfer of the sum borrowed "into the bank account to be maintained with you in the name of the LLP". The members' own contributions too were paid into that account.

115 The margin of 0.50% was, as the interest clause indicates, additional to the fixed rate matching that payable on the deposit and, like the arrangement fee, it was payable on drawdown and represented an irrecoverable cost to the member. The margin and the arrangement fee together represented the bank's charge for its participation. Payment was not made, independently, by each member, but was made on his behalf by the partnership, on IML's instructions, on the day on which the borrowings were drawn down by which time the members' own contributions had been received, by transfer of the aggregate due from all of the members from the partnership's account with the bank.

116 There was some debate during the course of submissions about whether the rate of interest paid by the bank on the deposited sum was commercially low (HMRC's position) or higher than one might expect (the individual referrers' position and, we think, that of the appellant partnerships too). We did not hear any evidence from which we might draw a conclusion, one way or the other, but in our view this debate led nowhere. It is quite obvious that, once the margin had been determined and paid, it made not the slightest difference to the banks, the individual referrers, Shamrock or the appellant partnerships what was the rate of interest paid by the bank on the deposit or payable by the members to the bank in respect of their loans, provided only—as was invariably the case as a matter of fact and was an inbuilt feature of the scheme—that the two were the same.

117 The debenture to which the security clause referred, also dated 31 March 2010, contained

the charges for which that clause provided. It was expressed to be “continuing security for the payment and discharge of the Borrower Liabilities by the Borrowers and the payment and discharge of the Chargor Liabilities by the Chargor”. The Borrowers were the members of Hawksbridge and the Borrower Liabilities all their debts and other obligations to Barclays: the primary purpose of the debenture was plainly to ensure that the members' borrowings and interest as they respectively fell due were paid. The Chargor was Hawksbridge and the Chargor Liabilities were any debt or other obligation owed to Barclays by Hawksbridge. It is not altogether clear how any such debts or obligations might arise, particularly since the debenture provided that the members' obligations were excluded from the Chargor Liabilities and as we understand it Hawksbridge had no overdraft or similar facilities, but as will become clear the bank was taking no chances.

118 Hawksbridge was, of course, required to make six immediate payments: of the IML fees (disregarding the recurring annual fees), amounting in all to £434,681; of £5,000 each for the three intellectual property rights it acquired; of £5,188,500 to Shamrock; and of £96,390 to Barclays, representing the arrangement fees (0.4%) and margin (2%, being 0.5% for each of four years), a total of £5,734,571. The total capital injection, including the borrowings from Barclays, amounted to £5,795,750 and there was therefore a residue of £61,179. Accordingly Hawksbridge was left with a small balance, some of which may have been accounted for by irrecoverable VAT; we were not addressed on this point and we do not think it is important. Whatever residual money a partnership had was placed on deposit with the lending bank and the interest earned was treated as partnership income.

119 As we have mentioned, Shamrock's obligations to pay the quarterly amounts and the final minimum sum to Hawksbridge were to be secured. That was achieved by two documents. The first was a Deed of Guarantee and Indemnity dated, unsurprisingly, 31 March 2010. The guarantor was Shamrock Solutions UK Limited, while Hawksbridge's principal exploitation agreement was with Shamrock Solutions Limited, the Irish parent company. As the guarantor was the wholly-owned subsidiary of the parent whose liabilities it was to underwrite it did not become entirely clear to us what the value of the guarantee was, but we do not think anything turns on that point for present purposes. The guarantee was of all of the obligations to make payments which the principal exploitation agreement imposed, and not merely the quarterly amounts and the final minimum sum although, as will become clear, they were in monetary terms by far the most important obligations.

120 The second, and plainly more significant, security for Shamrock's obligations to Hawksbridge consisted of a letter of credit addressed by Barclays to Hawksbridge, expressly at Shamrock's request. It too was dated 31 March 2010, and provided that it was to be irrevocable with an expiry date “30 days after the final Quarter Date”, which was specified as 31 March 2014. Thus the expiry of the letter of credit also coincided, with some leeway, with the possible disposal of the business by Hawksbridge to Shamrock at or about the fourth anniversary of the principal exploitation agreement. The letter of credit guaranteed Shamrock's obligation to pay the quarterly amounts and the final minimum sum, setting out in a table the same figures as appeared in the principal exploitation agreement. In essence, the bank was required to make up any shortfall in the payments, including any shortfall which occurred on disposal of the business.

121 The letter of credit assumed, and was issued by Barclays only following, the making by Shamrock of an “Initial Deposit” of £4,636,600, a sum which, it will be observed, is exactly the same sum as the aggregate amount lent to the members of Hawksbridge by Barclays. This amount was placed in a blocked deposit account at Barclays. In addition, and also on 31 March 2010, Shamrock provided to Barclays a Deposit Notice, in the form of a letter; such notices were designed to bring the Initial Deposit within the overall security arrangement we describe in the next paragraph. The result was that Barclays not only had the money in a blocked account which it controlled, but also had a first charge over it. A particular passage in the letter on which HMRC rely states that “the Deposit will be paid into the Deposit Account from an account of the Beneficiary with the Bank”. The Deposit is the sum of £4,636,600, the Deposit Account is the blocked account, and the Beneficiary is Hawksbridge. In other words, the intention was always that the money would simply move from one account at Barclays to another. Although, as the evidence showed, that was normally what happened, in Hawksbridge's case and some others (and despite what was said in the letter) Shamrock made the requisite deposit first, using cash derived from another source, and an equivalent amount in the partnership's blocked account was released to it.

122 There were various additional security arrangements in place between Shamrock, Barclays and Basinghall Limited, one of the designated members, by which various assets, including cash deposits with Barclays and the letters of credit it was to issue, were charged. These additional arrangements were designed to be utilised for several partnerships, and were therefore of a generic nature. Their underlying purpose as we understand it was to ensure that neither Barclays nor a partnership could ever be at risk of loss by reason of default by Shamrock. We do not think it necessary to deal with these arrangements further, beyond observing that the risk that the loans from the banks would not be repaid was effectively eliminated. In most cases the lending bank did not part with any money at all; in others it did so only when it had already received the equivalent amount in cleared funds.

123 We should mention, for completeness, Mr Peacock's submission that although it was IML which introduced Centipede or Shamrock to the bank which was providing the members' loans, in order that the security could be put in place, each of them had its own independent relationship with the bank. We accept that as a correct statement of fact. It has a minor significance, in the context of a change of bank with which we deal later, but in our view is not a matter of any importance in itself. It would, in fact, be surprising if any of the banks had treated Centipede or Shamrock otherwise than as an ordinary customer.

124 It is worth pausing at this point to summarise the flows of money which took place on the day on which each partnership closed and the various agreements were executed. In a hypothetical but typical case, assuming an 80% borrowing, the members' own contributions of, say, £1 million were by then in IML's hands and paid into a blocked partnership account at the lending bank. By “blocked account” we mean one from which withdrawals could be made only with the bank's specific agreement. A further sum of £4 million in aggregate was lent by the bank to the members, and credited to the same account. Of the total fund available to the members of £5 million, £96,000 (2.4%) was paid to the bank by way of fees and margin, £375,000 (say) might be paid to IML for its fees, £15,000 (or a similar modest total) to the owners of intellectual property rights and perhaps £4,450,000 to Shamrock. On this hypothesis the partnership was left with £64,000. Shamrock then entered into the agreements for production and sharing of revenue which we have described, making aggregate net payments of, say, £400,000. It was also required to deposit £4 million with the bank by way of Initial Deposit, and was therefore left with £50,000. In this hypothetical case all those sums, apart from one, actually changed hands. The bank released from the blocked account the amounts necessary for the payments to itself, to IML, to the owners of the intellectual property rights and, so far as it exceeded the Initial Deposit, to Shamrock. The exception in this example was the borrowed £4 million, which remained at all times in one or another account at the same bank, ultimately the blocked Shamrock account to which we have referred above.

125 Although that was the typical pattern it was not universal. In the case of Acornwood, as we have explained, the payment to Centipede was made in two stages, to reflect the manner in which the intellectual property rights were acquired, and there were two payments to Centipede's blocked account, in each case by transfer from Acornwood's own blocked account with BoS (the lending bank in that case) through Centipede's ordinary account with BoS and into its blocked account, also with BoS. In reality, BoS moved the money by simply making the requisite entries in its records; the only cash which ever left its hands was, again, only the excess over the amount needed to back the letter of credit, the excess representing the sum which the members had themselves contributed—the bank did not part with any of its own money.

126 More important was the change which took place in some later iterations, including that of Hawksbridge. Here, as we have said, despite the wording of the documents Shamrock paid the Initial Deposit to Barclays from its own resources, shortly in advance of its receiving payment from Hawksbridge. Thus it cannot be said in this case that the cash stayed within Barclays' control, simply moving by way of accounting exercise from one account to another. It is also conspicuous that in Hawksbridge's case Shamrock was left with a shortfall; it received £5,188,500 from Hawksbridge, of which it paid a net sum of £785,000 to the production companies, leaving it with only £4,403,500, although it was required to pay £4,636,600 to the bank. The explanation we had was that when the partnership closed there were insufficient members' contributions and borrowings to pay all of the sums to which Shamrock had provisionally committed itself in order to put together the “package” presented to the prospective members and, rather than lose the opportunity, Shamrock agreed to make up the shortfall itself. Whether there was a similar shortfall in other cases we do not know.

127 As we indicated at para 112 above, the sum deposited by the principal exploitation company as the security for the letter of credit accrued interest at a rate which matched that payable by the members. As a result, the accrued interest at each quarter date, as identified in both the principal exploitation agreement and the letter of credit, matched the quarterly amount payable by Shamrock (or the advance payable by Centipede) to the partnership on that day—the amounts varied slightly to match the differences in the number of days in each quarter. In other words, the arrangements were always so structured that the interest earned on the deposit exactly matched the quarterly amounts, which in turn exactly matched the interest, net of the margin, payable by the members on their borrowings. Thus if all went according to plan and the letter of credit was not called upon, the interest earned by the deposit was paid to Shamrock, in order that Shamrock could pay the corresponding quarterly amount to Hawksbridge, which in turn distributed that sum to the members in accordance with their respective shares. The members used the sums paid to them to discharge their obligation to pay interest to Barclays. The money therefore went round in a circle; and in doing so it too merely passed from one Barclays account to another, never leaving Barclays' control.

128 The obligation on the principal exploitation company to pay the quarterly amounts (or in earlier cases advances) was, therefore, little more than a bookkeeping exercise. As the final minimum sum had another important role to play in the context of the acquisition by the principal exploitation company of the partnership's business, to which we come next, the arrangements by which it was received and utilised in order to pay off the members' loans was not quite so simple but, in an ordinary case without unexpected complication this process, too, was essentially a bookkeeping exercise: when the loans to the members came to be paid off, the bank simply withdrew from the blocked deposit account the sums necessary to discharge the loans—the total required, as we have explained, invariably and exactly matching the deposited sum—while the interest arrangements were also structured so that, whenever redemption occurred, there was no shortfall in either direction.

129 As the clause set out at para 67 above shows, Acornwood's principal exploitation agreement with Centipede granted Centipede the right to “acquire the entire business and assets”, but the right was dependent on prior action by Acornwood. Clause 6 of the agreement granted to Acornwood a put option, by which it could compel Centipede to purchase the LLP Business, defined as “that part of the entire business and assets of the LLP that relates to the Rights including all of the LLP's rights, title and interest in the Rights”. In reality, we think, Acornwood would have nothing additional to those rights, apart from any cash retained from members' capital injections and, perhaps, any undistributed revenue there might have been. The option was exercisable on the fourth anniversary of the principal exploitation agreement, on 60 days' notice. Acornwood was required to specify its “reasonable estimate of the Option Price [defined as the market value of the business] required by the LLP”. The principal exploitation agreement went on to make provision for agreement or, in default of agreement, expert determination of the price to be paid. If the price so determined was less than the final minimum sum Acornwood had the right to revoke the option notice it had served, and if it did so it could either terminate the agreement with immediate effect, in which case Centipede was obliged to pay the final minimum sum, or require Centipede to make an “Accelerated Payment” of the difference between the option price and the final minimum sum. But in this case Centipede acquired the right to serve a call option notice, requiring Acornwood to sell the business to it for the option price as it had been agreed or determined. The net effect of these provisions, regardless of whether the put option or the call option was exercised or the agreement was simply terminated, was that Acornwood was guaranteed to receive not less than the final minimum sum. The advances were payable until the sale was completed, with a daily apportionment if appropriate. Similar provisions applied in the event of termination for other reasons, such as material breach.

130 The means by which Hawksbridge could sell and Shamrock could buy the business, although differently worded (see para 87 above), were essentially the same in their mechanics, and again consisted of a put option and contingent call option. The differences between the terms of the two agreements lie in minor matters, such as the requisite periods of notice. The ultimate effect, however, is identical: the clause guaranteed that Hawksbridge would receive not less than the final minimum sum and quarterly amounts up to completion of the sale.

131 As we have already explained, the security arrangements ensured not only that the bank loans would be serviced and repaid on time, but also that the final minimum sum and quarterly amounts would be paid, either in the manner for which the principal exploitation agreement

provided, or by recourse to the letter of credit. The latter did not guarantee the payment of any surplus of the price agreed for the sale over the final minimum sum although there was, at least in Hawksbridge's case, the guarantee provided by Shamrock's subsidiary company. We were not made aware of any case in which the principal exploitation company and the partnership had agreed on a price which exceeded the final minimum sum or in which there was an expectation, even a hope, that more than the minimum would be payable, and leave the possibility out of account as an irrelevance. Although there were some instances, as we have mentioned, in which the arrangements were terminated before four years had gone by, we were not told of any instances in which the four-year period had been extended, or in which there was an intention to extend the period.

132 We mentioned at para 109 above our acceptance that the members' borrowing arrangements constituted full recourse loans. However, as the foregoing explanation makes clear, their exposure to any real risk of having to repay the loans from their own resources was illusory. In the later iterations when the borrowed money, or some of it, left the bank as we have described there was a real difference from the perspectives of the bank and of Shamrock, as we accept, even though the interval between the payment in by Shamrock and its receipt of the fee prescribed by the principal exploitation agreement, following release of the money by the bank, was very short. Whether that change affects the outcome of the appeals or the reference is an issue to which we come very shortly. What is clear is that this change made no difference to the fact that the members were exposed to no real risk in respect of their borrowings.

The rationale for the borrowing

133 The essence of the appellant partnerships' case is that money was borrowed in order that there should be a greater sum available for the exploitation of the intellectual property rights each had acquired than would have been the case had the members put in only the sums they could provide from their own resources. HMRC's response is that none of the borrowed money was ever truly available for exploitation of the rights, and that the purpose of the borrowing, coupled with the notional gross payment to each production company, was to create the illusion that the expenditure incurred by the partnerships in the first year was much greater than it truly was, in order to inflate the intended tax benefit. In our view, and for reasons we can explain now, HMRC's case on this issue is unanswerable.

134 Mr Hutton agreed as he gave evidence that only the net sum was required in order to fund the production costs. He accepted that, from Shamrock's perspective, the receipt of a large fee from the partnership in order that the greater part of it could be placed on deposit served no useful purpose. The additional agreements which he had to sign, in order to ensure that the deposited sum was secured, that a letter of credit was issued, that interest sufficient to make the quarterly payments was received and that the final minimum sum was paid at the appropriate time were, he said, a nuisance and he agreed to enter into the arrangements only because IML required him to do so and because that was the basis on which he could secure Icebreaker business.

135 Ms Hamilton, in her oral evidence, equivocated about her knowledge of the security arrangements the principal exploitation company was required to make with the bank and about the source of the money used for the deposit. Eventually she conceded that it would be necessary to deposit a sum equal to the borrowed amount in order to obtain a letter of credit to cover payment of the final minimum sum. We found her equivocation, and reluctance to concede the obvious, difficult to understand.

136 In the principal exploitation agreement between Acornwood and Centipede the relevant clause, 3.6, provided that

> “As security for its obligations to pay the Advances for the first four years of the Term and the Final Minimum Sum and/or the Option Price plus any additional payments due in accordance with clause 6.3.2, immediately upon signature hereof Centipede shall obtain appropriate security provided by a financial institution with a minimum credit rating of AA- from Standard & Poor's. Such security shall be in a form and substance acceptable to the LLP.”

137 Although the precise wording used differed in later agreements, all were in substance the same: the principal exploitation company was required to provide security in a form acceptable to the partnership. There is no reason to think that, despite this provision, any partnership failed to satisfy itself of the suitability of the security, not least because it was a feature of the promotion of the schemes that the guaranteed payments were secured by a letter of credit issued by a recognised financial institution. Ms Hamilton did not suggest any other means than a deposit by which a company such as Shamrock might obtain a letter of credit. She worked closely with Mr Hutton on numerous partnerships over a period of years and it is not credible that she did not know exactly what the arrangement between Shamrock and the relevant bank was. In our view there can be no doubt that she knew perfectly well from the outset that the money borrowed would be used, directly or indirectly, to secure its own repayment.

138 All of the evidence relevant to this point, as we have set it out, shows that there was no possibility, in the earlier iterations of the scheme, that the borrowed money could be used in the exploitation of the rights acquired by each partnership. The money had to remain available to the principal exploitation company in order that it could be placed on deposit, and because it remained in a blocked account with the lending bank it was not, as a matter of fact, ever in Centipede's or Shamrock's hands in a way that that either could have made the nominal gross payments to the production companies while retaining all the rights in the products. It was not merely what happened, but a necessary and for that reason inbuilt feature of the scheme, that only the net payment would be made.

139 In addition, both Ms Hamilton (with some reluctance) and Mr Hutton (rather more readily) agreed that the arrangements for exploitation of the acquired intellectual property rights would have been equally effective without borrowing. The supposed need for a greater sum, that is the aggregate of the members' personal contributions and the borrowed money, in order to pay for the exploitation (that is, to fund the notional gross payment to the production companies) is undermined by Ms Hamilton's eventual acceptance that, at least in the earlier iterations, Shamrock needed to sell a share of the revenues in order to obtain the capital sum with which it could make the necessary deposit; and that fact alone makes it clear beyond doubt that the gross sum was and never could be available for the exploitation of intellectual property rights.

140 We are not persuaded that there is any material distinction to be drawn in this respect in those later cases in which Shamrock funded the deposit from its own resources and received the money from the relevant partnership a short time later. The fact remains that, whether Shamrock used the money merely to replace the amount it had put on deposit or for some other purpose of its own, it did not use it in order to exploit intellectual property rights. The practice of its agreeing a large production fee and a slightly smaller fee for the assignment of a share of revenue continued unchanged, and without any discernible increase in the proportion of the nominal gross payment which remained in the production company's hands. It was not, moreover, suggested that in the earlier cases a desire to use a greater amount to exploit the rights had been frustrated by the need to make a deposit. A sum equivalent to the amount borrowed from the bank reached the blocked account by a different route; but this difference represents, as we find, no more than a cosmetic change. For that reason we draw no distinction on this account between Hawksbridge and the other appellant partnerships.

141 Once the contention that the borrowed money was used in the exploitation of intellectual property rights (or, indeed, played any part in the pursuit of the partnership's business) is discarded, it inevitably follows that another reason for the borrowing must be found since it is implausible that the members would knowingly incur arrangement fees and margin merely in order to borrow money they did not need. We will return to this point at para 147 below.

The rationale for the guaranteed payments

142 We deal with the evidence about the potential for profit, and our conclusions on that point, in the section beginning at para 377 below. At this stage we merely record that, despite Mr Hutton's work of identifying projects with, as he thought, the potential for making profits, his optimism and his negotiation of production costs and the sharing of revenue, none of the various projects pursued by the appellant partnerships and, it seems, the remaining Icebreaker Partnerships earned more than very modest trading revenue, and in some cases none at all. There was a single potential exception of which we were made aware, the Far-fetch project, but as we explain at para 396 below even that project did not, in the event, make a profit in the sense that the

partnership which adopted it (Edgedale) recovered the capital it had injected into the project with income or gains in addition.

143 We were asked to accept, as indeed we can, that projects of the kind undertaken by the Icebreaker Partnerships do not generate profits immediately, but require time for production and marketing, followed by (it is hoped) significant sales. In other words, one cannot expect quick returns from projects of this kind. One might, perhaps, expect that any investor willing to put his money into such projects would be aware of that fact, and would be prepared to wait for returns after some interval. A feature of the Icebreaker Partnerships, however, was that immediate, or near immediate, returns in the shape of the advances or quarterly payments were promised despite the fact that, even on the most optimistic assessment, no trading revenue could be expected for some time into the future. We therefore come to the evidence about the rationale for those payments.

144 The first, and simplest, argument for the making of the guaranteed payments, advanced by Ms Hamilton in her evidence, was that members would not have joined the partnerships if they had not been assured of a certain level of return; this is, in substance, another iteration of the argument advanced about protecting the “downside” to which we refer in a different context, and in more detail, at para 169 below. It was coupled with an assertion by Ms Hamilton that the quarterly payments and final minimum sums came first, and it was only when they were in place that the banks were willing to offer loans to the prospective members.

145 A second suggested justification was that the members' right to the guaranteed payments was the consideration for the grant by the partnership to Centipede or Shamrock of valuable rights, an essential course if the projects were to succeed. Ms Hamilton put it in this way in her witness statement produced in respect of Hawksbridge:

> “… the Principal Exploitation Agreement made provision for Shamrock to pay Hawksbridge certain amounts each quarter (the ‘Quarterly Amounts’) and a final minimum sum (the ‘Final Minimum Sum’). These payments were in return [for] (i) the right for Shamrock to earn its 10–15% revenue share from its distribution activities, (ii) the right for Shamrock to sell to others shares of revenue from the projects and (iii) the right for Shamrock to acquire Hawksbridge's business under the call option. Shamrock's obligation to pay the Quarterly Amounts and the Final Minimum Sum was subject to the ongoing grant of rights by Hawksbridge to Shamrock for 10 years. This ongoing grant of rights by Hawksbridge to Shamrock was clearly most important since without it, Shamrock would be unable to exploit the products and thereby earn or sell any share of revenue. If Hawksbridge sold its business to Shamrock under the put or call option, it would not receive any Quarterly Amounts or the Final Minimum Sum following the sale.”

146 In our view both of these assertions are disingenuous. The first puts into sharp focus how artificial the borrowing was: if Ms Hamilton's assertion is right, it follows that the members entered into, or put in place the possibility of their entering into, arrangements which had no purpose but to guarantee the servicing and repayment of loans, in order that they could borrow the money which would be used, directly or indirectly, to make the interest payments and eventual repayment of the borrowing. The borrowing had, and could only ever have had, that entirely circular purpose.

147 The truth is that the “return” the members received was nothing of the kind; in net terms, and disregarding any possible tax benefit, the borrowing arrangements gave them nothing at all, but merely discharged the interest as time passed and repaid the capital at the end of the term. Indeed, the irrecoverable cost to them of the arrangement fees and margin led to the members making a certain loss, without the prospect of even a speculative gain from the use of the borrowed money. The agreements for borrowing, guarantee and repayment were, and we are satisfied were always seen by all concerned as, a means of increasing, without risk, the apparent size of the amount paid for the exploitation of the intellectual property rights each partnership had acquired. That is HMRC's case and, again, it is in our view unanswerable: as we have already said the money was not, and could not be, used in the exploitation of the rights and the borrowing was an arrangement with no commercial but only a tax purpose.

148 Although we accept that the passage from Ms Hamilton's witness statement we have set out above accurately recites the provisions of the agreements, we do not accept it as an explanation.

It was not disputed that the effective exploitation of the intellectual property rights each partnership had acquired necessitated the assignment or grant to Shamrock of rights to the finished product, some of which it could use as incentives or as payment to others. We also accept, despite its ability to dispose of 100% of them (see para 88 above), Mr Peacock's argument that it was necessary for Shamrock to have a continuing interest in the rights, and not one which could be terminated prematurely. But it is plain from the description of the security arrangements as we have set them out that the payments of the quarterly amounts and the final minimum sum had nothing to do with that assignment or grant. The quarterly amounts were met from, and only from, the interest generated on the amount Shamrock was required to deposit with the lending bank (which in turn was derived, at least in the majority of cases, from the sum paid to it by the partnership), and the final minimum sum was met from that same deposit. Shamrock's ability to make the guaranteed payments was wholly unaffected by its deployment of the rest of the money paid to it since, as we have said, it was only ever intended that it would pay the difference between the nominal gross cost of production and the sum paid for a share of the rights to the production companies and, thereafter, it made not a jot of difference to its ability to meet the guaranteed payments whether the projects earned money or simply wasted it; the funds were in place and ring fenced so that they could be used for no other purpose.

149 For similar reasons we reject Mr Hutton's evidence that he would not have agreed to pay the final minimum sum and the quarterly amounts had Shamrock not been permitted to sell shares of revenue. In a superficial sense the proposition is true: had Shamrock been obliged to hand over the gross amounts for which the production agreements provided, without the ability to dispose of a part of the revenue stream in return for consideration, it would not have had enough cash remaining in its hands to enable it to fund the deposit. But we repeat, yet again, that it was a feature of the arrangements, in every case, that the principal exploitation company never paid the gross sum, but only a net sum which left it with sufficient to fund the deposit.

150 We can accept, too, that Mr Hutton would not have agreed to exploit the projects without some share of the profit, but those parts of the agreements which reflected his wish to share in profit would have been much the same whether or not Shamrock had any obligation to make guaranteed payments. It is not a case, as this argument suggests, in which Shamrock was dependent on the profitability of the projects if it was to meet its obligation to make the guaranteed payments. For the reasons we have given Shamrock could, and without cost to itself, meet that obligation whether any given project made ample profits or substantial losses: there was no causal connection between the one and the other. Even if losses became so extensive that Shamrock became insolvent the members had the letter of credit to fall back upon.

151 Overall, a great deal of effort was expended by Ms Hamilton and, in submissions, by Mr Peacock and Mr Maugham in attempting to persuade us that the guaranteed payments represented a revenue stream genuinely derived from the exploitation of intellectual property rights, and that they, as well as the put option, were “downside protection”, sheltering the members from the risk that the projects would be unsuccessful. Even a cursory examination of the arrangements shows that this is not a proper interpretation of them. As we have said already, the guaranteed payments were due not only irrespective of the success or otherwise of the projects, but were payable from a different source, the sum deposited by the principal exploitation company with the bank. Neither the borrowings nor the guaranteed payments had, in reality, any connection at all to the intellectual property rights the partnership had acquired.

Negotiation of the payments

152 Before we come to the detail of the evidence we heard on this topic it is necessary to dispose of a procedural argument advanced primarily by the individual referrers, though with support from the appellant partnerships. It was that, the absence of a direct challenge by HMRC, in the material produced by them during the course of the appeals and the reference, to the various amounts paid by the partnerships for the exploitation of the intellectual property rights they had acquired, to the promoters, and by the principal exploitation companies to others who were to undertake the production of, for example, music albums or books, must lead us to find that the amounts paid represented fair market value for what was to be provided in return. Mr Maugham, in particular, relied for that proposition on dicta of the *House of Lords in Browne v Dunn (1894) 6 R 67 as they were explained* and expanded upon by the *Court of Appeal in Markem Corpn v Zipher Ltd [2005] EWCA Civ 267* . It is not necessary for present purposes to do more than set out the proposition in **Halsbury's Laws** which was drawn from the speeches in

Browne v Dunn , and approved by the Court of Appeal in Markem Corpn :

> “Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.”

153 The evidence in chief of Ms Hamilton and Mr Hutton was, in summary, that all of the payments with which we are concerned were negotiated on an arm's length basis; and if that was right, said Mr Maugham, they must be taken to represent fair market value for the services to be provided. HMRC had failed to make it clear in advance of the hearing that the evidence to this effect was disputed, with the consequence that the witnesses had not been given a fair opportunity of dealing with it. He advanced the same argument, with which we can conveniently deal now, in respect of statements made by the individual referrers to the effect that they had not been motivated, as HMRC contend, primarily by the tax advantages of the arrangements. He gave as a particular example Mr Ironmoat's answer, when it was put to him that tax saving was a purpose he had in mind when deciding whether to join a partnership, that he regarded the incidence of tax as neutral in the longer term and that tax considerations did not play a major part in his decision, an answer which was not further challenged. Thus Mr Ironmoat, although he may have accepted that tax considerations played **some** part in his thinking, was not asked the statutory question, that is whether, to adopt the words of ITA s 113A(3) , “the main purpose, or one of the main purposes, of making [his] contribution [was] the obtaining of a reduction in tax liability by means of sideways relief”. Against that background, Mr Maugham argued, we could not now find that tax saving was a main purpose.

154 HMRC retorted that it has been clear throughout that that their position is that the sums were not paid to the principal exploitation companies wholly and exclusively for trade purposes, but at least in part in order to acquire a financial asset, and that it is implicit in such an argument that the sums paid did not reflect the market value of the exploitation services to be provided. They likewise say that it has been clear throughout, and moreover was put to Mr Hutton in particular in his cross-examination, that the sums paid to the production companies, against which were immediately and invariably set off the fees paid for the assignment of revenues, were a fiction or a contrivance in that the parties to those agreements could as easily have negotiated the final arrangement as a single package, rather than, as Mr Blair put it, dress them up as if they consisted of two distinct and separately negotiated agreements. The net sum payable to the production company was what it needed in order to provide the relevant service and the gross sum was contrived in order to inflate the notional loss. HMRC's answer to the contention that it was not put to Mr Ironmoat that his main purpose in entering into the partnership was to secure sideways relief in accordance with s 74ZA of ITA is that since he would not concede that tax avoidance was even one of his purposes (even though it had been accepted by Mr Maugham on behalf of the members of IMAG as a group) it was not necessary to put it to him in addition that it was his main purpose.

155 We do not accept the proposition that HMRC's case was unclear to the appellant partnerships or the individual referrers before the hearing. On the contrary, we are quite sure, not only from the documents exchanged in advance but from the manner in which they gave their evidence, that Ms Hamilton, Mr Hutton and the individual referrers knew exactly what was being said by HMRC. In the statement of case served in Acornwood's appeal, in November 2009, it was said that

> “… the Respondent asserts additionally that the present case constitutes one of mislabelling. This is because the terms in which various documents pertaining to the activities of [Acornwood] and its arrangements with Centipede and others, seek to characterize certain items, do not reflect the reality of the situation. By way of example, invoices issued by Centipede to [Acornwood], on their proper construction, purport to be in respect of exploitation costs within the meaning [of] the Principal Exploitation Agreement , when in fact, at least in the main, they are not.”

156 Although that passage does not deal directly with the question of negotiation it was not alone in advancing HMRC's case that the arrangements were in many respects artificial, and that the

level of the payments made, in certain cases, was equally artificial. The s 28ZA questions referred to us, without more, make it perfectly plain how HMRC are putting their case about the arrangements: no-one could realistically be under any illusion that HMRC did not view the Icebreaker Partnership arrangements as a tax avoidance device. The argument in relation to Mr Ironmoat's evidence amounts, in our view, to little more than a pedantic objection to HMRC's choice of words. We accordingly reject the individual referrers' argument on this point.

157 We come, therefore, to the substance of the issue between the parties on this point. Although the level of some of the payments we have described above was uncontroversial, it is, we think, necessary to say something about them in order to put the more controversial payments in their context.

158 Ms Hamilton told us that the prices paid by each of the relevant partnerships for the intellectual property rights they acquired were negotiated with the owners of those rights. As will be apparent from the narrative above, the amounts paid were all relatively modest round sums (in one case the payment was of only £1) and in our view they were little more than a token, coloured by the fact that the amounts of money changing hands for the production—which, as we have said, was commonly undertaken by a company controlled by the originator of the intellectual property rights—were rather greater. Nevertheless, in the absence of any reason to think otherwise we are willing to accept that the amounts paid for the intellectual property rights were freely negotiated.

159 Further sums had to be paid to the banks in respect of the arrangement fees and margin. We are, again, willing to accept that there might have been some negotiation about their scale, and indeed the evidence showed that the amounts paid differed from one partnership to another, and from one bank to another. However, these payments, like those made for the intellectual property rights, represented a small proportion of the overall amount paid into each partnership and any impact their negotiation could have had on the money available would be very modest.

160 We were also told by Ms Hamilton and Mr Hutton that the fee paid by each partnership pursuant to its principal exploitation agreement was negotiated between them on an arm's length basis. Mr Hutton began, they said, by indicating the fee Shamrock wished to charge, dictated by the amount it would have to pay to production companies, the other costs it would incur, the future payment of the guaranteed amounts, and its desired profit. Ms Hamilton, who had been kept informed about the nature of the package proposed for the prospective partnership on whose behalf she was negotiating (indeed, as we understand the evidence, it was she or a member of IML's staff who agreed the package Mr Hutton proposed), told us she could form a view about the costs Shamrock was likely to incur, and could therefore assess the reasonableness of the proposed fee. She would also, she said, form her own view about the likely profitability of the proposed projects; where possible revenue projections were prepared. She and Mr Hutton then debated the fee until they reached agreement. We shall return to this point at para 175 below. Ms Hamilton added that, from IML's and the partnership's perspective, the fee handed over to Shamrock was money with which Shamrock could deal as it wished, and once it had been paid neither IML nor the partnership had any further interest in or control over the money. That statement was the subject of considerable disagreement. We have already made some observations about Ms Hamilton's knowledge of how the greater part of the money would be used, and we shall have to revisit the subject in more detail when we come to the comparison of these cases with Icebreaker 1 .

161 A further point of contention was Mr Peacock's submission that it was Centipede (and later Shamrock) which chose the production company in each case, and that it was Centipede or Shamrock which negotiated the price paid to that company, and the price paid in return for the share of revenue, without any influence from the relevant partnership or from IML. That submission was based primarily on Mr Hutton's evidence that the sums agreed to be paid by Shamrock to the production companies were negotiated in good faith, and were determined in a manner which reflected, on the one hand, the cost of production and the value to Shamrock and the relevant partnership of the worldwide rights in the resulting product, and, on the other, the value to the production company of a share of the rights which it could in turn use for the payment or part payment of others involved in the project. Ms Hamilton added that, in her capacity of adviser to the partnerships, she was indifferent about the figures which appeared in the resulting agreements. Once the partnership had paid the agreed exploitation fee to Shamrock, it was for Shamrock to dispose of the money as it saw fit. That evidence does not entirely coincide with the provision in the agreement between Acornwood and Centipede that

enabled Acornwood to control costs (see para 65 above), but we recognise that later principal exploitation agreements did not contain a corresponding provision.

162 As we have already indicated, we accept that it was Shamrock (and, we infer, Centipede before it) rather than IML which identified the projects which were to be adopted by an Icebreaker Partnership, albeit IML agreed the package before it was promoted to prospective members (and, even if only nominally, the members too agreed on the package by signing pre-prepared resolutions immediately they joined a partnership). Since the production company was usually controlled by the owner of the intellectual property rights, it follows that in most cases by identifying the project Shamrock effectively identified the production company. We are also willing to accept that it was Centipede or Shamrock, rather than IML, which undertook the task of negotiating the price payable for the production and of the amount payable for the share of revenue, and that the relationships between Centipede and Shamrock and the production companies were at arm's length.

163 We do not, however, accept the second part of Mr Peacock's submission, and in particular we reject Ms Hamilton's evidence that she and the members of any partnership were indifferent about the (gross) amount supposedly payable for the production; on the contrary, as will become clear, we accept HMRC's case that the magnitude of that payment was a matter of considerable importance if the Icebreaker scheme was to work as intended. For the same reason we do not accept that Mr Hutton truly had a free hand in agreeing that figure. We deal later with the parties' submissions about the significance for the issues we must decide of this point, which was the subject of some debate; at this stage we deal only with the evidence and our conclusions of fact from that evidence.

164 Although Mr Hutton may have had more freedom when negotiating the price payable for the share of revenue, there were still some constraints placed on him. One was the need for Shamrock to have available the amount it was required to deposit in order to obtain a letter of credit. Another was the fact that there was only a finite amount available, since each partnership was presented to the prospective members as a package, with the payments to be made as the partnership closed all agreed in advance. We can deal with the evidence on that topic, and our conclusions about it, now.

165 Mr Hutton accepted that in no case in which Shamrock was the principal exploitation company for an Icebreaker Partnership had it made the various payments for which the services and licensing agreement seemingly provided, while the counterparty to that agreement made, separately, the payment in the opposite direction required by the assignment of revenues agreement. Instead, the one was invariably netted off against the other; indeed, the former document expressly provided for set-off in that manner. Both Mr Hutton and Ms Hamilton were asked why the arrangements could not have been made in a single document, providing for the production (taking the Planeteer agreement as a simple example) of the recordings in exchange for a single payment of £160,000 and 50% of the revenue, and neither could give to us what we can regard as a convincing, or even coherent, explanation of the reason why there were two agreements rather than one, and two payments rather than one.

166 Both Ms Hamilton and Mr Hutton offered in evidence the explanation that the use of two agreements was commonplace, to the extent that it was the usual practice in the creative industries, though no other examples were shown to us. The reason was, they said, that the agreements dealt with separate subjects, and separate payments—that is, Shamrock was paying a certain sum for the production while the production company was paying a different sum for a share of the revenue—and there was in addition a need to segregate them in case there should be a dispute. We were, indeed, offered some, very sketchy, examples of such disputes, in which Shamrock had claimed against a production company the full amount paid, or notionally paid, to it, without (it seems) giving credit for the amount paid, or notionally paid, in return for a share of revenue. We did not, however, learn the outcome of the disputes, or even whether the production companies attempted to set off or counterclaim for the price of the share of revenue. Even if they did not, it is in our experience by no means unusual for agreements to cover more than one topic, and for them to provide that a dispute in respect of one topic will have no impact on another.

167 We were also referred to a minute of a discussion between a director of one of the production companies which had been engaged on an Acornwood project we have already described, Mark Frith, and HMRC officers in which, it was suggested, Mr Frith had said that organisations such as the BBC adopted the same approach. In our view that is not what he said

or, at least, it is not what he is recorded to have said. He spoke of arrangements by which the BBC secured productions for an “up-front” fee and a share of revenue; he did not speak of separate agreements and, indeed, the minute indicates that he thought Icebreaker's approach of agreeing a large “up-front” fee and a supposedly separate payment for the share of revenue, moreover in separate documents, was unusual.

168 Mr Peacock and Ms McCarthy produced a lengthy document entitled “Appellant's suggested material findings of fact”, in which two further explanations were advanced. The first was that “The money raised from the assignment of revenue … put the principal exploitation company in a position to pay the LLP the certain minimum amounts agreed under the Principal Exploitation Agreement ”. As we have just said, it is factually correct that the money was needed for the deposit each principal exploitation company was required to make in order to obtain a letter of credit, but this proposition does not explain the use of two documents, and two notional payments, rather than one. It would have been simpler and equally effective for Shamrock to agree on and pay a single net sum, and to retain the money needed for the guaranteed payments.

169 The second explanation was based on Ms Hamilton's oral evidence that the partnership was “limiting its downside”, that is putting some of the risk of failure and consequent loss of capital on others, in return for taking a smaller share of the “upside”, or profit. As an explanation of the rationale for making a smaller initial payment and sharing the potential profit that proposition makes perfect sense. We also accept the subsidiary point Ms Hamilton made, that judging where the balance between potential risk and reward should be struck is difficult, and that one may find at a later stage that too much of the profit has been handed over, or too little of the risk sheltered. These arguments do not, however, come close to explaining why it was not possible to reach a single, composite agreement about the capital injection to be made into the production and the sharing of revenues or, if it was possible, why the principal exploitation company never adopted that course; nor does it explain the making of two supposedly separate payments.

170 One could understand the use of two agreements had they been temporally separated, for example if the production company decided to buy a share of revenue only after the project was well under way; but in these cases there was no temporal or indeed any other form of separation. The agreements were invariably negotiated in advance and then executed on the same day. Even if it were the usual practice to use separate documents it remains the case that it was an inbuilt feature of the Icebreaker scheme that a large notional payment in one direction was invariably offset simultaneously by the notional payment of most of it in the opposite direction, and that the principal exploitation company was never required to make a payment of more than the net sum and, perhaps more importantly, that the production company did not, and was not intended to, receive more than the net sum. In the absence of any cogent explanation of it we reject the proposition that there was any commercial rationale either for the use of two agreements or for the supposed separate determination of two capital sums when it was always intended that the one would be set off against the other.

171 We are willing to accept, from the evidence we heard and read, that (again taking Planeteer as the example) a sum of £160,000 plus a 50% share of the resulting revenue, the share for which the agreements provided, represented a fair, arm's length price for the production of Mr Velard's recordings. That price represented “real money” for Shamrock, in that it was handing over cash and foregoing part of what might have become a valuable income stream, and we have no reason to think (despite what we say later about the potential for profit) that Mr Hutton was either an exceptionally poor or an exceptionally skilful negotiator, or that there was any reason why he, or IML, would agree to pay more than necessary, or why the production company would accept less than it truly required.

172 Ms Hamilton gave a good deal of evidence about the work that was done on assessing the profitability of prospective projects and on determining the balance between the magnitude of the partnerships' payments to their principal exploitation companies and the share of the future income which should be foregone in exchange for a payment by the production company (notional though some of the payments may have been) and we can accept that a good deal of work of that kind was undertaken, albeit the projects, as both Ms Hamilton and Mr Hutton conceded, were speculative to the extent that, in truth, profit projections were no more than estimates and, indeed, would often have amounted to little more than guesswork. In addition, although reliable or at least supportable calculations might have been possible in some cases, we are unable to accept that in respect of every project, even if Shamrock was handing over “real

money", the net amount was arrived at by informed negotiation. In the case of the Kiss project, for the reason we have given at para 102, the amount cannot have been agreed in the light of fully validated projections; it can only have been the result of, at best, a combination of assumptions and inspired guesswork on both sides. Nevertheless, we have no reason to think that that the net sum paid to the production company was arrived at otherwise than in good faith.

173 What we cannot accept from the evidence is that the gross figures—£1,800,000 and £1,640,000 in the Julian Velard example—can be regarded as reliable, or even approximate, yardsticks of the true cost of production or the value of the rights in the finished product respectively. If Planeteer required £1.8 million to finance the production, as the schedule to which we referred at para 99 above suggested, one has to ask how it was in fact able to finance it with only the £160,000 it actually received. On Ms Hamilton's own evidence, obtaining funding for projects of this kind was difficult, and the revenues for which Planeteer had forgone the bulk of the gross payment were, of necessity, in the future. We had no evidence about, or explanation of, Planeteer's apparent ability to undertake the project with less than a tenth of the predicted cost in its hands.

174 The only rational conclusion is that the gross fee was inflated in order to increase the apparent loss. The difference between the gross and net fee was never truly available for the exploitation of the relevant intellectual property rights, and was not intended to be so available. We are satisfied that all concerned knew perfectly well that the gross payments were a pretence.

175 We dealt, at para 160 above, with the negotiation between each partnership, represented by Ms Hamilton, with the principal exploitation company it had engaged about the latter's fee. Although we recognise that the net amounts Shamrock (taking Shamrock to be representative of those companies) needed to pay to production companies necessarily affected the fee it required and that, as we have said, the net amount paid to the production companies was "real money" which Shamrock was handing over, we do not accept that there was arm's length negotiation of the fee in quite the manner described to us.

176 Since the final minimum sum was invariably the same as the amount borrowed by the members of any partnership, and the borrowing usually represented 75% or 80% of the total available cash, it necessarily follows that the bulk of the fee which Shamrock required (since it was obliged to deposit the equivalent sum with the bank immediately, or had already done so and required reimbursement) was pre-determined, and negotiation about it would be purposeless. Any true negotiation could have been undertaken only in respect of the division between IML and Shamrock of what remained of the members' personal contributions after payment of the bank's arrangement fees and margin, and the cost of the intellectual property rights. In addition, each partnership was left with a relatively modest balance, typically less than £100,000. There was some suggestion in the evidence that this was planned, as a reserve for payment of IML's annual fees or as an available fund should further expenditure be required, but we did not discover whether the amount was pre-determined or merely represented what was left over. We do not think there is any significance in the point for present purposes.

177 Although we have accepted that the net sum paid to each production company was "real money", and that it was arrived at after arm's length negotiations, it inevitably follows from what we have also said that IML, contrary to Ms Hamilton's evidence, had a keen interest in the amount which would be used in this way, for the obvious reason that the greater the payments to production companies, the smaller the sum which remained for the payment of fees to IML and Shamrock. Indeed, as we have mentioned, Ms Hamilton told us that on occasion IML reduced the fees it had intended to charge in order that enough was available for the exploitation of the rights a partnership which was about to be closed was to acquire. It is also noteworthy in this context that in the cases of Edgedale and Hawksbridge, and possibly other partnerships, Shamrock received less from the partnership by way of fee than it paid out. We had no clear evidence explaining why that was so, but deduce that Mr Hutton was optimistic about the projects and proceeded on the assumption that an immediate capital loss would be made up by profits and monitoring fees later. Whatever the reason, which in itself does not seem to be material to the issues we must decide, it does indicate, in our view, that there were negotiations between IML and Shamrock about the fees each would receive in each case, and that a prominent feature of those negotiations must have been the amount which Shamrock would have to pay to the production companies. It follows that we agree with HMRC that, as the description of the various arrangements shows, Centipede and Shamrock had limited scope for independence.

178 In summary, we accept that there was arm's length negotiation about the fees and margin paid to the banks, the sums paid for the intellectual property rights and the net sums paid to the production companies. We reject Ms Hamilton's evidence that she was indifferent about the last of those items; on the contrary, we are satisfied that it was a matter of some importance to her. The greater part of the fee payable to the principal exploitation company (that is, so much of it as matched the members' aggregate borrowings) could not in any meaningful sense have been negotiated. We accept that the negotiation between IML and the principal exploitation company in respect of what remained of the partnership's cash (that is, so much of it as exceeded the sum to be deposited and the amounts payable to the production companies) was conducted on an arm's length basis.

The promotion of the Icebreaker Partnerships

179 In October 2005, when the Icebreaker Partnership concept was still relatively new, a document entitled “Icebreaker Information Memorandum” (“the IIM”) was produced by IML; it appears it was revised and refined as time went by, but later versions were materially the same so far as concerns the issues before us. Its purpose was to explain the concept, primarily for the benefit of professional advisers, in order to encourage them to recommend to their clients that they should invest in and become members of future partnerships. Some members, or prospective members, saw it and others may have done so. It provided a rather less detailed description of the arrangements than is set out above, but the main features of a typical Icebreaker Partnership were provided. A PowerPoint slideshow, describing the “Icebreaker Fund” as “An exciting business opportunity” was created as part of the marketing of the scheme. Flow diagrams were provided, showing some of the arrangements designed to secure the lending by, in the early version, BoS of 75% of the partners' contributions; they did not show all of the guarantee and security arrangements in detail but the IIM made it clear that comprehensive security was built into the scheme and that for participants there was a low risk in respect of their borrowings, even if the member's personal contribution was not secured.

180 HMRC drew our attention to several passages in the IIM which, they say, reveal the true purpose of the Icebreaker Partnership scheme. They relate to four topics of particular importance in the present context: the fact that periodic payments and a final minimum sum were promised, coupled with the claim made by the IIM that their amount would be negotiated and agreed by the partnership before the partnership entered into contracts with third parties (such as the owners of intellectual property rights); the further claim that the terms of the put option between the partnership and the principal exploitation company would also be negotiated and agreed before the partnership incurred any expenditure on intellectual property; the absence of any income forecasts; and the IIM's description of the tax benefits potentially available to members of the partnerships.

181 The IIM made it clear that periodic payments and a final minimum sum were features of the scheme and, as HMRC argued, rather coyly indicated that they would be negotiated with the aim that they would be sufficient to service the members' loans, and guaranteed. The relevant passage, in a typical version of the IIM, read as follows:

> “The Advisor [*ie* IML] believes that the Icebreaker LLP will be able to negotiate the Advances and Final Minimum Sum such that the LLP's assets will be sufficient to meet all payments of interest and principal under the Loans.”

182 HMRC argue that this passage misrepresents the reality, in that it was an invariable, indeed central, feature of the Icebreaker Partnership arrangements that the advances (or in later iterations quarterly payments) and the final minimum sum exactly matched the interest due to the bank and the capital repayable, and that anyone reading the IIM as a whole would realise that this was the case. Ms Hamilton's evidence (see para 144 above) that the amounts were negotiated first and the borrowing followed, if true, would in our view reinforce that conclusion, since the amount which could be borrowed would be limited by the guaranteed payments which had been agreed. Similar arguments were advanced in relation to the passage in the IIM dealing with the put and call options:

> “Icebreaker Management believes that it will be possible to obtain a sale price for the

> Business, whether under the option arrangements or otherwise, that equals or exceeds an amount equal to 75% of the total Capital Contributions of the LLP"

183 Again, say HMRC, this passage does not reflect the reality that it was invariably the case that the arrangements would provide for the sale price, however the sale was triggered, to equal or exceed the final minimum sum. Ms Hamilton did not offer, in her evidence, any reason why it might be thought that there was any real risk that the partnership business might be sold for less than the amount owed by the members to the bank; on the contrary, she regarded the arrangements by which the sale price, or the equivalent depending on the manner in which the sale took place, could never be less as part of the "downside" protection to which we have already referred.

184 In our view, what was said in the IIM about negotiation of the various guaranteed payments was nothing more than a pretence. We dealt with Ms Hamilton's evidence that their amounts were determined first and the borrowing followed at para 146. We have rejected that evidence. It became clear to us, and is in any event uncontroversial, that IML agreed, in advance, with the lending bank on an aggregate loan facility (the examples we saw were of £50 million or £25 million) to be taken up in portions by a number of partnerships. The principal exploitation company, with IML's agreement, identified a number of projects, and determined in the manner we have described the net amounts payable for their exploitation. Prospective members were then identified, and the amounts they were willing and able to contribute—by a combination of their own funds and borrowings—were matched, as nearly as possible, to the costs of a set of projects. At that stage the necessary agreements were prepared, and the partnership closed.

185 We have little doubt that the process we have just described required a significant amount of ingenuity on IML's part. What we cannot accept is that there was any negotiation of the periodic payments and final minimum sum, or of the minimum sale price. As they invariably, and by design, matched the interest and repayment commitments of the members and could never differ there was nothing to negotiate. Indeed, Mr Hutton accepted as he gave his evidence that he had no choice but to agree to the predetermined payments if he wished Shamrock to continue as the principal exploitation company, and we have no doubt that IML would have looked elsewhere had Mr Hutton not been willing to do so. In our view the evidence shows clearly that the aggregate amount borrowed by the members of a partnership, once they had been identified, immediately determined what the guaranteed payments must be, and those payments became the starting point in the preparation of the agreements. Once they had been catered for, the remaining details all fell into place.

186 The IIM contains a good deal of material commonly to be found in any prospectus relating to a proposed trading partnership, but by any measure the forecasts of trading revenues and profits one might expect are conspicuously lacking. All that is said in one version of the IIM to which we were taken is that "It is intended that the Icebreaker LLP should generate significant profits for its members", with no further detail. In another, the point was made that "The LLP is newly established and has no financial or operating history upon which applicants may base an evaluation of performance or any assumption as to the likelihood of whether or not it will be profitable". We accept that warnings of that kind are mandatory in prospectuses such as the IIM, but there were no evidence-based projections of future income—indeed, there were no projections at all. Moreover, there was no evidence that they were requested by a prospective investor or an IFA. It also became clear that, as a matter of fact, no existing Icebreaker Partnership had a record of even modest success which might have led to confidence that further partnerships could also succeed. We interpose that it seems to us from the evidence about the success, or lack of it, of the appellant partnerships which we describe elsewhere that "profits" is a misnomer; a better term would be "revenue" or "income".

187 We should, however, add that the IIM contained a significant amount of information about IML personnel, in the earlier versions (when Centipede was the principal exploitation company) including Mr Hutton, who was (as we have said) described as IML's head of sales. There was also a description of the manner in which the partnership would be managed. The tone and content of these passages were plainly intended to inspire confidence in the quality of IML's advisory and management skills.

188 The fourth feature of importance is what was said about taxation. A large part of the IIM,

descending to considerable detail, was devoted to the tax consequences for members who joined a partnership, including some variations for differing circumstances. The point was made that “To maximise returns, Members are likely to need to be higher rate tax payers with a certain level of income and/or capital gains”. It added that leading counsel's opinion on the tax consequences had been obtained, and that a copy would be supplied on request. In fact, we were shown two opinions, one provided by Mr Peacock while the IIM was still in the process of being drafted, dealing with the then forthcoming requirement that loans be on a full recourse basis (it was this change which has led to the Restrictions Regulations question with which we deal below), and the other (the opinion referred to in the IIM) by Mr Andrew Thornhill QC, dealing more generally with the tax consequences of the arrangements and expressing the view that the Restrictions Regulations , which had by then come into effect, were of no application.

189 The IIM formed only part of IML's sales strategy; IFAs could also attend presentations at which the PowerPoint slideshow to which we have referred was used. One slide used in those presentations was entitled “Advantages of Icebreaker”. It stated that membership of a partnership presented a “real chance of making profits” and that “Tax relief makes [it] even more attractive.” Another slide, entitled “Key Features”, provided an illustrative example:

Typical geared structure for investor

– 25% cash, 75% loan

– Potential tax relief of £40,000 on £25,000 net cash investment

– Plus further profits from LLP trade

Option to sell after 4 years

– Sale price equivalent to 75% loan

– 10% CGT payable with full business asset taper relief.

190 HMRC make the point that the primary purpose of this slide was to identify, in clear terms, the tax consequences of joining an Icebreaker Partnership and that it is consistent with what was intended to, and in most cases did, happen: the member paid in £25,000 (in this example) in order to recover tax relief of £40,000. Ms Hamilton accepted that the illustration did show a benefit of that kind, but said that it was necessary to provide an explanation of the tax consequences of membership, since the manner in which members could expect to be taxed would inevitably influence their decision whether or not to join a partnership: it was no more than one of the financial considerations which any prospective member would take into account. We interpose that the prospective trading profits were also described in considerably less detail than the tax consequences in the PowerPoint slideshow: again, there were statements to the effect that profits could be generated, but no projections or any other detail.

191 HMRC also lay some emphasis on the terms of a letter written on 8 March 2006 by an IFA to a prospective investor, who later became an actual investor. The passages of relevance are as follows:

“You are looking to recover tax on the following income

2002/03	£180,000
2003/04	£200,000
2004/05	£220,000 …

> The partnerships are structured in such a way which [*sic*] enables tax to be sheltered on income in the current tax year and previous three tax years, together with capital gains in the current and previous tax years … The key benefit of taking out this investment is to reclaim income tax you have paid in the previous three tax years ….
>
> It is recommended that you invest £503,408 in two separate partnerships, this equates to 102% of the amount of taxable income being sheltered. However, as you will be utilising bank borrowings for your investment, your cash contribution will be £125,852 which represents 25% of the total investment amount. The remainder of your investment [will be] made up of bank borrowings amounting to £377,556.
>
> The two partnerships you join will close prior to 5th April 2006. On completion of the partnership accounts, you will apply for your loss claim in the next tax year. This should lead to a tax refund of £186,674 giving you positive cash flow of £60,822. After four years the partners will have the option to sell the assets of the partnership. This could lead to a liability to Capital Gains Tax of £37,756.
>
> In addition to the tax reliefs available to you, the partnership will also benefit from a revenue share agreement with the exploitation company used for the various projects the partnership will undertake. No indication can be given to the income that could be generated from this revenue share arrangement."

192 The letter went on to refer the addressee to the IIM, dealt with some personal background including the terms of the separate loan which was to be taken out in order to fund the investor's cash contribution, and then added that

> "… the purpose of taking out this investment is to take advantage of the generous tax relief facilities that are available",

before sounding warnings about investment risk. The letter made it clear that the loan to be taken from, in this case, BoS was a full recourse loan (albeit secured) and that HMRC would not agree in advance that relief such as that previously described would be available.

193 Assuming the figures set out above were correct (in that the client invested the recommended amount, a 75% borrowing was taken and tax rates remained unchanged) the client would make a net gain from tax relief of £23,066, and more if the potential capital gains tax liability could be mitigated. It is conspicuous that the letter barely mentioned the nature of the partnership's business (although a copy of the IIM was attached to it), and, like the IIM, offered no projections of possible income, merely remarking that "the investment is high risk in terms of the return the partnership is likely to produce".

194 It is in our view quite clear than no investment adviser, and no sophisticated investor, would regard the IIM or the PowerPoint presentation as the means of encouraging investment into a trading partnership, which happened to have tax consequences requiring an explanation. It is perfectly clear that the tax consequences were the central feature of both, and that the investment adviser or sophisticated investor would recognise that fact. In so far as Ms Hamilton gave evidence to the effect that this was a genuine investment opportunity, we reject it. Although we have taken only one example of an IFA's letter to a prospective investor, we are satisfied that it demonstrates clearly how a typical IFA viewed the scheme, namely as a means of reducing the investor's tax liability rather than as a conventional investment product.

Choosing and joining a partnership

195 We have already provided an outline description of the projects undertaken by Acornwood and Hawksbridge. In order that what follows can be understood, we need to provide a rather briefer description of the projects undertaken by the other appellant partnerships, and summary details of the payments made.

Bastionspark:

The partnership closed on 30 March 2007. All its projects were popular music albums,

and Bastionspark paid in all £20,001 for the intellectual property rights. The immediate IML fees amounted to £275,750, with an annual £10,000 administrative services fee (though no continuing advisory fees), and the sum paid to Shamrock was £4,503,000. The members' capital contributions amounted to £5,010,000 of which £4,008,000 (80%) was borrowed.

Edgedale:

The partnership closed on 3 April 2008. It promoted the Far-fetch project we have already mentioned and to which we will return (it is an internet retail scheme for fashion products with, we were told, unusual and novel features), a device called Nicobloc aimed at helping smokers to give up the habit and a music album. The aggregate cost of the intellectual property rights was £15,000. It paid IML fees of £465,157 with an annual £13,250 administrative services fee, and it paid £6,026,500 to Shamrock. The members' capital contributions amounted to £6,645,105 of which £5,316,084 (80%) was borrowed.

Starbrooke:

The partnership closed on 3 April 2009. Its projects consisted of two music albums and, like Acornwood, a large format book although in this case the subject was Barcelona Football Club. It paid in all £15,000 for the intellectual property rights. The IML fees amounted to £472,331 with an annual £12,000 administrative services fee, and Starbrooke paid £6,342,000 to Shamrock. The members' capital contributions amounted to £6,997,500 of which £5,598,000 (80%) was borrowed.

196 The agreements had the same structure as in the Acornwood and Hawksbridge iterations. In particular, they included the payment by Shamrock of large sums to the production companies, offset by payments for a share of the revenues when in fact only the difference between the two was paid; provision for guaranteed payments secured by letter of credit backed by a deposit equal to the final minimum sum, which was in turn equal to the total amount borrowed by the members; and although a term of ten years was provided for, all included put and call options by which the partnership business might be sold after four years for not less than the final minimum sum.

197 As the structure of each partnership was similar to that of every other, so too was the structure of each of the individual referrers' witness statements similar to those of the others. We say that not by way of criticism, nor as an indication of any surprise, but as a prelude to our approach of identifying the common features of the evidence we heard from the individual referrers before dealing with differences between them and other points of significance. The statements, and most of the oral evidence we heard, related to three principal issues: the circumstances in which and the reasons why each individual referrer became a member of an Icebreaker Partnership, a topic with which we deal now; and a subject which is important in the context of the referred questions, the nature of the activities he or she undertook while such a member and the time spent in such activities, with which we deal later, since it has only incidental relevance to the appeals.

198 Once they had indicated an interest in becoming a member of an Icebreaker Partnership, the individual referrers were provided with more detailed information about their structure and management, and about the differences between them, which lay primarily in the nature of the intellectual property rights—music, film, inventions, books or a mixture—which each partnership intended to exploit. They accepted that the projects were presented as a package—that, as we have explained, a set of intellectual property rights had already been decided upon by IML and Centipede or Shamrock—but said they all had a choice between two or more partnerships. Some of the individual referrers told us their choice was driven by the nature of the intellectual property rights to be exploited although the date on which each partnership closed to new members (often, but as we shall explain not always, shortly before the end of the tax year) would have limited the choice to some extent, as would the fact that most partnerships had a mix of projects; as we understand it few pursued only one type of project. Some partnerships closed earlier than originally forecast, when enough money to exploit the intellectual property rights to be acquired had been raised. Mr Edgedale, for example, found that his preferred partnership had already closed, and he decided to join another.

199 It became clear from their evidence that all of the individual referrers have, or have had, successful careers in various fields, and all have enjoyed significant levels of earnings. We formed the impression that most, if not all, of them were financially sophisticated. Typically they were introduced to Icebreaker, or perhaps more accurately IML, by an IFA or another intermediary who had seen the IIM, and who showed it, or extracts of it, to the individual referrer. All said they received an explanation of the working of the schemes, and were assured that other Icebreaker Partnerships had made profits, though none told us that details of those claimed profits were provided, and none seems to have asked their IFA or IML for them. In fact, as we have already said, the IIM dealt with the prospect that each partnership might make a trading profit in what we can only describe as aspirational terms. We deal later with the evidence we heard about the potential for the making of profits, and about the trading success or otherwise of each partnership; in this section we deal only with the individual referrers' perceptions before they decided to join a partnership and more recently, as they described them.

200 Despite the lack of detailed projections all the individual referrers said that they had a high expectation of earning profits (in the true sense of that word) from their injection into the partnership they joined. Mr Bastionspark said he “had a personal expectation that, in addition to the sums required to repay my loan, I would receive tens of thousands of pounds in revenues from the projects”. Mr Edgedale, too, said that “I would not have committed my capital if there was no prospect of generating significant profits. I had a genuine expectation that the projects would make a profit.” None was willing to agree with Mr Blair that the prospect of a profit was remote, and that it played little or no part in his or her decision to join an Icebreaker Partnership.

201 Some of the individual referrers told us that they had interests or experience of their own in the rights a particular partnership intended to exploit, and that they were enthusiastic, for their own sake, about the projects. Mr Bastionspark was, he said, attracted by that partnership because of its concentration on musical projects, including a singer known as Rozalla who, he knew, had had several hit singles in the early 1990s. He thought, he said, that Rozalla and one of the other acts had good prospects of earning profits, though was rather less confident about the other two of the proposed projects. He believed that his membership of Bastionspark would enable him to influence the manner in which the acts were promoted. Mrs Starbrooke, to take another example, told us she was particularly interested in football and was encouraged to join Starbrooke because three professional footballers and others associated with professional football were also doing so. She was aware that music projects in particular were risky, but was willing to take a chance on Starbrooke's music interests because she was confident that the Barcelona book project would prosper. She was insistent that she saw Starbrooke as a business opportunity, and that the possible availability of tax relief, though a benefit, was not a major factor in her decision to join the partnership. Mr Hawksbridge, too, said that he had joined that partnership in preference to another, Dovemoat, because of the projects it was to pursue. However, others seem to have been largely indifferent, before joining, about the precise nature of the rights to be exploited.

202 HMRC suggested that the choice of partnership must in reality have been unimportant since the IIM indicated that a prospective member's contribution could be allocated by IML to any available partnership, with the consequence that the member would join that partnership regardless of any preference he or she might have. Ms Hamilton accepted that the provision was present, but said that it had never been exercised and that members' preferences were respected. We were invited by HMRC to conclude, nevertheless, that this was a feature of the arrangements which was consistent with the proposition that the aim was to avoid tax rather than to exploit intellectual property rights for their own sake. We do not, ourselves, think there is much significance in the point and accept that, with exceptions such as Mr Edgedale described, members could exercise a choice and that some may have done so because they preferred, say, popular music to publishing, or because they preferred to join a partnership with a mixture of projects. It does not, of course, necessarily follow that it was this interest which motivated them to join an Icebreaker partnership even if, having decided to join, they chose one partnership over another.

203 In some cases the detail of the arrangements into which the members were to enter changed in the interval, as we understand it usually no more than a week or two, between their agreeing to join a partnership and the execution of the various agreements. For the most part the changes—for example in respect of the level of the fees payable to IML—were probably attributable to nothing more than last-minute adjustments and seem to us to be of little or no

relevance for present purposes. Rather more important, in our view, were the changes in some cases to the proportions of their capital contributions which the members were to pay from their own resources and to borrow respectively. In Mr Bastionspark's case, for example, his borrowed proportion increased from 75% to 80%, as did the proportion of every other member of Bastionspark. We are bound to say that the explanation we had of the reasons for this change was wholly unclear. The change seems to us to emphasise the artificial nature of the borrowing, a topic which we discussed at para 133 above, though we draw nothing more from it than that.

204 All the individual referrers received an explanation of the borrowing arrangements, usually it seems from their IFA or accountant, and said they understood there was potential personal exposure, but in the light of the protection which had been put in place were reassured that it was little more than theoretical. Mr Moondale, for example, said he took the view that the prospect that he would have to repay his borrowing from his own resources was not a "live possibility", and Mr Bastionspark said in his witness statement that "My understanding at the time was that the commercial risk of exposure on the loan was negligible as the result of the letter of credit". As we have explained in our description of the borrowing arrangements, the true level of the risk that any individual member would be required to repay the bank from his own resources was, in reality, nil, and the individual referrers' perceptions were right. They were, however, at risk of losing the proportion of their respective capital injections which was derived from their own resources or separate borrowing. Mr Hawksbridge, for example, put it this way in his witness statement:

> "I looked upon the proposition as one where I was effectively at risk of losing only 20% of my capital for which potential downside I got stakes in three potentially very desirable projects. From my perspective, this was an attractive proposition looked at without regard to tax."

205 He went on to explain that he regarded an investment in Hawksbridge as a sensible way of diversifying his investment portfolio, and that he "viewed Hawksbridge as a genuine opportunity to earn significant profits". He was, or gave the impression that he was, unconcerned about the possible loss of his personal contribution (of £55,000: his borrowing represented 80% of his total contribution of £275,000) in view of the potential for profit, as he saw it, and dismissed as a consideration the prospect that he might achieve a tax saving which exceeded that possible loss. Nevertheless, as the IIM and the presentation we have described made clear, the potential tax saving exceeded, and usually substantially exceeded, the true level of exposure to loss.

206 Nevertheless, despite the optimism we have recorded above that he "would receive tens of thousands of pounds in revenues from the projects", Mr Bastionspark accepted that he had been provided with no figures about the profits earned by other partnerships, but relied instead on an assurance that they had made profits (an assurance whose reliability must at least be questionable: as we have said there was no evidence before us that any Icebreaker Partnership had ever made a true profit) and was also persuaded by the statement in the IIM that IML "hopes that every LLP will be able to generate significant profits for its Members". In fact, as he also accepted, in four years Bastionspark had earned aggregate revenues of less than £1,250. We have taken Mr Bastionspark as an example because, of all the individual referrers, he expressed the greatest optimism; the others were rather more modest in their claimed expectations, although all said they had a genuine belief that they would receive something in addition to the guaranteed sums. In fact none of the Icebreaker Partnerships has earned significantly more than Bastionspark, and some have performed even more badly. As we explain elsewhere (see the discussion beginning at para 373 below), none has come close to earning a commercial rate of return on its members' personal contributions.

207 The reality is that prospective members had no verifiable information about the possible revenues from the projects, yet they all put a fairly substantial amount of their own money at risk. They may have had genuine hopes of future trading profits, and they may have chosen which partnership to join either because they preferred one set of projects over another or because they considered that partnership more likely to succeed than others; but whatever their hopes none, in our view, could reasonably or realistically have had any confidence (by contrast with hope) of trading success. We are, indeed, quite satisfied that no serious and even moderately sophisticated investor, or one with a competent adviser, genuinely seeking a profit, even one willing to engage in a high-risk venture, but unmindful of any possible tax advantage, would

rationally have chosen an Icebreaker Partnership. The prospect that substantial trading profits would be earned was so lacking in evidential foundation that a belief in it could be nothing more than wishful thinking, and the individual referrers, despite their claims to the contrary, could have had no rational expectation that they would see any return on the personal contribution, still less that the money would ever be returned to them, and we find that they did not.

208 We have already recorded the dispute about what was put to Mr Ironmoat in cross-examination about his motives (see para 153). Some of the individual referrers were prepared to acknowledge that the tax benefits of joining a partnership had been explained to them, in the manner set out in the IIM, and that they were a factor in their choosing to join, although they all said that those benefits played a minor part (or, in Mr Ironmoat's case, no part at all) in their decision, and that they would have gone ahead even without the tax saving. Some also added that they expected, over time, to pay more tax than they saved because of the profits they expected to earn.

209 We are willing to accept that the members hoped for profits since, as we explain elsewhere, we recognise that profits, even large profits, could be made by projects such as those adopted by the Icebreaker Partnerships. However, it is in our view clear that in these cases such profits would be the “icing on the cake”; the “investment” was no more than a gamble at very long odds. It is therefore convenient to record at this juncture that, for the reasons just given, we reject the claims that the individual referrers regarded an Icebreaker Partnership as a worthwhile investment opportunity in the conventional sense, that they had a genuine investment motive when joining a partnership and that they were not motivated by the tax savings which were potentially available to them; we are, on the contrary, satisfied that their predominant purpose in entering into the scheme was to achieve a tax saving, and we reject their evidence to the contrary. In particular, we do not accept Mr Ironmoat's evidence that the potential tax benefits played no part in his thinking; even had he truly thought an Icebreaker Partnership represented a sound investment prospect, he would be foolish to disregard the tax consequences of his joining such a partnership, and he did not strike us as a fool. In our view he, like the other individual referrers, was financially sophisticated and his assertion that tax was irrelevant to his decision makes little sense.

210 We are fortified in our conclusion on this topic by the evidence of what took place after the partnerships had been in existence for some time. We deal below, in the section beginning at para 417, with the individual referrers' evidence of their activities, some of which (it was said) were designed to identify new projects which the partnership of which that individual referrer was a member might adopt. Had any member identified a new project of sufficient potential there was no impediment to the members of the relevant partnership undertaking an evaluation of its prospects, with a view to further investment should they be found to be good; but there was no evidence before us that any possible new project had been subjected to more than superficial consideration. There was in addition a marked lack of enthusiasm for further investment: despite their professed enthusiasm, we do not accept, from the evidence we heard from the individual referrers, that they would have had any appetite for new projects unless and until the partnership's existing projects had borne significant fruit. It is, of course, understandable that the members should be cautious about committing further funds; but the fact that this was the common pattern in every partnership is in our view an indication that the members did not join them believing they were making investments in the ordinary sense of that term into true trading partnerships.

The perception of risk

211 We were invited to conclude that, whatever may have been the perception of the members, the lending banks did not consider that the arrangements were risk-free from their perspective. We were referred to three particular features. The first lay in various internal emails passing between bank officials, in which the soundness of the bank's security was the topic, or one of the topics. There was, in particular, some concern about the bank's position should the principal exploitation company become insolvent—in essence, the concern was that the deposited sum backing the letter of credit would be taken by a liquidator for the benefit of creditors generally, and cease to be an adequate security. That concern seems to us to have been, initially, justifiable, but it was addressed by the taking of a first charge over the deposit, and as it seems to us the bank's concerns were allayed. We detect no hint in later emails of continuing concern on this account.

212 The second lay in Ms Hamilton's evidence that the early terminations of both the Icebreaker 1 and Acornwood arrangements, when relations with their principal exploitation companies broke down, led BoS to be “unhappy”. She said she recalled an “awkward” meeting with the bank shortly after it became clear that early termination would be inevitable. However, we saw some contemporaneous exchanges between BoS, the members of Acornwood and IML, and do not detect in them any note of unhappiness on the bank's part; on the contrary, the correspondence deals, in an entirely matter-of-fact manner, with the mechanics of repayment of the loans. If there was any unhappiness it does not seem to have been attributable to a fear that the bank was at risk of default; as we have said, the earlier concerns had been dealt with and there is no evidence that any attempt was made to undermine the steps the bank had taken to ensure that it was fully secured.

213 The third feature was the refusal of BoS to lend further amounts. We were given no clear explanation of the reasons why it did so. Mr Hutton rather tentatively suggested that Shamrock might have reached its credit limit, but as Shamrock was not borrowing, we think that an unlikely reason and reject it. We do know, from Mr Hutton's evidence, that IML had changed its allegiance to SGHB shortly before BoS declined further participation, and that Shamrock, at IML's request, followed it to SGHB, and think it more likely that it was this move which prompted BoS's change of position. There is insufficient evidence from which we could conclude, as HMRC suggested, that BoS was concerned about reputational risk. The important point is that, whatever the reason for BoS's decision, we do not accept that the perception of risk played any part in it.

214 There is in our view no basis on which we could find from the available evidence that any of the lending banks considered as anything other than risk-free arrangements by which they lent money which never left their hands, or which was replaced by an equivalent sum before it left their hands, over which they had a first charge which hypothecated the deposited sum to repayment of the loan and when the arrangement was invariably neutral in respect of interest. We said earlier that the banks were taking no chances; there was, as a result, no possibility of default against which they were not fully protected. We do not, indeed, see any reason why the banks should have felt unhappy about early termination. The contracts, as we have described them, provided for advance payment of the arrangement fees and margin. Thereafter, from the bank's point of view, the only obligation was to make a notional payment of interest immediately followed by an equally notional receipt of the same amount. There was never any difference between the amount payable and the amount receivable, and the money invariably went round a closed circle entirely controlled by the bank itself. In reality, in the majority of cases not even money circulated; there was nothing more than a sequence of bookkeeping entries.

The mechanics of closing a partnership

215 We have already dealt with the evidence showing that the requisite documentation was put in place in advance. In essence, as we understood Ms Hamilton's evidence, a selection of projects was identified by IML, in conjunction with (in most cases) Shamrock, the capital necessary was calculated, and that amount became the target. An Icebreaker Partnership was formed, by the designated members, and remained open to investing members wishing to join until the target was achieved, with (usually) a small surplus; as we have explained there were some instances in which less than the target sum was achieved, and IML or Shamrock, or both, had to reduce the sum they received from that originally intended. At that point, prospective members submitted all the necessary bank forms, powers of attorney and other documents we have described, undated, and IML dealt with them on the members' behalf. We assume, although it was not a matter of any contention, that the members' personal contributions arrived at the same time. Once all the documentation was in place and the members' contributions had been received, IML “closed” the partnership by dating and, where necessary, exchanging the documents and by issuing payment instructions to the bank.

216 HMRC have suggested that it is a significant feature of the Icebreaker arrangements that most of the partnerships closed shortly before the end of a tax year—thus reducing the period between the incurring of the expenditure and the securing of the relief to which, if the appellant partnerships are right, that expenditure gave rise. As it happens, the appellant partnerships did all close near to the end of the relevant tax years and Ms Hamilton accepted in her evidence that some members had asked that the arrangements be put in place before the year end, no doubt in order that such tax relief as they might receive was available to them in one year rather than the next. She was, however, able to demonstrate that other Icebreaker Partnerships had closed

at different times of the year, and we do not regard the closure dates as a factor of any importance. In particular, we have not found that the dates on which partnerships closed have been of any assistance to us in deciding whether they were, or were not, genuine investment opportunities or tax avoidance schemes. In our judgment the fact that the members wished their partnership to close before the end of the current tax year and that their preference might well have been motivated by a desire that such tax relief as was available could be utilised in that year rather than the next, is not, in itself, an indicator of the nature of the partnership.

The accounting treatment of the payments

217 In this section of our decision we shall deal, relatively briefly, with the evidence of the two accounting experts and the parties' submissions on the accounting treatment of the various transactions. We do so only briefly because there was some doubt about the extent to which accountancy evidence would be of assistance, so much so that the parties were unsure at the beginning of the hearing whether it would be necessary to call the experts at all. In the event they were called, but we intend them no disrespect in saying that we did not find their evidence of great help, largely for the reason the parties themselves gave, namely that once one has determined what the various payments were made *for* , the correct accountancy treatment is readily identified. We have been able to determine what the payments were for by reference to the remaining evidence and the decision of Vos J in Icebreaker 1 , as will become clear, and we have recorded this evidence mainly for completeness and in case we are found elsewhere to be in error. There are, however, two points of controversy on which we need to touch; we come to them at paras 231 and 237 respectively.

218 Of necessity much of what the experts said in their reports was coloured by their own respective perceptions, as they prepared them, of the purpose of the payments. We regret to say that we found Ms Hotston Moore rather dogmatic, as she gave her oral evidence, about her view of the character of the payments, which is a matter for us, and thus she strayed from her field of commenting on the correct accounting treatment of the transactions once their character was determined and in doing so rather undermined the value of her evidence. However, she agreed with Mr Cannon that if we found a different purpose to the payments from that they had respectively assumed for the purposes of their reports, their opinions about the correct accounting treatment might not hold good.

219 We should also dispose of an observation made on behalf of the appellant partnerships. It was to contrast the respective experience and attainments of Ms Hotston Moore and Mr Cannon. Ms Hotston Moore has over 25 years of accountancy experience, 17 of them in audit at partner level in large firms, and she has been a fellow of the ICAEW since 2000. She also has experience in the media sector, having acted for a variety of clients working in that field. Mr Cannon, however, has been an employee of HMRC since 2007, having previously worked as a manager at a mid-range firm undertaking audit and general practice work. He has been a member of the ICAEW since 1996, but is not a fellow, and he accepted that he had no particular experience of the media sector.

220 We do not think that this comparison, plainly intended to persuade us that Ms Hotston Moore's evidence carries greater weight, takes us anywhere. We are satisfied that both of the experts have sufficient appropriate experience to enable them to give competent expert evidence and in choosing between them when they differ we have done so by reference to the quality of their evidence, as we perceive it, rather than by reference to any other factor.

221 We begin with a short description of the manner in which the partnerships in fact accounted for the transactions, for which purpose Acornwood is an appropriate example.

222 On 23 October 2006 Acornwood submitted its partnership tax return for the 2005–06 tax year. Its accounts for the period to 5 April 2006 were prepared on the footing that the two payments to Centipede and its payments to IML of advisory and administrative fees all represented revenue expenditure deductible in the computation of its trading profits or, as it was said to be, loss of £5,199,166 for that year. The members of Acornwood claimed to use their respective shares of the loss by way of sideways relief. The enquiry into the partnership return was opened a month later, on 22 November 2006, and the closure notice was issued on 23 July 2008. The conclusion was that the partnership could not bring any of the payments to Centipede or IML into the calculation of its profits or losses, and that it had made a taxable profit of £12,963. The amendment to the return was designed to give effect to that conclusion. The details of the

returns of the remaining appellant partnerships and of the enquiries and closure notices to which they led differ in dates and amounts, but they were submitted, and the partnerships' accounts were prepared, on the same basis. Brief particulars appear at para 10 above.

223 In Acornwood's case the claimed losses amounted to just over 97% of the individual members' aggregate contributions to the partnership, including borrowings, of £5,355,000. The remaining appellant partnerships' claimed losses represented a similar proportion of the members' aggregate contributions. The appellant partnerships and the individual referrers argue that such a result is to be expected and is in no way remarkable; the exploitation of intellectual property rights necessarily requires large advance expense, followed by profits in due course.

The expert witnesses' evidence

224 It was common ground, and is in any event uncontroversial, that the tax treatment of a transaction, as a general rule, follows the accounting treatment, provided that the accounting treatment accords with generally accepted accounting practice, commonly abbreviated to GAAP. The phrase appears frequently in tax legislation, most pertinently to these cases in the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") s 25(1) :

> "The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes."

225 Section 26(1) extends that requirement to the calculation of losses:

> "The same rules apply for income tax purposes in calculating losses of a trade as apply in calculating profits"

226 There is no suggestion in this case that GAAP does not apply or that any departure from it, or adjustment such as is contemplated by s 25(1) , is required or warranted. The experts agreed that a number of principles drawn from GAAP, and which are well-established, are relevant:

> # Entities are required to prepare their accounts in accordance with the applicable UK accounting standards. Those include the requirements of the Companies Act 1985 , which governed limited liability partnership accounts until 30 September 2008, and the Companies Act 2006 , which governs such accounts from 1 October 2008, the Financial Reporting Standards ("FRS") and guidance issued by the Accounting Standards Board ("ASB").
>
> # An entity's balance sheet and profit and loss account must give a true and fair view of the state of its affairs: see for example Companies Act 2006, ss 226A and 396(2) , and FRS 18.
>
> # An entity's financial statements should report the substance of transactions into which it has entered: FRS 5.
>
> # Entities should prepare their accounts on the accruals basis of accounting which requires the non-cash effects of transactions and other events to be reflected in the financial statements as far as possible: FRS 18. Accruals-based accounting requires that payments made by an entity in respect of services received by it should be treated as expenses in the accounting period to which they relate, while a payment made in advance of the receipt of the corresponding services creates a prepayment asset which is to be recorded in the entity's balance sheet.
>
> # A prudent basis should be adopted when determining the amount of any item to be included in the financial statements. Only profits realised at the balance sheet date may be included in the profit and loss account. All liabilities which have arisen in or before the financial year to which the accounts relate must be taken into account. Whenever there is uncertainty about the existence or value of assets, liabilities, gains, losses and changes to shareholders' funds, prudence requires such uncertainties to be taken into

> account. A higher quality of evidence about the existence of an asset or gain is required than is required about the existence of a liability or loss.

227 For completeness we should mention that Hawksbridge, Edgedale and Starbrooke (and, we imagine, some of the other Icebreaker Partnerships) were entitled to, and did, prepare their financial statements in accordance with the Financial Reporting Standard for Smaller Entities (the "FRSSE"). Entities which adopt the FRSSE are exempt from complying with other accounting standards, but the experts agreed that in this case the adoption of the FRSSE makes no difference to the outcome.

228 There was one technical point of significant disagreement between the witnesses with which it is appropriate to deal at the outset even though, in our view, it amounted to a rather sterile debate. It was whether there are circumstances in which more than one accounting method is capable of satisfying the requirement that a set of financial statements gives a true and fair view of a particular transaction. In his report Mr Cannon said that "whilst there may be a choice of accounting policies available in UK GAAP, an entity should always select the most appropriate accounting policy. There can only be one most appropriate accounting policy". Mr Peacock, supported by Ms Hotston Moore, maintained that he was mistaken since, he said, that proposition differed from what was said by Mr Martin Moore QC in an opinion provided to the Financial Reporting Council in April 2008: "The application of the [true and fair standard] involves judgment on questions of degree. Reasonable businessmen and accountants may differ over the degree of accuracy or comprehensiveness, there may be differences over the method used to adopt a true and fair view and there may be more than one view of a financial position, any of which could be described as true and fair".

229 We do not ourselves see any difference of substance on this point between Mr Cannon and Mr Moore; rather, we think they are saying the same thing in different ways. If, in a finely balanced case, there are two possible (and permissible) ways of accounting for a transaction it is similarly possible that one of two comparably experienced and skilled accountants will decide that one, *x* , is appropriate, while the second will decide that the other, *y* , is to be preferred. That, as we understand it, is Mr Moore's view. We do not see anything in it which is inconsistent with what Mr Cannon said. In the example we have given, the first accountant has concluded that method *x* is the most appropriate, and if he has reached that conclusion that method is the one which he must adopt; he cannot instead adopt method *y* because, for example, it happens to result in a lower tax liability. From the second accountant's perspective, the method *y* is appropriate, and it is correspondingly that method which he must adopt. In other words, before the judgment to which Mr Moore referred has been exercised there may, at least potentially, be more than one appropriate method; but after it has been exercised there is only one.

230 The experts prepared a joint report of the points of agreement and disagreement between them, from which we have drawn in what follows. We should mention before proceeding further that the joint report did not deal with HMRC's argument that part of the advisory services fee paid in each case to IML was the consideration for the right to enter into a tax avoidance scheme. Instead, the experts proceeded on the assumption that the whole of that fee was, in principle, capable of ranking as a deductible expense, and addressed only the question whether it was wholly deductible in the period to which the disputed return relates, partly in that period and partly in a later period, or wholly in a later period. We shall deal with this argument in more detail in the course of our analysis of the decision of Vos J in Icebreaker 1 . At this stage we merely record that, unsurprisingly, it was common ground that so much of the payment, if any, as was attributable to the right to enter into a tax avoidance scheme, or to the purchase of an asset, cannot be taken to profit and loss account as a revenue expense.

231 The starting point for determining the correct accounting treatment of whatever we find to be an allowable revenue expense is the requirement of FRS 18 that the payments made by the partnerships in respect of services received by them should be treated as expenses in the accounting period to which they relate. The experts agreed that in the case of Hawksbridge all of IML's services pursuant to the advisory and administration agreements had been provided before the relevant balance sheet date, that the fees paid as the partnership closed represented revenue expenses and that they were therefore both allowable as a deduction in that period, *ie* the period covered by the disputed return. So far as the administrative services fees are concerned, that agreement coincides with our own conclusion, as we shall explain it below, and we do not need to deal further with it at this stage. However, as will become clear, the agreement

about the advisory services fee does not coincide with our own conclusion, and it is also inconsistent with what Vos J said in Icebreaker 1 . In those circumstances, and despite the agreement, we have felt compelled to discard the experts' view on this point.

232 Ms Hotston Moore took the same view (that is, that all of the services were provided, and that the IML fees paid immediately represented an allowable revenue expense in the year) in respect of the remaining appellant partnerships. Mr Cannon had reservations, but accepted that whether the services had been supplied in whole or in part was a matter of fact which we must decide. We deal with our conclusions on this issue later. Both experts agreed, uncontroversially, that any part of the fees which represented the payment for services to be carried out after the balance sheet date must be treated as a pre-payment, and was not deductible in the relevant period. It is undisputed that the fees payable to IML in future years must be brought into account in the years of payment. We accept in passing and to avoid any doubt there might be Ms Hamilton's evidence that the scale of the future tasks was expected to be modest, and that the recurring fees were set at a level intended to reflect that expectation.

233 As we have said, Mr Cannon accepted that in the case of Hawksbridge the advisory and administration fees paid to IML as the partnership closed were the consideration for past services, and were correspondingly correctly treated as an expense in Hawksbridge's accounts for the period. We did not altogether understand why he had reservations in respect of the remaining appellant partnerships. The process was essentially the same in every case: IML, with the assistance of Centipede or Shamrock, assembled a “package” of intellectual property rights, in advance, which each partnership adopted by entering into the necessary agreements on the day on which it closed or, in Acornwood's case, did so in part on that day and in part shortly afterwards. IML, likewise, dealt with all of the relevant agreements and resolutions necessary for the formation of the partnership, accession of the members, collection and disbursement of their personal contributions and borrowings and similar tasks at the same time. We did not detect that there was any material difference between one partnership and another in this respect. It is true that the interval between closure of the partnership and the end of the tax year varied in length, but if all of the work for which the fees were paid was undertaken before, or as, the partnership closed, the length of that interval can make no difference. For those reasons we do not need to deal in any detail with the parties' submissions on this point.

234 Much more controversial is the correct accounting treatment of the sums paid to the principal exploitation company, a subject on which the experts differed fundamentally. We have concluded that the issue can be resolved by the application to these cases of what was said by Vos J in Icebreaker 1 and without resort to accountancy evidence or principles, and we deal with the issue on that basis below, but in case we should be found to have erred in that approach we summarise the experts' evidence in order that it should be available to an appellate tribunal. We also include some references to the parties' submissions on that evidence in the course of our analysis of the decision in Icebreaker 1 , which follows.

235 Mr Cannon took the view that the payments made by each partnership to Centipede and Shamrock consisted of two different elements—the amounts equivalent in each case to the final minimum sum; and the remainder. While the accounting treatment of the remainder should be the same as that for the IML fees—that is, depending on our findings of fact, treated as an expense in the period or as a pre-payment, or a combination of the two—the former element represented the consideration for a guaranteed income stream and should have been recognised in full as a financial asset in each partnership's balance sheet; it was not appropriate to treat any part of it as an expense in the profit and loss account. Simply treating the entirety of the payments as expenses in the year of payment was, he said, not GAAP-compliant.

236 His reasoning was that the payments were made in order that each partnership could obtain the right to receive the final minimum sum (or, as might be the case, an equivalent sum), as well as the advances or quarterly payments. As those payments were guaranteed, and not dependent on (for example) performance obligations by the partnership making the payment, or any similar contingency, they amounted to an asset, that is a balance sheet item, and could not be taken to the profit and loss account. Although the final minimum sum might be paid at different times and in different guises, depending on the event which triggered its payment, each partnership had paid a sum to the principal exploitation company in exchange for the right to receive a series of periodic payments, plus a final payment: whatever its nominal form, and whatever the eventual date of payment, such a right could only be regarded as a financial asset, and the payment made in exchange for it could not be treated as a revenue expense. The substance of the payment,

which is what must be recognised, is that it was for the acquisition of a capital item; it was no more than the exchange of one asset, in these cases cash, for the right to receive another, the guaranteed payments.

237 Ms Hotston Moore accepted that, should we find the factual assumption behind Mr Cannon's opinion to be correct, he would also be correct about the accounting treatment. However, she said, the assumption was wrong. An examination of the contractual documents together with Ms Hamilton's and Mr Hutton's witness statements could, she said, lead only to the conclusion that the entirety of the fee payable pursuant to the principal exploitation agreement was akin to the IML fees, and that in each case it had been paid for exploitation services provided before the balance sheet date. It was therefore properly charged to the profit and loss account as an expense, deductible in that period. To treat it otherwise would be incorrect since, as examination of the principal exploitation agreements showed, the final minimum sum was only potentially payable to each partnership. It was, contrary to Mr Cannon's view, not a matter of certainty; the payment was dependent on the performance by the partnership of certain obligations, namely the exercise of the put option or compliance with the call option, and the grant to the principal exploitation company in the interim of rights in the projects. At the relevant balance sheet date there could accordingly be no certainty about what the outcome might be. Moreover, if there was a sale of the business to the principal exploitation company the partnership would receive, not the final minimum sum, but a sale price which might be significantly greater, and the principal exploitation company would no longer be obliged to pay the final minimum sum.

238 Thus, in her view, until there was certainty about the partnership's right to receive a particular sum, and the nature of that sum, it was inappropriate to recognise a financial asset in the accounts. That is because an asset is defined by FRS 5, at para 2, as “rights or other access to future economic benefits controlled by an entity as a result of past transactions or events”. Ms Hotston Moore did not accept that the rights acquired by each partnership pursuant to its principal exploitation agreement fell within that definition; it is not accepted practice, she said, to recognise as an asset the benefit to be received under an unperformed executory contract. Thus FRS 5 excludes from the scope of an asset such things as futures contracts and employment contracts, as they are contracts for future performance. At Application Note G4 it is said that “a seller recognises revenue under an exchange transaction with a customer, when, and to the extent that, it obtains the right to consideration in exchange for its performance. At the same time it typically recognises a new asset, usually a debtor”. It follows from that passage that both consideration and performance are required before revenue can be recognised; one is insufficient without the other. Similarly, FRS 26, at para AG 35, states that “assets to be acquired and liabilities to be incurred as a result of a firm commitment to purchase or sell goods or services are generally not recognised until at least one of the parties has performed under the agreement”. Nothing in the principal exploitation agreements gave rise, without more, to the certainty of payment; each partnership had to do something, such as exercise an option, before that became the case. It followed that, in her view, it would not have been correct accounting practice to recognise a financial asset at the relevant balance sheet date.

239 The correct treatment of the equivalent payments was the central issue in Icebreaker 1 and it is, we think, more convenient to deal in detail with our conclusions about this dispute in the course of our examination of that decision. However, it will become clear from what follows that, based on our understanding of the evidence and our findings drawn from that evidence, Mr Cannon's view of the correct accounting treatment of the final minimum sum, in particular, accords more closely with our own.

Comparison with Icebreaker 1

240 As we have said, it is an important part of HMRC's case that the facts relevant to these appeals are materially indistinguishable from those considered in the appeal of Icebreaker 1. We should, they say, simply follow what was said by Vos J in that case. The appellant partnerships and the individual referrers say that, on the contrary, there are significant differences between the structure of the agreements used in these cases and those in question in Icebreaker 1 , and that, although much of what Vos J said remains relevant, closer comparison of the cases shows that his conclusions cannot be applied here.

241 It is convenient to embark at this point on an examination of his judgment, and thereafter to

determine whether HMRC are right or, as the appellant partnerships and the individual referrers say, there are sufficient dissimilarities between that case and these to lead to a different outcome. Although, for the reasons we have given, we have dealt with the facts in these appeals and references in some detail, the differences on which the appellant partnerships rely in this context can be relatively briefly described. They relate to three issues, with which we deal separately. Before going further, we should add that Icebreaker 1 offers guidance on the manner in which the payments made by each partnership to IML and its principal exploitation company are to be regarded, but does not deal with any of the questions which arise in the reference.

Icebreaker 1: part 1

242 The first significant issue on which the decision in Icebreaker 1 is of relevance relates to the restriction by ITTOIA s 34(1)(a) of the scope of deductible expenses so as to exclude “expenses not incurred wholly and exclusively for the purposes of the trade”. At [38], in a passage which it is common ground accurately states the law and which is reflected in much of what follows, Vos J said

> “There is no indication in these words that the ultimate use of the moneys by the recipient is to be relevant to a determination of the purpose for which they were expended. The focus is all on the taxpayer's own business. In other words, the statute directs attention to a single end of the telescope.”

243 We have already dealt briefly with the formation of the Icebreaker 1 partnership in February 2004, with the usual two corporate members. Six individuals joined on 5 April 2004, making aggregate capital contributions of £1.52 million; each member borrowed 70% of his or her capital from BoS. The total amount borrowed was therefore £1,064,000. On the same day the partnership entered into a licence agreement in order to acquire rights relating to eight film or television projects, one of them called **Young Alexander** , for a payment of £46,950, an administration agreement and an advisory agreement with IML, with which we deal at para 296 below, and a head distribution agreement (equivalent to a principal exploitation agreement) with Centre Film Sales Ltd (“Centre”), pursuant to which the partnership paid £1,273,866 for what were described as “exploitation costs” to Centre, which undertook both to manage the exploitation of the films and to pay annual (rather than quarterly) advances and a final minimum sum to Icebreaker 1, in consideration of the rights and benefits obtained by Centre under the agreement, which consisted essentially of the payment and the right to share in the profits which were generated. The agreement was to endure for ten years, at the end of which the final minimum sum became payable, but there were put and call options, exercisable after four years, similar to those included in the principal exploitation agreement in each of these cases. To this point, there is no material difference between the Icebreaker 1 arrangements and those with which we are concerned.

244 Icebreaker 1 submitted its tax return for the year ended 5 April 2004, exhibiting to it accounts prepared on the basis that in computing its profit or loss each of various payments it had made was deductible as revenue expenditure, and claiming relief for a loss of almost £1,491,816. HMRC opened an enquiry into the return and concluded that Icebreaker 1's claimed loss should be reduced to £11,900. On appeal, this tribunal concluded that the bulk of the claimed losses should be disallowed. Of the total payment of £1,273,866 to Centre, £1,064,000 was disallowable because, the tribunal found, it was not expended wholly and exclusively for the purposes of Icebreaker 1's film distribution trade within the meaning of s 74(1)(a) of ICTA , but instead in order to obtain and secure the right to future payments—the annual advances and final minimum sum—from Centre. Of the remaining £209,866 of that payment, the tribunal found (though after some estimation) that £174,866 was capital expenditure incurred in the production of a master negative of a film, deemed by ss 40A and 40B of the Finance (No 2) Act 1992 (provisions not relevant to these appeals) to be income expenditure but allowable only in later years, and £35,000 represented a pre-payment for future distribution services.

245 The parties agree that most of the differences of detail between that case and these are of no evident significance: for example, the intellectual property rights exploited in Icebreaker 1 related to film and television projects, whereas most of those in issue in these appeals relate to other kinds of project. The differences which the appellant partnerships say are important lie in the agreements entered into by the company standing in the equivalent position to Centipede or

Shamrock, in that case Centre. The first is that Centre instructed BoS to divide the £1,273,866 it had received from Icebreaker 1 and to pay £209,866 to a Centre account, which made those funds freely available to Centre, and the remaining £1,064,000 (equal to the final minimum sum, which as in these cases exactly matched the aggregate of the members' borrowings) into a blocked deposit account at BoS. The latter sum was therefore never released to Centre.

246 The underlying purpose of the agreements between Centre and the production companies engaged in that case was, one must assume, essentially the same as the purpose of those with which we are concerned. There is a slight obscurity in the First-tier Tribunal's decision in Icebreaker 1 [2010] UKFTT 6 (TC) about the payments by Centre to the production companies (see [152] and [153]), though it seems that the agreement or agreements were not before the First-tier Tribunal because there was a subsequent total breakdown of relations between IML and Centre (see the First-tier Tribunal's decision at [20]). Nothing in the decision of the First-tier Tribunal or that of the Upper Tribunal suggests that Centre made a large notional payment to each production company, receiving a simultaneous notional payment in return for a share of revenue, and Centre could not have used the £1,064,000 for the purpose, since the money had not been released to it. The absence of any reliance by the partnership in Icebreaker 1 on such an arrangement suggests it was not a feature of the agreement between Centre and the production companies and we deduce that only a single payment was made. In fact, neither decision mentions in any detail what Centre did with the residual £209,866, and the precise disposition of that sum remains obscure.

247 The first question to be decided is whether, as the appellant partnerships argue, so much of the exploitation fee as is equivalent to the final minimum sum is to be treated, with the remainder, as a revenue expense incurred wholly in the exploitation of intellectual property rights or, as HMRC contend, as the price of an asset. Ms Hotston Moore is, they say, wrong in her view that the fact that the final minimum sum might be payable at one date or another, or for one reason rather than another, or even that it might in some cases be called a sale price rather than final minimum sum is of any importance; what matters, as Mr Cannon had said, is that each partnership paid a certain sum for the right to receive a certain sum. That is all that is necessary to create a financial asset, and the application of elementary accounting principles makes it clear that the value of the income stream had to be taken to the balance sheet and not the profit and loss account.

248 Mr Peacock argued, by contrast, that it was Mr Cannon who was wrong in that he had failed, before reaching his opinion, to analyse the contractual documentation or the witness evidence properly. His lack of experience of the creative industries had hampered him in his analysis, and led him into error. Had he been correct in his view that the partnerships paid a sum of money to the principal exploitation company in exchange for a certain return, in particular an unconditional right to receive the final minimum sum, he would be quite right in his view that the certain return should be recognised as a financial asset; Mr Peacock agreed that para 11(c)(i) of FRS 25 defines a “financial asset” as (among other things) “a contractual right to receive cash or another financial asset from another entity”. But that is not what the partnerships did. The principal exploitation agreement in each case, as well as the evidence of Ms Hamilton and Mr Hutton, showed that the entirety of the fee was paid in order to obtain the principal exploitation company's exploitation services.

249 In addition, Mr Peacock said, Ms Hotston Moore was correct in her view that the right to receive the quarterly amounts and the final minimum sum was dependent on the performance of the obligations assumed by the partnership on signing the principal exploitation agreement, specifically on its continuing to grant to the principal exploitation company the right to exploit the partnership's intellectual property rights and, in the case of the final minimum sum, on its either selling its business and assets to the principal exploitation company or continuing to grant the licence to it for the remaining term of the agreement. The only possible conclusion on the evidence was that the payments were not in fact guaranteed but conditional. It followed that what the partnership obtained was not a financial asset within the meaning of FRS 25. The contractual right of one party to the principal exploitation agreement, the partnership, to receive cash was not matched by a corresponding unconditional obligation of the other, the principal exploitation company, to pay: the partnership did not secure a present right to receive a financial asset. Whatever the probability, payment was not certain until one or other contingency was satisfied, and until then the partnerships could not properly recognise a financial asset.

250 Mr Peacock argued HMRC's proposition that each partnership was simply buying a secured

income stream confused the purpose of the payer (in these cases to obtain exploitation services) with the use of the money by the recipient. It was irrelevant that the principal exploitation company used part of the money it received in order to secure the conditional or contingent payments it might be required to make in the future since the fact that it secured those payments did not make them any less conditional or contingent. All the principal exploitation company did was provide the partnership in question with the certainty that payment would be made if and when it became due. That argument was all the stronger in those cases in which Shamrock did not, as a matter of fact, use any part of the exploitation fee in order to fund the deposit; in those cases it could not be said that part of the fee was used for the purpose of providing the guaranteed payments.

251 We come at this point to an examination of the approach to this question in Icebreaker 1 . The clause by which Centipede agreed to make the guaranteed payments to Acornwood (see para 67 above) stated that the consideration for them was “the privileges and benefits obtained by Centipede under this Agreement”, one of which—even though not specifically mentioned in the same clause—was the payment of the fee. That was, in substance, the same wording as was used in cl 4.1 of the Icebreaker 1 agreement. At [47] and [48] Vos J said:

> “[47] In my judgment, Mr Peacock's argument [Mr Peacock also appeared for Icebreaker 1] that the sum of £1,273,866 was paid only in respect of Centre's film services and Exploitation Costs, and not for any other benefit that Icebreaker was entitled to under the [Head Distribution Agreement , equivalent to principal exploitation agreement] is a strained and artificial construction. He relied primarily on clause 4.1, about which his second supplemental skeleton said this:—

‘The HDA provides in terms that the consideration the Partnership is providing to Centre for the “certain payments”, per clause 4.1, is “the rights and benefits obtained by Centre under this Agreement”. This is, the Appellant contends, a clear agreement between the Partnership and Centre that those “rights and benefits” (as to which, see below) are for the “certain payments” and that, by necessary implication, the £1.273m (or any part of it) was not consideration for the “certain payments”.’

> [48] I do not accept this submission. As it seems to me, cl 4.1 makes it clear that the payment of the annual advances and the final minimum sum are paid ‘[i]n consideration of the rights and benefits obtained by Centre under [the HDA]’. I do not see why one of the rights and benefits obtained by Centre under the HDA is not the payment to which it is entitled under cl 2.4. Moreover, the fact that cl 2.4 states that the payment is ‘in respect of Exploitation Costs’ seems to me to be over-ridden by the obvious provision of cl 4.1, namely that the cash payments to be made by Centre (that are provided in addition to the income streams to be provided by the film distribution activities) are made by Centre in consideration of all the rights and benefits that Centre obtains, including the right to receive the £1,273,866. Of course, the rights and benefits that Centre obtains include also those that Mr Peacock identifies in para 1(b) and 1(c) from his second supplemental skeleton that I have set out above. But it does not follow, as he goes on to submit, that ‘no part of the £1.273m was paid by [Icebreaker] for the Clause 4 payments’. Clause 4.1 says the reverse.”

252 Vos J reminded himself, at [62], that the question to be asked is not, What did Centre do with the money? but What did Icebreaker 1 pay it for? At [64] he dealt with that part of the total amount paid to it by Icebreaker 1 which Centre placed on deposit:

> “… it seems to me that analysing the transaction as a whole, and looking at the matter exclusively from Icebreaker's end of the telescope, the payment of the £1,064,000, as part of the global payment of £1,273,866, was not made wholly and exclusively for the purposes of Icebreaker's trade. Indeed, that part of the payment was not made for the film distribution trade at all. It was made so that Icebreaker could be assured that it, and therefore, its members, would recover the loans that its members had borrowed from BoS, and which had been used to finance precisely that sum by way of investment into Icebreaker. BoS would not have regarded the transaction as such a low risk one (a fact

> much relied upon by the FTT) if that had not been the case. Moreover, the payment of £1,064,000 was never intended to be used for any film production or distribution purpose. Whatever Centre might have expended on preparing to film *Young Alexander* or making distribution deals for that or other films prior to the HDA is nothing to this point. The sum of £1,064,000 was expended and disbursed for the sole purpose of investment and security, and not for Icebreaker's film trade properly so regarded."

253 In other words, what was being purchased was security, in the form of certainty of payment, which the members of Icebreaker 1 could use to repay their loans. When the matter is viewed in that way the precise nature of the payment and the trigger for it are immaterial; indeed, the essence of security is that it provides protection in various situations, some of which may not be predictable when the security is put in place. Accordingly, we reject Ms Hotston Moore's approach as, impliedly, did Vos J. In Acornwood's case, save for the argument to which we come at para 257 below, we can see little room to distinguish the conclusion in Icebreaker 1 , which is of course binding on us.

254 The later version of the principal exploitation agreement (see para 87 above) was rather different, in that the consideration was expressed to be Shamrock's entitlement to assign a share of the income, for its own benefit. The appellant partnerships say that this change makes a difference of substance. When, they say, two parties agree that consideration is to be allocated in a particular way, that agreement must be taken to be conclusive. In *Spectros International plc v Madden (Inspector of Taxes) [1997] STC 114* Lightman J observed, at p 136, that:

> "The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted."

255 Thus if the partnership in question and Shamrock agreed that the payment of the fee was made by the partnership for the purpose of exploiting the intellectual property rights the partnership had acquired, and that the consideration for the guaranteed payments was something else, that agreement had to be respected. HMRC's argument that the agreements indulged in "mislabelling", and that, as their statements of case put it, the principal exploitation agreements "must be construed as a composite whole, rather than by an artificial and blinkered approach to any of its individual parts and the labels given to them" revealed an illegitimate approach to contractual interpretation. In *E V Booth (Holdings) Ltd v Buckwell (Inspector of Taxes) [1980] STC 578* Browne-Wilkinson J said, at 584:

> "In my judgment, where parties to a composite transaction have, as a result of negotiations between themselves, provided that part of the consideration is to be paid for one part of the transaction and part for another, they cannot subsequently seek to re-allocate the consideration for tax purposes. They have chosen to carry through the transaction in a particular manner, and the taxation consequences flow from the manner adopted."

256 That proposition must be equally true, the appellant partnerships say, when it is the tax authority which is seeking to re-allocate the consideration. The only conclusion properly available is that the fee each partnership paid to Shamrock was paid wholly and exclusively for exploitation services. If that is so, the fee must be treated, correspondingly, as an expense incurred wholly and exclusively for the purposes of the partnerships' trades.

257 The appellant partnerships also argue, in relation to what Vos J said at [64], that their position is to be distinguished from that of Icebreaker 1: once they had parted with the sums payable to Centipede or Shamrock, they had no further interest in or control over that money. How Centipede and Shamrock funded the quarterly payments and final minimum sum was a matter for them, and how they provided security for the letter of credit to the satisfaction of the bank was a matter between them and the bank; as long as there was a letter of credit in place it

was of no concern to the relevant partnership how it was secured, or even if it was secured. There was, accordingly, no necessary link between the payment to Centipede or Shamrock and the deposited sum or consequently, when the relevant wording differed, the guaranteed payments themselves. And in Acornwood's case, despite the use of the same wording as in Icebreaker 1 , there remained the difference that the entire fee was paid to Centipede and was not segregated, with the consequence that the link between the fee and the guaranteed payments was absent.

258 HMRC argue that the starting point in each case is to determine what was each partnership's purpose in making the payment. The seminal authority on this point is *Strong & Company of Romsey Ltd v Woodifield [1906] AC 448* , in which the taxpayer, a hotel keeper, sought to obtain relief in respect of a payment of damages to a customer who had been injured while staying at the hotel. At p 453 Lord Davey said:

> "I think that the payment of these damages was not money expended 'for the purpose of the trade.' These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

259 The money must be expended wholly (in terms of amount) and exclusively (in terms of purpose) for the trade, and duality of purpose will not suffice: see *Bentleys, Stokes & Lowless v Beeson [1952] 2 All ER 82* at pp 84–85 per Romer LJ. However, ITTOIA s 34(2) provides that if it is possible to split expenditure into one portion which is incurred wholly and exclusively for the purposes of a trade and another portion which is not, the former portion may be an allowable deduction. The latter—in this case, say HMRC, the consideration for the guaranteed income stream—is not.

260 A helpful summary of the law on the subject is to be found in the judgment of Millett LJ in *Vodafone Cellular Ltd v Shaw (Inspector of Taxes) [1997] STC 734* at 742:

> "The leading modern cases on the application of the exclusively test are *Mallalieu v Drummond (Inspector of Taxes) [1983] STC 665, [1983] 2 AC 861* and MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co [1989] STC 898, [1990] 2 AC 239 . From these cases the following propositions may be derived. (1) The words for the purposes of the trade mean to serve the purposes of the trade. They do not mean for the purposes of the taxpayer but for the purposes of the trade, which is a different concept. A fortiori they do not mean for the benefit of the taxpayer. (2) To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment. (3) The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment. (4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.
>
> To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the commissioners, not for the taxpayer."

261 However one looks at the principal exploitation agreements, and despite their wording, it is plain that what the partnerships paid for included a guaranteed income stream. Such an acquisition had nothing to do with the partnerships' trade in the exploitation of intellectual property rights but was something with an independent existence. It was not material that the agreements in the later cases stated that the consideration for the guaranteed payments was something else. That was for two reasons. First as the observation of Millett LJ, just quoted, showed, the fact that consequences were inevitably and inextricably involved in the payment must be taken to be a purpose for which the payment was made, unless those consequences were merely incidental, which plainly the consequences in these cases were not: they were a central feature of the arrangements, common to them all, and were presented as a distinct benefit to members in the promotional material. Second, the extract from the judgment in E V Booth (Holdings) Ltd v Buckwell on which the appellant partnerships relied (see para 255 above) was incomplete since it omitted two further sentences from the judgment:

> “The Crown's position may well be different in certain cases. After all, the Crown was not a party to the transaction.”

262 Those sentences made it quite clear that, while the parties to a transaction might, indeed normally would, be bound to what they had agreed, and could not seek to re-characterise it for fiscal advantage, the Crown is not so bound and can treat the arrangement for what it is, and not for what it appears to be. Thus although, as Lightman J said in Spectros International , the parties' agreement must be respected, that proposition does not extend to a case in which the agreement mis-states or mis-describes the nature of something. That point was made in the well-known observation of Lord Templeman in Street v Mountford [1985] 1 AC 809 at 819 that “[t]he manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.” This we should examine, not what the parties claim was the consideration for the payment, but what it actually was.

263 If the correct conclusion was that the payment was made for the purpose of securing a guaranteed income stream it could make no difference what the principal exploitation company did with the money; the test was the purpose of the payment, and the recipient's disposition of it, though it might be a guide, was not determinative. We should, say HMRC, conclude that the reality is that the bulk of the fee paid to the principal exploitation company was, and was known and intended by the partnership making it to be, the purchase price of the guaranteed income stream, and in consequence it should be treated as such and not as a payment made by the partnership for the exploitation of its intellectual property rights.

264 In our judgment the change in the wording of the principal exploitation agreement from that used in the Icebreaker 1 and Acornwood iterations to that used in later cases does not alter the outcome. Each partnership made a large payment to its principal exploitation company. In return it received two things: exploitation services, and a guaranteed income stream. We accept that the principal exploitation agreement in each case led to genuine legal relations and imposed real obligations in return for consideration, and in consequence was not a sham. However, for the reasons we have given elsewhere we have concluded that the arrangement by which the principal exploitation company supposedly made a payment to the production company offset by a payment for a share of the revenues was a pretence, designed, if we may say so rather crudely, to confer some plausibility on the claim that the borrowed money was available for use in the exploitation of intellectual property rights. In our judgment it failed in that objective.

265 We are equally satisfied, despite the absence of sham, that the description of the right to assign a share of the revenue as the consideration for the guaranteed payments was also a pretence. Although we accept the point made by the appellant partnerships that it is not a relevant factor that the amount paid for goods or services, when viewed objectively and commercially, may be excessive or inadequate, we do not think that proposition compels us to disregard the evidence with which we deal in our discussion, below, of the potential for profit that, if the agreements are to be taken at face value, the guaranteed payments exceeded the true worth of the right to assign a share of revenue, as it might fairly be assessed at the time of assignment, by so large a margin that neither party could realistically have believed that the one was a fair price for the other. This was not a case of one party making a bad bargain; both parties must have known that it was no bargain at all. We also accept HMRC's argument, drawn from E

V Booth v Buckwell , that it is open to them, and by extension us, to view the agreements for what they are, rather than for what they purport to be. In short, the reality is that part of the payment by each partnership to the principal exploitation company represented the price of the guaranteed income stream notwithstanding its description as something else.

266 One can arrive at the same result by examining what happened at the time the partnerships closed. In each of the earlier iterations Shamrock used a portion of the fee paid to it equal to the borrowed sums in order to make the requisite deposit; thus, as a matter of fact rather than of agreement, there was no difference in this respect between Acornwood and the other earlier appellant partnerships. We recognise that what the recipient does with the money it receives is not the test, but it is nevertheless unrealistic to disregard the application of the money when, as we are satisfied is the case here, the payer knows and intends that the money will be used in a particular way: such use becomes the payer's purpose. That is, we think, what Millett LJ meant by propositions (2) and (4) in the extract from his judgment in Vodafone which we have set out above.

267 The position in the later iterations, when Shamrock paid some or all of the deposit to the bank shortly before it received the fee from the partnership, is superficially different because it is true, as the appellant partnerships argue, that in these cases, and in contrast to the position in Icebreaker 1 , Shamrock could use the money as it wished. But it nevertheless remains the case that the purpose of the partnership in making the payment was to secure a guaranteed income stream. Ms Hamilton's own evidence was that this means of protecting the “downside” was offered to prospective members as an attractive feature of the Icebreaker arrangements. Mr Hutton, as we have recorded, regarded the borrowing arrangements as a nuisance and accepted that the borrowed money was never available, in a practical sense, for use in the exploitation of intellectual property rights. Even if it was not spelt out to each member that Shamrock would deposit a sum equivalent to the members' aggregate borrowings with the bank, Ms Hamilton knew that to be the case; we are satisfied, as was the First-tier Tribunal which heard Icebreaker 1 (see [110] of its decision), that she knew perfectly well, and could have told any member or IFA who enquired, that the only security the bank would accept, in any of these cases, was a cash deposit and that, whether or not the exploitation fee was the direct source of the deposit, the amount borrowed could never be available in practice for exploitation. It is nothing to the point that Shamrock *might* have used the whole payment for the exploitation of the intellectual property rights the partnership had acquired and met the guaranteed payments by some other means; the reality is that all concerned knew, or would have learnt if they enquired, that it would not do so, and that it was never intended that it should.

268 In addition, and so far as it remains relevant in the light of our earlier conclusions, we do not accept that in those cases in which Shamrock made the deposit in advance of its receipt of the exploitation fee, the entirety of that fee could have been available for the exploitation of the intellectual property rights the partnership had acquired. There was no evidence that, as a matter of fact, Shamrock had free funds which could be (still less were) used for that purpose; instead, it strongly suggested that Shamrock needed to receive early reimbursement of the money it had deposited. It should be borne in mind that several partnerships closed in fairly quick succession and that, as the appendix to this decision shows, in each of the last two of the tax years with which we are concerned, when Shamrock was making deposits before it received the exploitation fees, twelve partnerships closed, for all of which Shamrock was the principal exploitation company. Mr Hutton did not tell us that Shamrock had the resources to make the deposits without recourse to those fees; rather, it seems. Shamrock accumulated sufficient money from the surpluses of the fees it received over the amounts it paid to production companies, from the monitoring fees and from its share of the modest revenues, to make one deposit, and then used the fee it received from the partnership to which that deposit related to make the next deposit, and so on.

269 The proposition that the exploitation services fee was paid wholly and exclusively for the purpose of exploiting intellectual property rights is, therefore, to be rejected. It requires us to disregard the reality that all those concerned knew and intended that a relatively modest part of the total fee would actually be used in the exploitation of those rights, while the greater part would not; and the obvious fact is that the partnership would not have handed over the money if there had been no assurance of a guaranteed income stream.

270 The underlying question, as the legislation makes clear, is whether the payment, that is of the fee payable by each partnership to Centipede or Shamrock, was made wholly and exclusively

for the purposes of the partnership's business. That business, as the appellant partnerships themselves argue, was the exploitation of intellectual property rights, and not the acquisition of an income stream which was guaranteed, irrespective of the success of that exploitation, and which was not even derived from it. Once it is accepted that part of the payment was made to acquire a capital asset, that is the guaranteed income stream, it is unnecessary to look further: that is the only answer needed. It follows, therefore, that only so much of the fee as represents a payment for exploitation may represent an allowable deduction. There is therefore, in our view, no meaningful distinction to be drawn in this respect between these cases and Icebreaker 1 , and that remains true despite the changes in the arrangements which were made after the Icebreaker 1 formulation.

271 One might, conceivably though a little implausibly, debate the extent to which the fee paid by each partnership to Centipede or Shamrock represented the consideration for the exploitation and the guaranteed income stream respectively, and in some circumstances that might be a worthwhile debate, for example if the payments were not secured, or the rate of interest which determined the amount of the periodic payments could fluctuate. Here, neither of those factors is a consideration. The deposit which the partnership made possible by the members' borrowings invariably matched the final minimum sum, which in turn invariably matched the amount borrowed; and the periodic payments invariably matched the amount earned on the deposit which in turn exactly matched the interest payable on the borrowings. This was, in truth, sterile money. We can see no basis on which the consideration for the guaranteed payments should be valued at anything other than the amount of the deposit. We should add that the parties did not argue otherwise.

272 It necessarily follows, so far as the deductibility for tax purposes of that sum is concerned, that the reality, in these cases as in Icebreaker 1 , is that the borrowed money was only ever available for use as the price of the guaranteed payments, and not for the exploitation of intellectual property rights, and it was as a matter of fact used only for that purpose. We respectfully agree with Vos J that, in those circumstances, the payment cannot be brought into the calculation of profit and loss by reason of ITTOIA s 34(1) (in Icebreaker 1 the earlier provision, ICTA s 74(1)(a) , which s 34(1) replaced, was in issue).

273 It is probably not necessary to go further than that for the purposes of this decision, but we heard argument also on the question whether, irrespective of the application of ITTOIA s 34(1) , the payment was also excluded by s 33 , by reason of its being of a capital nature. Section 33 provides that:

> “In calculating the profits of a trade, no deduction is allowed for items of a capital nature.”

274 Mr Peacock did not demur from the proposition that if we should find that any part of the exploitation fee was of a capital nature, s 33 was engaged; his argument was that since, as a matter of fact, the entirety of the exploitation fee was paid for exploitation services, none of it could properly be regarded as having a capital nature. We agree that an argument based on s 33 adds little, and that it is in substance the same question (what was the payment for?) put in a different way, and we shall therefore deal with HMRC's arguments on the point quite briefly.

275 Whether or not a payment is of a capital nature is to be determined, say HMRC, in the light of all the relevant circumstances of a particular case. In *Tucker v Granada Motorway Services Ltd [1979] STC 393* Lord Wilberforce said, at 396,

> “It is common in cases which raise the question whether a payment is to be treated as a revenue or as a capital payment for indicia to point different ways. In the end the courts can do little better than form an opinion which way the balance lies. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulæ which have been found useful in another…
>
> I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure.”

276 The case law also shows that if a payment is made to secure an enduring asset or advantage it will be of a capital nature: *Atherton v British Insulated and Helsby Cables Ltd [1926] AC 205* . In that case a company made a one-off lump sum payment of £31,784 to establish the nucleus of a pension fund for the benefit of its staff. The House of Lords observed that, although not decisive, the payment of a one-off lump sum (as opposed to the making of recurring payments) is an indication that the expenditure is capital in nature; and a payment made to secure an enduring advantage is likely to be of that character. We were referred also to the detailed analysis undertaken by Dyson LJ in *IRC v John Lewis Properties [2003] STC 117* , in which he identified several features, which we do not think it necessary to rehearse, which might point to the conclusion that a payment or, as in that case, a receipt, was of a capital rather than revenue nature.

277 The payment in these cases of a large part of what was described as an exploitation fee was one-off, and it secured for the partnership, and through it the members, a secured income stream followed by a capital payment which, in substance even if not in strict form, amounted to reimbursement of the payment. In our view it is quite clear that what was acquired was an asset of a capital nature, and the jurisprudence indicates equally clearly that the payment made in return for it too was of a capital nature.

278 Our conclusion on this issue, therefore, is that in each case so much of the payment to the principal exploitation company made by each appellant partnership as matched the amount borrowed was the consideration for the acquisition of a capital asset, namely a guaranteed income stream. Even though he may not have expressed himself in the same way that was, as we read it, what Vos J also concluded. He regarded the payment as one made for investment and security and if that is right—and it is a finding which is binding on us, although we respectfully agree with it—the payment is necessarily of a capital nature.

279 In reaching that conclusion we have proceeded from our analysis of the decision of Vos J in Icebreaker 1 without regard to the experts' evidence about the correct accounting treatment, which we set out above. Before moving on we need to return to the difference of opinion between the experts on this subject. In our view Ms Hotston Moore's approach depends upon the introduction of a supposed uncertainty into an arrangement whose whole purpose was to eliminate uncertainty. It is quite true that each partnership might receive the final minimum sum by exercise of the option, or might receive a payment of the same or, conceivably, a greater (though never lesser) amount in a different guise; and it could not be predicted in advance when the payment would be made, and what would be the trigger for it. We therefore accept, as a matter of form, that the provisions in each partnership's principal exploitation agreement constituted an executory contract as that term was used by Ms Hotston Moore. But it was an executory contract only in the sense that the precise mechanism which triggered the payment differed depending on the circumstances prevailing at the time: it remains an inescapable conclusion that there was certainty of payment at some point. It was in our view for that certainty of payment, and with it the certainty that the members would be able to repay their borrowings, regardless of the time or the reason for it, that this element of the exploitation fee was paid.

280 We do not accept her argument that such a conclusion does not deal with every eventuality because the business of any of the partnerships might have been sold for an amount in excess of the final minimum sum. Ms Hotston Moore's view, as we understood it, was that if such a sale was achieved the principal exploitation company was relieved of the obligation to pay the final minimum sum, and therefore there was no invariable link between the payment by the partnership to the principal exploitation company and the latter's obligation to make a certain payment, whatever its precise character and whatever the proximate prompt for it. The difficulty with that argument, however, is that the terms of the agreements do not support it. There was provision in the agreement between Acornwood and Centipede for termination on the disposal by Acornwood of all or part of its assets, which would include a disposal of the business; other agreements were in similar if not identical terms. But in the event of termination, for whatever permissible reason, by either party, cl 9.2.1 provided that

> "The LLP shall be entitled to call for the payment by Centipede of an amount equal to the Final Minimum Sum plus a pro rata share of the next Advance payment calculated on the actual number of days elapsed."

Thus the members would receive the same in this case as in any other: sufficient to repay their loans and to discharge their interest liabilities to the date of repayment. We do not, therefore, consider that the argument advanced by Ms Hotston Moore can alter the conclusion we have reached.

Icebreaker 1: part 2

281 The First-tier Tribunal in Icebreaker 1 went on to deal with the residue of the payment to Centre (£209,866 in that case), and to consider, by reference to Centre's use of it, the extent to which it represented the cost of production or the cost of distribution, and to what extent it should be regarded as having been expended in the relevant tax year, or instead amounted to a pre-payment for services to be rendered in future years. The tribunal observed that the evidence available to it was limited, and it is also to be noted that its enquiry was in part focused on some legislative provisions (those we have already mentioned) which affect film investment, but are of no application to these cases. For those reasons we would find little to help us on these questions in the First-tier Tribunal's decision. However, even if we had, we would be required to discard it in view of the conclusions reached by Vos J in the Upper Tribunal. At [68] he said:

> “The question is what, on the true construction of the HDA or the transaction as a whole, the expense or disbursement was paid for from Icebreaker's point of view. It is not relevant to look at what Centre did with the money, as the FTT itself accepted at [154] in a different context.”

282 At [70] he added:

> “…it is necessary to consider whether it was a legitimate exercise for the FTT to seek to break down the sum of £209,866 to ascertain: (i) what part was spent on production so as to enhance a capital asset, and what part may have been legitimate distribution or other revenue expenses; and (ii) what part was a pre-payment expense for future years.”

283 As the First-tier Tribunal had examined what Centre spent rather than what Icebreaker 1 expended, and had thus approached the exercise in the wrong manner, Vos J decided that he should undertake the exercise himself, but by adopting what he considered to be the correct approach. At [71] he said that Ms Hamilton's evidence that the money was paid for the purposes of Icebreaker 1's film distribution business “could not seriously be challenged” and that the sum of £209,866 paid to Centre was “a fee paid in the year of account … It was only if the expense was truly a pre-payment that it could be challenged as deductible expenditure.” He then went on to decide that question by reference to a clause, cl 2.4, in the head distribution agreement into which Icebreaker 1 and Centre had entered. That clause was similar to the provision in Acornwood's agreement with Centipede, requiring Icebreaker 1 to pay exploitation costs as they were incurred, although with a large immediate payment, and therefore dissimilar to the equivalent provision in the later agreements which provided for an immediate payment alone.

284 At [72] and [73] Vos J said this:

> “[72] In my judgment, the fact that Centre may, as a matter of cash-flow, have used some or all of the £209,866 on production costs for Young Alexander was not something that Icebreaker can be taken to have known or expected, let alone intended. The £209,866 was a global payment made for the package of exploitation costs. The implication from cl 2.4 is that the up-front payment was for past exploitation costs, since provision is made in that clause for Icebreaker to discharge future exploitation costs.
>
> [73] Thus, in my judgment, the FTT was not justified in enquiring into where the £209,866 went. It was, in my judgment, on the face of the HDA a legitimate revenue expense, incurred wholly and exclusively for the purposes of Icebreaker's film distribution trade.”

285 Vos J went on, at [74], to decide that the First-tier Tribunal had been wrong to segregate parts of the total payment of £209,866 and to determine that part was a pre-payment for future

services, and thus not an allowable revenue expense in the year of payment. The critical part of his reasoning, as it seems to us, is that cl 2.4 provided for both an immediate payment and future payments. Thus the fee payable immediately was referable to those services which had already been rendered, or were to be rendered as the partnership closed—essentially the conclusion of the agreements which had been put in place in order to constitute the package offered to the members—and that, correspondingly, all of the £209,866 represented an allowable expense in the year of payment.

286 In our view there is no meaningful distinction to be drawn between the facts in that case and those of the Acornwood arrangements and we therefore follow Vos J, whose decision is, of course, binding on us, in concluding that the sum paid by Acornwood to Centipede, after deduction of an amount equal to the members' aggregate borrowings, is to be regarded as an allowable revenue expense in the year in which the payment was made.

287 The question which follows is whether the conclusion to be reached in respect of the other appellant partnerships should be different. In those cases there was no provision for continuing payments; there was, rather, a requirement that the partnership pay a single, pre-determined, fee at the outset, and there was no facility by which the fee might be adjusted, up or down, or by which a supplementary fee should be payable in any given eventuality. We set out the terms of the clause in the principal exploitation agreement between Hawksbridge and Shamrock which provided for the fee at para 83 above. In Bastionspark's case the equivalent clause, 4.1, was

> “Immediately upon signature of this Agreement the LLP will pay to Shamrock a fee in the sum of £4,729,000 (“the Fee”) for provision of its services hereunder”.

288 The fee payable in that case was, in fact, reduced to £4,503,000, with a corresponding reduction of the final minimum sum, because of a shortfall in the members' contributions rather than because of any change in the exploitation services, and for that reason the change is immaterial to this issue. It is to be noted that, unlike the corresponding provision of the Hawksbridge agreement, this clause did not refer to Shamrock's already having provided services (of the appellant partnerships, only Hawksbridge had such a reference in its principal exploitation agreement), but we do not think that difference is, in itself, of any consequence since it is clear, as we have already said, that as a matter of fact Shamrock had already undertaken a large amount of work. Rather more important is the change to the clause which defined Shamrock's obligations.

289 In the Icebreaker 1 head distribution agreement the relevant clause read as follows:

> “The LLP hereby appoints Centre, as its sole and exclusive distributor for the Term to exploit the Rights in the Territory, incur Exploitation Costs and procure Materials in relation to the Moving Images. Centre shall enter into Service Agreements and Exploitation Agreements for this purpose and the LLP and Centre will consult each other frequently in relation to all exploitation matters of whatsoever nature, giving due and proper consideration to each other's views.”

290 The precise formulation of that clause evolved over time. In Bastionspark's agreement the parts of the clause which dealt with Shamrock's exploitation obligations were as follows:

> “3.1 Shamrock shall work with the LLP and, if directed by the LLP, the Original Licensors to exploit the Rights in accordance with this Agreement. Shamrock shall ensure that the Rights are at all times given fair and equitable treatment and are not discriminated against in favour of any other rights or activity with which Shamrock and/or its senior representatives may be involved …
>
> 3.2 Shamrock shall not enter into any Licence Agreement without the prior written approval of the LLP.…”

291 The agreements between Edgedale and Starbrooke and Shamrock were in the same terms; again, it is only in the Hawksbridge agreement that a change of wording appears. We set out the

terms of the relevant clause as it appeared in that agreement at para 84 above. It is plain from the intermediate (Bastionspark, Edgedale and Starbrooke) version that events which can occur only in the future are included, a fact emphasised by the repeated use of the word “shall”. The same is, we think, true of the Icebreaker 1 and Acornwood (see para 64 above) wording. Although it is less clearly stated there is, in our view, a contemplation of future work in the Hawksbridge version too. That there was an obligation to undertake future work, albeit much of it had already been undertaken, did not deflect Vos J from the conclusion that the immediate payment contained no element of pre-payment. The question which arises, therefore, is whether the absence of any provision for continuing payment in the later—that is, post-Acornwood—agreements changes the conclusion.

292 In our view it does. It would, we think, be artificial and wrong in principle to treat a payment which, even if the bulk of it is attributable to work already undertaken, contains an element of payment for future work, even contingent future work, as one which has no pre-payment component at all. There was an obligation on Shamrock to undertake work in the future should that be necessary, and the evidence showed that Shamrock did in fact undertake some continuing work for which the monitoring fees could not be regarded as the reward. The work might not have amounted to a great deal by comparison with what had been done in advance, but for example, and possibly most significantly in this context, Mr Hutton or one of his colleagues regularly attended partnership meetings and provided information and advice, in particular about such matters as the disposal of the Far-fetch business, and such work cannot be dismissed as *de minimis* .

293 We cannot determine, from the evidence available to us, how much of the fee paid by each partnership to Shamrock should properly be regarded as the cost of work done in the relevant year, and how much as the cost of future work, beyond saying that it is likely that the former will significantly exceed the latter. We therefore reach on this issue a conclusion in principle, and leave the parties to agree on an apportionment if they can, or to return for further argument if they cannot. The conclusion of principle is that in the case of Acornwood and those other Icebreaker Partnerships for which it is the lead case the entirety of the fee paid to Centipede, less the equivalent of the final minimum sum, is an allowable expense in the relevant year, whereas in all the other cases, of what remains of the exploitation fee after deduction of the equivalent of the final minimum sum, a part, whose amount is to be determined, represents an allowable expense while the remainder represents a pre-payment, becoming an allowable expense in the period or periods when the work for which it is the payment is done.

Icebreaker 1: part 3

294 The third of the issues we must determine in respect of which Icebreaker 1 provides guidance relates to the IML fees paid immediately after each partnership closed. As it is undisputed that the annual fees represent payment for work to be carried out in future years, we need not deal with them. The dispute between the parties centres on their respective arguments about what it was for which the immediate fees were the consideration.

295 The appellant partnerships' case, in essence, is that the agreements speak for themselves, and show that the fees were paid for the services described in the agreements and for nothing else, that those services were carried out in the tax year within which the payments were made, and that the fees represent revenue expenditure wholly incurred and therefore allowable in that year. In most, but not all, cases there was separate provision for continuing payments in respect of future services. HMRC's position is that some part of the immediate fees represented payment for the right to enter into the scheme, and was of a capital nature (and therefore was not allowable as an expense) and some part, notwithstanding the provision for annual fees, represented a pre-payment, and was allowable, but not in the year of payment. The same, or similar, arguments were addressed in Icebreaker 1 .

296 As we have said, Icebreaker 1 entered into advisory and administration agreements with IML. It paid fees immediately of £50,000 and £120,000 respectively. The First-tier Tribunal concluded that of the aggregate of £170,000, £51,000, or 30%, was the consideration for delivery of the Icebreaker structure and not a deductible expense, £90,000 was allowable as the consideration for past services and the balance of £29,000 was a pre-payment in respect of future services. We are bound to say, with respect, that we find the reasoning which led to those conclusions rather difficult to follow.

297 In the Upper Tribunal, Vos J accepted the argument of Mr Peacock that the First-tier Tribunal had failed to pay proper regard to the provisions of the two agreements, but instead conducted an analysis of what, in the absence of evidence, it supposed that the aggregate fee must have been paid for. He then listed a number of the services for which the administration agreement provided, and made the point that some of those services were to be carried out after the date of the agreement, while others had plainly been carried out in the past. He observed (as had the First-tier Tribunal) that the adequacy or otherwise of the consideration was not a relevant factor, and then said:

> "[80] … There was no evidence of any kind before the FTT that the payment under the administration agreement was for the Icebreaker structure, nor that the services set out in schedule A to the administration agreement were not genuinely those that had been and would be provided, for which Icebreaker was paying an arm's length fee both at the time of the agreements and annually thereafter. No case was advanced that the division of the up-front and annual payments was a pretence, or had been deliberately front-loaded to evade tax.
>
> [81] The advisory agreement was, however, in a different form. It provided by para 1 that IML 'will provide [Icebreaker] with advisory services relating to the acquisition, licensing and exploitation of rights in moving images' and that '[w]e will advise you on all of the areas of business set out in the LLP Agreement of today's date, including the negotiation and entry into agreements with sub-contractors and other third parties for the exploitation of rights in moving images'. Clause 3 says that the term shall be until 5 April 2014 (ie ten years), and the fee is 'one stage payment in the sum of £50,000 on the date hereof in consideration for the provision of the services set out in para 1 above'.
>
> [82] As it seems to me, the advisory agreement is expressed to be entirely in respect of future advice. As such, whilst it is a revenue expense, it is one in respect of services to be rendered in the following ten years, and cannot be deductible in the year of account in which payment was made ending 5 April 2004."

298 His conclusion was, therefore, that the First-tier Tribunal had been wrong to look behind the agreements and to find, without evidence, that £51,000 was paid for the Icebreaker structure and was disallowable as a capital expense. It should instead have simply construed the two agreements according to their terms. Once that was done, it became clear that the £120,000 payable under the administration agreement was a disbursement made wholly and exclusively for the purposes of Icebreaker 1's trade in the year of account, but that the £50,000 paid under the advisory agreement was a revenue expense made by way of pre-payment for the following ten years, and was therefore disallowable.

299 The material clause in the administration agreement between Acornwood and IML, cl 2, is in these terms:

> "The Administrator [*ie* IML] shall provide to the LLP the Services set out in Schedule A. Such services shall be provided by the Administrator to the level and standard specified in the Schedule …."

300 Those words are identical to the words used in Icebreaker 1's agreement with IML (see [68] of the First-tier Tribunal's decision). It seems that Schedule A, too, was in similar if not identical terms. In Acornwood's case it provided that, in summary, IML would undertake Acornwood's accounting functions, prepare business plans for each proposed project, organise members' meetings, liaise with the auditors, the Registrar of Companies and HMRC, advise on the need for and secure legal services when required, prepare and submit statutory returns, deal with the admission of new members, maintain bank accounts as necessary, make and receive payments on Acornwood's behalf as appropriate, distribute reports and meeting agendas and minutes and communicate as necessary with the members. The consideration consisted of three elements: 4% of the members' capital contributions, paid immediately, annual fees equal to 0.2% of the capital, and fees for any additional work which IML agreed to undertake at a rate to be agreed at the time.

301 The advisory agreement, in Acornwood's case, consisted only of a letter, addressed by IML to Acornwood and signed by way of acceptance by Ms Hamilton on Acornwood's behalf. The operative provision was as follows:

> “We will provide you with advisory services relating to the acquisition, licensing and exploitation of distribution rights in all forms of intellectual property. We will advise you on all of the areas of business set out in the LLP agreement of today's date, including the negotiation and entry into agreement with sub-contractors and other third parties for the exploitation of such distribution rights.”

302 It is pertinent to add that the letter reserved IML's right to provide similar services to other clients, and provided that the agreement should subsist until its tenth anniversary, coinciding with the intended initial term of the partnership itself. The consideration for the services, as we have said paid immediately although the letter did not spell that out, was 2.5% of the members' aggregate contributions, with no provision for annual payments thereafter, or for additional fees for extra work.

303 The services to be carried out pursuant to the administration services agreement between Hawksbridge and IML were similar in character, though set out slightly differently in Schedule A to the agreement; that difference seems to be immaterial. Clause 2.1 provided that

> “The LLP hereby appoints the Administrator to provide the Services to the extent required by the LLP. The LLP shall not appoint any other person to provide the Services. The Administrator shall make reasonable efforts to provide to the LLP the Services in a competent and professional manner and to provide a high quality service.”

304 Those provisions, taken with the statement in cl 2.2 that the agreement was to continue for ten years and cl 2.3 which, as in Acornwood's case, allowed IML to provide similar services to others, suggest that the services were to be carried out in the future. However, cl 3.1 provided that the Price was to be

> “3.1.1 the sum of £50,000 to be paid on the date of this Agreement in consideration for the Services already provided in accordance with Schedule A; and
>
> 3.1.2 further annual payments as set out in Schedule B … in consideration for Services to be provided in accordance with Schedule A.”

305 The advisory services agreement, in this case, took the form of a formal agreement rather than a letter. The nature of what was to be provided was set out in a schedule, and although the description was rather more detailed than that offered by the letter in Acornwood's case, it was broadly the same. It was, according to cl 1.1, “to be provided”, and cl 3 added that “The Adviser shall make reasonable efforts …”, “shall use reasonable endeavours …” and “shall give due consideration …”, all suggesting future performance, as does the reservation of the right to offer similar services to others. Clause 5.1 stated that the parties were to review the operation of the agreement annually, beginning on the second anniversary (31 March 2102). The consideration, as in the administration agreement, was split: £384,681 “for Advice already provided”, annual payments of £5,000 and such additional amounts as might be agreed.

306 We do not think there is any difference, material to the issues before us, in the nature of the services rendered or to be rendered by IML to each partnership pursuant to either the administration or the advisory agreement. There was also, in each case including that of Icebreaker 1, provision for annual administration fees. The agreements between IML and Icebreaker 1, Acornwood and Bastionspark made no provision for recurring advisory fees. The material difference is that in Edgedale's case the agreement provided for such future payments as might be agreed, while there was provision for specified annual fees in the advisory agreements with Starbrooke and Hawksbridge.

307 Ms Hamilton was adamant as she gave her evidence that HMRC's perception of the IML fees, as in part the payment for a scheme, was quite wrong, and that the appellant partnerships'

position that they were paid exclusively for the services described in the agreements matched the facts. She put it in this way in a passage of her witness statement produced in respect of Hawksbridge; similar passages are to be found in the statements she provided for the remaining appeals:

> "IML is an adviser and administrator to all the Icebreaker partnerships. In each case, before being formally engaged, IML has done a lot of work for each partnership's benefit with a view to being engaged.
>
> The services we have provided to each partnership are broadly similar and include:

Advising the partnership on its overall commercial strategy, the types of projects which it could be involved with, and in relation to its dealings with third parties.

Helping the partnership source and evaluate projects.

Providing support to each partnership to enable its members to run its business."

308 Later in the same witness statement she enlarged on that general description:

> "… IML did a large amount of work for the ultimate benefit of Icebreaker Partnerships.
>
> A partnership such as Hawksbridge only received the benefit of our work when it formally entered into agreements with IML. Hawksbridge did this on 31 March 2010.…
>
> The principal services under the Advisory Services Agreement that IML provided to Hawksbridge before its accounting year end of 5 April 2010 related to advising Hawksbridge on its proposed initial projects. We helped to evaluate these and to establish what the possible revenue would be.…
>
> We also helped Hawksbridge to negotiate terms with Shamrock and other third parties, including the amounts payable to Shamrock and Hawksbridge's share of revenue from the projects. For example IML was involved in negotiating the final figure to be paid to Shamrock under the Principal Exploitation Agreement ….
>
> As part of our advisory role, IML worked alongside Hawksbridge and Shamrock at the outset to help source projects and secure the best outcome for Hawksbridge by assisting Shamrock with its arrangements in relation to the projects.…
>
> The principal services under the Administrative Services Agreement that IML provided to Hawksbridge before its accounting year end of 5 April 2010 were concerned with the administrative side of enabling it to proceed with the various licence agreements, the option and override agreements with First Light, Dreamac and Planeteer.
>
> The services that we provided to Hawksbridge under the Administrative Services Agreement before 5 April 2010 included circulating documents and resolutions to enable the members of Hawksbridge to make decisions and vote on all key matters for the partnership … IML also prepared project proposals in relation to the proposed projects. Whilst these were fairly short, a lot of work went into them because we needed to understand the arrangements in order to explain things. Once the members of Hawksbridge had decided on matters, we liaised with third parties to ensure Hawksbridge entered into the various agreements in accordance with members' wishes.…"

309 Ms Hamilton emphasised that the work described was undertaken by several members of IML's staff, and we accept from the documentary evidence available to us that the work of assembling a package of projects, albeit much of that was done by the principal exploitation company, the preparation of all the necessary agreements, the presentation of the partnership to prospective members and their IFAs or other advisers, the execution of the various agreements and the organisation of the cash transactions required a team of people if it was to be successful.

The IML fees payable immediately the partnership closed usually represented about 7.5% of the members' capital contributions, an amount which Ms Hamilton said she considered to be an appropriate percentage, representative of the work performed and acceptable to members, though she might reduce it to help a partnership struggling to raise enough cash to finance its intended projects. As we indicated when we dealt with the negotiation of the various payments we accept that there was evidence of some flexibility in setting the IML fees.

310 We had, in all, a considerable amount of evidence from Ms Hamilton about the way in which, she considered, the IML fees should be attributed to different aspects of IML's work, and how the work itself should be viewed. However, much of that evidence was, in reality, no more than indicative of her perception and it does not, as we see it, help us greatly in deciding the questions we must answer. We had some evidence from Mr Hutton on the same topic, in that he agreed that IML had spent a great deal of time, some of it in conjunction with Shamrock, in putting together the package of projects taken on by each partnership, and in various administrative tasks, but it added little to what Ms Hamilton had told us. The individual referrers did not give evidence on this subject, beyond confirming that they had each signed up to a ready-made package of projects. It was, however, plain from the substantial volume of documentary evidence which came into existence shortly before or as each partnership closed that IML had devoted a considerable amount of time to its compilation.

311 HMRC seek to distinguish the agreements used in these cases, or at least the later versions, from those in issue in Icebreaker 1 . They do not say they were shams, in the sense of being dishonest or fraudulent, but do argue that they do not provide a complete picture of the facts; and that we must view the facts realistically rather than in a blinkered manner which ignores the reality. In the context of a tax avoidance scheme, they say, the reality of the matter is that part of the fees paid to the promoter will be for the sale or provision to the payer of the capital structure under which the scheme is to operate: it is unrealistic to disregard the fact that a promoter earns his profit by selling the scheme.

312 Although HMRC accept that IML did, as a matter of fact, perform the various functions for which the agreements provided, they argue that its doing so amounted, when properly analysed with regard to the reality, to the putting together of a tax avoidance scheme: the projects were gathered together, and the documentation put in place, so that the members had ready-made arrangements in place as they joined a partnership. It followed, if that was right, that the members were paying, through the partnership, for the right to enter into the scheme, and accordingly some part of the fees should be attributed to the acquisition of that right. Secondly, the agreements were worded in the future tense, providing that IML “shall” undertake various tasks, an indication that the work was to be carried out in later years. The evidence showed that, as a matter of fact, much of it was indeed carried out in later years, by IML's attendance at partnership meetings, its provision of advice and guidance and its provision of regular administrative services on a continuing basis. It followed that a part, or further part, of the immediate payment should be treated as a pre-payment for that work and not an expense incurred in the relevant year.

313 The appellant partnerships' starting point was that these were not tax avoidance schemes at all; but in any event the IML fees contain no element of purchase price, but were paid for the services described in the agreements which, as Vos J indicated, we should simply construe according to their own terms. Moreover, the evidence showed that the advice, consisting of deciding upon and securing intellectual property rights, negotiating with Centipede or Shamrock on the terms of the principal exploitation agreement and procuring borrowing facilities with the bank was, plainly, all work undertaken during the relevant year, and it was work which enabled each partnership to embark on its trading activities. By far the greater part of the administrative services, too, were rendered either when the partnerships closed when, as the narrative above shows, a considerable amount of documentation which IML had prepared in readiness was executed, or immediately thereafter and correspondingly before the end of the relevant tax year. It was true that future work was necessary, but the annual fees were put in place to cover that work, and there was no basis on which any part of the immediate fees should be treated as a pre-payment. There is no evidence to suggest that the services set out in the advisory and administrative services agreements were not in fact provided by IML and in accordance with those agreements. There was accordingly no ground on which we could properly distinguish Icebreaker 1 and we should follow Vos J in concluding that the agreements themselves dictated the outcome.

Discussion

314 We have not found this an easy issue, not least because, conscious as we are that the decision of Vos J in Icebreaker 1 is binding on us, we have encountered some difficulty in applying what he said to the facts of these cases.

315 It is, we think, appropriate to begin by standing back from the detail in order to determine, in fairly broad terms, what it was that IML did, and to take the advisory agreement first. Using designated members, IML formed a partnership which at the outset had no trade and only nominal capital. It then assembled a package of projects and arranged borrowing facilities; the combination of those features was the product of what Ms Hamilton described as “a lot of work for each partnership's benefit with a view to [IML's] being engaged”. That phrase, as we see it, illustrates the first difficulty: was the work done for the partnership's benefit; or was it done in order that IML should be engaged, and thereby become entitled to a fee? The second difficulty is that in Icebreaker 1 Vos J concluded that the entirety of the advisory fee represented a pre-payment because of the manner in which the agreement was worded, in the future tense, which is also the tense adopted by the versions of the agreements with which we are concerned. The evidence, however, shows that most of the work was undertaken before the members joined the partnership, and that there was relatively little thereafter. There is, of course, also the difference between Icebreaker 1 and these cases, other than Acornwood and Bastionspark, that there was provision both for an immediate fee and annual payments, albeit in the case of Edgedale there was no more than an unenforceable agreement to agree.

316 Against that background we have come to the conclusion that there is a distinction to be drawn between the circumstances of Icebreaker 1 and those of Edgedale, Starbrooke and Hawksbridge; we will return to Acornwood and Bastionspark shortly. First, it does not seem to us that a fee “for Advice already provided”, as the agreements put it, can amount to the consideration for services “to be provided”, the more so when the detailed obligations are also expressed in the future tense. When there is, in addition, provision for annual payments (we are willing to treat the rather vague Edgedale provision in the same way) which relate to the future services it is, in our view, incorrect to regard any part of the immediate fee as a pre-payment. In the absence of sham or of evidence that an apportionment on which the parties have agreed has been artificially determined, and there is none in these cases, it seems to us that the apportionment must be respected.

317 However, we also differ from Vos J in finding, in these cases, that there is evidence that the fee was paid, not for advisory services, but for the purchase of a package. That evidence is to be found, first, in Ms Hamilton's statement that the work was undertaken “with a view to [IML's] being engaged”, second, in her own description of the work undertaken before a partnership was offered to prospective members, set out in the extract from her statement which appears at para 308 above and which, when properly analysed, does not amount to the giving of advice to anyone, but consists only in the assembling of a package, and, third, in what we were told by the individual referrers (and is in any event obvious): they each joined a partnership which already had a ready-made package of projects. IML did not advise either the partnership or the members on projects at that stage, in such a way that they might accept or reject any one or more of them, but simply presented a no longer negotiable bundle of agreements. It did so, as Ms Hamilton said, in the hope of attracting members to a partnership; and as the individual referrers told us, what they took as they joined a partnership was the package on offer—there was no scope for changing it. A prospective member had a choice, in most cases, of partnership, but IML offered no advice on that choice (or if it did, it was not advice for which the advisory agreement provided). In our view the members of any partnership, on joining it, and the partnership itself (since it is the partnership's rather than the members', payment which matters, artificial though the distinction may seem), paid a fee to IML not for “advice already provided” but for the package with which they were presented. The immediate fee was, therefore, the consideration for an asset even if the partnership had to make good its asset by acquiring the intellectual property rights which the package comprised. Although Vos J found no evidence in Icebreaker 1 that the advisory services fee represented payment for the structure (in fact, so far as we can tell from his decision, he was not asked to do so), it is conspicuous that he also did not attribute any part of it to advice given in the relevant year. On the latter point we are content to follow him.

318 In Acornwood's and Bastionspark's cases there is a difference in that there was no provision for annual advisory fees, and in that respect there is a greater similarity with the facts of

Icebreaker 1 . It seems to us an inescapable conclusion, in those circumstances, that we must follow Vos J in attributing at least some of the fee to pre-payment for future years. However, there are two further considerations. First, as we have related, Acornwood did in fact take on a further set of projects after it had closed, and we see no reason why so much of the advisory fee as is fairly to be attributed to IML's work in respect of those projects should not be treated as revenue expenditure of Acornwood in that year. Second, there is no distinction to be drawn between Acornwood, Bastionspark and the other appellant partnerships in respect of what was presented to prospective members, that is a ready-made package. In our judgment, therefore, the advisory fee paid by Acornwood is to be divided into three elements: a payment for the package, revenue expenditure incurred in 2005–06, and a pre-payment. We do not have the evidence on which we might attempt that division ourselves. In Bastionspark's case the division must be into two parts, a payment for the package and a pre-payment. Again, we do not have the evidence from which the division might be made, but in a practical sense it makes no difference to the outcome of Bastionspark's appeal since none of the advisory services fee represents an allowable expense in the relevant year.

319 The structure of the administrative services agreements in Icebreaker 1 and these cases is similar, in providing for both an immediate and an annual fee. In the absence of evidence that there was anything artificial about the determination of each of those elements it seems to us that there is no basis on which we can properly distinguish Icebreaker 1 and we accordingly conclude that the immediate administrative services fee in each case is to be treated as revenue expenditure of the partnership in the year to which the closure notice relates. We should add, in case it should be relevant elsewhere, that we are satisfied from the evidence that IML's administrative services were rendered to the partnership as and immediately after it closed and, even if the matter were at large, we would not conclude that any part of that fee represented payment for the structure or package, or a pre-payment.

Conclusions on the Ineffective Argument

320 At para 9 above we set out five questions, the first four of which make up the various elements of HMRC's ineffective argument. The conclusions we have reached on those questions are described in the preceding sections of this decision, but need some drawing together.

(1) What were the relevant payments made for?

321 The payments made to the principal exploitation company are in each case to be divided into two parts. The first, in an amount equal to the final minimum sum, was paid for the purchase of a certain income stream (para 278); the second, representing the remainder of the payment, for exploitation services (para 293). The advisory fees paid to IML on closure of the partnership represented, in Acornwood's case, the consideration for three things: the purchase of a package; advisory services rendered in the relevant year; and pre-payment for future services (para 318). In Bastionspark's case they represented in part the consideration for the package and as to the remainder a pre-payment. In all the other cases the advisory fees so paid represented the payment for the package of projects, and nothing else (para 317). All of the administration fees paid on closure of the partnership represented, in each case, the consideration for services rendered in the relevant tax year (para 319).

(2) In the light of the answer to question (1), was each of the payments of a revenue or capital nature?

322 The answer to this question follows naturally and, we think, uncontroversially from what we have said in answer to question (1). The payments to the principal exploitation company which represent the purchase price of a guaranteed income stream are of a capital nature while the remainder are of an income nature. The advisory fees paid immediately by Bastionspark, Edgedale, Starbrooke and Hawksbridge were all of a capital nature, whereas the fee paid by Acornwood must be apportioned: so much of it as represented the purchase price of the package was of a capital nature while the remainder is of a revenue nature. The entirety of the administration services fee paid on closure of the partnership was of a revenue nature.

(3) Do the appellant partnerships' accounts reflect those conclusions?

323 The answer to this question is plainly not: the taking to profit and loss account (as each partnership did) of the entirety of the amounts paid to IML and the principal exploitation company was not correct since it led to the introduction into the calculation of the profit or loss of what we have found to be capital payments and of sums properly to be treated as pre-payments. That approach was, therefore, not GAAP-compliant, and did not satisfy the requirements of ITTOIA ss 25(1) and 26(1) . Our conclusion, although it is more properly a matter for the appellant partnerships' auditors, is that the accounts should be re-drawn so as to remove from the calculation of the profit or loss earned or sustained in the relevant year those payments which we have found to be of a capital nature, or which represent pre-payments. In any event, the necessary consequences must flow for tax purposes as if the accounts had been so amended.

(4) What are the tax consequences of the arrangements, as we find them?

324 As we have explained, there are a number of matters of detail, in particular concerning the apportionment of some of the payments, which we cannot resolve from the evidence available to us, and we can make decisions only in principle. It follows from what we have said above that each partnership was entitled to treat as an allowable expense in the relevant year only so much of the payments it made as was of a revenue nature, and which did not represent a pre-payment. We accept that, so far as they were of a revenue nature and attributable to the relevant year, the payments were made for the purposes of the partnerships' trades and that they are not excluded from relief by virtue of ITTOIA s 34(1) .

325 The remainder of the amount paid, however, may not be taken to profit and loss account in the relevant year and, in the case of capital payments, at all. In every case, therefore, the true loss for the relevant year will be considerably less than the amount claimed though not, we think, as little as HMRC have maintained. As we cannot make a calculation of the true loss in each case for ourselves we also cannot determine the extent to which the conclusions set out in the closure notices require amendment. It appears, nevertheless, that in each case it will be necessary to allow the appeal against the closure notice, although only to a limited extent.

The Ramsay Argument

326 It is uncontroversial that the Ramsay line of authority enables a court or tribunal, in certain circumstances, to examine a composite transaction, or linked series of transactions, as a whole and to apply the relevant taxing statute to the whole rather than discretely to each step in order that the overall transaction is taxed in accordance with the statutory intention. The proper approach can be derived from the decision of the House of Lords in Ramsay itself. There, the taxpayer sought to obtain the benefit of loss relief in order to escape tax on a large capital gain. He adopted a scheme which required a series of steps to be carried out in rapid succession according to a pre-arranged timetable. Once started, it was intended that the scheme should be carried through to its conclusion, in order to create the desired capital loss. In reality, however, a comparison of the taxpayer's position at the start and finish showed that no real loss was suffered. The House held that such a scheme should be viewed, not as a series of separate transactions, none of which was a sham, but as a whole; and that in doing so it is necessary to compare the position, in real terms, of the taxpayer at the start and the finish.

327 HMRC's argument is that there is a close parallel between Ramsay itself and this case. The arrangements were so structured, they say, that, save for the IML fees and some incidental expenditure, the members were guaranteed at the end of the sequence to be put back in the position from which they started, in that not merely were their borrowings repaid but they did not themselves have to find the interest on the borrowings in the meantime. If any money was ever at risk it was no more than their own capital injection. HMRC's argument focuses only on the borrowed sum; they do not contend that the Ramsay principle applies to the amounts injected by the members from their own resources. The appellant partnerships' case (and that of the individual referrers) is that HMRC's proposition misrepresents the reality in that, for the reasons we have already set out (although contrary to the findings we have made), the borrowed money was in fact used for the purposes of the trade and the conditional or contingent character of the final minimum sum or its equivalent shows that, unlike in a case to which the Ramsay principle might apply, the necessary element of certainty was absent. There was no guarantee that the members of a partnership would be put back in the position from which they started.

328 In Icebreaker 1 Vos J dealt with the Ramsay line of authority in some detail, at [27] and following, and in doing so extracted a number of principles which, he said, showed how one should approach an analysis of the agreements used in that case. At [40] he observed that

> "… both sides accept that, once one has understood the purpose of the statute, and the correct approach to the analysis of the transaction in question, the next most important task is the construction of the documents creating the transaction itself. Only after that exercise has been concluded, can one consider whether this is a case in which the tribunal would be justified in disregarding certain stages of that transaction on the principles in Ramsay , [*MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2003] 1 AC 311*], and [*Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] 1 AC 684* (" BMBF ")].

329 However, he then went on to conduct the exercise of construing the documents, and reached his conclusions without further reference to Ramsay principles. Thus he did not consider whether, and if so in what manner, the tribunal would be justified in disregarding certain stages of the transaction.

330 We too are not altogether persuaded that the Ramsay line of authority can have any application to these cases, though perhaps for slightly different reasons. If we are right in our conclusions about the ineffective argument, the tax treatment of the transactions, as we have found them to be, conforms with the purpose of the legislation: once the appellant partnerships' accounts have been redrawn to comply with GAAP, only those payments which were of a revenue nature and made in respect of expenses incurred for the purpose of the trade in the relevant year would be brought into the profit and loss account for that year. If, instead, we are wrong and the entirety of the exploitation fee was, as the appellant partnerships argue, paid for exploitation services then, again, we do not see anything in the arrangement which offends the relevant taxing provisions. The exploitation fee would be properly deductible in computing each partnership's loss because, on this hypothesis, it would be an expense of a revenue nature incurred for the purposes of the trade in and wholly referable to the relevant tax year. It is not a consideration for this purpose that the amount paid is excessive when assessed on commercial principles, or that it will take many years for a return to be achieved.

331 In order to consider the application of Ramsay principles to these cases we need to proceed on a different hypothesis, namely that the exploitation fee (or so much of it as was equal to the final minimum sum) was in reality of a capital nature, but the scheme succeeded in its purpose of ensuring that it was treated, by correct application of GAAP and consequently for tax purposes, as a revenue expense wholly attributable to the relevant year. Although, in view of our findings, that is an unrealistic position, and moreover not one which reflects the appellant partnerships' case, we think it appropriate to deal, albeit fairly briefly, with the arguments we heard. As we have said, Vos J analysed the authorities, and their relevance to these arrangements, in Icebreaker 1 and there is nothing to be gained by our adding to an already long decision by repeating what he said.

332 We should, however, mention and summarise a further recent and convenient analysis of the authorities provided by Lewison J, also sitting in the *Upper Tribunal, in Berry v Revenue and Customs Commissioners [2011] STC 1057* . This decision was released shortly after that in Icebreaker 1 , and Vos J therefore did not have the benefit of it. At [31] Lewison J set out a number of propositions. The Ramsay principle is a general principle of statutory construction. In applying it one must determine, purposively, exactly what transaction answers to the statutory description, and whether the transaction in question does so; those two steps may be undertaken in either order. The purpose of a statutory provision must be found in the words of the statute itself, and the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the Act as a whole. The more comprehensive a statutory provision or description, the less the scope for deviating from the literal meaning of the words. There must be a search for the relevant fiscal concept, and it must generally be assumed that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction. A relieving provision should normally be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief although even a transaction carried out in

order to avoid tax may still be one that answers the statutory description: tax avoidance schemes sometimes work. The facts must be viewed realistically and in the case of a composite transaction (that is one where there is an expectation that the whole series of transactions will be carried through) one should examine its overall effect rather than each step individually, and should disregard irrelevant steps.

333 In defining those principles Lewison J referred to, and clearly relied on, the succinct and frequently quoted observation of Ribeiro PJ, in the Hong Kong Court of Final Appeal, in Collector of Stamp Revenue v Arrowtown Assets Limited [2003] 6 ITLR 454 at [35]:

> "… the driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

334 That, HMRC say, is the approach we should adopt in considering the relevant statutory provisions and facts in the present case; it was, in essence the approach that Vos J identified to be correct in Icebreaker 1 . There is a close parallel between this case and Tower MCashback LLP 1 v Revenue and Customs Commissioners [2011] AC 457 in which, at [75], Lord Walker of Gestingthorpe said of the scheme in that case,

> "…75% of the capital raised, although not simply a sham, was really being used in an attempt to quadruple the investor members' capital allowances …In this case there was a loan but there was not, in any meaningful sense, an incurring of expenditure of the borrowed money in the acquisition of software rights. It went into a loop in order to enable the LLPs to indulge in a tax avoidance scheme."

335 The outcome was that the scheme failed, on Ramsay grounds, because of that artificial structure. The same result, HMRC say, should apply here.

336 The appellant partnerships argue that the Ramsay approach can have no application to these cases. Once it is accepted (as HMRC do) that the documents are not shams they are to be construed on their own terms. There is no scope for construing them in some other way, or for disregarding their effect. If, on proper construction, they are found to be agreements by which the members borrowed money which they injected into trading partnerships, for the purposes of the partnerships' trade, there is nothing to be disregarded. The partnerships and, ultimately, the members should be taxed (or secure relief from taxation) on the basis of what the agreements showed that they did, and not in the manner in which HMRC think they should be treated.

337 We have, as we have indicated, effectively accepted the appellant partnerships' argument that Ramsay has no application to these cases, albeit not for quite the same reasons. But if one assumes for this purpose that the arrangements had succeeded in ensuring that a capital payment was treated for tax purposes as if it were an allowable revenue expense we agree with HMRC that one must at least consider whether, as Ribeiro PJ put it, "the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

338 The transaction, viewed realistically, was one by which (as we have already said) the members borrowed money which was placed, directly or indirectly, into a deposit account with the lending bank in order that the interest earned on the deposit would enable the borrowers, pound for pound, to pay the interest they incurred on the borrowing, and in order that the deposit would eventually be released for the sole purpose of repaying the borrowing. It was, for all practical purposes, money going round in a circle; and the borrowers were in exactly the same position at the end as they had been in at the start.

339 We are conscious of the need to avoid taking Ramsay principles too far, and we heed the warning of Lord Walker in Tower MCashback , at [77], that:

> "One of the lessons of the BMBF case is that it is not enough for the revenue, in attacking a scheme of this sort, to point to the money going round in a circle. Closer analysis is required."

340 Nevertheless, one cannot escape the fact that, as in Tower MCashback , the borrowing served no useful purpose but the inflation of the supposed loss, and the further fact that the money borrowed was not used, and was never available for use, in the exploitation of intellectual property rights. In *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1989] STC 705* Lord Goff of Chieveley described such arrangements as “typical examples of artificial transactions, the sole purpose of which is the avoidance of tax”. He went on to add that “They can, in my opinion, be properly disregarded for the purposes of tax.” In our view, were this in reality a live issue before us, the same outcome would be appropriate here.

The Reference

341 The answers we have already given render the references of largely academic interest only but, in case we are found to be wrong in those answers, we should deal with the referred questions. We set each out in full as we reach it; a summary of them is to be found at para 13 above. The questions were put in the reference itself in a different order from that in the summary, but we have found it convenient to deal with them in accordance with that order. We shall start with the questions and the parties' arguments about the factors which are of importance in arriving at the answers, followed by the evidence relevant to the issues we heard from the individual referrers, and then our conclusions. As it is HMRC who raise the matters to which the referred questions relate as obstacles to the availability of relief we shall deal with their arguments in relation to each question first.

342 It is necessary, however, to begin with some preliminary remarks. The individual referrers accept that it is an inevitable consequence of the fact that the structure of the transactions entered into by the partnerships, at least by those partnerships which closed within any given tax year, are materially identical, that HMRC's case in respect of the commercial basis question (that is, whether each partnership's trade was carried on a commercial basis and with a view to profit) is generic and, second, that our conclusions in relation to those of them who are members of lead partnerships—Mr Bastionspark, Mr Edgedale, Mrs Starbrooke and Mr Hawksbridge—must be conclusive of the answer to the commercial basis question for the other individual referrers. They also accept that our findings in relation to the trades carried on by the lead partnerships will inform the resolution of the active partner question for each of Mr Bastionspark, Mr Edgedale, Mrs Starbrooke and Mr Hawksbridge, and for the same reasons. Similarly, since the structure of the transactions entered into by all of the Icebreaker Partnerships is materially the same, our findings in relation to the members of the lead partnerships must also inform the resolution of the active partner question in relation to the individual referrers who are members of other Icebreaker Partnerships.

343 On the other hand, said Mr Maugham, the Restrictions Regulations question requires for its answer no more than the construction of the relevant lending and security documents entered into by the individual referrers and the partnerships of which they were respectively members. He suggested that our conclusions in relation to the four individual referrers who are members of lead partnerships should be conclusive of the answer to the Restrictions Regulations question for the other individual referrers. Alternatively, he said, HMRC should agree that we need answer the Restrictions Regulations question only in relation to the lead partnerships. We will deal with this point when we arrive at our discussion of the Regulations.

344 We should also mention, although only parenthetically, a further referred question, one not set out in the summary at para 13 above. For Mr Hawksbridge the question was put in this way:

> Was his contribution to the trade of the relevant LLP in question made for a “prohibited purpose” as those words are used by section 113A ITA 2007 as inserted into Chapter VII of Part 4 ICTA 1988 by section 26 and Schedule 4 paragraph 3(3) FA 2007 ?

345 For all the other individual referrers it is:

> Was his [or her] contribution to the relevant LLP in question made for a “prohibited purpose” within the meaning of section 113A ITA 2007 ?

346 The meaning of “prohibited purpose” is to be found in s 113A(3) :

> “For the purposes of this section a contribution is made for a prohibited purpose if the main purpose, or one of the main purposes, of making the contribution is the obtaining of a reduction in tax liability by means of sideways relief or capital gains relief.”

347 It is common ground that this question (that is, whether the purpose of making a capital contribution was to reduce the payer's tax liability) must be answered by reference to subjective criteria, and therefore no answer can be given which will be of equal application to every member. Thus although we have described and analysed the evidence given by the individual referrers, our conclusions on their perception of the Icebreaker Partnerships, and their reasons for joining one, do not dictate the outcome for every member of an Icebreaker Partnership. It is also common ground that s 113A is engaged only in respect of members who are inactive (strictly, did “not devote a significant amount of time to the trade in the relevant period for that year”), in other words those in respect of whom we answer the active partner question in HMRC's favour, in which case the maximum amount they may each claim for sideways loss relief is capped at £25,000 in any event. The individual referrers accept that, in those cases in which s 113A is relevant because the particular member is inactive, but the remaining questions have been decided in his or her favour, the referred question relating to s 113A must be decided in HMRC's favour. HMRC have some minor reservations about the application of s 113A to other members of Icebreaker Partnerships, but nevertheless agree that there is no need for us to deal further with this issue, and we shall therefore not do so.

The commercial basis question

348 The questions whether the partnerships could ever, realistically, hope to make trading profits, and whether their trades were commercial, are of some relevance to the issues which arise in the appeals, but are not issues in themselves. An important question in the reference, however, is whether the trades were carried on on a commercial basis and with a view to profit, a requirement which must be satisfied if sideways relief is to be available to the individual referrers, and a question to which the realistic prospect of profit is of obvious relevance, though not the only consideration.

349 The referred question differs slightly from year to year. For 2006–07, as it affects Mr Bastionspark, Mr Ironmoat and Mr Keepstone, it is as follows:

> In relation to the trade carried on by the relevant LLP in question was it: (a) being carried on “for the year of assessment” on a “commercial basis” and “with a view to the realisation of profits” in the trade as those terms are used in section 384 of the Income and Corporation Taxes Act 1988 (“ICTA 1988”); and/or (b) carried on throughout the “period” on a “commercial basis” and in such a way that profits in the trade could “reasonably be expected to be realised in that period or within a reasonable time thereafter” as those terms are used in section 381 ICTA 1988 ?

350 For 2007–08 (Mr Edgedale), 2008–09 (Mrs Starbrooke), and 2009–10 (Mr Moondale and Mr Hawksbridge) it is rather shorter:

> Was the trade carried on by the relevant LLP in question “commercial” as that term is used by such of sections 66(1) and 74(1) ITA 2007 as are relevant?

351 It is appropriate to begin by setting out the legislative provisions which give rise to the questions. As we have said, many of the members aimed to secure relief by operation of ICTA ss 380 and 381 . These provisions remained in effect for tax years up to and including 2006–07, and therefore apply to the members of Acornwood and Bastionspark, and the members of the other Icebreaker Partnerships for which they are lead cases. The ICTA provisions were re-written to ITA ss 64, 71 and 72 , and those provisions, which are substantially but not wholly identical, apply to later years and affect the members of Edgedale, Starbrooke and Hawksbridge, and of the other partnerships for which they are the lead cases. ITA also introduced TCGA s 261B ,

which extended the effect of ITA ss 64, 71 and 72 by allowing a person with insufficient income to enable him to relieve the entirety of a loss to relieve the balance of the loss (after offset against any income) against his capital gains. We do not think it necessary to deal further with that section for the purposes of this decision. As they were in force at the time, and so far as they are relevant for present purposes, ss 380 and 381 provided as follows:

> *"380 Set-off against general income*
>
> (1) Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within twelve months from 31st January next following that year, make a claim for relief from income tax on—
>
> > (a) so much of his income for that year as is equal to the amount of the loss …."
>
> *381 Further relief for individuals for losses in early years of trade*
>
> (1) Where an individual carrying on a trade sustains a loss in the trade in—
>
> > (a) the year of assessment in which it is first carried on by him; or
> >
> > (b) any of the next three years of assessment;
>
> he may, by notice given on or before the first anniversary of the 31st January next following the year of assessment in which the loss is sustained, make a claim for relief under this section.
>
> (2) Subject to … this section, relief shall be given under subsection (1) above from income tax on an amount of the claimant's income equal to the amount of the loss, being income for the three years of assessment last preceding that in which the loss is sustained, taking income for an earlier year before income for a later year.
>
> (3) …
>
> (4) Relief shall not be given under subsection (1) above in respect of a loss sustained in any period unless the trade was carried on throughout that period on a commercial basis and in such a way that profits in the trade (or, where the carrying on of the trade forms part of a larger undertaking, in the undertaking as a whole) could reasonably be expected to be realised in that period or within a reasonable time thereafter…."

352 Section 380 did not have any equivalent to s 381(4) , but the same restriction appeared instead in s 384 , entitled "Restrictions on right of set-off". Subsection (1) provided that:

> "… a loss shall not be available for relief under section 380 unless it is shown that, for the year of assessment in which the loss is claimed to have been sustained, the trade was being carried on on a commercial basis and with a view to the realisation of profits in the trade or, where the carrying on of the trade formed part of a larger undertaking, in the undertaking as a whole."

353 The corresponding provisions of ITA are as follows, again so far as material to this decision:

> *"64 Deduction of losses from general income*
>
> (1) A person may make a claim for trade loss relief against general income if the

person—

(a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year ("the loss-making year") …

(8) This section needs to be read with—

(a) …

(b) sections 66 to 70 (restrictions on the relief),

(ba) sections 74ZA to 74D (general restrictions on relief) …."

"66 Restriction on relief unless trade is commercial

(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.

(2) The trade is commercial if it is carried on throughout the basis period for the tax year—

(a) on a commercial basis, and

(b) with a view to the realisation of profits of the trade.

(3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits."

"72 Relief for individuals for losses in first 4 years of trade

(1) An individual may make a claim for early trade losses relief if the individual makes a loss in a trade—

(a) in the tax year in which the trade is first carried on by the individual, or

(b) in any of the next 3 tax years …

(5) This section needs to be read with—

(a) …

(b) section 74 (restrictions on the relief unless trade is commercial etc),

(ba) sections 74ZA to 74D (general restrictions on relief) …"

"74 Restrictions on relief unless trade is commercial etc

(1) Early trade losses relief for a loss made by an individual in a trade in a tax year is not available unless the trade is commercial.

(2) The trade is commercial if it is carried on throughout the basis period for the tax year—

(a) on a commercial basis, and

(b) in such a way that profits of the trade could reasonably be expected to be made in the basis period or within a reasonable time afterwards."

354 There are further restrictions which focus on the individual members, and they are to be found in the other provisions of ITA, ss 74ZA to 74D mentioned in ss 64 and 72 ; similar provisions appeared in ICTA s 118ZE . They import the "active partner" question to which we come at para 417 below. ITA ss 67 to 70 have no application to these appeals or the reference.

355 There is a difference between the ICTA provisions and the re-written provisions in ITA —which the Explanatory Notes published with ITA indicate was intended—in that the earlier provisions stipulate that the question is whether the trade was carried on "on a commercial basis" throughout the "year of assessment" in which the loss was sustained, whereas the later provisions refer to the "basis period" (the meaning of which is explained below) but it does not seem to us, and the parties did not suggest, that this difference is material for present purposes or that there is any other meaningful difference between the earlier and later statutory provisions.

356 We propose at this stage to set out the parties' submissions on the law and their approach to the application of the law to the facts which, they say, we should find in respect of this subject before coming to our own interpretation of the relevant law and a more detailed analysis of the evidence, and of the facts as we find them.

HMRC's submissions

357 HMRC's underlying argument is that an activity may amount to a trade carried on with a view to profit yet still be conducted on an uncommercial basis, and that if it is it fails the statutory test: both requirements must be satisfied. Mr Blair gave as an example the antique shop where the opening hours are unpredictable or depend on the owner's convenience to which Robert Walker J *referred in Wannell v Rothwell [1996] STC 450* at 461. Thus the mere fact that a trade is being carried on, and profits are being, or may be, earned, does not automatically lead to the conclusion that the activities are carried on "on a commercial basis"; if it did, that legislative criterion would be otiose. In the same case Robert Walker J went on to draw a distinction between "the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante".

358 A number of observations about the "on a commercial basis" test were made by this tribunal in *Samarkand Film Partnership No 3 and others v Revenue and Customs Commissioners [2012] SFTD 1* (" Samarkand "), in which structures similar in broad outline to the Icebreaker Partnerships were under consideration; we deal with those structures in more detail at para 471 below. There too the partnerships were to receive secured and guaranteed payments which were sufficient to service the members' loans, representing in that case 90% of the sums contributed, and an uncertain (and probably very small) share of profits. The tribunal held that the partnerships were not trading because they did not have a genuine commercial purpose; the major returns to the members were represented by the guaranteed sums, and were unaffected by the performance of the films. After referring to Wannell v Rothwell the tribunal observed at [253] that "it seems to us that the serious interest in a profit is at the root of commerciality". Thus "profit" requires no more than a surplus of income over expenditure, which may arise by good fortune rather than by design, whereas "on a commercial basis" implies something rather more, of which profitability is merely one, even if the most important, element. In Samarkand the profits which might be derived from the films were (as the tribunal found) of limited interest to the members; the partnership's activities consisted only of managing the fixed returns. Accordingly it could not be said that the partnership was pursuing a trade on a commercial basis.

359 HMRC do not contend that these cases should be viewed in exactly the same way, and they accept that all of the partnerships, and correspondingly the members, carried on a trade in the year of assessment relevant to their respective claims, that profits (even if modest) could be

expected in the period in question or within a reasonable time thereafter, as ICTA ss 381(4) and 384(1) , and ITA ss 66(2)(b) and 74(2)(b) require, and that the partnerships suffered losses in those years. But, they say, the business of none of the partnerships was carried on "on a commercial basis", and in doing so they rely on an argument based on the net present value ("NPV") of the future receipts. The essence of this argument is that initial expenditure must be compared with the NPV of the future receipts. If the former exceeds the latter there must be an expectation of collateral benefits which outweigh the difference. We were asked to take Bastionspark as an example; although we have not dealt with Bastionspark's projects in any detail it is not necessary to do so for the purposes of this argument, which is applicable to all the Icebreaker Partnerships.

360 Leaving the bank fees and margin to one side, Bastionspark's initial expenses consisted of the fees paid to Shamrock (£4,503,000), the IML fees (£375,750), and the cost of the licences (£20,001). That aggregate expenditure of £4,898,751 can be split into two elements: an amount equal to the final minimum sum (£4,008,000), and the balance (£890,751). Bastionspark, like all the other appellant partnerships, had a guaranteed entitlement to quarterly advances and the final minimum sum, and was entitled without any guarantee to a proportion of the revenues earned by the projects.

361 It is obvious, say HMRC, that if a person pays a sum of *x* (equal to the final minimum sum) which he has a right to receive back after 10 years (for this purpose the options exercisable after four years can be disregarded), plus a balance of *y* (where *y* is £890,751, or about 22% of *x*), and in the interim will receive interest on *x* at (as was always the case in the Icebreaker Partnership arrangements) a lower than commercial rate, then the NPV of his future receipts (*ie* the NPV of *x* and the low interest) must be less than *x* + *y* . So much was conceded in Mr Maugham's skeleton argument; and it followed, even leaving aside the low rate of interest, that the arrangements could be commercial only if there were other expected profits, the value of which would, if realised, outweigh the deficit—in other words, the value of the right to a share of revenues must have been greater than the difference in value between the NPV of the future rights on the one hand and *x* + *y* on the other.

362 In that respect there was a close similarity between the facts of these cases and those of Samarkand , in which the tribunal said, at [292], that "it was very unlikely that [the rights to future profits] would have produced any significant sums, and we do not believe that there was any real chance or expectation that they would deliver a return big enough to compensate for the net present value losses". It is, say HMRC, equally clear that the value of Bastionspark's rights to revenue shares was less than the deficit. Projects of the type with which it (like all the Icebreaker Partnerships) was involved are very risky and, as its own evidence showed, the majority would not generate significant revenues. The risky nature of the projects was borne out by what had happened. An analysis of the returns earned from the exploitation of their intellectual property rights by over 50 Icebreaker Partnerships, during the tax years from 2003–04 to 2009–10, showed that they had achieved an average annual return on the members' contributions (that is, disregarding the guaranteed sums and the borrowed capital) of less than one tenth of one percent, and that it would take more than 200 years to recover the capital, even disregarding interest and inflation. None of the appellant partnerships, as we have already said, made a profit and although some exceeded and others did not attain the average, none showed any sign of becoming profitable, to the extent that it could realistically be expected that the capital injected might be recovered within a reasonable timescale.

363 The NPV of Bastionspark's revenue rights must therefore have been less than the £890,751 which was expended on them. The same conclusion, say HMRC, should be reached in respect of all the partnerships despite the minor differences between them, and is of equal application to the remaining individual referrers. As Mr Maugham did not suggest that there were any factors which might lead us to different conclusions for different partnerships, or for different individual referrers, we do not think it necessary to explore this argument further. In addition, say HMRC, it is not open to the members to argue that the benefit, or purported benefit, of loss relief could be taken into account as a collateral receipt making up the deficit since, even if it could be regarded as a receipt, it would not be a receipt of the trade but of the members in their personal capacity. That point was also made by the tribunal in Samarkand at [288].

The individual referrers' submissions

364 Mr Maugham's primary argument was based upon what he said was an inconsistency in HMRC's case. Once it is accepted that the lead partnerships were carrying on trade with a view to profit, as HMRC do, he said, there is nothing left in the commercial basis question. All that is necessary to satisfy the statutory test is that the trade is conducted “with a view to the realisation of profits”; there is no added requirement of “serious” interest in profits (whatever that might mean) or any other similar qualification. That was, in essence, what the Lord President said in British Legion, Peterhead Branch v IRC (1953) 35 TC 509 , 514:

> “In my view, a person cannot be said to be engaged in carrying on a trade or a concern in the nature of trade within the meaning of the Income Tax Acts unless, in a reasonable sense, he is conducting business on commercial principles.”

In other words, one cannot accept that a trade was being conducted without at the same time conceding that the activity was commercial.

365 It is also not a condition that profits actually be earned; the test is no more than whether the trade is conducted with a view to profit. All that is necessary is to distinguish between a hobby, in which profit is not a consideration even if it may be an incidental product of the trading, and a commercial activity, in which it is. One cannot logically accept, as HMRC do, that the trade is carried on with a view to the realisation of profits while at the same time contending that it is carried on without a serious interest in profit. The test is a simple one and should not be over-elaborated by purported distinctions of that kind.

366 Mr Maugham did not argue that Samarkand was wrongly decided; he asked us to distinguish it on its facts, and on the basis that there, as the tribunal found, the earning of profits was no more than incidental, and of little if any interest to the members whereas here, he argued, the individual referrers' evidence showed that they went into the partnerships with a real, meaning genuine, interest in the generation of trading profits. It is important to look, not at what has been the result, but what was the intention at the outset: a trading profit was always the objective, and the guaranteed payments were in the nature of an insurance policy, intended to ensure that the members would see some return even if the trading activities were unsuccessful. That none of the Icebreaker Partnerships had (so far) made a trading profit was unfortunate but not an indication that profit was not an aim, and substantial profits were still possible.

367 The test does not involve the exercise of judgment about what a typical commercial person might have done. The rules in ss 381 and 384 and, now, ss 66 and 74 were intended to prevent taxpayers from using sideways loss relief in order to have their hobbies subsidised by the general body of taxpayers, and they therefore discriminate only between, on the one hand, trade conducted for profit, and, on the other, activities which have no profit objective; there is no greater subtlety to the test than that. The trades conducted by the partnerships in these cases could not reasonably be said to have been pursued by the individual referrers as hobbies, and the rules are accordingly not engaged.

Discussion

368 We agree with Mr Blair that the statutory test has two elements which cannot be elided as Mr Maugham argued. It is, in our view, quite clear that the phrase used in ICTA , “on a commercial basis and in such a way that profits in the trade … could reasonably be expected to be realised”, and the corresponding requirements in ITA , separated by the draftsman into two paragraphs, must be interpreted in such a way that “on a commercial basis” and (to adopt the later wording) “with a view to the realisation of the profits of the trade” necessarily implies a two-part test. We do not see anything in the observation of the Lord President in British Legion which undermines that proposition; he was, as we understand what he said, emphasising the fact that an activity cannot properly be regarded as a trade unless it is carried on commercially. He was not dealing at all with the making of profits, and was not seeking to equate commerciality with profitability. It is, therefore, not enough that profits have been, or may be, earned; something more is required. We agree also with Mr Blair that Robert Walker J was making exactly that point in Wannell v Rothwell .

369 The legislation requires that the trading activity be carried on with a view to profit, but says nothing about the scale of the profit (nor, realistically, could it do so) and it requires only an aim to profit, and not the realisation of profits. One may set out with a clear business plan, with

adequate capital and other resources, and with a commitment to devote the necessary time to the trade, yet still fail because of unexpected market conditions, because the choice of commodity was ill-judged or because of misfortune. As we see it, the legislation (which, after all, is aimed at relieving losses) is not intended to penalise those who, despite their best efforts, are unsuccessful, but rather to exclude those who, despite their desire for profits, do not conduct their trading activities in a manner which, all things being equal, are conducive to the generation of profits.

370 Thus we take the draftsman to have used the phrase “on a commercial basis” to mean in accordance with ordinary prudent business principles, and not in the manner of the amateur or dilettante to which Robert Walker J referred. No business is certain to succeed, and the making of a loss, or of only modest profits, is not necessarily an indication that its proprietor has not pursued the trade on commercial lines. But if, as Mr Blair demonstrated, it can be shown that at the moment the business was started the prospect of recovering the capital invested, even without a surplus, was dependent on the realisation of an unrealistically high profit with the consequence that loss was, if not certain, then much more probable than not, it does not seem to us that it can fairly be said that those embarking on the trade can have entertained a serious profit motive, and their claim to have intended to conduct the trade on commercial lines must, at the least, be doubtful. The amateur may be content to make a loss since the pleasure of the activity is reward in itself; the ordinarily prudent commercial person would not enter into a partnership whose business was more likely than not to result in a loss.

371 In essence, the difference between the parties can be resolved only by an analysis of the evidence in order to determine whether the making of a trading profit by each partnership was a genuine, meaning real and earnestly pursued, objective, or, even though there was a hope of and potential for trading profit, any profit which did result would be little, or even nothing, more than a potential incidental benefit of an activity in reality pursued for other reasons.

372 We were not altogether persuaded that HMRC's approach to the analysis by the use of the NPV of the possible trading income was the most apposite and we have instead conducted an analysis of our own.

373 As we have recorded, none of the Icebreaker Partnerships with which we are concerned has generated much revenue, and it was not suggested that any one of them has made a profit overall—indeed, had any of the 51 Icebreaker Partnerships affected by the appeals made a significant profit from even one of the projects which, together, they financed, we have little doubt we would have had evidence of it. We have also set out our conclusion that none of the individual referrers can realistically claim to have entered into an Icebreaker Partnership for the principal purpose of making a trading profit, without regard to the tax consequences. That conclusion was, however, based upon the absence of any but the vaguest of revenue predictions at the time the members joined rather than upon what happened after each partnership began to trade. The absence of revenue predictions is, in our view, an indication that a prospective trade is unlikely to be conducted on commercial lines, but it cannot be taken to be a conclusive factor.

374 We have already dealt with the evidence of the individual referrers to the effect that they joined the partnerships with hopes, in some cases put as an expectation, of significant trading profits, and that they were disappointed with the outcome. They nevertheless expressed continuing hopes for the future, though with reservations: all said they were unwilling to inject more money without a high level of confidence that they would see some return on it. It was clear to us as they gave their evidence, and despite what they claimed, that whatever the true level of their confidence in trading profits at the time they entered the partnership, by the time of the hearing none of the individual referrers retained a serious expectation, or even hope, that significant profits would materialise in the future.

375 The only one of the projects about which we heard evidence and which did meet with a measure of success was the Far-fetch project, in which the intellectual property rights were owned by Edgedale and of which Shamrock had a share. In early 2010 there were negotiations with a prospective purchaser which made an offer for the purchase of those rights. As both Mr Hutton and Mr Edgedale explained, the members thought the offer too low: they had by this time some confidence that the project might make a significant amount of money. The initial proposal was that the purchaser would take a proportion of the revenues receivable by Edgedale and Shamrock in exchange for a single payment of £500,000. Negotiations proved to be protracted, and ultimately there was no sale to this prospective purchaser; instead, as we explain at para

397 below, a different purchaser bought the entirety of Edgedale's interests, in 2011, and for a rather less favourable price than the first prospective purchaser had offered. Mr Edgedale (who discovered only as a by-product of the voting process which was engaged before any sale could be ratified that he had a greater stake in the partnership than any other member) told us he was disappointed that his fellow-members wished to sell and realise some money—each member received a cheque for his share of the proceeds—since he considered Far-fetch would prosper as, in fact, it now has. He gave us a good deal of detail of the work he undertook personally in evaluating the offer and we accept that he must have devoted a substantial amount of time to it, albeit the work was spread over a prolonged period, and was all undertaken some time after the critical six-month period (the significance of which we explain later) following the closure of the partnership.

376 The structure of the agreements, as we have already said, made provision for the acquisition and exploitation of additional rights, for which the funds might come from profits or additional capital injections by the members, and in most cases, as we have explained, there was a small surplus fund after the initial expenditure had been incurred. That sum was placed on deposit with the lending bank and earned a modest amount of interest for the partnership. The individual referrers spoke of their hope in the earlier months of their membership that the partnerships of which they were members might have succeeded in expanding in this way. Although, as we explain in the next paragraph, some very preliminary investigations into possible future projects were undertaken, none of them came to fruition: as we have also said, no partnership generated enough profit to make the taking on of another project financially possible, and the members were evidently insufficiently enthused to inject further capital instead. We should add, to eliminate any possible ambiguity, that the second tranche of rights acquired by Acornwood was paid for from the members' initial injections; there was no second call.

377 It was not only the individual referrers who spoke of the hope that profits would be earned. Significant parts of their witness statements, and a good deal of the oral evidence of Ms Hamilton and Mr Hutton, was devoted to this topic. They both told us that the members, and the IFAs advising them, were interested in the nature of the projects each partnership intended to pursue, not only in the general sense that one prospective member might favour (for example) music while another favoured publishing, but in the more particular sense that they examined the detail of the individual projects—such as the identity of the singers to be promoted—before making a choice, and that they were also keen to consider the prospects that each project had of making a profit. We will have more to say about the individual referrers' evidence on the latter point when we come to deal with the “active partner” question.

378 Ms Hamilton and Mr Hutton also explained in some detail how Shamrock evaluated projects. The evidence showed that far more projects were proposed to Shamrock (which we are willing to accept established a reputation and profile in the creative industries quite quickly) than could possibly be adopted, and that much of Mr Hutton's time was spent in, to put it bluntly, weeding out the hopeless (which seem to have been substantially in the majority) and assessing those proposals which at least had some potential. We accept that Mr Hutton, who on occasion engaged external consultants to assist him, did evaluate projects in a professional manner, that many were rejected—on commercial rather than on other grounds—and that IML, and Ms Hamilton in particular, were involved in the process. The evidence also showed that the evaluation of the projects was based primarily upon the perceived prospect of financial success, and as we have already said that negotiations were conducted at arm's length and on a commercial basis between Shamrock and those who (to take music projects as an example) were to perform, or to produce the resulting recordings. We also accept, as the natural corollary of those conclusions, that any one or more of the projects could have been successful, and could have earned substantial profits for the partnership which had adopted it as well as for Shamrock itself. We should add that we have no reason to think that Centipede was materially different from Shamrock in its approach to the selection of projects, nor that any distinction in this respect is to be drawn between those of the Icebreaker Partnerships which contracted with Centipede and those which contracted with Shamrock.

379 Ms Hamilton and Mr Hutton both told us that various Icebreaker Partnerships had in fact identified successful projects by this process. We are bound to say that the evidence to support that proposition was rather vague and that most of it consisted of nothing more than projections of what might be the revenue earned if a project was successful, whereas the evidence of what had actually happened was rather more indicative of failure, in some cases because of the

economic downturn in 2008, and in others, particularly music projects, because the partnership concerned was let down by one of the other participants or, more commonly, the product simply failed to sell. Several projects were dealt with in some detail in the appellant partnerships' suggested findings of fact document. In almost all cases there was early optimism which was not realised. The projects went into production, and some (so we were told) met with critical acclaim. Sales, however, did not materialise, and the revenue share the partnership received was in almost all cases extremely modest.

380 Perhaps surprisingly, in view of the fact that music projects seem to have outnumbered the others, we had relatively little detailed information about such projects, although such information as we did have suggested that they had encountered little, and in many cases no, success either because of unforeseen circumstances or, more commonly, for no other reason than that very small numbers of albums were sold. Whether that was because of poor promotion and marketing, or because, despite Shamrock's best efforts, prospective purchasers simply did not like the music did not become clear. We had rather better evidence about three projects, which we have already mentioned briefly: the Locca device, Nicobloc, and Far-fetch. Of the several projects suggested as examples it is, we think, sufficient for present purposes to describe four, three which were unsuccessful and another which was sufficiently successful to attract other investors within a relatively short period from launch.

381 Of the music projects we have sufficient information to take one, the Dream Concerts project adopted by Acornwood, as an illustration, although we acknowledge that it is not typical of all of the music projects in that it involved concerts as well as recordings. We can accept, as the appellant partnerships' suggested findings of fact document emphasises, that IML and Centipede spent a good deal of time and effort on evaluating the project (and, as we also accept, other projects), on tailoring it, and in negotiating the terms on which Brickhouse was to produce the concerts and the recordings which were to be sold thereafter, as well as the net price to be paid to Brickhouse and the terms on which the resultant revenue was to be shared. As we have said, speculative though they were, any one of the projects taken on by an Icebreaker Partnership could have been very successful, and it would have been foolish not to have put in place firm contractual provisions catering for that eventuality. We can also accept that if the forecasts were realised, Acornwood would have made a worthwhile profit.

382 However, although the project made a promising start, one performer withdrew, we were told in breach of contract, and some others had a conflicting engagement (how that had occurred was not apparent) which led to a re-scheduling of some concerts. That re-scheduling led in turn, Ms Hamilton said, to a loss of confidence in the project by the theatres which were to stage the concerts, and they too withdrew, with the result that the entire project collapsed. Acornwood's share of such revenues as had been generated was modest, but even so it did not receive all of them as by this time Brickhouse was insolvent.

383 Although the reasons why other projects failed differed, the experience of early optimism frustrated by events or an inability to attract public interest was not untypical. Sinead O'Connor, one of the singers supported by Hawksbridge, became ill and unable to perform; the albums produced by Julian Velard and Rozalla simply failed to sell.

384 As those were music projects, it is convenient to deal with Mr Andrews' evidence at this stage. He has, as we accept, extensive experience at a high level of the popular music industry, and has at various times been a performer, a writer of songs, a television presenter, a journalist, a promoter and producer, a marketing director and a managing director of companies operating within the industry. He has had a professional relationship with Shamrock for some years, and has acted on behalf of Sinead O'Connor but we are satisfied that these connections do not compromise Mr Andrews' impartiality. We were told that he had not met or had any other contact with Ms Hamilton before being asked to give evidence in these proceedings.

385 The essence of Mr Andrews' evidence was that, as Ms Hamilton and Mr Hutton had said, the potential rewards of a successful music project are enormous, and are derived not only from record sales but also from concert tours and sales of merchandise. He gave several examples of highly successful singers and groups, and we have no doubt that some have achieved spectacular success. However, he added, the vast majority of acts sell only a very small number of albums, and usually fade into obscurity although a few of the more persistent might find success after a long wait. In broad terms, one project in a hundred might succeed, in the sense of making a worthwhile return on the investment in it. It was very difficult to identify in advance

which acts would succeed and which not, with the result that large sums of money were often spent on promoting a performer who seemed to have potential, only to find that he or she did not attract sales. The potential for loss was therefore considerable, and those involved in the promotion of music acts had always to hope that their profits from successful acts would more than make up for their losses on the unsuccessful. Those starting in the industry, in which category he put Shamrock, were more exposed to risk than established companies because of lack of experience and in Mr Andrews' view Shamrock's lack of success in identifying profitable projects, and its history of bad luck, were typical of newcomers and therefore unsurprising.

386 Mr Andrews did not consider that the net amounts paid by Shamrock to third parties in order to produce the various music albums and to acquire rights in them differed from industry norms, although Shamrock might have had to pay a little more than longer-established companies because of its lack of a track record. He added that Mr Hutton was conducting Shamrock's business in a manner similar to others in the industry, and that he had built up, in quite a short period, a good reputation which had made it possible for Shamrock to attract better quality singers—he mentioned Sinead O'Connor, who is of course long-established, as an example. We accept that evidence, and we have in any event already accepted for other reasons that the amounts paid to the owners of the intellectual property rights (usually the performers) and the net amounts paid to the production companies were reasonable, and commercially driven. We also accept that that the substance of the arrangements was consistent with industry practice, in the sense that they contained orthodox provisions for the production, marketing and sale of the music albums and distribution of the resulting revenues. That is not to say that we accept that the manner in which the gross payment made by Shamrock was simultaneously offset by a smaller payment in the reverse direction was either necessary or common practice; as we indicate elsewhere, we are satisfied it was neither.

387 More controversial were Mr Andrews' comments on the potential revenues of the music projects which Shamrock handled on behalf of Icebreaker Partnerships. He prefaced them with the observation that the lack of success of the projects was not attributable to any failing on Shamrock's part, but to misfortune, such as Sinead O'Connor's illness which had caused that project to stall, and to the difficulty of forecasting public taste. He identified a number of the projects which were, as he put it in his report, “examples of artists who look highly promising on paper but simply fail to live up to expectations. That is the unpredictable nature of the music industry.…” Although he might not have chosen the same artists himself, Shamrock's portfolio of projects was, he thought, balanced.

388 In an appendix to his report Mr Andrews set out the sources of the revenue which might be earned from each of ten music projects adopted by one or other of the appellant partnerships, as a means of demonstrating how the gross sum spent on exploitation might be recovered. By “gross sum” we mean the fee notionally paid by the principal exploitation company to the production company, before payment in the reverse direction of the consideration for the share of the rights. The calculations make no allowance for the principal exploitation company's own fee, nor do they take any account of the fact that, by selling a share of the rights, the principal exploitation company had diminished the revenue stream which might be received. The purpose of the appendix was to set out the sources from which revenue might be expected, such as UK sales, overseas sales and derivative products, together with what Mr Andrews considered to be an important and potentially lucrative source, that of the share of the revenues to be earned from future albums, even if not financed by the partnership, for which the “override” agreements to which we have referred provided. In each case the tables in the appendix showed how those various sources might contribute to the overall total, which approximately matched the amount spent. Mr Andrews did not set out, by the appendix, to do more than demonstrate how the expenditure *might* be matched by revenue.

389 However, he did go on to say in his report that “I am of the view that it would have been entirely reasonable for Shamrock to expect that these revenue targets for each project could have been achieved.” He followed that remark with a description of each of the ten projects and his comments on why Shamrock or the partnership which was financing the project could reasonably have expected that such revenue could be earned, albeit he was forced to concede that in every case the expectation was considerably greater than the reality. Although Mr Peacock and Mr Maugham emphasised Mr Andrews' long experience, and urged us in consequence to accept his predictions as realistic forecasts, in truth, as we find, Mr Andrews' evidence boiled down to an opinion that any of the projects, if reasonably successful, could have

earned the amount invested in it, and that some might have earned a very great deal more. In fact, as he accepted, and because of the combination of bad luck and fickle public taste to which he had already referred, all had failed to generate more than minimal revenues.

390 A noticeable feature of Mr Andrews' projections is that they all result in the recovery by the relevant partnership of the amount nominally paid by Shamrock to the production company (that is, the gross payment before offsetting the payment for a share of the revenue) and, in some cases, a modest additional amount, but no more. Disposal of a share of the revenue would, obviously, result in the receipt of an immediate capital sum and the diminution of the future revenue stream. Overall, however, it seemed to us that such an adjustment would be broadly neutral in that Shamrock could expect to gain as much by the immediate payment as it lost from foregone revenue, assuming the project achieved, broadly speaking, the measure of success assumed by Mr Andrews and that Shamrock and the production company had struck a fair bargain. In other words, it made little difference to these calculations that Shamrock did in fact dispose of a share of the revenue. We leave aside for present purposes our finding set out elsewhere that the gross sum paid by the principal exploitation company to the production company was artificially inflated.

391 Although Mr Andrews said (and we have already accepted) that some projects could earn considerably more than his appendix indicated, he agreed that it is a characteristic of the industry that only a small proportion of the performers whose projects are financed do meet with great success, and many more fail. Although the projects managed by Shamrock might have met with less success than the average, as Shamrock was a relative newcomer, it is apparent from what Mr Andrews said that he did not consider the failure rate it had experienced was very much out of the ordinary.

392 What became clear to us from this evidence was that if, as the appellant partnerships ask us to do, we take the gross payment as the cost of production and marketing, and assume that each one of Mr Andrews' projections was realised, the projects, taken collectively, would barely break even. It is, as we recognise, possible that any one of them could have achieved greater success, but Mr Andrews' own evidence was that such success is a rarity and that it was much more likely that the projects would fail. The projects he identified in the appendix were ones which, hypothetically, were reasonably successful; and their success would, on his own evidence, be offset by numerically greater failures. Thus, if we have understood Mr Andrews' evidence correctly, overall the partnerships were virtually guaranteed to make a trading loss on their music projects. It does not seem to us to make any difference that, as Ms Hamilton emphasised, in order to protect the “downside” Shamrock disposed of a share of revenues (and with it a share of losses) in exchange for payment if we are also correct to conclude that its doing so was likely to be neutral in the longer term. This is not a case in which the capital was used in the business but retained (as it might be, for example, in the purchase of machinery available for future work); it was all expended in the production and if the project was to show a true return the capital too needed to be recovered.

393 Mr Andrews' evidence did not extend to non-music projects, in respect of which we are dependent on what we were told by Ms Hamilton and Mr Hutton.

394 We were provided with projections of the possible sales of the Locca product (the device enabling a householder to control various items of equipment within his home wirelessly) which, if they had been realised, would have resulted in significant profits for Acornwood. Ms Hamilton explained how several well-established and large companies, both in the UK and in the United States, had expressed interest, and that some had entered into agreements for the marketing and distribution of the product. The projections forecast an Acornwood share of profit at more than £600,000 over three years (though the arrangements described at para 78 above suggest this might have been ambitious). However, we were told, the economic downturn of 2008 and its effect on the distribution companies had led them to cancel the arrangements. This project too collapsed and, in the event, Acornwood's income from it was very small. We observe in passing that by 2008 total revenue from the Locca project (in which Acornwood had acquired the intellectual property rights in March 2006) amounted to £119,409. We did not learn how much of that sum represented profit, of which Acornwood was entitled to a 4.8% share, but even if the entire £119,409 was profit, Acornwood's share of it, £5,732, compares unfavourably to Centipede's net payment for the project of £117,500, and still less favourably to the nominal gross payment of £650,000.

395 The evidence we had of the Nicobloc project into which Edgedale entered showed that it had been the subject of extensive pre-contract investigation (which, again, we accept) and that, potentially, the project might generate substantial revenue even if it secured only a very small share of what, as we also accept, was becoming an extremely valuable market. We were provided with a projection showing that Edgedale's share of the net profits over ten years might have amounted to about £650,000. There was evidence of a series of contracts providing for the distribution of the product in various parts of the world. In the event, however, this project, too, foundered, we were told because an intended flotation of the production company failed as a consequence of the 2008 downturn, and Edgedale earned only £1,332 from its investment in Nicobloc.

396 The Far-fetch project, as it was described to us, consisted of an internet portal and platform by which clothing retailers could sell to consumers: Far-fetch provided the platform which operated as the link between the customer and the retailer, and obviated the need for the retailers to create and maintain their own platforms. It also enabled a customer to buy several retailers' products by visiting a single website, and making a single payment for all of the goods bought. Far-fetch's reward was commission (paid by the retailer) of an agreed percentage of the selling price of the goods. Ms Hamilton's evidence was that at the time businesses in that market, and using that method of selling, were doing extremely well. The company which was to provide the service (Far-fetch Ecommerce) was set up by a man already established in the fashion trade and, again, Shamrock undertook a substantial amount of due diligence into the company and its prospects. Unusually, a presentation of the project to IFAs advising prospective members took place in January 2008. The projected turnover and profits of the company were considerable, leading to an estimate of Edgedale's share of profits, over ten years and after taking account of the arrangements for the division of revenues between the Far-fetch company, Shamrock and Edgedale, of about £3.5 million.

397 Development of the portal and website began shortly after conclusion of the agreements by which Edgedale was to finance the project, and it became “live” in September or October 2008, quickly attracting, we were told, considerable interest and generating revenue. During the next two or three years Far-fetch was approached by a number of venture capitalists. As we have mentioned, a sale was agreed in 2010, but that it did not proceed to completion. In June 2011, however, another venture capitalist, Index Ventures, did agree to purchase the business. The agreement provided that Index Ventures would acquire all of the intellectual property rights, in which Edgedale and Shamrock had an interest, as well as their respective shares of revenue. The outcome was that Edgedale received a total of £581,846 for its interests. It had also received a share of revenue amounting to £55,102 in the period before the sale, and its total return was therefore almost £637,000. The amount paid for the intellectual property rights (£5,000) and for production (£2,250,000 gross) were not, therefore, recovered. If however one takes the net sum paid for production, £545,000, that is the gross sum less the amount received in return for a share of the revenues of £1,705,000, as the base cost the return is, obviously, rather different. It was, of course, Shamrock rather than Edgedale which entered into the relevant contracts but, disregarding that element of the overall fee paid to Shamrock which is attributable to this project, it can be seen that Edgedale recovered more than it had invested in the project.

398 Far-fetch is still trading and, we were told, has a significant market share. Mr Edgedale observed that, had the partnership retained its interest in the project, it would now be earning about £75,000 per month from it, a proposition which HMRC did not challenge. One can, however, view that fact in two different ways. On the one hand it shows that, in this case, IML or Shamrock had identified a project with real potential, and that it was indeed possible to earn significant profits from this means of exploitation—HMRC say only that the Far-fetch project was an exception, and not typical of the Icebreaker projects as a whole. On the other hand it shows that even when a project with long-term potential was identified, the members of the partnership, collectively even if individual partners such as Mr Edgedale himself disagreed, could not be persuaded to retain their investment in it. That might in turn be taken as support for HMRC's argument that the members had no real interest in trading profits, but it may amount to nothing more than that the members of Edgedale made a decision which, with the benefit of hindsight, can be seen to have been an error. In our view it would not be reasonable to read anything of significance into the decision to dispose of the partnership's interest in the project.

399 The appellant partnerships produced projections of possible income and profit from various other projects, necessarily making assumptions about volumes of sales, and on the alternative

bases that the partnerships financed the project and took all the revenue, and that some of the revenue was sold to the production company. HMRC did not challenge the projections, as projections, and we are willing to accept, with two caveats to which we come shortly, that the forecast profits were attainable if the projects were successful. None of the projects had, as Mr Hutton put it, "hit the stratosphere", although he said he was confident some would be successful, while accepting that many had met with no success at all. However, and as we have already said, with the single exception of Far-fetch, we were not provided with an example of a project which was showing signs of making large profits, meaning a reasonable, or commercially respectable, return on capital; and we regard what Mr Hutton said as little more than an optimistic assertion.

400 The fact that, as we have said, most of the projects were not successful does not undermine the validity of the projections as representative of the possible (whether or not likely) outcome of an individual project, but it does reinforce the conclusion that a partnership with only a handful of projects, as the Icebreaker Partnerships were, has a limited prospect of overall profits. If one assumes Mr Andrews' estimate of one successful project in a hundred is of equal application to projects other than those involving music (and Ms Hamilton and Mr Hutton broadly accepted that it was) the chance that any given partnership, with three or four projects, would succeed was, obviously, small; and the collective experience of the Icebreaker Partnerships suggests that even that estimate was optimistic or, instead, Mr Hutton was rather less adept at identifying projects with potential than we have been willing to accept. Moreover, any profit which was earned on one project would be offset by the losses made on the other projects; and therefore a significant success, recovering much more than the amount invested in it, for at least one project would be needed if any partnership were to make an overall profit.

401 There are, in addition, the two caveats to which we have referred. The first is that the figures produced for our benefit treated each project separately, and the potential profit for the partnership from that project was not offset by the value of the losses sustained on other projects supported by the same partnership. In other words, even if the projected profits had been realised in respect of one project, it did not follow that the partnership's overall trade would be profitable.

402 The second caveat is that in most cases the calculations of future revenue included the quarterly payments and final minimum sums as if they were truly derived from exploitation of the intellectual property rights whereas, as we have already said, they were payable regardless of profit or loss and were derived from the sum deposited with the lending bank. It is conspicuous that in some of the calculations with which we were presented the inclusion of those payments converted a loss into a profit, or a modest profit into one more worthwhile, suggesting that a true trading profit was unlikely. There were, however, some cases in which, if the projections were realised, a worthwhile trading profit would be achieved, even without the inclusion of the guaranteed payments.

403 We can develop this point further. A relatively simple analysis of partnerships' projects, together with the estimates provided by Mr Andrews, illustrates the reasoning behind the conclusion that, without the intended tax advantage, none of the partnerships had a reasonable prospect of even recovering the members' contributions, let alone of showing a return on them. For this purpose we take Bastionspark as an example, as all of its five projects related to musical acts and were therefore within Mr Andrews' province.

404 The total of the members' own contributions was £1,002,000 and the borrowing brought the total capital of the partnership to £5,010,000. Mr Andrews' estimate of the revenues which might reasonably be expected to be derived from the acts if they were successful was, in three cases £750,000, in one £500,000 and in the fifth £600,000. In each case 50% of that sum was to be paid to the artist's production company, 5% to Shamrock and 45% to Bastionspark. If one takes a project estimated to earn, if successful, £750,000, Bastionspark's gross share would amount to £337,500, fractionally over a third of the members' personal capital contributions. Thus if the members were to recover that capital, three of their five projects would each need to earn £750,000. It is apparent from Mr Andrews' evidence that one act in a hundred might be expected to succeed that an expectation, or even a reasonable hope, that three acts out of five would do so is unrealistic. We recognise that any one act might perform better, even considerably better, and that in addition to the revenues Mr Andrews estimated there were possible additional earnings from second and subsequent albums. However, all these possibilities were, on Mr Andrews' evidence, no better than speculative.

405 We also note in passing that in every one of the five arrangements into which Bastionspark entered the fee payable, or more accurately notionally payable, by the artist's production company for its share of revenue (the assignment of revenues fee) exceeded the share of revenues which, on Mr Andrews' estimates, the production company could realistically hope to receive. The Satin Dolls project was one of those Mr Andrews estimated might earn £750,000, of which the share payable to the production company, The But! Group, was half, or £375,000. The assignment of revenues fee was £680,000. The excess of the assignment of revenues fee over the income which it was estimated the production company engaged for the project was of a similar amount in the other four sets of arrangements.

406 It is not quite so easy to undertake a similar analysis in the cases of the other appellant partnerships because of their mix of projects. It is clear that the same observations may be made of those of their projects which related to musical performers. We cannot make a finding, because we had insufficient evidence, that the other projects should be considered in the same way. However, it is conspicuous that properly reasoned projections of revenue and profits were lacking in every case. It is entirely possible that any one or more of the projects would be successful, or reasonably so as Far-fetch was, but no intending investor could conceivably have had any confidence that he would see either a return on his capital, or the return of the capital. At best, and leaving the tax advantages out of account, investment in an Icebreaker Partnership was speculative; realistically it could only be viewed as likely to lose money.

407 We were also provided with a spreadsheet which set out the income to March 2011 of the appellant partnerships and the other partnerships listed in Appendix 1, and their projected income thereafter over their expected lifetimes. The receipts to March 2011 recorded against many of the partnerships were nil, in other cases very modest, and in none were they of a scale which might be termed “healthy”, even though some of the partnerships had by then been active for a few years. By way of example, the gross receipts from projects which had been earned by the appellant partnerships by that date were:

Acornwood (started 2005–06): £37,952

Bastionspark (started 2006–07): £1,237

Edgedale (started 2007–08): £40,324 (this was the amount achieved before the sale of Far-fetch)

Starbrooke (started 2008–09): £1,937

Hawksbridge (started 2009–10): nil.

408 It is, in our view, conspicuous that all the Icebreaker Partnerships, including the earlier six partnerships which have no interest in the outcome of these appeals (that is, 57 partnerships in all), had, collectively, earned total project income of about £654,000 by March 2011 while their combined income from the quarterly payments, derived from the interest earned on the money deposited with the lending banks, amounted by that date to almost £26 million. The appellant partnerships make much of the fact that by June 2012 project income had increased by £1.31 million (including the proceeds of the sale of Far-fetch), and that Mr Hutton, using what he described as a prudent “medium” estimate, put future partnership income from projects at £68.75 million, with the potential for considerably more. While the medium figure was not seriously challenged by Mr Blair, two points need to be made. First, as we have explained, most of the projections of future income, even at what Mr Hutton described as medium levels, have turned out to be very optimistic. Second, over the same period, and on the Icebreaker Partnerships' own calculations, the aggregate value of the quarterly payments would total £83 million and the final minimum sums £372 million—thus even if every one of Mr Hutton's medium estimates was achieved the projects had no realistic prospect of ever generating sufficient revenue from their trading activities to meet the guaranteed payments.

409 We were also asked to accept, from the information contained in the spreadsheet, that the partnerships were making worthwhile returns on capital. If one were to regard the quarterly payments and final minimum sums as returns on capital that would, we think, be a reasonable contention in some cases. However, we cannot accept that the projected income from the exploitation of the intellectual property rights the partnerships acquired (taking Mr Hutton's

medium estimates) would be regarded by a serious investor as a reasonable return. The total project income to June 2012 of £1.966 million represented a return of 2.04% of the members' cash contributions (that is, disregarding their secured borrowings). Since some of the partnerships had by then been in existence for several years, that rate of return, annualised, was very modest indeed and gave no grounds for optimism that the capital itself would ever be recovered. The appellant partnerships, however, point to the fact that revenues from projects of the kind they exploited do not immediately follow investment (which we accept) and that one must look at a longer period, that is the projected ten-year lifetime of each partnership. Over that period, if all of Mr Hutton's medium estimates were proved correct, the annualised return on the members' personal capital from project income would be about 7.3%. We are willing to accept that a serious investor might regard that as a reasonable rate of return, even for what was accepted to be a speculative venture, if Mr Hutton's projections could be taken as likely to be achieved and there was in addition some prospect of recovering the capital invested or of selling the project for an equivalent price—which, if one takes the trading income alone, and for the reasons we have just explained, seems to us to have been extremely unlikely. If one examines instead the return from project income on total capital invested (that is, treating the members' borrowings and their personal injections together as the capital invested) it amounts, again assuming Mr Hutton's medium forecast could be achieved in every case, to be only about 1.8% per annum. We are doubtful whether any serious investor would regard that as a worthwhile rate of return after taking account of the risky nature of the investment.

410 We referred, at para 82 above, to the fact that Mr Velard was under no obligation to produce songs of any particular quality, or to do so by any particular time, and at para 88 to the ability of Shamrock to dispose, if it wished, of all of the revenue stream derived from his song writing and performing. Those arrangements were repeated in similar terms in the principal exploitation agreements into which other partnerships entered. In our view the absence of conditions setting, even in general terms, performance criteria and which allow another party to the contractual matrix to dispose of the revenue stream, without any compensation to the partnership, are inconsistent with the proposition that these were ventures from which the participants were expecting real profits, and impossible to reconcile with the claim that the members joined their respective partnerships with the principal aim of exploiting the intellectual property rights for reward. These features are not what one would expect in agreements whose purpose is the exploitation of intellectual property rights for the financial benefit of those providing the capital and without regard to the tax consequence.

411 We have already accepted that it was possible that any project would turn out to be successful, even highly successful. We have also accepted that, save for the payment of a notional gross fee offset by an equally notional (and as we have indicated, in at least some cases unrealistically high) payment for a share of revenue, the agreements between the principal exploitation company and the production company were in an orthodox form which provided, as between the principal exploitation company and the production company, for the commercial exploitation of the intellectual property rights to which the agreement related, and for the division of the resultants profits if there were any. Thus from the principal exploitation company's perspective the agreements could reasonably be regarded as commercial in character.

412 The question we must answer, however, is not whether Centipede or Shamrock was trading commercially, but whether the Icebreaker Partnerships were doing so. It is a feature of the legislative requirements that “profits in the trade … could reasonably be expected to be realised …” (ICTA s 381(4)) or that the trade is carried on “with a view to realisation of profits of the trade” (ITA s 66(2)(b)). It is to be noted that it is only the profits from the trade, rather than of some other activity, which are to be taken into account. If one discards, as we have, the proposition that there was any connection between the trading activities and the guaranteed payments it follows that so much of each partnership's income as was derived from the guaranteed payments cannot rank as profits of the trade, and must be left out of account in applying the statutory test.

413 The conclusions we have reached above can be summarised as follows: only a small proportion of projects of the kind pursued by the Icebreaker Partnerships can be expected to make significant profits although any one project might make very large profits; the adoption of a limited number, typically fewer than six, of such projects necessarily limits the chances that a project with true potential has been identified; the partnerships embarked on their trades without projections of likely income; projections produced later showed that, in the absence of

outstanding success, no partnership could reasonably expect even to recover the capital invested; trading losses were considerably more likely than profits; the principal exploitation agreements into which the partnerships entered allowed the principal exploitation company to alienate all of the income stream; and the members of each partnership could have had no genuine expectation on joining that partnership that trading profits would be received.

414 It follows from those conclusions that none of the appellant partnerships, and in consequence its members, could have had a reasonable expectation of realising profits of the trade, so as to satisfy the ICTA s 381(4) or s 384(1) or the ITA s 66 or s 74 test. Aiming at, or hoping for, profit is not to be equated with having a reasonable expectation of it. To take an analogy: a 14-handicap golfer may set out on the first tee with the aim and hope of going round the course in par; but he could have no reasonable expectation of doing so.

415 Having reached that conclusion we do not need to deal, as a discrete issue, with the question whether the trades were “commercial”, but we should nevertheless make some brief observations. We have already said that the absence of revenue predictions at the outset is an indication that a prospective trade is unlikely to be conducted on commercial lines, Another, in our view, is that there was no evidence that any of the members of a given partnership had any expertise (rather than interest) in the partnership's projects. One might normally expect that the members of a trading partnership would have some experience and knowledge of the trading activities they intended to pursue. We accept that the absence of such experience is not conclusive (and that some entrepreneurs have succeeded in entirely novel businesses) and that each partnership had the assistance of its principal exploitation company; but in reality the partnership was not merely assisted by but wholly dependent on that company for the conduct of its trading. Most important of all, as it seems to us, is that a trade which is virtually certain to lead to a loss might be carried on as a hobby, or on philanthropic or charitable principles, but cannot realistically be described as commercial.

416 For those reasons we answer the commercial basis question as follows: although the individual referrers, in each case, aimed to make a trading profit in addition to the guaranteed payments, none could have had any reasonable expectation of doing so and, in addition, the trade of each partnership was not conducted on a commercial basis. The individual referrers therefore fail both parts of the statutory test. We repeat, for the avoidance of doubt, that the guaranteed payments, which were wholly independent of any profit or loss of the trade, and not derived from revenues earned from trading activities, cannot be regarded as trading profits.

The active partner question

417 The referred question, in relation to Mr Bastionspark, Mr Ironmoat and Mr Keepstone, is:

> During the applicable “relevant period”, was he a “non-active partner” as those words are used by section 103C ITA 2007 as inserted into Chapter VII of Part 4 ICTA 1988 by section 26 and Schedule 4 paragraph 3(1) of the Finance Act 2007 (“FA 2007”)?

418 There is a minor disagreement between the parties on the formulation of this question, in that although HMRC say that the ITA provisions (as the referred questions suggest) are in point, the individual referrers point to ICTA ss 118ZE and 118ZH , which were replaced by the ITA provisions. They agree, however, that this difference does not affect the outcome. The significance of the question lies in ITA s 103C , which we do not think it necessary to set out. It provides that in the case of a non-active partner the maximum amount of sideways relief available in any tax year is £25,000. For completeness we should record that it was ICTA s 118ZE(3)(b) which introduced the concept of the “non-active partner”, or member who “did not devote a significant amount of time to the trade (within the meaning given by section 118ZH)”, which provided that:

> “For the purposes of section 118ZE, the individual shall be treated as having ‘devoted a significant amount of time to the trade’ in a given year of assessment if, for the whole of the relevant period, he spent an average of at least ten hours a week personally engaged in activities carried on for the purposes of the trade.…”

419 The meaning of "non-active partner" was changed in its presentation though not, we think, its substance by ITA s 103B , which was inserted by the Finance Act 2007 and is deemed always to have had effect. As originally enacted, and so far as relevant, it was as follows:

> "(1) For the purposes of this Chapter an individual carries on a trade as a non-active partner during a tax year if the individual—
>
> > (a) carries on the trade as a partner in a firm during the year,
> >
> > (b) does not carry on the trade as a limited partner at any time during the year, and
> >
> > (c) does not devote a significant amount of time to the trade in the relevant period for the year.
>
> (2) For the purposes of this Chapter an individual devotes a significant amount of time to a trade in the relevant period for a tax year if, in that period, the individual spends an average of at least 10 hours a week personally engaged in activities carried on for the purposes of the trade."

420 Subsection (2) was amended, in respect of relevant periods ending on or after 12 March 2008, so as to read:

> "For the purposes of this Chapter an individual devotes a significant amount of time to a trade in the relevant period for a tax year if, in that period, the individual spends an average of at least 10 hours a week personally engaged in activities of the trade and those activities are carried on—
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits as a result of the activities."

421 The amendment necessitated a change to the referred question in relation to Mr Edgedale, Mrs Starbrooke, Mr Moondale and Mr Hawksbridge. In their cases it is:

> During the applicable "relevant period", was he [or she] a "non-active partner" within the meaning of section 103B(1) ITA 2007 ?

422 Further provisions of s 118ZH , also re-written to ITA , dealt with the meaning of "relevant period", but it is not in dispute that in this case (and in respect of all the individual referrers) the period is the six months beginning with the day on which the member joined the partnership.

423 Whichever statutory provision is in point, the referred question breaks down into two components: whether the relevant member personally spent at least 10 hours a week on activities with some connection to the partnership's business; and whether those activities were (in periods before 12 March 2008) "for the purposes of the trade" or (in periods thereafter) "carried on, on a commercial basis, and with a view to the realisation of profits."

The individual referrers' evidence of their activities

424 The evidence of all the individual referrers showed that the legislative requirements they must meet in order to secure tax relief on their losses had been impressed upon them by IML from the outset. They all agreed that they were well aware before joining a partnership that they must not only spend the requisite time on partnership activities but also put themselves into a position to demonstrate that they had done so, and all of them also told us they had taken great care to ensure they met the requirements.

425 In the course of the enquiries, HMRC wrote to many, and possibly all, of the members about their expenditure of time, agreeing that they had spent at least ten hours each week “in the activities described by you”. The letter went on to say (to take the letter sent to Mr Bastionspark as a typical example):

> “In order to qualify for loss relief, the legislation … requires that you should have spent an average of at least 10 hours a week in the period 30 March 2007 to 28 September 2007 personally engaged in activities carried on for the purposes of the LLP's trade.
>
> HMRC's view, in considering whether your activities were carried on for the purposes of the LLP's trade, is that activities such as reading scripts or journals, watching TV or DVDs are not undertaken on a commercial basis with a view to profit. As such they cannot be taken into account in calculating the average of 10 hours a week in the prescribed period.”

426 In the light of HMRC's acceptance that the members had spent an average of at least ten hours a week we propose to assume without making any specific finding that each of them did, and focus instead on the second part of the test, namely whether the activities were carried on “for the purposes of the trade”. Mr Bastionspark, Mr Ironmoat and Mr Keepstone need to satisfy us of no more than that; but the different wording of ITA , and particularly s 103B , shows that the remaining individual referrers must also demonstrate that their activities were undertaken on a commercial basis and with a view to the realisation of profits. Whether that change adds anything of substance to the earlier test or merely clarifies what was always the requirement is a matter we shall examine later.

427 Several of the witness statements with which we were provided descended to considerable detail, in some cases listing, for example, large numbers of artists to whose music the member had listened, or other possible projects the member had reviewed, and we were provided by Mr Maugham with an analysis of the individual referrers' respective witness statements, listing the paragraphs in which references to the tasks they had undertaken were made. There were a great many such paragraphs. The individual referrers all told us that they undertook those tasks with a real sense of purpose. Mr Keepstone, for example, said that he took the view that the identification of new projects, by the members on their own initiative, or by their considering, reviewing and discussing possible projects introduced to them by IML or Shamrock, was an important feature of his membership of the partnership.

428 Mr Hawksbridge's witness statement provided an impressive list of things he had done, including listening to considerable amounts of music, attending concerts and exhibitions and searching for new prospective projects, in respect of which he prepared reports and suggestions for his fellow-members. He told us he had carried on with those activities despite the fact that the six-month period expired long ago. Mrs Starbrooke, formerly a senior banker and management consultant, explained that when she retired in 2005 she looked round for various business and voluntary activities. She knew of the requirement that she must spend ten hours or more on partnership business but as she was no longer in paid employment did not find it difficult to spend significantly more time. Again, we had a detailed description of the activities in which Mrs Starbrooke had engaged, which consisted mainly of browsing the internet, listening to music (much of which was supplied to the members by IML) and attending football matches and concerts, as well as partnership meetings. She explained that although she enjoyed the football for its own sake she also took care to note the identities of advertisers around the ground and in the programme as potential sponsors of Starbrooke's book project.

429 Mr Edgedale, whose principal occupation is as a corporate adviser, told us he spent some time with those developing the Nicobloc device in order to learn more about the product and its potential. He thought, he said, that there was a prospect that the company could be floated and, in view of his own background, was keen to be involved should that occur.

430 On a regular basis IML sent to the members for review material which might form the basis of a new project. It seems that much of that material consisted of recordings made by popular music performers, though not exclusively so. The members were encouraged to consider the material, make notes and provide feedback, and later to discuss their views at partnership meetings. Mr Ironmoat gave us an example of a song whose potential he had evidently considered carefully, and in great detail, and as long as two years after he had joined the

partnership. It seemed to us probable, from the evidence, that the same recordings, or other items, were sent to all the members of any partnership, and possibly to the members of more than one partnership, but we are unable to make a finding that this was the case. What is clear is that IML went to a good deal of trouble to provide the members with material of this kind, and to keep careful records of what it had done.

431 There were regular meetings of the partnerships, attended by IML personnel, at which the members received progress reports, reviewed and commented on various documents and discussed the partnership's projects and possible future projects. Ms Hamilton emphasised that IML regarded it as part of its function to encourage the members of each partnership to meet, to build up relationships, and to pool their knowledge and experience in order that they could advance the partnership's business and, she said, most of the members showed a keen interest in the projects of their partnership. Not all members attended all the meetings in person; some attended by telephone and others still did not attend, though it seems all of the members attended some meetings. Mrs Starbrooke, for example, told us that she had attended partnership meetings whenever possible and had spent time considering the agenda, proposal papers and, later, the minutes. The remaining individual referrers gave very similar evidence of their activities, which it would be repetitious to describe. No doubt, as one might expect, some were more diligent about the meetings (and one must assume the other activities) than others. We accept that the minutes record discussions of possible additional projects, sometimes in great detail, and we accept that the minutes fairly reflect what was in fact discussed.

432 We saw in addition large volumes of email traffic passing between the members and IML. While many of the exchanges in advance of or following meetings were inconsequential, others were serious, and in some cases it is clear that the member concerned must have spent some time considering the matter under discussion. There was some, but limited, evidence that members might on occasion play an active part in the direction of their partnerships; Mr Moondale, for example, described how he had become instrumental in negotiating an escape from a project known as Opus, in which Moondale had become involved, when it became clear that it was unlikely to succeed.

433 The absence of any similar example suggests to us that this was an exceptional event and, indeed, Mr Hutton acknowledged that in the great majority of cases, and so far as the exploitation of the intellectual property rights the partnership had acquired at the outset was concerned, the members could in reality only ever exercise an oversight function. In particular, they had no input into the evaluation of the partnership's projects since that had been undertaken before the package for that partnership, as it was offered to prospective members, was put together. Likewise, the manner in which the rights were to be exploited had already been agreed between Shamrock (in respect of earlier iterations “Centipede” should replace “Shamrock” in what follows) and the production company, and was set out in the agreement between the two executed on the day the members joined the partnership. Thereafter the members' only substantive management role was to receive and consider reports of progress provided by Shamrock, with little scope for them to exercise any influence, and he accepted that there was no evidence that any of the members' cumulative efforts had in fact led to a change in the way existing projects were exploited. Mr Peacock also conceded that, realistically, and in view of the fact that the members had delegated most day-to-day tasks to IML, they were left with little more than a supervisory role in the management of the partnership's financial and administrative affairs: in other words, they were in substance endorsing IML's recommendations, or approving what it had already done.

434 There was some evidence, in minutes of meetings, that members had expressed dissatisfaction with the progress of projects, with the revenues derived from them and, on occasion, with Shamrock's or a production company's performance, and we accept from this evidence that some of the members at least had continuing hopes that the projects adopted by their partnerships might make profits, although as we have already said we are driven to the conclusion that after a year or two few could seriously have thought that profits, or revenues, which had hitherto flowed at a very low level, and in some cases not at all, were likely to increase greatly in the future. In a practical sense, and in relation to the initial projects, there was, as we find, very little that the members could do which might have had any effect, for example by generating a profit when otherwise there would be none, by enhancing any profit which was earned, or by identifying any other means by which the partnership's financial performance might improve.

435 As we have indicated, it was apparent from the minutes that several of the members had

suggested at partnership meetings that the partnership should, or might, acquire additional intellectual property rights, and several possible projects were identified, most commonly because the proposing member considered that a particular singer had potential, although there was evidence of other suggestions. We were made aware of only one acquisition of additional intellectual property rights once a partnership had been in existence for an appreciable time, for £2,000 and apparently funded from the surplus remaining of the members' original contributions rather than from profits derived from existing projects or an additional injection of capital, but had very little evidence of the background to that acquisition, or of what became of it. However, with that exception, none of the possible additional projects progressed beyond the suggestion stage; there was, as some of the individual referrers accepted as they gave evidence, a marked lack of enthusiasm among members as a body for the incurring of further significant expenditure (necessitating the injection of additional capital contributions, whether or not supplemented by borrowing) even though the member making the suggestion may, individually, have had great enthusiasm. There was in addition no evidence that any exploratory talks had taken place with the owners of the intellectual property rights or with production companies, or that financial projections had been prepared, in respect of any such suggested project.

436 We have already explained our conclusion that the partnerships' business activities were not conducted commercially, and we do not repeat the explanation now. That conclusion does not, however, dispose of this question, since the ICTA version of the relevant test makes no reference to commerciality, and in the later, ITA , test the question is not whether the business is commercial, but whether the individual member's activities are carried on on a commercial basis. It would, we think, be a little odd if a member of a partnership could be found to have spent sufficient time engaged, on a commercial basis, in activities conducted for the purposes of a trade which is itself not commercial, but in what follows we shall assume in the individual referrers' favour that such a finding is possible.

HMRC's submissions

437 HMRC argue, in relation to the nature of the activities, that it is of critical importance to identify what is meant by the phrase “for the purposes of the trade”. It has, they say, three elements: the activities must serve the purposes of the trade; they must further the commercial objectives of the trade; and they must contribute towards the earning of profits in the trade. Such activities must be contrasted with those which, viewed realistically, will have no impact on how profits are earned, and will not contribute towards the earning of profits. In Strong & Company of Romsey Ltd v Woodifield, to which we have already referred , it will be recalled that the issue was whether certain expenditure, a payment of damages to a person who was injured while a guest in the taxpayer's hotel, had been incurred “for the purposes of the trade”. Thus the context was different, but the interpretation by the House of Lords of the same phrase, in the passage we set out at para 258 above, offers useful guidance.

438 More recently, in *Mallalieu v Drummond [1983] STC 665, the House of Lords* was again required to consider whether expenditure (on black clothing for a female barrister) had been incurred “for the purposes of the trade”. At 667–8 Lord Brightman said:

> “The effect of [the legislation] is to exclude, as a deduction, the money spent by the taxpayer unless she can establish that such money was spent exclusively for the purposes of her profession. The words in the paragraph ‘expended for the purposes of the trade, profession or vocation’ mean in my opinion ‘expended to serve the purposes of the trade, profession or vocation’; or as elaborated by Lord Davey in Strong & Co of Romsey Ltd v Woodifield … ‘for the purpose of enabling a person to carry on and earn profits in the trade etc.’ The particular words emphasised do not refer to ‘the purposes’ of the taxpayer as some of the cases appear to suggest…. They refer to ‘the purposes’ of the business which is a different concept although the ‘purposes’ (*ie* the intentions or objects) of the taxpayer are fundamental to the application of the paragraph.”

439 The activities described by the individual referrers, of attending partnership meetings, listening to and commenting on recordings provided by IML, reading music magazines and visiting music internet sites in order to read about or sample musical or music-related materials and products, attending concerts and offering comments were not, say HMRC, “for the purposes of the trade”. Such activities, undertaken by members with no relevant expertise or experience,

did not further the commercial objectives of the trade, nor could they contribute to the earning of profits in the trade. There was no realistic possibility that the activities would have any material impact on the conduct of the trade or the scale of the revenues which might be generated. They were no more than “window-dressing” carried on in an attempt to achieve “active partner” status.

440 In particular, the supposed evaluation of potential new projects served no useful purpose, since there was no realistic prospect that new projects would be adopted. While the members were willing at the outset to adopt a number of projects which had been recommended by IML or Shamrock, numerous later possibilities were rejected. It was of no significance that the IIM and the partnership agreements referred to the possibility that additional projects might be adopted; there is no reason to think that the later opportunities supposedly identified by the members were any less commercially attractive than the initial projects, yet they were all rejected without any proper examination because the members plainly had no appetite for expansion of the business. Similarly, reviewing and commenting on existing projects also did not serve the purposes of each partnership's trade, since the comments could not have had any impact. The partnerships had all delegated the exploitation of the existing projects to the principal exploitation company, which in turn had engaged people with expertise and experience which none of the members could claim. Thus the research, such as it was, undertaken by the members could not have had have any material impact on the trade of the partnership and correspondingly was not “for the purposes of the trade”.

441 That was sufficient to demonstrate that Mr Bastionspark, Mr Ironmoat and Mr Keepstone failed the ICTA test. If the change in the wording effected by ITA added anything to that test (and it was clear it took nothing away), it must also be the case that the individual referrers who joined their partnerships after ITA came into force were to be regarded as non-active members.

The individual referrers' submissions

442 Mr Maugham's argument was that the starting point for the consideration of this question should be the common ground that the partnerships were all engaged in a trade. It was then necessary to ask whether the activities undertaken had a sufficient nexus—the nature of which might differ depending on whether the ICTA or ITA provisions applied—with that trade. That was a question of fact. It was important to note when considering the evidence that the phrase used in ICTA was “for the purposes of the trade”, and not “for the *main* purposes of the trade”. Thus, in relation to Mr Bastionspark, Mr Ironmoat and Mr Keepstone, a wider interpretation is necessary than that for which HMRC argued. In essence, said Mr Maugham, anything done by the members which was connected to the trade and reasonably undertaken was “for the purposes of the trade”. Even after ITA changed the test, the requirement was that the activities be undertaken on a commercial basis and with a view to profit; there was no requirement that profit should be the direct result of the activity, and there was nothing which excluded activities undertaken with a view to future profit.

443 He reminded us too that when the Icebreaker Partnerships were promoted to prospective members the possibility that new projects might be taken on was given some prominence. It was not, as HMRC claimed, a matter of no significance. It had been the case from the outset, and well before the coming into force of the changes effected by ITA . The possibility of new projects was reflected in the partnership agreements, so as to amount to a constituent element of the partnership's business model. Mr Keepstone, for example, had emphasised as he gave evidence that prospective expansion of the business was an important feature for him; he was aware that he was expected to play an active role in the partnership's affairs, and willingly did so. The individual referrers had given evidence of their having decided to join a particular partnership precisely because of their interest in the intellectual property rights to be acquired, and their assessment that those projects could be sufficiently successful to support the taking on of additional projects. Ms Hamilton's evidence about IML's having encouraged the members to meet and discuss the promotion of the business, and about their keen interest in the projects, had been unchallenged.

444 HMRC's approach focussed only on the short term whereas, as all the evidence showed, projects of this kind took a long time to mature. It was both reasonable and realistic of the members to take a longer view, to research the market and to discuss ideas for the future even if there was no immediate prospect that a new project would be adopted. In any event, if a project with real potential had been identified the partnership in question might well have adopted it; the

members could not fairly be criticised merely because they took a cautious approach.

445 All of the evidence, not only of the individual referrers themselves but that derived from minutes of the meetings and email exchanges, as well as what was said by Ms Hamilton and Mr Hutton, showed that the members entered into the partnerships with, and retained, a real interest in the initial projects, and that they were enthusiastic and serious in their attempts to identify new projects and persuade their fellow-members to take them on. It was true that none had demonstrable expertise or experience in exploiting projects of the kind promoted by the partnerships, but that fact was irrelevant; Shamrock and the production companies had been appointed because they did have the necessary expertise. What the members were doing was to identify possible additional projects which, after professional evaluation, could be the subject of further agreements with those competent to exploit them on the partnership's behalf.

446 The evidence, properly and fairly assessed, showed that the individual referrers had undertaken the activities they described with the serious purpose of advancing the commercial interests of their respective partnerships, that what they did had a real prospect of increasing profits in the longer term, and that it could not be dismissed, as HMRC wished to do, as a form of window-dressing.

Discussion

447 In our view it is necessary as a starting point to ascertain the purpose behind the legislative requirements in order to determine how they are to be applied. Once that has been done we agree with Mr Maugham that the question is essentially one of fact.

448 It is, we think, uncontroversial that the overarching aim is to restrict relief to those who are genuinely working for a significant amount of time each week in a partnership, and making a real contribution to the partnership's business, and to exclude those indulging a hobby or who are in substance sleeping partners. It is also to be noted that, whichever version of the legislation one examines, the relevant activity must be for the purpose of the trade, and not the purpose of the partnership or of the member himself. Although the authorities to which we were referred must be treated with a degree of caution, since they relate to the expenditure of money rather than of time, we are satisfied that Mallalieu v Drummond is directly in point in this respect.

449 In our judgment HMRC are correct to say that “for the purposes of the trade” implies a good deal more than the rather imprecise nexus for which Mr Maugham argued. The activity in question must, in our view, be aimed at advancing the trade, that is by increasing income or reducing costs in order to make it more profitable, by expanding the business, by enhancing the security of the income stream, for example by attracting more reliable suppliers or customers, or in some similar way; and it must in addition be possible to achieve that aim, in the sense that the activity could lead to the intended result even if, in the event, it does not. Merely doing something which has some connection to the trading activity is not enough; there must at least be a realistic prospect that the activity will result in an enhancement to the trade.

450 On the other hand, one should avoid an excessively restrictive approach. In a trading partnership there might be a number of members who buy and sell, and whose activities plainly affect the level of profitability, while another might have a role equivalent to company secretary. His work would have no direct effect on profits; but without it the partnership would be less well managed, or the trading partners would be diverted from buying and selling in order to perform the work themselves. In an indirect sense, therefore, that member's activities are undertaken “for the purposes of the trade” and it would be strange if such a member were precluded from relief in the event of loss while the members who undertook the buying and selling were not.

451 The next question which appears to arise is whether, in any meaningful sense, there is a difference (at least so far as the individual referrers are concerned) between the requirements of the earlier and later versions of s 103B(2) . In other words, is there a difference between “activities carried on for the purposes of the trade” and “activities of the trade”; and do the phrases “on a commercial basis” and “with a view to the realisation of profits” add to or subtract from the earlier test, or do they merely rewrite it without substantive change? One must assume that there was a purpose behind the amendment of s 103B(2) but as the parties were agreed that any change of substance there might be would make no difference to the outcome in this particular case we shall assume, without formally deciding, that the same test is to be applied to all the individual referrers.

452 We begin with what might be loosely termed management activity, consisting of attending partnership meetings, considering reports, draft resolutions and similar documents and exchanging emails. We are willing to accept from all the evidence we heard and read that a typical member could have spent about two hours a week, on average, on activities of this kind. It does not of course necessarily follow that all of it meets the test; but we are satisfied that at least some of it does. As we have said, day-to-day management of the partnership was delegated to IML, and the exploitation of the intellectual property rights which had been acquired to Shamrock (or Centipede), and in consequence, as the evidence clearly showed, there was little the members did or could have done which might affect the direction of the partnership business in any meaningful sense.

453 However, the members of a partnership have a legitimate interest in ensuring that those undertaking delegated tasks are doing so as efficiently as circumstances allow, and it seems to us that the monitoring of their work was undertaken for the purposes of the trade. We do not agree with HMRC's argument that supervising those appointed to run the partnership's affairs is excluded.

454 We accept too that there were various matters which were not delegated and on which the members were required to pass resolutions, even if they were for the most part of a formal nature. The resolutions relating to the sale of Edgedale's interests in Far-fetch were of a rather different character and time spent on them would, we think, also qualify, but as we understood the evidence sales of the rights in projects were exceptional. This particular event was also, as it happens, irrelevant for present purposes as more than six months had passed from the closing of the partnership before the sale occurred.

455 On the other hand some of the resolutions on which the members were required to vote had little, if any, connection with the trading activities even if they were connected with the partnership. Example are the annual resolutions approving the accounts and re-appointing the auditors; however necessary, the approval and reappointment do not have any effect on the trading activity. They might perhaps be regarded in the same way as the activities of the member carrying on the company secretarial function, to whom we have already referred; but, in our judgment, are more properly to be viewed in the same way as the black clothing in Mallalieu v Drummond .

456 For reasons which will become apparent we do not need to determine the extent to which the management activities, as we have called them, do or do not satisfy the statutory criteria, but in case we should be found elsewhere to have been in error, the impression we have—and it can be no more than impression as the evidence was insufficiently clear for a precise finding—is that an equal division would be fair.

457 It follows from what we have already said that we are willing to assume for the purposes of this decision that a typical member spent in addition eight hours or more in each of the 26 weeks after he or she joined a partnership engaged in tasks such as listening to music, reading periodicals, and attending sports events or concerts, which might equally loosely be termed research activities.

458 The individual referrers claimed, in their witness statements and in their oral evidence, that these activities were earnestly undertaken, into genuine potential projects, and that they carried them out with the serious purpose of recommending to their fellow-members that any they found and considered to have sufficient potential should be adopted by means, if necessary, of further capital injections. It is plain that additional capital injections would be required if any new project were to be adopted since the prospect that any of the partnerships would ever generate sufficient revenue from existing projects was, as we have explained, almost negligible. It is not suggested that these activities were designed to, or could, affect the exploitation of the intellectual property rights the partnerships had acquired at the outset.

459 There are, we think, two difficulties facing the individual referrers in this argument. First, although we acknowledge that the partnership agreements made provision for the possible acquisition of additional intellectual property rights, it does not seem to us that the provision had been implemented, if it was implemented at all (we were not made aware of any resolution to expand a partnership's business, as an aim in itself), in a commercial manner. There was no consensus, in any case, between the members of a partnership that, should a suitable project be found, they would be willing to commit further funds, still less what funds might be committed and

in what manner; rather, the minutes show that enthusiastic members made suggestions to their rather less enthusiastic, or often wholly uninterested, fellow-members. Had there been such a consensus activities which might lead to an expansion of the business could, we think, be regarded as having been undertaken for the purposes of the trade; without one, the activities were not undertaken in pursuit of a business aim. We think there is also considerable merit in HMRC's argument that searching for new projects before the existing projects had even got off the ground, let alone before they had yielded any worthwhile revenue, was premature. It is conspicuous, too, that none of the members had a specified responsibility, for example to search for new projects of a particular type, but that they were sent, indiscriminately, recordings and other materials by IML. Even when a member did identify a possible project, there was no evidence that a business plan was prepared on which the members might have made an informed decision; nothing progressed beyond the suggestion stage.

460 The second reason is that there is no basis, in our view, on which it might be thought that any of the individual referrers' activities could realistically have led to the claimed outcome. The fact that we were offered no example of a new project identified by a member and adopted by an Icebreaker Partnership fortifies us in that conclusion. The activities described to us were, as we find, unfocussed and of questionable utility in that, however enthusiastic they might have been, none of the individual referrers could, or did, claim to have had any training, professional experience or other recognisable expertise in the projects of his or her partnership, or in those which he or she was invited by IML to appraise or identified unaided. It was, indeed, clear to us that HMRC were right to say that in many cases the hours were accumulated by, for example, little more than listening to music rather than engaging in some other leisure activity, in listening to one performer rather than another, or in attending a football match or concert with little more than an incidental possibility of picking up an idea. In short, we have reached the conclusion that the research activities not only did not advance the trade of any partnership, but had no realistic prospect of ever doing so.

461 We recorded, at para 424 above, the individual referrers' awareness of the need to spend a minimum amount of time on partnership-related activities; we were not persuaded that they properly understood the nature of the activities which were required, though they can perhaps be forgiven for that. However, whatever their understanding, and despite their professed interest and enthusiasm, we are satisfied that the individual referrers spent the time because they had been told they must, and that they undertook activities such as they described, not in the expectation or even hope that anything useful might come of them, either for that reason alone or, because they happened to enjoy the particular activity for its own sake, as a pleasurable means of fulfilling a statutory requirement. For reasons we explain elsewhere we are satisfied that these were, and were recognised by the individual referrers to be, tax avoidance schemes and, although it is by no means a factor determinative of that issue, we are bound to say that the assiduity with which they spent time and (in most cases) kept records supports the conclusion that the tax relief was of considerable importance to them. We are equally left in no doubt that IML supplied such items as music recordings in order to assist the individual referrers in satisfying the statutory requirement, and not because it had any real expectation that its doing so would serve any other purpose.

462 We accordingly answer the active partner question in HMRC's favour: that is, in respect of each of the individual referrers, and irrespective of the formulation of the question, the answer is “yes”, and they are correspondingly to be regarded as non-active partners. For the avoidance of doubt, and in case anything turns on it, we should say that we also find as a fact that the activities we have described were not carried on “for the purposes of the trade”, “on a commercial basis” or “with a view to the realisation of profits”.

463 We end this section, for completeness, with Mr Blair's argument that the members who took an interest in the partnership's projects nevertheless did not regard them as serious business propositions, but as a hobby. In our view in some (though not all) cases even that description is flattering, since it implies that the activities were undertaken with genuine enthusiasm and for the pleasure they provided, whereas the evidence showed that they were not. We are, instead, satisfied that, hopeful though they may have been that profits would be made, none of the individual referrers could reasonably have believed that the activities he or she was undertaking would contribute to profit and we were left with the unambiguous impression that while some derived pleasure from what they did, others regarded the expenditure of the time as an unwelcome burden.

The Restrictions Regulations question

464 The referred question in respect of Mr Bastionspark, Mr Ironmoat and Mr Keepstone is:

> Did he take out a loan in connection with his financing of the whole or part of a contribution to the relevant trade for the purposes of regulation 4 of the Partnerships (Restrictions on Contributions to a Trade) Regulations 2005 (SI 2005/2017) ("the Restrictions Regulations 2005"), and, if so, in respect of such loan, was condition 1, 2, or 3 under regulation 4 of the Restrictions Regulations 2005 satisfied?

465 In respect of Mr Edgedale, Mrs Starbrooke, Mr Moondale and Mr Hawksbridge the question is:

> Did he [or she] take out a loan in connection with his financing of the whole or part of a capital contribution for the purposes of regulation 4 of the Restrictions Regulations 2005 , and, if so, in respect of such loan, was condition 1, 2, or 3 under regulation 4 of the Restrictions Regulations 2005 satisfied?

466 The parties agree that if we give the same answer in respect of each of Mr Bastionspark, Mr Edgedale, Mrs Starbrooke and Mr Hawksbridge, that answer will be conclusive in relation to the remaining individual referrers, though if we give different answers it will be necessary to consider the application of those answers to the others.

467 The Regulations, which are engaged only in respect of capital contributions to a partnership, came into force on 2 December 2004, and affect all of the individual referrers. Regulation 4 is entitled "Restrictions on computing the amount of an individual's contribution to a trade—Loans", and so far as relevant in these cases it provides as follows:

> "(1) This regulation applies where—
>
> > (a) an individual takes out a loan in connection with his financing of the whole or part of a capital contribution, and
> >
> > (b) at least one of the following conditions is satisfied.
>
> *Condition 1*
>
> There is, at any time, an agreement or arrangement under which all or any of the financial cost of repaying the loan is, will or may be borne, or ultimately borne, by any other person.
>
> *Condition 2*
>
> All or any of the financial cost of repaying the loan is at any time borne, or ultimately borne, by any other person (except under the terms of an agreement or arrangement falling within Condition 1).
>
> *Condition 3*
>
> The liability to repay the loan is at any time assumed or released by any other person."

468 There is a fourth Condition, which is not material in this case. The terms used in the Conditions are defined in reg 2 , as follows (again, so far as relevant to these cases):

> "'any other person', in relation to an individual, includes a partnership of which the individual is a member;

‘arrangement’ means any scheme, arrangement or understanding of any kind (whether or not it is, or is intended to be, legally enforceable); …

‘loan’ includes—

(a) an advance of money, or any form of credit, and ‘takes out a loan’ shall be construed accordingly; ….”

469 The consequence for a taxpayer, if any of Conditions 1 to 3 is satisfied, is spelt out by reg 4(2) . As originally made, it read:

> “Where any of Conditions 1 to 3 are satisfied, there shall be excluded when computing the amount of the individual's contribution to the relevant trade at the time in question the financial cost of repaying the loan, which is, will or may be borne or ultimately borne by the other person, or the liability to repay which is assumed or released by the other person, as the case may be.”

470 The words “contribution to the relevant trade” were replaced by “capital contribution” with effect from 6 April 2007, and it is that replacement which has led to a change in the wording of the referred questions. It has, however, no other significance for present purposes. Following provisions of the regulation cater for consequential matters, but we do not think it necessary to deal with them. The reason why the individual's “contribution to the relevant trade” or “capital contribution” is important is that ICTA ss 117, 118ZB and 118ZE impose restrictions on loss relief by reference to it. In summary, if an individual takes out a loan to finance a contribution to a trade and the loan is on limited or non-recourse terms, or, as it so happens, the cost of repaying the loan is borne or assumed by someone else, then certain sums are excluded when computing the amount of his contribution to the trade, and the amount of relief he may receive is correspondingly reduced. The parties do not disagree about the consequences which follow once we have answered the referred questions, and we do not need to dwell on them. The question we must answer, in essence, is whether each of the individual referrers took out a loan falling within one or more of Conditions 1 to 3 in connection with the financing of all or part of his or her capital contribution to the partnership he or she joined.

HMRC's submissions

471 HMRC again adopt and rely substantially upon the analysis of the Regulations undertaken by this tribunal in Samarkand . In that case two partnerships acquired rights to certain films, which they then leased to a company, Haiku Releasing Ltd (“Haiku”), which in turn licensed them back to the original vendors of the films. The purchases were conditional on the lease agreements and *vice versa* ; as the tribunal found, it was a single, composite transaction. The leases provided for fixed but escalating rentals over a 15 year period. The members of the partnerships borrowed, from a bank, 90% of their capital contributions, which were used in purchasing the films and in paying fees to an agent who had sourced the films. The original vendors paid Haiku about 80% of the sale proceeds as the fee for the licences, and Haiku placed an equal sum on deposit with the lending bank. The deposit was charged as security for Haiku's rental obligations to the partnerships, and the deposit and the interest it earned were used to pay the rentals due to the partnerships. The members used their respective shares of that income to service and repay their loans. The interest earned on the deposit was marginally less than that payable on the partners' loans, and the difference was the bank's turn. In addition, the partnerships charged their assets to the bank as security for the members' loans; the tribunal determined, at [480], that “there was an arrangement under which the partnership might bear the financial cost of the loans”, albeit each member had indemnified the partnership against any liability arising from his “personal affairs”.

472 The tribunal decided that the partnerships were not trading but went on to consider the impact of the Restrictions Regulations on the assumption that the partnerships had in fact been trading. The particular question was whether, even irrespective of the indemnity, the partnership was truly bearing the cost of repaying the loans, in view of the fact that the members, as in any partnership, generally have a proportionate entitlement to the partnership's assets and are indirectly bearing the cost themselves: that is, in essence, the individual referrers' case here. At [486] the tribunal in Samarkand said:

> "For that reason, to the extent that the indemnity given by the partner to the partnership has equivalent value to the liability assessed or discharged by the partnership for the partner we do not regard the cost as borne by the partnership. (We note that the test is whether the liability is borne by the partnership not whether the partner continues to carry a cost.)"

473 That observation, and particularly the sentence in parenthesis, makes it clear that in the absence of indemnities a partnership would bear the cost of repaying its members' loans; the fact that the members would continue to carry a cost, by virtue of their entitlement to a share of the partnership's assets, does not affect that conclusion. In addition, the tribunal was right to conclude that a partnership does bear a cost, for the purposes of Condition 1, notwithstanding that the partners might ultimately meet it from their entitlement to the partnership's assets. That follows from the definition by reg 2 of "any other person", which includes a partnership of which the individual is a member. The draftsman plainly intended that the Restrictions Regulations should apply in the case of a partnership repaying its members' loans; if that were not so they would be of very limited effect. The individual referrers' argument, to which we come below (see para 481), that since ITTOIA s 863(1)(c) , provides that "the property of [a] limited liability partnership is treated as held by the members as partnership property", resort to the assets of the partnership amounts to resort to the assets of the members, is misconceived, since it does not address the point that the partnership incurs the liability even if it has recourse to those assets by way of indemnity or reimbursement.

474 The question must be answered, as reg 4(2) puts it, "at the time in question". In the years up to and including 2006–07, by virtue of the relevant provisions of ICTA , that time is the end of the year of assessment. In subsequent years, the corresponding provisions of ITA moved the time to the end of the basis period, *ie* the period of 12 months ending with the accounting date in that year (see ITTOIA s 198 , ITA s 104). We interpose that this point was not controversial, and we do not think anything turns on it for present purposes. What is clear is that one must examine the position on a particular date and not over a period of time although, as the arrangements did not change, we do not think it a point of importance.

475 Taking Mr Bastionspark as an example (there is no material difference between him and the other individual referrers), it is plain that he did take out a loan, in his case of £240,000, or 80% of his total contribution. Regulation 4(1)(a) is therefore satisfied. HMRC say that Condition 1 is also satisfied because Bastionspark charged its assets in favour of the lending bank as security for repayment of its members' loans. That is enough to demonstrate that there was an agreement or arrangement under which the financial cost of repaying Mr Bastionspark's loan may be borne by another person (a term which includes a partnership), namely Bastionspark. As the tribunal recognised in Samarkand , the fact that, in the absence of indemnities, Mr Bastionspark would indirectly carry a cost, by virtue of his entitlement to a share of the partnership's assets, does not matter.

476 Alternatively, clause 18 of the Bastionspark partnership agreement, which provides that the partnership is to come to an end on the occurrence of certain events and for the disposal of the net proceeds of sale of its assets, leads to the same result. The first use of the proceeds prescribed by the agreement—and the remaining agreements are in similar terms—is repayment of members' loans. If that occurred, Bastionspark would have borne the cost of repaying Mr Bastionspark's loan, again satisfying Condition 1. It is no answer to say, as the individual referrers do, that repayment in that manner would be made out of each member's own assets because clause 18 refers to "repayment on behalf of the members"; "on behalf of" does not mean that the repayment would be made by the partnership as an agent for the members, using the members' own assets. Clause 18 also provides that what remains after repayment of the loans must be used for various other purposes, such as payment of Bastionspark's own creditors, and it is only if there is some residue at that stage that it is distributed between the members. Thus it is only at that stage that the members become entitled to any assets; and it follows that the antecedent repayment of their loans could not be made from those assets.

477 It is not necessary, say HMRC, to consider Conditions 2 and 3, but as a matter of fact they too are satisfied, and for the same reasons. We interpose that the proposition that if Condition 1 is satisfied so too are Conditions 2 and 3 was not controversial, and we shall not deal with it further.

The individual referrers' submissions

478 Mr Maugham's first argument was that HMRC's contentions must be examined against the lending and security arrangements. The bank loans were all on full recourse terms, providing (typically—the precise wording varied from one bank to another but was materially in the same terms) that:

> "The Bank will take security from the LLP in respect of the Loan, and other security as outlined in Clause 10. This does not lessen or remove your personal liability as borrower of the Loan. Your liability is not limited to the assets of the LLP and any other security. You are and will remain fully responsible for the payments due."

479 The security arrangements, described above, made it difficult to see how any of the lending banks could ever, as a matter of fact, seek repayment of a member's loan from the partnership of which he or she was a member. The clause from the loan agreement set out above made it clear that the member was personally liable, and the security arrangements showed that his liability was fully secured. There was no conceivable eventuality in which the partnership could be called upon to meet the member's liability, since there was no possibility that the security would fail. HMRC had themselves relied, in the statement of case served in Edgedale's appeal, on an internal memorandum of BoS, the lending bank in that case, in which it was said that "Under Basle I, this structure provides zero weighting for the debt to the investors." In addition, a "comfort letter" issued by BoS recognised that it could enforce its security at any time in order to ensure that the loans were fully repaid. The bank itself had no expectation of looking to the partnership for repayment, and the same was true of the other partnerships.

480 HMRC's reliance on the tribunal's decision in Samarkand was misplaced, since it ignored much else which was said in that case, in particular at [485]:

> "We do not however regard the fact that someone may pay an amount as indicating that he bears the cost associated with that payment. To our minds a person bears a cost if his net assets are diminished as the result of the cost. By contrast a cost is ultimately borne if as the result of a series of transactions or the lapse of time a cost which was not initially borne by a person ultimately reduces his net assets. We do not regard the contrast between 'borne' and 'ultimately borne' as requiring that the mere payment or assumption of a liability comprises the bearing of a cost. 'Borne' indicates the carrying of a burden without relief."

481 Thus, even if resort could be had by BoS to the assets of, in this case, Edgedale, the security would be exercised over assets of the partnership owned by the members in shares exactly proportionate to their respective secured borrowings. Although the partnership would temporarily bear the cost, it would not bear it permanently since the only effect would be to diminish assets which would otherwise have been distributed by the partnership to its members on a winding up. That was, again contrary to HMRC's case, the effect of ITTOIA s 863(1) , which provides that

> "(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit—
>
> > (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
> >
> > (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
> >
> > (c) the property of the limited liability partnership is treated as held by the

members as partnership property.

References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.”

482 If, as s 863(1)(c) provides, the property of the partnership is treated as held by the members as partnership property, resort to the property of the partnership can only be resort to the assets held by the members who would, again, bear the liability in shares exactly proportionate to the value of their shares in the partnership. For the same reason, on winding up, regardless of whether the partnership paid the bank “on behalf of” the members, the members would be repaying their loans from their own assets.

Discussion

483 On this issue we prefer the individual referrers' arguments. In our view the aim of the Restrictions Regulations is to remove or restrict relief in those cases in which the borrower does not truly have any liability to repay the borrowing—in other words, the provisions are aimed at arrangements in which there is the appearance but not the substance of a borrowing, or where the borrower is in some way fully indemnified without cost to himself.

484 Although, as we have already said, the borrowing in these cases was wholly unnecessary, and undertaken only in order to increase the scale of the tax relief which might be obtained, the arrangements were not (as HMRC have accepted) a sham. Thus the members did each borrow money, and they used it, as we have found, to purchase an income stream and final minimum sum which would enable them to repay the loans and service them in the meantime. Although the possibility that they would have to repay the borrowings from funds not within the scheme was, as we have also found, illusory, we accept that these were full recourse loans, albeit fully secured. There was no realistic prospect, as a matter of fact, that the partnership would have to repay the loan; but even if there were we agree with Mr Maugham that a partnership which pays a member's debt from the member's share of the partnership assets is not, as the Conditions require, bearing or assuming the liability; in a meaningful sense it is doing no more than discharge it for the member.

485 We can illustrate that conclusion by a simple example, albeit not one involving a partnership. Bank A may lend to an individual a sum of money, on the security of a post-dated cheque, for the aggregate of the capital and the agreed interest over the period of the loan, drawn by the borrower on Bank B. The arrangement is, from the outset, that on maturity of the loan Bank A will present the cheque to Bank B. It does so and, as the borrower has sufficient funds at Bank B, Bank B accepts the cheque and thereupon assumes the liability for payment of the relevant amount, and does pay it, debiting the borrower's account accordingly. It is difficult to imagine that the draftsman of the Restrictions Regulations had in mind that an arrangement of that kind should disqualify the borrower from any relief to which he might otherwise be entitled. The borrower was at all times liable to, and in a real sense did, repay the loan.

486 We see no material difference between that situation and that with which we are faced here. In our judgment what is meant by “borne” or “assumed”, as those words are used in the Conditions, is borne or assumed in the real sense that the ultimate burden is borne or assumed. The fleeting burden of paying the amount of the debt followed by instantaneous reimbursement, whether one takes the bank in our example or the partnerships here, does not in our view satisfy any of the Conditions. Their aim is to deprive the borrower who has never had, or has successfully divested himself of, any liability for repayment, of relief. That is not this case. Although the individual referrers all had the certainty that the necessary funds were guaranteed, the liability for repayment was, and at all times remained, theirs. We agree, therefore, with what this tribunal said in Samarkand at [485], which is set out above.

487 Accordingly we answer this question as follows: each of Mr Bastionspark, Mr Edgedale, Mrs Starbrooke and Mr Hawksbridge (as we have said, the answer in the cases of the other individual referrers follows) took out a loan within the scope of reg 4(1)(a) of the Restrictions Regulations , but none of Conditions 1, 2, or 3 prescribed by reg 4(1)(b) is satisfied, and reg 4(2) is therefore not engaged.

The s 74ZA question

488 As we have indicated, this question was referred only in respect of Mr Moondale and Mr Hawksbridge. Section 74ZA provides as follows:

> "(1) This section applies if—
>
> > (a) during a tax year a person carries on (alone or in partnership) a trade, profession or vocation ('the relevant activity'),
> >
> > (b) the person makes a loss in the relevant activity in that tax year, and
> >
> > (c) the loss arises directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements.
>
> (2) No sideways relief or capital gains relief may be given to the person for the loss (but subject to subsection (5)).
>
> (3) In subsection (1) 'relevant tax avoidance arrangements' means arrangements—
>
> > (a) to which the person is a party, and
> >
> > (b) the main purpose, or one of the main purposes, of which is the obtaining of a reduction in tax liability by means of sideways relief or capital gains relief.
>
> (4) In subsection (3) 'arrangements' includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

489 It is agreed that sub-s (5) has no application to these cases.

490 The referred question breaks down into two parts, in these terms:

> Was he a party to any "arrangements" which were "relevant tax avoidance arrangements", as those terms are used in subsections (3) and (4) of section 74ZA ITA 2007 ?
>
> If that question is answered in the affirmative, then did the person make a loss which arose in consequence of, or in connection with, those "relevant tax avoidance arrangements", and, if so, did that loss arise in circumstances falling within the commencement provisions in paragraph 11, Schedule 3, Finance Act 2010 ?

491 The commencement provisions of para 11 of Sch 3 to the Finance Act 2010 (which inserted s 74ZA) apply its provisions to arrangements entered into, or in respect of which a binding obligation was entered into, on or after 21 October 2009. It is common ground that Mr Hawksbridge is affected by it, but HMRC now accept that the Moondale expenditure was incurred before 21 October 2009, and we do not, after all, need to consider whether s 74ZA has any application to Mr Moondale.

HMRC's submissions

492 We were referred to two decisions of the Special Commissioners, *Snell and another v Revenue and Customs Commissioners [2008] STC (SCD) 1094* , and *Lloyd v Revenue and Customs Commissioners [2008] STC (SCD) 681* , in which various observations were made about a similar provision, ICTA s 703 . That provision (since re-written to ITA and the Corporation Tax Act 2010) related to transactions in securities and has no direct relevance in this case. Nevertheless, the essential requirement is the same: the drawing of the line between, on one

side of that line, something which is the main purpose, or one of the main purposes, of a transaction, and on the other something which results from the transaction but is incidental in that it is a by-product rather than its main purpose or one of its main purposes.

493 The starting point is, perhaps, *IRC v Brebner [1967] 2 AC 18, in which the House of Lords* (dealing with an earlier provision corresponding to s 703) made it clear that the question is essentially one of fact, to be determined against the background of the transaction as a whole, rather than by reference to the individual steps, and that "purpose" (meaning "objective" or "aim", rather than "effect") is to be ascertained from subjective factors.

494 In Snell the Special Commissioner found that although the transactions in question were carried out for *bona fide* commercial reasons, the tax advantage which followed was more than merely incidental: one of the objects of the arrangements in that case was to ensure that cash payments were made to the participants in a tax-advantageous manner. In Lloyd the transaction was also found to have been undertaken for *bona fide* commercial reasons, but the Special Commissioner decided that the tax treatment of the transaction was important in that it determined both the structure and the timing of the arrangements, and was therefore more than ancillary; it was, as he determined, one of the main objects of the transaction. In A H Field (Holdings) Ltd v Revenue and Customs Commissioners [2012] UKFTT 104 (TC) this tribunal, dealing with similar provisions in the context of the loan relationship rules, observed at [135] "it is legitimate to consider the consequences of the taxpayer's actions in order to determine his purpose" and, at [176],

> "There are a number of different ways of testing whether tax is one of the main purposes of this transaction. We also think it is legitimate to ask in this context whether the transaction would have been undertaken if the tax impact had been neutral."

495 Then, after referring to the remark of Lightman J in *IRC v Trustees of the Sema Group Pension Scheme [2002] STC 276* at [53] that "Obviously if the tax advantage is mere 'icing on the cake' it will not constitute a main object", the tribunal concluded at [178] that in the case before it

> "the tax planning in respect of this [arrangement] was more than mere icing and that in fact this transaction produced a preponderance of icing and very little cake."

496 HMRC argue that the nature of the Icebreaker arrangements, as we have described them above, is quite obvious: the "front loading" of the expenditure, and the (as they contend) unnecessary loans, demonstrate unequivocally that the principal purpose was to put the members in a position to claim loss relief, and to do so in respect of an amount greater than their own contributions. It was clear from the outset that this would be the case, as perusal of the IIM shows; the tax relief was a key "selling point" of the arrangements. Even if we should not be persuaded that obtaining tax relief was the main purpose of the arrangements it was manifestly one of the main purposes, and that was enough. In addition, and viewing the facts realistically, the only reason why the members obtained loans was to enable them to make increased claims for loss relief. That fact too pointed to the conclusion that the main purpose, or one of the main purposes, of the arrangements was to obtain a tax advantage. As in Field , there was a great deal of icing and very little, if even any, cake.

497 The assertions in Mr Maugham's skeleton argument that "Hawksbridge would have received revenues in excess of capital contributed", and "the tax burden on the income streams would have very considerably exceeded the loss relief" were simply not borne out by a realistic appraisal of the likely revenues or by what had in fact happened. Even if, contrary to any realistic expectation, Hawksbridge were, as a matter of fact, to earn significant revenue streams from exploitation of the intellectual property rights it had acquired, there was no certainty that the income would be taxable in the members' hands, still less that the tax payable would exceed the immediate tax advantage, since the members could, for example, sell the business. However, even if they did eventually pay an equivalent amount of tax that was an irrelevant consideration since the test introduced by s 74ZA(3) is whether "the main purpose, or one of the main purposes … is the obtaining of a reduction in tax liability by means of sideways relief or capital gains relief". Even on Mr Hawksbridge's case he was using, or seeking to use, sideways relief in order to secure an immediate reduction, which might possibly be matched eventually by a liability. Thus

the question to be asked is not whether there will be a reduction of tax liability overall, but whether the main purpose of the arrangements is to secure sideways relief or capital gains relief.

Mr Hawksbridge's submissions

498 There are, said Mr Maugham, two reasons why s 74ZA does not apply to Mr Hawksbridge. First, HMRC have accepted that Hawksbridge was carrying on a trade with a view to profit. They were compelled to make that concession in order to rely on s 74ZA , since, if that were not the case, Mr Hawksbridge would not come within the scope of s 74ZA(1) and the provisions would not be engaged. In addition, he would not be deemed by ITTOIA s 863 (see para 481 above) to be carrying on a trade in partnership. HMRC could properly have made the concession only if they also accepted that Hawksbridge was expected to generate profits in excess of the members' capital contributions. Even assuming Hawksbridge received nothing in respect of its entitlement to shares of revenues derived from the exploitation of the intellectual property rights, pursuant to its principal exploitation agreement with Shamrock, it would receive the guaranteed sums, representing revenues in excess of capital contributed. These profits would be taxable at rates which in turn would lead to the tax burden exceeding the loss relief which Mr Hawksbridge was seeking. If the arrangements also generated variable income streams, those income streams too would be taxable. In those circumstances it could not sensibly be said that one of the purposes of the arrangements was the obtaining of a reduction in tax liability.

499 The second reason was that, as his evidence showed, Mr Hawksbridge did not enter into the partnership for the purpose of generating sideways loss relief, but with the aim of achieving profits from the exploitation of intellectual property rights. The question is one of fact, and it requires us to determine what was Mr Hawksbridge's subjective intention. That is to be derived from his evidence on the point, which was not materially challenged. He dealt in his witness statement, and in some detail, with his interest in the creative industries and his view of the partnership as a means of enabling him to participate in the commercial success of the projects which Hawksbridge had adopted. He also said that he knew sideways relief was not certain, but went ahead regardless. He chose Hawksbridge over Dovemoat precisely because of the projects each intended to take on, preferring those of Hawksbridge.

500 HMRC had also failed, said Mr Maugham, to put the matter properly to Mr Hawksbridge as he gave his evidence. The relevant exchanges were as follows:

> Q. How did you ultimately decide to become a member of Hawksbridge as opposed to a member of Dovemoat?
>
> A. As I describe in my statements, I saw greater commercial opportunity from the Hawksbridge projects than from the Dovemoat proposal.
>
> Q. Tax had an impact on your decision to enter into this, didn't it?
>
> A. As it was described, I see [*sic*] the LLP as being tax neutral over its life, so I would not consider the tax element to be a major part of it.
>
> Q. One of your purposes, I suggest, of your entering into this Icebreaker partnership called Hawksbridge was because it provided a benefit to you of reducing tax liability with sideways tax relief. That's right, isn't it?
>
> A. The tax consequences of my involvement I would say are part of my tax return overall. As I've described, my motivation for involvement in Hawksbridge was commercial.

501 Those exchanges, argued Mr Maugham, did not put the statutory question correctly, and did not give Mr Hawksbridge a proper chance of answering what is being said against him. The statutory test is whether the main purpose, or one of the main purposes, of entering into the arrangements was the obtaining of sideways relief. All that had been put to Mr Hawksbridge was that it was one of his purposes, and that was not enough.

Discussion

502 We deal first with Mr Maugham's argument that Mr Hawksbridge was not asked the right

question. In our view there is no merit in it. The questions and answers we have set out above represent, as one would expect, only part of the oral evidence Mr Hawksbridge gave. Once they are put into their context, it is clear, in our view, that Mr Hawksbridge cannot realistically have failed to understand that it was being put to him that the obtaining of sideway tax relief was the primary reason why he joined the partnership. His answers, taken as a whole, show that he did in fact understand what was being put to him; indeed, on occasion, he avoided answering awkward questions, particularly about the advice offered to him by his IFA (which was not disclosed). Mr Maugham's objection is, as we see it, little more than pedantry and we reject it.

503 We can deal with the remainder of this issue quite briefly, in view of what we have already set out above. It is quite true, as Mr Maugham emphasised, that Hawksbridge, like the other partnerships, was engaged in trade with a view to profit. But is also true, as we have found, that profit, in the true sense of the term, was an unlikely prospect, and that Mr Hawksbridge, like the remaining individual referrers, knew very well when he joined the partnership that it was unlikely. We have already said, but repeat without rehearsing the reasons, that none of the individual referrers could rationally have joined a partnership believing that it was a serious conventional investment, whatever their hopes that profits might in fact result. Their motives for doing so must, therefore, have been other than an investment purpose.

504 We need to discern that motive only in Mr Hawksbridge's case, though there is in reality nothing to distinguish him from the other individual referrers. We are quite satisfied that he knew that profits, in the true sense, were unlikely and that, absent a tax advantage, this was not a prudent investment since he was much more likely than not to lose the money paid in from his own resources. We are also satisfied that his primary motive for joining the partnership was to secure sideways relief; no other plausible conclusion is possible. In so far as his evidence was to the contrary, we reject it.

505 Accordingly we answer this question as follows. Mr Hawksbridge was a party to relevant tax avoidance arrangements within ITA s 74ZA(3) and (4) in that he was aiming to obtain sideways relief, he made a loss which arose in consequence of, or in connection with, those tax avoidance arrangements, and the arrangements which gave rise to that loss were entered into after the commencement provisions in para 11 of Sch 3 to the Finance Act 2010 came into effect.

Summary of Conclusions and Disposition

506 The underlying, and fundamental, conclusion we have reached is that the Icebreaker scheme is, and was known and understood by all concerned to be, a tax avoidance scheme. The aim was to secure sideways relief for the members, and to inflate the scale of the relief by unnecessary borrowing, coupled with the illusion that the borrowed money was available for use in the exploitation of intellectual property rights by the device of the purported payment of a large production fee offset by the equally purported payment of a fee for a share of the resulting revenue. In our judgment the schemes substantially failed in their purpose. We accept, nevertheless, that each of the appellant partnerships was carrying on the trade of the exploitation of intellectual property rights.

Conclusions in the appeals

507 A more detailed summary of our conclusions on the effective argument appears in the section beginning at para 320 above, and we do not repeat them now, but merely provide a summary:

the sums borrowed by the members of all the appellant partnerships were not used for the purposes of the partnerships' trades, but in the purchase of a capital asset;

some (and in Acornwood's case all) of the payment by each partnership to its principal exploitation company less the equivalent of the final minimum sum was revenue expenditure incurred in the year of payment;

the administrative services fee paid by each partnership to IML as it closed is to be regarded as revenue expenditure incurred wholly in the year of payment;

in the cases of Edgedale, Starbrooke and Hawksbridge, the immediate advisory

services fee represented a capital expense, but in the cases of Acornwood and Bastionspark apportionment of that fee is required in the manner described at para 318 above;

the treatment of the payments in the appellant partnerships' accounts was incorrect;

the amendments effected by the closure notices must be adjusted, to a limited extent, in the appellant partnerships' favour;

the Ramsay line of cases has no application to the arrangements as we have found them to be; but if we had concluded that the arrangements succeeded in their purpose, the tax consequences should be disregarded.

Conclusions in the references

none of the appellant partnerships' trades were carried on on a commercial basis and with a view to profit;

none of the individual referrers was an active partner;

the Restriction Regulations do not apply to any of the individual referrers;

Mr Hawksbridge's main purpose in entering into the arrangements was to secure sideways relief in order to avoid tax.

508 The appeals against the closure notices therefore succeed in part, in that relief should be given for what we have found to be revenue expense incurred in the year to which the closure notice in each case relates, though not for what we have found to be capital expenditure or to represent a pre-payment. As we have indicated we are not asked at this stage to determine the detail of the amendments, and the parties may apply for the appeals to be continued for that purpose if they are unable to agree. In view of the complications of the case we have decided to set a time limit of one year from the release of this decision for the parties to make such an application.

509 Any application in respect of costs must be made to the tribunal within the time limit imposed by rule 10(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 , namely 28 days after the date of release of this decision, but we dispense with the requirement that any such application be accompanied by a schedule of the costs sought.

510 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.

Appendix

List of Icebreaker Partnerships

Lead Partnerships' names in bold type

Tax Year	Name of LLP	Loss claimed	Annual totals
2004–05	Icebreaker 2	£1,718,927	
	Icebreaker	£953,790	**£2,672,717**

Tax Year	**Name of LLP**	**Loss claimed**	**Annual totals**
	3		
2005–06	**Acornwood**	£5,199,166	
	Butchers Hook	£888,881	
	Fenland Hill	£2,304,956	
	Grapestorm	£4,568,641	
	Watership Park	£5,100,530	**£18,062,174**
2006–07	**Bastionspark**	£4,883,792	
	Castledale	£4,821,067	
	Fortscroft	£6,015,200	
	Havensbridge	£6,049,020	
	Ironmoat	£6,401,251	
	Keepstone	£6,366,386	
	Moonguard	£2,235,232	
	Sporting Future	£2,765,132	
	Tenter Lane	£5,607,328	
	Towersgate	£5,139,453	**£50,283,861**
2007–08	Arransgate	£4,099,704	
	Crosstone	£7,183,781	
	Edgedale	£6,496,686	
	Goldsbridge	£6,444,739	
	Purplesun	£5,714,280	

Tax Year	**Name of LLP**	**Loss claimed**	**Annual totals**
	Seacrest	£4,597,898	
	Silverfort	£8,567,302	
	Skybrooke	£5,248,496	
	Whitebrooke	£5,579,408	
	Wyrecroft	£6,815,471	**£60,747,765**
2008–09	Brightdale	£5,619,136	
	Carastone	£6,457,747	
	Cedarpark	£7,989,316	
	Clydemoat	£6,287,528	
	Foxbridge	£4,608,731	
	Ivancroft	£11,749,125	
	Kildapark	£5,750,204	
	Lochurst	£4,928,775	
	Opalstone	£8,223,839	
	Pinebrooke	£7,852,278	
	The Platinum Vintage	£8,037,548	
	Starbrooke	£6,820,283	**£84,324,510**
2009–10	Dovemoat	£10,030,329	
	Eaglefort	£11,153,047	
	Firecroft	£7,574,740	
	Hawksbridge	£5,628,653	
	Larkdale	£25,234,196	

Tax Year	Name of LLP	Loss claimed	Annual totals
	Laserbrooke	£7,944,806	
	Lightcrest	£6,050,613	
	Moondale	£11,371,604	
	Owlbrooke	£6,897,686	
	Raybrooke	£6,276,888	
	Sparkdale	£9,399,878	
	Sunbridge	£12,534,400	**£120,096,840**
		Grand total	**£336,187,867**