[2012] UKFTT 696 (TC)

TC02365

**Appeal numbers: TC/2009/13898, TC/2009/13899, TC/2009/16005
TC/2009/13897, TC/2009/16004, TC/2009/16006**

CORPORATION TAX – purported assignments of unregistered trade marks in gross (newspaper mastheads) by subsidiaries to their parent company – whether valid under common law – held no – alternatively on the basis that they were valid whether certain of them were unlawful distributions pursuant to sections 263 and 270(2) Companies Act 1985 – held no – whether purported licences-back of the trade marks by the parent company to the subsidiaries were for a licence fee in excess of market value – found yes – and whether the licence fees were unlawful distributions of capital by the subsidiaries –* Progress Property Co Ltd v Moore [2011] 1 WLR 1 *considered – held no – whether the licence fees were capital receipts or income receipts in the hands of the parent company – held capital – whether Sch. 29 FA 2002 applies to the licences – held no, because there was no post-commencement expenditure on their creation – whether the purported assignments and licences-back were tax avoidance arrangements within para. 111, Sch. 29 FA 2002 – held yes – whether the one of the main purposes for which the subsidiaries and parent entered into loan relationships to facilitate the transactions was a tax avoidance purpose within para. 13, Sch. 9 FA 1996 – held yes – whether any debit under Ch. II, Pt. IV, FA 1996 was attributable to the tax avoidance purpose – held no – appeals allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ILIFFE NEWS AND MEDIA LIMITED — Appellants
HERTS AND ESSEX NEWSPAPERS LIMITED
STAFFORDSHIRE NEWSPAPERS LIMITED
CAMBRIDGE NEWSPAPERS LIMITED
LSN MEDIA LIMITED**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
LYNNETH SALISBURY**

Sitting in public at Bedford Square, London on 10, 11, 13 and 14 October 2011 and at the Royal Courts of Justice, London on 24, 25, 26 and 27 January 2012

Daniel Alexander QC, Julian Ghosh QC, Mary Stokes and Elizabeth Wilson, instructed by Reynolds Porter Chamberlain LLP, for the Appellants

Philip Jones QC and David Yates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

A: Introduction

1. The parties to these appeals produced an agreed Statement of Facts Not in Dispute, from which we extract the following facts which will form an introduction to this Decision.

2. Iliffe News and Media Limited ("INML"), the first appellant, was at all times material to these appeals an intermediate holding company of a newspaper group whose ultimate parent was Yattendon Investment Trust plc ("Yattendon").

3. The second to fifth appellants, Herts and Essex Newspapers Limited ("HENL"), Staffordshire Newspapers Limited ("SNL"), Cambridge Newspapers Limited ("CNL") and LSN Media Limited ("LSN") were 100% subsidiaries of INML at the times in 2003 to 2005 which are relevant to these appeals, except that LSN was acquired in August 2005 (as noted in paragraph 7 below).

4. HENL, SNL, CNL and LSN carry on business as regional newspaper publishing companies. When more than one of these subsidiaries is referred to in this Decision they are referred to either by the applicable abbreviation (HENL, SNL, CNL or LSN as the case may be) or as "Subsidiaries".

5. The appeals concern transactions carried out in 2003 and 2005 whereby the appellants contend (though this is disputed by the respondents ("HMRC")) that various unregistered trademarks ("UTMs"), being titles of local newspapers and other publications, referred to as "mastheads", were assigned from the respective Subsidiaries, HENL, SNL, CNL and LSN, to their parent company, INML, and were then licensed back to the respective Subsidiaries by INML for consideration of various sums payable as lump sums totalling £51,400,000.

6. The transactions carried out in 2003 ("the 2003 Transactions") can briefly be described as follows:

a) On 26 September 2003 HENL, SNL and CNL each entered into a separate Trade Mark Assignment Agreement ("TMA"), a separate Trade Mark Licence Agreement ("TMLA"), and a separate Loan Agreement ("LA"), in each case with INML;

b) The UTMs sought to be assigned by the TMAs were the mastheads (trade marks and logos) of various regional newspapers (free and paid-for) owned by HENL, SNL and CNL respectively;

c) In consideration of £1, each of HENL, SNL and CNL sought (by the TMAs) to assign UTMs to INML;

d) INML sought to license back the UTMs assigned to it respectively by HENL, SNL and CNL to the Subsidiary assigning such UTMs, for a period of 5 years in return for premiums payable as at 26 September 2003 by the Subsidiaries respectively in the following amounts: HENL - £15,500,000; SNL - £6,500,000; and CNL - £18,500,000.

e) Under LAs, also entered into on 26 September 2003, INML made loans of the above same amounts to HENL, SNL and CNL respectively, for 5-year terms with interest being payable at 3% above the base rate set by Lloyds TSB plc.

7. The transactions carried out in 2005 ("the 2005 Transactions") can briefly be described as follows:

Transactions between CNL and INML

a. On 5 April 2004, CNL had acquired 100% of the share capital in Acorn Magazines Limited ("Acorn") from a third party. Following the acquisition of Acorn, by deed executed on 20 June 2004, Acorn agreed to sell and transfer and CNL agreed to purchase and take over Acorn's trade and business as from 5 April 2004;

b. On 1 April 2005, CNL and INML entered into a TMA and an addendum to the TMLA which CNL had entered into with INML on 26 September 2003 (see: paragraph 6(a) above) ("the CNL Addendum");

c. Under the TMA, CNL sought to assign to INML, with effect from 6 April 2004, the various UTMs which it had acquired from Acorn, for £899,000;

d. Pursuant to the terms of the CNL Addendum, CNL agreed to pay INML £259,000 for the grant of a trade mark licence of the various UTMs which had been sought to be assigned by CNL to INML (see: the preceding paragraph), also with effect from 6 April 2004 and for a duration of approximately 4 years and 6 months (i.e. the remaining term of the TMLA entered into by CNL on 26 September 2003).

Transactions between LSN and INML

a. On 12 August 2005, INML acquired 100% of the share capital in LSN from a third party.

b. On the same day LSN and INML entered into a TMA (subsequently amended on 4 November 2005) and a TMLA (subsequently amended on 6 September 2005).

c. Under the TMA (as amended), LSN sought to assign to INML, with effect from 12 August 2005, LSN's various UTMs for £19,060,000.

d. Pursuant to the terms of the TMLA, LSN agreed to pay INML £10,641,000 for the grant of a non-exclusive trade mark licence of the various UTMs which had been sought to be assigned by LSN to INML (see: the preceding paragraph), also with effect from 12 August 2005, for a term of 8 years. The term of the licence was extended to 26 September 2013 by the amendment to the TMLA.

e. On 4 November 2005, LSN and INML entered into:
- a LA whereby LSN lent INML £19,060,000; and
- a LA whereby INML lent LSN £10,641,000.

f. The LAs referred to in the preceding paragraph had a defined drawdown date of 12 August 2005, and a repayment date of 26 September 2013. Under the loan by LSN to INML of £19,060,000, INML was to pay interest at 'the rate of the borrower's group borrowing margin with Lloyds TSB plc in addition to the Base rate as set by Lloyds TSB plc …'. Under the loan by INML to LSN, interest was payable at 3% above the base rate set by Lloyds TSB plc.

8. All of the appellants are UK incorporated companies resident in the UK for the purposes of corporation tax.

9. INML appeals against 2 closure notices dated 30 June 2009 and 3 July 2009 respectively and both amended on 25 August 2009.

10. Each of HENL and SNL appeals against 3 closure notices, one dated 30 June 2009 and two dated 3 July 2009 and all 3 amended on 25 August 2009.

11. CNL appeals against 3 closure notices, dated 3 July 2009, 8 September 2009 and 9 September 2009 respectively. The closure notice dated 3 July 2009 was amended on 25 August 2009 and each of the other 2 closure notices was amended on 16 October 2009.

12. LSN appeals against one closure notice dated 8 September 2009 and amended on 16 October 2009.

13. The issues for determination in the appeal were formulated by each of the parties. The formulations are generally identical, but they do diverge in some respects. Drawing on both formulations, we state the issues for determination by us in the appeals as follows:

a. Whether the assignments of the UTMs by the Subsidiaries to INML are void because they are *unregistered* trade marks;

b. If the assignments are not void, whether they are unlawful distributions which INML holds on trust for the assigning Subsidiaries (respectively);

c. Alternatively, in so far as the assignments are effective, whether the premium (licence fee) paid by each of the Subsidiaries to INML in consideration of the licence back of the UTMs is in excess of market value; and, if so, whether it is to any extent an unlawful distribution out of capital by the Subsidiary concerned to INML;

d. Alternatively, whether the accounting treatment adopted by the Subsidiaries reflects the substance of the transactions as required by Financial Reporting Standard 5 ("FRS5"), and, if not, whether the effect of FRS5 is that the premium (licence fee) paid by each of the Subsidiaries to INML is to be treated for corporation tax purposes as a distribution by that Subsidiary to INML – this issue was withdrawn by HMRC after the relevant expert evidence had been heard (see paragraphs 222 and 223 below) ;

e. Alternatively, in so far as the premium (licence fee) paid by each Subsidiary to INML is not a distribution, whether it comprises:

i. a capital receipt obtained by INML on a part-disposal of a capital asset to the Subsidiary which is relieved from corporation tax on chargeable gains by the operation of section 171 Taxation of Chargeable Gains Act 1992 ("TCGA") (as the appellants contend); or

ii. a revenue receipt (royalty income) in INML's hands which must be accounted for as a credit under paragraph 14, Schedule 29, Finance Act 2002 ("FA 2002") or a taxable receipt within Schedule D, Case VI (as HMRC contends);

f. Alternatively, whether the licences created on the licensing back of the UTMs by INML to each of the Subsidiaries comprise intangible property in the Subsidiaries' hands, within the scope of Schedule 29, FA 2002;

g. In so far as such licences do comprise intangible property in the Subsidiaries' hands within the scope of Schedule 29, FA 2002, whether or not paragraph 111 of Schedule 29, FA 2002 applies in each instance of the assignment and licence back arrangements to disregard those arrangements when determining whether Schedule 29 credits or debits arise, with the effect of reducing or denying the debit which would otherwise accrue to each of the Subsidiaries in respect of the amortisation of the licences, and if paragraph 111 does apply in this way, the amounts of the Schedule 29 credits or debits arising;

h. As regards the loans entered into by INML and the Subsidiaries to finance the assignments and licence back arrangements, whether paragraph 13 of Schedule 9, Finance Act 1996 ("FA 1996") (the 'unallowable purpose' rule) applies in each instance with effect to reduce or deny the debits which would otherwise accrue to each of the Subsidiaries (and, in one case, INML) in respect of the interest payable by it on the loan taken out by it.

B: The parties' submissions in outline

Issue *a* – see paragraph 13 above

14. The appellants submit that by each assignment in issue both UTMs and the goodwill attaching to them were assigned, so that we do not have here any attempted assignment of an UTM in gross (that is, a transfer of an UTM independently of the underlying business and goodwill to which it relates). They further submit that the UTMs were assigned intra-group and that therefore there was no risk of the

assignments deceiving the public. They submit that HMRC's approach is to attempt to extend the law limiting assignments of UTMs well beyond the situations for which the rule was developed to circumstances where there is no rationale in preventing assignment.

15. HMRC submit that the purported assignments of UTMs in this case are purported assignments in gross, and that a UTM (as opposed to a registered trade mark) cannot, as a matter of law, be assigned in gross. The TMAs in this case are, in HMRC's submission, ineffective. Further, HMRC originally contended that a UTM is not an intangible asset within the meaning of Schedule 29 FA 2002 (which gives 'intangible asset' the meaning it has for accounting purposes and includes, in particular, any intellectual property, which for these purposes includes 'any … trade mark … or any licence or other right in respect of [any trade mark]' (paragraph 2, Schedule 29, FA 2002). However, this latter point was withdrawn by Mr Jones in the course of argument – see: paragraphs 163 to 165 below.

Issue *b* – see paragraph 13 above

16. HMRC contend that in the case of each of HENL, SNL and CNL, the value of the UTMs assigned was significantly in excess of the amount standing to the credit of the relevant Subsidiary's profit and loss account, and hence the assignments constituted unlawful distributions to INML.

17. The appellants submit that provided a company has profits available for distribution (which was the case for each of HENL, SNL and CNL), the amount of the distribution must be measured by reference to the value of the distributed asset as stated in the relevant company's last annual accounts (section 270(2) Companies Act 1985 ("CA 1985")). If the asset distributed does not appear in those accounts (no UTMs were shown in the accounts of HENL or CNL for the 52 weeks ending 28 December 2002 – the last annual accounts with reference to the 2003 Transactions), then the amount of the distribution is zero. If the asset is stated in those accounts, the amount of the distribution is measured for these purposes by reference to the book value of the asset and not its market value. In the case of SNL, an intangible asset of £708,000 is shown in the accounts of SNL for the 52 weeks ended 28 December 2002, representing one of the titles which was subsequently assigned to INML. SNL had distributable profits of £2,408,000 which more than covered the referable value of the distributions (£708,000 less £1 = £707,999).

Issue *c* – see paragraph 13 above

18. HMRC submit that the valuation evidence shows that the difference between the agreed licence fees and the fees that could properly be charged between arm's length parties is so 'staggering' (to quote their opening skeleton argument) that the overpayments by the Subsidiaries to INML in respect of the licences fall into the category of unlawful distribution even if the parties *bona fide* believed that the E&Y valuation was a fair and proper valuation (see: *Progress Property Co. Ltd v Moore* [2010] UKSC 55, [2011] 1 WLR 1).

19. The appellants, while asserting that (on the evidence) the licences were granted for market value premiums, submit (on the basis of *Progress Property*) that even if

the premiums paid for the licences were (on the evidence) in excess of their market value, they did not constitute a distribution, because on a realistic assessment of all the relevant facts, the transactions were genuine arm's length transactions and not improper attempts to extract value by the pretence of an arm's length transaction.

Issue *d* – see paragraph 13 above

20. In the accounts of HENL, SNL and CNL, the TMLAs have been accounted for as acquisitions of intangible assets, being the rights to use the relevant UTMs for 5 years, with the intangible assets being amortised to the profit and loss accounts over 5 years. The consequent debits to the profit and loss accounts are sought by the appellants to rank as debits permitted under Schedule 29 FA 2002 (as losses in respect of intangible fixed assets). However, pursuant to paragraph 5(1) of Schedule 29 FA 2002, if a company does not draw up accounts in accordance with generally accepted accounting practice ("GAAP") – called "correct accounts" in paragraph 5 – the provisions of Schedule 29 apply as if such correct accounts had been drawn up.

21. HMRC originally contended (on the expert accounting evidence) that GAAP requires that FRS5, entitled 'Reporting the Substance of Transactions', should be applied and in consequence the licence fees paid by HENL, SNL and CNL respectively to INML in respect of the TMLAs should be accounted for as distributions made by HENL, SNL and CNL respectively to INML.

22. The appellants on the other hand submitted that the expert accounting evidence shows that GAAP requires that Financial Reporting Standard 10, entitled 'Goodwill and Intangible Assets' ("FRS10"), should be applied without reference to FRS5, because FRS10 is relevantly a more specific standard, with the consequence that the accounting treatment actually adopted by HENL, SNL and CNL is the appropriate accounting in accordance with UK GAAP.

23. Although HMRC withdrew this issue in their closing written submissions (dated 17 January 2012) after consideration of the oral evidence of the accounting experts, we have summarised the evidence given – see section D5 of this Decision.

Issue *e* – see paragraph 13 above

24. On the factual basis that the licence fees paid in respect of the TMLAs are not, in accordance with GAAP, to be regarded as distributions by the Subsidiaries to INML, the appellants contend that they represent capital receipts obtained by INML on part-disposals of capital assets (the UTMs), which were intangible fixed assets created before commencement for the purposes of Schedule 29, FA 2002 (i.e. before 1 April 2002, see: paragraphs 117, 118 and 121 Schedule 29 FA 2002), to the Subsidiaries and that any chargeable gains arising are relieved by application of section 171 TCGA (transfers within a group).

25. On the same factual basis, HMRC submits that the licence fees are revenue receipts in INML's hands which must be accounted for as a credit under paragraph 14, Schedule 29 FA 2002, being royalties within paragraph 139, Schedule 29 FA 2002 or as a taxable receipt within Schedule D, Case VI. HMRC advance several arguments in support of this submission. In particular, they say that the true nature of

the licences is that they are each terminable by INML on 30 days' notice with a straightforward formula for a refund in the event of early termination on a pro-rata time basis. They say that this is strongly suggestive of a *per diem* use by the Subsidiaries of the licences.

Issue *f* – see paragraph 13 above

26. The appellants contend that each licence constituted intellectual property being an 'intangible fixed asset' for the purposes of paragraphs 1, 2, 3, and 118(1)(c) and (2)(c), Schedule 29, FA 2002 in the relevant Subsidiary's hands. Each licence was acquired from a related party (INML) after commencement and was created after commencement (see: paragraph 118(1)(c) and (2)(c)).

27. HMRC recognise that the appellants' case relies on the proposition that the licences were intangible fixed assets created after commencement (paragraph 118(2)(c), Schedule 29, FA 2002). However they submit that the creation of the licences is only the conferring of a lesser right than an outright transfer of the UTMs, which, HMRC asserts, would plainly not give rise to an acquisition by a Subsidiary of an asset created after commencement for the purposes of Schedule 29. HMRC submit that in context the appellants' argument leads to a 'remarkable, illogical and absurd result' (to quote from their skeleton argument) and on a proper construction of paragraph 118 it is incorrect.

Issue *g* – see paragraph 13 above

28. This issue relates to the application or not of paragraph 111, Schedule 29 FA 2002 ('tax avoidance arrangements to be disregarded'). Paragraph 111 is in the following terms (the words in square brackets were enacted in relation to accounting periods beginning on or after 20 June 2003, but both parties submitted texts including these words and neither suggested that there was any material difference in effect between the version cited and its predecessor):

> ' 111 - (1) Tax avoidance arrangements shall be disregarded in determining [whether a debit or credit is to be brought into account under this Schedule or the amount of any such debit or credit].
>
> (2) Arrangements are 'tax avoidance arrangements' if their main object or one of their main objects is to enable a company-
>
> > (a) to obtain a debit [under this Schedule] to which it would not otherwise be entitled or of a greater amount than that to which it would otherwise be entitled, or
> >
> > (b) to avoid having to bring a credit into account [under this Schedule] or to reduce the amount of any such credit.
>
> (3) In this paragraph-
>
> > "arrangements" includes any scheme, agreement or understanding, whether or not legally enforceable; and
> >
> > "brought into account" means brought into account for tax purposes.'

29. The appellants submit that paragraph 111 is not engaged because the arrangements in this case are not ‘tax avoidance arrangements’ because the only main purpose of the arrangements was to diminish the commercial profits of each of the Subsidiaries to prevent commercial predators, advertisers and trade unions from using the Subsidiaries’ reported profits as a commercial weapon in negotiations. Nor, they submit, can there be any purpose of avoiding having to bring a credit into account under Schedule 29, FA 2002, because the dealings in the UTMs by INML could never have given rise to any such credit because the UTMs were intellectual property created before commencement and therefore within the scope of taxation under TCGA, not Schedule 29, FA 2002.

30. HMRC submit that the evidence shows that the tax avoidance arrangements inherent in the transactions in issue were (at least) one of the main objects of the transactions. They support this by submitting that the arrangements did not and could not (as a matter of fact) achieve the non-tax motivated purpose contended for by the appellants – because the amortisation of the licence fees was disclosed in the Subsidiaries’ accounts – and in any case the tax advantage was positively identified as a motivation for the arrangements.

Issue *h* – see paragraph 13 above

31. This issue relates to the application or not of paragraph 13, Schedule 9, FA 1996 (‘loan relationships for unallowable purposes’) to the interest payable by each of the Subsidiaries on the loan taken out by it with INML as part of the transactions in issue.

32. Paragraph 13, Schedule 9, FA 1996 is (so far as relevant) in the following terms:

> ‘13 – (1) Where in any accounting period a loan relationship of a company has an unallowable purpose, -
>
> (a) the debits …
>
> which, for that period fall, in the case of that company, to be brought into account for the purposes of this Chapter shall not include so much of the debits … given by the authorised accounting method used as respects that relationship as, on a just and reasonable apportionment, is attributable to the unallowable purpose.
>
> …
>
> (2) For the purposes of this paragraph a loan relationship of a company shall be taken to have an unallowable purpose in an accounting period where the purposes for which, at times during that period, the company-
>
> (a) is a party to the relationship, or
>
> (b) …
>
> include a purpose (“the unallowable purpose”) which is not amongst the business or other commercial purposes of the company.
>
> (3) …
>
> (4) For the purposes of this paragraph, where one of the purposes for which a company-
>
> (a) is a party to a loan relationship at any time, or
>
> (b) …

is a tax avoidance purpose, that purpose shall be taken to be a business or other commercial purpose of the company only where it is not the main purpose, or one of the main purposes, for which the company is a party to the relationship at that time or, as the case may be, for which the company enters into that transaction.

(5) The reference in sub-paragraph (4) to a tax avoidance purpose is a reference to any purpose that consists in securing a tax advantage (whether for the company or any other person).

(6) In this paragraph-

…

"tax advantage" has the same meaning as in Chapter I of Part XVII of [ICTA] (tax avoidance).'

33. The appellants submit that paragraph 13 is not engaged because the funding of the premiums paid to INML under the TMLAs by the Subsidiaries was not dictated by tax. They adopt their submissions on paragraph 111, Schedule 29, FA 2002 *mutatis mutandis*.

34. HMRC submit that each of INML and the Subsidiaries was a party to their respective loan relationships in order to facilitate and implement a scheme whereby it was intended that the Subsidiaries would obtain a corporation tax deduction by reason of a debit under Schedule 29, FA 2002 and at the same time that any accounting for a credit by INML would be avoided. They submit further that the obtaining of such debits taken alone and/or in conjunction with the avoidance of a credit under Schedule 29, FA 2002 satisfied the applicable definition of 'tax advantage' and that such a purpose was either a main purpose or one of the main purposes of INML and the Subsidiaries being parties to the loan relationships. HMRC accept that these are matters where the burden of proof rests on them.

C: The evidence and structure of the hearing of the appeal

35. We heard the appeal in two parts.

36. The first part of the hearing was in October 2011, when we heard oral evidence from (1) Ian Richard OBE ("Mr Richard"), from 1999 until 31 December 2003 Group Publishing Director of Yattendon, a director of INML and Chairman of the Board of Directors of HENL; (2) Anthony Robert Morton FCCA ("Mr Morton"), Finance Director of Yattendon from December 1993 to his retirement in April 2006; (3) Peter Alan Holgate FCA ("Mr Holgate"), senior accounting technical partner in the London office of the UK firm of PricewaterhouseCoopers LLP, instructed on behalf of the appellants as an expert on the accounting treatment appropriate for the licence of newspaper titles; (4) Mark James Holt FCA ("Mr Holt"), Advisory Accountant in the Strategic Risk Unit of the LBS Directorate of HMRC, advising HMRC officers on accountancy matters, instructed on behalf of HMRC as an expert accounting witness on the same accountancy issue; (5) Ian Burns FCA ("Mr Burns"), director in the Audit and Business Services Department of Smith & Williamson Limited, instructed on behalf of the appellants as a valuation expert to give his opinion on the value of the licences over mastheads owned by INML and granted (as at 26 September 2003) to SNL, CNL and HENL, (as at 1 April 2005) to CNL, and (as at 12 August 2005) to LSN (see: paragraphs 6 and 7 above); and (6) Daniel Ryan, chartered accountant ("Mr Ryan"), Senior Managing Director of FTI Consulting Limited, instructed on behalf of

HMRC as a valuation expert to give his opinion on the value of those licences and the value of the UTMs.

37. Mr Richard and Mr Morton had each made two witness statements to which their oral evidence was supplementary. Mr Holgate and Mr Holt had each prepared an Expert Report to which their oral evidence was supplementary. Mr Burns and Mr Ryan had each prepared an Expert Report and a Supplementary Report as well as a joint memorandum outlining the areas of agreement and disagreement between them. Mr Ryan prepared a further Supplementary Report after two days of the hearing, and Mr Burns served a further Supplementary Report in reply. Their oral evidence was supplementary to the evidence contained in these documents. Mr Ryan put in a further document entitled ‘A Reconciliation of the profit split calculation of Mr Ryan and Mr Burns’ and Mr Burns put in a Response to that document.

38. The second part of the hearing was in January 2012, when we heard submissions on the intellectual property issues arising from Mr Alexander QC for the appellants and Mr Jones QC for HMRC; on the company law issues arising from Ms Stokes for the appellants and Mr Jones for HMRC; and on the tax law issues arising from Mr Ghosh QC for the appellants and Mr Jones for HMRC.

39. Besides comprehensive skeleton arguments from Counsel, we received from Counsel for the appellants a Note of Evidence (“NoE”) drawing together, from the appellants’ perspective, the evidence we had heard. We received from Mr Jones and Mr Yates, for HMRC, a Note (“HMRC’s Note”) commenting, from HMRC’s perspective, on various points made in the appellants’ NoE. We also received, in February 2012, after the end of the hearing, a Reply from Counsel for the appellants to HMRC’s Note, as well as a further Note from Counsel for the appellants on the lease premium provisions in the Income and Corporation Taxes Act 1988 (“ICTA 1988”).

40. We also had before us 3 bundles of relevant documentation.

41. From the evidence we find facts (supplementary to those agreed facts outlined above) as follows. Where we recount the evidence of the various witnesses, we should be taken to accept it except where there is an indication to the contrary in this Decision.

D: The facts

D1-How the transactions in issue came to be entered into.

42. Mr Richard was involved in the lead-up to the 2003 Transactions as a director of INML and as a member of the boards of HENL, CNL and SNL. His evidence was that those companies’ purpose in entering into the 2003 Transactions, in particular the licensing arrangements whereby the UTMs were licensed back to the respective Subsidiaries, was to reduce the actual commercial and accounting profits of those Subsidiaries, but without interfering with the newspaper businesses which each of the Subsidiaries ran. Mr Richard’s summary of the reasons why the companies wanted the Subsidiaries’ profits to be reduced was so that they would be in a position to (1) deny detailed information in the statutory accounts about the companies, and in

particular HENL to Yattendon's competitors; (2) distract such competitors' attention away from healthy advertising markets which they would otherwise see were worth attacking; and (3) dampen union expectations with regard to future wage negotiations.

43. He explained that HENL was acquired by the Yattendon group in 1989. It was a profitable company with an excellent cost/revenue ratio and clear market dominance in each of the 6 small prosperous market towns served and had not to that point been attacked by potential predators, particularly 'free' newspapers (i.e. newspapers provided to the public free of charge, particularly successful in attracting advertising from estate agents and motor dealers who had traditionally advertised in paid-for title newspapers) despite its healthy advertising in the property and motor sectors. Mr Trevor Wells, previously managing director for 17 years and subsequently a non-executive director after the Yattendon takeover, was strongly of the view that the opacity of the annual trading results subsumed in the general results of the enterprise which sold HENL to Yattendon had been a key reason for the comparative lack of predators.

44. After Yattendon took over HENL, its profits began to climb, particularly by reason of the synergies available with CNL, including printing and full-colour availability.

45. In 1987, the Yattendon group had sold its two largest newspaper companies, the Birmingham Post & Mail and the Coventry Evening Telegraph. The release of capital enabled Yattendon to acquire a controlling interest in a marina operator and to make other investments. As a result of these developments, there was little central control of the group in terms of administration and accounting, and, as Mr Morton put it, the individual businesses were run as 'little fiefdoms', particularly in the case of the remaining newspaper companies. The need for a reorganisation became apparent and eventually, in 2000, a new holding company structure was introduced. INML (at first called Iliffe Newspapers Limited), a direct subsidiary of Yattendon, became the holding company for HENL, CNL and SNL.

46. As a result of the new holding company structure introduced in 2000, HENL was required to publish its annual results in statutory accounts. Before this it had been a dormant company with its trade and assets held by Yattendon Holdings plc under an agency agreement.

47. Within a few months of the new structure's implementation, concerns over the impact this would have on HENL were being raised, in particular by Trevor Wells. This is referred to in the minutes of the meeting of the HENL board on 25 May 2000, which was with our papers. Mr Morton told us that Mr Wells's concerns were shared by Lord Iliffe and the managing directors of HENL and CNL (as well as Mr Richard).

48. Mr Richard supplied some detail of the problems connected with growing union militancy among the journalists of HENL and CNL, with threats of strike action against HENL in 2002 and the involvement of the NUJ's national newspaper organiser in the negotiations, and also concern about what potential competitors would do with the published information about HENL's profits, which indicated a

healthy advertising market worth attacking. He said in his second witness statement that ‘these concerns were also applicable to [SNL]’.

49. There is a note dated 11 October 2000 with our papers which shows that Sonya Richards, the Group Financial Controller reporting to Mr Morton, discussed with Mr Wells ‘tax associated problems of suddenly increasing management charges in [HENL]’ and that Mr Wells agreed that ‘we will have to live with the problem of strong [HENL] statutory accounts performance and manage it accordingly’. There is a memorandum with our papers from Mr Morton to other Yattendon directors noting that certain charges made to HENL had the ‘advantage’ of having the effect of reducing their reported profits.

50. In 2002, a publication called ‘UK Press Directory – Newspapers – Volume 2’ included a table which ranked newspaper companies in the UK by operating profit as a percentage of sales. HENL featured as the company with the highest percentage operating margin (CNL was 25th in the table). Similarly, Yattendon features in a table published by ‘UK Press Directory – Newspapers – Volume 1’ in 2003 as the company with the highest operating margin.

51. Attention continued to be given to the matter of the transparency in the accounts of the high profitability of newspaper subsidiaries of INML (in particular HENL) and the desirability and means of reducing it. We have a copy of a minute of a board meeting of INML on 21 February 2003, which includes the following paragraph:

> ‘**Divisionalisation of Newspapers**
>
> Mr Morton reported that divisionalisation of the newspaper companies would lessen the degree of transparency of individual company published results but would lead to adverse capital gains tax implications where sales of assets would be taxed whilst sale of shares is now protected. The Chairman [Lord Iliffe] asked Mr Morton to check again whether consultancy or management changes [*sic*] could be raised to reduce reported profits without risking taxation penalties.’ [‘charges’ would appear to have been meant in place of ‘changes’]

52. In what we consider was a significant development, Mr Morton emailed a Mr Chris Pedley (“Mr Pedley”) of Ernst and Young (“E&Y”) on 28 February 2003. The text of the email was as follows:

> ‘Dear Chris
>
> This refers back to correspondence with Sonya in early December, which made it quite clear that if we ever intend to sell any of our newspaper interests it is better for the assets to remain in their present companies, and have the protection of substantial shareholdings exemption. We have no immediate intention to sell any, but it would be foolish to lose the current flexibility, and this is accepted.
>
> What we would like to do is to be able to reduce reported profits in the newspaper subsidiaries, since the levels of profit become common knowledge and could lead to union claims. They are also highlighted in a publication called the UK Press Directory, which lists companies by various measures and we are not too happy to come out top of the league on the profit measures. Any adjustment is only worthwhile if it can be significant, just playing at the edges is not a lot of value.

We already charge management fees, which could possibly be increased by a (small?) mark up.

We could charge something over and above this e.g. Tony Morton Consultancy £500,000 to each subsid, but we believe this runs the risk of being disallowed in the subsidiary whilst being taxed in [Yattendon]. We could charge each subsid for the benefit of being able to use the Iliffe News and Media name. In my Dunlop days we charged technical aid fees or royalties for those lucky enough to manufacture our products. Is there any way in which such a straightforward arrangement could be allowed?

[Yattendon] could purchase assets (either buildings or Plant) and lease/rent them back. With [HENL] we were advised that the rent charge would have to be reasonably close to market, so that the equation of rent versus depreciation/interest seemed to give a neutral result.

We might use INML to purchase newsprint, plates and inks (annual value around £8 million or 15% of newspaper costs, around 10% of turnover) and recharge with a mark up. To be worthwhile we would probably want to add a third, and whatever we did would have to avoid a large extra group purchasing dept.

We don't want to make the businesses more difficult, and as I have said we don't just want to tinker round the edges. Is there any legitimate way in which we might achieve our objective without any negative tax implications? If the answer is "you might do it if you re-locate Barn Close [the head office] to the Isle of Man, but …" or anything similar it's better to stop thinking about it.

Your views please before we spend too much time on it.

Tony'

53. Following this email and conversations between Mr Morton and Mr Pedley (and, later, Mr Pedley's colleagues at E&Y), the idea emerged that to achieve the commercial objective of reducing profits in the Subsidiaries by means of a licence fee of some kind, it would be necessary for a capital asset to be created and sold by them to INML, who would then license it back for a fee. We have with our papers a copy of a note in Mr Morton's handwriting of a telephone conversation with Mr Pedley on 14 March 2003 which contains the germ of the idea. The essence of the note is as follows:

'…

INML register names of titles as trade marks & grant licences to use the TM – asset. For say 5 years – say £40 million. Capital sum in INML, no tax, HEN would amortise. New tax rules would allow this to be charged to profits.

…

Not like a bumped up management charge.

INML would register the names. Can it do it out of the blue?

Even if tax didn't work looks as though we could do it to reduce profits. Then it could be a simple annual fee. Could be based on turnover or profits – so that it didn't risk making results go negative with other commercial disadvantages.'

54. At a meeting of the board of directors of INML on 11 April 2003, Mr Morton reported that he was meeting E&Y in the near future to 'consider a possibility of INML charging each newspaper subsidiary for the use of its titles which might be tax efficient, as well as a means of lessening the transparency of reported results'. The minutes of the meeting of the board of INML on 16 May 2003 note that:

> 'Mr Morton reported that [E&Y] had confirmed that if the newspaper titles and/or mastheads were registered as trade marks in the ownership of [INML], it was possible for the latter [i.e. INML] to charge the newspaper companies a fee for the use of the former in a tax efficient manner that would significantly lessen the transparency of reported results. It was agreed to progress this matter in consultation with [E&Y].'

55. Mr Morton's evidence was that the detail of the plan was 'worked up by our advisors' (which we take to be E&Y) over the following weeks and culminated in a meeting of 20 May 2003 where the action required was set out. He commented in his witness statement: 'we now had a solution which achieved our commercial objective. It satisfied the concerns of the operational board directors such as Ian Richard and Trevor Wells. Profits declared in the statutory accounts would be significantly reduced without affecting the performance requirements of management and still allowing the mastheads and titles to be used in the newspaper businesses – in short we had found a way of reducing the risk from predatory attacks and union wage demands'.

56. Mr Morton's evidence was that as Finance Director he was not looking for a tax result which was different to the commercial result, but he 'was content to be told that under the new tax law the newspaper subsidiaries would be taxed only on their actual commercial profits and INML would simply undertake intra-group capital transactions without a tax charge'.

57. The proposal was presented to the board of INML in a 'Group Board Report' dated 18 July 2003 which recounted the genesis described above and stated:

> 'In order to effect the commercial result of reducing the subsidiary company profits, the transfers [of titles to INML] would be at a nominal value of £1, whilst the licences would be at arm's length commercial value. It is proposed that the licences should be for a period of five years, they would be capitalised by the subsidiaries, and would be amortised over the licence period. The valuations have to be considered in more detail but it seems likely that a value of at least £40 million would be a market figure, leading to a total reduction of around £8 million p.a. in statutory accounts for the three subsidiaries [HENL, SNL and CNL]. At group level all these amounts would have a nil effect on consolidation. In putting these proposals together we have been advised that not only can we avoid the risk of increasing the group tax charge, but because of the treatment of intangibles under tax legislation post April 2002 we can almost certainly obtain a legitimate tax benefit. This would be to allow the amortisation costs to be charged against Corporation Tax, which makes the proposal particularly attractive, and further justifies the costs of the exercise.'

58. Approval to instruct E&Y to continue work on the proposal, to carry out valuations of the necessary licences and to prepare the legal documentation required, was given at INML board meeting on 18 July 2003. Before that meeting (on 17 July 2003) advice from Queen's Counsel had been obtained on the tax treatment of the proposal.

59. Mr Morton together with Mr Pedley and others from E&Y attended a consultation with Counsel on 17 July 2003 and we have in our papers the instructions to Counsel for that consultation, as well as an email from Mr Pedley to Mr Morton dated 22 September 2003 commenting on Counsel's oral advice, and a Note of the consultation with Counsel apparently prepared around 30 October 2003. In particular, it is clear from these documents that E&Y's proposal, as originally put to Counsel, was that the mastheads would be registered as trademarks, but that Counsel had expressed a preference that the trademarks should not be registered 'in case registration constitutes the creation of a new asset for the purposes of Schedule 29 [FA 2002]' and that Intellectual Property Counsel had subsequently 'confirmed that a trademark is a new asset'.

60. E&Y produced a valuation report dated 31 August 2003. In the Executive Summary section of the report it is stated that '[i]t is management's intention to grant 5 year licences over the mastheads in question and we have therefore valued the licence over a 5 year term'.

61. The valuations in the E&Y report were: between £5m and £8m for the licence of SNL's mastheads; between £16m and £21m for the licence of CNL's mastheads; and between £13m and £18m for the licence of HENL's mastheads. In the licence agreements subsequently entered into, the licence fees charged were: £6.5m for the SNL mastheads; £18.5m for the CNL mastheads; and £15.5m for the HENL mastheads.

62. In arriving at the valuations, E&Y stated that they had focused on 3 main methodologies of valuation, the 'royalty relief methodology', the 'elimination methodology' and the 'market approach'. E&Y regarded the 'market approach' as the 'primary analysis'.

63. The arrangements involving HENL, SNL and CNL were implemented in September 2003.

D2- The transaction documents

64. The transaction documents executed on 26 September 2003 were prepared (and drafted) by Tite & Lewis, a firm of solicitors at the time associated with E&Y. The engagement letter dealing with the work to be done for Yattendon by Tite & Lewis 'in connection with the assignment and licensing of the Yattendon group's newspaper brands' was dated 2 September 2003.

65. The TMA between HENL and INML dated 26 September 2003 recorded an assignment in the following terms, for a consideration of £1:

> '1.1 The Assignor [HENL] is the owner of certain unregistered trade marks including, without limitation, those marks and logos in schedule 1 together with the get-up of such trade marks and logos and all goodwill attaching to the trade marks and logos (the "Trade Marks").
>
> 1.2 In consideration of the Purchase Price (as defined … [i.e. £1]) the Assignor assigns with full title guarantee to the Assignee [INML] absolutely the Trade Marks and all and any rights, title and interest in and to the Trade Marks and any common law rights and all the goodwill attaching to the Trade Marks.

> 1.3 The Assignor covenants that, with effect from the date of this assignment, it will not use the Trade Marks itself, or sue the Assignee for use of such Trade Marks and it will not do anything to stop the Assignee from building up its own rights and reputation in the Trade Marks.'

66. The UTMs listed in the schedule were 'Hertfordshire Mercury'. 'Royston and Buntingford Mercury', and 16 other titles.

67. The assignments in the TMA between CNL and INML dated 26 September 2003 and the TMA between SNL and INML also dated 26 September 2003 were in similar terms. The UTMs listed in the schedule to the TMA between CNL and INML were 'Cambridge Evening News', 'Cambridge Weekly News', and 16 other titles. The UTMs listed in the schedule to the TMA between SNL and INML were 'Burton Mail', 'Black Country Bugle' and 9 other titles.

68. The LA between INML and HENL dated 26 September 2003 recorded an advance by INML as lender to HENL as borrower of £15,500,000 for drawdown on the same day for repayment in 5 years and at a rate of interest of 3% pa above Lloyds TSB plc base rate from time to time.

69. The LAs between INML and CNL dated 26 September 2003 and between INML and SNL also dated 26 September 2003 were in similar terms. The amounts borrowed by CNL and SNL respectively from INML were £18,500,000 and £6,500,000 respectively.

70. The TMLA between INML as licensor and HENL and licensee, dated 26 September 2003 included the following provisions to which we were specially referred at the hearing:

> '2. TERM
>
> This Agreement and the Licence granted under this Agreement will commence on the Effective Date [the date of the TMLA – i.e. 26 September 2003] and shall continue for a period of five (5) years (the "Term") unless terminated earlier by either party in accordance with clause 8.
>
> 3. LICENCE
>
> 3.1 The Licensor [INML] hereby grants to the Licensee [HENL] a non-exclusive licence to use, reproduce and apply the Jobfinder Mark [the trade mark and logo for the "Jobfinder" title] and an exclusive licence to use, reproduce and apply the Trade Marks [trade marks and logos set out in Schedule 2 (the mastheads) including without limitation the Jobfinder Mark] together with the get-up of such trade marks and logos (as updated from time to time) and any abbreviations of such trade marks (excluding the Jobfinder Mark)], both in connection with the Products and Services [as identified in Schedule 1- production and distribution of newspapers etc. – and any additional products and services agreed between the parties] in the Territory [i.e. the UK] for the term of this Agreement and in accordance with the terms of this Agreement. The Licensor agrees that it shall not grant a licence to use the Jobfinder Mark to any other party except [CEN], save as otherwise agreed by the parties.
>
> 3.2 The Licensee acknowledges that the Licensor is the owner in the Territory of the Trade Marks and of the goodwill attaching to the Products and Services in respect of which they are used and agrees that the Trade Marks shall remain vested in the Licensor and that the goodwill accrued from the use of the Trade Marks will accrue to the exclusive benefit of the Licensor, both during the term of the Agreement and thereafter in the Territory. The Licensee agrees not

to challenge the ownership of the Trade Marks, the subsistence of the goodwill therein or that the use thereof by the Licensee is on behalf of the Licensor as a licensee under its control. If at any time the Licensor requires a confirmatory assignment of its rights, title, interest, reputation and goodwill in the Trade Marks, the Licensee shall, at the Licensor's cost, immediately execute such an assignment in the form requested by the Licensor.

3.3 The Licensee hereby undertakes that:

3.3.1 it will use the Trade Marks only in connection with the Products and Services;

3.3.2 it will use all reasonable endeavours to exploit the Trade Marks in connection with the Products and Services;

3.3.3 it will use the Trade Marks (including, but not limited to, the presentation of the Trade Marks in respect of any notepaper, price lists, advertisements and other promotional material and the like relating to the Products and Services) as respects the words, shaping, printing style, colour quality of materials used and otherwise in the form (or substantially the same form) set out in schedule 2 or in a form otherwise approved by the Licensor, such approval not to be unreasonably withheld or unduly delayed;

3.3.4 when requested by the Licensor, it shall consult the Licensor as to the form and content of all advertising and promotional material in which the Trade Marks appear and in such circumstances the Licensee undertakes not to use or distribute such material unless and until the Licensor shall have approved the same (such approval not to be unreasonably withheld or unduly delayed);

3.3.5 it will not use, register or seek to register any of the Trade Marks or any element thereof, either alone or in combination with any word, name, symbol or device or any other trade or service marks or other brand property which could amount to a misrepresentation that products or services other than the products and Services are connected with the Licensor and/or which are similar to, or substantially similar to or so nearly resemble, the Trade Marks as is likely to cause deception or confusion, or aid or abet anyone else in doing so; and

3.3.6 it will not use the Trade Marks in any manner, or do anything or omit to do anything, which is likely to cause material harm to the goodwill attached to the Trade Marks, diminish the rights of the Licensor in relation to any of the Trade Marks or bring any of the Trade Marks into disrepute.

3.4 The Licensee may not grant sub-licences of the Licence without the Licensor's prior written consent. The Licensee shall ensure that any such sub-licence is on substantially the same terms as this Agreement, but excluding the right to sub-license.

3.5 The Licensee may register, or appoint an agent or nominee to register on its behalf, any Domain Names [internet domain names which incorporate the Trade Marks].

3.6 In the event that the Licensor decides to apply for registration of the Trade Marks in the Territory as the first user thereof, the Licensee will render to the Licensor all reasonable assistance towards the obtaining of a registration. In the event that any of the Trade Marks are registered pursuant to this clause, the Licensee shall ensure if so required by the Licensor, that the Trade Marks are displayed with the corresponding ® symbol when used in respect of each of the Products and Services.

3.7 The Licensor may from time to time, at its sole discretion and without any recourse to the Licensee, on at least 30 days written notice to the Licensee, add trade marks or other intellectual property which relate to, or consist of an extension to, any trade marks or other intellectual property comprising the trade Marks to the Licence and the definition of the "Trade Marks" in this Agreement shall be construed accordingly.

3.8 The Licensor may from time to time, at its sole discretion and without any recourse to the Licensee, on at least 30 days written notice to the Licensee, remove any trade marks or other intellectual property comprising the trade Marks from time to time and the definition of "Trade Marks" in this Agreement shall be construed accordingly. Subject to clause 3.9 below, in the event that the Licensor removes any trade marks or other intellectual property comprising the Trade Marks ("the Deleted Marks") in accordance with this clause, the Licensor shall pay a refund to the Licensee calculated on the following basis.

$$\frac{\text{Licence Fee attributable to the Deleted Marks (£)}}{\text{Term}} \times \text{unexpired period of Term} = \text{refund payable}$$

3.9 In the event that the Licensor removes any trade marks or other intellectual property comprising the Trade Marks in accordance with clause 3.8 as a result of the Licensee failing to comply with its obligations under this clause 3, no refund will be due to the Licensee.

3.10 In the event that the Licensor removes any trade marks or other intellectual property comprising the Trade Marks in accordance with clause 3.8, the Licensee shall transfer, or procure the transfer of any Domain names that make use of such Deleted Marks, to the Licensor.

4 LICENCE FEE

4.1 In consideration of the grant of the Licence in accordance with clause 3, the Licensee shall pay the Licensor the sum of £15,500,000 (fifteen million, five hundred thousand pounds) (the "Licence Fee") on the Effective Date [the date of the Agreement, 26 September 2003]

[There follow provisions relating to the infringement of Trade marks which do not appear to call for special notice, a provision prohibiting assignment of the Agreement by either party without the written consent of the other and a confidentiality provision. Clause 8 deals with Termination as follows:]

8 TERMINATION

8.1 Either party may at any time by notice terminate this Agreement and the Licence with immediate effect if the other party is in material breach of this Agreement and the breach is not capable of remedy or if the other party is in material breach of the Agreement and the breach is capable of remedy and the other party has failed to remedy that breach within 30 days of notice from the non-breaching party specifying the breach and requiring its remedy.

8.2 Either party may by notice terminate this Agreement and the Licence with immediate effect at any time in the event that:

> 8.2.1 any Change of Control [change in the person that can exercise control of the other party, where "control" has the meaning given by section 840 ICTA] of the other party occurs or any transfer of any substantial part of its business is made unless the party giving notice has consented to such change or transfer in writing;
>
> 8.2.2 the other party calls a meeting of its creditors or proposes any arrangement of composition with, or any assignment of the benefit of, its creditors, or shall have a

receiver, administrator, administrative receiver, liquidator or any other similar officer or insolvency practitioner appointed in respect of all or any of its undertakings or assets; or

8.2.3 the other party passes a resolution or the Court makes an order that the other party be wound up otherwise than for the purpose of a bona fide reconstruction or amalgamation, or a receiver, manager or administrator on behalf of a creditor is appointed in respect of the business or any part of it or circumstances arise which entitle a Court or creditor to appoint a receiver, manager or administrator of which entitle the Court otherwise than for the purpose of a bone fide reconstruction or amalgamation to make a winding-up order or the other party is unable to pay its debts within the meaning of section 123(1) of the Insolvency Act 1986.

8.3 The Licensor may by notice terminate this Agreement and the Licence on at least 30 days' prior written notice in the event that:

8.3.1 the Licensor is affected by a Change of Control; or

8.3.2 the Licensor assigns the Trade Marks to a third party.

8.4 The Licensor may by notice terminate this Agreement and the Licence with immediate effect if the Licensee makes any claim to any of the Trade Marks or lodges any filings in respect of any of the Trade Marks or marks confusingly similar to the Trade marks or in any way challenges the validity or ownership of any of the trade Marks.

8.5 In the event that any currency restrictions, monetary or exchange controls, export or import regulations, customs levies or other duties or levies, conditions and restrictions are imposed upon either party, which in the sole judgment of such party no longer make it commercially feasible to continue to perform its obligations under this Agreement, such party shall have the absolute right, without further liability, to terminate this Agreement upon 90 days' written notice to the other party unless the other party agrees to supply the party giving notice additional compensation to offset any and all loss of revenue resulting from such government action.

9 RIGHTS AND DUTIES UPON TERMINATION

9.1 In the event that the Licensor terminates this Agreement in accordance with clauses 8.1, 8.2 or 8.4, no refund of the Licence Fee will be payable to the Licensee.

9.2 In the event that the Licensor terminates this Agreement in accordance with clause 8.3, the Licensor shall pay a refund to the Licensee calculated on the following basis ("Refund Formula"):

$$\frac{\text{Licence Fee (£)}}{\text{Term}} \text{ x unexpired period of Term } = \text{ refund payable}$$

9.3 In the event that the Licensee terminates this Agreement in accordance with clauses 8.1 or 8.2, the Licensee may require the Licensor to pay a refund to the Licensee calculated in accordance with the Refund Formula.

[9.4 contains provisions for the termination of the Licence and any other rights under this Agreement and consequential matters.]

9.5 Termination of this Agreement in accordance with clause 9 shall be without cost or other liability of the party so terminating this Agreement, save as provided in clauses 9.2 and 9.3.'

71. The TMLAs between INML and CNL and between INML and SNL, both also dated 26 September 2003 were in the materially similar terms *mutatis mutandis*. The Licence Fee provided by clause 4 of the TMLA between INML and CNL was stated to be £18,500,000 and the Licence Fee provided by clause 4 of the TMLA between INML and SNL was stated to be £6,500,000.

72. The TMA dated 1 April 2005 between CNL and INML was in terms supplemental to the TMA between those parties dated 26 September 2003 and drafted in materially similar terms *mutatis mutandis* to it.

73. The CNL Addendum dated 1 April 2005 between INML and CNL was in terms supplemental to the TMLA between those parties and recorded the parties' agreement to amend the TMLA to include defined supplemental UTMs.

74. Mr Morton's evidence was that when LSN was purchased in 2005 'it was logical to replicate the arrangements already made, since the commercial rationale held true'.

75. The TMA dated 12 August 2005 between LSN and INML as amended by a Deed of Amendment between the same parties dated 4 November 2005 had effect in materially similar terms *mutatis mutandis* to the TMAs dated 26 September 2003.

76. The TMLA dated 12 August 2005 between INML and LSN as amended by a Deed of Amendment between the same parties dated 6 September 2005 also had effect in materially similar terms *mutatis mutandis* to the TMLAs dated 26 September 2003, except that the licence granted by clause 3 of the TMLA dated 12 August 2005 was a non-exclusive licence.

77. The LAs between INML (as borrower) and LSN (as lender) and between INML (as lender) and LSN (as borrower), both dated 4 November 2005, were in materially similar terms *mutatis mutandis* to the LAs dated 26 September 2003.

D3-The oral evidence in relation to the objects and purposes of the transactions

78. With reference to issue *g* as formulated in paragraph 13 above, it is necessary for us to make findings as to whether the transactions in issue in this case disclose arrangements having as their main object or one of their main objects the enabling of a company to obtain a debit under Schedule 29 FA 2002 to which it would not otherwise be entitled (or of a greater amount than that to which it would otherwise be entitled) or to avoid having to bring a credit into account under Schedule 29 FA 2002 or to reduce the amount of any such credit.

79. Also, with reference to issue *h* as formulated in paragraph 13 above, it is necessary for us to make findings as to whether the transactions in issue in this case disclose that any company is a party to a loan relationship for a purpose that consists in securing a tax advantage (within the meaning of Chapter 1, Part XVII, ICTA), whether for that company or any other person.

80. These issues were explored in the oral evidence of Mr Richard and Mr Morton in which the witness statement evidence that the motivation for the transactions was the commercial issues identified in paragraph 42 above was examined. Mr Richard

emphasised the commercial importance of lowering the Yattendon group's profile in the industry league tables and reducing the revenue figures in the Subsidiaries' accounts filed at Companies House, which would be a first port of call for any rival considering mounting an attack on those advertising in the Subsidiaries' titles and for any union negotiating with the Subsidiaries on behalf of employees. In this regard, his evidence was that the 'key objective' was to alter (lower) the 'bottom line'. This was achieved by the 'amortisation of publishing rights' which (in the accounts for the 52 weeks ended 27 December 2003 of HENL, for example) features in the Notes to the Financial Statements as a constituent element of the deduction from turnover in the profit and loss account made in order to arrive at a figure for operating profit. In those 2003 accounts of HENL, that deduction (for 'costs and overheads less other income') totalled some £9.7m, of which £775,000 (some 8%) was disclosed as 'amortisation of publishing rights'. The corresponding figure for the 2002 period was, of course, zero. Mr Richard's evidence was that if the amortisation charge had been challenged by a union in negotiations, as a 'legitimate charge' it was 'something that you would defend'.

81. Mr Morton confirmed that the group hoped that the majority of people who would look at the accounts would look 'to the bottom line numbers', and, in any case, would not be able 'to tell directly what those publishing rights and the amortisation were'. Mr Morton said that the deduction 'did do something for the transparency of [the] accounts' (in the sense of reducing the profit in a somewhat opaque way) and added that although 'it may not have been perfect' yet 'it was a long way in the direction in which we were trying to get'.

82. Mr Richard rejected the proposition put to him by Mr Jones for HMRC that obtaining a tax benefit was the object of the 2003 Transactions (and, by implication, the 2005 Transactions).

83. But there was with our papers a memorandum from Mr Morton dated 21 May 2003 and circulated to a number of individuals within the Yattendon group including Mr Richard in which it was stated that 'apart from having commercial advantages, we expect that amortisation of the licences will be tax allowable and could have significant cash benefits to the Group'. Mr Richard's evidence was that he 'wouldn't have drawn the conclusion that it was a huge benefit to the company in terms of a tax gain'. He rejected Mr Jones's suggestion that the object or one of the main objects of the transactions was the hoped-for tax benefit, while admitting that he was 'not naïve enough to think that [the tax advantage] wasn't welcome, but it arrived well down the line after our discussions about transparency'.

84. On being taken to his handwritten note of his telephone conversation with Mr Pedley on 14 March 2003 – see paragraph 53 above – Mr Morton denied that obtaining the potential tax advantage from the amortisation 'took over', but accepted that it had become 'important', adding 'I don't think anybody can deny that'. And when cross-examined on the 'Group Board Report' dated 18 July 2003 (see: paragraph 57 above), he said 'one of the reasons [for the proposed transactions] was the tax advantage and that's put very clearly there'.

85. Mr Morton however described his 'primary concern' before the INML board meeting on 18 July 2003 as being 'that the scheme had no hidden issues which might have had negative implications whether from a tax perspective or from an operating perspective', but he added that '[c]learly, having been alerted to a potential tax saving arising from recent changes in tax legislation, we would have been foolish not to ensure that we progressed the proposal in a way that assured us of that tax saving'.

86. On the other hand, he stated that 'even without the tax benefit we would have gone ahead with this' and the Note of the consultation with Counsel apparently prepared around 30 October 2003 (see: paragraph 59 above) stated that 'it was commented that the group would proceed with the proposed arrangements regardless of whether a tax benefit was available, provided there was no tax effect which would put the group in a worse position than that prior to entering into the arrangements'.

87. Mr Jones put to Mr Morton that so far as the ascertainment from the Subsidiaries' accounts of their earnings before interest, tax, depreciation and amortisation (a figure referred to as 'EBITDA'), the transactions had no effect. Mr Morton replied that he hadn't even thought of that.

88. He also said that he could not remember being aware of the point made in the instructions to Counsel for the consultation on 17 July 2003, which he attended, that the charge to the profit and loss account in respect of the amortisation would probably be disclosed in the accounts as an exceptional item because of its magnitude. His evidence was that he might not have recognised that amortisation would not be 'lost' in the accounts 'somewhere in the other charges'.

89. Both Mr Richard and Mr Morton were cross-examined by Mr Jones on why the reductions in the Subsidiaries' profits in respect of the use of the titles took the form of a lump sum for a 5-year licence (with the consequent amortisation and the concomitant need to disclose an amortisation charge in the accounts) rather than an annual fee or royalty. Mr Richard said he had no idea why a lump sum was paid rather than annual royalties and seemed relieved when this part of the cross-examination ended. Mr Morton also said he had no idea why a lump sum was paid, other than that E&Y had advised it, and he said he did not know why they were advising it. He said that E&Y 'had almost certainly explained [that receipt of a capital sum by INML would not have attracted tax, whereas receipt by INML of an annual royalty would have] to us … but at this point I cannot remember why we dropped the idea of royalties which had been an issue as a possibility that I put forward, but very quickly royalties became something which wasn't discussed'.

90. The evidence that HENL was a very profitable company and featured at the top of the UK Press Directory's table in 2002 was not reflected in the position of CNL (which was 25th in the table) or SNL or LSN (which did not feature).

91. In relation to the 2005 Transactions involving CNL and LSN no new accountancy advice was taken, and a version of the 2003 arrangements was carried out. Mr Jones pointed out that with effect from 2004 Schedule 28AA ICTA (transfer pricing rules covering provision not at arm's length) had been amended to avoid any 'tax negative'

consequences of a Subsidiary being overcharged by INML. Therefore an opaque (in terms of accounts presentation) suppression of the Subsidiaries' profits could have been achieved without adverse tax consequences by inflated management charges being made. But such charges would of course have been tax-neutral and would not have afforded the tax advantage claimed for the arrangements actually implemented (no charge in INML and tax deductions in respect of the amortisation charges in the Subsidiaries). The evidence was that Mr Morton himself had no recollection of this change in the law in 2004 on transfer pricing.

D4- The valuation evidence

92. In reviewing the valuation evidence we start with the notes of the board meeting of Yattendon which was held on 20 May 2003 (referred to at paragraph 55 above). Tim Rocke, described as 'Valuations Director, Ernst & Young' was present. It was noted that a valuations exercise had been carried out in around 2000 which suggested a market value for the newspaper group of some £200m, with net asset values of only £20m, giving a goodwill figure of £180m. Mr Rocke is recorded as explaining that 'the value of the titles, when registered, would comprise between 50% and 70% of this, with the rest being pure trading goodwill'. The profits of the newspapers might push the values of the titles 'towards the top end of this range and possibly a little higher'.

93. A valuation of 'selected newspaper mastheads', dated 31 August 2003, was prepared by E&Y in connection with the proposal to carry out the 2003 Transactions. It is stated in the first introductory paragraph of this valuation that '[i]t is management's intention to grant 5 year licenses [*sic*] over the mastheads in question and we have therefore valued the license [*sic*] over a 5 year term'. Three methodologies of valuation were considered, all assuming a 5 year licence. These were: the royalty relief methodology ("RRM") – which we understand to be a computation of the present value of royalty payments saved through the ownership of the licence; the elimination methodology ("EM") – sometimes called 'the residual value approach', which is a method based on allocating the correct proportion of the determined value of the entire intangible assets and goodwill of a business to the assets licensed, and determining the proportion of that value attributable to the licences by application of the RRM; and the market methodology ("MM") – ascertaining the proportion of enterprise value represented by mastheads in transactions in the market place (or the price paid for mastheads sold in isolation), applying such proportion to the value of the relevant Subsidiaries' businesses and determining the proportion of the resultant ascertained value attributable to the licences by application of the RRM.

94. E&Y regarded the MM as being the 'primary analysis'. The MM was the ascertainment of market value for the licences, based on a hypothetical sale of a licence to use the masthead by a willing vendor to a willing purchaser, 'each of whom is acting for self-interest and gain and both of whom are equally well informed about [the masthead] and the market place in which it operates'. It can be seen that the adoption of the MM made the question of what proportion of the enterprise value was represented by the mastheads of prime importance in reaching a valuation.

95. E&Y's valuation of 5 year licences of the HENL portfolio was between £13m and £18m, their valuation of 5 year licences of the CNL portfolio was between £16m and £21m, and their valuation of 5 year licences of the SNL portfolio was between £5m and £8m. As stated above, the figures adopted in the relevant licences were: HENL – £15.5m; CNL - £18.5m; and SNL - £6.5m. In other words, valuations mid-point in the ranges suggested by E&Y were adopted as the consideration for the grants of the licences in question.

96. Mr Burns (the appellants' independent valuation expert) stated that in his opinion the MM represented the most robust and accurate method of valuation. He concluded that substantially all of the value of the intangible assets of HENL, CNL and CNL could be attributed to their mastheads. He accepted in cross-examination that he had based everything on the premise that virtually all the value of the intangible assets of the Subsidiaries was attributable to the values of their respective mastheads. He put values on the licences involved in the 2003 transactions as follows: HENL – between £14m and £21m; CNL – between £11m and £20m; and SNL – between £5m and £8m. He put values on the licences involved in the 2005 Transactions in the range of between £5.3m and £11m. It will be recalled that INML charged CNL £299,000 for the grant of the licence of the UTMs sought to be assigned by CNL in 2005, and INML charged LSN £10,641,000 for the grant of the licence of the UTMs sought to be assigned by LSN in 2005. These figures total just under £11m. Mr Burns said in evidence that he thought the E&Y valuation in 2003 was 'a competent piece of professional work'. The E&Y valuation of 2005, however, focussed on the RRM, and Mr Burns, concluding that although his value range for the 2005 licences came within E&Y's valuation, considered that E&Y's valuation was 'pretty near the top of it' and that, in relying on the RRM, he considered that 'intellectually, [E&Y were] flying in fairly thin air'.

97. The E&Y valuation of 2003 therefore attributed more of the enterprise value to the licences than had been suggested by Mr Rocke at the meeting on 20 May 2003. Mr Morton's evidence was that he was not surprised by this, as his 'very simple logic would always be that the major part of the value of goodwill, if not the whole of the value of goodwill, was given to the title, which is one of the reasons why people did not try to come in to one's main principal patch because they knew that the likelihood was that they would not be able to make a profit'.

98. The evidence was that the EM and the MM were similar methodologies focussing on an attribution of a proportion of enterprise value to the licences, whereas the RRM was different, and focussed on the present value of royalty expenditure saved by ownership of the licences. A difficulty faced by both Mr Burns and Mr Ryan was that there was not much relevant evidence of licences or sales of mastheads having taken place in the open market, as opposed to sales and purchases of newspaper businesses as a whole or, more usually, the companies carrying on the businesses (examples being INML's acquisition of Acorn in 2004 and LSN in 2005), although we note that Mr Burns's opinion was that when a newspaper business was acquired, the acquirer regarded the masthead as the sole asset it was seeking to acquire.

99. Mr Ryan (HMRC's independent valuation expert) stated in his original report that he regarded the RRM as the most suitable method to value the licences in issue, but he cross-checked his valuation of the UTMs by considering what proportion of intangible asset value the licences represented and the replacement cost of a local newspaper masthead. He identified what he regarded as appropriate royalty rates (5%-6% for the HENL, CNL and SNL licences and 2% for the LSN licence, because LSN publishes free newspapers only). He initially (in his written evidence) valued the licences involved as follows: HENL - £2.1m to £2.5m; CNL - £3m to £3.6m; SNL - £1.4m to £1.7m; and LSN - £1m.

100. Mr Ryan made the point that the value given by the RRM would be appropriate only if one did *not* accept his view that in the market in which the licences were granted the most likely acquirer of the licences from INML would be the existing publisher of the newspaper concerned. (He thought – having considered the position of the newspaper publishers in nearby areas which could be said to be most likely to wish to expand into the Subsidiaries' areas – that 'the incumbent would pay the maximum value because if it purchases the masthead or the licence nobody else is going to – you go back to the position that you were in'.) Mr Ryan's view was that if one accepted this point then the value of the licences would be unlikely to be significantly higher than the cost of recreating the UTMs concerned (i.e. rebranding), which would give a lower value than that achieved by application of the RRM. If, on the other hand, there was a real risk of someone else coming into the market, the value of the licence would increase to a value calculated on a licensing-in basis (i.e. computed by using the RRM). He rejected the MM as the primary valuation methodology because, as with most intellectual property valuations, there were not enough reference points to apply a 'top-down' valuation in a rigorous way.

101. Mr Ryan produced his Second Supplemental Report dated 12 October 2011 in the light of transcripts of evidence given at the hearing on 10 and 11 October 2011. In it he referred to evidence which Mr Richard had given which in his view emphasised the dominant nature of the paid-for newspapers (the most important of the titles concerned) operated by the appellants in their local markets. This evidence suggested to Mr Ryan that the existing publisher would be the only credible acquirer of the licences in the hypothetical market being considered and that therefore a valuation based on the costs of recreating the UTMs concerned might be a more appropriate valuation methodology.

102. In Mr Ryan's Second Supplemental Report he also considered clause 3.8 of the licences (see: paragraph 70 above), which he said he had overlooked when he wrote his two earlier reports. Clause 3.8 concerns the entitlement of the licensor (INML) from time to time at its sole discretion on at least 30 days' notice to remove any UTMs from the licence on payment of a *pro rata* refund of the licence fee attributable to UTMs so removed.

103. Mr Ryan stated that clause 3.8 significantly increased the likelihood that an existing publisher would be the only credible acquirer of the licences, essentially because of the investment needed in the business which the licences would permit, and the uncertainty attendant upon possible exercise by the licensor (INML) of its

entitlement under clause 3.8. He stated his opinion that the replacement value of the UTMs which were subject to the licences was £10.8m and, on the basis that the Tribunal found that the existing publishers (notionally deprived of the right to use the relevant mastheads) were the only credible acquirers of the licences, he suggested that the appropriate valuation was based on that figure, but discounted to take account of the uncertainty created by possible exercise of the power of removal under clause 3.8. He suggested a figure of up to 35% of the cost of recreating the UTMs. This methodology gave a total valuation of £3.8m for all the licences in issue, as compared with £7.5m to £8.8m if the RRM was applied. Mr Ryan added that if the Tribunal found that the existing publishers were *not* the only credible acquirers of the licences, then he would confirm his valuation adopting the RRM method.

104. Mr Burns discounted Mr Ryan's point that an existing publisher would be the only credible acquirer of the licences by saying that he assumed that the existing publishers, having disposed of the UTMs in their respective mastheads would not try to remain in the market. They would not try to launch a new masthead (because, according to Mr Richard's evidence a newspaper launched in a locality with a new masthead different from the dominant newspaper would fail) and they would 'exit the business'. Mr Burns made this point on the basis of an assumption that the hypothetical situation in which the valuation of the licences was to be made was that the existing publishers had sold the UTMs concerned for full value to INML – which in fact they did not – and that therefore it would be more logical to distribute the proceeds of the sale to their shareholders than to contemplate re-entry into the market by taking licences of the titles which they had recently disposed of.

105. Nor did Mr Burns agree with Mr Ryan's conclusions on the effect of clause 3.8 on the valuations. His evidence was that any potential purchaser would make a judgment on the likely length of the licence in practice – i.e. whether or not any removal under clause 3.8 was likely. In this regard, the obligation to make a *pro rata* refund of the licence fee in the event of removal would be likely to provide 'significant protection against exposure to early termination prior to 5 years'. He accepted that the fact that the start-up costs incurred by a licensee would be at risk of being wasted by an early termination of the licence under clause 3.8 would be of significance. But he regarded the importance of this point as limiting the number of people who would pay the same for the licence incorporating clause 3.8 as they would pay for a fixed term (5-year) licence to those potential purchasers for whom the relevant start-up costs would be 'very small', 'particularly for existing competitors with their own facilities in place'. On that basis clause 3.8 was 'unlikely to make a material difference' in the value of the licence, beyond any adjustment that might need to be made for the fact that a rebate payable on an early termination of the licence was a *pro rata* rebate payable without interest. (We observe in passing that the relevant start-up costs for existing publishers in the hypothetical circumstances being considered would be virtually zero.)

106. Mr Richard's view was that 'the masthead is the masthead, is something well over 90 per cent, virtually 100 per cent, as a brand, of the value of the company, And without it you can't actually have the company go in'.

107. Mr Jones, in cross-examining Mr Burns, explored whether the fact that no non-competition covenant had been given by the Subsidiaries in assigning the UTMs to INML and that INML had not given any non-competition covenant on granting the licences to the Subsidiaries had had any effect on the value of the licences. Mr Jones's point was that the Subsidiaries, although without the right to use the various mastheads, remained as incumbents in their respective areas and must be assumed (as was the fact) to have retained their employees, local office facilities, distribution networks and advertiser relationships, and were therefore in a position immediately to recommence publishing, albeit under a different title, the Cambridge Star, say, instead of the Cambridge Evening News.

108. Mr Burns's answer was that such was the commercial importance of a recognised masthead – even of a free newspaper, though more obviously of a paid-for newspaper – that the Subsidiaries deprived of their mastheads would find it difficult to compete with any business which possessed and used the mastheads. Although he accepted that there would (in theory) be a time when the Subsidiaries with the same operations as before they disposed of their mastheads (although now deprived of their mastheads) would be able to publish under another title before any newspapers could be published using the established mastheads, he said that 'the rational expectation' was that the Subsidiaries would nevertheless not compete, but would instead 'exit', fearing that the old established masthead 'may be on the streets very quickly'. He accepted that a purchaser or licensee of a masthead would have been well-advised to obtain a non-competition covenant, but he said that he did not think one was commercially essential. He justified this view by saying that in reality a purchaser 'would buy the business and the goodwill, and the goodwill would be in the masthead'.

109. Mr Burns regarded the RRM as of no assistance, because the transactions providing the basic data necessary to apply it were drawn from 'non-comparable transactions in a non-comparable period a long time ago in different jurisdictions'. The cross-checking he employed for the purposes of his valuation on the MM was against actual sales of companies running newspaper businesses in possession of mastheads, and for this purpose he attributed the whole of the value of the intangible assets of such companies to their mastheads. Mr Jones put to him that this begged the question of whether it was correct to make that attribution. He then said (without much enthusiasm) that instead of the RRM one could look at the expected split of profits between a licensor and a licensee, and make a cross-check of the valuation on that basis.

110. Mr Burns was disposed to agree that the non-exclusive nature of the licence between INML and LSN concluded as part of the 2005 Transactions would have had an impact on the value of that licence.

111. Mr Ryan thought it was neither possible nor realistic to regard all (or virtually all) the value of the Subsidiaries other than that attributable to tangible assets to be attributable to their respective mastheads. He made the point that a masthead was essentially a brand (Mr Richard had described it as such) and a specialist brand consultancy called Interbrand had valued the Coca-Cola brand at 50% of the value of

the Coca-Cola company's intangible assets – for the McDonalds brand, the figure was said to be 40%, for the Apple brand, it was 10%. In the light of that he thought it very unlikely that any brand could be worth 100% of the owning company's intangible asset value. Instead he suggested a value of 20% to 30% - which he described as 'a relatively hefty amount, in my experience', regarding at least 50% of the company's intangible asset value as attributable to its incumbency – that is, the relationships it has because it is in place as the local newspaper publishing company – which Mr Ryan regarded as distinct from brand loyalty. A newspaper brand – a masthead – told the purchaser something about what to expect in terms of the editorial comment and the style of the newspaper. It was not the newspaper itself. Thus the value of a masthead had to be supported by, for instance, editorial staff, although Mr Ryan accepted that this was less important with a free newspaper, which did not rely on the reader making a conscious decision to take (and pay for) the newspaper. On the other hand, the value of the masthead of a free newspaper was connected to the value of the newspaper's relationship with its advertisers. He made the point that the relationships supporting the value of a masthead could not be 'replaced overnight' and that the value of a masthead needed to be maintained, and could dissipate rapidly 'if the editorial content is no longer there to support it'. On the other hand, he acknowledged that if one could 'replace everything overnight' then one 'would be able to capture a lot of [the] business', adding that Mr Richard's evidence had been that it would be impossible for a newcomer to a local newspaper market to do that.

112. Mr Ryan considered that it was very advantageous to check a valuation of an intellectual property asset against other valuations of the asset computed on different methodologies. Thus, he considered it appropriate to check a valuation arrived at by the MM (a 'top-down' methodology arrived at by taking an overview of the value of the business) against the RRM or a discounted cash-flow methodology which is 'a bottom-up method which really relies on getting to grips with the business and how it works'.

113. Mr Ryan, disagreeing with Mr Burns, thought that a newspaper business which had disposed of its masthead, but otherwise retained its business intact, would 'rebrand' – that is, publish under a different name – rather than close down or 'exit' the market. He thought (based on competition surveys which had been carried out) that it was quite possible that there could be a significant take-up of a new brand.

114. Mr Ryan's view was that the royalties implied in the licence fees charged to the Subsidiaries by INML were too high to be commercial – having regard to the alternatives available to the Subsidiaries, namely to enter the market with rebranded titles. The licence fees as a percentage of the licensees' profits were, in Mr Ryan's view, too high to be commercial – and far higher than any intellectual property valuation that he had been involved in. Even on Mr Burns's estimate (of 60% to 70% of the licensees' profits) the licence fees were too high to be commercial, in Mr Ryan's view. That level of profit split would suggest that the product being licensed was very profitable (like a 'blockbuster pharmaceutical product') and that the market risks and the functions to be performed by the licensee were minimal.

115. Mr Ryan, differing from Mr Burns, did not regard the factor of synergies (the ability for an acquirer to make more profit out of existing assets, or to save costs) or a 'bid premium' on the licensing of the UTMs as likely to increase the market value of the licences, because he regarded the parties most likely to pay the most for the licences to be the existing publishers (the Subsidiaries) and therefore 'there are clearly no synergies because all you are doing is making it whole, effectively'. And there would be no logical basis to add a 'bid premium'. If, alternatively, a third party newspaper publisher acquired the licence and could achieve synergies by 'sweating [its assets] more', Mr Ryan's view was that those synergies would be counterbalanced by the loss of revenue it would experience by competing in the market with the existing publishers' rebranded newspapers. He acknowledged that synergies might boost the value of the licences if one could assume that the existing publishers would 'exit the market', but he made the point that Competition Commission reports had stated that many local newspapers were in effect able to operate a monopoly in a particular market, and therefore it could not be assumed that there would be a competitor for paid-for titles with a distribution network and other relationships which could give rise to synergies.

D5- The accounting evidence

116. The accounting evidence was, of course, relevant to issue *d* outlined in paragraph 13 above and, as indicated at paragraphs 20 to 22 above, went to whether or not GAAP requires that FRS5 should be applied in accounting for the Subsidiaries' acquisitions of their respective licences (as HMRC contend) or whether, alternatively FRS10 should be applied without reference to FRS5 (as the appellants contend and as actually happened in drawing up the Subsidiaries' financial statements).

117. Mr Holgate (the appellants' independent accounting expert) gave evidence to the effect that the acquisitions of the licences of the various UTMs by the Subsidiaries respectively from INML had been properly accounted for, in accordance with GAAP, by being treated as acquisitions of intangible assets. This treatment was in accordance with FRS10 (entitled 'Goodwill and intangible assets') which Mr Holgate considered contained specific provision relative to the circumstances of the acquisitions of the licences. The objective of FRS10 is to ensure that purchased goodwill and intangible assets are charged in the profit and loss account in the periods in which they are depleted.

118. FRS10 defines intangible assets (in paragraph 2) as 'Non-financial assets that do not have physical substance but are identifiable and are controlled by the entity through custody and legal rights. An identifiable asset is defined by companies' legislation as one that can be disposed of separately without disposing of a business of the entity …'. Mr Holgate accepted that in making his reports he had assumed that the UTMs in question were intangible assets – it being put to him by Mr Jones that HMRC were taking the point that an UTM was not an intangible asset within FRS10. (Later, we understood this point to have been effectively withdrawn – see: paragraphs 163 to 165 below.)

119. Mr Holgate did not think that if it were the fact that the amounts paid by the respective Subsidiaries for the licences were excessive, that would alter his view that

the accounting treatment should follow what the Subsidiaries did – i.e. that they acquired licences of intangible assets.

120. His view was that FRS10 in the circumstances of this case should be applied rather than FRS5 (entitled 'Reporting the substance of transactions'). He based this view on paragraph 13 of FRS5, dealing with the scope of FRS5, which is in the following terms:

> 'Where the substance of a transaction or the treatment of any resulting asset or liability falls not only within the scope of this FRS but also directly within the scope of another FRS, a Statement of Standard Accounting Practice ("SSAP"), or a specific statutory requirement governing the recognition of assets or liabilities, the standard or statute that contains the more specific provision(s) should be applied.'

121. Also relevant was paragraph 43 of FRS5, also dealing with the scope of FRS5. It is in the following terms:

> 'The FRS [i.e. FRS5] sets out general principles relevant to reporting the substance of all transaction. Other accounting standards, the Application Notes of the FRS and companies legislation apply general principles to particular transactions or events. It follows that where a transaction falls within the scope of both the FRS and another accounting standard or statute, whichever contains the more specific provision should be applied. Nevertheless, the specific provisions of any standard or statute should be applied to the substance of the transaction and not merely to its legal form and, for this purpose, the general principles set out in FRS5 will be relevant.'

122. Mr Holgate was referred by Mr Jones to a passage from PricewaterhouseCoopers's book 'Manual of accounting: the definitive guide to GAAP' of which he is one of the principal authors, which in effect makes reference to paragraph 43 of FRS5. Mr Holgate confirmed that in considering an intangible asset within FRS10 one has to look at the substance of the transaction and not just the form, but he maintained that in his reports he had not ignored paragraph 43 of FRS5.

123. He made a distinction between a sale of an intangible asset and a licence back of the asset for 5 years – which he said was this case and was properly accounted for under FRS10 – and a sale, licence back and a repurchase of the intangible asset after 5 years, which was 'pre-envisaged' at the time of the initial sale. The latter case, he suggested, should be accounted for on the basis that 'in substance really nothing has happened'. In this context he was looking at what he described as 'commercial substance'. The sales and licences back in this case and the writing off over 5 years (amortisation) of the licence fees had 'commercial substance'.

124. In assessing whether a transaction had 'commercial substance' for these purposes, Mr Holgate looked at the commercial objective of the transaction. The fact that the transaction may not have achieved that commercial objective would be irrelevant, provided the commercial objective accorded with the company's intentions. A commercial objective for these purposes could include an alteration in the presentation of accounts which was carried out for commercial reasons.

125. Mr Holgate's evidence was that one had to weigh up both standards (FRS5 and FRS10) and take a view on the interpretation of them both together.

126. Mr Jones asked Mr Holgate to comment on the substance of the transaction framed in these terms: on day one the intangible assets belong to the Subsidiaries; on day two the Subsidiaries merely had a lesser interest in those intangibles and had paid some £40m in cash. Mr Holgate responded that one could see a distribution in that transaction, but that 'the one that shouts out to me most obviously as being a distribution is the first transaction of selling the trademarks to the parent for £1'. There was a distribution of the value of the trademarks less £1. However where the trademarks were carried in the Subsidiaries' accounts at a nil value, the distribution had effectively no value, but it should be disclosed in the financial statements. As a result of that transaction – which could be viewed as a distribution – the parent (INML) owned the trademarks and the licence fee charged by the parent to the Subsidiaries on the grant of the licences he thought would be regarded as 'a normal thing', that is, an amount to be accounted for as a disposal and acquisition of intangibles.

127. He accepted that an application of FRS5 rather than FRS10 would be a 'valid' treatment and could lead in this case to the treatment of the licence fees paid by the Subsidiaries to INML as distributions, rather than as acquisitions of intangible assets. But his evidence was that accounting for licence fees as prices paid for the acquisitions of intangible assets (as the Subsidiaries had done, following FRS10) was 'the mainstream way in which accountants would treat' the transactions.

128. Mr Holt (HMRC's accounting expert, whom we accepted as giving an independent opinion despite his holding a position as an Advisory Accountant in the Strategic Risk Unit of the LBS Directorate of HMRC) expressed the opinion that the correct way to account for the transactions whereby the Subsidiaries assigned the UTMs to INML for £1 and took 5-year licences back for considerations aggregating £40.5m was to treat the Subsidiaries as having given away part of the assets they had already held (the right to use the UTMs after the 5th year) and as having made cash distributions to INML of £40.5m in aggregate. (The figure of £40.5m appears only to recognise the payments made under the 2003 Transactions, but we did not understand Mr Holt's analysis of the 2005 Transactions to be different.)

129. He based this view on his understanding of the effect of FRS5 and in particular the need to consider linked transactions as a whole. He regarded the assignments and the licences back as linked together to achieve a commercial purpose, bearing in mind that they were carried out on the same day. He did not regard as important, for the purposes of ascertaining the correct accounting treatment, the fact that the nature of the Subsidiaries' rights to the UTMs had changed from being complete ownership before the transactions to entitlement to 5 year licences after the transactions. He said those rights 'are the same from an accounting perspective'.

130. Although he accepted that 'FRS5 and FRS10 both apply', he seemed to ignore the application of FRS10 in practice on the basis that 'FRS10 does not consider a transaction whereby an intangible is assigned at less than market value and is partially reassigned back or licensed back for a 5 year period'.

131. Mr Ghosh put to Mr Holt that what had happened was that the Subsidiaries taken together had gifted the value of the UTMs to INML and then taken 5 year licences to use the UTMs at market value, and that that was the substance of the transaction. Mr Holt did not accept that, saying that he thought the licences were 'a subset of the original intangible' and that the Subsidiaries 'merely continue to hold a subset of what they originally had and they give away' £40.5m. This was the result achieved by not taking a step by step approach to the different aspects of the transaction' but looking at the transactions as a whole, taking the assignments and the licenced back 'as a composite'.

132. Mr Holt said that he would not 'necessarily' have taken that view in relation to a sale and lease back of real property and that it was 'difficult to articulate' why the position was different for trademarks, but that intangible assets were different to fixed assets. He also said that the treatment of a sale and leaseback of plant or machinery 'could be different depending on the use that you put the asset to'.

133. Mr Ghosh put to Mr Holt that on his analysis what the Subsidiaries had given away was the use of the UTMs in the 6th year and thereafter in perpetuity. Mr Holt responded that the Subsidiaries had given that away, and also £40.5m. But he suggested that this would be accounted for as a distribution of only £40.5m because the distribution representing the use of the UTMs in the 6th year and thereafter in perpetuity would have no book value and ought only to be recorded as a disclosure in the financial statements.

134. In response to questioning by the Tribunal, Mr Holt '[didn't] disagree' with the view that a company could choose to adopt one rather than another of two different respectable views on correct accounting. He accepted that Mr Holgate's view was respectable but he thought it was incorrect.

E: The issues outlined in paragraph 13 above

Issue *a*: submissions and discussion

135. We stated above (at paragraph 14) that the appellants submitted that by each assignment in issue both UTMs and the goodwill attaching to them were assigned. Although we did not understand them formally to withdraw that submission, they certainly did not pursue it forcefully in their written or oral submissions, but instead Mr Alexander concentrated in his written and oral submissions on the contention that the common law rule that an UTM could not be assigned in gross was limited in scope to cases (which did not include this case) where such an assignment would be deceptive, or would be an assignment of the right to commit a fraud on the public (as Morritt LJ put in in *Al Bassam Trade Mark* [1995] RPV 511 at 522).

136. We accept Mr Jones's submission that the purported assignment, by clause 1.2 of the TMAs, of 'the Trade Marks and all and any rights, title and interest in and to the Trade Marks and any common law rights and all the goodwill attaching to the Trade Marks' is a purported assignment in gross of the relevant UTMs. Authority for the proposition that the reference in clause 1.2 to 'all the goodwill attaching to the Trade Marks' does not make the purported assignment anything other than a

purported assignment in gross is to be found in *Thorneloe v Hill* [1894] 1 Ch 569, where a purported assignment of 'the name, title and goodwill of John Forrest, London' was held by Romer J to be a proposal 'to transfer, if and so far as [the purported assignor, one Read] could, to the Plaintiff [Thorneloe] the right to the mere name of John Forrest and such advantage, if any, as could be said to attach to such a right'. Romer J went on to state that such a right could not be validly assigned. The judgment of Lawrence LJ in *In re John Sinclair Limited's Trade Mark* [1932] 1 Ch 598 at 620 is to similar effect. Lawrence LJ said:

> 'Without expressing any concluded opinion whether goodwill can be split up, I am clearly of opinion that a trade mark cannot be assigned with only that portion of the goodwill which necessarily passes with the trade mark when it is assigned by itself. That would be to affirm the proposition that a trade mark can be assigned in gross, as such an assignment would necessarily carry with it such goodwill as attaches to the mere user of the trade mark.'

137. Mr Alexander's argument on the scope of the common law rule against the assignment of UTMs in gross was that the appellants were not (as Mr Jones contended) seeking to establish an exception to the rule in respect of assignments within a corporate group. He submitted that it had been recognised by the Court of Appeal in *Revlon Inc and others v Cripps & Lee Ltd and others* [1980] FSR 85 that it was wrong, in the context of a group of companies under common control, to regard for the purposes of trade mark law, goods produced by one company in the group as not connected with a trade mark owned by another company in the group. Indeed he submitted that it was HMRC that were seeking to extend the rule 'into terrain for which it was never intended, is entirely unsuited, and … leads to harsh and anomalous consequences'.

138. The issue between the parties, therefore, was as to the precise scope of the common law rule against assignments of UTMs in gross, and whether the assignments in issue in these appeals were within it. From the time when trade marks were first recognised by the law as constituting a species of property (to, we are told, the surprise of the profession), there had been a rule that they were not assignable in gross, but only assignable in connection with the goodwill of the business concerned in the goods to which the mark was referable (*The Leather Cloth Company Ltd. v The American Leather Cloth Company Ltd.* (1863) 4 De G J & S 137, and (1865) XI HLC 523). This rule was codified in the first Act which provided for the registration of trade marks in England, the Trade Marks Registration Act of 1875 and was re-enacted in the ensuing trademarks legislation until the law was changed in 1937 by the Trade Marks (Amendment) Act 1937 which was replaced immediately after it came into force by the Trade Marks Act 1938 ("the 1938 Act"). The 1938 Act remained in force until the Trade Marks Act 1994 ("the 1994 Act") superseded it. The 1994 Act implemented a Community directive seeking to harmonise the law of registered trademarks and remains in force.

139. The relevant change in the law was enshrined in section 22 of the 1938 Act, the relevant provisions of which were as follows:

> ‘22(1) Notwithstanding any rule of law or equity to the contrary, a registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible either in connection with the goodwill of a business or not.
>
> (2) A registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible in respect either of all the goods in respect of which it is registered, or was registered, as the case may be, or of some (but not all) of those goods.
>
> (3) The provisions of the two foregoing subsections shall have effect in the case of an unregistered trade mark used in relation to any goods as they have effect in the case of a registered trade mark registered in respect of any goods, if at the time of the assignment or transmission of the unregistered trade mark it is or was used in the same business as a registered trade mark, and if it is or was assigned or transmitted at the same time and to the same person as that registered trade mark and in respect of goods all of which are goods in relation to which the unregistered trade mark is or was used in that business and in respect of which that registered trade mark is or was assigned or transmitted.’
>
> …
>
> (7) Where an assignment in respect of any goods of a trade mark that is at the time of the assignment used in a business in those goods is made, on or after the appointed day, otherwise that in connection with the goodwill of that business, the assignment shall not take effect until the following requirements have been satisfied, that is to say, the assignee must, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the Registrar may allow, apply to him for directions with respect to the advertisement, and must advertise it in such form and manner and within such period as the Registrar may direct.
>
> (8) Any decision of the Registrar under this section shall be subject to appeal to the Court.’

140. Thus, pursuant to section 22 of the 1938 Act, the assignment of an UTM in gross was permitted, providing it was used in the same business as a registered trade mark being assigned at the same time and to the same person as the UTM, and further provided that the UTM was in respect of goods, all of which were goods in relation to which the UTM was used in that business, and in respect of which the registered trade mark was assigned. There were also provisions for notification to the Registrar, and for advertisement, to safeguard the position where a trade mark was assigned in gross.

141. The 1994 Act repealed the 1938 Act and provided that a registered trade mark was transmissible by assignment, testamentary disposition or operation of law in the same way as other personal or moveable property, and that it was so transmissible either in connection with the goodwill of a business or independently (section 24(1). By section 24(6) however it was provided that:

> ‘(6) Nothing in this Act shall be construed as affecting the assignment or other transmission of an unregistered trade mark as part of the goodwill of a business.’

142. Mr Jones submitted that by section 24(6) of the 1994 Act, Parliament was replicating the common law rule in relation to the assignments of UTMs, and removing the possibility of assigning an UTM in gross in the limited circumstances provided for by section 22(3) of the 1938 Act. Mr Jones submitted that the issue of assignment was therefore the subject of Parliamentary consideration as recently as 1994 and that Parliament could have taken steps to alter the common law position in

relation to UTMs but did not. He also submitted that no exception to the common law rule was provided in respect of assignments between group companies. Mr Alexander, on the other hand, submitted that the significance of section 24(6) of the 1994 Act was that Parliament was not in that Act indicating what was the content of the common law rule but only that it was not affected by the Act.

143. In a decision of the House of Lords after the enactment of the 1994 Act, *Scandecor Developments AB v Scandecor Marketing AB and others* [2001] CMLR 30, 645, Lord Nicholls gave a résumé of the common law of assignment. After mentioning Lord Westbury's observation in *The Leather Cloth* case, he said (at *ibid.* 656-657):

> 'So the law became that a trade mark may be sold, but not separately from the business in which it is used. Nor may a trade mark be assigned when it connotes a personal connection between the original owner of the mark and the goods in respect of which it is used [*Pinto v Badman* (1891) 8 RPC 181]. An instance of the latter is an artist's mark on his own artistic works.
>
> I pause to note that the recognition that a trade mark is saleable represents a significant development in the conception of what a trade mark indicates. A trade mark is not usually to be understood as a representation regarding the identity of the source, namely, who is in control of the business in which the mark is being used. Rather, with the changes in trade, a trade mark can "fairly be held to be" only a representation that the goods were manufactured in the course of the business using the mark, without any representation as to "the persons by whom that business was being carried on" [*Thorneloe v Hill*].
>
> This approach accords with business reality and customers' everyday expectations. Customers realise there is always the prospect that, unbeknown to them, the management of a business may change. To confine the use of a trade mark to the original owner of a business would be to give the concept of a business origin or business source an unrealistically narrow and impractical meaning. Of course, the new management, the new owners, may not adhere to the same standards as the original owner. But the risk of an unannounced change of standards is ever present, even when there has been no change in management. An owner may always decide to change his quality standards. As already noted, customers rely on it being in the owner's self-interest to maintain the value of his mark. The self-interest of the owner of a trade mark in maintaining its value applies as much to a purchaser of the mark as it does to the original owner.'

144. We record, at this stage, Mr Alexander's submission on the import of *Pinto v Badman*. He concentrated on the passage, *ibid.* at p.195, where Fry LJ said:

> 'It is obvious that the Legislature in so enacting [the trade mark Statutes of 1875 and 1883] are intending to confine the right of assigning the trade mark after registration within the same limits by which it is confined at law and in equity before registration. Therefore there can be no doubt to my mind, that before and after registration a trade mark cannot be assigned independently of the manufacture of the goods to which it relates. It never can be assigned in any way which will enable the transferee to represent something different to that which it represented in the hands of the transferor.'

145. Mr Alexander's submission was that this passage makes it clear that the entire purpose and focus of the common law rule is to ensure that there is not independence (or a severance) of the mark from the manufacture of goods to which the mark relates (the business in which it is used). Therefore, Mr Alexander says, the common law rule does not apply in circumstances where the mark and the manufactory (business)

cannot on any sensible view be regarded as divided one from the other, in the sense that there would be essentially fraud in the use of the mark by the assignee. And even if one considers the period after INML had taken the assignments from the Subsidiaries and before it had licensed the UTMs back to the Subsidiaries (a *scintilla temporis*) there is, in Mr Alexander's submission, 'in reality', and on Mr Morton's evidence, 'no question of a relevant trade mark division between the assignee [INML] and the relevant [newspaper publishing] business[es]'. Assignments of UTMs to a holding company responsible for the undertakings of its subsidiaries are not assignments made 'independently' (to use Fry LJ's word in the citation from *Pinto v Badman* above) of the subsidiaries' businesses. 'Lord Justice Fry, Lord Westbury and their kin would not have entertained a suggestion that [an action for passing off] couldn't be maintained [by the assignee] because the assignment was to a group company.'

146. We cannot accept this submission. We consider that it is founded on a very nuanced interpretation of the citation from Fry LJ's judgment, the plain meaning of which, in our view, is that a UTM cannot be assigned independently of the business to which it relates *because* such an assignment would enable the transferee to represent that it was part of the goodwill of the business, which it could not be if it were independently assigned out of the ownership of the owner of the business. The interpretation of the scope of the common law rule which we discern from the citation from Fry LJ's judgment (essentially that for which Mr Jones contends) is supported by the citation from Lord Nicholls's speech in *Scandecor* (above). Lord Nicholls emphasised that the relevant connection for these purposes is between the trade mark and the business in which it is used, not between the trade mark and the persons who may (from time to time) control that business. Although Mr Alexander said that his submission was that, realistically speaking, there was no divorce of the UTM from the business that supports it, his submission seems to us to emphasise, wrongly, the connection between the businesses of the Subsidiaries and the person (INML) which in fact controls them, when in truth what is relevant is the separation which the assignments (if valid) would have achieved between the UTMs and the businesses in which they were used.

147. The result, in our view, is that the modern law (post 1994) has liberalised dealings in registered trademarks, with the protection which the registration rules give to the public (albeit including aspects which can prevent a registration being made), but Parliament has intentionally not reformed the law on the assignment of UTMs in the sense of liberalising it, perhaps with the object of promoting the use of the registration arrangements. Indeed so far from reforming the law on the assignment of UTMs, Parliament has actually, by the 1994 Act, made it more restrictive than it had been by restoring the common law rule without the exceptions which the 1938 Act had provided. We therefore see no evidence of a legislative intention to liberalise or relax the common law rule preventing the assignment of UTMs in gross, that is, without the business and goodwill to which it relates.

148. We also consider that Mr Alexander's reliance of *Revlon* was misplaced.

149. *Revlon* is a case where the Court found on the facts that the trade mark REVLON FLEX was connected to all the businesses of the Revlon group. The facts of the *Revlon* case are important. It was a passing off action brought by members of the international Revlon group (the US parent company, Revlon Inc., the first plaintiff in the action, and various subsidiaries and sub-subsidiaries) against importers of quantities of Revlon anti-dandruff products which had been introduced by Revlon Inc. to the US market and whose sale Revlon Inc. had discontinued. The case concerned parallel imports into this country of goods bearing the REVLON FLEX mark.

150. The registered proprietor of the REVLON FLEX mark was a Swiss Revlon sub-subsidiary ("Suisse"), the second plaintiff, whose only function was to hold trademarks. Another Revlon subsidiary, a Venezuelan company ("Overseas"), the third plaintiff, was registered as a registered user of the REVLON FLEX mark and manufactured certain Revlon products in Wales. The fourth plaintiff, a US Revlon subsidiary ("International") marketed Revlon products in many countries outside the US, including England and Wales.

151. The legal issue in the trade mark aspect of the *Revlon* case was whether the right to the use of the REVLON FLEX given by registration under the 1938 Act had been infringed by the parallel imports of goods bearing the REVLON FLEX mark by certain of the defendants. In this connection, section 4(3)(a) of the 1938 Act provided that there was no such infringement where the use of the mark was:

> 'in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use had applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark'.

152. The defendants in the action relied on this provision to assert that the goods imported were connected in the course of trade with the proprietor of the REVLON FLEX mark or a registered user of the mark. As stated above, the registered proprietor of the mark was Suisse, which carried on no trade. Overseas was the relevant registered user of the mark. Buckley LJ declined to hold that Revlon Inc. should be regarded as the registered proprietor for these purposes but held (*ibid.* p.105) that it was:

> 'realistic and wholly justifiable to regard Suisse as holding the mark at the disposal of [Revlon Inc.] and for [Revlon Inc.'s] benefit. The mark is an asset of the Revlon Group of companies regarded as a whole, which all belongs to [Revlon Inc.]. This view does not, in my opinion, constitute what is sometimes called "piercing the corporate veil"; it recognises the legal and factual position resulting from the mutual relationship of the various companies.'

153. Buckley LJ went on to consider whether the application of the mark in the US to the US products which had been imported by the defendants was a use of the mark in relation to goods connected in the course of trade with Suisse or Overseas (*ibid.* p.106).

154. He concluded that it was a use of the mark in relation to goods connected in the course of trade with both Suisse and Overseas. His reasoning was as follows (*ibid.* at 106-107):

> 'To use an expression employed in *Radiation Trade Mark* (1930) 47 RPC 37, 43, line 36, the mark has become in effect a "house mark of the whole group". It has at all material times been intended for use, and has been used, to indicate that the goods to which it is applied are goods which originate from the Revlon Group, but not from any particular part of that Group. The exploitation of the mark and of the goods to which it relates is a world-wide exercise in which all the component companies of the Group who deal in these particular products are engaged in the course of trade. This view is, I think, reinforced by the condition attached to the registration of Overseas as a registered user of the mark. In these circumstances it seems right to say that the United States products in question are goods connected in the course of trade with Overseas. It might be said that, as Suisse carried on no trade, the products cannot be goods connected in the course of trade with Suisse, but I do not think that would be right. Suisse holds the trade marks for the purposes of the trade carried on by companies in the Group. In particular it holds the REVLON FLEX United Kingdom trade mark for the purposes of the trade of Overseas and International in the United Kingdom. This provides, in my view, a sufficient nexus with trade to lead to the conclusion that the United States products in question are goods connected with Suisse in the course of trade.'

155. Bridge LJ agreed with the judgment of Buckley LJ and for the reasons given by him. Templeman LJ delivered a judgment agreeing with Buckley LJ's conclusion but for different reasons on some points.

156. The conclusion in *Revlon* on which the appellants rely is that where one member of a group of companies holds a trade mark, goods produced by another company (or other companies) in the same group are connected in the course of trade with the company holding the mark. They argue from this that, after assignment to INML, the UTMs in this case were not 'divorced from [their] place of origin' or, in INML's hands, indicative of 'something different to what [they] indicated in the hands of [the assignor Subsidiaries]' (*cf.* Bowen LJ in *Pinto v Badman* (*ibid.* at 194-195)

157. But the facts of this case do not support that argument. The UTMs in issue, originally held by the Subsidiaries, were not used or intended for use to indicate that the newspapers in question were newspapers originating from the Yattendon or INML group. Quite the contrary, they were specific mastheads indicating a local newspaper whose particular quality or 'selling point' was that it was a local newspaper locally managed and locally produced. The exploitation of the UTMs and of the newspapers to which they related was not an exercise in which all component companies of the Yattendon or INML group were engaged in the course of trade. To take but one example of the evidence proving this point, Mr Richard said in cross-examination that advertising in a local newspaper, which is 'key to' making a profit, came as to 'roughly about 14 per cent.' from national advertising and the bulk of the advertising comes from within the marketplace'.

158. We conclude, therefore, that the common ownership of the Subsidiaries by INML does not assist the appellants.

159. We add that there is in our view force in Mr Jones's point that in *In re John Sinclair Limited's Trade Mark* [1932] 1 Ch 598, which concerned an assignment of a trade mark between group companies, the point now raised by the appellants was never considered. In saying this we recognise that the *Sinclair* case was principally about a different issue, the construction and application of section 22 of the Trade Marks Act 1905. We also consider that there is force in Mr Jones's 'coach and horses' argument – that if the appellants are right an UTM could be assigned in gross to a company in the same group as the assignor and the shares in the assignee then sold outside the group, so avoiding the common law rule.

160. We are not dissuaded from our view that an UTM cannot, as a matter of law, be assigned in gross by the high level dictum of Sir George Jessel MR in *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465 cautioning against 'extend[ing] arbitrarily those rules which say that a given contract is void as being against public policy'. It will have been seen that our view is that our conclusion that the common law rule is and should be applied as Mr Jones submits involves no extension of any rule.

Issue *a*: conclusion

161. Our conclusion in relation to issue *a* therefore is that the purported assignments of UTMs in this case by the respective Subsidiaries to INML were assignments in gross and were void for mistake as to the assignability of the subject matter of the purported assignments (see: *Halsbury's Laws, 4th Edition 2007 Reissue, Vol. 13, Deeds and other instruments* paragraph 71 and the cases there cited). It follows that no UTM has been validly transferred to INML or licensed back by INML and on this basis the Subsidiaries' appeals in relation to their claims to write down for tax purposes the acquired licences of UTMs fall to be dismissed.

Supplementary and miscellaneous comments

162. However, we deal in what follows in relation to issues *b* to *g* inclusive on the basis that the UTMs were validly transferred and licensed back, in case we are wrong in our conclusion on issue *a* and out of deference to the full argument and evidence we received on those other issues. Issue *h* is in a different category, because it concerns the tax treatment of interest under the LAs. Although the LAs were entered into to facilitate the license-back (and in one case the assignment) of UTMs, the validity of the LAs themselves could not, in our view, be affected by the invalidity of the purported assignments of UTMs.

163. In paragraph 15 above, we recorded HMRC's original submission that because an UTM could not be assigned in gross it was therefore not an intangible asset within the meaning of Schedule 29 FA 2002. In his oral submissions, Mr Jones qualified this submission, describing it as 'probably with hindsight a red herring'.

164. He explained this as follows. 'Intangible asset' for the purposes of Schedule 29 FA 2002 'has the meaning it has for accounting purposes' (ibid. paragraph 2(1)). This leads one to FRS10 which includes a condition that an asset, to be an intangible asset for relevant purposes must be one that is capable of being 'disposed of separately without disposing of a business of the entity'. This rules out an UTM from

being an intangible asset for the purposes of Schedule 29 FA 2002 (the reference to 'any trade mark' in ibid. paragraph 2(2)(a) being, in HMRC's submission, a reference to a registered trade mark).

165. However, by paragraph 4 of Schedule 29 FA 2002:

> '4(1) Except as otherwise indicated, the provisions of this Schedule apply to goodwill as to an intangible fixed asset.
>
> (2) In this Schedule "goodwill" has the meaning it has for accounting purposes.'

and because a UTM is, as Mr Jones described it, 'just part of the goodwill', taking the meaning which "goodwill" has for accounting purposes, Schedule 29 applies to an UTM as it would to an intangible asset. Therefore no relevant consequences flow from an UTM not being an "intangible asset" for the purposes of Schedule 29 FA 2002; the Schedule applies to an UTM qua goodwill. We accept this reasoning and the conclusion flowing from it.

Issue *b*: submissions and discussion

166. This issue relates to the assignments of UTMs by HENL, CNL and SNL respectively to INML as part of the 2003 Transactions ("the 2003 Assignments"). It is common ground that the 2003 Assignments (each for a consideration of £1) were at an undervalue. (In connection with the 2005 Transactions, substantial value was paid for the assignments and the point is not taken that they constituted unlawful distributions.) The appellants accept that the 2003 Assignments can be characterised as distributions for the purposes of section 263 CA 1985 (see below). It is agreed between the parties (and the evidence shows) that the relevant accounts of the respective Subsidiaries for the 52 weeks ended 28 December 2002 ("the 2002 Accounts") showed distributable profits of: HENL - £2,824,000; CNL - £4,139,000; SNL - £2,408,000. This issue (issue *b*) is not directly concerned with the quantum of the undervalue. We approach this issue (issue *b*) on the assumption (but without deciding) that the market value of the UTMs assigned by HENL, CNL and SNL respectively in the 2003 Assignments was at all relevant times in excess of their respective distributable profits as shown by the 2002 Accounts.

167. With one exception, the UTMs assigned by HENL, CNL and SNL to INML in the 2003 Assignments were not carried in the books of the respective Subsidiaries because they did not qualify for recognition, as being internally generated assets. This treatment was, according to Mr Holgate's evidence (which we accept), in accordance with paragraph 14 of FRS10 which states that 'an internally developed intangible asset may be capitalised only if it has a readily ascertainable market value'. The one exception was an UTM acquired by SNL (i.e. not internally generated) which was shown in its balance sheet as at 28 December 2002 as an intangible fixed asset with a net book value of £708,000.

168. Ms Stokes, for the appellants, explained the distinction between the common law rule against making a distribution out of capital and the relevant statutory rule contained in section 263 CA 1985 that a company shall not make a distribution except out of profits available for the purpose. She pointed out, by reference to the

commentary on Pt. 23 of the Companies Act 2006 ("CA 2006") in *Buckley on the Companies Acts* (Issue 22), which had been contributed in an extra-judicial capacity by Mr Justice David Richards, that an essential difference between the common law rule and the statutory rule was that the common law rule is applied by reference to actual values at the date of distribution, whereas under the statutory rule the determination of profits out of which distributions may be made is by reference to figures appearing in the relevant accounts (*cf. ibid.* [17]).

169. Ms Stokes submitted that it was clear that the common law rule had not been infringed by the 2003 Assignments, because after the 2003 Assignments had occurred the relevant Subsidiaries were all 'still massively solvent, [had] huge distributable reserves and [their] net assets vastly exceed the amount of the called-up share capital'. In argument, Mr Jones made it clear that it had not been part of HMRC's case that the common law rule had been engaged. It was HMRC's case that there was an unlawful distribution under the statutory rule contained in Pt. 8 of CA 1985.

170. The relevant statutory rule is provided by section 263 CA 1985 to the effect that a company shall not make a distribution except out of profits available for the purpose, which are its accumulated realised profits (so far as not previously utilised by distribution or capitalisation) less its accumulated realised losses (so far as not previously written off in a reduction or reorganisation of capital duly made). Sections 270 and 271 CA 1985 relevantly provide for determining the question whether a distribution may be made by a company without contravening section 263.

171. Ms Stokes argued that, pursuant to section 270(2) CA 1985, if a company has profits available for distribution, the amount of a distribution must be measured by reference to the value of the distributed asset as stated in the company's last annual accounts. It followed, in her submission, that if a distributed asset does not appear in those accounts the amount of the distribution is zero. If the asset is stated in the company's last annual accounts, the amount of the distribution must be measured by reference to the book (or stated) value of the asset, and not its market value.

172. Section 270(2) CA 1985 provides as follows:

> '(2) The amount of a distribution which may be made is determined by reference to the following items as stated in the company's accounts-
>
> (a) profits, losses, assets and liabilities,
>
> (b) provisions of any of the kinds mentioned in paragraphs 88 and 89 of Schedule 4 (depreciation, diminution in value of assets, retentions to meet liabilities, etc), and
>
> (c) share capital and reserves (including undistributable reserves).'

173. The accounts referred to are the company's last annual accounts (section 270(3) CA 1985).

174. Mr Jones submitted, by reference to section 270(2) CA 1985 (prior to the enactment section 845 CA 2006 – see below) that 'you cannot lawfully distribute an

asset which is not an asset appearing in the accounts'. His submission was that on the statutory code operating in 2003 the policy on the lawfulness of a distribution of an asset not stated in the company's last accounts was that it required either the capitalisation of the asset prior to distribution or a sale of the asset intra-group at market value and a subsequent distribution of the proceeds of the sale. Both courses required the preparation of interim accounts in which the asset would feature – see section 270(4) CA 1985. And he said that a capitalisation of the mastheads involved in the 2003 Assignments could not have been achieved, because FRS10 would not have permitted it in the necessary interim accounts, and a sale intra-group at market value and a subsequent distribution of the proceeds of sale would have required sufficient distributable profits to be shown in the necessary interim accounts, which were a 'very important safeguard' required by section 270(4) CA 1985 'where the distribution would be found to contravene [section 263 CA 1985] if reference were made only to the company's last annual accounts'. And no interim accounts were drawn up in connection with the 2003 Assignments.

175. Ms Stokes had submitted that section 270(4), with its reference to interim accounts, was a 'facility provision' applying if a distribution would infringe section 263 if reference were made only to the company's last annual accounts, which on her argument was not needed in the case of the 2003 Assignments. Her interpretation of section 263 and 270 CA 1985 was, she said, consistent with the way in which unrealised profits are treated in section 276 CA 1985 (distributions in kind). Section 276 CA 1985 relevantly provides as follows:

> 'Where a company makes a distribution of or including a non-cash asset and any part of the amount at which that asset is stated in the accounts relevant for the purposes of the distribution in accordance with sections 270 to 275 represents an unrealised profit, that profit is to be treated as a realised profit-
>
> (a) For the purpose of determining the lawfulness of the distribution in accordance with this Part (whether before or after the distribution takes place) …'

176. Thus the mastheads could have been capitalised, resulting in an asset value matched by a revaluation reserve, which, even if it represented an unrealised profit, would be treated as a realised profit for the purposes of section 263 CA 1985.

177. Ms Stokes met the point that FRS10 would not have permitted a capitalisation of the mastheads by pointing out that the relevant Subsidiaries were private companies and therefore all that would have been required would have been the preparation of interim accounts being accounts 'necessary to enable a reasonable judgment to be made as to the amounts of the items mentioned in [section 270(2) CA 1985]'. Such accounts (in contradistinction to interim accounts required for public companies – see: section 272 CA 1985) would not have required the application of FRS10 even if, which she did not concede, FRS10 could not have been complied with.

178. Ms Stokes accepted that the language of section 270(2) 'is not as clear as it should be', and that the point has 'now been clarified' by the enactment of section 845 CA 2006. That section relevantly provides as follows:

'845 Distributions in kind: determination of an amount

(1) This section applies for determining the amount of a distribution consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company of a non-cash asset where-

(a) at the time of the distribution the company has profits available for distribution, and

(b) if the amount of the distribution were to be determined in accordance with this section, the company could make the distribution without contravening this Part.

(2) The amount of the distribution (or the relevant part of it) is taken to be-

(a) in a case where the amount or value of the consideration for the disposition is not less than the book value of the asset, zero;

(b) …

(3) …

(4) In this section "book value", in relation to an asset, means-

(a) the amount at which the asset is stated in the relevant accounts, or

(b) where the asset is not stated in those accounts at any amount, zero.'

179. Mr Jones accepted that section 845 CA 2006 'resolves this issue … by including as an asset with a value an asset which actually isn't there and saying it's got a nil value'. He was referring to the way section 845 CA 2006 resolves the issue which he submitted arose from the language of section 270(2) CA 1985. He submitted that the legislative history, which he referred us to, showed that the draftsman recognised 'we say correctly … that all you can get out of section 270(2) is a reference to those assets which are actually stated in the accounts'. His submission was that section 845 CA 2006 altered the law and did not have retrospective effect. There is no reference in the statutory language to its application 'for the avoidance of doubt'. Against that, Ms Stokes referred us to the official Explanatory Notes referring to CA 2006 which state (at [1154]) that section 845 CA 2006 'clarifies' the position and 'avoids the potential need for many companies to carry out asset revaluations requiring professional advice and incurring fees to advisors prior to making a distribution of a non-cash asset'.

180. We have to determine a question of statutory construction of section 270(2) CA 1985. When an asset is not carried at any book value – it is effectively carried at zero – and does not feature in a company's accounts, is the asset to be taken as having been 'stated in the company's accounts' and its value, so stated, to be zero? HMRC's argument that section 270(2) is not engaged in the case of an asset which does not feature in a company's accounts is supported by a literal interpretation of section 270(2). We must seek to apply a purposive construction which may or may not accord with the literal interpretation, but must primarily have regard to what we discern as the statutory purpose of section 270(2).

181. We bear in mind that, as Ms Stokes submits, the actual value of a non-cash asset at the date of its distribution is relevant for the purposes of the common law rule against distributions out of capital, which remains behind the statutory rule 'as a residual safety net' providing protection for creditors. Further, the principle of the

statutory rule is that the amount of a distribution is to be justified (in the first instance) by reference to the company's last annual accounts, and, as Ms Stokes submits, there are no – at any rate, no obvious – reasons for measuring the amount of a distribution in specie by reference to its actual value at the time of the distribution (as HMRC submits) rather than to its carrying value as per the last annual accounts. And Ms Stokes relies on section 845 CA 2006, not as a way of construing section 270(2) CA 1985 but to underline what she says is the continuing policy of having regard to the values at which assets are carried in the last annual accounts, rather than their market value at the time of distribution.

182. Mr Jones contended that the problem highlighted in this case had been recognised at least as early as 1996 (when a working party of the Company Law Committee of the Law Society reported) and that 'advisers simply didn't take any risks', which explains the absence of any reported decision on this issue.

183. On the issue of the purpose of section 270(2) CA 1985, which, of course, is connected with the discernible legislative policy behind the enactment of section 845 CA 2006, Mr Jones's main point is that Parliament did not make section 845 retrospective, which suggests an acceptance that the section 845 changed the law.

184. We do not accept that the lack of any stated retrospective application of section 845 CA 2006 has the effect claimed for by HMRC. It is a feature of the policy behind the statutory rule that the carrying value of an asset in historic accounts is relevant for determining the value of a distribution of that asset, and that policy is evidently continued and, we would say, affirmed by section 845 CA 2006. Mr Jones's argument is essentially an argument from redundancy – he says that the enactment of section 845 CA 2006 shows that Parliament thought that the change concerned was necessary.

185. Lord Hoffmann in *Walker v Centaur Clothes Group Limited* [2000] STC 324 said (at 331 in a passage well known to tax lawyers):

> 'My Lords, I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway.'

186. This observation fortifies us in our conclusion that not much weight should be put on the fact that section 845 CA 2006 is not expressed to be retrospective. Ms Stokes's argument on the construction of section 270(2) CA 1985 seems to us to correspond more happily with what we discern as the purpose of the statutory rule than Mr Jones's insistence that where an asset is not stated in a company's accounts (and is therefore carried at a book value of zero) regard should be had not to its carrying value but to its market value at the time of distribution for the purposes of determining the amount of a distribution of the asset concerned.

Issue *b*: conclusion

187. We therefore decide issue *b* in the sense contended for by Ms Stokes. The 2003 Assignments were not unlawful distributions. It follows that INML did not hold the

UTMs which were the subject of the 2003 Assignments on trust for the assigning Subsidiaries (respectively).

Issue *c*

188. Issue *c* encapsulates an issue of fact – whether the licence fees paid by the respective Subsidiaries were in excess of the market values of the respective licences – and an issue of law – whether, if so, the payments of the licence fees were unlawful distributions out of capital for company law purposes by the Subsidiaries concerned to INML.

Issue *c* – the market values of the licences

189. In assessing the evidence as to the market values of the licences in order to determine whether or not the Subsidiaries overpaid for the grants of the licences, it is convenient to follow the approach of HMRC in their closing submissions and examine the differences between the evidence of Mr Burns and that of Mr Ryan in relation, first, to the valuation of a newspaper masthead as a whole, and then to the particular features of the licences in this case.

190. Mr Burns, for the appellants, accepted in cross-examination that he had based everything on the premise that virtually all the value of the intangible assets of the Subsidiaries was attributable to the value of their respective mastheads (see above, paragraph 96). His opinion was that when a newspaper business was acquired, the acquirer regarded the masthead as the sole asset it was seeking to acquire (see above, paragraph 98).

191. But it was difficult for Mr Burns to support this proposition with empirical evidence because (as he said) transfers of value in the newspaper sector are in practice achieved by sales of companies which operate newspaper businesses, even though (as he said) when a newspaper business is acquired, the acquirer regards the masthead as the sole asset it is seeking to acquire. We can well see that in that context a buyer and a seller could regard all the value of the business contributed by the intangible assets as attributable to the masthead – in a way, the newspaper title is a shorthand way of describing the goodwill of a newspaper business, 'the benefit of the whole set up' as Mr Jones described it. This explains, in our view, Mr Richard's comment that 'the masthead is the masthead, is something well over 90 per cent, virtually 100 per cent, as a brand, of the value of the company, and without it you can't actually have the company go in' (see above, paragraph 106). We consider that it also illustrates the logic underlying why E&Y in their valuation of 2003 attributed more of the enterprise value to the licences than the 50% to 70% suggested by Mr Rocke at the board meeting of Yattendon on 20 May 2003.

192. We however have to consider an artificial (from a commercial point of view) state of facts where only the masthead (the UTM) is alienated by a newspaper operating business, and no non-competition covenant is given by the existing publisher.

193. In that context, Mr Burns sought to support his valuation of a newspaper masthead by making the assumption that the existing publisher (who has notionally

alienated only the masthead) would not try to remain in the market, and so would not be a potential purchaser of a licence of the masthead. Mr Burns thought that it would be more logical for the existing publishers to distribute the proceeds of sale to their shareholders than to contemplate re-entry into the market by taking licences of the titles which they had recently disposed of (see above, paragraph 104).

194. Mr Ryan, on the other hand, was of the view that the existing publisher would be the only credible acquirer of the licence in the hypothetical market being considered (see above, paragraph 101). Indeed he thought that the existing publisher, even if unsuccessful in acquiring the licence, would be likely to use its existing business apparatus to publish under a different name ('rebrand') rather than close down (paragraph 113). This course would be particularly attractive in relation to free newspapers (such as those operated by LSN). The fact that the Subsidiaries had not given covenants not to compete when assigning the UTMs to INML, and the fact that the licence taken by LSN was on a non-exclusive basis supported this view.

195. On this important issue, we favour the approach of Mr Ryan and reject that of Mr Burns. In particular we cannot understand the basis on which Mr Burns makes his assumption that the existing publisher would 'exit the business' rather than acquire the licence and in this way continue to derive value, and profit, from its existing (and notionally retained) employees, local office facilities, distribution networks and advertiser relationships. It seems to us that there is no basis to assume (as Mr Burns did, and as was not the fact) that the existing publishers had disposed of the UTMs for full value, and further that there is no basis to assume that, if they had, they would not have considered re-investing a part of that value in the acquisition of the licences. On the contrary, the assumed business realities seem to us (as they did to Mr Ryan) to point to the existing publishers being the most likely acquirers of the licences, because they retained the necessary business facilities in place to derive immediate and maximum benefit from the licences, once acquired. Any other purchaser, for example a newspaper publisher in a nearby area, or one who could achieve synergies by 'sweating [its assets] more' (*cf.* above, paragraph 115), would inevitably require a period of adjustment before it could enter the market using the licensed masthead, and this would leave a time-gap which could be exploited by the existing publisher – particularly in the area of free newspapers.

196. We reject the appellants' submission that the existing publishers should not be regarded as possible purchasers in the hypothetical open market for the licences. This submission was advanced on the basis that an existing publisher possessed of everything necessary to produce and distribute a newspaper but lacking only the right to use its masthead was 'completely removed from reality' and so should not be taken into account in an exercise designed to yield a market value. The answer to this point in our view is that the element of unreality arises because the transaction took the form it did. We are faced with a commercially unreal transaction. We have to find a value for the licence on the basis of the market which we can logically postulate for the licences of the mastheads. There is, in our view, no reason in logic for our excluding the existing publishers from that market.

197. Having reached this view, we reject Mr Burns's valuations because they assume that all the value of the other intangible assets of the businesses which were hypothetically retained by the Subsidiaries when they sold the UTMs alone, attached to the UTMs sought to be licensed. Clearly an existing publisher would not expect to pay a fee for licensing UTMs, which included value representing intangible assets which that publisher had retained. We do not consider that an existing publisher would be 'forced' to pay a super-value for the licences by competition from third party outsiders, because such outsiders would, we consider, be put off from offering a super-value (whatever synergies might reasonably be expected to be achieved) by the real fear that the existing publisher might 'rebrand' and compete in the market. We consider, on the basis of Mr Richard's evidence in particular, that such competition, particularly in the case of the market for paid-for local newspapers, would be fierce and would be likely to be damaging to all businesses involved and that the prospect of it would reduce the likelihood of a challenge by a third party outsider to the bid of an existing publisher for a licence.

198. We regard Mr Burns's use of the MM to value mastheads sold in isolation to be flawed because we do not accept his underlying assumption that the masthead represents the entirety of the intangible asset value of a newspaper business. We regard the RRM as being, in principle, an appropriate valuation methodology to use, concentrating, as it does, on the present value of royalty payments rendered unnecessary by the ownership of the licence. However, having reached the view that in the hypothetical market in which the licences were granted the most likely purchasers would be the existing publishers of the newspapers concerned, we are persuaded by Mr Ryan's view that the value of the licences would be unlikely to be significantly higher than the cost of recreating the UTMs concerned (i.e. rebranding), which would give a lower value than that achieved by application of the RRM (see above, paragraph 100).

199. In the light of Mr Ryan's evidence about the values assigned by Interbrand to the Coca-Cola brand, the McDonalds brand and the Apple brand, we would not in any event have accepted a value for the UTMs in this case which exceeded 30% of the relevant Subsidiaries' intangible asset value. We accept Mr Ryan's point that the bulk of that value is attributable to the Subsidiaries' incumbency – the relationships it has, because it is in place as the local newspaper publishing company – and his point that that is distinct from brand loyalty, or masthead value (see above, paragraph 111). He was challenged on this point in cross-examination, but in the end the point was accepted by Mr Ghosh.

200. Turning to the particular features of the licences in this case, Mr Jones highlighted as significant in the context of valuation: (1) the effect of clause 3.8 of the TMLAs (see above, paragraph 70) giving INML the right at its sole discretion at any time on at least 30 days' notice to remove any UTMs from the licence, on payment back to the licensee of a *pro rata* part of the licence fee, but without interest; (2) the lack of benefit from any anti-competition clause given by the incumbent; and (3) the fact that the licence taken by LSN was on a non-exclusive basis. We have considered (2) and (3) in our discussion above of the probability of the existing incumbent being the most likely purchaser of the licences in a hypothetical open market. We mention

here that Mr Burns effectively agreed that the non-exclusive nature of the LSN licence would have depressed the value of that licence (see above, paragraph 110).

201. It remains to consider the effect of clause 3.8 on the value of the licences. Mr Jones submitted as ‘now our primary argument’ that the result of the clause was that the value of each licence was minimal. He argued, in effect, that the licences should not be valued as 5-year licences but as renewable 30-day licences. The evidence was unclear on why the right to remove UTMs from the licence on 30 days’ notice, with a *pro rata* rebate of the licence fee was retained by INML. Mr Morton could not remember. Mr Jones suggested that the E&Y valuation did not take it into account. It is right to recall at this point that Mr Ryan overlooked the effect of clause 3.8 when he wrote his first two reports and only addressed it in his Second Supplemental Report. The appellants submit that clause 3.8 (together with clauses 3.7, 8.3 and 9.2) reflected the decision taken at the board meeting of Yattendon on 20 May 2003 that ‘the licences [would] also build in appropriate flexibility in case of the acquisition or commencement of additional titles or the disposal of titles or operating companies’. This seems to us to be a reasonable explanation and we accept it.

202. We consider that it would be wrong to value the licences as if they were simply renewable 30-day licences. We accept Mr Burns’s evidence that any potential purchaser would make a judgment on the likely length of the licence in practice and that the obligation on INML in the event of its exercise of clause 3.8 to make a *pro rata* refund of the licence fee would indeed be likely to provide ‘significant protection against exposure to early termination prior to 5 years’. Like Mr Burns, we accept that any start-up costs incurred by a licensee would be at risk of being wasted by an early termination of the licence, and that this would limit the pool of potential purchasers to those for whom the relevant start-up costs would be ‘very small’ (see above, paragraph 105).

203. The significance of this, it seems to us, is that it reinforces the fact that the existing publishers of the newspapers concerned were in a uniquely strong position to acquire the licences and we accept that the uncertainty created by the possibility of an unexpected exercise by INML of its rights under clause 3.8, and the fact that no interest was payable on the *pro rata* refund of the licence fee in that event would be factors depressing the value of the licences from the start.

204. On the view we have taken, that the value of the licences would be unlikely to be significantly higher than the cost of recreating the UTMs concerned (i.e. rebranding), the effect of the presence of clause 3.8 in the licences on the resulting valuation of them is unlikely to be significant.

205. In the result, we accept Mr Ryan’s evidence (at paragraphs 1.19 to 1.21 of his Second Supplemental Report) that the value of the various licences equated to 35% of the cost of recreating the relevant UTMs which gives a total value of £3.8m, allocated between the licences as follows: HENL - £1.4m; CNL - £1.1m; SNL - £900,000; and LSN £400,000. The fees paid for the relevant licences were: HENL - £15.5m; CNL - £18.759m (£18.5m in 2003 and £259.000 in 2005); SNL - £6.5m; and LSN - £10.641m. Comparison of these figures gives amounts paid by the various

Subsidiaries to INML in excess of the market values of the licences concerned as follows: HENL - £14.1m; CNL - £17.659m; SNL - £5.6m; and LSN - £10.241m. These are the figures we take into account when considering the amounts which may (or may not) rank as distributions for company law purposes by the Subsidiaries concerned to INML.

206. If we had not determined that the correct valuations were linked to the cost of recreating the relevant UTMs, we would have preferred valuations calculated by the use of the RRM, as prepared by Mr Ryan. An advantage of Mr Ryan's approach using the RRM, as against Mr Burns's approach using the MM (which we have rejected), is that Mr Ryan has cross-checked his valuations against the proportions of intangible asset value which they represented and the resultant profit split between licensor and licensee. This, in our view, added to the robustness of Mr Ryan's RRM-based valuations.

Issue *c* – whether the excessive licence fees paid by the Subsidiaries to INML were distributions for company law purposes

207. Both parties relied in their respective submissions on this point of company law on the Supreme Court's decision in *Progress Property Co. Ltd. v Moore* [2011] 1 WLR 1 ([2010] UKSC 55). That case concerned the sale by a company (Progress Property Co. Ltd ("PPC")) to another company ("Moorgarth"), which was a co-subsidiary with PPC of a common holding company, of shares in a subsidiary of PPC at an undervalue, but for a consideration which the relevant responsible director ("Mr Moore") of both PPC and Moorgarth genuinely believed was market value. Although the Supreme Court proceeded on the assumption that Mr Moore had been in breach of his duty in failing to realise that the sale was in fact at an undervalue, the Supreme Court held that the sale was not an unlawful distribution of capital.

208. Mr Jones's point is relatively simple. He says that excess licence fees paid by the Subsidiaries to INML as follows – HENL - £14.1m; CNL - £17.659m; SNL - £5.6m; and LSN - £10.241m – must be characterised as unlawful distributions having regard to section 263 CA 1985.

209. This is because objectively the licence fees paid were 'manifestly beyond any possible justifiable reward for [the licences]', a formulation used by Oliver J in *Re Halt Garage (1964) Ltd.* [1982] 3 ALL ER 1016 at 1044c, adopted by Lord Hamilton in *Clyde Football Club Ltd v Steedman* [2002] SLT 109 at [76] and cited by Lord Walker in *Progress Property, ibid.* at [31]. Mr Jones without hesitation accepted that all the directors of INML and the relevant Subsidiaries acted in good faith and that the advisers, principally E&Y, also acted in good faith, and he made his submission on the basis that the parties *bona fide* believed that the E&Y valuation was a fair and proper valuation. His case was that the difference between the quantum of the licence fees and the objectively ascertained value of the licences was so 'unreasonably large' (*Clyde Football Club*, *ibid.*) that it must be recognised as a 'dressed up return of capital' (*ibid.*), albeit that a 'margin of appreciation [should] properly be allowed' (*ibid.*) to the Tribunal in assessing the situation.

210. Ms Stokes's response is that *Progress Property* does not suggest that a discrepancy between the true market value of an asset and the value at which the asset is transferred, even if very great, is on its own enough to establish that a transaction is a distribution. She pointed out that Lord Walker and Lord Mance both made it clear that the test is dependent on an examination of all the relevant facts.

211. The facts of this case do not disclose a case within the category of cases in relation to which Lord Walker regarded the state of mind of the human beings who are orchestrating the corporate activity as 'totally irrelevant' – see: *ibid.* [28]. Thus, we have not here a dividend or its equivalent, excessive director's remuneration or some other attempt to make a payment out of capital. Instead, the facts of this case *may* disclose a distribution disguised as an arm's length commercial transaction (*ibid.* [29]). To determine whether they do so, we must make 'a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries' (*ibid.* [29]).

212. In *Aveling Barford Ltd. v Perion Ltd.* [1989] BCLC 626, 'the disparity between the valuations and the sale price of the land was sufficient, by itself, to satisfy Hoffmann J that the transaction could not stand' (per Lord Walker in *Progress Property* at [30]). But in that case, as Lord Mance said in *Progress Property* at [42], the facts 'made it possible to speak of knowledge and intention to sell at an undervalue'. Hoffmann J had found that the sale was infected by an illegitimate purpose on the part of Dr Lee. Hoffmann J said:

> 'So it seems to me in this case that looking at the matter objectively, the sale to Perion was not a genuine exercise of the company's power under its memorandum to sell its assets. It was a sale at a gross undervalue for the purpose of enabling a profit to be realised by an entity controlled and put forward by its sole beneficial shareholder.' (*ibid.* p.632)

213. We have to consider whether the licensing transactions were 'genuinely conceived of and effected as an exchange for value' (*Progress Property* at [31]). The contrary has not been suggested. Did 'the "essence" of the agreement[s]' involve distributions of the Subsidiaries' capital? Was that the agreements' 'substance'? (*ibid.* at [42])

214. Directly dealing with Mr Jones's point, we have to consider whether the difference which we have found between the licence fees paid and the values of the licences granted in exchange was, as he submitted, 'manifestly beyond any possible justifiable reward' or 'otherwise unreasonably large' (*ibid.* [31]).

215. This directs attention to the reasonableness and justifiability of the overpayments, as well as to the purpose for which the licence agreements were entered into.

216. As we will go on to find below, when deciding issue *g*, we accept that the tax avoidance arrangements inherent in the transactions in issue (including importantly the licences) were (at least) one of the main objects of those transactions. We reject the appellants' case that the only purpose of the arrangements entered into by them was to diminish the commercial profits of each of the Subsidiaries to prevent

commercial predators, advertisers and trade unions from using the Subsidiaries' reported profits as a commercial weapon in negotiations. We do, however, accept that that those were also main objects of the transactions.

217. There is no suggestion, however, that the directors of the Subsidiaries wanted or intended to make a distribution by entering into the TMLAs, or sought to disguise such a distribution by an arm's length transaction. Each Subsidiary was solvent and trading profitably with substantial distributable reserves. The profit and loss account reserves in the various Subsidiaries as at 28 December 2002 were as follows – HENL - £2.824m; CNL - £4.139m; SNL - £2.408m – and as at 30 September 2004 – LSN - £3.663m – and as at 1 January 2005 – CNL - £5.173m.

218. The directors took the professional advice of E&Y on the valuations, which were intended to show market values for the licences. The directors considered E&Y to be skilled in making the relevant valuations. HMRC take the point that E&Y may not have had the actual licences before them when they performed the valuation and that the boards of the relevant companies may not have examined the actual licences or E&Y's valuation. But even if this were the case (and we find that all the boards of directors considered and approved the transactions respectively entered into by them), it would not demonstrate an intention to make a disguised distribution. Instead it would show a casual attitude within the private Yattendon group of companies in carrying into effect the proposals considered at the board meetings of Yattendon on 20 May 2003 and INML on 20 September 2003 and an unsurprising, though supine, willingness in the boards of the Subsidiaries to comply with the apparently (and actually) *bona fide* wishes of the boards of their holding companies (Yattendon and INML). The same comments in all probability apply to the decision to implement the 2005 Transactions.

219. Although the 2003 valuations were higher than the 50% to 70% of the enterprise value suggested by Mr Rocke at the board meeting of Yattendon on 20 May 2003, this was because, as we have explained, E&Y in their valuation had taken the view that in the hypothetical open market a buyer and a seller could regard all the value of the business contributed by the intangible assets as attributable to the masthead. And E&Y were considering (and the directors were implementing) transactions for which there were no ready actual market comparisons and there was no empirical evidence to support any valuation of a licence of a newspaper masthead alone because transfers of value in the newspaper sector are in practice achieved by sales of companies which operate newspaper businesses.

220. In these circumstances we do not regard the licence fees actually paid as unreasonably large or manifestly beyond what was possibly justifiable. In reaching this conclusion we have also borne in mind that the directors fixed the licence fees at the mid-point of the range of values suggested in E&Y's valuation. If the essence (or substance) of the licence agreements had been a return or distribution of capital, the directors might not have been as moderate as they were in fixing the actual consideration. We think it is likely that they would have chosen figures at the high end of the range of values. We conclude that the licence fees contracted to be paid ought not, on the authority of *Progress Property*, to be characterised as distributions.

Issue *c*: conclusion

221. We decide issue *c* as follows. The licence fees paid by each of the Subsidiaries to INML in consideration of the licences back of the UTMs were in excess of market value, but were not unlawful distributions of capital by the Subsidiaries concerned to INML.

Issue *d*

222. The dispute between the parties was (originally) whether, in respect of the 2003 Transactions, the accounts of HENL, SNL and CNL have or have not been drawn up in accordance with generally accepted accounting practice (GAAP). The licences have been accounted for as intangible assets, being the rights to use the relevant UTMs for 5 years, and have been amortised in the profit and loss account over those 5 years. This is the treatment called for by FRS10. HMRC contend that FRS5 applies with the consequence that the licence fees paid by HENL, SNL and CNL respectively should be accounted for as distributions made by those companies to INML.

223. In HMRC's written closing submissions (dated 17 January 2012) it is stated that '[a]fter considering the oral evidence of both experts [Mr Holgate and Mr Holt] on what was the substance of the transactions, HMRC propose withdrawing this issue. Whilst HMRC still maintain that the only proper accounting treatment was that set out by Mr Holt, HMRC do not seek to ask to [*sic*] Tribunal to rule on this issue.'

224. Having heard the accounting evidence (summarised at section D5 of this Decision) we had anyway reached the view that Mr Holgate's evidence was to be preferred to Mr Holt's and so we would have decided this issue in favour of the appellants. However in view of the passage from HMRC's closing submissions recited above, we will treat the issue as withdrawn and will not enlarge on why we preferred Mr Holgate's analysis to Mr Holt's.

Issue *e* – the submissions of the parties and discussion

225. The point of dispute in this issue between the appellants and HMRC is in substance whether the receipts obtained by INML from the respective Subsidiaries in respect of the licence fees are to be regarded as capital receipts (as the appellants contend) or as revenue receipts (as HMRC contends). We do not understand the legal consequences (in terms of the appropriate tax treatment) which would follow from a decision that the receipts were capital receipts, or alternatively revenue receipts, to be in dispute.

226. If the receipts are capital receipts, the appellants submit that section 171 TCGA applies (transfer of an asset within a group giving rise to no gain and no loss on the disposal) and we do not understand HMRC to contend otherwise. The parties are agreed that the assignments of the UTMs by the Subsidiaries to INML are transfers within section 171 TCGA.

227. Alternatively, if INML's receipts on granting the licences are revenue receipts, HMRC submits that they are charged to tax either under paragraph 14, Schedule 29, FA 2002 as a royalty (within the meaning of paragraph 139, Schedule 29, FA 2002)

or under Schedule D, Case VI and state in their Skeleton Argument that 'not much is likely to turn on this'. We do not understand the appellants to dissent from this.

228. Mr Ghosh submitted that the receipts obtained by INML in respect of the licence fees were premiums, not royalties, and therefore capital in nature. They were not (unlike royalties) payments for uses of the UTMs, the quantum of the licence fee not being connected to any particular annual usage of the UTMs, or anticipated annual usage of the UTMs. He submitted that the grant of the licences caused the value of the UTMs to be diminished in INML's hands, and the licences, being for terms of between 5 and 8 years (in the case of the licence granted by CNL as part of the 2005 Transactions: 4 years, 5 months and 20 days), were of sufficient durability to render them as fixed intangible assets, and the fees received for their grant as capital rather than income in character. In all cases, except the licences granted to LSN, they were exclusive licences, which points to the fees received on their grant being capital in nature. In the case of the non-exclusive licence granted to LSN, the fact that it was granted diminished the value of the UTMs concerned in INML hands, if only because the grant of the licence to LSN precluded INML from granting an exclusive licence to any other party. Mr Ghosh also prayed in aid the (now uncontested) accounting treatment whereby the audited accounts recorded the licences as held as capital fixed assets by INML on the one hand and by the respective Subsidiaries on the other.

229. Besides *Inland Revenue Commissioners v John Lewis Properties plc* [2002] EWCA Civ 1869, [2003] STC 117 (see below), Mr Ghosh referred us to *Desoutter Bros Limited v JE Hanger & Co Limited* [1936] 1 All ER 535, *CIR v British Salmson Aero Engineers Limited* 22 TC 29, and *Murray v Imperial Chemical Industries Ltd* [1967] 1 Ch 1038.

230. Mr Jones focussed on clause 3.8 and clause 8.3 of the licences, providing for removal by the licensor (INML) of any UTM from the licence on 30 days' written notice to the licensee (the Subsidiary concerned) and for termination by the licensor (INML) on 30 days' written notice on a change of control affecting INML or an assignment of the relevant UTMs by INML to a third party. He submitted that these clauses had the effect that there was no or virtually no diminution in the values to INML of the UTMs licensed by virtue of the grant of the licences. He submitted that the each of the licences was in substance 'a revolving 30-day licence'. Having regard to the obligation to refund the licence fee *pro rata* on a removal of a UTM pursuant to clause 3.8, he said:

> 'The amount of the original licence fee that, if I can put it in these terms, unequivocally belongs to the licensor, increases on a *per diem*, per day, basis throughout the period of the licence. … This is not a fixed, 5-year licence or lease. It is a transitory interest that can be revoked on 30 days' notice.'

231. Mr Jones also referred us to the provisions of the licences, in clause 3.3, by which the licensor, INML, retained a high level of control on how the licensees would use the licences. His point was that these provisions took the transactions whereby the licences were granted even further away from being the equivalent of a sale of the UTMs.

232. Mr Jones submitted that the use of a lump sum on the grant of a licence to use trademarks was atypical and referred us to evidence that E&Y had advised the appellants that typically such licence arrangements provided the grant of the use of the trade mark to a third party for payment of a royalty. He said that the purpose of the lump sum arrangement was to relieve the Subsidiaries 'of what might have been an otherwise "default" obligation of having to make recurrent payments to INML for the ongoing use of the UTMs on a daily, weekly, monthly or yearly basis'.

233. Both parties cited the decision of the Court of Appeal in *John Lewis Properties*. In that case John Lewis Properties plc ("JLP") held freehold or long leasehold interests in 5 properties let to its ultimate group holding company on yearly tenancies. JLP assigned to a bank the right to receive the rents on these properties for a period of 5 years and a day in return for a lump sum calculated as the discounted value of the rents concerned. JLP claimed that the disposal was on capital account for tax purposes, but the Inland Revenue assessed them as income for corporation tax purposes. On appeal against the assessments, JLP was successful before the Special Commissioner, the High Court (Lightman J) and the Court of Appeal. Leave to appeal to the House of Lords was refused by the House. In the Court of Appeal Arden LJ dissented from the majority decision (of Schiemann and Dyson LJJ).

234. Dyson LJ (*ibid.* at [80] to [88]) identified the indicia of a capital payment as follows: the longer rather than shorter duration of the asset disposed of in return for the payment; the higher rather than lower value of the asset disposed of; whether the payment causes a diminution in the value of the assignor's interest; whether such diminution is permanent; the amount of such diminution (a larger diminution in value being more suggestive of a disposal of an asset for a capital sum than a smaller diminution in value); whether the payment is of a single lump sum; and whether the disposal of the asset is accompanied by a transfer of risk in relation to it. Dyson LJ was careful to say that it may not be the case that the absence or converse of these features indicates a revenue rather than a capital payment.

235. Mr Ghosh submitted that all the indicia listed by Dyson LJ when applied to this case showed that the licence fees were capital and not revenue payments in INML's hands. In particular the licences were granted for long enough periods to render the licence fees capital, and the diminution in value of the UTMs in the hands of INML following the grants of the licences was of sufficient duration, although admittedly not permanent.

236. Mr Ghosh countered Mr Jones's point that each of the licences was in substance 'a revolving 30-day licence', by submitting that clause 3.8 was put in for flexibility and that it provided for UTMs to be added to the licences as well as for the removal of UTMs from the licences. It was akin to an option over the 5 year licences, rather than a provision subverting their character as 5 year licences at all. The evidence was that there was no intention or expectation that the rights under clause 5.8 would be, or were in fact, exercised. Reference was made, in the note on the lease premium provisions in ICTA 1988 (referred to at paragraph 39 above) to section 34 and section 38 ICTA 1988 (subsequently re-enacted in the Corporation Tax Act 2009). Mr Ghosh, Ms Stokes and Ms Wilson submitted that those sections demonstrate the

general legal position that a *prima facie* capital payment (a lease premium) remains capital without special statutory modification, such as that made by section 34, and that section 38 shows that without special provision no assumption is made (or ought to be made) that a lease or licence will fail to run its complete term by reason of circumstances, for example a break clause, enabling its early termination. They made the point that there were no provisions in Schedule 29 FA 2002 which modified or altered that basic position in relation to intangible fixed assets.

237. We accept Mr Ghosh's submission that clause 3.8 and clause 8.3 of the licences, on which Mr Jones placed such reliance, do not, as Mr Jones had submitted, require or enable us to regard the licences as revolving 30-day licences rather than 5 year licences. In our judgment these clauses were inserted to deal with contingencies which might have (but did not) arise – the evidence was not clear as to why they had been inserted, but we accept that the most likely explanation was to provide flexibility as Mr Ghosh and Ms Stokes submitted. They did not change the substance of the licences from a commercial or legal point of view from 5 year licences to 30-day licences, and were, we accept, akin to break clauses in a lease.

238. Our decision on this point deals with the gravamen of Mr Jones's submission on this issue. As we accept that the licences were in substance 5 year licences, it follows that we regard the licences as having given rise to a significant diminution in the values to INML of the UTMs licensed, and to have transferred risk in relation to the UTMs from INML to the respective Subsidiaries. We do not regard the retention by INML of the degree of control provided by clause 3.3 as a very significant counter-indicator in favour of treating the licence fees as revenue payments. If the Subsidiaries had abused the UTMs so that their value fell significantly, that loss would have been suffered by the Subsidiaries directly, as well as by INML indirectly.

239. Nor does the fact that the use of a lump sum may be atypical in trademark licensing arrangements appear to us to be of much significance. In *John Lewis*, a lump sum received for the assignment of the right to receive rents on yearly tenancies over a period of 5 years and a day was held to be a capital receipt. In the light of that decision it would, we think, be perverse for us to hold that the lump sums received in this case were on revenue account because the payment relieved the Subsidiaries of a (non-existent) requirement to pay royalties for the ongoing use of the UTMs. The answer to this point is simply that that was not the way the transaction was structured.

Issue *e*: conclusion

240. In the result, we hold that the licence fees received by INML on the several grants of the licences of UTMs to the Subsidiaries were capital receipts obtained by INML on part-disposals of capital assets (the UTMs concerned), which were intangible fixed assets created before commencement for the purposes of Schedule 29, FA 2002.

Issue *f*: the submissions of the parties and discussion

241. This issue focusses on the licences in the Subsidiaries' hands – whether Schedule 29 FA 2002 applies to them, so that the charges to the Subsidiaries' profit and loss accounts can constitute debits brought into account for tax purposes pursuant

to paragraph 9 of the Schedule. (References in this part of the Decision, which deals with issue *f*, to paragraph numbers are to the respective paragraphs of Schedule 29 FA 2002, unless a contrary indication is given.) The Schedule applies to the licences, as intangible fixed assets of the respective Subsidiaries, if the terms of paragraph 118 (application of the Schedule to assets created or acquired after its commencement – 1 April 2002) are fulfilled in relation to them.

242. Paragraph 118 relevantly provides as follows:

> '(1) Except as otherwise expressly provided, the provisions of this Schedule apply only to intangible fixed assets of a company ("the company") that-
>
> (a) are created by the company after commencement, or
>
> (b) are acquired by the company after commencement from a person who at the time of the acquisition is not a related party in relation to the company [which, by paragraph 95, Schedule 29, FA 2002 includes a company which has control of the company acquiring an intangible fixed asset], or
>
> (c) are acquired by the company after commencement from a person who at the time of the acquisition is a related party in relation to the company in the cases specified in sub-paragraph (2).
>
> As to when assets are regarded as created or acquired, see paragraphs 120 to 125.
>
> (2) The cases mentioned in sub-paragraph (1)(c) in which this Schedule applies to assets acquired by the company after commencement from a related party are-
>
> (a) …
>
> (b) …
>
> (c) where the asset was created, whether by the person from whom it is acquired or any other person, after commencement.'

243. Paragraph 120 supplements paragraph 118. It provides relevantly as follows:

> '(1) This paragraph has effect for the purposes of paragraph 118 (application of Schedule to assets created or acquired after commencement) and applies to all intangible assets except …
>
> (2) An intangible asset to which this paragraph applies is regarded as created or acquired after commencement to the extent that expenditure on its creation or acquisition is incurred after commencement.
>
> As to whether expenditure on the creation or acquisition of the asset was incurred after commencement, see paragraphs 123 to 125.
>
> (3) If only part of the expenditure on the creation or acquisition of the asset is incurred after commencement-
>
> (a) this Schedule has effect as if there were a separate asset representing the expenditure so incurred, and
>
> (b) the enactments that apply where this Schedule does not apply have effect as if there were a separate asset representing the expenditure not so incurred.

> Any apportionment necessary for this purpose shall be made on a just and reasonable basis.'

244. Paragraph 123 supplements paragraph 120. It provides relevantly as follows:

> '(1) For the purposes of paragraph 120 (assets regarded as created or acquired when expenditure incurred) the general rule is that expenditure on the acquisition of an asset is treated as incurred when it is recognised for accounting purposes.
>
> (2) This is subject to …'

245. Mr Ghosh, for the appellants, makes the following points in relation to the application of these provisions (and of Schedule 29 itself) to the facts in this case. First, he says (correctly) that the licences created in the 2003 Transactions and the licences created in the 2005 Transactions were bilateral contracts executed by both licensor and licensee, with premiums paid by the respective licensees. Secondly he says, by reference to paragraph 2(2), that the relevant legislation distinguishes between a trademark and a licence in respect of a trademark – this point was not disputed by Mr Jones. Thirdly, he submitted that paragraph 118 (1)(c) and (2)(c) are in point, in particular that the licences were acquired by the respective Subsidiaries after commencement from a related party (INML) and the licences were created after commencement for the purposes of paragraph 118.

246. To make this last point good he relies on paragraph 120(2) and submits that the licences are to be regarded as created after commencement because 'expenditure on [their] creation or acquisition [was] incurred after commencement'. Mr Ghosh submits that the licences were created by both parties to the bilateral contracts by which the respective licences were granted (by INML) and acquired (by the respective Subsidiaries) and the licence fees incurred by the respective Subsidiaries rank for the purposes of paragraph 120(2) as 'expenditure on [the respective licences'] creation or acquisition'.

247. Mr Jones disputes this interpretation and application of paragraph 120(2). He submits that in interpreting that sub-paragraph, one has to determine whether it is to be applied in relation to a creation or in relation to an acquisition of an intangible asset. In other words, he regards the word "or" where it occurs between "created" and "acquired" and between "creation" and "acquisition" as disjunctive.

248. Mr Jones submits that paragraph 120(2) is sought to be applied by the appellants in this case by reference to the creation of an intangible asset, not by reference to its acquisition. This is because the route by which paragraph 120(2) is reached passed through paragraph 118(2)(c), which required the intangible asset to have been 'created, whether by the person from whom it was acquired or any other person, after commencement'.

249. He goes on to submit that applying paragraph 120(2) by reference to the creation of a licence requires expenditure on its creation to have been incurred after commencement. Here, he submits, there has been no expenditure on the creation of the licences, only expenditure on their acquisition. The licences were, he submits, created only by INML and were only acquired by the respective Subsidiaries – in the

same way as a lease out of a freehold is created by the freeholder and acquired by the leaseholder. It follows, in Mr Jones's submission, that the licences are not to be regarded as created after commencement for the purposes of paragraph 118(2)(c) with the consequence that Schedule 29 FA 2002 does not apply to them by virtue of paragraph 118(1)(c) or at all.

250. Mr Jones further submits that his interpretation leads to a sensible result. If, he says, a trade mark created before the commencement of the Schedule had been assigned after commencement to a related party, instead of a licence in respect of the trade mark being granted after commencement to the related party, then the Schedule would not apply to the trade mark in the hands of the assignee.

251. This is undoubtedly correct. There could be no argument to the effect that the trade mark was created after commencement for the purposes of paragraph 118(2)(c), as Mr Ghosh accepts.

252. Mr Jones says that in these circumstances it would be unexpected ("remarkable, illogical and absurd" according to his Skeleton Argument) if the acquisition of a lesser interest engaged the provisions of the Schedule. He submits that one cannot impute to Parliament such an intention and a purposive interpretation of the provisions in issue would avoid that result. He cites *Coutts & Co v Inland Revenue Commissioners* [1953] AC 267, 281, *Inland Revenue Commissioners v Hinchy* [1960] AC 748, 768 (both dicta of Lord Reid), *Mangin v Inland Revenue Commissioners* [1971] AC 739, 746, per Lord Donovan, *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209. 238 per Lord Millett, *McMonagle v Westminster City Council* [1990] 2 AC 716, 726 and 727, per Lord Bridge, and *Director of Public Prosecutions v McKeown* [1997] 1 WLR 295, all dicta on the interpretation of statutes, in support.

253. Mr Jones criticises the appellants' argument as amounting to the proposition that expenditure by the licensees is sufficient to bring about the creation on the part of the licensor on or after 1 April 2002 for the purposes of paragraph 120(2). He argues that such an interpretative approach is inconsistent with the clear words of paragraph 120(2) as well as going against the general scheme of Part 14 of the Schedule (which deals with commencement and transitional provisions). He submitted that the decision of the Upper Tribunal in *Greenbank Holidays Limited v HMRC* [2011] STC 1582 provides some guidance by way of analogy at paras. [25] to [28] which is supportive of HMRC's submissions in this case. He submitted that the scheme and purpose of Part 14 of the Schedule is that the "creation" of an intangible asset is a unilateral act by a vendor prior to acquisition by a purchaser, as opposed to being simultaneous with it.

254. Mr Ghosh's response to Mr Jones's interpretation of paragraph 120(2) was that his (Mr Jones's) suggested reading of the sub-paragraph did too much violence to the language as well as refusing to recognise that the respective Subsidiaries as well as INML created the licences. The wording of the subparagraph is:

> 'An intangible asset to which this paragraph applies is regarded as created or acquired after commencement to the extent that expenditure on its creation or acquisition is incurred after commencement.'

Mr Ghosh submitted that Mr Jones would have us read it as if the words were:

> 'An intangible asset to which this paragraph applies is regarded as created … after commencement to the extent that expenditure on its creation … is incurred after commencement.'

Indeed Mr Jones in his Skeleton Argument did submit that paragraph 120(2) should, 'in relation to creation', be read in this way.

255. Mr Ghosh submitted that to read paragraph 120(2) as Mr Jones would wish involves 'a massive rereading'. He submitted that it was an incorrect analysis. He accepted that his own interpretation gave rise to an asset created after commencement (with tax advantages) in a case where a new asset (a licence) over an old asset (a trade mark) was created after commencement, and that an assignment of the old asset (the trade mark) would not have given rise to an asset created after commencement, and so would give rise to no tax advantages. He commented that a transitional rule (which is what paragraph 120(2) is) does make what might seem to be arbitrary distinctions – it is in the nature of a transitional rule to do so.

256. The two points which we have to decide in consideration of this issue *f* are (1) whether the licences were created by INML alone, or by both INML and the respective Subsidiaries; and (2) whether we should adopt Mr Ghosh's or Mr Jones's interpretation of paragraph 120(2).

257. As to the first point, although we accept that the licences were in fact created by bilateral agreements, we consider that for the purposes of the Schedule a distinction is drawn between the creation of an intangible asset and its acquisition, and in the context of the grant of a lesser interest in an asset out of a greater interest, it is more natural, and preferable, to regard the owner of the greater interest out of which the lesser interest is created as being the creator of the lesser interest. We would regard a lease out of a freehold of land as created by the freeholder and acquired by the leaseholder. The owner of the greater interest is uniquely able to create the lesser interest. He could do so unilaterally, by a transaction with a nominee, although we accept that in this case INML did not do that. But we discern no reason why a unilateral creation of a lesser interest should have different consequences under Schedule 29 from a creation of a lesser interest by means of a bilateral contract. On the facts of this case, we regard the licences of the UTMs as having been created by INML (as the owner of the UTMs immediately before the licences were created) and as having been acquired by the respective Subsidiaries on their creation.

258. We see no reason to infer (as Mr Jones suggested) that the creation of any of the licences should not be considered to have occurred at the same moment as the acquisition of the licence concerned. We would regard the creation by INML of a licence and the acquisition of it by the Subsidiary concerned as having taken place at the same time.

259. As to the second point, we accept Mr Jones's submissions on the interpretation of paragraph 120(2). We regard the word "or" where it appears (twice) in the sub-paragraph as being disjunctive. That is, one reads paragraph 120(2) to find out 'when assets are regarded as created or [alternatively] acquired' – see: the final words of paragraph 118(1). There are specific circumstances in which, for the purposes of Part 14 of the Schedule, it is necessary to find out when an intangible fixed asset is 'created' – see: paragraph 118(1)(a) and paragraph 118(2)(c), which is the provision relevant in this case – and specific circumstances in which it is necessary to find out when an intangible fixed asset is 'acquired' – see: paragraph 118(1)(b) and (c). We consider it would be wrong to interpret the provisions of paragraph 120(2) which relate to the creation of an asset as relevant to the ascertainment of when an asset was acquired and *vice versa*.

Issue *f*: conclusion

260. It follows that we consider that the only expenditure which could cause the licences to be (to any extent) regarded as 'created … after commencement' (see: paragraph 118(2)(c)) is expenditure (by any person) on the creation (by INML) of the licences. Expenditure after commencement by the respective Subsidiaries on the acquisition of the respective licences was not expenditure on their creation, and does not give rise to the application of the Schedule to them. The only relevant expenditure after commencement was expenditure on the acquisition of the licences. It follows that we hold that the provisions of Schedule 29 FA 2002 do not apply to the licences.

Issue *g*: submissions of the parties

261. This issue, which relates to whether or not paragraph 111, Schedule 29 FA 2002 applies in this case has been explained in brief at paragraphs 28 to 30 above. We must decide on the evidence whether or not the case discloses 'tax avoidance arrangements' which fall to be disregarded in determining whether a debit or credit is to be brought into account under Schedule 29, or the amount of any such debit or credit (see: paragraph 111(1)). (Again, paragraph numbers in this part of the Decision, relating to issue *g* should be taken as referring to the respective paragraphs in Schedule 29 FA 2002.)

262. For these purposes 'arrangements' includes any scheme, agreement or understanding, whether or not legally enforceable (see: paragraph 111(3)). We can and must consider the 2003 Transactions and the 2005 Transactions as separately constituting 'arrangements' for this purpose. The 2005 Transactions must be viewed in their context as a repetition of the scheme adopted in carrying out the 2003 Transactions.

263. 'Tax avoidance arrangements' for these purposes are arrangements which have as their main object or one of their main objects to enable a company to obtain a debit under the Schedule to which it would not otherwise be entitled (or a debit of a greater amount that that to which it would otherwise be entitled) or to avoid having to bring a credit into account under the Schedule (or to reduce the amount of any such credit) (see: paragraph 111(2)). Thus Mr Ghosh submitted that the Tribunal is not concerned to compare the actual transactions by 'hypothesing some perfect transaction', but

instead must ascertain whether the transactions were undertaken with the object of obtaining or increasing a tax benefit under the Schedule.

264. The appellants which are Subsidiaries seek to establish that they are entitled to debits under the Schedule in respect of the charges to the Subsidiaries' respective profit and loss accounts in relation to the amortisation of the capitalised expenditure incurred by the respective Subsidiaries in acquiring their respective licences of UTMs – in other words in respect of the write-downs of the licence fees paid by them to INML.

265. INML seeks to establish that it is not obliged to bring any credit into account under the Schedule in respect of the licence fees to which it became entitled on the respective Subsidiaries acquiring the respective licences of UTMs from it.

266. Mr Ghosh submits that, so far as the Subsidiaries are concerned, the 2003 Transactions and the 2005 Transactions had as their main object (and the parties agree that the test is a subjective one, from the point of view of those individuals responsible for carrying out the transactions, though there is disagreement as to whether the tax advisers (E&Y) can be regarded as responsible in this sense in any way) to diminish the commercial profits of each of the Subsidiaries in order to prevent commercial predators, advertisers and Trades Unions from using the Subsidiaries (higher) commercial profits as a weapon in negotiations. He submits that this is an example of taxpayers wishing to be taxed on their commercial profits (and not on a higher amount) and that does not disclose a 'main' purpose of obtaining a relievable debit under Schedule 29. He cites *CIR v Kleinwort, Benson Ltd* 45 TC 369 at 382 in support.

267. In relation to INML, Mr Ghosh submits that since the UTMs were "old" intellectual property to which Schedule 29 does not apply – that is, they were created before the commencement of the Schedule, 1 April 2002 – any dealing in them by INML cannot fall to be taxed under the Schedule and it follows that the arrangements cannot have had as their main object the avoidance of having to bring a credit into account under the Schedule. We have noted above (at paragraphs 251 and 252) that both parties accepted (and indeed Mr Jones for HMRC asserted) that the UTMs were created before the commencement of the Schedule. The gravamen of this point is whether the arrangements whereby the licence fees, which were accounted for by INML as capital receipts, were structured in this way rather than as recurrent royalties (to which the Schedule would have applied by virtue of paragraph 119 to the extent that they were recognised for accounting purposes after commencement) show that a main object of the arrangements was to avoid having to bring credits into account under the Schedule.

268. Mr Ghosh says that the answer should be that it was not a main purpose of the arrangements that there should be no credits brought into account under the Schedule, given that the commercial purpose of the transactions was to reduce the Subsidiaries' commercial profits and that the evidence was that the transactions would have been carried out to achieve that commercial purpose even if the tax advantage of the tax-free receipt in INML's hands had not been available.

269. Mr Jones accepts that the genesis of the scheme was the desire to hide disclosable profits. The issue was raised in relation to HENL by Trevor Wells in 2000, when, as a result of the reorganisation within the Yattendon group HENL was required to publish its annual results in statutory accounts. It became more pressing following the publication in 2002 in 'UK Press Directory – Newspapers – Volume 2' of the table ranking newspaper companies in the UK by operating profit as a percentage of sales, in which HENL was ranked first, and CNL 25th. This commercial issue led Mr Morton to consult Mr Pedley of E&Y on 28 February 2003 (see paragraph 52 above, where we described the email as "a significant development").

270. However, following the involvement of E&Y, HMRC's submission is that 'the pre-existing commercial rationale [was] hijacked and used as a fig leaf' for a tax avoidance scheme. Although Mr Morton's evidence was that the tax scheme '[didn't] take over', Mr Jones relies on his acceptance that 'the tax scheme becomes important, and I don't think anybody can deny that'. (It should be noted here that Mr Ghosh pointed out that the words "tax scheme" had been put into Mr Morton's mouth by Mr Jones.) In this connection, Mr Jones submits that we can and should consider the evidence of the subjective intentions of the taxpayers' advisers (E&Y) as well as those of the relevant officers in the appellant companies. He cites *Addy v IRC* [1975] STC 601, and *Lloyd v HMRC* [2008] STC (SCD) 681 in support.

271. In *Addy*, Goff J held that for the purposes of section 28(1) Finance Act 1960 (transactions in securities) which required examination of the object of transactions to determine whether or not they (or any of them) 'had as their main object, or one of their main objects, to enable tax advantages to be obtained', which is similar wording to the definition of 'tax avoidance arrangements' in issue (see paragraph 111(2)), 'what has to be applied is a subjective test of the intention of those in control' (*ibid.* p.610d). Further, on the facts of *Addy*, where a company was liquidated and another company incorporated to acquire the undertaking and assets of the first company, and a third company under common control stood to benefit from the release of funds from the first company, the relevant subjective intention was of the directors of the first and third companies and of their professional adviser, on whose advice the scheme was carried out.

272. In *Lloyd*, the Special Commissioner (Dr John Avery Jones) had to consider for the purposes of section 703(1) ICTA (the legislative descendant of section 28(1) Finance Act 1960) whether at least one of the main objects of the sale of shares in issue was to enable tax advantages to be obtained. The Special Commissioner found that the transaction was a 'joint effort' between the appellant, Mr Lloyd, and a Mr Childs of the firm of auditors of the companies involved in the transaction, 'with Mr Childs seeing the tax benefits of the transaction and the appellant seeing some commercial benefit …'(*ibid.* p.686g). Further, he found that 'while the appellant may not have been particularly concerned with tax, Mr Childs must have been …' (*ibid.* p.687a) and that although one of the appellant's main objects in carrying out the transaction was to achieve his commercial ends, the existence and timing of the particular transaction entered into was driven by the desire to achieve the tax treatment claimed for it on his behalf, and that the tax advantage inherent in that tax

treatment 'cannot be said to be an effect rather than an object of the transaction [and] was one of the main objects of the transaction' (*ibid.* p.687b/c).

273. Mr Ghosh responds by submitting that we should only look at the advisers' purposes where they and the taxpayers' purposes 'mesh'. By that he means that advisers' purposes can be taken into consideration where a taxpayer has, in effect, delegated the tax planning parts of the transactions which he proposes to the adviser for advice which is then implemented. But, he submits, tax advisers' purposes are irrelevant in a case where a taxpayer has not gone to the adviser for tax advice, but simply for advice on how to structure a commercial transaction which he intends to carry out. On the facts of this case, Mr Ghosh submits that E&Y were instructed by Mr Morton to find a way to reduce profits in the Subsidiaries, and they came up with the plan of the Subsidiaries paying a lump sum to INML, which would not be taxable in its hands and which could be amortised through the Subsidiaries' profit and loss accounts, commercially reducing the profits in the Subsidiaries and incidentally achieving a tax advantage.

274. Mr Ghosh submitted that the tax advantage achieved was the fact that because the licence fees were received in capital form by INML, and because they related to 'old' intellectual property, they suffered no tax in INML's hands. He urged us not to regard the obtaining of debits for tax purposes under Schedule 29 FA 2002 as a tax advantage for the Subsidiaries, because the debits were a means by which the Subsidiaries' taxable profits were reduced so that they were in line with their commercial profits, and the only main reason for the reduction in the Subsidiaries' commercial (and taxable) profits was commercial. He put it this way: "You can't do one without the other, you can't pay the money to achieve your commercial objective without also fructifying your tax object – it's not the same thing as doing something which is only explicable to get the tax saving".

275. Mr Ghosh supported his case by heavy reliance on the decision of the House of Lords in *IRC v Brebner* [1967] 2 AC 18 (which, we note, was relied on in the decisions in several of the cases referred to above). *Brebner* concerned a reduction in capital of a company, which was arranged to enable the shareholders to whom capital was returned to repay in part a loan which they had taken out from a bank some two years earlier, for use in the purchase of their shares in the company. *Brebner* is chiefly authority for the proposition that the questions of whether (for the purposes of section 28(1) Finance Act 1960) transactions were entered into for *bona fide* commercial reasons, and whether the obtaining of tax advantages is the main object or one of the main objects of the transactions, are questions of fact for the fact-finding tribunal.

276. However, in *Brebner*, the Special Commissioners found that, while a taxable dividend could have been declared by the company, that would have been a very astonishing thing indeed for a company of that size to do and would not have provided the required finance (after tax) for the repayment of the bank loan, and neither such a dividend, nor a loan to the shareholders by the company at interest was contemplated. The Special Commissioners went on to find that the obtaining of a tax advantage by the reduction of capital was an ancillary result of the main *bona fide*

commercial object of the share purchase and that the transactions in question did not have as their main object or as one of their main objects to enable tax advantages to be obtained.

277. Lord Upjohn dealt with the Inland Revenue's argument, based on these findings, that 'the whole object of the reduction of capital was to extract the cash without paying tax' (*ibid.* p.29F) by saying that the Special Commissioners had been entitled to regard the reduction of capital as but one limb of the transaction involving the purchase of the shares. He said, further, at *ibid.* p.30E/G, that:

> 'when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong as a *necessary* [original emphasis] consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence.'

278. Lord Pearce, in a passage also brought to our attention by Mr Ghosh, said (*ibid.* at p.27F):

> 'that which had to be ascertained was the object (not the effect) or each inter-related transaction in its actual context and not the isolated object of each part regardless of the others.'

and, in relation to the facts of *Brebner*:

> 'the method of carrying … out [the reduction in capital] was intended as one part of a whole which was dominated by other considerations'

and concluded (*ibid.* at p.28B):

> 'I am of opinion that the Special Commissioners came to a reasonable conclusion on the evidence before them. They could have reached a contrary conclusion, which would have been equally unassailable, had they taken a different view of the evidence. But it was they who heard the witnesses, and I see no reason to suppose that their decision was not just and sensible.'

279. Mr Ghosh also made the point that it was clear that the shareholders in *Brebner* would not have gone ahead with the reduction of capital if the tax advantage had not been available. In the light of the evidence that INML would have carried out the transactions in issue without the benefit of the non-taxable receipt of the capital sum representing the licence fees, Mr Ghosh submitted that the absence of a main purpose of tax avoidance was clearer than it was in *Brebner.*

280. Mr Ghosh also referred us in this part of his case to *McNiven v Westmoreland Investments Limited* [2003] 1 AC 311, in particular to paragraphs [60] and [61] in Lord Hoffmann's speech where the limits of proper recharacterisation under the *Ramsay* principle were being discussed. Lord Hoffmann said, *ibid.* at [60]:

> '… a transaction which, for the avoidance of tax, has been structured to produce, say, capital, and does produce capital in the ordinary sense of that concept (unlike the payment in *IRC v*

McGuckian [1997] 1 WLR 991) cannot be "recharacterised" as producing income: see *Comr of Inland Revenue v Wattie* [1997] 1 WLR 873.'

281. Mr Ghosh also referred us to *IRC v Sema Group Pension Scheme Trustees* [2002] EWHC 94 (Ch), in which the Court of Appeal upheld the decision of the Special Commissioners, who in that case had held that one of the main objects of the transaction in issue was to obtain a tax advantage on the basis that 'the sales were made when they were made only because Mr Mullins knew that he would receive the tax credits' which 'were crucial' to Mr Mullins's decision to sell, 'and so one of the main objects of the sales was to enable tax advantages to be obtained' (*ibid.* paragraphs [115] and [116]). Mr Ghosh explained that this was a case where the pricing of the transaction was tax-driven and was crucial to the carrying out of the transaction itself. He submitted that such was not the position in this case because the appellants had chosen figures midpoint in the ranges suggested by E&Y as the licence fees payable by the respective Subsidiaries to INML.

282. Mr Ghosh also contrasted this case with *Prudential plc v HMRC* [2008] STC (SCD) 239. In that appeal, where Mr Ghosh and Ms Wilson had represented the Commissioners, Prudential had implemented a scheme (referred to in the documentation as a 'tax planning opportunity' – *ibid.* [17]) devised by E&Y, and described by E&Y as 'a tax enhanced method for a UK company to hedge a foreign currency exposure' (*ibid.* [15]). This was a scheme which on the evidence had as its main purpose the obtaining of a tax advantage (*ibid.* [84]) and which, again on the evidence, the Special Commissioners found would not have been implemented without the prospect of obtaining the claimed tax advantage (*ibid.* [33]). In the instant appeals, Mr Ghosh submitted, the evidence was that a commercial purpose drove the transactions and was also that the transactions would have been implemented even without the benefit of a 'tax mismatch' – i.e. a non-taxable capital receipt in the hands of INML matched by taxable deductions in the respective Subsidiaries' hands.

283. Mr Jones referred us to Mr Morton's handwritten note of his telephone conversation with Mr Pedley on 14 March 2003 – see paragraph 53 above. He submitted that the scheme which was adopted did not and could not achieve the non-tax motivated purpose of reducing the commercial profits of the Subsidiaries to give protection against commercial predators, advertisers and Trades Unions. This was because the nature of the reduction in profits (the amortisation charges in the Subsidiaries' accounts) was (and was required to be) disclosed in their respective accounts as 'amortisation of publishing rights'. The relevance of this, Mr Jones argued, was that it went to demonstrate that the appellants had another main object in entering into the transactions beyond the reduction in the Subsidiaries' commercial profits, namely tax saving.

284. Referring again to Mr Morton's note of the conversation on 14 March 2003, Mr Jones made the point that if a 'simple annual fee … based on turnover or profits' had been charged (instead of the amortisation of the capital sum payable on the grant of the licences) it would, as an annual royalty or licence fee, have been hidden in other internal charges, reducing the Subsidiaries' commercial profits and, significantly,

making their accounts less transparent in relation to the charge which achieved the reduction.

285. As it was, Mr Jones submitted, the key figure representing 'EBITDA' (earnings before interest, tax, depreciation and amortisation), which would indicate the value of a Subsidiary to a potential commercial predator or competitor, would emerge from the accounts unchanged by the operation of the scheme – because the amortisation charge could be easily identified. Mr Jones did however accept that the amortisation charges changed the 'bottom line' of the Subsidiaries' net commercial profits and that would have concealed the true position from anyone who did not read the accounts for all that they contained, and would also have affected the Subsidiaries' ranking in any of the published tables of the profitability of newspaper companies.

286. Mr Jones relied particularly on specific internal documents (the minutes of the INML board meetings on 11 April 2003 and 16 May 2003, the memorandum from Mr Morton to Mr Richard and other personnel dated 21 May 2003, and the INML Group Board Report prepared by Mr Morton and dated 18 July 2003) to demonstrate that those with executive responsibility in the Yattendon group regarded the obtaining of a tax advantage as an important consideration for proceeding with the scheme. He submitted that Mr Richard and Mr Morton had failed to give any convincing answer to this, when it was put to them in cross-examination. Insofar as the evidence showed that there were aspects of the transactions for which Mr Richard or Mr Morton could give no explanation, for example why the Subsidiaries paid INML a lump sum for the licences rather than annual sums, then Mr Jones submitted that the Tribunal could and should have regard to E&Y's reasons for those aspects. In relation to the Subsidiaries' payments of lump sums rather than royalties, it was clear from the Instructions to Counsel, prepared by E&Y and dated 17 July 2003, that the proposal was designed by E&Y so that the grant of the licences by INML should be dealt with under the capital gains code with no gain/no loss treatment under section 171 TCGA and, because the intangible assets in INML's hands would be treated as 'existing assets' to which Schedule 29 FA 2002 would not apply (see: paragraph 118), there would be no credit to be brought into account for tax purposes by INML under the Schedule.

287. Mr Jones submitted that although there was evidence that, even without the tax benefit, INML and the Subsidiaries would have effected the transactions to achieve their non-tax commercial objects, HMRC's case was that they would not have effected the transactions on the terms in which they were effected. He said that 'at most, if they'd done the sale and the licence-back it would have been annual payments, because that would have gone some considerable way to disguising the true profits' in the Subsidiaries' accounts.

288. In answer to Mr Ghosh's point based on *Brebner*, Mr Jones said that this was not a case (like *Brebner*) where there was one commercial objective and different ways of achieving it. Here, the commercial objective was to reduce the commercial profits of the Subsidiaries to give protection against commercial predators, advertisers and Trades Unions. If the licences had been granted by INML in return for annual payments by the Subsidiaries, that would have achieved the non-tax commercial

objective but would not have secured the tax advantage. On the other hand, the course adopted, involving the payments of lump sums to INML by the Subsidiaries, Mr Jones submitted went hardly any way to achieving the commercial objective but was motivated mainly by the desire to achieve the tax advantage.

289. Mr Ghosh submitted in response to this point that if the Subsidiaries had paid royalties to INML, it would have been apparent to anybody reading their accounts that they had begun to pay royalties – and to that extent no more significant lack of transparency in the accounts would have been achieved than was actually achieved by the lump sum arrangements. In any case, whether or not the transactions actually entered into achieved the object of suppressing profits in a way that would assist the Subsidiaries in fending off competitors or negotiating with advertisers or trade unions, the evidence was that such was appellants' motivation in entering into the transactions. The result of the transaction, he submitted, its effectiveness in achieving the non-tax commercial objective, is irrelevant to the question of whether there was a subjective main tax avoidance purpose.

290. But in any event, Mr Ghosh submitted that the significance of the effect of the transactions was that they achieved a reduction of profits in the Subsidiaries, which affected the important 'bottom line' and kept the Subsidiaries out of a prominent position in the published profitability tables. The evidence had been clear on that and Mr Jones had accepted that that much had been achieved.

Issue *g*: discussion

291. We now come to consider the findings of fact in relation to this issue *g*, which we noted at paragraph 78 above, would be necessary. We must consider the objects (subjectively assessed) of the 2003 Transactions, and of the 2005 Transactions, to ascertain, in each case, whether their main object, or one of their main objects, was to obtain, put broadly, a tax advantage within paragraph 111(2), Schedule 29 FA 2002.

292. Clearly we can and must consider the evidence of the subjective intentions of Mr Richard and Mr Morton (who gave oral evidence) and of the other individuals responsible for carrying out the transactions (so far as can be discerned from the documents we have been taken to). We have concluded that we should also consider the evidence we have of the subjective intentions of E&Y to the extent that their advice affected the shape and structure of the transactions. This is a more difficult task than it might have been if we had heard any evidence from Mr Pedley or anyone else at E&Y who was involved. But we have documentary evidence from which we consider it is safe to find facts in relation to E&Y's relevant subjective intentions.

293. Our reasons for so concluding are that we have to find the subjective intention of those in control (*Addy, ibid.* p.610d). We find that the transactions in issue included aspects which neither Mr Morton nor Mr Richard could explain – in particular the arrangement for the payment of lump sums rather than annual royalties by the Subsidiaries to INML in respect of the licences (see above: paragraph 89). The subjective intention of the relevant companies entering into transactions having such aspects can, we consider, only be identified by examining why E&Y advised that the transactions should be structured in that way.

294. Also, the transactions when explained to Mr Morton by Mr Pedley as early as their telephone conversation on 14 March 2003 clearly envisaged that the relevant trademarks would be registered by INML before INML licensed them to the Subsidiaries. The instructions to Counsel prepared by E&Y on 17 July 2003 disclose the same intention. (Interestingly, it seems always to have been envisaged that the initial transfers of intellectual property at an undervalue from the respective Subsidiaries to INML would have been transfers of UTMs in gross, and so the point taken by HMRC under issue *a* above would have been available to them even if the original intention to register the trade marks had been carried through.)

295. The proposed structure of the transactions changed from a licence of registered trademarks to a licence of UTMs following Counsel's advice that registration might constitute the creation of a new asset for the purposes of Schedule 29 FA 2002 (which was later confirmed by Intellectual Property Counsel) (see above: paragraph 59). The significance of this was that a lump sum received by INML in respect of a new intangible fixed asset would have ranked as a credit under the Schedule, and could not have benefited from the no gain/no loss treatment under the capital gains code (section 171 TCGA).

296. Thus a particular and central aspect of the transactions originally proposed by Mr Morton for non-tax commercial reasons in his email to Mr Pedley of 28 February 2003 (to "charge each subsid for the benefit of being able to use the Iliffe News and Media name") and mentioned by Mr Morton in his memorandum dated 21 May 2003 and maintained, as we have said, to the point of E&Y's instructions to Counsel of 17 July 2003, was plainly changed thereafter for the sole purpose of obtaining the tax advantage inherent in the application of section 171 TCGA.

297. We reject Mr Ghosh's objection to our consideration of E&Y's purposes on the basis that Mr Morton had not gone to E&Y for tax advice but simply for advice on how to structure a commercial transaction which he intended to carry out. The evidence makes plain that Mr Morton presented E&Y, in his email of 28 February 2003 to Mr Pedley, with the commercial problem which the Subsidiaries were facing and with his idea that it might be solved by arranging for the subsidiaries to be charged to use the Iliffe name, but that E&Y then took this up and developed it into a proposal to transfer and licence back the trade marks with the significant tax advantage that what INML received from the Subsidiaries would not (if it were structured as a capital sum) attract tax, but that the write-downs in the Subsidiaries' accounts – which it was assumed would meet the group's commercial objective – would also be deductible for tax purposes.

298. While we consider Mr Jones's formulation that 'the pre-existing commercial rationale [was] hijacked and used as a fig leaf' for a tax avoidance scheme to be (pardonable) forensic hyperbole, we do regard E&Y's input as having the effect of turning the germ of an idea for a non-tax commercial transaction into a complicated scheme which would, at any rate arguably, achieve the INML group's original non-tax commercial objective, but would also provide a very significant tax advantage by way of the mismatch between the treatment of a capital sum in INML's hands and the tax write-offs for the amortisation charges in the accounts of the Subsidiaries.

299. We consider that E&Y's subjective intention in relation to the transactions was that E&Y had as their main object or one of their main objects to enable that tax advantage (which falls within the language of paragraph 111(2)) to be obtained. We also consider that the language of the internal documents relied on by Mr Jones (see above: paragraph 286) bears out his proposition that enabling that tax advantage to be obtained was at least one of the main objects of the responsible officers of INML (see particularly: paragraphs 54 and 57 above).

300. Although Mr Richard and Mr Morton in their evidence emphasised their 'key objective' to alter (lower) the 'bottom line' in the Subsidiaries' profit and loss account – and we do not doubt that this was, for them, a main object of the transactions – we do not (on the basis of the cross-examination referred to at paragraphs 84, 85, 87 and 89 above) accept their evidence that enabling the tax advantage to be obtained was not also, for them, a main object of the transactions.

301. We consider now the evidence that even without the tax benefit the appellants would have carried out the transactions in issue (see: paragraph 86 above). The evidence is that of Mr Morton who said in his evidence in chief: 'but even without the tax benefit we would have gone ahead with this and we would have gone ahead with it as quickly as we could'; and again: 'but we were still looking at the key commercial issue and we would have done this irrespective of whether there was a tax benefit; and in cross-examination: 'and we would have done this anyway irrespective of whether there was a tax benefit … we still had our primary purpose and this, hopefully, was going to come on top of it' [in any dispute with HMRC which might ensue].

302. In his evidence in chief, Mr Morton was being taken to the Group Board Report (see: paragraph 57 above), as to which he also said (in cross-examination) 'one of the reasons [for the proposed transactions] was the tax advantage and that's put very clearly there' (see: paragraph 84 above). And in his evidence in cross-examination, he was being taken to the minutes of the board meeting of Yattendon on 20 May 2003 where it was stated as follows:

> 'this form of licensing of "pre-commencement intangible fixed assets" was probably not intended when [Schedule 29 FA 2002] was put in place. Therefore the Inland Revenue might well challenge the tax deductibility of these licences, either by saying that the licences do comprise "new assets" (i.e. post-commencement assets) or by challenging the valuations. On the basis that the valuations were to be robust and conservative in this case, it is more likely that the Revenue will challenge on the technical issue. In terms of whether they are likely to take [Yattendon] as a test case (i.e. to the Special Commissioners or to the Courts), there can be no certainty but it was suggested that it is more likely that the Revenue would take a particularly offensive case, i.e. one with larger sums involved or where there was far less of a commercial driver behind the transaction in the first place.'

303. We draw the inference that what the appellants would have 'gone ahead with' or 'done' irrespective of whether there was a tax benefit or not, were transactions commercially driven by the desire to reduce the Subsidiaries' profits by an assignment and licence-back of the UTMs, rather than transactions with the particular features of the transactions actually entered into. We refer especially to the feature of a lump sum licence fee to be paid by each Subsidiary to INML for the grant of a 5-year licence, rather than annual royalties. Mr Morton's and Mr Richard's evidence was

that they had no idea why a lump sum was paid. Mr Morton's evidence was he could not remember why they had dropped the idea of royalties which he had put forward as a possibility – 'but very quickly royalties became something which wasn't discussed' (see: paragraph 89 above). With this evidence of Mr Morton's and Mr Richard's lack of grasp of detailed knowledge of the actual transactions and the reasons for their structure, we cannot accept that (had the tax advantage not been thought to be available) the appellants would have gone forward with transactions structured in the same way as the actual transactions were structured.

304. There is, in our view, some probative force in the point made by Mr Jones (see, e.g.: paragraph 285 above) that the transactions actually undertaken did not very effectively achieve the non-tax commercial objective of reducing the commercial profits of the Subsidiaries to give protection against commercial predators, advertisers and Trades Unions. But we also accept (as did Mr Jones) that they did lower the 'bottom line' in the Subsidiaries' profit and loss accounts (see: paragraph above) and that that was, for the appellants, substantially the achievement of their non-tax commercial objective.

305. The relevant point is that we are satisfied that the transactions as they were actually structured and implemented did have as one of their main objects the enabling of a tax advantage (within the language of paragraph 111(2) Schedule 29 FA 2002) to be obtained, even though we accept that they also had as one of their main objects the achievement of what we have described as the appellants' non-tax commercial objective. The non-tax commercial objective could have been achieved (we accept, more effectively) by INML charging annual royalties for the licences rather than lump sums for 5-year licences.

306. Nor do we accept that *Brebner* provides any guidance for us to the effect that we should regard a payment in capital form to achieve a non-tax commercial objective, which could have been achieved by payments in income form, as incidental to the achievement of the non-tax commercial objective.

307. First, that is not said in the speeches in *Brebner*. Lord Upjohn clearly said that the adoption of a means of carrying out a commercial transaction which saves tax should not *necessarily* lead to the conclusion that one of the main objects of the transaction was avoidance of tax. It can be, as Lord Pearce in *Brebner* recognised was the position in that case, an incidental aspect of a transaction which was dominated by other (non-tax avoidance) considerations.

308. But the contrary can also be true. Lord Pearce accepted that if the Special Commissioners in *Brebner* had taken a different view on the question of fact which they had to decide, then their conclusion 'would have been equally unassailable'. We conclude that an element with a tax-avoidance object incorporated into a transaction with a main non-tax commercial object can either demonstrate the presence of a main tax-avoidance object of the entire transaction or a subsidiary tax-avoidance object of the entire transaction.

309. Secondly, this is a more complicated case than *Brebner* and one where it is much more difficult (indeed, in our view, impossible) to say that the obtaining of the tax advantage hoped for was an ancillary (or subsidiary) result of the main non-tax commercial object. In *Brebner*, the Special Commissioners were of the view that the declaration of a taxable dividend (i.e. the alternative way of achieving the non-tax commercial objective which would not have resulted in tax avoidance) would have been a very astonishing thing indeed for a company of that size to do. In contrast, we cannot consider that a requirement for the Subsidiaries to pay annual licence fees as opposed to capital payments for 5 year licences would in any way have been strange or uncommercial – apart from the tax considerations.

Issue *g*: conclusion

310. For these reasons we find that one of the main objects of the 2003 Transactions – and of the 2005 Transactions, because they were effectively a re-run of the 2003 Transactions – was the enabling of INML to avoid having to bring a credit into account under Schedule 29 FA 2002 while at the same time seeking an entitlement for the Subsidiaries to claim debits for tax purposes under the Schedule, that is, an object within paragraph 111(2)(b) of the Schedule.

311. We accept Mr Ghosh's submission, based on *Kleinwort, Benson* in particular, that the 2003 Transactions and the 2005 Transactions had as their object to reduce the Subsidiaries' profits and that the object (which we find was inherent in those transactions) that the respective Subsidiaries should not be liable for tax on any amounts representing such reductions in profits (i.e. on the write-downs of the licence fees paid by them to INML) was not an object to obtain or increase the amount of a debit under Schedule 29 FA 2002 within paragraph 111(2)(a) of the Schedule.

312. The consequence of these findings is that the 2003 Transactions and the 2005 Transactions are separately 'tax avoidance arrangements' within paragraph 111 and therefore are to be disregarded in determining whether a debit or credit is to be brought into account for tax purposes under the Schedule, or the amount of any such debit or credit. In consequence no debits or credits ought to be brought into account for those purposes in respect of the 2003 Transactions or the 2005 Transactions.

313. Since no credit was sought to be brought into account for tax purposes under the Schedule in the case of INML, this will not affect INML's tax position. But it will affect the tax positions of the Subsidiaries, all of which have claimed to bring debits into account under the Schedule in respect of the amounts written off in relation to the amortisation of the respective licence fees. These debits will not be available, and, as Mr Ghosh accepts, this is the consequence of a finding that the transactions had a main purpose of avoiding having to bring a credit into account, even though that finding relates to INML rather than the Subsidiaries.

Issue *h*: the parties' submissions and discussion

314. This issue, which relates to whether or not paragraph 13, Schedule 9 FA 1996 applies in this case, has been explained in brief at paragraphs 31 to 34 above. We must decide on the evidence whether or not any amount of debits which would otherwise be brought into account for the purposes of Chapter II FA 1996 (loan

relationships) is attributable to an unallowable purpose of the related loan relationship. References in this part of this Decision (relating to issue *h*) to paragraph numbers are to the respective paragraphs of Schedule 9 FA 1996, unless otherwise indicated.

315. A loan relationship has an unallowable purpose where the purposes for which the company claiming the debits (here, each of the Subsidiaries and, in one case, INML) is a party to the loan relationship includes a purpose which is not amongst the business or other commercial purposes of the company (paragraph 13(2)).

316. A tax avoidance purpose is to be regarded as amongst the business or other commercial purposes of the company only where it is not the main purpose, or one of the main purposes for which the company is a party to the loan relationship (paragraph 13(4)).

317. A tax avoidance purpose is a purpose that consists in securing a tax advantage (whether for the company or any other person) (paragraph 13(5)), and for these purposes 'tax advantage' has the same meaning as in Chapter I of Part XVII of ICTA (paragraph 13(6)). That meaning is as follows (section 709(1) ICTA):

> 'a relief or increased relief from, or repayment or increased repayment of, tax, or the avoidance or reduction of a charge to tax or an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains.'

318. The loan relationships in issue are:

(a) LAs entered into on 26 September 2003 by which INML made loans to HENL, SNL and CNL respectively in the amounts necessary to fund the premiums (licence fees) payable by those respective Subsidiaries on the grants by INML to those respective Subsidiaries of the 5 year licences of the UTMs earlier sought to be assigned by them respectively to INML. The loans were for 5-year terms with interest payable at 3% above the base rate set by Lloyds TSB plc (see: paragraph 6 (above); and

(b) LAs entered into on 4 November 2005 by which (i) LSN made a loan to INML of £19,060,000, to fund INML's (purported) acquisition by way of assignment of LSN's various UTMs; and (ii) INML made a loan to LSN of £10,641,000, to fund the grant of a non-exclusive licence of those UTMs. These LAs had a defined drawdown date of 12 August 2005 and a repayment date of 26 September 2013. The loan at (i) above bore interest at the rate of INML's group borrowing margin with Lloyds TSB plc in addition to the base rate as set by Lloyds TSB plc. The loan at (ii) above bore interest at 3% above the base rate set by Lloyds TSB plc. (see: paragraph 7 above)

319. Put shortly, the question for us is whether the Subsidiaries entered into their respective LAs with INML, and INML entered into its LA with LSN whereby it (INML) borrowed £19,060,000 from LSN, for a tax avoidance purpose (as defined) which was the main purpose, or one of the main purposes for which those (debtor) companies were parties to their respective LAs, and, if so, what (if any) amount of the debits to be brought into account by those (debtor) companies for the purposes of Schedule 9 FA 1996 is attributable to that purpose.

320. We consider that the relevant tax avoidance purpose by reference to which we should make the necessary enquiry is the avoidance by INML of a charge to tax on its receipt of capital sums on the grants of the various relevant licences of UTMs, combined with the reduction in the charge to corporation tax sought to be achieved by the Subsidiaries concerned by way of debits under Schedule 29 FA 2002 in respect of the amortisation of the licence fees payable by them. The scheme or arrangements with which these appeals are concerned sought to avoid tax by a combination of the obtaining of debits by the Subsidiaries under Schedule 29 FA 2002 and the avoidance of a credit under that Schedule in respect of the receipt by INML of the licence fees for the grants of the various licences of UTMs.

321. HMRC's case on this issue is recorded at paragraph 34 above.

322. Mr Ghosh submits that paragraph 13 has no application on the facts of this case because the funding of the several premiums or licence fees (and, we assume, the funding of INML's purported acquisition of UTMs from LSN) was not dictated by tax. He makes the point that every interest coupon involved gave rise to a corresponding credit under Schedule 9 FA1996 in the hands of the respective creditor company. Thus, were paragraph 13 to be applied to disallow any amount of debit, the credit representing the disallowed debit would still remain taxable, so penalising the group as a whole.

323. Mr Ghosh also submits that the main purposes of the loan relationships in issue do not include a tax avoidance purpose, because the loan relationships were entered into to fund licences of UTMs (and, in the case of LSN's loan to INML, the acquisition of UTMs) which, in turn, were transactions entered into for the non-tax commercial purposes of diminishing the Subsidiaries' commercial profits as stated above (e.g. at paragraph 266).

324. He also submits that the legislative purpose of paragraph 13 is to strike down a debit only to the extent that it is greater than it would be but for the identified unallowable (tax avoidance) purpose. He contended that there could only be a reduction of a debit under paragraph 13 if HMRC could prove that the transactions in relation to which the loans were entered into were entirely motivated by a tax avoidance purpose – and it is clear (and HMRC accepts) that there was a non-tax commercial purpose for entering into those transactions.

325. We have found, in relation to issue *g* above, that one of the main objects of the 2003 Transactions and of the 2005 Transactions was the enabling of INML to avoid having to bring a credit into account under Schedule 29 FA 2002, that is, an object

within paragraph 111(2)(b) of that Schedule. This ranks as a purpose that consists in securing a tax advantage for INML within paragraph 13(5) – i.e. a tax avoidance purpose.

326. The LAs in issue were entered into in order to fund the 2003 Transactions and the 2005 Transactions and we consider that it must follow that the purposes for which the parties to those LAs entered into those LAs included a tax avoidance purpose and we find that the tax avoidance purpose was one of the main purposes for which those parties were parties to the respective LAs within paragraph 13(4).

327. However, we accept Mr Ghosh's submission that even on this basis no amount of the debits in respect of the LAs in issue falls to be disallowed under paragraph 13 because there is no evidence before us which would enable us on a just and reasonable basis to attribute any amount of the interest payable under the LAs in issue to the tax avoidance purpose. It is, we find, all attributable to the non-tax commercial purpose of acquiring the licences (and the UTMs) which the evidence shows was sought to be done at market value and in order to reduce the Subsidiaries' commercial profits.

Issue *h*: conclusion

328. We find therefore that one of the main purposes for which the parties to the LAs in issue were parties to those LAs was a tax avoidance purpose within paragraph 13, Schedule 9 FA 1996, but we hold that no amount of the debits under Chapter II, Part IV, FA 1996 is attributable to the tax avoidance purpose.

F: Summary of conclusions and disposition of the appeals

329. In summary, our conclusions on the issues we have to decide is as follows:

330. Issue *a*: the purported assignments of UTMs by the respective Subsidiaries to INML were void, and on that basis no UTM has been validly transferred to INML or licensed back by INML – see: paragraph 161 above.

331. If we are right in our conclusion on issue *a*, it follows that issues *b* to *g* do not arise for decision (but issue *h* does). However, we state out conclusions on issues *b* to *g* on the basis that we are wrong in our conclusion on issue *a*, as follows:

> Issue *b*: the assignments of UTMs by HENL, CNL and SNL respectively to INML as part of the 2003 Transactions were not unlawful distributions – see: paragraph 187 above.
>
> Issue *c*: the licence fees paid by each of the Subsidiaries to INML in consideration of the licences back of the UTMs were in excess of market value but were not unlawful distributions of capital by the Subsidiaries concerned to INML – see: paragraph 221 above.
>
> Issue *d*: HMRC withdrew this issue (concerning the correctness of the accounting treatment adopted by the Subsidiaries) and do not seek a ruling from us on it. We therefore state no formal conclusion – see: paragraphs 223 and 224 above.

Issue *e*: the licence fees received by INML were capital receipts obtained by INML on part-disposals of capital assets (the UTMs concerned), which were intangible fixed assets created before the commencement of Schedule 29 FA 2002 – see: paragraph 240 above.

Issue *f*: the provisions of Schedule 29 FA 2002 do not apply to the licences because there was no expenditure after the commencement of the Schedule on their creation – see: paragraph 260 above.

Issue *g*: the 2003 Transactions and the 2005 Transactions were separately tax avoidance arrangements within paragraph 111, Schedule 29 FA 2002 and therefore are to be disregarded in determining whether a debit or credit is to be brought into account for tax purposes under the Schedule, or the amount of any such debit or credit. In consequence no debits or credits ought to be brought into account for those purposes in respect of the 2003 Transactions or the 2005 Transactions – see: paragraphs 310 to 313 above.

332. Our conclusion on issue *h* is that one of the main purposes for which the parties to the LAs in issue were parties to those LAs was a tax avoidance purpose within paragraph 13, Schedule 9 FA 1996, but no amount of the debits under Chapter II, Part IV, FA 1996 is attributable to the tax avoidance purpose concerned – see: paragraph 328 above.

333. At the conclusion of the hearing, the parties asked us to make determinations in principle on the issues arising – which we have done. We invite the parties to consider the disposition of the appeals in the light of our decision. It seems to us that the Subsidiaries' appeals fall to be dismissed, except in respect of HMRC's attempt to deny them the benefits of debits for loan interest (issue *h*), in relation to which they fall to be allowed, and that INML's appeal, which was in relation to a possible charge to tax on the receipt of the licence fees (issue *e*) and the denial of a debit for loan interest paid (issue *h*) also falls to be allowed.

334. We determine the appeals accordingly and grant liberty to the parties to apply for further directions should that be necessary or convenient.

Information about appealing from this Decision

335. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 1 November 2012