[2013] UKFTT 157 (TC)

TC02573

Appeal number: TC/2010/06180

FILMS – Relief for expenditure on production – Deferments – Unconditional obligation to pay – Contracts between production company and individual members of production team – Claim for relief by Partnership – Deferred amounts payable to cast and crew as and when exploitation income was received from sales agent – No exploitation income received by Partnership in year of claim – Whether agreement between production company and Partnership transferred obligation to pay deferments to Partnership – Whether an unconditional obligation to pay deferments in year of claim – Appeal dismissed – F(No.2)A 1992 s.42 and F(No.2)A 1997 s.48 – CAA 2001 s.5(1) and(5)

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALCHEMIST (DEVIL'S GATE) FILM PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC
CHARLES BAKER FCA

Sitting in public in London on 17-20 July 2012

Michael Sherry and Anne Redston, counsel for the Appellant

J McClelland, counsel, instructed by the General Counsel for HM Revenue and Customs, for the Respondents

DECISION

1. The Alchemist (Devil's Gate) Film Partnership ("the Partnership") appeals against HMRC's amendment to the Partnership return for the accounting period ending 5 April 2002. The Partnership return, as submitted, had shown losses of £1,920,259. The effect of HMRC's amendment was to reduce the Partnership losses by £1,322,959 to £597,300.

Overview

2. Expenditure incurred on the production of a film is deductible as soon as there is an unconditional obligation to pay it. In the present case expenditure was incurred by the Partnership on the creation of a film; this was spent by the Partnership during the period to 5 April 2002 and there is no dispute that that amount is deductible. The dispute concerns "deferred" amounts to which the cast and crew (and certain others involved in the creation of the film) were entitled to under their individual performance contracts. We refer to those performance contracts as "the Production Team Contracts". Those deferred amounts (which we refer to as "the Deferred Cast and Crew Amounts") were to be calculated by reference to the proceeds of exploitation of the film. The Partnership has claimed to deduct the aggregate of those Deferred Cast and Crew Amounts in the period to 5 April 2002.

3. The Partnership accepts that the film was not in a state to be exploited during the period to 5 April 2002 and that nothing had been spent by it in respect of the Deferred Cast and Crew Amounts in that period. The Partnership claims to deduct the Deferred Cast and Crew Amounts for that period on the basis that the unconditional obligation to pay had arisen once the individual member of the cast and crew had performed his or her services as required under his or her Production Team Contract.

4. HMRC challenge the Partnership's claim so far as it relates to the Deferred Cast and Crew Amounts. HMRC's case is that the Partnership was under no obligation to make any payment in respect of the Deferred Cast and Crew Amounts to any of the cast and crew individuals. And even if the Partnership had been under any such obligation to the individuals, no expenditure was incurred during the period covered by the claim (or at all); at no time, HMRC say, was the Partnership under any unconditional obligation to pay those amounts.

Legislation in issue

5. The legislation principally in issue is:

- Section 42 of Finance (No.2) Act 1992 ("Section 42 F(No.2)A 1992")
- Section 48 of Finance (No.2) Act 1997 ("Section 48 F(No.2)A 1997"); and

- Section 5 of Capital Allowances Act 2001 ("CAA 2001") (formerly Section 159 of the Capital Allowances Act 1990 ("CAA 1990")).

6. Section 42 F(No.2)A 1992 is the principal provision as regards relief for production or acquisition expenditure. The relevant provision for present purposes is section 42(4), which was limited to the lesser of three sums, including:

> (a) one third of the "total expenditure incurred by the claimant"; and
> (b) one third of that "total expenditure" such as has not been claimed under a different section, i.e. section 41.

There were further limiting provisions at section 42(5) which are not in issue here.

7. The effect of Section 48 F(No2)A 1997 was to substitute a different and generally more favourable regime as regards the limitation to making claims under section 42 F(No.2)A 1992. In respect of film production cases, such as this one, section 48(4) limited the reach of section 48(2):

> "The total expenditure incurred by the claimant on the production of the film concerned as has not already been deducted by virtue of section 41 above …"

The other key provision of section 48 is:

> "(9) Sub-sections [(1)-(5) of section 5 of the Capital Allowances Act 2001] … shall apply for determining when … any expenditure is incurred … ."

8. The relevant provisions of CAA 2001 are subsections (1) and (5) of section 5:

> "(1) For the purposes of this Act, the general rule is that an amount of capital expenditure is to be treated as incurred as soon as there is an unconditional obligation to pay it.
> …
> (5) If under an agreement an amount of capital expenditure is not required to be paid until a date more than four months after the unconditional obligation to pay has come into being, the amount is to be treated as incurred on that date."

Relevant facts

9. This appeal concerns the making of a film called "Devil's Gate" and the tax implications of a scheme designed to obtain tax relief for the investors. A presentation to potential investors is found in a document entitled "Prospective Partner Information Document", dated 1 September 2001. This explained that partners would be required to contribute capital equal to 30% of the "total costs of production", with the balance being covered inter alia by "contracted contingent debt

fees to the creative, executive, supplier and production teams". It was then explained that because the production costs would be allowable for tax purposes and because it was unlikely that any income would be generated in the first accounting period – "the Prospective Partners will receive a reduction of tax, or a refund of up to 40% of the total cost of production".

The Partnership Agreement

10. A Partnership Agreement was executed on 7 November 2001 ("the Partnership Agreement"). The members of the Partnership were Alchemist Films Ltd (referred to in that document as "the Limited Partner"), Merrymaker Ltd (referred to as "the Managing Partner") and four named general partners ("the General Partners"). The Partnership Agreement recorded that the Partnership had been formed for the purpose of producing the film "Devil's Gate" (the "Film").

11. It was agreed by Clause 3.3 of the Partnership Agreement that "the Films [sic] should have a total budget of £2m including "deferred revenue expenditure" of £1,402,700. The total capital actually introduced into the Partnership by the General Partners was £597,300.

The production of the Film and the Production Team Contracts

12. Starting in late 2001 a company known as Alchemist Films (Devil's Gate) Ltd ("AFDG") entered into a number of "Production Team Contracts" with cast, crew and other service providers. Although not all such contracts were available to us, it is not in dispute that each of these provides for a mixture of fixed payments and further sums. In all cases the Production Team Contract is between the individual member of the production team and AFDG. In each case the fixed amount was to be paid by instalments during the period for which he or she was obliged to provide services. The further sums are expressed as pre-agreed amounts of "net income, when fully received from the sales agent" subject to an overall limit applicable to each individual. The more significant members of the production team were to participate in a specific percentage of the "Producer's Profit". We illustrate the arrangements by reference to two Production Team Contracts. One was entered into by Ms Laura Fraser, the lead actress, and is dated 4 December 2001. The other was between AFDG and a Ms Sarah McBurnie, a "runner".

13. Laura Fraser is hired by AFDG to rehearse for three days and to start working on 2 January 2002 for a guaranteed period of five weeks. Her "remuneration" is in three forms. She is to be paid £10,000 by five weekly instalments. She is to be paid £145,494 in the manner specified in Schedule l2 to her Production Team Contract. The first three payments are expressed as follows:

> "From the first £201,299 of nett [sic] income, when fully received from the sales agent, the sum of £5,685.
> From the next £201,299 of nett income, when fully received from the sales agent, the sum of £9,542

> From the next £201,299 of nett income, when fully received from the sales agent, the sum of £9,015."

The overall limit is £145,494 and is reached by 17 pre-agreed payments. The final amount becomes payable when "nett income" received reaches some £3.5m.

14. "Net income" is defined in paragraph 2 of Schedule 2 to Laura Fraser's Production Team Contract as "all proceeds of exploitation of the Film after deduction of distribution commissions, distribution expenses, sales agency commissions and the cost of repayment of borrowings, interest and finance charges in respect of borrowings required to complete the Film in the event of the costs exceeding the budget."

15. Schedule 2 paragraph 2 goes on to provide –

> "Any amount payable pursuant to the terms of this agreement or to have Net Income shall be payable once received by the Company [AFDG] to the Artist's Agent … within four weeks of the Company's auditor certifying the amount of Net Income, which certification shall be final, provided that payments shall only be made to the Artist's Agent once the amount due to the Artist has exceeded the sum of £100."

16. Laura Fraser's 1% share of the Producer's Profit (the third form of "remuneration") is defined as 1% of "Net Income in excess of the amounts of Net Income required to pay all sums to be paid to any person out of Net Income in full".

17. All payments to Laura Fraser are to be exclusive of VAT but "inclusive of" NI and Income Tax required to be paid or deducted, whether under PAYE or otherwise, in respect of such income": see Clause 3.3 and 3.4. Clause 14 of the "Standard Personal Services Provisions" states:

> "**Assignment**
>
> The Company [AFDG] shall have the right to freely assign this Agreement and/or any of the Company's rights hereunder to any person, firm or corporation. The Company shall remain liable to the Artists for their obligations hereunder unless such assignment is to a "major" motion film studio or distributor, or to any entity with which the Company is merged or consolidated or by which the Company is acquired and such assignee accepts the Company's obligations hereunder. Artists shall not have the right to assign this Agreement."

18. The Production Team Contract with Ms McBurnie entitles her to £500 per week for a period of 4.5 weeks. In addition she was to be paid "The sum of £2,100 payable in accordance with the provisions of Schedule 1 to this Agreement". This £2,100 was the Deferred Cast and Crew Amount so far as she was concerned.

19. Pursuant to Schedule 1 Ms McBurnie was to become entitled to the Deferred Cast and Crew Amount in increments according to the level of net revenue received by AFDG from the exploitation of the Film. The revenue levels were split into thirteen different cumulative bands comprising twelve bands of £201,299 and a final band of £163,473. Thus in relation to the first two bands it was provided that:

> "For the purposes of the agreement of which this Schedule forms part the sum of £2,100 including VAT under Clause 5.1 shall be paid as follows:
>
> (1) From the first £201,299 of nett income, when fully received from the sales agent, the sum of £25
>
> (2) From the next £201,299 of nett income, when fully received from the sales agent, the sum of £125."

"Net Income" is defined in the same terms as apply to the Laura Fraser contract.

Summary of financial position of members of the Production Team

20. The Deferred Cast and Crew Amounts belong to the individual member (subject to AFDG's obligation to account for NI and income tax) by stages, being as and when AFDG first receives the relevant "layer" of Net Income. That is the effect of, for example, Clause 3(2) and Schedule 2 to Laura Fraser's contract. The residue of the proceeds of exploitation of the Film is dealt with as Producer's Profits and belongs to those (including AFDG as executive producer and Laura Fraser as regards her 1 per cent) who have agreed to share in that residue.

21. AFDG is free to assign the benefit of any contractual undertaking in its favour. It cannot, by assignment or otherwise, override the rights of the individual members of the production team to Deferred Cast and Crew Amounts, if any. The rights to the Deferred Cast and Crew Amounts (if any) will have belonged to those individuals from the moment they have signed up and performed the services specified in their Production Team Contracts with AFDG.

The Production and Financing Agreement ("PFA")

22. On 20 March 2002, the Partnership entered into the PFA with AFDG. Parts of the PFA dealt with matters that had already occurred by the date of signing. By then the various Production Team Contracts between AFDG and the individual members of the cast and crew had, so far as we are aware (and this is not disputed), been signed. Moreover, the services of the cast and crew, as required by the individual Production Team Contracts with AFDG, had been performed and the individuals' particular rights to payment of their Deferred Cast and Crew Amounts (if and when Net Income came through the exploitation pipeline) will therefore have become the property of those individuals. In that connection Mr St Paul (described in paragraph 40 below) had explained in evidence that filming had actually started "right after Christmas" in January 2002. They had "shot" for four weeks. There were then four

weeks of "picture edit" and "sound edit came afterwards". "Delivery", Mr St Paul said, had taken place on 27 March 2002.

23. Under the PFA, AFDG agreed to produce the Film according to various specifications and deliver it to the Partnership. The production of the Film was to be "the function and responsibility of [AFDG]", although the PFA provided that the Partnership would be "consulted" in relation to it.

24. Clause 2(2) of the PFA relates to the so-called "Essential Elements" (which include the cast). These are (subject to the Partnership's prior written approval) to be employed by AFDG; as the cast had all been employed before the PFA was entered into, we take it that the Partnership endorsed the employment of the individual members of the Production Team.

25. Clause 2(11)(c) required AFDG to complete and deliver the Film to the Partnership by 5 April 2002.

26. Clause 3 of the PFA is headed "Financing". The Partnership undertook certain financing obligations. So far as relevant, these are dealt with as follows:

> "Subject to the terms of this Agreement and provided the Partnership has given all consents and approvals required and upon condition that no Event of Default is in existence, the Partnership will (except as herein provided) furnish or cause one or more other parties to furnish all funds required to finance the direct costs of production of the picture up to the Budget (excluding contingent deferments or any other sums which are to be supplied by persons other than the Partnership) by making available cash credit and facilities in accordance with the Partnership's customary financing and accounting terms and procedures and the cashflow schedule agreed between the parties hereto …"

27. The "Budget Figure" was defined in Part IV of Schedule 2 to the PFA as follows:

> "A maximum total production cost of £2,610,000 of which not more than £597,000 shall be payable out of the initial cash budget and with the balance being contractually due out of all proceeds of exploitation of the Film after deduction of distribution commissions, distribution expenses, sales agency commissions and the costs of repayment of borrowings, interest and finance charges in respect of borrowings required to complete the Film in the event of the costs exceeding the budget."

28. In substance therefore the Partnership agreed to pay up to £597,000 with the remaining "Budget" sums to be paid out of the Film proceeds.

29. An immediate difficulty is that the PFA is silent on the exploitation of the film. The effect of the PFA was to transfer ownership of the completed film to the Partnership and to grant the Partnership exclusive rights to exploit the film. See, for

example Clause 2(1) "… and deliver to the Partnership and the Partnership shall own the Screenplay and the Film which…". Also Clause 2(19) "the Executive Producer hereby grants and assigns to the Company [*sic*] exclusively by way of assignment of present and future copyright the entire unencumbered copyright and all other rights of whatever nature….". In consequence, the Partnership would control the arrangements for exploiting the film. All parties accepted that ultimately the Deferred Cast and Crew Amounts (if any) would be paid. However the PFA is silent on how the exploitation arrangements for the film were to be structured to achieve that effect.

Completion of the Film

30. Work on the Film continued after 5 April 2002. This appears from certain documents put in evidence. These include a number of agreements signed by AFDG after 5 April 2002. These relate to production work and include : a Music Licence Agreement with Tambourine Music dated 20 February 2003, a Synchronisation Licence Agreement with Warner Music UK Ltd dated 18 March 2003 and a Music Commissioning Agreement with the composer dated 20 March 2003.

Release and exploitation

31. The Film was not released until late 2003. This is not disputed by the Partnership. It was given a British Board of Film Classification "12A" Certificate on 30 October 2003, following which there appear to have been screenings in Scotland (Shetland Islands, Dundee, Aberdeen and Edinburgh). This was in keeping with the understanding recorded in the Prospective Partner Information Document referred to in paragraph 9 above to the effect that no revenue would be generated (and therefore no obligation to pay Deferred Cast and Crew Amounts would be incurred) in the first accounting period. Arrangements for the distribution of the Film were made under a sales agency agreement of 28 January 2004 for worldwide distribution of "the feature film provisionally entitled Devil's Gate". A further sales agency agreement was signed and dated 24 March 2006 between the Partnership and Echelon Entertainment for worldwide distribution.

32. The evidence indicates that in June and July 2002 Mr St Paul was seeking to set up distribution contracts. If the Film had been completed during the year to 5 April 2002, no revenue would have been generated and therefore there would have been no liability in respect of the Deferred Cast and Crew Amounts within four months of the completion date. The relevance of this point relates to the possible application of Section 5(5) CAA, dealt with in paragraph 60 below.

Financial plan and sale estimates

33. On 27 March 2002 Mr Edmund and Mr St Paul concluded that there was "a reasonable probability" of sales of £2,578.061. That, if achieved, would give rise to rights of the individual members of the cast and crew to most of the Deferred Cast and Crew Amounts. (The matter is dealt with in greater detail later.) This conclusion was

based on a report by Indy UK that estimated gross sales between USD2,500,000 and USD5,000,000. That report was supported by an automated report from Showbiz Data on 17 March 2002 which indicated gross worldwide sales of USD80,666,270 based on a comparison with 29 films selected according to a chosen but unstated criteria.

34. The Partnership provided three subsequent estimates from the following sources:

(a) From RGH/Lions Shared Pictures: Gross sales of between USD4,500,00 and USD6,000,00.

(b) From Ardent international on 10 July 2007: Gross sales of between USD1,165,550 and USD2,104,600.

(c) From an "Unknown" and undated sources: Gross sales of between USD720,500 to USD1,979,500

On those estimates Mr Edmund and Mr St Paul concluded that there was "a reasonable probability" of sales of £2,578,061. That, if achieved, would cover the amounts required to meet the rights to the Deferred Cast and Crew Amounts of the individual members of the cast and crew. (The matter is dealt with in greater detail later.)

DCMS Certificate

35. The Film obtained a DCMS Certificate on 1 May 2002.

Partnership's Accounts and tax return

36. A copy of the Partnership's financial statements for the period ended 5 April 2002 ("the Financial Statement") recorded a tangible fixed asset of £1,916,011. This was identified in Note 1 as "Film Production Cost". A breakdown of this cost was provided in a Schedule entitled "Fixed Asset Capitalisation". From that it can be seen that £1,223,132 of this so-called cost is made up of "Contingent Debt", being the aggregate of the Deferred Cast and Crew Amounts. The Financial Statement does not include a statement of accounting policy. Nor is any reference found to the accounting basis upon which it was prepared. It appears however that the Partnership calculated the "Contingent Debt" as being that proportion of the Deferred Cast and Crew Amounts as would be payable if the projected receipts of £2,578,061 were obtained. The Financial Statement also recorded a trade creditors balance of £1,371,158. This entry was not analysed in any of the notes to the Financial Statements. However we understand that much the greatest part of this figure is made up of Deferred Cast and Crew Amounts.

37. In its tax return for the year to 5 April 2002, the Partnership claimed relief under section 48 F(No.2)A 1997 for "Film Production costs" of £1,916,011, comprising £1,223,132 by way of Deferred Cast and Crew Amounts.

38. On 14 January 2004 HMRC stated that it intended to enquire into the Partnership's tax return. Following lengthy correspondence, on 15 March 2010, HMRC issued a closure notice of their enquiry into the tax return for the year to 5 April 2002. HMRC reduced the Partnership loss to £597,300, being the amount actually contributed by the Partnership.

39. The Partnership appealed on 13 April 2010.

The Witnesses of Fact

40. The Partnership called two witnesses of fact. One was Mr Stuart Aikman known professionally as Stuart St Paul. We have referred to him as "Mr St Paul". He directed the Film and his evidence was addressed at the make up of the Deferred Cast and Crew Amounts and to the development, filming, post-production and eventual release of the Film. The other witness of fact was Mr James Edmond, an accountant at Charterhouse (Accountants) LLP. He had been one of the architects of the scheme. His evidence addressed the conception of the scheme, the forecasting of revenue and the preparation of the Financial Statement.

The Issue

41. Did the Partnership incur expenditure of £1,283,132, being the aggregate of the Deferred Cast and Crew Amounts in the tax year ending 5 April 2002? For this purpose the Partnership has to satisfy us that it was under an "unconditional obligation to pay" the Deferred Cast and Crew Amounts within the meaning of those words in section 5(1) CAA 2001; and if so, we need to be satisfied that the Partnership was required to pay the Deferred Cast and Crew Amounts within four months after that unconditional obligation came into being for the puroses of section 5(5) CAA 2001.

42. HMRC contend, as a preliminary point, that the Partnership at no stage ever undertook, whether conditionally or otherwise, to pay any of the Deferred Cast and Crew Amounts. Instead, the relevant contracts with the individual members of the Production Team had been entered into by AFDG and not by the Partnership and the obligation to discharge the rights of those individuals to their Deferred Cast and Crew Amounts remained with AFDG. We start therefore by determining whether the Partnership ever became obligated in respect of the Deferred Cast and Crew Amounts.

Was the Partnership under any obligation in respect of the Deferred Cast and Crew Amounts to the individual members of the Production Team?

43. The Partnership argue that on its proper construction the PFA made the Partnership liable to discharge by payment the rights of the individual members of the production team to their Deferred Cast and Crew Amounts. The argument, as advanced by Mr Michael Sherry, starts with clause 4(1)(b) of the PFA. This requires the Partnership to pay to AFDG, as executive producer and to the other co-producer, a

"remuneration" of £765,565 for their services "in accordance with Schedule 3". Schedule 3 states that that amount is to be paid by eighteen stages with £8,052 to be paid from "the first £201,299 of Nett Income, when fully received from the sales agent", and so on by defined amounts. Then Mr Sherry referred to the definition of Budget Figure in Schedule 2 (Part 4) to the PFA. We repeat the relevant words:

> "A maximum total production cost of £2,610,000 of which not more than £597,000 shall be payable out of the initial cash budget with the balance being contractually due out of all proceeds of exploitation of Film after deduction of distribution commissions, distribution expenses, sales agency commissions and the cost of repayment of borrowings, interest and finance charges in respect of borrowings required to complete the Film in the event of the costs exceeding the budget."

Those provisions, in Mr Sherry's words, provide that – "Of the total production cost, £597,000 shall be payable out of the initial cash budget – and of course it's payable by the partnership in the context – with the balance being contractually due – from the partnership. We say this is how it is to be interpreted – out of all the proceeds of exploitation of the Film. That includes the producer's £765,000, but it also includes the amounts which the producer has incurred by entering into the agreements with the cast and crew. So what we say is this places liability on the Partnership to pay all of that. And that is the only way you can make sense of the provision … . The consequence of this is that the Partnership has to discharge the rest of the deferrals as they fall to be paid, or cause that to happen; and that's what this is doing".

44. That interpretation, Mr Sherry argued, was what "the reasonable person having all the background knowledge of everything" (envisaged by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at p 912) would think the PFA was meant to achieve. And in any event there was, he argued – "… as an absolute necessity, an implied term that the Partnership be responsible for discharging the deferral liabilities of the executive producer" (AFDG) under the Production Team Contracts. The implied term, Mr Sherry said, might read – "The partnership will discharge the deferrals owed to the artists and crew out of the Net Income as defined". Thus, Mr Sherry argued, "the Partnership had a legal obligation at the balance sheet date in respect of the deferrals under this contract. And for capital allowance purposes it does not matter that the sum is unascertained or the payment date is uncertain. … CAA 2001 section 5(5) which deals with the 4-months period is not in point."

45. For HMRC, Mr McClelland argued that the Partnership was not responsible for the Deferred Cast and Crew Amounts. He pointed out that the Production Team Contracts for cast and crew services were all between the individual members of the production team and AFDG. The Partnership was never a party and none of those contracts had been novated in such a way as to make the Partnership a party. None of AFDG's obligations to the individual cast and crew members of the production team were transferred to the Partnership. The only relevant agreement to which the Partnership was a party was the PFA with AFDG and that agreement, while providing

a funding commitment to AFDG, specifically excluded from the Partnership's commitment, the "contingent deferments" i.e. the obligations in respect of the Deferred Cast and Crew Amounts contained in the individual Production Team Contracts.

46. We agree with HMRC. Nothing has displaced the obligations in the Production Team Contracts assumed by AFDG to account to the individual members of the production team for their shares of "Net Income", i.e. the Deferred Cast and Crew Amounts, as and when exploitation proceeds come through the pipeline. Nor can the PFA be read as showing that the Partnership has assumed those liabilities. There is no ambiguity in the PFA and no aberration in the language that calls for a different interpretation on *West Bromwich* principles of construction. In particular we cannot read the definition of Budget Figure (quoted in paragraph 27 and 43 above) in Part 4 of Schedule 2 to the PFA as in some way imposing an obligation on the Partnership which has been specifically excluded in the main body of that Agreement (i.e. in Clause 3(1)(a)). The words of exclusion in 3(1)(a) cover the Deferred Cast and Crew Amounts that (in right of their entitlements to remuneration in their respective Production Team Contracts) will belong to the individual members of the production team as and when successful exploitation of the Film takes place; and AFDG will remain contractually bound to those individuals to account to them for their respective Deferred Cast and Crew Amounts.

47. Can a term be implied into the PFA, as Mr Sherry urges, that passes the obligation in respect of the Deferred Cast and Crew Amounts to the Partnership? We think not. No such implication is required to make the arrangements embodied in the PFA effective. The rights to be paid "contingent deferments" (i.e. the entitlements of the individual members of the production team to their Deferred Cast and Crew Amounts) are triggered the moment "Net Income" from exploitation of the Film flows in. AFDG has the obligation to make the distributions of the Deferred Cast and Crew Amounts to production team members and others. As we have observed earlier, the PFA is silent on the procedure for exploiting the film. There are several possible ways in which the gross income could flow through to the various parties entitled to share in that gross income. There is no apparent reason why the Partnership should necessarily have that obligation (i.e. to account for the Deferred Cast and Crew Amounts to those individuals). Moreover, the express terms of Clause 3(1)(a) exclude, as "contingent deferments", the Partnership's responsibility for Deferred Cast and Crew Amounts. We cannot therefore imply a term that contradicts Clause 3(1)(a).

48. We observe that Clause 2(17) deals with events of default by the Executive Producer. Clause 2(17)(b)(iii) states:

> "The Partnership may require the Executive Producer to assign to the Partnership its rights under any of the Production Contracts in connection with the Film in which event the Partnership may elect to assume the Executive Producer's obligations under any such Production Contracts"

The Executive Producer is AFDG and the Production Contracts included the obligation to pay the Deferred Cast and Crew Amounts. This clause gives the Partnership the option of accepting an obligation to pay the Deferred Cast and Crew Amounts in the event of the Executive Producer's default. The clear implication is that the Partnership does not have that obligation in the ordinary course of events.

49. We mention in this connection evidence from Mr Edmond which acknowledged the reason why the obligation to account for Deferred Cast and Crew Amounts had been left with AFDG. Because there was unlimited liability in the partnership and because AFDG was a limited liability company, AFDG was put in place as party to the Production Team Contracts with cast and crew in order to shield the individual partners from unlimited liability to the members of the cast and crew. That explanation drives home the significance of the words of exclusion in Clause 3(1)(a) of the PFA,, i.e. "excluding contingent deferments". Of course the Partnership had an interest in ensuring that liabilities in respect of Deferred Cast and Crew Amounts were duly discharged, because only then could it claim what was left of the Producer's Profit. But that is not the same as saying that the Partnership assume the obligation to members of the cast and crew in respect of Deferred Cast and Crew Amounts.

50. That conclusion determines the appeal against the Partnership. The disputed amount of £1,223,132, representing the aggregate of the Deferred Cast and Crew Amounts, was not "capital expenditure by [the Partnership] on the production of the Film" for purposes of section 48(4) of F (No.2) A 1997. Assuming we were wrong in that conclusion, we now turn to examine the issue of whether section 5 CAA 2001 applies to treat that amount as being incurred in the year to 5 April 2002.

Was there an unconditional obligation to pay the Deferred Cast and Crew Amounts as at 5 April 2002?

51. It will be recalled that section 48(4) of F(No.2)A 1997 gives relief for "expenditure incurred by the claimant on the production of the Film; and section 5(1) CA 2001 lays down the general rule that "an amount of capital expenditure is to be treated as incurred as soon as there is an unconditional obligation to pay it".

52. The Partnership has claimed relief for the expenditure on the basis that the effect of the Production Team Contracts was for the obligation to pay to arise once each individual cast and crew member had performed his or her services. The Production Team Contracts were not, Mr Sherry argued, conditional. The obligations to pay the Deferred Cast and Crew Amounts were terms of the particular Production Team Contract; they were not conditional obligations.

53. Section 5(1) requires us to determine whether the relevant "obligation to pay" is conditional or unconditional. The obligation to pay may be one of a series of provisions in an unconditional contract; but that does not make the particular obligation unconditional. The wording of section 5(1) requires us to focus on the

obligation to incur the expenditure in question and to determine the point of time at which there arises an unconditional obligation to pay it.

54. One analysis of the arrangements, which it was not advanced in the course of argument, is that, quite irrespective of the words of exclusion in Clause 3(1)(a) of the PFA (i.e. "excluding contingent deferments"), the Partnership never assumed any obligation to the individual members of cast and crew in respect of Deferred Cast and Crew Amounts. Those amounts, in common with the exploitation expenses such as "distribution and sales agency commissions", were charges to be borne in determining the Producer's Profit, the residue of which (after deducting amounts of "remuneration" due to AFDG and to, for example, Laura Fraser as regards her 1%) belongs to the Partnership. On that analysis the Partnership stood to spend nothing in respect to Deferred Cast and Crew Amounts. Its entitlement to that residue, if any, remained intact and undiminished by any Deferred Cast and Crew Amounts; thus it never incurred expenditure in respect of those amounts. However, as the Partnership's case is based on the proposition that the Partnership itself had the obligation to pay, we will deal with its case on that basis. The Partnership's case is that the obligation on the Partnership came into being once the services under the Production Team Contracts were performed. Without conceding their main contention that the Partnership never assumed any obligation in respect of Deferred Cast and Crew Amounts, HMRC accept that there was an over-arching unconditional contract in the form of the PFA; but, they say, as regards the obligation to pay the Deferred Cast and Crew Amounts, that was not triggered until the Film was profitably exploited.

55. The assumed obligation, being "the obligation to pay" the Deferred Cast and Crew Amounts, arises here, we observe, when and only when "Net Income" reaches the levels prescribed in, for example, Schedule 2 of Laura Fraser's Production Team Contract. The obligation is triggered by the combined effect of a series of events. There has to be acceptance by a sales agent to take the Film. There has to be a distributor who agrees to take on the marketing and distribution obligations. The movie-going public have to buy and occupy seats to watch the showings of the Film; sales of DVDs have to be made. Those are just examples. All of those events are outside the control of those who are in some way or other contractually committed to make the Film.

56. Those and other events make the present situation comparable to an obligation to purchase land which depends upon the grant of planning permission. In *Michaels v Harley House*, Walker LJ (as he then was) surveyed the authorities on what constituted conditional and unconditional obligations (including *Eastham v Leigh London Provincial Properties* [1971] Ch. 871). At paragraph 115 of the *Michaels* decision is the observation that there might be a contract to sell land where the principal obligation "only arises on the fulfilment of the condition that is not within the control of the parties, for instance, the grant of planning permission. In such a case there may be a contract with some unconditional obligations of a preliminary character, for instance to seek planning permission and to appeal if necessary, that the contract is properly to be classified as being subject to a condition precedent as regards the principal obligation". So here, we have an unconditional contract that

contains obligations that are dependent on the outcome of the event or events that we have just summarised; the outcome of those events is outside the control of the present contracting parties (and indeed of all those contractually committed to the making of the Film). In particular the response of the public by paying to see the Film and buying DVDs remains in the hands of the public however actively the parties to the contract may have caused the Film to be publicised. For those reasons we think that, as a matter of pure contractual analysis, the commitments of the Partnership to pay the Deferred Cast and Crew Amounts were conditional obligations contained in an unconditional contract.

57. We now address the argument of the Partnership that the obligation to account for the Deferred Cast and Crew Amounts to the individual Production Team members was not conditional because, once the relevant Production Team Contract had been signed and the services performed, obligations became unconditional and payment "was just a matter of timing". We do not accept that. It was not a matter of timing. There remained the contingency that the event triggering the obligation to pay might never occur; that was the position here as things turned out. The obligation was wholly dependent upon there being an inflow of sufficient Net Income. No one, either at the date of signing the Production Team Contract or at the time when the individual Production Team member furnished his or her performance work on the Film, could know whether sufficient Net Income, originating from ticket and DVD sales, would ever come into the reckoning of "Net Income". .

58. The Partnership sought to rely on a decision of the Special Commissioners, *Halcyon Films LLP v Revenue and Customs Commissioners* [2008] STC (SCD) to the effect that relief should be given for "deferrals". That case was distinct from the present. It involves a claim for tax relief in respect of the cost of acquisition of some films purchased under a sale and lease arrangement. Here, however, we are concerned with the costs of production. *Halcyon* was not concerned, as here, with the application of section 5(1) CAA 2001; nor were the authorities on conditionality, such as *Eastham*, *supra,* considered.

59. For those reasons we reject the argument for the Partnership that there was an unconditional obligation to pay the Deferred Cast and Crew Amounts as at 5 April 2002.

Section 5(5) CAA 2001

60. This covers the situation where under an agreement the payment of the expenditure may be deferred until a fixed or fluctuating date more than four months after the date when the unconditional obligation to pay came into being. In that situation the amount is incurred on that later date. In view of our conclusion that "the agreement" (whether that be the PFA alone or the PFA coupled with each individual Production Team Contract) does not contain an unconditional obligation to pay when the individual's services have been performed (as the Partnership have contended), section 5(5) does not affect the Partnership's claim for tax relief. As we interpret the arrangements, no unconditional obligation to pay arises until the proceeds of

exploitation have become "Net Income" (i.e. after discharge of marketing and distribution expenses). There is no power in "the agreement" that either requires payment to be made within four months of the maturing of the unconditional obligation undertaken by the Partnership or that gives the Partnership the right to defer payment for more than four months from then. Indeed the arrangements for exploitation (as explained above) do not contemplate the unconditional obligation to pay arising within four months of "completion", i.e. the performance by the individual cast and crew member of the Production Team Contract to render his or her services.

61. We mention for the record that Mr Sherry, for the Partnership, relied on the fact that, for the 2002/03 years onward, Finance Act 2002 section 100 introduced amendments to F(No.2)A 1997 section 48. Section 100 was headed "exclusion of deferments from production expenditure". It took effect for films completed on or after 17 April 2002 and it amended the definition of "total production expenditure" in F(No.2)A 1997 section 48(6) so that it was subject to a new subsection (6A). This reads as follows:

> "For the purposes of this section the production expenditure on a film shall be taken not to include any amount that at the time the film is completed –
>
> (a) has not been paid, and
> (b) is not the subject of an unconditional obligation to pay within four months after the date of completion."

That provision replicates the effect if not the exact wording of CAA 2001 section 5(5). Thus, Mr Sherry argued, if it were the case that section 5(5) already applied to the expenditure, this amending provision would be entirely unnecessary.

62. We do not accept that. As we read section 48(6A) it has a different function from section 5(5) CAA 2001; section 48(6A) is defining "production expenditure"; section 5(5) by contrast deals with the time at which expenditure is to be treated as having been incurred. In any event, we do not accept that, as a matter of statutory construction, the words of a later provision can displace the proper meaning of an earlier provision.

The Accountancy Evidence

63. In paragraph 36 above we observed that the Partnership's Financial Statement showed that some £1.22m of the amount recorded as Film Production Cost (some £1.9m) was made up of "Contingent Debt", being the Deferred Cast and Crew Amounts. Both sides acknowledged that accountancy treatment can only be supportive. But with that caveat in mind, the Partnership adduced accountancy evidence to demonstrate that the amount shown as Cost should, to the extent that it included Deferred Cast and Crew Amounts, be properly recorded as a liability and that the sum of £1.22m was a reliable estimate of that cost.

64. As a general observation we mention that the taxation results of the Partnership are derived by a two stage process. Firstly, the Partnership prepares commercial accounts in accordance with generally accepted accounting practice in the UK (GAAP). Secondly, the partnership prepares a computation of the taxable results. This starts with the results shown in the commercial accounts and then makes the specific adjustments required by taxation legislation.

65. We heard evidence from two experts on whether the commercial accounts were compiled in accordance with GAAP. Those experts were Mr S V Malde, a Partner in Malde & Co., Chartered Certified Accountants and Mr S P D Harrap, a Chartered Accountant employed by HMRC. We had before us a written report from each expert and a joint report that set out the areas of agreement and disagreement. Both experts gave oral evidence that was unimpressive. Neither expert compared the accounting policies of the partnership with the published accounting policies of major film productions companies.

66. Both experts proceeded on the assumption that the obligations to discharge the Deferred Cast and Crew Amounts were obligations of the Partnership. That was challenged by HMRC and is dealt with earlier in this Decision where we have upheld HMRC's challenge. Nonetheless, in this section we have followed that assumption only for the purpose of drawing conclusions from the accountancy evidence.

67. The experts agreed that a relevant question was whether the figure of £1,223,132 that represented a deferred creditor in respect of Deferred Cast and Crew Amounts was correctly included in the accounts of the partnership as a provision. The recognition of this amount as a provision would necessarily result in a corresponding amount being recognised in the financial statements as a film production cost. The alternative treatment was as a contingent liability that would be reflected in the notes to the financial statements as a narrative comment and not affect the amount of the film production cost.

68. In the UK, generally accepted accounting practice (GAAP) requires compliance with the financial reporting standards issued by the Accounting Standards Board. Of particular relevance are *FRS5 Reporting the Substance of Transactions* and *FRS12 Provisions, Contingent Liabilities and Contingent Assets.*

69. The criteria for the recognition and inclusion of a provision in an entity's balance sheet are set out in FRS12, paragraph 14. This standard imposes three conditions, which must all be met, before a provision is recognised in an entity's balance sheet. These three conditions are:

> a) an entity has a present obligation (legal or constructive) as a result of a past event;
>
> b) it is probable that a transfer of economic benefits will be required to settle the obligation; and
>
> c) a reliable estimate can be made of the amount of the obligation.

70. The experts disagreed on the application of those tests and we will need to deal with those tests.

71. FRS12, paragraph 13, distinguishes between provisions and contingent liabilities. It states, in reference back to an earlier definition of contingent liabilities, that:

> "(b) contingent liabilities – which are not recognised as liabilities because they are either:
>
> (i) possible obligations, as it has yet to be confirmed whether the entity has an obligation that could lead to the transfer of economic benefits; or
>
> (ii) present obligations that do not meet the recognition criteria in the FRS because either it is not probable that a transfer of economic benefits will be required to settle the obligation, or a sufficiently reliable estimate of the amount of the obligation cannot be made."

72. The conclusion that we can draw from this accountancy evidence is that a relevant question is whether, on 5 April 2002, the liability for the Deferred Cast and Crew Amounts met the three conditions for inclusion in the financial statements as a provision. In summary those three conditions were a present obligation, a probable transfer of economic benefits and a reliable estimate.

73. The Accountants were agreed that *FRS21 Events after the Balance Sheet Date* required the preparer of financial statements to take account of any adjusting events that had occurred prior to signature of the financial statements. The evidence was that the amount of the provision was decided on 27 March 2002 and was not reviewed before the financial statements were approved. In reaching our decision, we can take account of adjusting events that occurred before the financial statements were approved. This was presumably shortly before the financial statements were signed on 11 July 2002.

Linking of transactions

74. Mr Harrap said that was not the end of the matter. In his opinion, it was inappropriate to account for the potential film receipts independently of accounting for the potential payments to the cast and crew. The two operate in conjunction with each other. Mr Harrap drew attention to the overarching requirement of FRS5 to reflect the substance of the transaction that an entity enters into.

75. FRS5, paragraph 14, states "a reporting entity's financial statements should report the substance of the transactions into which it is entered. In determining the substance of a transaction, all its aspects and implications should be identified and greater weight given to those more likely to have a commercial effect in practice. A group or series of transactions that achieve or is designed to achieve an overall commercial effect should be viewed as a whole." And from the introductory Summary of FRS5, paragraph c states - "transactions requiring particularly careful

analysis will often include features such as…. a transaction is linked to others in such a way that the commercial effect can be understood only by considering the series as a whole…"

76. The Deferred Cast and Crew Amounts became payable only if and when the partnership received net sales income. Mr Harrap's view was that the Deferred Cast and Crew Amounts were so intertwined with the receipt of sales income that it was not true or fair to present one without the other. Mr Malde disagreed on the basis of the accounting principle of prudence. Whilst we have considerable sympathy for Mr Harrap's view we feel it inappropriate to decide whether, in this respect, the financial statements complied with GAAP in the face of conflicting expert accounting evidence. It would have been of assistance to know how major UK film production companies dealt with this issue.

Was there a present obligation?

77. FRS5, paragraph 58 reads:

> The notion of obligation implies that the entity is not free to avoid an outflow of resources. Where there is some circumstance in which the entity is unable to avoid such an outflow, whether for legal or commercial reasons, it will have a liability. However in accordance with *SSAP18 Accounting for contingencies* if the entity's obligation is contingent on the occurrence of one or more uncertain future events (as under a stand-alone guarantee given by the entity) its liability may not be recognised.

78. Mr Malde had ignored the sentence beginning "However in accordance …" because SSAP18 had been superseded by FRS12. It was put to him that FRS12 had not changed the substance of that paragraph. It was also put to him that the obligation to pay Deferred Cast and Crew Amounts mapped exactly onto the first leg of the definition of contingent liabilities, namely that the payments were dependent upon future events not wholly within the entity's control. He was not able to give a convincing answer to these points.

79. It seems clear to us that in using the phrase "present obligation", the authors of FRS5 and FRS12 meant an obligation that the entity was not free to avoid by its future actions. FRS5 explicitly states that:

> "The notion of obligation implies that the entity is not free to avoid an outflow of resources" (FRS5 paragraph 58)

80. Then the examples in FRS12 support that understanding:

> (a) An entity that has given a stand-alone guarantee has a present obligation because it is not free to avoid the consequences. Whether it should make a provision or whether it only has a contingent liability depends on the probability of being required to transfer economic benefits (FRS12 Example 9).

(b) An airline with a legal requirement to overhaul its aircraft every three years does not have a present obligation to overhaul the aircraft independently of the entity's future actions – the entity could avoid the future expenditure by its future actions, for example by selling the aircraft (FRS12 Example 11B).

(c) An entity fails to comply with new legislation requiring the fitting of smoke filters. There is no obligation for the costs of fitting smoke filters because no obligating event (the fitting of the filters) has occurred. However, an obligation might arise to pay fines and penalties because the obligating event (non-compliance) has occurred (FRS12 Example 6).

81. The Appellant contended that the obligating event was the signing of the Production Team Contracts because those agreements committed the taxpayer to making the deferred payments as and when they became due. We disagree. The signing of the Production Team Contracts was a necessary, but not sufficient condition. The Deferred Cast and Crew Amounts would only become due and payable if and when there was a receipt of Net Income as defined in, for example, Schedule 2 to the Laura Fraser Contract. In turn that was dependent upon successful marketing of the completed film. If, for whatever reason, sales of the Film were not made or marketing and distribution agreements were not entered into (to give examples of events that required the cooperation of independent third parties) or the Partnership chose to sell its rights for a capital sum, then no income would reach the Partnership and consequently the Partnership would have no obligation to pay anything to any of the members of the cast and crew.

82. At the time the financial statements were approved, the taxpayer had not signed any distribution agreement. Consequently, no obligating event had occurred and no provision should have been made in the financial statements.

Was there a reliable estimate?

83. In his file note of 27 March 2002, Mr Edmond recorded the conclusion of his telephone discussions with Mr St. Paul (aka Stuart Aikman). Their conclusion was "After consideration, it was agreed that the level of sales for which there was a reasonable probability of receipt, and therefore there was a reasonable probability of the contingent debt being paid should be confirmed as band 13, i.e. a sales level of £2,578,061." The note recorded that this decision was after discussion of the sales projections provided showing £2.5m as the likely level to be achieved and of additional income.

84. The sales projections referred to were a report by INDY UK Independent Feature Film Distributors. On the face of it, that report appeared to have been authored by Alan McQueen, a Producer and Senior Executive of INDY UK. Mr St Paul acknowledged that he controlled INDY UK, Alan McQueen worked for him and that he (Mr St Paul) had a significant input into the compilation of the report. Mr St Paul said that as the producer of the film he was best placed to estimate its sales potential at that time.

85. Attached to the report were sales estimates by geographical territory divided into maximum and minimum figures. The total worldwide sales were listed as between $2.5m and $5.0m which was translated to between £1.5m and £3.0m. There was no indication at all as to how the figures had been compiled or the basis of those estimates. It was noted that the estimates were that the sales would be greater in each of Scandinavia, France, Germany, Italy, Spain, Australia and Japan than in the UK. The estimates also included sales for most of Central and South America, parts of Asia and the former eastern block countries.

86. It was put to Mr St Paul that the film featured young barely-known UK actors in a story set on a Scottish island. In this light the geographical spread of the sales estimates seemed inherently implausible. He responded that there had now been a wide spread of sales including to Africa. He strongly disagreed with the characterisation of the actors. In particular Laura Fraser was, Mr St Paul said, a rising star whose name could be used to attract an audience.

87. Mr St Paul explained that 90% of the value of the film came from the name recognition and previous films of the principal cast. In this case, the principal actor was Laura Fraser who had appeared in "The Man in the Iron Mask". It was pointed out that in the credits for that film she appeared 28th out of 30 and her role was "bedroom beauty". She ranked below "ballroom beauty" and "ruffian". Mr St Paul explained that if he put on an advertising poster that she had appeared in the Man in the Iron Mask that poster credit was important and only 5% of the public would check whether she had a significant role in that film.

88. The sales estimates also referred to information obtained from INDb-pro and ShowBIZ Data. Screen prints were attached to the estimates. The INDb-pro screen print simply stated that it was last updated on 28 February 2002, described the film as in post production and gave the "StarMeter" ratings for the quoted cast. The ShowBIZ Data report went a little over five pages and had a manuscript date of 19 March 2002. This screen print gave revenue forecasts first for the US and then for the major worldwide markets including the US market on a different set of assumptions. The US forecast was for $11m gross or $15m adjusted gross or $12m on the alternative basis. The ShowBIZ Data report stated "this estimate is based on 29 films that meet the chosen criteria"; the chosen criteria were not stated.

89. The INDY UK report stated "the mechanical sales projections by territory from SHOWBIZ DATA are far more optimistic, and show what the film might do if it is a success." ShowBIZ Data were forecasting adjusted gross sales in the USA alone to be three times INDY's maximum estimate of worldwide sales. ShowBIZ Data's forecast for the UK was double INDY UK's estimate for worldwide sales. ShowBIZ Data's estimate for sales in Italy was more than INDY UK's estimate for maximum worldwide sales. The INDY UK report made no attempt to reconcile the wide divergence between the ShowBIZ Data figures and their own estimate.

90. The most obvious reconciling feature is that the ShowBIZ Data projections were derived from the sales statistics of films that had gone on general cinema release. We were not given any information about the proportion of films similar to "Devils Gate"

that achieved general cinema release. In any event, we are not concerned with statistical probabilities for similar films. The question is whether there was a reliable estimate of the deferred payments to cast and crew which in turn required a reliable estimate of the sales of this particular film.

91. The INDY UK report commented "both sites rather suggest our manual sales figures are conservative". We draw a different conclusion. Namely, that there was no useful comparison to be drawn with statistics for films that had gone on general cinema release.

92. By the date of signing the financial statements several sales agents had viewed the film at the Cannes festival. None had signed a sales agency agreement. We were shown spread sheets from several potential agents. These were clearly illustrations of principle or negotiating documents and were not intended as firm forecasts of what the agent would achieve.

93. By the date when the financial statements were approved:

(d) The sales estimate used to calculate the deferred payments was based solely on the estimate of INDY UK which was strongly influenced by the executive producer of the film.

(e) The range of sales estimates by INDY UK was £1.5m to £3.0m which, of itself is a wide range.

(f) The estimates were unsupported by any third party information or any rational explanation or any comparison with similar films at that stage.

(g) The geographical spread of the estimated sales was implausible.

(h) There was no documented reasoning behind the decision to settle on a sales estimate of £2,578,061 for the purpose of calculating the provision.

94. There had been no sales of the film and none were pending. No sales agents had been appointed and no distribution agreements made.

95. We conclude that the future sales of the film could not be predicted within even a wide range. Hence it was not possible to make a reliable estimate of the deferred payments to cast and crew that would become due in consequence. Accordingly, no provision should have been made for the deferred payments in the financial statements because they failed the third requirement of FRS12, namely a reliable estimate of the amount.

Summary of Conclusions on Accounting Evidence

96. Making a provision in the Financial Statements for Deferred Cast and Crew Amounts required a "present obligation" within the meaning of FRS 12. No such obligation existed at the relevant date.

97. Making a provision in the Financial Statements for Deferred Cast and Crew Amounts required a "reliable estimate" of those Deferred Amounts which, in turn,

required a reliable estimate of the future sales. At the relevant date it was not possible to make a reliable estimate of the future sales.

Summary of Conclusions generally

98. For both of these reasons, the Financial Statement failed to comply with generally accepted accounting practice in the UK. Accordingly, the contents should have been corrected to remove the provision for deferred payments to cast and crew before being used as a starting point for the calculation of the taxable profit or loss of the Partnership. The Financial Statements would support HMRC's conclusions.

99. When the April 2002 Financial Statement was signed the situation was:

(i) the individual members of the production team had entered into agreements with AFDG to protect the Partnership (which had unlimited liability) from the obligations to pay the Deferred Cast and Crew Amounts;

(ii) the principal document describing the financial arrangements was the PFA;

(iii) the Partnership had not paid any of the Deferred Cast and Crew Amounts and might never do so; and

(iv) the Deferred Cast and Crew Amounts were unascertained (and in our view unascertainable at the time).

Nevertheless, the Partnership claimed that it had incurred expenditure in respect of Deferred Cast and Crew Amounts. That is an unacceptable claim.

100. The claim is unsupported by the documentation and the evidence. In the first place the principal document describing the financial arrangement was the PFA. That document had some negative reference to obligations towards the production team. It was silent on any positive link between the Partnership and the payment of any Deferred Cast and Crew Amounts. In the second place, the individual members of the production team had contracts entitling them to the Deferred Cast and Crew Amounts from AFDG and not the Partnership. The members of the production team had not consented to any financial arrangement with the Partnership. Indeed there was no evidence that they were necessarily aware of the existence of the Partnership. Finally, Mr Edmunds was a designer of the financial arrangements. In his evidence he was unable to give a coherent explanation of how the claimed outcome would flow from the various parties carrying out their responsibilities in the ordinary and natural course of events.

Decision

101. For the reasons given above, we dismiss the appeal.

102. 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.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE

RELEASE DATE: 5 October 2012