NCN: [2021] UKFTT 383 (TC)

TC 08305

INCOME TAX – EIS – Qualifying business activities – was a trade being carried on – yes – by the appellant – yes – on a commercial basis with a view to profit – no – was it carrying on excluded activities – no – did it meet the risk to capital condition – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/08897

BETWEEN

CHF PIP! PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted in public remotely by video on 14-16 July 2021 with written submissions received from the parties in August and September 2021

Harriet Brown and Rebecca Sheldon counsel for the Appellant

Ruth Hughes counsel instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the Enterprise Investment Scheme ("**EIS**") and more particularly the respondents (or "**HMRC**") decision to refuse to grant authority to the appellant ("**Pip**") to issue compliance certificates to its shareholders under section 204(1) of the Income Tax Act 2007 ("**ITA 2007**") relating to various tranches of shares issued between 17 May 2018 and 14 November 2018 ("**the share issues**").

2. Broadly speaking, there are two technical conditions which Pip needed to satisfy on the dates of the share issues (the "**issue dates**"). Firstly it needed to carry on or to exist for the purposes of carrying on a qualifying trade (the "**qualifying trade issue").** Secondly it needed to satisfy the "risk to capital" condition (the "**risk issue**"). Pip says that it did carry on and existed for the purposes of carrying on a qualifying trade and that it satisfied the risk to capital condition. HMRC do not agree.

3. At the hearing Ms Brown Miss Sheldon and Miss Hughes made clear helpful and eloquent submissions, both orally and in writing. I am grateful for those submissions which have helped me considerably, and I have taken the submissions into account (along with all of the evidence) even though, in reaching my conclusions I have not necessarily referred to each and every argument and item of evidence in detail.

4. Following the hearing I sought submissions on the presumption of regularity and its application to certain issues in this appeal. Whilst I was awaiting those submissions, the Court of Appeal issued its decision in *Ingenious Games LLP v HMRC* [2021] EWCA Civ 1180 ("*Ingenious*"). Given its implications for the qualifying trade issue I then sought submissions on its relevance. I have received both parties' submissions on both issues for which I am most grateful and which I have taken into account in reaching my decision.

THE LEGISLATION

5. I have set out the relevant legislation in Appendix 1 to this decision. It is copious and complicated. But some of this legislation is more relevant than others, and I set out below that which is relevant to the issues in this appeal. It must be said that there is little disagreement between the parties on the relevant legislation although they have dealt with the risk issue before the qualifying trade issue, whereas I have considered the qualifying trade issue first and only then, if I decide that Pip did carry on a qualifying trade (or existed for the purposes of doing so) (the "**trading requirement**") shall I go on to consider the risk issue. References to sections in this decision are to sections in the ITA 2007.

6. Under section 174 the relevant shares must be issued to raise money for the purpose of a qualifying business activity which means, in the context of this appeal, that Pip needed to carry on a qualifying trade on the issue dates. Furthermore under section 181 Pip needed to have existed wholly for the purposes of carrying on one or more qualifying trades for, effectively, a three year period starting on the issue dates.

7. Qualifying trade is defined in section 189 as a trade which is conducted on a commercial basis and with a view to the realisation of profits, and which does not at any time in that three year period consist wholly or as to a substantial part in the carrying on of excluded activities.

8. One of these excluded activities is receiving royalties and licence fees. However there is

then a safe harbour for Pip if it was receiving royalties or licence fees if those royalties and licence fees are attributable to the exploitation of relevant intangible assets. To be a relevant intangible asset the whole or greater part in value must have been created by Pip, and where the intangible asset is intellectual property, its creation must have been in circumstances where the right to exploit the intellectual property vested in Pip.

9. I have set out the risk to capital condition in section 157A below.

157A Risk-to-capital condition

(1) The risk-to-capital condition is met if, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that—

(a) the issuing company has objectives to grow and develop its trade in the long-term, and

(b) there is a significant risk that there will be a loss of capital of an amount greater than the net investment return.

(2) For the purposes of subsection (1)(b)—

(a) the risk is to be determined by reference to a loss of capital, and the net investment return, for the investors generally,

(b) the reference to a loss of capital is to a loss of some or all of the amounts subscribed for the shares by the investors, and

(c) the reference to the net investment return is to the net investment return to the investors (whether by way of income or capital growth) taking into account the value of EIS relief.

(3) For the purposes of subsection (1) the circumstances to which regard may be had include—

(a) the extent to which the company's objectives include increasing the number of its employees or the turnover of its trade,

(b) the nature of the company's sources of income, including the extent to which there is a significant risk of the company not receiving some or all of the income,

(c) the extent to which the company has or is likely to have assets, or is or could become a party to arrangements for acquiring assets, that could be used to secure financing from any person,

(d) the extent to which the activities of the company are subcontracted to persons who are not connected with it,

(e) the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure,

(f) how any opportunity for investment in the company is marketed, and

(g) the extent to which arrangements are in place under which opportunities for investments in the company are or may be marketed with, or otherwise associated with, opportunities for investments in other companies or entities……..

CASE LAW

10. I have set out extracts from some of the cases to which I was referred in Appendix 2 to this decision. Those cases are defined in that Appendix and I have used those definitions in the body of this decision.

THE PARTIES POSITIONS IN A NUTSHELL

11. The basic contentions between the parties are these. Ms Brown submits that Pip carried on a trade which was the creation development production marketing and exploitation of intellectual property namely a children's television series. The commercial exploitation of this intellectual property started with the children's television series which was, effectively, an advertisement, out of which sprang a number of financial opportunities, namely the production of toys, games, Christmas specials, clothing, DVD's etc. which were promoted via a specialist website. This trade had been carried on a commercial basis with a view to profit even though, for commercial reasons, Pip had not exploited the intellectual property itself, given that it did not have the expertise to do so, but had outsourced that exploitation by entering into contracts with companies in the CHF group. It is, is a matter of principle, possible to carry on trade even if all such activities have been outsourced. Pip was entitled to carry out its activities without employing individuals directly and was trading in its intellectual property through the use of subcontractors. But in any event, it had sufficient capability to independently control and supervise the outsourced activities. It was not carrying out excluded activities as it was not receiving royalties or licence fees. But if that is wrong, then those royalties and licence fees fell within the safe harbour in section 195 since Pip had the right to exploit the intellectual property in Pip Ahoy!, as it had created the whole or greater part in value of that intellectual property. No other person was in a position to exploit that intellectual property as no other person had the right to that intellectual property. Pip's trading satisfied the risk to capital requirements

12. Miss Hughes submits that Pip had next to no independent capabilities of its own; it had no employees and all the activities which Pip carried on were undertaken by others (members of the CHF group); it subcontracted all its ostensible trading activity to third parties and it is not clear what, if anything, Pip actually did. It did not produce the television series nor did it monetise that series through merchandising and licensing. CHF group companies did that. Any actions undertaken by Pip were minimal and Pip was not in control of any business decisions taken as regards the trade since these were taken by CHF group companies. Contrary to the assertions made by Pip, it had no capability to independently control and supervise the outsourced activities. Pip was involved in investment rather than trading activity since all it did was to fund the development of its intellectual property. The income generated by this intellectual property was by receiving royalties and licence fees and thus an excluded activity which did not fall within the safe harbour of section 195 since Pip did not create the greater part of its value in the intellectual property as it had outsourced the animation production activities to CHF and it was CHF group companies and not Pip that had created the value. If, to the contrary, Pip was carrying on a trade, it did not satisfy the risk to capital requirements.

EVIDENCE AND FACTS

13. I was provided with a bundle containing a considerable number of documents. I was also provided with a witness statement of Charles William Ward ("**Mr Ward**") who also gave oral evidence, at some length. I start by setting out some of the background facts which I do not believe to be particularly contentious before moving on to the evidence of Mr Ward.

Background

14. *The entities*

(1) In 1976 Cosgrove Hall was formed.

(2) On 26 May 2011 CHF Entertainment Ltd was incorporated.

(3) On 26 July 2011 Pip was incorporated as CHF Pip! 01.

(4) On 10 August 2011 Pip's name was changed to CHF Pip! Plc.

(5) On 6 December 2012 CHF Enterprises Ltd was incorporated.

(6) On 23 July 2012 CHF Media Group Ltd was incorporated.

15. *The Information memoraranda*

(1) In or around 22 November 2011 Pip issued an information memorandum seeking offers for subscription of up to 2.3 million ordinary shares of 20p each at an offer price of £1 per ordinary share. Following that offer if it was fully subscribed, the founders would hold 74.2% of the A ordinary shares and the outside investors would hold 25.8% of the ordinary shares. The founders are Charles Ward, Simon Hall, Mark Hall, Brian Cosgrove, Francis Fitzpatrick, Adrian Wilkins and Martin Keenan. The document records that on 21 September 2011 Pip acquired the intellectual property rights to Pip!, an entertainment concept developed by Charles Ward, Simon Hall, Francis Fitzpatrick, Brian Cosgrove and Mark Hall and targeted at pre-school children. It states that Pip's objective is to adapt this concept for television and produce 52 high-quality 11 minute animations that can be sold internationally to broadcasters. [Pip] will also licence merchandising, publishing and other content rights to generate a continuing revenue stream. It goes on to state that Brian Cosgrove and Mark Hall had worked together within the animation industry for over 40 years and during that time had produced a number of highly regarded and award-winning children's animations including Danger Mouse. And also that before his death, Mark Hall was at the heart of developing the Pip! concept in its early stages. It records that Pip had signed heads of terms with Cosgrove Hall Fitzpatrick Entertainment Ltd which sets out the basis upon which Pip intends to commission Cosgrove Hall Fitzpatrick Entertainment Ltd to produce the animated television series. It was anticipated that Brian Cosgrove and Francis Fitzpatrick would be the executive producers of the show and they would provide their services to Pip through Cosgrove Hall Fitzpatrick Entertainment Ltd. It was the director's belief at that time that their industry experience and proven track record of animating and developing successful children's animation concepts [will] be invaluable to the development of the Pip! concept and will be of crucial importance in securing access to broadcasters and in optimising licensing and merchandising opportunities. The finance required to produce the initial 13 animated episodes of the series was the reason for the fundraising issue. The document also records that before the offer, Charles Ward owned 20.9% of the total issued share capital of Pip, Simon Hall 15.1% and the estate of Mark Hall 15.1%. After the offer, on the assumption that it was fully subscribed, those numbers would fall to

16.26%, 11.7% and 11.7%. The document also confirms that Pip had received confirmation from HMRC that its ordinary shares will qualify for EIS relief and that its trade is a qualifying trade.

(2) A second information memorandum was issued by Pip in or around 12 February 2013 seeking to raise an additional £3 million through the issue of 3 million ordinary shares of 20p each at a subscription price of £1 per ordinary share. The purpose of this fundraising was to provide the required finance to produce the initial 26 animated episodes of the animated television series. This document stated that Pip had received confirmation from HMRC that its ordinary shares will qualify for EIS relief and that its trade is a qualifying trade.

(3) A further information memorandum was issued on or around 1 March 2016. This is described as version 4 and was issued not by Pip but by CHF Media Fund. It indicates that Brian Cosgrove and Mark Hall, in 2011, came out of retirement to form CHF Entertainment the production arm of Cosgrove Hall and which now produces high quality imaginative and trusted family entertainment for children and their families across the globe. It goes on to state the CHF's new suite of shares and concepts are produced in the UK by a highly talented creative team and that CHF fully supports the government's creative tax sector tax credits and use of the EIS and the SEIS to fund and monetise new animation productions and concepts through broadcast, digital and organic media. An investor is told that he has the opportunity to become part of the Cosgrove Hall tradition of creating intelligent and educational family entertainment and also sharing the potential of commercial returns enjoyed by the likes of a number of children's favourites. Pip is not mentioned by name. The foreword in the memorandum is provided by Sir David Jason OBE and also indicates that the CHF Media Fund's investments in investee companies "should qualify for EIS relief". It is not at all clear how much the CHF Media Fund sought to raise through this information memorandum. But its investment strategy is declared to be that it aims to invest in a selection of shows or concepts both those in development and/or in production, and that it may invest in companies which individually owned the intellectual property rights to a new family entertainment concept or show either originated or developed by CHF. The capital raised will be used to develop produce and monetise the shows or concepts. The success of investee companies will "derive from all revenue inflows relating to their intellectual property rights such as broadcasting, licensing and merchandising sales".

(4) On or around 1 April 2018 a further information memorandum, identified as version 5, was issued by CHF Media Fund. Again, as for version 4, I cannot see how much it was intended to raise, but it contains much of the same information as was included in version 4. The foreword was again contributed by Sir David Jason, and the sentiments regarding investment in investee companies, and the hopes that the investment should qualify for EIS relief are repeated. It declares that to ensure that investee companies, shows or concepts have the best possible chance of success both critically and more importantly commercially, each will have access to the full range of CHF's extensive in-house expertise and support. It also declares that investee companies are highly dependent on the skills of CHF and identifies that if key personnel within CHF and its associated companies left and appropriately skilled replacements could not be found, the investee companies' financial performance and prospects might be adversely affected.

Officers

16. Details of Pip's directors are set out in the following table:

Director	Appointed	Resigned
The City Partnership (UK) Limited	26 July 2011	10 August 2011
Julian Grant	26 July 2011	10 August
Simon Hall	10 August 2011	12 May 2017
Charles Ward	10 August 2011 10 April 2015 19 June 2020	31 August 2014 27 April 2018 -
Julian Hickman	17 November 2011	18 July 2014
Jean Hawkins	13 October 2014	22 July 2020
Paul Harris	27 April 2018	8 November 2019
Adrian Wilkins	15 November 2019	5 February 2021
Colin Tall	26 August 2020	-
Francis Fitzpatrick	19 June 2020	-

Payments and financial statements

17. Pip's bank statements with HSBC show that between 25 October 2011 and 10 September 2016, the following payments' inter alia, were made: £7,500 to Francis Fitzpatrick on 25 October 2011; £3,197.44 to Simon Hall on 26 January 2012 (expenses); £5,000 to Francis Fitzpatrick on 3 February 2012; £1,719.05 to Martin Keenan on 27 March 2012; £3,000 to Mr CJ Reynolds on 27 March 2012; £7,200 to Take 4 Limited on 27 March 2012; £6,000 to Francis Fitzpatrick on 28 March 2012; £2,000 to Corinne Averiss on 30 March 2012; £3,300 to Mr CJ Reynolds on 6 September 2012; £2,500 to Corinne Averiss on 6 September 2012; £2,000 to Francis Fitzpatrick on 6 September 2012; £7,000 to Francis Fitzpatrick on 4 October 2012.

18. Pip's annual report and financial statements for the year ended 31 July 2013 record a turnover of zero and also record that during that year it made payments to CHF Entertainment Ltd ("**CHF Entertainment**") of £456,000. They also record that in that year it made payments to Charles Ward of £17,792 for ongoing business consultancy and expertise. They record operating losses in 2012 of £191,699 and losses in 2013 of £135,978.

19. Pip's annual report and financial statements for the year ended 31 July 2014 record a turnover of zero and that during that year it made payments to CHF Entertainment, a connected company, for production development costs, of £2,119,870. Furthermore, during the year Pip purchased services from CHF Enterprises, a connected company, and paid £70,428 for those services. It also paid Charles Ward £15,000 for ongoing business consultancy and expertise They also record that Mr A Wilkins, a director of CHF Media Group Ltd ("**CHF Media Group**") had provided a personal guarantee in respect of the bank borrowing. They record operating losses of £548,874.

20. Pip's annual report and financial statements for the year ended 31 July 2015 record a turnover of £233,544 and that during that year it made payments to CHF Entertainment, a connected company, for production development costs totalling £1,574,170, and purchased

services for £268,185 from CHF Enterprises. It also made payments to Charles Ward of £1,860 for ongoing business consultancy and expertise. They record operating losses of £308,175.

21. Pip's annual report and financial statements for the year ended 31 July 2016 record that during that year it had a turnover of £70,281 and made payments to CHF Entertainment a subsidiary of CHF Media Group for production costs of £1,272,129 and bought services from CHF Enterprises Ltd ("**CHF Enterprises**") for £62,430. They record operating losses of £162,163.

22. Pip's annual report and financial statements for the year ended 31 July 2017 record turnover of £30,739 and that during that year it made payments to CHF Entertainment a subsidiary of CHF Media Group of £949,046 and purchased services from CHF Enterprises for £72,052. They record operating losses of £72,574.

23. Pip's annual report and financial statements for the year ended 31 July 2018 record turnover of £9,594 and that during that year it made payments to CHF Entertainment a subsidiary of CHF Media Group for production costs of £416,670 and purchased services for £68,007 from CHF Enterprises. They record operating losses of £105,573.

Contracts

24. On 2 November 2011 Pip entered into a contract with Cosgrove Hall Fitzpatrick Entertainment Ltd ("CHFE"). This agreement (the "**production agreement**") records that Pip owns the copyright and all rights in Pip! (previously titled "the Salties") including website and Bible created by Pip (the "Series") and that CHFE is a children's TV production company which wishes to assist Pip in bringing the Series to the global TV licensing market. Under this agreement, Pip agrees to work with CHF to seek firm commitments from broadcasters, networks and third-party financiers to raise funding to produce the Series for which the projected budget was £6.5 million. It is agreed that Pip owns all intellectual property relating to the Series. Pip appoints CHFE as the exclusive production company for the Series. The parties having committed to work with each other to raise funding declare that the specialist fundraising team of investment brokers comprising Adrian Wilkins and Martin Keenan have been retained to seek EIS investment. And that CHFE will provide quality experienced animation experts to work on the Series and have agreed terms with Corinne Averiss to be the main writer and director and with Ben Turner to be art director and designer. The agreement is expressed to continue for the life of the Series or unless otherwise agreed by the parties. It is signed by Mr Ward on behalf Pip and Simon Hall on behalf of CHFE.

25. A merchandise and licensing addendum entered into as of 1 September 2018 between CHF Entertainment and John Adams Leisure Ltd records that a licensing agreement was entered into between CHF Entertainment and John Adams Leisure Ltd on 10 July 2014. This addendum was executed on behalf of Pip by Jean Hawkins and, most significantly, revises the contracting parties to the 2014 agreement replacing CHF Entertainment with Pip. The term of the original agreement is replaced with a 15-month term starting on 1 September 2018 and ending on 31 December 2019.

26. Another merchandise and licensing addendum was entered into as of 1 September 2018 between CHF Entertainment and BCI International Limited. This records that a licensing agreement had been entered into between those parties on 15 June 2015. This addendum too was executed by Jean Hawkins on behalf of Pip, and it too revises the contracting parties to the original contract so that Pip is now deemed to be the contracting party in place of CHF

Entertainment. Other revisions are made to the original contract dealing with the term, the minimum guarantee and the schedule in the original agreement dealing with agents.

27. I shall refer to the foregoing addenda as the "**amending addenda**".

28. At the annual general meeting of Pip held on 16 March 2016, Mr Ward had asked about Pip licences being held in the name of CHF Entertainment and what steps were being taken to ensure that they would be transferred into the name of Pip. The minutes record that "Jenny Johnston assured everyone that this was being done". I shall refer to these minutes as the "**March 2016 minutes**".

29. On 1 May 2016 Pip entered into a production services agreement with CHF Entertainment. The commencement date of this agreement was 1 June 2016 and was expressed to continue until the completion or termination of the last of the production services and the add-on services. This agreement dealt with the production of the third series of Pip Ahoy! i.e. episodes 53 to 78. It set out in some detail the services which will be provided by CHF Entertainment and appoints CHF Entertainment as producer of the episodes for which it will be paid an amount in accordance with the pre-ordained budget. These episodes are called the "Production" and all rights in and to the Production except for the intellectual property rights in certain studio and technical assets belong to Pip. Pip also licences certain rights associated with the Pip Ahoy! brand to CHF Entertainment. CHF Entertainment also assigned to Pip "All Present and Future Copyright (including, without limitation, the All Media Rights), and all other Intellectual Property Rights in and to the Production and the Deliverables…….. for the purposes of enabling [Pip] to have and exploit all worldwide rights of production, reproduction, distribution, merchandising and exhibition in all media and manner of communication now or hereafter known, in all languages, throughout the universe, in perpetuity." All Media Rights are defined as "the right to produce, manufacture, supply, sell, rent, distribute, license, market and exploit the Production and Deliverables……. in all forms of media…." This agreement was signed by Jean Hawkins on behalf of Pip.

30. On 1 June 2016 Pip entered into a merchandising and licensing representation agreement with CHF Entertainment. This recognised that Pip was the sole and exclusive owner of the concept/property of Pip Ahoy! Pip wished to appoint CHF Entertainment to represent it in respect of the commercial exploitation and licensing of merchandising and publishing rights in respect of that property. Pip therefore appointed CHF Entertainment to be its agent for a period of 7 years. It granted CHF Entertainment the exclusive right to represent Pip with respect to the commercialisation and licensing of merchandising and publishing rights in connection with the concept/property in return for which CHF should use its best endeavours to solicit and negotiate potential licensing opportunities and arrangements with third parties including manufacturers, retailers, wholesalers, publishers, producers and distributors. In return, Pip would pay a commission equal to a percentage of the gross revenues generated by any licence agreements which the agent managed to procure for Pip during that period. CHF Entertainment acknowledged that the ownership of all intellectual property including trademarks, patterns, copyrights, artwork, designs belongs to Pip.

31. In a letter of intent dated 19 July 2012 from Channel 5 Broadcasting Ltd to Adrian Wilkins of CHF Entertainment, and which is signed by both parties (by Mr Wilkins for and on behalf of CHF Entertainment), Channel 5 confirms its intention to acquire 52, 11-minute programmes of the animation series "Pip!" from CHF Entertainment, for proposed broadcast

on the pre-school branded service Milkshake. Channel 5 indicated its understanding that it could expect delivery of these programmes in early 2014.

32. By way of a letter agreement dated 26 September 2013, Sir David Jason's agent entered into an engagement with Cosgrove Hall Fitzpatrick Entertainment Ltd. Under this agreement, Sir David Jason would provide voice-over services in connection with the television series of Pip which Cosgrove Hall proposed to make. All intellectual and other property rights in and relating to those services was assigned to Cosgrove Hall.

33. I was provided with a schedule of contractors as at March 2018 onwards, which was not seriously challenged by Miss Hughes, and which I was told reflects contracts to which Pip was party. As well as including contracts for legal audit and tax services, it also includes services for fundraising, marketing, music overlay, web app and games, postproduction services, TV distribution services and licensing and merchandising services. Many of these contracts had been signed by Jean Hawkins as a director of Pip.

34. An engagement letter dated 28 June 2011 with RW Blears solicitors was sent to Mr Adrian Wilkins acting for Pip. An agreement for the production and commission of original music dated 17 October 2013 was entered into between Phil Bush and Pip (which was referred to as the "Production Company" in that agreement). On 1 February 2014, Pip entered into a further agreement for the production and commissioning of original music with Pluto Entertainment Ltd. A letter dated 3 December 2014 signed by Simon Hall for Pip records a loan to Pip of £150,000 from Mr Jessop. Pip entered into a media partner agreement with Little Dot Studios Ltd with an effective date of 7 June 2017. This document was signed by Jenny Johnston on behalf of Pip who gave her job title as commercial director.

35. Pip also entered into contracts with; Landmark in June 2018, Pluto music in July 2018, Creeley Ltd in 2018, Adroit Print & Design who invoiced Pip on 24 July 2018, JetPack Distribution in October 2018, Little Dot Studios in October 2018 and Kite Tech in November 2018. Many of these contracts were signed by Jean Hawkins on behalf of Pip.

AGM's

36. An annual general meeting ("**AGM**") of Pip was held in Manchester on 11 March 2014 at which Charles Ward and Nicola Johnson were expressed to be present and a number of people were expressed to be in attendance, including Simon Hall, described as a director and Francis Fitzpatrick, who chaired the meeting, as a representative of CHF Media Group Limited along with two others from that organisation and Adrian Wilkins from CHF Entertainment.

37. An AGM of Pip was held in Manchester on 25 March 2015. Francis Fitzpatrick, who chaired the meeting, was expressed to be present and described as "Corporate representative of CHF Media Group Limited". Also present were inter alia Jean Hawkins and Charles Ward and Simon Hall was expressed to be in attendance.

38. An AGM of Pip was held in Manchester on 16 March 2016 and was attended by Simon Hall and Charles Ward, both described as directors of Pip, as well, inter alia, as Jenny Johnston, Adrian Wilkins and Nicola Johnson all of whom hold positions with the CHF group. Apologies were given by Jean Hawkins, director of Pip. The minutes of this AGM are the March 2016 minutes.

39. An AGM of Pip was held on 8 June 2017 at Prestbury. Prior to that meeting Mr Ward and Jean Hawkins sent a note to shareholders dated 31 May 2017 telling the shareholders that

Simon Hall had recently stepped down from the management of CHF Media Group Limited and as a director of Pip. Adrian Wilkins as corporate representative of CHF Media Group Limited chaired a meeting at which Jean Hawkins and Charles Ward were present as, too, were a number of shareholders including Grant Ashley, Charles Dorman, Joe Grice and Paul Harris. Nicola Johnston was also present in her capacity as Shareholder and Head of Finance, CHF Enterprises. and gave a presentation regarding the commercial state of the company. It had been a challenging year for Pip Ahoy! But the future held promise. Toy sales had been weak because of lack of UK viewers of the television programmes. There was a push for new content and new ways of delivering that content. Many children now watch content on tablets rather than on television. The feasibility of the American market via Netflix and Amazon was discussed and recognition that this would require further episodes. It was also agreed that information regarding fundraising, production spend and commercial projections will be circulated to investors on a more regular basis. The desired timing and method of exit was discussed with a review suggesting that the earliest potential date for exit should be circa 2020 when the optimum returns would be generated for investors from all commercial routes.

40. An AGM of Pip was held at Leamington Spa on 25 January 2018 which was chaired by Adrian Wilkins as Corporate Representative of CHF Media Group Limited and at which Jean Hawkins and Charles Ward were present as too were a number of ordinary shareholders. The chairman's statement records that 2017 was a mixed year for Pip Ahoy! The market was challenging and distribution remained pivotal to the success of the series as it was the key factor to drive audience awareness and create demand for the related product. There was a shift from linear to digital viewing in younger audiences which provided opportunities but also a dilution in Pip's audience reach. The trends were fluid and evolving and the process of increasing distribution which had been set out as an ambition at the 2017 AGM had been slow. However Pip had concluded a distribution agreement into Russian territories; launched on many platforms in China; launched on a UK YouTube channel; participated in the U.K.'s largest indoor Christmas theme park. The production for the new series which was being produced in China had been delayed because of technical and translation issues. Pip's plans for 2018 were very much focused on broadcast distribution and looking to extend into subscription video on demand. Pip had not been able to match the sale forecasts projected over the past 3 years and as such the directors wished to introduce a number of changes to give the show every opportunity of becoming a commercial success. Everyone at CHF remained very positive about the success of the show.

41. The 2019 AGM was held on 23 January 2019 at an address in Piccadilly. It was chaired by Paul Harris and present were a number of ordinary shareholders including those who were members of the steering committee which had been created in the second half of 2018. A representative of JetPack Distribution Ltd attended. The meeting adopted the directors report and financial statements for the financial year ended 31 July 2018 as well as passing other resolutions as ordinary and special resolutions. The latter relating to allotment of shares in disapplication of pre-emption rights.

The Director's reports

42. Pip's financial statements all included a director's report.

43. The 2012 report is by way of a chairman's statement made by Simon Hall. It records that Pip had achieved a number of milestones including obtaining a letter of intent to broadcast Pip! from Channel 5; signed a production contract with CHF; secured a tax credit of 20% of production costs of the UK production if that is introduced in the 2013 Budget; Brian Cosgrove

had received a BAFTA lifetime achievement award; Carter Bench, the toy design company working with Pip, had received a licensing award; Pips' marketing team had attended global entertainment and television markets in New York, Cannes and London.

44. The 2013 report records that Pip continued the development and exploitation of its animated television series "Pip!". Pip had also purchased a number of its own shares.

45. The 2014 report records that the principal activity of Pip continues to be the development and exploitation of its animated television services "Pip Ahoy!". 13 episodes had been delivered to Channel 5, and the first show had been broadcast on 12 June 2014. The series had generated significant ratings which had led to the discussion and signing of a number of distribution and licence and merchandising opportunities including the post balance sheet signing of a major toy licence. Series production was ongoing but significant revenues were not expected to be generated until 2015/2016. The business would continue to grow in the period to July 2015 as the series is completed and commercialised, but significant revenues were not expected until the following year. The main risk to Pip is the level to which the series generates income.

46. The 2015 report repeats the previous years' principal activity, and further records that 39 further episodes of the television series had been delivered to Channel 5 and that a Christmas special was being completed for delivery after the year end. Pip Ahoy! was on air in the UK on Channel 5 and had generated significant ratings which had led to the signing of a number of distribution licensing and merchandising opportunities and to a contract for 26 more episodes from Channel 5. It was anticipated that the business would continue to grow in the period to July 2016 as the series are completed and commercialised but significant revenues were not expected until the following year. The outlook for Pip continued to look positive as series 3 starts production and the product is monetised.

47. The 2016 report records that production of the third series of "Pip Ahoy!" was underway and delivery was expected in quarter four 2017. This would expand distribution opportunities into territories such as the US. Pip had decided to partner with a government owned production studio in China for part of the new series animation as a result of which the first 2 seasons of Pip Ahoy! looked set to air across multiple digital channels in China as early as the end of February/beginning of March 2017. Toy sales in the UK had been slow which had impacted on new licence deals. Reasons for this included market competition and brand visibility. Exploitation rights were now to be directly managed in-house. Distribution in the UK was to be expanded onto digital platforms. John Adams the master toy licensee remained confident and had reported retailer feedback was encouraging for future distribution and sales. The directors anticipated that as a result of the foregoing, 2017 would be a growth year for Pip Ahoy! with new broadcast and licensing and merchandising deals concluded.

48. The 2017 report, on which the 2018 AGM Chairman's report was based, records the matters set out in that statement at [40]

49. The 2018 report records that a lot of effort had been put into monetising Pip Ahoy! since the last AGM, with a view to initialising an exit plan. Pips board had been strengthened with the creation of a steering committee and a new non-executive director (Paul Harris). During the year Pip Ahoy! was on terrestrial television as well as on other platforms such as YouTube; it been translated into Russian and had also been distributed in China. JetPack had been engaged to distribute the programmes in some major areas of the world which would hopefully produce a solid platform to increase viewing figures with preschool children creating a need

for merchandising. Various events had taken place throughout the UK supported by a web app which had been successful and 18 more venues were planned for the following year including Butlins, Pontins and Park Holidays. Facebook and Twitter feeds would promote those events. John Adams had relaunched Pip Ahoy! toys both new and old favourites at a competitive price supported by a dedicated webpage. A very wide range of top up products was now available on the market ranging from T-shirts and pyjamas to colouring books and buckets and spades. This was the first step in the merchandising plan and once traction had increased, products would be reviewed to include outside toys, homeware, collectables and stationary. The directors recorded that a lot of effort had been put in by the steering committee and the management team to build a platform which they hoped would project Pip Ahoy! into a good revenue stream. But Brexit and world stock-market instabilities were causing consumer uncertainty. The directors indicated that they were trying to steer Pip Ahoy! through these stormy waters and reap the benefits in the following years.

Intellectual property agreement

50. On 21 September 2011 Pip entered into an agreement with Francis Fitzpatrick and Charles Ward for the assignment, to it, of certain intellectual property rights (the **"IP agreement**"). Under this agreement, Messers Fitzpatrick and Ward assigned to Pip all intellectual property rights including copyright, design, drawings, script and Bible, and moral rights, in and to a television show devised by them entitled "Pip!". The consideration for this assignment was £1.

The relevant share issues and EIS claims

51. Between 17 May 2018 and 14 November 2018 Pip issued 12 tranches of shares in respect of each which it submitted form EIS 1, i.e. an EIS compliance statement to HMRC. Each form sought authority to issue certificates under section 204(1) ITA 2007. HMRC gave notice of their decision in respect of these in a letter to Pip dated 5 April 2019. That decision was that the compliance statements were not correct in a number of respects and that authority to issue compliance certificates in respect of those compliance statements was refused as Pip failed to meet the requirements of the EIS. In particular, Pip had failed to meet the risk to capital condition; it was carrying out excluded activities and had engaged in prohibited investment activity. Pip requested a review of that decision, and in the review conclusion letter dated 18 October 2018, HMRC indicated that having completed that review, the reviewing officer confirmed the original decision not to give authority to issue the compliance certificates. On 14 November 2019, Pip appealed against that conclusion.

52. This was not the first time that Pip had approached HMRC in relation to the EIS. In a letter dated 23 August 2011, Pip's accountants had sought advanced assurance from HMRC that, amongst other things, Pip would be a qualifying company, carrying on a qualifying trade and qualifying business activity and that the shares to be issued pursuant to the first information memorandum of November 2011 would be qualifying EIS shares. HMRC responded by letter dated 7 September 2011 confirming that Pip was a qualifying company carrying on a qualifying trade and qualifying business activity and that its ordinary shares were eligible shares for the purpose of EIS relief.

Promotional material

53. A great deal of promotional material was disseminated to the media which related to the Pip Ahoy television programmes and its associated commercialisation. Almost without exception, this material associated CHF entities and in particular CHF Media and CHF

Entertainment very closely with the Pip Ahoy brand. It describes Pip as CHF Pip, and to a reader without any knowledge of the legal independence of Pip and the commercial arrangements it had entered into with the CHF companies gives the clear impression that it is the CHF group which is commercialising distributing and dealing with the Pip brand. This material indicates that it is firstly CHF Entertainment and then CHF Media Group which has entered into a toy deal with John Adams, and it is CHF Pip which has secured a deal with BCI International to create a line of night wear, swimwear and underwear based on the brand. It is CHF Media Group who, in partnership with a London based custom merchandise printer, has launched online shops for its Pip Ahoy! animated series in the UK. Pip Ahoy! is described as being made by CHF Entertainment (Cosgrove-Hall Fitzpatrick). The material also states that it is CHF Media Group through its commercial distribution development and production arms which was developing new IP to pitch to UK and US broadcasters in the first of 4 new programmes is the preschool series Pip Ahoy!

Financing growth in innovative firms

54. In 2017 HM Treasury published a consultation document entitled "Financing Growth in Innovative Firms". The responses to that consultation were set out in a document of the same name dated November 2017 (the "**Patient Capital Review**"). One aim behind the consultation was to help create an economy that is driven by innovation which would see the UK becoming a world leader in new technology. The 2017 Budget announced an action plan to unlock over £20 billion to finance growth in innovative firms over a 10-year period. One element of this was to change the qualifying rules to the EIS and to introduce the risk to capital condition which, at paragraph 3.16 of the consultation response document, states that that condition "depends on taking a "reasonable" view as to whether an investment has been structured to provide unknown risk return investors". Further details of this test are set out in Annex A to the document. At A.6 the document states that the risk to capital condition "requires all relevant factors about the investment to be considered in the round. The legislation will suggest some factors that may be considered, for example the nature of the company's ownership structure……. Or whether income from an asset forms a substantial part of the trade." Furthermore in box A.1 entitled "illustrations of how the risk to capital condition will be applied" (subject to the caveat that the examples are intended to provide an illustration of the risk to capital rule, and do not provide formal guidance…..) there is the following illustration: "An investment in an animation production company to develop, market and exploit a series of new characters **would qualify** even if the company outsources the animation to freelance animators. The government recognises that many sectors use outsourcing as part [of] normal commercial practice. In this case, outsourcing is not an indicator of a capital preservation investment." (Emphasis in the original).

Mr Ward's blog

55. On 2 January 2020 Mr Ward published an online article ("**Mr Ward's blog**") entitled "Pip News from 2019". He explained the background to Pip Ahoy! and that a great deal of money needed to be raised to produce the television programmes. He went on to explain that Pip's revenue came from licensing and merchandising deals along with the sale of television rights. He had always been keen to learn more about Pip's financial state but that this has proved very difficult to understand. Although a stand-alone company, Pip had always been associated with the CHF group. He had been a director on 2 separate occasions but had always found it extremely difficult to obtain monthly management accounts, view details of the intercompany transactions and simply understand if Pip was profitable. His only information had been historic, usually provided before the AGM and available at Companies House. He

explained that the reason for starting the blog was that for a number of years he had been very concerned about Pip's financial health together with the performance of some of the management team. When he simply asked if Pip was profitable he received an unhelpful email. He noted developments which had taken place since April 2019 and that he was concerned that investors were not being kept fully informed as to Pip's prospects for the future. He provided a diagram which showed that Pip was fully controlled by Adrian Wilkins and went on to hope that recipients of the blog would attend that month's AGM.

Steering group documents

56. During her closing submissions, Ms Brown took me to a number of documents which she explained had been produced by the steering group (the "**steering group documents**"). These documents are undated and were not put to Mr Ward, but Miss Hughes took no issue as to their provenance. They included a document entitled "current activity to monetise Pip Ahoy! Ltd" (the "**monetisation document**"), a draft profit and loss account for Pip for the period between 2018 and 2023 (the "**draft profit and loss account**") and a document containing 5 year financial projections for the licensing merchandising and DVD/video on demand income which would be generated from Pip Ahoy! between 2018 and 2023 (the "**projections**").

57. The monetisation document states that Pip assigned a global TV distribution deal with JetPack, and since this deal was contractually made on 1 October 2018, it seems reasonable to assume that this document post dates that. It contains a number of aspirations regarding relaunching the Pip Ahoy! animation episodes back onto mainstream television and also onto YouTube channels. This would be done by JetPack; it records the fact that the programmes are being distributed in Russia and being shown on TV channels in China; it suggests there will be a relaunch via an app; it identifies a number of merchandising and marketing initiatives including a relaunch of the Pip Ahoy! toys by John Adams.

58. The document also includes some cash flow forecasts for the period 2019 to 2024, and includes gross revenue forecasts from the broadcasting merchandising and sale of DVDs and video on demand from the animation programmes. The figure for 2019 is approximately £389,000, for 2020 it is £761,000, for 2021 it is a little over £2 million, for 2022 it is a little over £3 million, for 2023 it is £3.6 million approximately, and for 2024 it is approximately £4.4 million. It also includes figures for projected profits and losses in those periods. For 2019 a profit of £99,117 is forecast. For 2019 and 2020 it records accumulative profit of £436,267. For 2021 the forecast profit is £1,181,350. For 2022, the forecast profit is £1,886,617. For 2023, the forecast profit is £2,303,787. The projected cumulative profit for 2019-2023 is forecast as being £5,808,229.

59. Those figures are the same which had been used in the draft profit and loss account save that the figures have been pushed back a year. In other words the £761,000 in these accounts will now be made in 2019 and the £4.4 million will be made in 2023. This account includes a figure for 2018 of £171,500. Somewhat oddly, given that this account is entitled "profit and loss account" it does not give projected profit and loss figures. It does however give cash flow forecasts which are negative in 2018 and 2019 (£395,862 and £128,406 respectively) and are then positive in 2020 (£135,661), 2021 (£169,911), 2022 (£1,702,682) and 2023 (£1,313,569). This document also states that the figures for 2020 and 2021 reflect the production of Series 4,

and the figures for 2023 reflect the production of Series 5. I take this to mean series 4 and series 5 of the Pip Ahoy! animated programmes.

60. Similar figures appear in the projections although these are broken down into quarterly periods but which show that between 2018 and 2023, the total projected gross revenues are anticipated to be a little over £14 million.

Mr Ward's evidence

61. Mr Ward submitted a witness statement which he adopted subject to a few minor amendments and which he fleshed out with some additional details in examination in chief. He was cross examined at some length and then re-examined, also at some length. His evidence was as follows.

62. In his witness statement as modestly amended and fleshed out Mr Ward's evidence in chief was:

(1) During a family holiday in Salcombe some 25 years ago Mr Ward told his two sons stories about small seaside creatures called the Salties with a dog called Skipper as the harbourmaster.

(2) He sketched out some of the characters in a small notebook and subsequently, some years later, with the help of professional illustrator friend, developed the characters and the stories. He took the Salties to a brand licensing exhibition in 2007 where he met Francis Fitzpatrick who had developed his own animation product. He went into partnership with Mr Fitzpatrick on a 50-50 basis, and Mr Fitzpatrick helped to promote the idea. In 2011 Mr Fitzpatrick introduced him to Cosgrove Hall and he met Mark Hall and Brian Cosgrove at their offices in Manchester to discuss whether they would be interested in developing the Salties for television. Messers Hall and Cosgrove wanted to keep Skipper but redesign the rest of the characters with a new lead character called Pip.

(3) CHF Entertainment was established to raise the funds to make a television series called Pip Ahoy! Mr Ward was aware that other companies were being formed to handle various projects but he was not party to discussions about this or meetings concerning them. His involvement was purely to view and record the progress of Pip. His understanding was that CHF Entertainment would make the Pip animations and CHF Enterprises would raise the funds to finance them.

(4) He was a founder shareholder and director of Pip holding the office of director between various periods during which he was largely unpaid. He would travel from his home in Northamptonshire to photograph the making of the Pip television programmes in Manchester and Bristol.

(5) He is a professional photographer and found that he was spending too much time with Pip and was neglecting his own commercial photographic business. He therefore resigned as a director in April 2018 but rejoined recently when he wanted to assist in helping Pip sort out its financial difficulties.

(6) He and Francis Fitzpatrick had assigned the rights to the intellectual property to the Pip brand on 21 September 2011 as they felt that Cosgrove Hall would provide Pip with the best chance to monetise it. They had a well-documented history in animation and he was immensely

proud that they had agreed to develop his idea. It was intended that the funds which would be raised for Pip would be raised by CHF Enterprises.

(7) He had hoped that he would make money out of the commercial success of Pip by selling his shares in that company.

(8) He said that it was his belief that he was a director of Pip in name only as he was provided with very little information concerning contracts and finance of the company. He therefore created his own role by attending meetings, production facilities, sound recordings etc. and building a photographic library for the benefit of Pip.

(9) His view was that Pip had never been a production services company. It required the services of script writers, animators, voice over artists, musicians and toy designers and these were best subcontracted for financial reasons. Pip's role was to then monetise the shows by licencing them to TV broadcasters and to sell toys.

(10) He has invested considerable time and money in to the project, and friends of his have invested in the project too. One contributory factor to this investment was the reputation of Cosgrove Hall and Sir David Jason. They thought that they would make some money from the television shows and toy sales and it is those 78, 11 minute television shows, along with a Christmas special, and a range of toys which comprise the intellectual property of Pip.

(11) Mr Ward described himself as a "creative" and so as a director of Pip contributed creative skills to that company.

63. In cross examination Mr Ward added:

(1) The job of reworking his concept of the Salties by keeping its basic components but redesigning many of the characters including a new lead character called Pip was undertaken by Ben Turner.

(2) Francis Fitzpatrick's role was to promote Mr Ward's ideas about Pip around the world.

(3) He accepted that CHF Entertainment had been incorporated before Pip.

(4) He suggested that in the early days it was intended that Pip would employ staff, but accepted that given the transfer of the intellectual property to Pip and its involvement with CHF Entertainment, the latter providing all the people necessary to create the television programmes, that the freelance staff were actually provided by CHF entertainment rather than being employees of Pip.

(5) He had found it difficult to get information about Pip from people involved in the company but was able to talk to Jean Hawkins, the accountant, when he wanted financial information.

(6) He agreed with the statement made in his witness statement that it was his belief that he was a director of Pip in name only and was provided with very little information concerning contracts and finance and thus created his own role by attending meetings and taking photographs.

(7) He denied that it was people working for CHF Entertainment who were in control of, and not being effectively supervised by, Pip.

(8) He thought that he may have seen some of the contracts which Pip entered into and would have read some of them.

(9) The seed capital of £100,000 which Pip was looking to raise in August 2011 was for making the promotional show.

(10) The intellectual property which was transferred by himself and Francis Fitzpatrick to Pip under the IP agreement included the Bible which is a synopsis of the concept and how it might be monetised through licensing and merchandising. That document went through many iterations and would have included input from Mark Hall, Brian Cosgrove and Ben Turner.

(11) As far as he was concerned the animators who were sitting at their computers under the management of Simon Hall were working for Pip. He knew that they were freelancers but they came from all over the world and he viewed them as being a production house. Simon Hall was, as far as he was concerned, managing projects and making all the decisions because he was a director of Pip and it was Simon Hall with whom Mr Ward would hold production meetings regarding the programmes.

(12) The television programmes were really long advertisements to promote Pip merchandise. Creation of those programmes involved teams of scriptwriters acting under Simon Hall's direction. The scripts were written in such a way as to promote the toys. He denied that at this stage this was being undertaken by CHF Entertainment, and that Ben Turner and Corrinne Averiss were working through that company. When he attended the studios it was his view that everyone working there was working with their "Pip hat on" and were working under the umbrella of Pip. He denied that all of these scriptwriters and other work was being done under the production agreement by CHF Entertainment.

(13) He was not certain for whom Simon Hall was working when he was series producer.

(14) Pip's strategy of monetising its concept via linear television was probably 5 to 10 years too late given that by the time the programmes were made, children were watching content on a variety of platforms for example YouTube and video on demand. In 2011 Pip set out to monetise its brand via channels like Channel 5 and ITV but these platforms and content were then bypassed by, for example, YouTube, Netflix and Amazon prime. Very few preschool children watch linear television.

(15) Pip has always been associated with the CHF group, but he always made it clear that it was a stand-alone company

(16) He accepted that as a director he had responsibilities including ensuring that information which was included in the information memoranda that were sent out whilst he was a director was accurate.

(17) He disagreed with the suggestion that all the activity that was going on in Pip was going on through CHF Entertainment. In his view it was being done with Pip as a stand-alone company with Simon Hall as the managing director.

(18) He thought that the negotiations with Channel 5 which had been made possible through a third party agent Brendan Kelly, might have been done by CHF Entertainment but the contract should have been entered into between Pip and Channel 5 notwithstanding that it was entered into between CHF Entertainment and Channel 5.

(19) He accepted that the relationship between Messrs Cosgrove and Hall and Sir David Jason was the reason why the latter was prepared to participate in the television programmes and that the contract was between Sir David Jason's company and CHF Entertainment.

(20) He knew little about the securing of tax credits.

(21) Ben Turner had come up with the idea for the Pip toys which were central to the licensing and merchandising. These are both soft toys and hard plastic toys. Carter Bench was a company which was well known to Mr Ward and they were tasked with taking Ben Turner's initial sketches and designs and working them up into products. The toys were ultimately produced by John Adams who had the toys made in China and then shipped into the UK. Mr Ward attended their premises in Huntingdon always under the banner of Pip.

(22) He rejected the suggestion that at the time of the second information memorandum, Pip was wholly dependent on CHF companies.

(23) His recollection was that the television programmes cost about £100,000 per minute to produce. He disagreed with the suggestion that in the information memorandum, the statement that substantially all of Pip's revenues would come from the production and distribution of children's television and licensing and merchandising was correct as it had always been explained to him that licensing and merchandising was the route to monetising the concept and the television programmes were a vehicle to licence.

(24) Even though Francis Fitzpatrick might have been a director of some of the CHF companies, when Mr Ward dealt with him it was always in his capacity as a representative of Pip.

(25) Simon Hall had suggested that he might receive £2,000 per month for the work he was doing in photographing the work done in producing the television programmes. Although this was reflected in the accounts, in fact he seldom claimed all the money that he was due.

(26) When CHF personnel such as Francis Fitzpatrick attended Pip meetings it was not apparent to him that they were there in any representative capacity of a CHF group company. They always dealt with Pip related matters. As far as he was concerned, Francis was always looking to help him to make his dream come true.

(27) When the agreement with their distribution partner, Monster Entertainment, ended in December 2015, the financial statements indicate that Pip was intending to bring the TV distribution in house. To do this an industry expert, Jenny Johnston, was appointed as commercial director. Mr Ward was not certain who she was employed by.

(28) The merchandising master agreement with John Adams might have been in the name of CHF Entertainment, but John Adams had been brought to Pip by Lisle Entertainment, Pip's licensing agent. His understanding was that this agreement was later transferred across to Pip.

(29) Mr Wilkins had a difficult job as he was responsible for funding the production of the television programmes. Raising funds became increasingly difficult. The fundraising to make the first 26 shows went reasonably well. It was much harder to raise the money for the next 26 shows and very hard when the last 26 shows were going to be made in China. Mr Ward was very protective of Pip and when he first heard about the CHF Media Fund, he was concerned that this would deflect Mr Wilkins away from raising money for Pip. He thought that as Pip was the only plc in the group, it was being funded differently. He accepted that the information

memorandum released by the CHF Media Fund identified Jean Hawkins as an independent director of each investee company.

(30) At the time of information memorandum version 4, March 2016, he believed that it was Pip's intention to hold on to its intellectual property for the long-term.

(31) He had not realised that Mr Hopwood who was responsible for the music for the television programmes worked for a company called CHF Music. Mr Ward only dealt with him with his company called Pluto music.

(32) He thought a number of licences had been entered into between incorrect parties as well as those mentioned in the March 2016 minutes. He thought this was down to inefficiency rather than the role that CHF Entertainment was playing in the obtaining of these licences.

(33) Paul Harris who was present at the 2017 AGM was a friend of Mr Ward, and an experienced businessman. Mr Ward thought that he would provide the strong leadership that in his view was not being provided by Jenny Johnston. He could provide supervision and, being retired, had the time to do so. It was at this AGM that Mr Ward had asked if all licensing contracts and sales agreements were now in the name of Pip and Jenny Johnston confirmed that they were all either in the name of Pip or had been assigned to Pip. Mr Ward had also requested that all licensing and merchandising revenue would be paid into the Pip bank account, which was confirmed.

(34) At that AGM it was also recorded that it was anticipated that the production of Pip Ahoy! would stop after the next series making a total of 78 episodes. This was not a decision to halt the growth and development of Pip, it reflected the fact it had sufficient ammunition to go to market and was thus more of a pause. However there had been a discussion, generated by Francis Fitzpatrick, about taking Pip Ahoy! to the American market where it was thought that you need a minimum of 104 episodes. The American market was very big and so Mr Ward wanted, if possible, to produce these further episodes but funding was very difficult.

(35) The increase in the value of the intangible assets in the 2017 accounts reflected the money that had been invested in the animations. The value in those accounts approximately £6.6 million was, in his opinion, a valid one given the amount of work that had been invested in those programmes.

(36) The AGM which was held on 25 January 2018 was a very important meeting for two reasons. Firstly because this was the first time that Mr Ward was told about the problems with payments to the Chinese company which was responsible for the final tranche of television programmes. Secondly the steering group was coming together and it was the meeting at which the role of Mr Harris as a director was also discussed. Mr Harris replaced Mr Ward as a director in April 2018. There were a number of documents such as investor updates which were sent directly to the shareholder investors in Pip which were not sent to him but which he saw because they were given to him by the shareholder investors. He saw his role as director as being responsible to the shareholders and in particular his own group of shareholders, i.e. those who he had persuaded to invest in Pip. He was finding it increasingly difficult to devote time to Pip as a director as he needed to concentrate on his photographic business, hence the reason for bringing in Mr Harris as a director in his place.

(37) Mr Ward denied that the board did not have the capability of supervising contracts. In his view Mr Harris was more than capable of doing this and he also had the assistance of the

steering group who spent maybe 6 to 8 months going through every single document in the company and producing their own reports about it.

(38) He disagreed with the suggestion that when he stepped down as a director, Pip's situation was bleak. He accepted that the plastic toys were not selling as well as anticipated but the soft toys were selling well. There needed to be a change and things needed to be re-marketed. This would be achieved in part by Mr Harris whose appointment was a new beginning. He disagreed also with a suggestion that there was no reason to expect any improvement from that gloomy situation and there was a real intention to change.

(39) He accepted that when the administrators sold the goodwill and intellectual property of Pip in 2021 to a company owned by himself, Mr Fitzpatrick and a third gentleman, the price for the goodwill and intellectual property was £75,000 of which the intellectual property was £50,000.

(40) There were serious plans, whilst he was a director, for Pip to have PAYE employees, but in the early days they used freelance staff. Had they had all the money to make the 78 episodes from day one, Mr Ward's view was that they would have recruited PAYE employees. He did not think that the people at CHF were actually in control of Pip and were using it to develop their own business.

64. In re-examination Mr Ward made the following points:

(1) Simon Hall, his girlfriend Rachel Giles, Ben Turner and his wife Jean, Brian Cosgrove, Jean Hawkins and Helen Brown, as well as the production staff, were all involved in making decisions for Pip. These people wore Pip as well as CHF hats and when they were making decisions for Pip they were wearing their Pip hats. This is also true of Francis Fitzpatrick even though he was president of CHF group. When he was chairing meetings for Pip, he was wearing his Pip hat. They all wanted to make money out of Pip and see it succeed.

(2) Mr Ward, as a director, brought creative experience and skills to the business which were most relevant in the very early days when he was transferring the intellectual property to Pip and explaining how he had created the Salties. Those making decisions for Pip, for example Jean Hawkins, had very different skills, and Mr Ward would not have been consulted about decisions on which she, for example, had been consulted about simply because he had different input.

(3) The concept of the steering committee had been discussed at the 2018 AGM. The individuals who became members of the steering committee had a vested interest in the success of Pip because they were investor shareholders and wanted to see a return on their investment.

(4) He understood the director's responsibilities for keeping adequate records and withholding approval from the financial statements unless the directors are satisfied that they give a true and fair view of a company's affairs.

(5) He thought that a number of individuals who worked for CHF also owned shares in Pip as too did CHF Media Group.

(6) He always perceived Jenny Johnston as being the commercial director of Pip even if she was not a Companies House registered director.

(7) He was very keen to make sure that everything that should be in the name of Pip was in

the name of Pip, hence the reason for the comments he made concerning the commercial contracts at the 2017 AGM. No one ever argued with him about whether or not those commercial contracts which he asked to be put in the name of Pip and in respect of whose revenue should be paid direct to Pip, should have been Pip contracts. He confirmed that he did not think that there was anything untoward about the contracts being in the wrong names, it was simply an administrative error caused, perhaps, by a confusion as to which hats those entering into the contracts, were wearing.

(8) He confirmed that the chairman's statement at the 2018 AGM reflected the then current situation.

(9) He stated that the amending addenda resulted in the agreements being made as has always been intended i.e. between Pip and the appropriate counterparty.

(10) The intellectual property which he transferred to Pip comprised the assets and ideas that he had created in the characters that made up the Salties and their world. He also made a number of models, a website, and had produced an animation. These had cost him approximately £125,000. He had transferred these to Pip since he thought this would provide the opportunity of seeing his ideas become a world-class animation and licensing product which he could monetise and from which he would make a profit.

(11) This would be achieved by the input of Brian Cosgrove, Mark Hall, and Francis Fitzpatrick all of whom loved the idea of the Salties and had huge experience and great expertise in the making of animations and their monetisation. The CHF brand provided credibility within the animation industry and opened doors such as access to Sir David Jason.

(12) When Pip was formed, all the original drawings and additional drawings have been made by Mark Hall Brian Cosgrove and Ben Turner and their initial meeting and would have been used by Pip and CHF for the animations.

(13) In his view the interest shown by Mark Hall and Brian Cosgrove predated the establishment of CHF Media Group.

(14) He felt very responsible to his investors namely people to whom he had sold the vision of Pip Ahoy! and who had collectively invested nearly £400,000 in the venture.

(15) One of his frustrations about obtaining information from CHF was because of their accounting systems which changed once Jean Hawkins was appointed to work for CHF/Pip.

65. In response to questions from me, Mr Ward stated:

(1) A great deal of money had gone from the shareholders pockets into Pip and then to CHF, but it was his impression that when, for example, Simon Hall signed something or dealt with something in his capacity as director of Pip, it was because he agreed with Mr Ward that Pip should be prioritised and he was keen on, and very protective of, Pip.

(2) Mr Fitzpatrick and Pip had produced projections showing how Pip would grow, the shows, and the different merchandising that Pip would be selling. This might enable Mr Ward to sell his shares.

(3) Even though the profits of Pip had declined, he still thought that it would make profits, mainly out of toy sales which were the main product. He thought that John Adams had spent

about £1.3 million on the toys yet shortly before the hearing he had spoken to John Adams who had said they had a 4,200 SCU's left. The soft toys had sold extremely well and there were none left in stock but there were issues with the hard plastic toys.

(4) He thought that CHF Entertainment, CHF Enterprises and CHF Media Group were the right organisations for Pip to deal with but had misgivings about the roles that certain people were playing at those organisations and whether they were the best people for those particular roles.

(5) Pip did not take independent advice on the terms of the various contracts which it entered into. He trusted the qualities of Francis Fitzpatrick who understood contracts far better than Mr Ward did. He did however check payments made by Pip and queried a number of these which he disagreed with or thought were excessive.

SUBMISSIONS

66. Ms Brown and Miss Sheldon made the following submissions:

(1) The relevant legislation should be interpreted purposively and in this context the Patient Capital Review was relevant since it provided the background to the risk to capital condition and also put the way in which companies like Pip works into perspective. Such companies do not have a linear progression. HMRC have treated Pip against the backdrop of a conventional trading company which has led them into error. The Patient Capital Review uses an animation company as an example of the sort of company that the risk to capital condition was intended to assist as indeed is the EIS regime.

(2) HMRC appear to have accepted in respect of earlier EIS issues that Pip was carrying on a qualifying business activity. The main issue in this case is the risk to capital condition. On trading, the issue is not whether trading was being undertaken but whether it is being undertaken by Pip or by the CHF group. The evidence clearly shows that it was being carried on by Pip who outsourced or subcontracted many of the activities which it needed to undertake its trade which was the exploitation of its intellectual property and its monetisation by way of the creation and licensing of more than 70 episodes of a television show, a Christmas special, both of which acted as effectively lengthy advertisements for the associated tangible products namely toys, T-shirts, and other merchandise which was then to be sold to generate a profit. This evidence includes the fact that the television shows were actually made; the production and merchandising and licensing agreements all of which made clear that the intellectual property associated with Pip Ahoy! belonged to and remained throughout with, Pip; the activities of the (mainly) CHF group entities to whom Pip had outsourced, for example, its licensing and merchandising activities as well as the production of the animated programmes should be attributed to Pip since these CHF entities were acting as Pip's agent; the directors strategic reports clearly show that Pip was trading in its own right; Pip entered into a number of contracts on its own behalf; contracts which had not been entered into between the correct parties were amended without demure from CHF personnel; the trade was carried on through the agency of the external contractors as well as through its directors who exercised control and supervision over the activities of those external contractors.

(3) The risk to capital condition imports a degree of objectivity. The lens should be the reasonable businessman and not the reasonable HMRC inspector. The circumstances to which regard may be had should be looked at in the round. They could, in theory, all be ignored, although it is Pip's case that it satisfies many if not all of the circumstances. HMRC have cherry picked those which Pip does not meet and that is not how the legislation should be interpreted.

(4) The same is true of the cases relating to trade. One needs to stand back and look at the whole picture. The badges of trade are not a particularly helpful concept in the context of a company which is exploiting intangible assets.

(5) Pip paid a very great deal of money to CHF entities, but received a considerable amount in return. He ended up owning more than 70 television programmes, a Christmas special, and a large number of toys and other merchandise. The relationship with those CHF entities was a commercial one.

(6) Although a number of CHF personnel were officers of Pip, they always acted in the best interests of Pip and wore Pip hats when carrying on Pip's business. The presumption of regularity applies to directors and there is nothing to suggest that Pip's officers, even though they had roles within CHF, were not acting in Pip's best interests when they came to decisions about Pip. These were decisions which benefited Pip and not, as alleged by HMRC, the CHF group. There is no evidence that there was any dereliction of fiduciary duty by the CHF personnel when carrying out their duties as officers of Pip. There were also independent directors, such as Mr Ward and Mr Harris, who were also evidently acting for Pip and not for CHF.

(7) There is nothing which obliges a trading company to carry on their trade through employees rather than outsourcing those activities. A company in Pip's position will need different skills from different people at different times in its development, so it makes commercial common sense to outsource these activities to different entities at the appropriate times. Pip was trading by exploiting its intellectual property through the television programmes and monetising those through merchandising and licensing agreements. This is not an investment activity but is trading.

(8) The risk to capital condition requires the consideration of whether Pip had the objective of growing and developing its trade in the long-term. The factors which are set out in section 157A(3) are neither exhaustive nor mandatory. Even if all such factors are present, that does not necessarily mean that the risk to capital condition will be met if the objective of long-term growth is not present. And to the contrary, that objective may be present even if many of those factors are not present. I need to consider all of the circumstances in the round. Furthermore where the objective is to grow and develop in the long term, failure to realise that objective in the short to medium term is not a basis on which to say there is no long term objective.

(9) Pip had the objective to develop its trade in the long term. The emphasis is on objective rather than achievement. The evidence shows that Pip intended to develop its trade, that evidence including the raft of contracts it entered into, Mr Ward's evidence, the directors strategic reviews, the creation of the more than 70 television programmes, the Christmas special, and monetisation of those via the licensing and merchandising agreements. The development included moving from the production of the television shows into the merchandising and licensing of them and the production of the toys and other merchandise. It is equally clear that Pip intended to grow as evidenced by the increase in the number of the television programmes and the merchandising and licensing agreements and that it intended, for example, to enter markets other than the UK such as Russia and China. Mr Ward's evidence was that it always intended to increase its profitability and also that it intended to employ employees. In this regard directors can be seen as employees.

(10) Consideration of an exit plan did not affect the fact that Pip intended to grow and develop its trade. It simply reflects the fact that shareholders might wish to realise their investment and

the best way of achieving the greatest return from that investment on the sale of their shares would be to ensure the commercial viability and thus the monetisation and profitability of Pip's intellectual property.

(11) As regards excluded activities, the issue is whether Pip had the right to exploit the intellectual property and whether it did so. Pip did so exploit the intellectual property through subcontractors as explained above. Its directors were involved in selecting those subcontractors. It is well documented in the directors' strategic reports how that intellectual property was exploited by Pip. Pip was a stand-alone company and when CHF personnel were managing Pip, they were doing so with their Pip hats on. Pip was a contracting party to a wide variety of contracts which did not involve CHF entities. The merchandising and licensing agreements which were not correctly set up with Pip as a contracting party were corrected by the amending addenda. The value in Pip Ahoy! the cartoons and the intellectual property was created by Pip. The original idea and associated intellectual property had been transferred by Mr Ward to Pip under the IP agreement and it was then Pip which generated value in this intellectual property by entering into the various agreements with subcontractors, producing the television programmes and monetising those through merchandising and licensing agreements.

(12) As regards the presumption of regularity, Ms Brown cited the cases which I have set out in Appendix 2. She submitted the presumption need be applied no further than to say it should be assumed that that it is in order which appears to be in order, and the presumption is no more than a rebuttable statement founded on common sense and experience of the inference that it will normally be appropriate to draw in a given situation where primary evidence is lacking. It is entirely reasonable to apply such presumption here in that a person on whom the law imposes fiduciary duties both knows and complies with those duties. HMRC have provided no positive case to suggest that the CHF directors of Pip were not acting in the best interests of Pip and instead acted in the interests of the wider CHF group. On the facts there were a number of directors of Pip who had different roles and control over different elements of its business. It is clear from Mr Ward's evidence that he knew of and intended to fulfil his duties as a director. Mr Ward's evidence was also that Simon Hall also acted in the best interests of Pip as he was protective of Pip and wanted to keep it at the forefront of CHF's activities.

(13) On *Ingenious* Ms Brown emphasised elements of the decision which made clear that the question of whether a particular activity constitutes a trade depends upon an evaluation of all the facts and that decisions relating to one set of facts may not be conclusive as regards a different set of facts. She recognised that the legal principles were largely the same as those set out in the authorities which had been mentioned in the parties written submissions. When those principles are applied to the fact in this case, it is clear that the appellant was trading by using subcontractors. Transactions carried out by Pip had a commercial nature and a genuine commercial purpose. Pip's desire to obtain a tax advantage by alleging trading did not denature what was essentially a commercial operation, neither did Mr Ward's desire to have his idea brought to life.

67. Mrs Hughes submitted as follows:

(1) The three key issues that I need to consider are whether Pip was trading; whether it had the objectives to grow and develop and whether the intellectual property in the television show Pip and the associated businesses was created by Pip or by CHF entities. The theme which runs through her submissions is that there was no independent activity happening in Pip and that all or substantially all of the activity was being undertaken by CHF entities. In particular any

growth and development was objectively intended to take place in those CHF entities and not in Pip. Pip had no employees and never intended to have any; in its 7 years of operation it never developed any infrastructure of its own independently of the CHF entities; there is no evidence of any oversight by Pip of the activities undertaken by the CHF entities.

(2) The risk to capital legislation in section 157A is clear and there is no need to consider it against the backdrop of the Patient Capital Review to construe it purposively.

(3) The outsourcing of all of its activities to CHF entities without any independent ability to control or supervise them is redolent of investment rather than trading.

(4) If Pip was trading, then it was carrying on an excluded activity of receiving royalties and licence fees which did not fall into the safe harbour in section 195(3) since the value of the intellectual property had not been created by Pip, but by CHF entities, and Pip could not exploit its intellectual property as it had no activities of its own.

(5) There was little dispute between the parties as regards the important authorities. *Eclipse* provides guidance on how I should deal with the "vicarious trade" argument. *Seven Individuals* deals with trading on a commercial basis with a view to profit.

(6) There was a great deal of evidence in this case but there was also a great deal of potential evidence missing, both documentary and witness evidence. The burden of proof which was on the appellant was important in this case. It is for the appellant to establish, for example, the hats which the CHF personnel were wearing when ostensibly acting for Pip. Mr Ward had considerable difficulty identifying the capacity in which such personnel were acting at any particular time and on a particular occasion. He was not in a good position to identify who was doing what for whom. There were no board minutes presented as evidence to assist.

(7) Any presumption of regularity would fall away when, as Mr Ward did, a director's evidence was that he was a director in name only. It was not clear what activities Mr Hall undertook when he was acting as a director of Pip. If he was reviewing the animations, for example, the appellant has not established that he was not doing so in his capacity as an employee of CHF.

(8) It is not appropriate to attribute all of the activities of Pip's agents to Pip. *Eclipse* is authority for that. The absence of any active supervision and monitoring of the contracts points strongly against the conclusion that Pip was trading.

(9) Mr Ward accepted that he was a director in name only and had difficulty in obtaining information about Pip. This is evidenced by his oral evidence and by his blog. He could, therefore, hardly exercise the functions of the director. At no stage was he a guiding mind of Pip. He was not a director at the time of the relevant share issues and prior to that he was a director in name only. At the relevant times, supervision and control was, if at all, exercised by CHF entities. Those entities had control over production licensing and merchandising. It was CHF Entertainment as producer which obtained the animation tax credits. The financial reports and directors' statements show that CHF Entertainment oversaw all elements of deals transacted on behalf of Pip, and that they worked with the relevant local agents.

(10) It is difficult to know what the master merchandising and licensing agreement said since we do not have copies. But it was clear it was entered into by CHF Entertainment. This reflects the activities undertaken by that company. Simply changing the parties by the amending addenda does not alter the fact that those activities were undertaken by CHF Entertainment.

Other contracts entered into by Pip do not reflect activity undertaken by Pip. The activity was undertaken by CHF entities. Indeed many of the contracts which Pip entered into were signed by CHF personnel and it was to them to which notices were to be sent.

(11) Pip had next to no independent capabilities of its own. It had no employees and no business plan (other than within the information memoranda) and it did not intend to develop any capabilities of its own. All the activities on which Pip relies in this appeal were undertaken by others. The production of the first three series of Pip Ahoy! had been undertaken by CHF Entertainment, and the merchandising and licensing agreement of 1 June 2016 granted CHF Entertainment the right to represent Pip in respect of merchandising and publishing for 7 years subject to renewal. The Channel 5 letter of intent of 19 July 2012 is addressed to Adrian Wilkins at CHF Entertainment; Pip was not a party to the agreement with Sir David Jason's company; the John Adams contract for toy merchandising was through a master deal with CHF Media Group.

(12) Information memorandum version 5, the one which is relevant to the issue of the relevant shares, makes clear that Pip is simply an investee company in which the CHF Media Group would typically hold 50% of the company's voting rights with investors holding the balance. It refers to Pip Ahoy! as "CHF's latest show on television". It identifies a number of risk factors including the retention of key personnel within the CHF group. It declares that the CHF Media Fund might invest in companies which individually own intellectual property rights. Such investee companies will have access to the full suite of CHF's extensive in-house expertise and support and may engage CHF Entertainment for development, production and animation services. CHF Enterprises would also assist investee companies with their application for further funding as and when required. All of this shows that investee companies including Pip were shells, housing investment in intellectual property which was at all times intended to be highly dependent on CHF's expertise and experience and not to build any capability itself.

(13) This dependency is borne out by the large numbers of payments made by Pip to CHF Entertainment over a number of years amounting, in total, to a little over £7 million.

(14) It is CHF Entertainment (and not Pip) which has been publicly credited with the production and development of Pip Ahoy! Not only in the relevant information memorandum but also in many trade news articles which frequently quote Adrian Wilkins as CEO of the CHF Media Group.

(15) As far as independent supervision is concerned, it is clear that Mr Ward was not undertaking this. Jean Hawkins was an accountant and it is questionable what supervision she was able to undertake regarding the commercial contracts. Mr Harris became a director, a non-executive director, in 2018, and there is no evidence of what supervision he undertook over the commercial contracts. No evidence has been adduced as to what the steering group might have done. So there is no evidence of any independent supervision and monitoring by Pip of the CHF entities.

(16) The badges of trade were more relevant than had been suggested by Ms Brown. An application of these to the facts points strongly towards investment rather than trading activity. Pip holds a single idea, namely Pip Ahoy! and Pip has invested in only one concept. There is no repetition. Pip's activities regarding Pip Ahoy! are stand-alone and not related to any extant trade of Pip's. The subject of Pip's activities relates to animation and intellectual property in respect of which there was an element of pride as evidenced by Mr Ward's evidence. The manner in which Pip undertook its activities points towards investment rather than trading. It

wholly subcontracted its activities. Apart from the HSBC debenture, and the loan from Mr Jessop, practically all of its funding was by way of equity. Pips intention regarding resale of the intellectual property is difficult to discern and Mr Ward's evidence is in tension with the statements made in the information memorandum which suggested the possibility of a buyout after 3 to 5 years. Any resale however would bring a capital gain rather than trading receipt. A certain amount of investment yield has been generated by way of licensing fees. To the extent that intellectual property rights were acquired by Pip, and then developed, income generated therefrom is investment income. When one steps back and review the activities of Pip all that it did was to fund the development of intellectual property which is investment and not trading activity.

(17) As regards the risk to capital condition, Miss Hughes agreed that the test had an objective element. There was no definition of the statutory words "growth and development". Growth generally means the process of increasing in size whilst development generally means the process of something changing to become more advanced. In summary, by the time of the relevant share issues, Pip had been incorporated for 7 years; it had no employees; turnover had been minimal and was declining; it was never likely to be anything other than dependent on and controlled by CHF entities; it had not grown or developed any infrastructure or capability of its own, and held a single concept and was never likely to hold any others.

(18) Mr Ward might have thought that Pip would have employees but he realised that was unlikely once CHF Entertainment became involved with the animation. At the time of the relevant share issues, turnover had decreased to about £30,000, and the strategic reports evidenced clear difficulties in delivering content to preschool age children via linear television given the changes to the market by companies such as Amazon YouTube and Netflix. Pip had not achieved its objectives as evidenced by the directors' statements. It was not reasonable to conclude that Pip had the objective of increasing turnover in these difficult commercial circumstances. Its objective was to make the best out of a bad situation. Pip's sources of income were licensing and merchandising and those sources were at substantial risk. Pip owned intellectual property but it is difficult to know its precise value. It certainly was not worth the book value of £4 million given its subsequent sale by the administrators for £50,000. All of the activities of Pip were outsourced and as far as ownership structure and allowing others to participate, it is clear that it was controlled by CHF entities. This is inconsistent with growth and development the 4th and 5th information memoranda show the control and dominance of the CHF group and is entirely in line with the contractual provisions and the reports made in the financial statements bringing activities in house. I need to consider all of these criteria in the round and having done so I should conclude that Pip did not have the objective to grow and develop at the time of the relevant share issues. Miss Hughes placed particular reliance on three points namely; no intention to have any employees; the infrastructure that was developed was developed for the benefit of the CHF Media Group; Pip had decided to halt production of the animated programmes.

(19) Even if Pip was carrying on a trade, it received royalties or licence fees which were excluded activities. These fell outside the safe harbour in section 195. The value of the intellectual property is difficult to gauge as, too, is the issue of it being created by Pip. The evidence shows that much of the intellectual property was created by Mr Ward who had spent £125,000 on developing The Salties at the time that he brought the concept to Cosgrove Hall. It was clear from the evidence that the concept was then developed by Mr Cosgrove and Mr Turner, but Mr Ward's evidence was that the DNA of the Salties stayed the same (there was still a crab, seagull and lobster). A number of people were then involved in creating and developing the intellectual property including Mr Ward, Mr Cosgrove, the late Mr Hall, Esther

Turner, possibly Mr Turner's wife, possibly Take Four, and definitely CHF Entertainment who produced the series of animations which constituted Pip Ahoy! And it was these people and not Pip that created the value in the intellectual property.

(20) Her submissions regarding the lack of activity and supervision in and by Pip made above were also relevant to her submissions regarding who created the value in the intellectual property. In her view that value had been created by CHF entities.

(21) On the presumption of regularity, Miss Hughes cited the cases which I have set out in Appendix 2. These authorities do not establish the kind of wide-ranging presumption that directors were acting in the best interests of the company which the appellant seeks to establish. Furthermore, on the facts of this appeal, it does not apply. The facts show that Pip, by design funnelled shareholders capital into the CHF group creating a business infrastructure for the companies within that group and not for Pip. Furthermore, Mr Ward's evidence was that he was a director in name only. These facts show lack of regularity and are inconsistent with the manner in which it is said by the appellant that the presumption should apply. She endorsed the sentiment expressed in the authorities that the presumption is no more than a rebuttable statement founded on common sense of the inference that it will normally be appropriate to draw in a given situation where primary evidence is lacking. In her view it is unlikely that I would be assisted by the so-called presumption of regularity.

(22) On *Ingenious* Miss Hughes suggested that it was only the trading issue which was relevant to this appeal and not the view to profit issue. She emphasised that it is important to analyse precisely what the appellant did and the continuing utility of the badges of trade including the necessity to stand back and consider the whole picture. The court endorsed dicta in *Eclipse* in which the taxpayer had been found to be carrying on an investment activity and not a trading activity. One significant issue in *Ingenious* was the hats which various Ingenious personnel were wearing when performing the services. This has relevance to this appeal. It was not accepted that Ingenious was trading by way of subcontracting through using the services of a development services company in order to produce relevant games. This had been finding of fact by the FTT with which the Court of Appeal declined to interfere.

68. Ms Brown replied as follows:

(1) She cautioned me about reading too much into the authorities many of which dealt with schemes and anti-avoidance and which turned on their own particular facts But in essence agreed that *Seven Individuals* is the correct authority which deals with commercial basis and view to profit. View to profit is a subjective test whereas commercial basis connotes a degree of objectivity. Evidence of Pip trading on a commercial basis with a view to profit at the relevant time included the steering group documents. Provision is made in the projections for the employment of Valerie Fry, a consultant.

(2) She took issue with the assertion made by Miss Hughes that I should draw an adverse inference from the absence of witnesses who might have given evidence on behalf of the appellant.

(3) Mr Ward and Jean Hawkins were both competent to supervise the contracts which Pip had entered into.

(4) The concept of a non-trade business of film exploitation which was referred to in *Eclipse* was relevant to the legislation which was considered in that case but not relevant to the very different legislation which I need to consider.

(5) The fact that it was CHF Entertainment which claimed the animation tax credit is simply a function of the way in which that highly specific legislation operates and should not be read as implying that it was CHF Entertainment which had undertaken the development of the intellectual property.

(6) She re-emphasised that the activities of Pip's agents should be attributed to Pip. Furthermore Pip carried out a number of activities independently of those agents including entry into the outsourcing agreements; managing the company; making payments to a number of individuals who were carrying out activities on behalf of Pip; monetising the animations; appointing a steering group which proposed to undertake significant activities to monetise those animations.

DISCUSSION

69. I deal first with the qualifying trade issue. Unless Pip can establish that it was carrying on trade on commercial basis with a view to the realisation of profits, and even then, that it was not carrying on, wholly or to a substantial extent, excluded activities, then there is no need to consider the risk to capital condition. Pip falls at the first hurdle.

70. For the reasons given below I find that Pip has fallen at that hurdle. In my judgment, at the relevant time, namely the issue dates (to remind you, 17 May 2018 to 14 November 2018) Pip was carrying on a trade but was not doing so on a commercial basis with a view to the realisation of profit. This, strictly speaking, means that I do not have to consider excluded activities nor the risk to capital condition, but because both were fully argued before me, I have done so. In my judgment Pip was not carrying on, wholly or to a substantial part, excluded activities by dint of the safe harbour for royalties and licence fees. But it did not satisfy the risk to capital condition since on the issue dates, it did not have the objective of growing and developing its trade in the long term.

Trading?

71. I remind myself that the authorities make it expressly clear that I cannot consider whether an entity is CHF trading without first ascertaining precisely what it is that entity actually does. It is my view that Pip exploited the intellectual property in the Salties which it had acquired from Mr Ward and Mr Fitzpatrick under the IP agreement and which it developed, through the agency of the CHF entities (mainly CHF Entertainment) into the 78 animated television programmes of Pip Ahoy! Pip then monetised those by entering into a number of contracts to license the programmes to linear television channels (in particular Channel 5) and subsequently to other streaming services such as YouTube and Netflix, and by entering into merchandising agreements, in particular with John Adams to manufacture toys which were then sold on behalf of Pip. The television programmes were also monetised via DVDs, Christmas specials, clothing, games, and other activities. I find this as a fact based on the following evidence.

72. Firstly Mr Ward's evidence. I found Mr Ward to be a credible and convincing witness. He had created the Salties and on meeting Messers Cosgrove and Hall was flattered that they were prepared to come out of retirement and to exploit his idea and that they believed in it so passionately. This passion was continued by Simon Hall when Simon Hall became, in his father's place, a director of Pip in August 2011. I reject Miss Hughes's suggestion that Pip was simply exploiting Mr Ward's personal ambition to exploit the concept. Under the IP agreement, Pip acquired the intellectual property in the concept which was then developed, on its behalf, by CHF entities through the personal agency of Messers Hall Cosgrave and Turner, and those employed by those CHF entities either as freelancers or as employees. Mr Ward said that his

ambition was to monetise his idea and I believe him. He thought the best way of achieving this was through the medium of Pip. His evidence is that he was also concerned about contracts which Pip should have entered into and which I have set out earlier in this decision. We do not have the original merchandising and licensing contracts but we do have the amending addenda, and given that those amend the original contracting parties from CHF Entertainment and respectively John Adams and BCI international, and that those amendments were, basically, made without demur from the CHF personnel who were involved in managing Pip, and it was Mr Ward's evidence that those contracts were originally intended to have been entered into between Pip and the relevant counterparty, this strongly supports his evidence that it was Pip which was intending to monetise the intellectual property and the animated television programmes in the way set out above. I also accept his evidence that those television programmes were intended to be, effectively, a lengthy advertisement to exploit by way of, for example, toys clothing and games. This seems a thoroughly credible business model to me.

73. Pip also entered into the production agreement. Under that agreement Pip agreed to work with CHF to seek firm commitments from broadcasters, networks, third-party financiers to raise funds to produce the animated television programmes, and that CHF would produce those programmes for Pip. This illustrates that Pip intended to, and indeed did, produce those television programmes which it could then monetise.

74. Secondly, as well as the merchandising and licensing contracts mentioned above, Pip entered into a wide variety of contracts with counterparties including individuals and corporates for a wide variety of services, which I have detailed earlier in this decision. Pip made a number of payments to those individuals who have provided services to them to support the exploitation of the intellectual property and the television programmes.

75. Thirdly the information memorandum of 22 November 2011 shows that Pip, having acquired the intellectual property rights to Pip! planned to exploit these by adapting the concept of television and to produce 52 high-quality 11 minute animations that could be sold internationally to broadcasters and that Pip would also licence merchandising publishing and other content rights to generate a continuing revenue stream.

76. Fourthly the directors' reports set out in the financial statements between 2012 and 2018 records that the principal activity of Pip was the development and exploitation of its animated television series Pip Ahoy!.

77. Fifthly, a review of the AGM minutes which I have set out above clearly shows that Pip was seeking to exploit the television programmes by way, for example, of toy sales, and those minutes record the commercial headwinds which Pip experienced in 2017 and 2018.

78. Finally the steering group documents support Pip's contention that it was seeking to monetise the television programmes by way of selling merchandise, for example. Details of those steering group documents are set out above and show that once the television programmes had been relaunched, further merchandising and marketing initiatives would be undertaken including a relaunch of the Pip Ahoy! toys by John Adams.

79. Having found these facts as regards Pip's activities, I now need to consider whether they amount to trading. This has two elements. Firstly do they amount to trading simpliciter; and secondly if they do, was the trade being carried on by Pip or whether, as alleged by HMRC, it was being carried on by CHF entities "vicariously", as Pip had neither the intrinsic capacity to undertake the activities nor the personnel to supervise and control the activities which it had outsourced to those CHF entities.

80. It is my view that Pip was carrying on a trade, and it was Pip and not the CHF entities which were carrying it on. I say that for the following reasons.

81. A company is an intellectual construct. It is created by filing certain documents with Companies House. Its existence therefore depends on words (in written or electronic form). And as such it could no more carry on any form of activity let alone a trading activity than I could fly to the moon. It can only conduct an activity through a human electronic or robotic agency. It is HMRC's view that this agency must be, at least to some extent, conducted "in house", i.e. the activity must be undertaken by employees of the company or, if outsourced, at least supervised or controlled by in-house officers or employees of the company. It is Pip's view that there is nothing preventing that activity being undertaken by an external organisation, even if there is no supervision or control of it, but in any case, on the facts of this appeal, there was such supervision or control.

82. I cannot see any principled difference between the activities being carried out by employees of a company and being carried out by a third party to whom those activities have been outsourced or subcontracted. If the activities are being carried out by employees of the company, the company will pay for the services of those employees and, in return, those employees will generate a product either in terms of goods or services, for the employer. In the case of this appeal, if Pip had employed animators, producers, toy manufacturers and owned a television channel, then I have absolutely no doubt that HMRC would accept that it was carrying on a trade. The animators would have created the television programmes for which they would have been paid. The producers would have produced them for which they would have been paid. The employees in the toy manufacturing limb of Pip would have been paid for making the toys which were then sold to monetise those programmes. The employees of the television channel would have been paid for ensuring that those programmes were properly broadcast. The issue is that, for sensible commercial reasons, Pip outsourced those activities.

83. But in essence all that has happened by doing that is that a different group of people have been paid for conducting those activities. Instead of employees of Pip being paid, or freelancers being paid by Pip direct (and there is evidence of freelancers being paid direct by Pip) the CHF entities and in particular CHF Entertainment have effectively acted as a conduit for Pip's money. Pip has paid CHF in return for which CHF have provided a variety of services to Pip. Pip has also paid third parties for merchandising and licensing. In return for this those entities have either employed individuals to create and produce the animated programmes or manufacture toys, or obtained the services of freelancers to do so. In return for the money that Pip has paid, it has received a product identical to that which it would have received had it undertaken these activities by in-house personnel. Miss Hughes has calculated that over £7 million was paid by Pip to CHF entities, a figure which Ms Brown does not dispute. But this was not paid for nothing. As Ms Brown correctly says, Pip received items of considerable value for this payment, namely the 78, 11 minute animations of Pip Ahoy! This is no different from what would have happened had Pip created and produced those animations using its employees.

84. It is notable that the production agreement reserves all important intellectual property rights to Pip, and this is reflected in the fact that the money paid to Pip by CHF Entertainment was reflected in Pip's balance sheets as an increase to the value of Pip's intangible assets. Miss Hughes questioned whether those increases could be justified, and frankly I have no expertise to say whether those increases in value were, in accounting terms, correct. But what it shows is that the parties recognised that the intellectual property in the animations belonged to Pip and that payments made for its development increased Pip's worth. And I see this as being no different from the position which would have arisen had Pip employed individuals to create

and produce the animations. The money paid by Pip to those employees would have increased Pip's value by dint of the increase in value to its intangible assets. And the intellectual property would have belonged to Pip, either by dint of the principles of general employment law or by the fact that a clause would have been inserted into the employment contracts ensuring that any intellectual property created by those employees would belong to their employer.

85. So as a matter of principle it is my view that a company can trade by outsourcing its activities to a third party. And in this particular case, CHF Entertainment agreed to create the animated programmes of Pip Ahoy! and that it would act as agent for Pip under the Merchandising and Licencing agreement of 1 June 2016.

86. I am fortified in my view that a trade can be conducted by outsourcing by three further indicia. Firstly the Patient Capital Review. The illustration in box A.1 talking about an animation company clearly shows that a company might satisfy the risk to capital condition if it outsources the animation to freelance animators. Secondly the risk to capital legislation in section 157A requires consideration of the extent to which activities of the company are subcontracted. These show that Parliament accepts that subcontracting is a permissible way of conducting trading activities (whilst recognising the extent of that subcontracting may have an impact on the risk to capital condition). Finally, as Millet J as he was then said in *Ensign* at first instance it is open to a partnership like any other trader to act through agents or independent contractors.

87. In my judgment the activities of CHF and the other parties to whom Pip outsourced its activities should be treated as activities carried on by Pip. The question then arises as to whether those activities constitute a trade.

88. In my view they clearly do. It is clear from the authorities and in particular from *Ingenious* that I need to consider all the facts and stand back and look at the whole picture. This is emphasised in *Marson* when considering the badges of trade. To be a trading transaction, there must be a genuine commercial purpose. Trade presupposes that there is a customer i.e. someone with whom the trade is made, and whilst trade is infinitely varied and cannot be precisely defined, certain characteristics can be identified. Miss Hughes urged me that those characteristics set out in *Marson* are relevant to this appeal, whilst Ms Brown suggested that these characteristics belong to an earlier era and were not particularly relevant to the sort of activities undertaken by the appellant. They also dealt with in adventure in the nature of the trade rather than ongoing trading activities. In this case Pip created animated television programmes which were licensed to linear and on demand channels and which it used to promote toys and other goods. It entered into a contract with John Adams to manufacture those toys. Pip clearly had a customer in mind, namely preschool children (and more importantly their parents) at whom the programmes were aimed in order to sell the toys. The sale of toys is clearly a trading activity, and advertising those toys (albeit at huge expense) is simply a way of generating additional sales. I do not think that Pip was trading in intellectual property in the sense that it intended to sell it on having purchased it in 2011. It was using that intellectual property initially through the medium of the animated programmes to generate profit from licensing those programmes and from the sale of toys. Unlike Miss Hughes I do not think that is an investment activity. It is a long way from *Eclipse.* Stripping Pip's activities down to its bare essentials, I find that its bare essentials are identical to its actual activities as set out earlier in this decision. And in contrast to *Eclipse* which did not pay for the production of films nor make a significant contribution towards their exploitation, Pip paid a small fortune for the production of the animated programmes.

89. I find, therefore, as a fact, that the activities of Pip comprised a trade.

90. I now need to consider two further things. Firstly was it Pip carrying out those activities or was it CHF entities. And secondly if it was Pip, whether it was carrying out those activities on the issue dates.

91. It is Miss Hughes' view that because Pip had little capabilities of its own, it was CHF entities which were, vicariously, carrying on the trade in Pip. Although she did not express it in these terms, what I take from her submissions is that HMRC think that it was CHF entities which were using Pip as a conduit for carrying out their activities, rather than Pip itself which was carrying out those trading activities as principal. I do not accept that submission. As I have said above, all the activities which were carried on by the contractual third parties to whom Pip outsourced a variety of activities are attributable to Pip, and that includes the activities which were outsourced to those CHF entities, and in particular CHF Entertainment.

92. It is clear too from the evidence that Pip entered into a number of contracts with individuals and entities other than CHF entities and made payments to those parties.

93. Miss Hughes also submits that Pip did not have the capability to independently supervise the activities of, and contracts entered into with, the CHF entities, as evidenced by the fact that throughout the majority of the period since its incorporation, Pip's officers were also employees of those CHF entities, in particular Jean Hawkins and Simon Hall. And Mr Ward's evidence, that he was director in name only, is telling in that it shows that he did not provide any independent scrutiny of the activities of those CHF entities. And as a question of fact, no such independent scrutiny actually took place.

94. But I am with Ms Brown on the presumption of regularity when she makes the point that there is nothing to suggest that those CHF employees who acted as directors of Pip failed in their fiduciary duty towards Pip and did not act in Pip's best interests. Whilst it might not be perfect corporate governance, all that has happened here is that certain CHF employees have worn two hats, and that of itself does not indicate a failure of fiduciary duty. It was Mr Ward's evidence that Mr Hall cared passionately about Pip, and I accept that evidence. I have seen nothing to suggest that Pip's officers failed to act in the best interests of Pip. It was clearly in Pip's best interests to enter into outsourcing contracts with counterparties who were best placed to assist. In this respect, the entities best placed to assist Pip to produce the animated programmes and develop the intellectual property which had been transferred to it in 2011, were entities associated with Messers Hall and Cosgrove. And once those contracts had been entered into, and that was the major strategic decision that Pip made, it seems to me there was little oversight required since, as Ms Brown suggested, the contracts effectively governed the terms of the relationship. I accept that the presumption of regularity is no more than a rebuttable statement founded on common sense. But the inference which I draw from the evidence I have seen is that Pip's officers acted in Pip's best interests even though they were, at times, employees of CHF entities.

95. I have also come to the conclusion that the value of the intellectual property, and the increase in that value which arose as a result of the money paid by Pip for the production of the animated programmes was properly attributed to Pip in its accounts. I do not accept Miss Hughes' suggestion that the value of intellectual property was built up for the benefit of CHF entities via the medium of Pip. It is clear from the various contracts that the relevant intellectual property rights belonged to Pip. And so, when CHF Entertainment entered into the letter contract with Sir David Jason's company, and reserved the intellectual property rights in the

voice-overs to itself, those intellectual property rights then became owned by Pip as a result of the wording of the merchandising and licensing agreement it had ended entered into with CHF Entertainment.

96. Nor do I think that the promotional material which Miss Hughes cited as evidence that it was CHF entities which were developing promoting and dealing with the Pip brand carries a great deal of weight. It seems to me inevitable that the enviable reputation of Cosgrove Hall should be exploited in the media, to the maximum possible extent, and indeed the CHF entities had a vested interest in so exploiting it since it stood to gain by the additional turnover which it might generate for Pip. So it does not surprise me in the slightest that promotional material disseminated to the media blurred the legal distinction between Pips activities on one hand, and CHF's, on the other.

97. It is also the case that Pip was a CHF entity in that it was part of the CHF empire by dint of its share ownership, and many of the statements made in those promotional materials are correct as a question of fact given they talk about Pip in the context of it being a CHF company.

98. Furthermore, these were statements disseminated to the media, and I suspect those creating the statements applied pretty broad brush to the legal niceties of the precise contractual arrangements between Pip and the CHF entities with whom Pip had contracted. Simply because those disseminating the promotional material to the media associated CHF entities with the Pip brand, does not provide cogent evidence that it was the CHF entities which were trading through Pip, and were building up their intellectual property rights, rather than those of Pip. These were press statements not affidavits.

99. I can also see the force of Mr Ward's suggestion that it would have been confusing for those in the CHF entities to define, precisely, what roles they were playing at any particular time, and whether they were representing Pip on the one hand, or CHF entities, on the other, or Pip, as a member of the broader CHF group. As such, representations made by those individuals are not indicative of the actual contractual relationship.

100. Miss Hughes also submits that the evidence from the information memoranda, and in particular information memorandum version 5 identify a number of issues which suggest that it was CHF Media which was building up the intellectual property rights for its own benefit rather than for Pip's. I do not accept this. It is certainly true that the information memorandum identifies risk factors, such as the departure of key employees from CHF Media, but that is a risk factor if those employees were employed in house, and do not, to me, suggest that CHF was vicariously trading through Pip. Nor do the statements in that document regarding the investment by CHF in investee companies support that submission. CHF Media had by that stage, become an umbrella organisation which invested in the investee companies, one of which was Pip. It is the contractual arrangements which Pip had with CHF entities which are, to my mind, determinative.

101. And so I reject Miss Hughes suggestion that any trading undertaken by Pip was, in reality, undertaken by CHF entities. It is my judgment that it was Pip carrying on the trading activities which I have set out above.

102. Finally the question arises as to whether Pip was trading at the time of the share issues between May 2018 and November 2018. As has been seen from the evidence, much of it delves back into the history of the relationship between Pip and the CHF entities, which is inevitable to provide a full picture of that relationship. But as far as this appeal is concerned, the crucial period is May 2018 to November 2018 which is when the shares were issued for which HMRC

have failed to issue compliance certificates. By this stage, the economic headwinds which were affecting Pip had become readily apparent. Its turnover had fallen from £233,544 in the 2015 accounts, to £70,281 in the 2016 accounts to £30,739, in the 2017 accounts and finally to £9,594, in the July 2018 accounts. Pip was also continuing to make operating losses. The reasons for this are apparent from the directors' reports set out in those financial statements as well as the minutes of the AGM's. These are set out more fully above but in essence there was change in the way in which preschool children watched content, using tablets and video on demand rather than linear television. Whilst the sale of soft toys had gone well, there were problems with the sale of hard toys. Whilst there was an ambition to enter the US market, it would become increasingly difficult to raise funds for the production of the animated programmes, and a further 26 or so episodes would have been required to be produced for a credible attempt to enter the US market.

103. However, as the evidence shows, in the year to July 2018, which covers some of the period during which the shares were issued, Pip has strengthened its board with the creation of the steering committee and a new non-executive director and a variety of initiatives had been undertaken which are more particularly set out in the 2018 report details of which are set out at [49] above. Furthermore, the steering group documents evidence a variety of activities which were intended to monetise the Pip Ahoy! brand.

104. Miss Hughes suggested that Pip's intention was to cease making any further animated programmes after the 78 that had been made, but it was Mr Ward's view that there had simply been a pause, and that there was an intention to make a further 26 or so programmes with a view to entering the US market. Miss Hughes also suggested that the reference in the relevant information memorandum (version 5) and discussions about exit strategies evidenced by the AGM minutes militates against Pip carrying on a trade (even though she prosecuted this point with more conviction when she was making it in the context of the risk to capital condition).

105. Whether or not there was a pause or a halt in the production of the animated programmes, it is my view that Pip was carrying on a trade in the year ending July 2018, and I think it is highly likely, and I find as a fact, that it was also carrying on a trade until November 2018 when the final tranche of relevant shares, was issued.

On a commercial basis with a view to the realisation of profits?

106. The shares must have been issued in order to raise money for a trade conducted on a commercial basis and with a view to the realisation of profits, and furthermore Pip must have existed solely for that purpose at the time the shares were issued.

107. Miss Hughes and Ms Brown both cited *Seven Individuals* as the appropriate authority on trading commercially with a view to profit and extracts from that case are set out in Appendix 2. What I take from that case is that although trading commercially with a view to realising profits are two separate tests, they overlap. The question is whether the trade is being carried on in a way that a person seriously interested in a commercial success would carry it on. Such persons are those with a serious interest in profits and in making a commercial success of the trade.

108. In *Seven Individuals* the judge endorsed the first-tier tribunal's view in Ingenious of view to profit, which had an objective element. That objective element was discredited by the Upper Tribunal in Ingenious, who said it was a wholly subjective test, and that, as can be seen from the extracts from *Ingenious* in Appendix 2, and in particular at paragraphs 121and122 of their decision, was endorsed by the Court of Appeal. However I do not think that affects the

principles set out in *Seven Individuals.*

109. *Ingenious* makes clear that the view to profit test is a purely subjective one. But some sort of reality check is needed, and the question must be answered in the context of the business in question. And whilst there is no objective element to the requirement for a view to profit, the likelihood of profits and the timescale in which they might be achieved will often be relevant to testing whether there is a genuine subjective view to profit.

110. I do not believe that Pip satisfied these tests between May 2018 and November 2018. I say this for the following reasons.

111. The financial statements show that Pip's turnover had been decreasing year on year (see [102]). For the year ended 31 July 2018, its turnover was £9,594. They also show that in each of the years 2012-2018 Pip made an operating loss (see [18]-[23]) The 2018 report makes it clear that the steering committee had been appointed as had Paul Harris as a new non-executive director and much good work being done in seeking to place Pip Ahoy! into different markets and on different platforms from linear television. And that various events had taken place to promote Pip and a wide variety of products were then on the market. These activities are potentially capable of being commercial activities conducted in a commercial way. But whether they are actually commercial requires a consideration of the view to profits test and whether Pip had a serious interest in making profits.

112. I have considered the steering group documents which Ms Brown took me to as evidence that Pip's subjective intention during the relevant period was to make a profit. Mr Ward's evidence was that Pip had always sought, and continue to seek, monetisation of the animated programmes, and make a profit, but during this period, he was not a director even though he was an investor and taking an interest in the company on his own behalf and also on behalf of the investors that he had asked to invest in Pip. So there is no direct evidence from the guiding minds of Pip during this period regarding its subjective intention of making a profit. I must find such intention from other evidence, and, as Miss Hughes has pointed out, it is for the appellant to prove that it had this subjective intention.

113. Details of the steering group of documents are set out [56]-[60]. They tell me two things. Firstly that the company hoped to revamp or relaunch the Pip Ahoy! animated programmes, on the back of which it would increase its licensing revenues, as well as revenues from merchandise. The second is the level of income and profit which Pip anticipated deriving from those activities. There is no evidence as to where these figures have come from, but to my mind they are jawdroppingly optimistic to the extent of being total pie in the sky.

114. As regards turnover. In 2018, the year in which turnover had fallen to about £9,000, the documents project that for the rest of that year, Pip's turnover would be approximately £170,000, and in subsequent years that turnover would increase through £2 million to £3million and then to £4 million plus in 2024 (or 2023 depending on which figures are taken), resulting in a total income over the 5 year period to, say, 2024, of more than £14 million. Pip's maximum turnover between 2011 and 2018 was, I think, in the year to 2015 when its turnover was £233,554, when Pip was actively promoting the first and second series of Pip Ahoy! After that, notwithstanding the creation of the third series and the monetisation through the toy sales and licensing, turnover diminished. It is clear from the directors' reports that this was because of the number of economic factors including the way in which preschool children accessed content, and difficulties over the sale of hard toys.

115. As regards profit. As has been seen, in each of the years between 2012 and 2018 Pip

made an operating loss. However the steering group documents, whilst predicting a negative cash flow for 2018 and 2019, then project positive cash flows rising to a peak in 2022 of £1,702,682 (see [59]). They also predict profits rising rapidly and a cumulative profit for 2019-2023 of £5,808,229 (see [58]).

116. For me it simply beggars' belief that against the background set out in the directors reports, those running Pip in 2018, who were appointed because many of them had serious commercial experience, seriously thought that the revamp that they were suggesting would generate the levels of income and profitability which are set out in the steering group documents. Those figures are wholly unrealistic, and indeed, as things turned out, were clearly wholly incorrect since Pip never made anything like the income anticipated, and went into administration in 2021.

117. I have no evidence as to why those running Pip thought that the revamp would generate those levels of income and profitability. History had shown that Pip was loss-making. I can see nothing in the revamp which was doing anything more than putting Pip into the same situation as it had been in earlier years following the completion of the third series of animated programmes. Yet even following that completion, Pip had failed to monetise those programmes as anticipated and had continued to make operating losses.

118. One thing which might have changed Pip's fortunes was an entry into the US market. But I have no evidence that this was the basis on which these overoptimistic forecasts were made other than a somewhat delphic entry in the draft profit and loss account. That account also refers to series 5 about which I had absolutely no evidence during the hearing and I do not understand why a 5th series was required nor why it might have realistically generated additional revenue. Indeed, the evidence from Mr Ward was that it was becoming increasingly difficult to fund further series' of the animated programmes.

119. It is all very well for Ms Brown to say that a view to profit is a subjective test, but anyone can come up with a series of numbers projecting profit and a self-serving document to support them. I have absolutely no evidence on which to test the reality of the numbers in the steering group documents. In saying this I make no criticism of Ms Brown or Miss Sheldon who are appearing pro bono and have provided the appellant with excellent representation in the best tradition of their profession. And I am drawing no adverse inference from the fact that witnesses that might have come forward to assist, have not done so. But it is for the appellant to show, on the balance of probabilities, that those turnover and profit figures are realistic, and they have provided no evidence to support them.

120. So although it is a subjective test, I cannot accept, at face value, the steering groups turnover and profit projections as conclusive evidence that Pip intended to make a profit. *Ingenious* makes it clear that the likelihood of profits is relevant to testing whether there is a genuine subjective view to profit. There is no evidence about the basis for the figures in the steering group documents. There has been no oral evidence regarding the subjective intention of the officers of Pip to make a profit. And the spectacularly optimistic turnover and profit forecasts are wholly unrealistic and thus to my mind call into question whether there was a genuine subjective view to profit. I do not think that there was such a genuine subjective view given the falling turnover, and the fact that the revamp was doing little more than putting Pip back into the position that it had been in its early years of trading. And during those years, it had turnover which was far below the anticipated income in the steering group documents, and history showed that it had been falling. History also showed that since its incorporation Pip had never made a profit. To my mind these figures are a pious hope rather than evidence of a

genuine intention to make a profit.

121. In my judgment therefore that whilst Pip was carrying on a trade and existed for the purposes of carrying on a trade, at the relevant time, it did not do so on a commercial basis with a view to the realisation of profit. And accordingly, I must dismiss this appeal.

122. However, in case I am wrong on the foregoing conclusion, and given that these issues were fully argued before me I have also considered firstly whether, if Pip was trading commercially with a view to profit, it was carrying on an excluded activity which was not safe harboured by section 195; and secondly whether Pip met the risk to capital condition at the time that the relevant shares were issued. I can deal with these two points in short order.

123. Firstly, as regards the excluded activities, it is my conclusion that whilst Pip did receive royalty or licence fees, Pip's business did not consist wholly or as to a substantial part in carrying on receiving those royalties and licence fees since they fell within the exclusion in section 195. This is because those royalties and licence fees were attributable to the exploitation of relevant intangible assets (namely intellectual property) and the whole or greater part of that value had been created by Pip. The reasons for reaching this conclusion are the same as those that I have set out above, when coming to the conclusion that it was Pip which was carrying on a trade, and not a CHF entity carrying on a trade vicariously through Pip. It was Pip which reserved to itself all intellectual property rights in, for example, the animated programmes both their development and production. Even though the practical production and development was carried out by CHF Entertainment, it did so as agent for Pip. Pip paid for these programmes and received ownership of them in return for that payment. The money paid by Pip for the development of the intellectual property was reflected in Pip's balance sheet as an increase in the value to its intangible assets.

124. Secondly, as regards the risk to capital condition, I find that at the relevant time it is not reasonable to conclude that Pip had objectives to grow and develop its trade in the long-term. I say this for the same reasons as I have given for coming to the conclusion that Pip was not trading on a commercial basis with a view to profit. The risk to capital condition has an objective element and it is my objective view that Pip did not have the objectives of growing and developing its trade in the long-term. The aspirations of the steering group which Miss Brown has given as evidence of that long-term objective are wholly unrealistic when tested against the trading history and financial performance of Pip between 2011 and 2018.

125. Finally, as regards both the commerciality and trading with a view to profit tests and the risk to capital condition Pip did not satisfy these tests at the relevant time, i.e. between May 2018 and November 2018 when the relevant shares were issued. The monetisation of Pip suffered because of unlucky timing. It produced animated programmes, designed for viewing on linear television, at a time when preschool children's appetite for viewing content was changing very rapidly. As a result Pip was always playing catch up. To my mind one of the most telling pieces of evidence given by Mr Ward, to which neither counsel referred in their submissions, was the conversation which Mr Ward had with Keith Chapman who invented Bob the Builder. He told Mr Ward that Pip Ahoy had missed the boat (no pun intended) in that it was a bit stale and a little quaint, and was behind the times given the number of rather harder edged programmes being broadcast and which were finding success with preschool children. The evidential history of Pip, and the problems that it faced as evidenced by the directors' reports, the AGM minutes, Mr Ward's evidence, and its financial performance, bear out this view. I think there was little realistic possibility in 2018 at the time of the relevant share issues that, notwithstanding the platitudes set out in the steering group documents, there was any

realistic possibility of Pip growing or developing in the long term.

DECISION

126. For the foregoing reasons, I dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

127. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 20 0CTOBER 2021

APPENDIX 1

LEGISLATION

The relevant legislative provisions in force at the time include the following, all of which are found within Part 5 of ITA 2007 which establishes EIS relief.

156 Meaning of "EIS relief" and commencement

(1) This Part provides for EIS income tax relief ("EIS relief"), that is, entitlement to tax reductions in respect of amounts subscribed by individuals for shares.

(2) In this Part "EIS" stands for the enterprise investment scheme.

(3) In accordance with section 1034(3), this Part has effect only in relation to shares issued on or after 6 April 2007.

This is subject to Schedule 2 (transitional provisions and savings).

157 Eligibility for EIS relief

(1) An individual ("the investor") is eligible for EIS relief in respect of an amount subscribed by the investor on the investor's own behalf for an issue of shares in a company ("the issuing company") if–

(za) the risk-to-capital condition is met (see section 157A),

(a) the shares ("the relevant shares") are issued to the investor,

(aa) the shares are issued before 6 April 2025,

(b) the investor is a qualifying investor in relation to the relevant shares (see Chapter 2),

(c) the general requirements (including requirements as to the purpose of the issue of shares and the use of money raised) are met in respect of the relevant shares (see Chapter 3), and

(d) the issuing company is a qualifying company in relation to the relevant shares (see Chapter 4).

(1A) The Treasury may, by regulations, amend subsection (1)(aa) to substitute a different date for the date for the time being specified there.

157A Risk-to-capital condition

(1) The risk-to-capital condition is met if, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that—

(a) the issuing company has objectives to grow and develop its trade in the long-term, and

(b) there is a significant risk that there will be a loss of capital of an amount greater than the net investment return.

(2) For the purposes of subsection (1)(b)—

(a) the risk is to be determined by reference to a loss of capital, and the net investment return, for the investors generally,

(b) the reference to a loss of capital is to a loss of some or all of the amounts subscribed for the shares by the investors, and

(c) the reference to the net investment return is to the net investment return to the investors (whether by way of income or capital growth) taking into account the value of EIS relief.

(3) For the purposes of subsection (1) the circumstances to which regard may be had include—

(a) the extent to which the company's objectives include increasing the number of its employees or the turnover of its trade,

(b) the nature of the company's sources of income, including the extent to which there is a significant risk of the company not receiving some or all of the income,

(c) the extent to which the company has or is likely to have assets, or is or could become a party to arrangements for acquiring assets, that could be used to secure financing from any person,

(d) the extent to which the activities of the company are subcontracted to persons who are not connected with it,

(e) the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure,

(f) how any opportunity for investment in the company is marketed, and

(g) the extent to which arrangements are in place under which opportunities for investments in the company are or may be marketed with, or otherwise associated with, opportunities for investments in other companies or entities.

(4) If the issuing company is a parent company—

(a) any reference in this section to the company's trade is to what would be the trade of the group if the activities of the group companies taken together were regarded as one trade, and

(b) any reference in subsection (3)(a) to (e) to the company is to any group company.

174 The purpose of the issue requirement

(1) The relevant shares (other than any of them which are bonus shares) must be issued in order to raise money for the purpose of a qualifying business activity so as to promote business growth and development.

(2) For this purpose "business growth and development" means the growth and development of—

(a) if the issuing company is a single company, the business of that company, and

(b) if the issuing company is a parent company, what would be the business of the group if the activities of the group companies taken together were regarded as one business.

178A The no disqualifying arrangements requirement

(1) The relevant shares must not be issued, nor any money raised by the issue employed, in consequence or anticipation of, or otherwise in connection with, disqualifying arrangements.

(2) Arrangements are "disqualifying arrangements" if—

(a) the main purpose, or one of the main purposes, of the arrangements is to secure—

(i) that a qualifying business activity is or will be carried on by the issuing company or a qualifying 90% subsidiary of that company, and

(ii) that one or more persons (whether or not including any party to the arrangements) may obtain relevant tax relief in respect of shares issued by the issuing company which raise money for the purposes of that activity or that such shares may comprise part of the qualifying holdings of a VCT,

(b) that activity is the relevant qualifying business activity, and

(c) one or both of conditions A and B are met.

(3) Condition A is that, as a (direct or indirect) result of the money raised by the issue of the relevant shares being employed as required by section 175, an amount representing the whole or the majority of the amount raised is, in the course of the arrangements, paid to or for the benefit of a relevant person or relevant persons.

(4) Condition B is that, in the absence of the arrangements, it would have been reasonable to expect that the whole or greater part of the component activities of the relevant qualifying business activity would have been carried on as part of another business by a relevant person or relevant persons.

(5) For the purposes of this section it is immaterial whether the issuing company is a party to the arrangements.

(6) In this section—

"component activities" means—

(a) if the relevant qualifying business activity is activity A (see section 179(2)), the carrying on of a qualifying trade or preparing to carry on such a trade, which constitutes that activity, and

(b) if the relevant qualifying business activity is activity B (see section 179(4)), the carrying on of research and development which constitutes that activity;

"qualifying holdings", in relation to the issuing company, is to be construed in accordance with section 286 (VCTs: qualifying holdings);

"relevant person" means a person who is a party to the arrangements or a person connected with such a party;

"relevant qualifying business activity" means the activity for the purposes of which the issue of the relevant shares raised money;

"relevant tax relief", in respect of shares, means one or more of the following—

(a) EIS relief in respect of the shares;

(b) SEIS relief under Part 5A in respect of the shares;

(ba) SI relief under Part 5B in respect of the shares;

(c) relief under Chapter 6 of Part 4 (losses on disposal of shares) in respect of the shares;

(d) relief under section 150A or 150E of TCGA 1992 (enterprise investment scheme) in respect of the shares;

(e) relief under Schedule 5B to that Act (enterprise investment scheme: reinvestment) in consequence of which deferral relief is attributable to the shares (see paragraph 19(2) of that Schedule);

(f) relief under Schedule 5BB to that Act (seed enterprise investment scheme: reinvestment) in consequence of which SEIS re-investment relief is attributable to the shares (see paragraph 4 of that Schedule).

179 Meaning of "qualifying business activity"

(1) In this Part "qualifying business activity", in relation to the issuing company, means–

(a) activity A, or

(b) activity B,

if it is carried on by the company or a qualifying 90% subsidiary of the company.

(2) Activity A is–

(a) the carrying on of a qualifying trade which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or

(b) the activity of preparing to carry on (or preparing to carry on and then carrying on) a qualifying trade–

(i) which, on that date, is intended to be carried on by the company or such a subsidiary,and

(ii) which is begun to be carried on by the company or such a subsidiary within two years after that date.

[3]…..

(4) Activity B is the carrying on of research and development–

(a) which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or which the company or such a subsidiary begins to carry on immediately afterwards, and

(b) from which, on that date, it is intended–

(i) that a qualifying trade which the company or such a subsidiary will carry on will be derived, or

(ii) that a qualifying trade which the company or such a subsidiary is carrying on, or will carry on, will benefit.

[5]……..

(6) In determining–

(a) for the purposes of subsection (2)(b) when a qualifying trade is begun to be carried on by a qualifying 90% subsidiary of the company, or

(b) for the purposes of subsection (4)(a) when research and development is begun to be carried on by such a subsidiary,

any carrying on of the trade or, as the case may be, the research and development by it before it became such a subsidiary is ignored.

(7) References in subsection (2)(b)(i) or (4)(b) to a qualifying 90% subsidiary of the company include references to any existing or future company which will be such a subsidiary at any future time.

181 The trading requirement

(1) The issuing company must meet the trading requirement throughout period B.

(2) The trading requirement is that–

(a) the company, ignoring any incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades, or

(b) the company is a parent company and the business of the group does not consist wholly or as to a substantial part in the carrying on of non-qualifying activities.

(3) If the company intends that one or more other companies should become its qualifying subsidiaries with a view to their carrying on one or more qualifying trades–

(a) the company is treated as a parent company for the purposes of subsection (2)(b), and

(b) the reference in subsection (2)(b) to the group includes the company and any existing or future company that will be its qualifying subsidiary after the intention in question is carried into effect.

This subsection does not apply at any time after the abandonment of that intention.

(4) For the purpose of subsection (2)(b) the business of the group means what would be the business of the group if the activities of the group companies taken together were regarded as one business.

(5) For the purpose of determining the business of a group, activities are ignored so far as they are activities carried on by a mainly trading subsidiary otherwise than for its main purpose.

(6) For the purposes of determining the business of a group, activities of a group company are ignored so far as they consist in–

(a) the holding of shares in or securities of a qualifying subsidiary of the parent company,

(b) the making of loans to another group company,

(c) the holding and managing of property used by a group company for the purpose of one or more qualifying trades carried on by a group company, or

(d) the holding and managing of property used by a group company for the purpose of research and development from which it is intended–

(i) that a qualifying trade to be carried on by a group company will be derived,or

(ii) that a qualifying trade carried on or to be carried on by a group company will benefit.

(7) Any reference in subsection (6)(d)(i) or (ii) to a group company includes a reference to any existing or future company which will be a group company at any future time.

(8) In this section–

"incidental purposes" means purposes having no significant effect (other than in relation to incidental matters) on the extent of the activities of the company in question,

"mainly trading subsidiary" means a qualifying subsidiary which, apart from incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades, and any reference to the main purpose of such a subsidiary is to be read accordingly, and

"non-qualifying activities" means–

(a) excluded activities, and

(b) activities (other than research and development) carried on otherwise than in the course of a trade.

(9) This section is supplemented by section 189 (meaning of "qualifying trade") and sections 192 to 199 (excluded activities).

189 Meaning of "qualifying trade"

(1) For the purposes of this Part, a trade is a qualifying trade if–

(a) it is conducted on a commercial basis and with a view to the realisation of profits, and

(b) it does not at any time in period B consist wholly or as to a substantial part in the carrying on of excluded activities.

(2) References in this section and sections 192 to 198 to a trade are to be read without regard to the definition of "trade" in section 989.

192 Meaning of "excluded activities"

(1) The following are excluded activities for the purposes of sections 181 and 189–

(a) dealing in land, in commodities or futures or in shares, securities or other financial instruments,

(b) dealing in goods otherwise than in the course of an ordinary trade of wholesale or retail distribution,

(c) banking, insurance, money-lending, debt-factoring, hire-purchase financing or other financial activities,

(d) leasing (including letting ships on charter or other assets on hire),

(e) receiving royalties or licence fees,

(f) providing legal or accountancy services,

(g) property development,

(h) farming or market gardening,

(i) holding, managing or occupying woodlands, any other forestry activities or timber production,

(ia) shipbuilding,

(ib) producing coal,

(ic) producing steel,

(j) operating or managing hotels or comparable establishments or managing property used as an hotel or comparable establishment,

(k) operating or managing nursing homes or residential care homes or managing property used as a nursing home or residential care home,

(ka) generating or exporting electricity or making electricity generating capacity available,

(kb) generating heat,

(kc) generating any form of energy not within paragraph (ka) or (kb),

(kd) producing gas or fuel, and

(l) any activities which are excluded activities under section 199 (provision of services or facilities for another business).

(2) Subsection (1) is supplemented by the following provisions–

(a) section 193 (wholesale and retail distribution),

(b) section 194 (leasing of ships),

(c) section 195 (receipt of royalties and licence fees),

(d) section 196 (property development),

(da) section 196A (shipbuilding),

(db) section 196B (producing coal),

(dc) section 196C (producing steel),

(e) section 197 (hotels and comparable establishments),

(f) section 198 (nursing homes and residential care homes)

(g) section 198A (export of electricity).

195 Excluded activities: receipt of royalties and licence fees

(1) This section supplements section 192(1)(e) (receipt of royalties and licence fees).

(2) If the requirement of subsection (3) is met, a trade is not to be regarded as consisting in the carrying on of excluded activities within section 192(1)(e) as a result only of its consisting to a substantial extent in the receiving of royalties or licence fees.

(3) The requirement of this subsection is that the royalties or licence fees (or all but for a part that is not a substantial part in terms of value) are attributable to the exploitation of relevant intangible assets.

(4) For this purpose an intangible asset is a "relevant intangible asset" if the whole or greater part (in terms of value) of it has been created–

(a) by the issuing company, or

(b) by a company which was a qualifying subsidiary of the issuing company throughout a period during which it created the whole or greater part (in terms of value) of the intangible asset.

(5) In the case of an intangible asset that is intellectual property, references to the creation of an asset by a company are to its creation in circumstances in which the right to exploit it vests in the company (whether alone or jointly with others).

(6) In this section–

"intangible" asset means any asset which falls to be treated as an intangible asset in accordance with generally accepted accountancy practice,

"intellectual property" means–

(a) any patent, trade mark, registered design, copyright, design right, performer's right or plant breeder's right, or

(b) any rights under the law of a country or territory outside the United Kingdom which correspond or are similar to those falling within paragraph (a).

(7) If–

(a) the issuing company acquired all the shares ("old shares") in another company ("the old company") at a time when the only shares issued in the issuing company were subscriber shares, and

(b) the consideration for the old shares consisted wholly of the issue of shares in the issuing company,

references in subsection (4) to the issuing company include the old company.

204 Compliance certificates

(1) A "compliance certificate" is a certificate which–

(a) is issued by the issuing company in respect of the relevant shares,

(b) states that, except so far as they fall to be met by or in relation to the investor, the requirements for EIS relief are for the time being met in relation to those shares, and

(c) is in such form as the Commissioners for Her Majesty's Revenue and Customs may direct.

(2) Before issuing a compliance certificate in respect of the relevant shares, the issuing company must provide an officer of Revenue and Customs with a compliance statement in respect of the issue of shares which includes the relevant shares.

(3) The issuing company must not issue a compliance certificate without the authority of an officer of Revenue and Customs.

(4) If the issuing company, or a person connected with the issuing company, has given notice to an officer of Revenue and Customs under section 241 of this Act or paragraph 16(2) or (4) of Schedule 5B to TCGA 1992, a compliance certificate must not be issued unless the authority is given or renewed after the receipt of the notice.

(5) If an officer of Revenue and Customs–

(a) has been requested to give or renew an authority to issue a compliance certificate, and

(b) has decided whether or not to do so,

the officer must give notice of the officer's decision to the issuing company.

206 Appeal against refusal to authorise compliance certificate

For the purpose of the provisions of TMA 1970 [Taxes Management Act 1970] relating to appeals, the refusal of an officer of Revenue and Customs to authorise the issue of a compliance certificate is taken to be a decision disallowing a claim by the issuing company.

APPENDIX 2

RELEVANT CASE LAW

1. TRADING

INGENIOUS GAMES

(1) In the Court of Appeal decision in *Ingenious Games LLP v HMRC* [2021] EWCA Civ 1180 ("***Ingenious***"), the court said this;

> "8. Furthermore, both issues have wider repercussions outside the field of tax law. The need for a business to be carried on with a view to, or with a view of, profit is a precondition of the existence of an unincorporated partnership under the general law (see section 1(1) of the Partnership Act 1890, which defines partnership as "the relation which subsists between persons carrying on a business in common *with a view of profit*"), as it is of the incorporation of an LLP (see section 2(1)(a) of the Limited Liability Partnerships Act 2000, which provides that for an LLP to be incorporated "two or more persons associated for carrying on a lawful business *with a view to profit* must have subscribed their names to an incorporation document").
>
> 9. Trade is also a concept which has been left undefined for tax purposes, the only relevant guidance (now contained in section 989 of ITA 2007) being that it includes "any venture in the nature of trade". Previously, the word used was "adventure" in the nature of trade (see the definition in section 832(1) of ICTA 1988, which applied generally in the interpretation of the Tax Acts), but the meaning of the two expressions is presumably the same. As Lord Wilberforce said, in *Ransom v Higgs* [1974] 1 WLR 1594 at 1610, referring to corresponding provisions in the Income Tax Act 1952:
>
> > "We have rather to apply to the facts the legal concept of "trade."…This may be called a concept of common law. Trade has for centuries been, and still is part of the national way of life: everyone is supposed to know what "trade" means: so Parliament, which wrote it into the Law of Income Tax in 1799, has wisely abstained from defining it and has left it to the Courts to say what it does or does not include."
>
> 10. It is therefore important that, in considering these two issues of principles, we should bear in mind the wider contexts in which they are relevant, and resist any temptation to give them an unduly narrow meaning because of the tax avoidance context in which the questions arise……..
>
> **II. The trading issue**
>
> **The law**
>
> 49. There appears to be no substantial disagreement between the LLPs and HMRC about the basic tests which have to be satisfied if an activity is properly to be characterised as a trade. Nor is it now contended by either side that the Tribunals below materially misunderstood the relevant legal principles. We can therefore deal with the underlying law relatively briefly, before turning to a more detailed examination of the decisions of Millett J (as he then was) in the High Court, and of the House of Lords, in *Ensign Tankers Ltd v Stokes* [1989] 1 WLR 1222, [1992] 1 AC 655, ("*Ensign*") upon which the LLPs have at all stages placed considerable reliance. We will also need to refer

to a series of more recent cases in this court, starting with *Eclipse Film Partners No. 35 LLP v HMRC* [2015] EWCA Civ 95, [2015] STC 1245 ("*Eclipse*"), in which this court has consistently declined to interfere with evaluative conclusions of the FTT that the activities there in question did *not* constitute a trade, but were instead investments.

50. A good starting point remains *Ransom v Higgs*, to which we have already referred for Lord Wilberforce's description of the legal concept of "trade" as a concept of common law, which Parliament has left it to the courts to develop: see [9] above. As Lord Wilberforce observed, shortly before the passage we have quoted, the court was there "concerned with some sophisticated transactions, evidently the product of expert intellects in the tax avoidance business". He continued to give this guidance, at 16101611:

> "Trade is infinitely varied; so we often find applied to it the cliché that its categories are not closed. Of course they are not: but this does not mean that the concept of trade is without limits so that any activity which yields an advantage, however indirect, can be brought within the net of tax…
>
> "Trade" cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed. The present is not such a case: it involves the question as one of recognition whether the characteristics of trade are sufficiently present.
>
> …
>
> Trade involves, normally, the exchange of goods, or of services, for reward…Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral—you must trade with someone.
>
> …
>
> Then there are elements or characteristics which prevent a trade being found, even though a profit has been made—the realisation of a capital asset, the isolated transaction (which may yet be a trade)…Although these are general characteristics which one cannot state in terms of essential prerequisites, they are useful benchmarks, so when one is faced with a novel set of facts, as we are here, the best one can do is to apply them as tests in order to see how near to, or far from, the norm these facts are. I attach no importance to the fact that, if there was trade, there is a difficulty in knowing what to call it. Christening normally follows some time after birth…"

51. In the same case, Lord Morris of Borth-y-Gest said at 1606D:

> "In considering whether a person " carried on " a trade it seems to me to be essential to discover and to examine what exactly it was that the person did."

In the present case, the FTT quoted that statement, although they misattributed it to Lord Reid, before continuing, in terms which we would respectfully endorse, at FTT/358:

> "That means what the LLPs did, not their members, and not what was done by Ingenious for itself or other persons. It will involve a weighing of a number of factors, the relevance and importance of which will depend on the circumstances. There is no complete list of those factors and no rule that any one or more of them are decisive…"

52. A number of factors which experience has shown to be useful in performing this exercise have come to be known as the "badges of trade". They were conveniently set out by Sir Nicolas Browne-Wilkinson V.- C. in *Marson v Morton* [1986] 1 WLR 1343 at 1348-1349, but Sir Nicolas emphasised at 1348C that the factors were "in no sense a comprehensive list of all relevant matters", and after setting them out he said at 1349C:

> "I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to go back to the words of the statute – was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

It should be noted, however, that these observations were made in the context of a

> "single transaction" case, where the question was whether it constituted an adventure in the nature of trade.

53. In *Eclipse*, the judgment of this court was delivered by Sir Terence Etherton C, who said at [112]:

> "As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal."

54. Sir Terence Etherton C went on to say, at [113]:

> "It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law…"

Ensign

63. In coming to these conclusions, Millett J had set out his understanding of the relevant law in nine numbered sub-paragraphs at 1232D to 1234B. The passage is of considerable length, so we will not reproduce it in full. The passage as a whole is set out at UT/164. We will content ourselves with the following brief extracts:

> "(1) In order to constitute a transaction in the nature of trade, the transaction in question must possess not only the outward badges of trade but also a genuine commercial purpose.
>
> (2) If the transaction is of a commercial nature and has a genuine commercial purpose, the presence of a collateral or ulterior purpose to obtain a tax advantage does not "denature" what is essentially a commercial transaction. If, however, the *sole* purpose of the transaction is to obtain a fiscal advantage, it is logically impossible to postulate the existence of any commercial purpose.
>
> (3) Where commercial and fiscal purposes are both present, questions of fact and degree may arise, and these are for the commissioners. Nevertheless, the question is not which purpose was predominant, but whether the transaction can fairly be described as being in the nature of trade.
>
> (4) The purpose or object of the transaction must not be confused with the motive of the taxpayer in entering into it…
>
> (5) The test is an objective one…
>
> (6) In considering the purpose of a transaction, its component parts must not be regarded separately but the transaction must be viewed as a whole…"

64. We have spent some time on the judgment of Millett J, because it brings out a number of important points in a factual context with considerable similarities to the present case. In particular, it illustrates the need to find "a genuine commercial purpose", and the general irrelevance of fiscal motive in answering the objective question whether the transaction viewed as a whole constitutes a trade……..

70. A similar result was also reached in yet another film scheme case, *Degorce v HMRC* [2017] EWCA Civ 1427, [2018] 4 WLR 79 ("*Degorce*"), where the leading judgment in this court was again delivered by Henderson LJ. The film scheme was of a different character from those in *Eclipse* and *Samarkand*, and indeed from the scheme in the present case. But we do not consider it necessary to describe the case in any more detail, because it added nothing of significance to the legal principles which we have already discussed. The same is true of a fourth case to which we were referred, *Brain Disorders Research Ltd_Partnership v HMRC* [2018] EWCA Civ 2348, [2018] STC 2382, in which the leading judgment in this court was delivered by Patten LJ……..

104. For present purposes, however, we do not need to resolve those questions, or enter into an arid debate about the precise extent to which the facts of the present case mirror those of *Ensign*. It is seldom, if ever, useful to look to earlier authorities for supposed analogies on the facts, when what is in issue is the application of legal principles to a new factual situation…….

119. In the present case, the UT held, and the parties are now agreed, that the words "with a view to profit" import a wholly subjective test. It must be the actual subjective intention or purpose of the putative partners to make profits from carrying on their trade, profession or business. This is not a question of motive. People may have many reasons why they aim to make profits, including, for example, to support themselves and their families, to make charitable gifts or to create tax losses. For these purposes, they are beside the point. It is the genuine subjective purpose of the partners to make profits from their trade, profession or business which is the defining feature of a partnership.

120. The FTT held that there was an objective element to the requirement for a view to profit.

> There had to be a realistic possibility of profit. It is not entirely clear to us whether the FTT understood this to be a further requirement, in addition to showing a genuine subjective purpose, or an alternative way of satisfying the test even where no subjective purpose could be shown. As it was the LLPs who were at that stage advancing this approach, one might have thought it was the latter, but it does not matter because on either basis it was an error.

121. We endorse the way it was expressed by the UT at UT/333:

> "We consider the better view to be that the test is a purely subjective one. There is no need for profit to be the predominant aim. As is noted in Lindley & Banks, difficult questions can arise when any profit-making aim is subsidiary to other purposes. In those circumstances, it is necessary to consider at what point the line is crossed and there is in fact no view to profit. Some sort of "reality check" is needed. It is necessary to identify whether there is a "real" intention rather than something that was not, in fact or reality, aimed for. The question as to whether a trade was carried on "with a view to profit" also cannot be answered in isolation, divorced from the context of the business in question. The context of "carries on a trade…" directs attention at least to some extent to the way in which the trade is conducted. Furthermore, an indifference to whether a profit is realised is not sufficient to meet the test. In this case, therefore, the FTT would have had to have been satisfied that the LLPs had genuinely intended to seek a profit from their activities."

122. While there is no objective element to the requirement for a view to profit, the likelihood of profits and the timescale in which they might be achieved will often be relevant to testing whether there is a genuine subjective view to profit. This was well expressed by the UT at UT/345:

> "Where the intention being tested is that of experienced businessmen, the lack of any realistic potential for or likelihood of profit on an objective basis may call into question whether there is a (subjective) view to profit. Experienced businessmen of course take risks, and different individuals will be willing to take differing levels of risk, but businessmen will generally seek to satisfy themselves that the risks are worth taking for the potential return on capital employed, at least if they are risking their own funds. The dynamics may differ where it is someone else's money that is at risk of being lost. HMRC repeatedly submitted that this was a case where the investment was being made with other people's money, namely that of the Exchequer in the form of the monies that the investors expected to receive from

HMRC by way of tax repayments. And the extent of the risk taken may depend not only on the risk appetite of the investors but on the degree to which the individuals making the decisions are answerable for any failure, or incentivised by success."

ECLIPSE

(2) In the Court of Appeal Decision in *Eclipse v HMRC* [2015] STC 1429 ("***Eclipse***"), Sir Terence Etherington said this:

> **[122]** Eclipse 35's case is that the combination of those matters must as a matter of law lead to the conclusion that Eclipse 35 was carrying on a trade.
>
> **[123]** We do not agree. Our reasons can be stated quite briefly. The proper characterisation of the business of Eclipse 35 depends upon the totality of its activity and enterprise. Stripping the business down to its essential elements, the transactions on which Eclipse 35 was engaged had two aspects. One aspect was that a payment by Eclipse 35 of £503m would be repaid with interest over a 20-year term and would produce a profit unrelated to the success or otherwise of the exploitation of the Rights sub-licensed. That aspect had the character of an investment. Mr Aaronson did not argue to the contrary.
>
> **[124]** The second aspect was the possibility of Eclipse 35 obtaining a share of Contingent Receipts and the activity on the part of Eclipse 35 to secure such a share. The FTT considered that this second aspect was in real and practical terms insufficiently significant in the context of Eclipse 35's business as a whole to lead to a proper characterisation of Eclipse 35's business as one of trade within the meaning of the tax legislation. In our judgment, that was a conclusion which the FTT were entitled to reach and, indeed, with which we agree.
>
> **[125]** The view of the FTT on this point is encapsulated in para [402] of their decision when they said that 'the prospect of Eclipse 35 actually receiving any Contingent Receipts was so remote as to make wholly unrealistic a conclusion that the entitlement to Contingent Receipts under the sub-licence of the rights in the Films gave the sub-licence the character of a trading transaction'. That mirrored the language they had used in para [314] of their decision
>
> **[148]** We turn finally to the other way in which Mr Aaronson put Eclipse 35's case, namely that the acquisition of the licence to the Rights and the sub-licensing of them for consideration and with a view to profit constituted inherently and as a matter of law carrying on a trade. We do not agree and we do not consider that the cases relied upon by Mr Aaronson justify his submission. We have summarised above the general principles and approach in this type of case, namely that what is necessary is an evaluation of the precise facts against the background of the meaning of the statute. The facts in the cases relied upon by Eclipse 35 were very different from those of the present case. In *Pearn v Miller* the taxpayer bought on mortgage five tenanted properties over a five year period. He repaired them and sold two of them to the tenants. Rowlatt J remitted to the Commissioners to determine whether what the taxpayer did was a trade or an adventure or concern in the nature of trade. In *Johnston v Heath* Goff J held that the taxpayer was engaged in an adventure in the nature of a trade where he entered into a contract to purchase land having already contracted to sell it to someone else.

[149] In *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] STC 226, [1992] 1 AC 655 the House of Lords held that a partnership between the taxpayer and others and the subsidiary of an American film production company to produce and exploit a film then in the course of production by the production company was carrying on a trade. The substance of its activity was to expend $US3.25m towards the commercial exploitation of the film in which they had a 25 per cent interest. Millett J said at first instance ([1989] STC 705 at 761, [1989] 1 WLR 1222 at 1232):

> "The production of a film, or the completion of an uncompleted film or, I might add, the purchase of a completed film, in each case with a view to its distribution and exploitation for profit, are all typical, though highly speculative, commercial transactions in the nature of trade."

[150] In the House of Lords Lord Templeman said ([1992] STC 226 at 241, [1992] 1 AC 655 at 677) that '[t]he production and exploitation of a film is a trading activity'.

[151] By contrast with that case, Eclipse 35 did not pay for the production of the Films and the FTT concluded that the reality was that it did not make a significant contribution towards their exploitation……

MARSON v MORTON

(3) In *Marson v Morton* [1986] STC 463 ("***Marson***"), Sir Nicolas Browne-Wilkinson V-C said this:

> "It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital profit, there do seem to be certain things which the authorities show have been looked at. For c convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them, so far as I can see, decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate. The matters which are apparently treated as a badge of trading are as follows: (i) that the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else. (ii) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel. (iii) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman of the commissioners quoted from Inland Revenue Commissioners v. Reinhold, 1953 S.C. 49. For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment. (iv) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature? (v) What was the source of finance of the transaction? If the money was

borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade. (vi) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade. (vii) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought. (viii) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself. (ix) Did the item purchased either provide. enjoyment for the purchaser, for example a picture, or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the tum. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment.

c I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade?.....”

ENSIGN TANKERS

(4) In *Ensign Tankers v Stokes* [1989] WLR 1222 (“***Ensign***”) in the High Court, Millet J said at 1238A:

“…..Those arrangements did not call for any significant degree of activity on the part of Victory Partnership. But it is not true that a partnership can act only through its partners. It is open to a partnership, like any other trader, to act through agents or independent contractors. Were it not for the availability of first year allowances and the effect of the "gearing" produced by the form which the arrangements took, no one would think that the absence of subsequent activity by Victory Partnership deprived the arrangements made on 14 July 1980 of their commercial character…..”

SEVEN INDIVIDUALS

(5) In *Seven Individuals v HMRC* [2017] UKUT 132, (“***Seven Individuals***”) Mr Justice Nugee said:

40. Even without reference to authority, I would have found it difficult to accept this submission. As a matter of ordinary language to run a trade or business “on a commercial basis” suggests running the trade or business in a way that is at any rate

designed to succeed as a commercial venture, that is one which is worth doing from a financial point of view. It is true that this means that there is an inevitable overlap between the commercial limb and profits limb, but the alternative would be to empty the commerciality limb of any connection with profit or profitability, when that is a central part of what would normally be understood by a reference to acting commercially…..

46. I do not accept this variant of the submission either. I agree that a trade can fail the commerciality limb in different ways. This is indeed what Robert Walker J says in *Wannell v Rothwell* where he refers to a trade being uncommercial either because the terms of trade are uncommercial, the prices not covering the costs, or because of the way the trade is conducted in other respects. So I agree that a trader can fail the commerciality limb either because of a lack of commercial organisation (Mr Maugham's class 1A) or because of a lack of any interest in making money (Mr Maugham's class 1B). But I do not think it follows that as long as the trade is sufficiently organised and the trader hopes to make a profit (Mr Maugham's class 2) that is always enough. Let us assume that a trade is well organised. The question whether such a trade is being carried on on commercial lines is not to my mind answered simply by pointing to a hope by the trader to make profits. A trade run on commercial lines seems to me to be a trade run in the way that commercially-minded people run trades. Commercially-minded people are those with a serious interest in profits, or to put it another way, those with a serious interest in making a commercial success of the trade. If therefore a trade is run in a way in which no-one seriously interested in profits (or seriously interested in making a commercial success of the trade) would run it, that trade is not being run on commercial lines.

47. That is in effect what we said in the UT in *Samarkand* at [97], which has been endorsed by Henderson LJ in the Court of Appeal. If that is right, it is not I think an answer to point to the hope of the trader that profits will nevertheless be made. In other words the concept of a trade carried on on commercial lines has an objective element to it, and cannot be satisfied by proof merely that the trade is well organised and that the trader had a purely subjective hope or desire to make a profit……..

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(1) ….

(2) ….

(3) Most significantly, however, all that the FTT decided in *Ingenious Games* was that there should be some realistic possibility of a profit. This cuts out the "extreme" case see where there is no realistic possibility of a profit (see [490(k)]), but says nothing about how probable or likely such a profit needs to be. But when assessing whether a trade is being carried on on commercial lines, the likelihood of profit seems to me to be central to an assessment of its commerciality. The question is whether the trade is being carried on in a way that a person seriously interested in commercial success would carry it on. Such a person would be unlikely to regard a trade which had a remote possibility of a small profit as worth carrying on as a commercial venture, even though it could be said that there was a realistic possibility of profit.

2. PRESUMPTION OF REGULARITY

(1) The presumption is one of fact and is described in the following way in *Harris v Knight* (1890) 15 PD 170 (at page 179) by Lindley LJ:

> The maxim, 'Omnia praesumuntur rite esse acta', is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.

(2) This was quoted in *Entrust Pensions Limited v Prospect Hospice Limited* [2012] EWHC 3640 (Ch) at paragraph 39 et seq, which says:

> This passage appears to suggest that the maxim will be of assistance only where there would otherwise be no proof one way or the other; but since the maxim is also stated to be "an expression . . . of a reasonable probability and an inference which may reasonably be drawn", I would respectfully question whether it really adds anything to the power which the court anyway has to make a finding of fact on the balance of probabilities based on inferences drawn from circumstantial evidence. But if that is right, the so-called presumption is really no more than a rebuttable statement, founded on common sense and experience, of the inference that it will normally be appropriate to draw in a given situation where primary evidence is lacking.

(3) *Entrust Pension* was approved by the Court of Appeal in *Shannan v Viavi Solutions UK Limited* [2018] EWCA Civ 681 at [84] in which Asplin LJ stated *"*I agree with Henderson J (as he then was) that the presumption is no more than a rebuttable statement founded on common sense, of the inference it will normally be appropriate to draw in a given situation where primary evidence is lacking. However, I also agree that it is directed at formality rather than intention."