Neutral Citation: [2022] UKFTT 303 (TC)

Case Number: TC08575

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01046

SEED ENTERPRISE INVESTMENT SCHEME – appeal against a refusal to authorise the issue of a compliance certificate in relation to certain issues of shares made by the Appellant – held that the refusal was justified – although (i) having regard to all the circumstances existing at the time of each share issue, the Appellant had objectives to grow and develop its trade in the long-term (so that the risk-to-capital condition requirement was satisfied) and (ii) the Appellant did not carry on "excluded activities" by virtue of receiving royalties or licence fees because those royalties and licence fees were attributable to the exploitation of "relevant intangible assets" (so that the trading requirement was met), the arrangements pursuant to which the Appellant had issued the relevant shares and applied the proceeds in the course of its trade were "disqualifying arrangements", with the result that the general requirements in respect of the relevant shares were not met – appeal dismissed

Heard on: 10 and 11 August 2022
Judgment date: 23 August 2022

Before

TRIBUNAL JUDGE TONY BEARE
MR DUNCAN MCBRIDE

Between

COCONUT ANIMATED ISLAND LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Harriet Brown and Ms Rebecca Sheldon, of counsel

For the Respondents: Mr Martin Priestley, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision relates to an appeal against a decision by the Respondents made on 30 April 2019 to refuse the Appellant authority to issue compliance certificates for the Seed Enterprise Investment Scheme (the "SEIS") under Section 257EC of the Income Tax Act 2007 (the "ITA") in respect of shares which were issued by the Appellant between 19 March 2018 and 5 April 2018 (inclusive). Unless otherwise specified in this decision, a reference in this decision to a numbered section should be construed as referring to that numbered section of the ITA.

THE LEGISLATION

2. The SEIS is scheme which is designed to encourage investment in companies meeting the criteria of the SEIS by allowing persons subscribing for the shares of such companies to obtain relief for income tax purposes. The provisions of the legislation relating to the SEIS are to be found in Part 5A and Part 5 of the ITA and those which are of particular relevance to the present proceedings are set out in the Appendix.

3. A feature of the scheme is that, in order for an investor to be able to obtain relief under the scheme in respect of a subscription for shares, the investor must have received a compliance certificate from the issuing company in respect of those shares under Section 257EB. Section 257EC(3) prohibits a company from issuing a compliance certificate to an investor without the authority of the Respondents and Section 257EE provides the issuing company with a right of appeal against a decision by the Respondents to refuse to authorise the issue of such a certificate. The present proceedings stem from such an appeal.

4. The Respondents initially refused to authorise the issue of a compliance certificate in this case on the basis that the Appellant failed the so-called "risk-to-capital condition" requirement in Section 257AA(za). More particularly, the Respondents were of the view that, having regard to all the circumstances at the time when the relevant shares were issued, the Appellant did not have "objectives to grow and develop its trade in the long-term", as required by Section 257AAA(1)(a) in order to meet the condition.

5. The Respondents have subsequently advanced two further reasons for their refusal to authorise the issue of a compliance certificate in relation to the issues of the relevant shares.

6. The first additional reason is that the Appellant has failed to meet the "qualifying company" requirement in Section 257AA(d) because:

(1) in order to meet the "qualifying company" requirement in Section 257AA(d), the Appellant needed to meet the "trading requirement" in Section 257D(a);

(2) in order to meet the "trading requirement" in Section 257D(a), throughout the three-year period commencing with the date when the shares were issued, the Appellant, ignoring any incidental purposes, must have existed wholly for the purpose of carrying on or more new "qualifying trades" (see Section 257DA(2)(a));

(3) in order for the Appellant's trade to have been a "qualifying trade", it must not, at any time in the three-year period commencing with the date when the shares were issued, have consisted wholly or as to a substantial part in the carrying on of "excluded activities" (see Section 189(1)(b));

(4) for this purpose, "excluded activities" included receiving royalties or licence fees (see Section 192(1)(e)); and

(5) although the legislation provides that a trade is not to be regarded as consisting of carrying on "excluded activities" as a result only of its consisting to a substantial extent

in the receiving of royalties or licence fees which (or all of which but for a part that is not substantial in terms of value) are attributable to intangible assets where the whole or the greater part in terms of value of each intangible asset has been created by the relevant company (see Section 195), the Appellant in this case had not "created" the whole or greater part in terms of value of each of its intangible assets.

7. The second additional reason is that, even if, notwithstanding the Respondents' view, the Appellant was carrying on a "qualifying trade" throughout the three-year period commencing with the date when the relevant shares were issued, the relevant shares have failed to meet the "general requirements" condition in Section 257AA(c) because:

(1) in order to meet the "general requirements" condition in Section 257AA(c), there need to have been no "disqualifying arrangements" (see Section 257C(f));

(2) in order for there to have been no "disqualifying arrangements", the relevant shares must not have been issued, and the money raised by the issues of the relevant shares must not have been spent, "in consequence or anticipation of, or otherwise in connection with, disqualifying arrangements" (see Section 257CF(1));

(3) there were "disqualifying arrangements", as defined in Section 257CF(2), in this case because:

(a) there were "arrangements" (as defined in Section 257HJ);

(b) the main purpose, or one of the main purposes, of those "arrangements" was to secure that:

(i) a "qualifying business activity" (as defined in Section 257HG) was being, or would be, carried on by the Appellant in the form of its carrying on, or preparing to carry on, its "qualifying trade"; and

(ii) one or more persons (whether or not including any party to the arrangements) – which is to say the investors in the B ordinary shares in the Appellant - might obtain a "relevant tax relief" (as defined in Section 257CF(6)) – which is to say relief under the SEIS - in respect of shares issued by the Appellant which raised money for the purposes of that activity;

(c) that activity was the activity for the purposes of which the issue of the relevant shares raised money; and

(d) one or both of the conditions referred to in Sections 257CF(3) and 257CF(4) are met because:

(i) as a direct or indirect result of the money raised by the issues of the relevant shares being spent, the whole or a majority of the money raised was, in the course of the arrangements, paid to or for the benefit of a person which was a party to the arrangements or a person which was connected to a party to the arrangements (see Section 257CF(3)); and/or

(ii) in the absence of the arrangements, it would have been reasonable to expect that the whole or greater part of the activities comprising carrying on (or preparing to carry on) the Appellant's trade would have been carried on as part of another business by a person which was a party to the arrangements or a person which was connected to a party to the arrangements (see Section 257CF(4)).

BACKGROUND AND AGREED FACTS

8. The agreed facts in relation to the appeal are as follows:

(1) the Appellant is a company which was incorporated to exploit the intellectual property rights to a pre-school animation programme called Coconut Bay, and related spin-offs, conceived by Mr Christopher Fenna at some point in the late 1990s. At the time when the Appellant acquired those rights, Mr Fenna was the creative director of CHF Entertainment Limited ("CHFE"), a member of the group of companies (the "CHF Group") headed by CHF Media Group Limited ("CHF MGL");

(2) the CHF Group operated a fund (the "CHF Fund") pursuant to which third-party investors were invited to subscribe for shares in special purpose investee companies, each of which held the intellectual property rights to a particular concept or show. The model was for investors to acquire 50% of the voting rights and economic equity in each investee company (through a nominee company which was a member of the CHF Group) and for CHF MGL to acquire the remaining 50% of the voting rights and economic equity in each investee company. The key to the success of the fund was the fund's creative commercial committee (the "CCC"). The CCC was responsible for identifying prospective concepts or shows which had the potential to generate significant returns for investors and, once the manager of the CHF Fund, based on the recommendation of CHF Enterprises Limited, another member of the CHF Group ("CHF Enterprises"), having consulted the CCC, had made its decision to the effect that the CHF Fund should participate in a new concept or show, the intellectual property rights relating to that concept or show would be transferred to a newly-incorporated investee company held in this way;

(3) in April 2017, Mr Fenna proposed his Coconut Bay concept to the CCC as something which might be appropriate for an investee company held in this way. He did this by way of a two-page proposal which briefly pictured the main characters and described the concept in words (the "Proposal"). At the time of the Proposal, Mr Fenna was himself a member of the CCC (although he did not himself participate in the relevant decision) and had worked for CHFE for three years, initially as an independent contractor and then more recently as an employee and creative director;

(4) as a result of the manager's approval of the Coconut Bay concept for the above purpose, based on the recommendation of CHF Enterprises, having consulted the CCC, the Appellant was incorporated on 16 May 2017. On incorporation:

> (a) its registered address was 2 Hurle Road, Bristol, BS8 2SY, which was the same as CHFE's registered address at that time;
>
> (b) its sole director was Mr Adrian Wilkins, the chief executive officer of the CHF Group; and
>
> (c) its sole shareholder was Ms Jean Hawkins, who held 100 A ordinary shares in the Appellant;

(5) in August 2017, the Appellant entered into an agreement (the "IP Assignment Agreement") with Mr Fenna, pursuant to which Mr Fenna agreed to assign to the Appellant all of the intellectual property rights owned by Mr Fenna in relation to the Coconut Bay characters and concept in consideration for the payment of £1 plus the right to 10% of the net profits of the Appellant with effect from the date of the agreement. (The signed copy of the IP Assignment Agreement produced to us was undated, but it was one of the attachments to the letter from the Appellant to the Respondents of 6 September 2017 referred to in paragraph 8(6) below and it is common ground that the IP Assignment Agreement must have been executed in August 2017);

(6) on 6 September 2017, Mr Wilkins wrote to the Respondents on behalf of the Appellant to ask for advance assurance as to the Appellant's qualifying status for the purposes of the SEIS and, in connection with that request, providing information to the Respondents about the Appellant and the activities that it intended to carry on (the "AA Letter"). In the AA Letter, Mr Wilkins:

(a) explained the Coconut Bay concept, the target market for the concept (pre-school children), the reasons for believing that it would be commercially successful and the marketing plan. That plan was to start by launching the concept on an established children's YouTube channel in the form of short "webisodes" before moving into more traditional broadcasting forms with longer episodes and, ultimately, deriving further revenue streams from licensing and merchandising in relation to the characters in the show;

(b) provided details on the background of Mr Fenna and explained that Mr Fenna had agreed to transfer the intellectual property rights in the concept to the Appellant (pursuant to the IP Assignment Agreement, which he attached to the AA Letter) and that the Appellant would be engaging Mr Fenna "to partake in the creative development of the Coconut Bay concept and to work with other team members towards producing a first series";

(c) explained that the Appellant had entered into a production services agreement with CHFE pursuant to which CHFE would provide the services of its employees and independent contractors to the Appellant in order to produce the initial "webisodes". Mr Wilkins said in the AA Letter that the relevant production services agreement was attached to the AA Letter but the production services agreement so attached was both unsigned and undated and it is common ground that it was never itself formally executed in that form. For the purposes of this decision, we will therefore refer to it as the "Draft PSA";

(d) explained that the intention was to fund the initial phase of the project through the SEIS and then to raise further funds through the Enterprise Investment Scheme (the "EIS") if the initial phase proved to be successful;

(e) said that:

(i) until the initial "webisodes" had been produced, the intellectual property rights did not have any significant commercial value because there was no way of knowing whether the concept would gain traction with either a broadcasting channel or merchandisers;

(ii) in developing the initial "webisodes", the Appellant would necessarily produce the greater part by value of the Appellant's intellectual property; and

(iii) therefore, he expected that the Appellant would be able to satisfy the safe-harbour in respect of the receipt of royalties and licence fees which were attributable to "relevant intangible assets", as defined in Section 195(4), by the time that it started receiving the royalties and licence fees;

(f) enclosed a copy of an information memorandum in relation to the CHF Fund (the "IM") which described the operation of the fund, its relationship with members of the CHF Group and the proposed shareholdings in investee companies such as the Appellant; and

(g) finally, enclosed an investor brochure which had been prepared for prospective investors in the Appellant by the CHF Group on behalf of the CHF

Fund (the "Investor Brochure") which contained various revenue projections and a budget for use of the funds raised by the Appellant;

(7) on 16 October 2017, the Respondents replied to the Appellant and confirmed that, on the basis of the information which the Appellant had supplied in the AA Letter, the Respondents would be able to authorise the Appellant to issue compliance certificates under Section 257EC(1) in respect of ordinary shares issued to individual investors (the "Advance Assurance");

(8) on 19 October 2017, Ms Hawkins was appointed as a director of the Appellant and, on 23 October 2017, Mr Wilkins ceased to be a director of the Appellant;

(9) the following issues of shares were then made by the Appellant:

Date	Shares issued	Amount subscribed (£)
13 December 2017	6,6601 B ordinary shares	16,650.25
2 January 2018	11,581 B ordinary shares	2,895.25
6 January 2018	97,111 B ordinary shares	24,277.75
23 January 2018	11,775 B ordinary shares	2,943.75
16 February 2018	39,002 B ordinary shares	9,750.50
27 February 2018	39,003 B ordinary shares	9,750.50
28 February 2018	8,327 B ordinary shares	2,081.75
19 March 2018	44,697 B ordinary shares	11,175.25
26 March 2018	36,471 B ordinary shares	9,117.75
3 April 2018	63,856 B ordinary shares	15,964.00
5 April 2018	108,197 B ordinary shares	27,049.25
Total	**526,621 B ordinary shares**	**144,397.00**

The B ordinary shares were all issued to nominee companies to hold legal title to the shares on behalf of the relevant investors as beneficial owners and a significant percentage of the B ordinary shares so issued were issued to CHF Nominees Limited, a member of the CHF Group ("CHF Nominees"), acting as nominee for the investors in question;

(10) on 16 March 2018, the Appellant submitted to the Respondents compliance statements in relation to the B ordinary shares issued between 13 December 2017 and 16 February 2018 (inclusive);

(11) on 29 March 2018, the Respondents wrote to the Appellant acknowledging receipt of the compliance statements but asking for some further information before they could consider the application further;

(12) on 10 May 2018, the Appellant submitted to the Respondents compliance statements in relation to the B ordinary shares issued between 27 February 2018 and 5 April 2018 (inclusive);

(13) on 6 June 2018, Mr Fenna was appointed as a director of the Appellant and Mr Fenna and the Appellant entered into a services agreement (the "Services Agreement");

(14) on 5 July 2018, the Appellant entered into a production services agreement (the "PSA") with CHFE pursuant to which CHFE agreed to provide production services comprising the production and delivery of certain matters as more particularly set out in

schedules 1 to 3 to the PSA (or as the parties might agree from time to time) in return for payments set out in schedule 4 to the PSA, with effect from July 2018;

(15) on 3 August 2018, Ms Hawkins transferred 98 of her 100 A ordinary shares to CHF MGL;

(16) on 7 August 2018, the Respondents wrote to the Appellant:

(a) to inform the Appellant about the new "risk-to-capital condition" requirement in the SEIS that was in the course of being enacted and which would apply to shares issued on or after 15 March 2018;

(b) to say that, of the issues of B ordinary shares made by the Appellant, it was likely that only the issue of B ordinary shares made on 19 March 2018 would be subject to the new condition – the Respondents appear to have overlooked the fact that the Appellant had previously notified them of issues of B ordinary shares made after 19 March 2018 (see paragraph 8(12) above) - but that the Respondents' view was that the issue of B ordinary shares made on 19 March 2018 was unlikely to satisfy the new condition for reasons which they then enumerated;

(c) to invite the Appellant to make further representations or provide further information if it did not agree with the Respondents' view; and

(d) to say that authority to issue a compliance certificate in relation to each of the issues of B ordinary shares made by the Appellant prior to 19 March 2018 was being sent to the Appellant under separate cover;

(17) on 10 August 2018, the Respondents sent to the Appellant their authority to issue a compliance certificate in relation to each of the issues of B ordinary shares made by the Appellant between 13 December 2017 and 28 February 2018 (inclusive);

(18) on 20 August 2018, following its acquisition of A ordinary shares in the Appellant referred to in paragraph 8(15) above, CHF MGL filed a notice at Companies House recording that, as a result of its holding more than 25% but not more than 50% of the voting rights in the Appellant, it was a person with significant control over the Appellant;

(19) on 20 February 2019, the Appellant entered into an acquisition agreement (the "Acquisition Agreement") with CHF TV Limited ("CHF TVL") pursuant to which the Appellant licensed to CHF TVL the right to show animated shorts known as "Coconut Bay" on CHF TV and all other IPTV platforms between 1 May 2018 and 30 April 2023 an unlimited number of times for a licence fee equal to 50% of the gross receipts received by CHF TVL from Little Dot Studios in respect of the programme;

(20) on 30 April 2019, the Respondents sent to the Appellant their decision to refuse to authorise the issue of compliance statements in relation to each of the issues of B ordinary shares made by the Appellant between 19 March 2018 and 5 April 2018 (inclusive);

(21) on 8 May 2019, CHFE went into voluntary liquidation; and

(22) on 30 September 2020, Ms Hawkins ceased to be a director of the Appellant.

THE EVIDENCE

Introduction

9. The evidence in relation to the appeal took the form of various documents which were contained within the bundle for the hearing, together with the evidence of Mr Fenna.

The documents

Introduction

10. The most critical documents were the IP Assignment Agreement, the AA Letter, the IM, the Proposal, the Investor Brochure, the Services Agreement, the Draft PSA and the PSA.

11. We have already set out in paragraph 8 above the relevant terms of the AA Letter. As regards the other documents set out in paragraph 10 above, we would make the observations which follow.

The IP Assignment Agreement

12. The rights in relation to the Coconut Bay characters and concept transferred under the IP Assignment Agreement were widely-defined. They included all "copyright, rights in inventions, patents, know-how, trade secrets, trade marks and trade names, service marks, design rights, rights in get-up, database rights and rights in data, semiconductor chip topography rights, rights in software, the right to sue in passing off, utility models, domain names and all similar rights" whether registered or unregistered, vested, contingent or future and whereever existing and any applications to protect or register the relevant rights and all renewals and extensions of such rights or applications. They also included any licences, agreement and materials which were required by the Appellant in order fully to exploit, use and receive the benefit of those assigned rights.

The IM

13. The date on which the IM was produced is somewhat unclear. The information and illustrations set out in the IM were stated to be "as at 1 March 2016" and yet other evidence suggested that it must have been a little later than that because both Mr Fenna, in his oral testimony, and an article by Ms Samantha Loveday of 18 May 2017 which was within the documents bundle for the hearing indicated that Mr Fenna did not become a member of the CCC and the creative director of CHFE until April or May 2017 and the IM referred to Mr Fenna as already having both capacities. What we do know is that, because the IM was included as an attachment to the AA Letter, it clearly dates from before 6 September 2017. This suggests that the IM is likely to have a date of between April 2017 and September 2017. In any event, very little turns on the precise date of the IM as both parties agreed that it was an accurate summary of the operations of the CHF Fund and the CHF Group and the relationship between both of those entities and the investee companies in general.

14. In addition to the matters which we have already summarised in relation to the IM in paragraph 8(6)(f) above, the IM contained the following relevant information:

(1) the CCC was "at the heart of the CHF Media Fund and…key to its success". The eight members of the CCC were all employees of the CHF Group and included Mr Wilkins – who was chief executive officer of the CHF Group – Ms Nicola Johnston – who was head of the corporate finance arm of CHFE – and Mr Fenna – who was the creative director of CHFE, as we have noted above;

(2) the job of CHFE's employees and independent contractors was "to not only produce and develop the shows or concepts but also to come up with ideas to be considered for development by the CCC". In addition, "[on] occasion, if the concept is strong enough, the CCC will consider proposals from external sources";

(3) the investors would hold their shares through a nominee which was a member of the CHF Group. That company would hold legal title to the shares whilst the investors would be the beneficial owners of the shares. An investor would provide his or her subscription monies to the administrator of the fund and then the manager of the fund, based on the recommendation of CHF Enterprises, having consulted the CCC, would

decide on the investee company in which the particular investor's subscription monies could most usefully be deployed;

(4) to ensure that investee companies' concepts and shows had the best chance of success, each investee company "[would] have access to the full range of CHF's extensive in-house expertise and support". In addition, an investee company might engage an external production company to develop and produce the concept or show;

(5) fees and charges which were payable by an investee company to the CHF Group included development and production fees, licensing and merchandising fees and distribution fees. These were all payable at a market rate;

(6) the risks faced by investee companies included the fact that they would be "highly dependent on the skills of [the CHF Group] and the departure of any of [the CHF Group's] key directors, consultants or employees or other people involved in the development of the investee companies could have a material adverse effect on the business of the investee companies";

(7) each investee company would have at least one director, Ms Hawkins, who was wholly independent of the CHF Group and whose role would be to act as the "investors' champion";

(8) the CHF Fund would have its own independent manager but the manager's decisions were based on advice received from CHF Enterprises, having consulted the CCC. The fees of the manager would be discharged by the investee companies and, to the extent not so discharged, would be recouped by the CHF Fund on exit prior to any dividends' being paid to investors;

(9) the CHF Group would defray various initial expenses in establishing the CHF Fund and would be entitled to receive various fundraising fees from the CHF Fund on an ongoing basis; and

(10) it was anticipated that the optimum holding period for each investee company would be between three and five years from the date of first release or first broadcast. No specific exit route could be prescribed at the outset but, at the relevant time, an exit likely to provide the highest return for investors would be devised, with input from the independent director. The intention was for the CHF Group to be able to leverage against its shareholding in the relevant investee company to acquire the shares of the investors and then for the relevant investee company to be sold to management or a third party or to be liquidated.

The Proposal

15. The Proposal briefly pictured the characters which were intended to populate the show without naming them or describing their characteristics and identified Mr Fenna as the owner of the intellectual property rights in the concept.

The Investor Brochure

16. The Investor Brochure showed no meaningful change to the design of each character as compared to the Proposal. However, the Investor Brochure:

(1) showed the characters which were intended to populate Coconut Bay in a little more detail than had been the case in the Proposal;

(2) explained the particular characteristics of each character;

(3) explained in greater detail than the Proposal how the plot of each show was intended to work and which objects could be featured in the shows; and

(4) identified the Appellant as the owner of the intellectual property rights in the concept.

17. The Investor Brochure also:

(1) explained the marketing plan, which was:

(a) to start with pilot "webisodes" on YouTube and work with YouTube to maximise revenues from advertising and sponsorship;

(b) to go on to launch the show on more traditional broadcasting channels, generating secondary revenue from those sales; and

(c) ultimately, to launch a licensing and merchandising programme;

(2) contained revenue projections which showed:

(a) advertising revenues, growing from a high of £50,000 and a low of £18,000 in year one to a high of £150,000 and a low of £45,000 in year three and then reducing to a high of £75,000 and a low of £25,000 in year five;

(b) broadcast sales revenues which commenced only in year two with a high of £30,000 and a low of nil, growing to a high of £75,000 and a low of £30,000 in year five; and

(c) licensing and merchandising revenues which commenced only in year three with a high of £20,000 and a low of £5,000, growing to a high of £80,000 and a low of £35,000 in year five;

(3) contained a budget of £150,000, of which by far the greatest item was £50,944 for "Design/Production Team" and allowed £5,864 for 'Pre-production", £35,556 for "Production", £8,140 for "Voice Recording, cuts and Picture edits", £6,450 for "Post production sound and Music", £21,391 for "Production overheads" and £21,655 for "Marketing, Social Media and Commercial"; and

(4) finally, invited any prospective investor who wanted further information to contact Ms Johnston, who was described as "Head of Finance", on her CHF Group email address.

The Services Agreement

18. The Services Agreement included the following terms:

(a) the Services Agreement superseded any earlier written or oral arrangement between the parties and contained the entire agreement and understanding of the parties in relation to the subject matter of the Services Agreement;

(b) with effect from the "Commencement Date" – which was defined as 16 August 2017 – Mr Fenna was appointed as director of the Appellant until the Services Agreement was terminated in accordance with its terms;

(c) the duties of Mr Fenna were to include:

(i) overseeing all creative development of "the IP Coconut Bay";

(ii) selecting and approving all contractors, including all artists, writers and musicians involved in developing "the IP" and all other "IP" that might be developed by the Appellant;

(iii) selecting and improving any outsourced production companies used in the making of any "Programme, web site or associated media"; and

(iv) selecting and approving any marketing, licensing, social media or PR companies;

(d) the above services were:

(i) to be provided without charge to the Appellant during the initial development phase, which would end on delivery of the first seven episodes; and

(ii) to be "deemed as the creator's investment into the [Appellant] in return for a net share of profits as defined in the Deed of Assignment";

(e) after the initial development phase, Mr Fenna's services would be renegotiated "dependent on circumstances not yet foreseen"; and

(f) Mr Fenna undertook, inter alia:

(i) to maintain the confidentiality of confidential information relating to the business and financial affairs of the Appellant, its customers and its suppliers; and

(ii) to hold on trust for the Appellant, and ultimately to assign to the Appellant, any copyrights, works and designs conceived or made by him during his working hours and acknowledged that any decisions in relation to exploiting the intellectual property arising as a result of his work were to be made by the Appellant.

The Draft PSA and the PSA

19. The Draft PSA and the PSA were on identical terms except as follows:

(1) the Commencement Date in the Draft PSA was said to be "[ ] 2017", whereas the "Commencement Date" in the PSA was said to be "July 2018";

(2) in schedule 2 to the Draft PSA, the "Production" was defined as five webisodes of two minutes each with Credits stipulated as "(1) minute open and closed credits x 2" and was required to be produced in the English language whereas, in the PSA, the "Production" was defined as seven webisodes of two minutes each, no provision was made for "Credits" and there was no requirement for the use of the English language;

(3) schedule 3 to the draft PSA specified that "[the] current production and delivery schedule is planned as 5 x 2 minute episodes, with a planned start date of November 2017, end date of 15th June 2018", whereas schedule 3 to the PSA provided "Deliverables are 7 x 2 minute webisodes. Planned start date of July 2018";

(4) the budget in schedule 4 to the Draft PSA was for an aggregate amount of £150,000 and the aggregate, the line items specified in the breakdown of the aggregate and the figures for those line items exactly matched the budget set out in the Investor Brochure, whereas the budget in schedule 4 to the PSA was for an aggregate amount of £98,578.43 and the line items specified in the breakdown of the aggregate and the figures for those line items were completely different from those set out in schedule 4 to the Draft PSA;

(5) the registered address of CHFE in the two documents was different; and

(6) the notices in the Draft PSA were required to be sent to Mr Simon Hall (in the case of CHFE) and Mr Wilkins (in the case of the Appellant) whereas the notices in the PSA were required to be sent to Mrs Helen Brown (in the case of CHFE) and Mr Fenna (in the case of the Appellant).

Other documentary evidence

20. In addition to the documents to which we have already referred, we were shown:

(1) a letter of 9 September 2018 from Mr Fenna on behalf of the Appellant to Ms Elizabeth Arnold of the Respondents in which Mr Fenna set out three reasons why he believed that the Appellant satisfied the "risk-to-capital condition" requirement in Section 257AA(za) (the "September 2018 Letter"). In that letter, Mr Fenna said that, between September 2017 and March 2018, he "had redesigned the characters, the backgrounds and had written scripts and all those activities had taken place since the [Appellant] had been assigned the IP";

(2) accounts for the Appellant in respect of its financial year ending 31 May 2018 (the "2018 Accounts"). These showed that, as at 31 May 2018, the Appellant had incurred £84,581 on the development and production of its intangible assets;

(3) accounts for the Appellant in respect of its financial year ending 31 May 2019 (the "2019 Accounts"). These showed that, as at 31 May 2019, the Appellant had incurred a further £49,479 on the development and production of its intangible assets, and had therefore incurred £134,060 in aggregate on the development and production of its intangible assets;

(4) accounts for the Appellant in respect of its financial year ending 31 May 2020 (the "2020 Accounts"). These showed that, as at 31 May 2020, the Appellant had incurred a further £5,937 on the development and production of its intangible assets, and had therefore incurred £139,997 in aggregate on the development and production of its intangible assets;

(5) various invoices which had been sent to the Appellant in 2018 – namely:

(a) on 11 June 2018, an invoice for £1,375 from Sheil Land Associates Limited for 50% of the script fee prepared by Ms Evgenia Golubeva;

(b) on 27 July 2018, an invoice for £450 (excluding VAT) from Soho Square Studios for services provided to the Appellant in connection with the production of Coconut Bay;

(c) on 6 August 2018, an invoice for £1,200 (excluding VAT) from Rabbit Vocal Management for services provided to the Appellant in connection with the production of seven two-minute episodes;

(d) on 8 August 2018, an invoice for £1,260 (excluding VAT) from Craig Knowles for services provided to the Appellant in connection with the production of Coconut Bay; and

(e) on 20 August 2018, an invoice for £1,715 (excluding VAT) from Kidztalk Limited for services provided to the Appellant in connection with the production of the Coconut Bay pilot;

(6) a brochure from Kuber Ventures, an entity describing itself as "[Opening] the door to EIS investment" (the "Kuber Brochure") which outlined the structure and nature of the CHF Fund for prospective investors in the fund;

(7) screen grabs from Okee TV which suggested that the episode of Coconut Bay entitled "Coconut Bay – Ball" first aired on Okee TV on 9 April 2021 and that the episode of Coconut Bay entitled "Coconut Bay - Brush" first aired on Okee TV on 15 January 2022; and

(8) a confirmation statement sent to Companies House in relation to the Appellant on 15 May 2019, which showed that, as at that date:

(a) 98% of the A ordinary shares in the Appellant (amounting to 49% of the voting rights and economic equity in the Appellant) was held by CHF MGL; and

(b) of the B ordinary shares which had been issued to nominees to hold on behalf of the investors, the greater part of the relevant shares had been issued to CHF Nominees.

The evidence of Mr Fenna

21. The evidence of Mr Fenna was as follows:

(1) he was the creator of the intellectual property known as Coconut Bay. He had worked in the animation industry for over 40 years after completing a degree in film-making and had had the original idea for Coconut Bay while working as a self-employed animator in the late 1990s. The concept which he had presented to the CCC was largely the same concept which he had developed in the late 1990s, with some minor modifications to bring the concept up to date. However, he had not pitched the idea to anyone until he did so to the CCC in April 2017, at which time he had been working full-time as an independent contractor for CHFE for some three years and had recently become an employee and the creative director of CHFE. However, he had never held any shares in any company in the CHF Group;

(2) the original funding model for productions when he had started his career had been for broadcasters to fund productions but that had changed over time to a co-funding model, in which external investors were invited to finance productions. Various jurisdictions around the world such as France and Canada had created advantageous tax regimes in order to encourage investment of that nature. The introduction in the UK of the EIS and the SEIS enabled investors in the UK to participate in financings of that ilk;

(3) the risky nature of productions meant that any money raised for a production had to be used efficiently. There was generally a long lead-time before a concept or show took off and therefore it made no sense for a company, such as the Appellant, which was seeking to exploit its intellectual property rights, to take on many employees. It was better for such a company to obtain the design, animation, writing and content from sub-contractors. CHFE had a team of employees and sub-contractors which made it an ideal sub-contractor for the Appellant in relation to Coconut Bay. That explained why most of the Appellant's budget had been paid to CHFE. He did not think that CHFE would have made a significant profit from the budget in the PSA. The amounts set out in the PSA were not much more than what he expected to have been the relevant costs for CHFE;

(4) his work for CHFE over the period in which the relevant shares in the Appellant had been issued had been full-time. He had been the series director for a show called "Daisy and Ollie". Thus, the work which he had done for the Appellant had largely been in his spare time outside working hours. Notwithstanding the suggestion in the IM that it was part of his job specification to come up with ideas for the CCC to consider (see paragraph 14(2) above), it was never part of his contract with CHFE as an independent contractor or as an employee to do so. Moreover, whilst it was true that most of the ideas that were pitched to the CCC came from employees of, and independent contractors who worked for, CHFE, that was not exclusively the case. The CCC also considered suggestions which were put to it from persons who had no connection with the CHF Group, as the IM had said;

(5) he had left all administrative matters in relation to the Appellant – such as the formation of the Appellant, the contractual documents and the figures in the forecast in the Investor Brochure – to others such as Mr Wilkins, Ms Johnston and Ms Hawkins. His sole focus was on the creative aspects of the Appellant's trade;

(6) the deal which he had reached with the CHF Fund in relation to Coconut Bay was that he would get 10% of the net profits of the Appellant going forward. He considered that that was a good outcome as he was aware of other cases where the original designer of the concept or show had retained a much lower percentage of the future profits. Moreover, he thought that his 10% profit share could prove to be extremely valuable. As he was content with his 10% profit share, he did not mind that the arrangements meant that the CHF Group would be obtaining a 49% share in the remaining 90% of the Appellant's net profits;

(7) it was never intended that the Appellant would acquire the intellectual property rights to any concept or show other than Coconut Bay. The model in the industry was for there to be a single investee company for each concept or show;

(8) when he said in the September 2018 Letter that he "had redesigned the characters, the backgrounds and had written scripts" since the intellectual property had been assigned to the Appellant in August 2017, he meant that other people had done so under his direction. For instance, he had hired Mr Knowles to bring a more contemporary feel to the show. As the extract from the September 2018 Letter suggested, Mr Knowles was not the only person whom he had asked to do work on the Appellant's behalf prior to 6 June 2018 when he had been formally appointed as a director of the Appellant. He had also engaged other sub-contractors on the Appellant's behalf, such as Ms Golubeva of Sheil Land Associates Limited, who worked on the script and, most importantly, CHFE, who provided various production services. This was the reason why the various invoices specified in paragraph 20(5) above had been issued to the Appellant and why the 2018 Accounts showed a figure for costs incurred in developing and producing intangible assets of £84,581;

(9) he accepted that there were deficiencies in the documentation during that period, in that:

> (a) he was not technically authorised to enter into contracts on behalf of the Appellant until he was formally appointed as a director of the Appellant on 6 June 2018; and
>
> (b) CHFE had performed production services for the Appellant before the PSA was executed on 5 July 2018;

(10) however, what was intended in that regard could clearly be seen in the fact that:

> (a) when he was formally appointed as a director of the Appellant on 6 June 2018, the Services Contract stated that the "Commencement Date" in relation to that appointment was 16 August 2017; and
>
> (b) although the Draft PSA had not been executed, it was in a similar form to the PSA that was eventually executed.

He said that, during that period, he had simply assumed that he was authorised to enter into contracts on behalf of the Appellant and that there was a production services agreement in place between the Appellant and CHFE on the terms of the Draft PSA. He ascribed the deficiencies in the documentation to a degree of chaos that existed

within the CHF Group over the relevant period as a result of a change in management which was then taking place within the group;

(11) since he had pitched the concept to the CCC, the concept had continued to evolve. For instance, whereas initially the Proposal had suggested that the characters were going to speak their own language, they now spoke in English. In addition, the characters had changed so as to be less gender-specific and the number of locations on the island had been expanded. In addition fifty-two scripts had been written. In all of this, the Appellant had relied heavily on CHFE to produce the animations and to advance the concept. The designs which Mr Knowles had worked on were developed further by the head of background design at CHFE pursuant to the PSA. In effect, until its liquidation, CHFE had been responsible for everything apart from the sound and the script. By the time of CHFE's liquidation, most of the production work had been completed but the post-production work had been carried out for the Appellant by Flix Facilities in Manchester;

(12) when the Appellant had entered into the Acquisitions Agreement on 20 February 2019, it had not at that time pitched the show to anyone apart from CHF TVL. However, the Appellant had done so subsequently and the screen grabs referred to in paragraph 20(7) above showed that the show had aired on Okee TV. He was not sure when those shows had first been aired on Okee TV. The "first aired" dates given in the screen grabs did not necessarily indicate that the relevant shows had not been aired before then. The show was targeted at the two to three-year old market and was therefore continually being refreshed and it was Okee TV's practice to re-launch shows; and

(13) the Appellant continued to trade, albeit at a much-reduced level from that originally anticipated because of the lack of funding with which to progress its goals. The plan had been to raise further funds through the EIS but the EIS was subject to similar conditions to the SEIS. Thus, the Respondents' refusal to provide authority for compliance certificates in relation to the SEIS effectively meant that the Appellant was precluded from obtaining EIS funding.

THE ISSUES

22. It may be seen from the summary in paragraphs 2 to 7 above that there are three issues which we are required to decide in these proceedings. They are whether:

(1) at the time when the relevant B ordinary shares were issued, the Appellant "[had] objectives to grow and develop its trade in the long-term" (the "risk-to-capital issue");

(2) the whole or greater part (in terms of value) of each intangible asset of the Appellant in respect of which royalties and licence fees were received by Appellant was "created" by the Appellant (the "IP issue"); and

(3) the relevant B ordinary shares were issued, or any money raised by the issue was spent, in consequence or anticipation of, or otherwise in connection with, "disqualifying arrangements" (the "disqualifying arrangements issue").

23. It is common ground that:

(1) in order for the Appellant to succeed in the appeal, it needs to show that the answers to the first two questions are in the affirmative and the answer to the third question is in the negative; and

(2) in relation to each question, the burden of proof is on the Appellant.

FINDINGS OF FACT

Introduction

24. In the light of the agreed facts and the evidence set out in paragraphs 9 to 21 above, we make the following two findings of fact.

First finding of fact – the engagement of Mr Fenna

Introduction

25. The first relates the basis on which Mr Fenna commissioned certain work in relation to the Coconut Bay concept in the period from 16 August 2017 – when the Appellant acquired the intellectual property in question pursuant to the IP Assignment Agreement – to 6 June 2018 – when Mr Fenna was formally appointed as a director of the Appellant pursuant to the Services Agreement.

The submissions of the parties

26. Mr Priestley submitted that, during that period, as Mr Fenna was neither a director nor an employee of the Appellant, he must have been acting in the course of his employment by CHFE as CHFE's creative director and not acting on behalf of the Appellant. He (quite fairly) pointed out that the mere fact that the Services Agreement stated that Mr Fenna's services were to be supplied with effect from the "Commencement Date" of 16 August 2017 did not mean that Mr Fenna thereby became a director of the Appellant retrospectively with effect from the Commencement Date. An agreement could not apply until it was executed.

27. In reply, Ms Brown accepted that the Services Agreement could not apply until it was executed. However, the reference to the earlier "Commencement Date" was strong evidence that the intention of both the Appellant and Mr Fenna all along was that Mr Fenna was to carry out work on behalf of the Appellant, and engage third party contractors on behalf of the Appellant, from the date that the Appellant acquired the intellectual property and that therefore we ought to infer that there was an oral contract to that effect in existence from the earlier date. In the alternative, Ms Brown said that, during the period in question, Mr Fenna could properly be seen as a "shadow director" of the Appellant – the person in accordance with whose instructions the actual directors of the Appellant during that period – Mr Wilkins and then Ms Hawkins - were accustomed to act.

28. Mr Priestley said that there was no evidence to support either of the above propositions. In particular, whilst we had heard the evidence of Mr Fenna, we had not received any evidence from either Mr Wilkins or Ms Hawkins as to the intentions of the Appellant during the relevant period.

Conclusion

29. In our view, it is not necessary to go so far as to consider whether Mr Fenna could properly be seen as being a shadow director of the Appellant during that period. That is because we think that it is clear beyond any reasonable doubt that, during the relevant period, the intention of both, on the one hand, Mr Wilkins and subsequently Ms Hawkins, as the directors of the Appellant and, on the other hand, Mr Fenna was that Mr Fenna was authorised to carry out work on behalf of the Appellant and to engage third party contractors on behalf of the Appellant in order to progress the Appellant's trade. There was therefore an oral contract to that effect between the Appellant and Mr Fenna in existence throughout the relevant period.

30. We say that primarily because that was the evidence of Mr Fenna and we found Mr Fenna to be an entirely honest and straightforward witness. After hearing Mr Fenna's testimony, there is no doubt in our minds that:

(1) Mr Fenna considered that, with effect from 16 August 2017, he was a director of the Appellant and entitled both to carry out work for the Appellant himself and to engage third party contractors on behalf of the Appellant in order to progress the Appellant's trade. In that respect, Mr Fenna was perfectly well aware that he was wearing two hats at the relevant time – as the creative director of CHFE and as (what he thought was) a director of the Appellant – and he was clear in his own mind where his duties lay as regards each of those engagements; and

(2) Mr Fenna's understanding of the position was the same as that of Mr Wilkins and Ms Hawkins.

31. Although we heard no evidence from Mr Wilkins or Ms Hawkins, Mr Fenna's testimony to the above effect is supported by the fact that:

(1) in the AA Letter of 6 September 2017, Mr Wilkins informed the Respondents that the Appellant was going to engage Mr Fenna "to partake in the creative development of the Coconut Bay concept and to work with other team members towards producing a first series". There is no suggestion in that statement that there was to be a delay of nine months before Mr Fenna was going to be so engaged; and

(2) in addition, although we accept that the terms of the Services Agreement were not yet in effect at the time when the various contractual obligations were incurred by Mr Fenna, those terms do evidence the Appellant's intention that Mr Fenna had the authority to do so because they made provision for the earlier "Commencement Date" for his appointment as a director.

32. In short, we entirely accept Mr Fenna's explanation that the reality of the position was somewhat different from that suggested by the date on which the Services Agreement was executed and that he was orally engaged by the Appellant throughout the relevant period both to carry out work for the Appellant and to engage third party contractors on behalf of the Appellant in order to progress the Appellant's trade.

Second finding of fact – the production services agreement

Introduction

33. Our second finding of fact relates to a somewhat similar point and concerns the production services arrangements with CHFE.

The submissions of the parties

34. Mr Priestley submitted that there was no production services agreement in place between the Appellant and CHFE until 5 July 2018, when the PSA was executed. He said that the Draft PSA had never been executed and that, in any event, there were many differences between the two documents and that those differences were significant.

35. In reply, Ms Brown said that Mr Priestley was exaggerating the extent and significance of the differences between the two agreements and that it was quite clear from the behaviour of the parties that there must have been an oral agreement in place between the Appellant and CHFE in relation to production services supplied over the period prior to the execution of the PSA.

Conclusion

36. We agree with Ms Brown that there is compelling evidence to the effect that, over the period in question, there was an oral agreement in place between the Appellant and CHFE in relation to production services and that the terms of that oral agreement were those set out in the Draft PSA. We say that again based on the evidence of Mr Fenna, as supported by the statements of Mr Wilkins in the AA Letter. It is apparent from that letter that Mr Wilkins was

under the impression that the Draft PSA had already been executed. He said that the arrangements with CHFE "are pursuant to the terms of a production services agreement, a copy of which is enclosed". He did not refer in that letter to an intention for the parties to enter into a production services agreement on a future date based on the terms of the Draft PSA. Moreover, the fact that the Appellant and CHFE were both proceeding on that basis can be seen in the figure for the cost of developing and producing the intangible assets in the 2018 Accounts.

37. Given that conclusion, we think that nothing turns on the differences between the terms of the Draft PSA and the PSA. In fact, the relevant differences seem to us to support the proposition that the situation was developing and that some of the terms set out in the Draft PSA had become inappropriate by the time that the PSA was executed. As the PSA was executed some nine months after the terms of the Draft PSA were set, it is inevitable that there were differences between the two. The development of the project over that period readily explains why:

(1) the PSA had a later commencement date than the Draft PSA;

(2) the number of "webisodes" had gone up from five to seven by the time that the PSA was executed;

(3) the budget under the Draft PSA had reduced by the time of the PSA (because part of the budget set out in the Draft PSA had already been spent, as evidenced in the 2018 Accounts);

(4) the reference for the need for the English language had been removed; and

(5) CHFE's registered office and the notice details for both parties had changed.

38. We have therefore concluded that, in similar vein to the deficiencies in the documentation which relate to the appointment of Mr Fenna as a director of the Appellant, this was a case where a document which ought to have been executed was not but the oral agreement between the relevant parties was clear.

THE ISSUES – THE RISK-TO-CAPITAL ISSUE

The submissions of the parties

39. It was common ground at the hearing that:

(1) this issue requires us to determine whether, in the light of all the circumstances existing at the time of issue of the relevant shares, it would be reasonable to conclude that the Appellant had objectives to grow and develop its trade in the long-term;

(2) the circumstances set out in Section 257AAA(3) are just some of the circumstances which we may take into account for this purpose. The list is inclusive and not exhaustive;

(3) it follows that, by definition, none of the circumstances set out in Section 257AAA(3) is determinative, in and of itself; and

(4) in addition, some of the specified circumstances are more relevant to the second limb of the risk-to-capital condition – whether there was a significant risk of a loss of capital of an amount greater than the net investment return – as opposed to the first limb which we are here addressing.

40. The parties also agreed that there was limited authority in relation to this question. There have been three prior First-tier Tribunal decisions which have addressed this question – *CHF Pip! Plc v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 383 (TC) ("*Pip*"), *Inferno Films Limited v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 141 (TC) ("*Inferno*") and *Cry Me A River v The Commissioners for*

Her Majesty's Revenue and Customs [2022] UFTT 182 (TC) ("*CMAR*"). As first instance decisions, none of the decisions is binding on us and, in any event, cases of this nature are heavily dependent on their own particular facts, which means that they have limited application to the facts in these proceedings.

41. However, despite agreement on the points set out above, the parties reached different conclusions on the facts of this case.

42. Ms Brown submitted that the facts clearly demonstrated that the Appellant had had the objective of growing and developing its trade in the long-term. She pointed out that:

(1) the way in which Section 257AAA was worded meant that what was required was an objective determination – "it would be reasonable to conclude" – of the Appellant's subjective intentions – "objectives". There was no need to show that the relevant objectives had actually been met;

(2) in this case, it was merely necessary to show that the Appellant's intention at the time when the shares were issued was to grow and develop its trade in the long-term. The phrase "long-term" was not defined and it might well be different for different types of business;

(3) the business model of:

(a) starting with YouTube "webisodes" before expanding to longer episodes in conventional broadcasting and ultimately licensing and merchandising; and

(b) engaging sub-contractors instead of employees in the initial stages of the business,

was entirely credible, as Judge Popplewell had accepted in *Pip* at paragraph [72];

(4) the revenue projections set out in the Investor Brochure were wholly consistent with the three-stage process described in paragraph 42(3) above in that:

(a) the only revenues in year one came from advertising, which then grew to a high in year three before slightly reducing;

(b) broadcast sales revenues commenced in year two and then were shown as growing exponentially in the years which followed; and

(c) licensing and merchandising revenues did not start until year three and then were shown as growing exponentially in the years which followed;

(5) moreover, those projections were entirely realistic at the time when they were made. The fact that they had not materialised was due to the ongoing challenge by the Respondents to the status of the shares issued by the Appellant as qualifying for the SEIS. This meant that the Appellant had been unable to access funding under the EIS, which was a fundamental part of its business plan;

(6) even though the original projections had not been met, the Appellant was still carrying on its trade and producing "webisodes" despite the liquidation of CHFE in 2019. In addition, Mr Fenna had testified that significant time had been spent on developing the concept and scripts;

(7) the fact that the Appellant had brought the appeal was further evidence of its desire to grow and develop its trade in the long-term. This was because relief under the SEIS was of no direct benefit to the Appellant itself. Instead, the reason why it was important for the Appellant that its issues of shares qualified for the SEIS (and, correspondingly,

the EIS) was that that would give the Appellant access to funding with which to progress its trade;

(8) turning to the various circumstances set out in Section 257AAA(3):

(a) as regards the circumstance described in paragraph (a):

(i) the revenue projections in the Investor Brochure showed that the Appellant did have the objective of increasing its turnover; but

(ii) it was unrealistic to expect the Appellant to have the objective of increasing its employees. The model for the kind of trade carried on by the Appellant was to engage sub-contractors and not to incur the long-term commitment of hiring employees. Indeed, had the Appellant intended to increase the number of its employees, that would have made no commercial sense and would in fact have cast doubt on its objective of growing and developing its trade in the long-term;

(b) as regards the circumstance described in paragraph (b), she accepted that the nature of the Appellant's business was such that there was a significant risk that the Appellant might not receive some or all of the income that it was projecting but the Appellant nevertheless had a sensible plan for minimising that risk;

(c) the circumstance described in paragraph (c) was not relevant in the present case because the Appellant needed to obtain a lot more equity funding before it would be able to borrow;

(d) the circumstances described in paragraphs (d), (e), (f) and (g) were all aimed at identifying whether the objective of the relevant company was to grow the trade of some other company or group instead of its own. Thus, the implication was that a connection between the Appellant and one of its sub-contractors would potentially be an adverse indication in terms of concluding that the Appellant had the objective of growing and developing its own trade in the long-term. In that regard, she did not shy away from the strong links between the Appellant and the CHF Group which existed in this case. She accepted that the evidence showed that this was the case and that, in particular, most of the Appellant's budget had been paid to CHFE under the production services agreements. However, she pointed out that:

(i) the Appellant was not "connected" with any member of the CHF Group because the relevant definition of "control" for the purposes of determining a connection in this context was the one in Section 995 and no member of the CHF Group had voting control over the Appellant. (She said that Section 257HJ(3) set out a number of provisions in Part 5A of the ITA for the purposes of which Section 995 was stated not to apply and Sections 450 and 451 of the Corporation Tax Act 2010 (the "CTA 2010") were stated to apply instead, that Section 257AAA was not one of the provisions so set out and that therefore Section 995 applied in identifying the nature of the "control" which was required in determining connection for the purposes of Section 257AAA). As the Appellant was not "connected" with any member of the CHF Group in connection with the circumstance described in paragraph (d), it was irrelevant that the majority of the funds raised by the Appellant had been paid to CHFE; and

(ii) opportunities for investors to invest in the Appellant were not confined to investors subscribing directly through the CHF Fund. On the contrary, the

Kuber Brochure showed that shares were marketed to prospective investors by other means; and

(e) it followed that, in her view, the answers in relation to the circumstances described in paragraphs (a), (b) and (d) were supportive of the conclusion that, in all the circumstances, the Appellant did have objectives of growing and developing its trade in the long-term, whilst the answers in relation to the circumstances described in paragraphs (c), (e), (f) and (g) were neutral.

43. Mr Priestley's view was that the facts in this case pointed strongly in the contrary direction. They revealed that the Appellant, like the other investee companies held in the same way, was simply a member of the CHF Group disguised as an independent company in order to enable its shares to qualify for relief under the SEIS (and the EIS). Mr Priestley submitted that the arrangements were simply about improving the profitability and value of the CHF Group and that there was no sense in which the Appellant could be said to have had the objectives of growing and developing its own trade as an independent entity in the long-term. The aim of all concerned in the project was simply to access the SEIS investor market by getting the trade to be carried on by a newly-incorporated special purpose vehicle and then to bring the activity back into the CHF Group after the expiry of three to five years. In short, the structure adopted had been designed to enable the CHF Group to obtain multiple rounds of SEIS relief despite the cap on that relief set out in the legislation.

44. He added that:

(1) the revenue projections set out in the Investor Brochure were wholly unrealistic – in a similar way to the revenue projections made in *Pip* – and should therefore not be taken as evidence of an objective to grow and develop the trade in the long-term. Moreover, those revenue projections extended for only five years and showed the advertising revenue reducing in year four as compared to year three and again in year five as compared to year four. This was hardly consistent with the proposition that the Appellant intended to grow and develop its trade in the long-term;

(2) in reaching its conclusion in *CMAR* that the "risk-to-capital condition" requirement was met, the First-tier Tribunal had placed great store on the fact that the appellant in that case was not simply a single project special purpose vehicle but there was instead an intention to expand its trade to encompass other films as and when they became ready to be produced (see *CMAR* at paragraphs [115] to [123]). That was not the case for the Appellant, whose trade was solely confined to a single project;

(3) in evidential terms, very little reliance could be placed on matters that had occurred in the period following the issues of the shares which were relevant to these proceedings. This was because the question to be addressed related to the objectives of the Appellant at that specific time. Thus, the fact that:

(a) the Appellant had chosen to pursue the appeal in order to gain access to additional funding at this stage; and

(b) the Appellant was continuing to trade despite the liquidation of CHFE,

shed very little, if any, light on the objectives of the Appellant at the relevant time;

(4) the three words/phrases "objective", "grow and develop" and "long-term" were not defined and therefore bore their ordinary meaning. An "objective" was more than simply a "hope". In order for something to qualify as a person's "objective", the relevant person needed to have intended actively and strategically to pursue that thing as a target. "Grow and develop" meant expanding and evolving over time and generally involved increasing

revenue and market share by obtaining additional capital or taking on additional employees. "Long-term" meant a period of more than five years. An intention to engage in profitable activity was not the same as an intention to grow and develop in the long-term;

(5) in the absence of any testimony from a director or employee of the Appellant at the relevant time, there was just the testimony of Mr Fenna and the documentary evidence. Looking at that evidence:

(a) the IM revealed that none of the investee companies was being established in order to pursue its trade in the long-term. Instead, each investee company was no more than a short-term vehicle for the overall aggrandisement of the business and trades of the CHF Group. That was why:

(i) the thrust of the IM was to emphasise the history of the CHF Group and to stress how the CHF Group was the creative force behind each concept or show;

(ii) the IM outlined an exit strategy to take effect after a period of between three and five years;

(iii) Mr Wilkins, the chief executive officer of the CHF Group, was the first director of the Appellant and responsible for writing the AA Letter;

(iv) the IM highlighted the key role that CHFE would play in the production of the Appellant's show and the significant risk faced by the Appellant from its exposure to the CHF Group;

(v) investors in the Appellant, even those obtained through the Kuber Brochure, invested through the medium of the CHF Fund; and

(vi) although Ms Hawkins was not an employee of the CHF Group, the IM made it clear that she was appointed by the CHF Group;

(b) Mr Fenna had never explained why it was appropriate for the CHF Group to obtain 49% of the voting power and economic equity in the Appellant when it had provided no capital or intellectual property rights to the Appellant and was being paid for providing the production services. The reason for it was that the CHF Group was the creative force behind the structure as a whole because Mr Fenna was an employee of the CHF Group when he made the Proposal to the CCC. Although Mr Fenna had said that it was not part of his contract with CHFE as an independent contractor or as an employee to suggest possible concepts or shows to the CCC, the IM indicated that that was the expectation, even if not a contractual obligation, as such;

(c) the sub-contracting arrangement with CHFE meant that the Appellant never had any meaningful control over its trade. Instead, that control was vested in CHFE under the PSA; and

(d) Mr Fenna had also not explained why the revenue projections in the Investor Brochure were realistic and the Appellant had provided us with no evidence to the effect that those projections reflected a view which was genuinely-held by the Appellant at the relevant time; and

(6) turning to the various circumstances set out in Section 257AAA(3):

(a) as regards the circumstance described in paragraph (a), he accepted that the animation business model meant that the Appellant could have an objective of

growing and developing its trade in the long-term without taking on additional employees but there was no evidence to support the proposition that the Appellant had the objective of increasing the turnover of its trade in the long-term;

(b) the circumstances described in paragraphs (b) and (c) were not particularly relevant to the limb of the "risk-to-capital condition" requirement which was in issue in these proceedings. Instead, they were more relevant to the second limb of the requirement – the question of whether there was a significant risk that there would be a loss of capital of an amount greater than the net investment return;

(c) as regards the circumstance described in paragraph (d), a connection between a company and its sub-contractor would potentially be a positive indication in terms of concluding that the company had the objective of growing and developing its own trade in the long-term because an unconnected sub-contractor would charge more for its services than a connected sub-contractor and that would impede the growth of the company. Thus, if the Appellant was not connected with CHFE, that would be a negative indication in terms of this circumstance;

(d) as regards the circumstances described in paragraphs (e), (f) and (g):

(i) the structure had been devised by the CHF Group;

(ii) the CHF Group held 49% of the voting power and economic equity in the Appellant; and

(iii) the opportunity for investors to invest in the Appellant was marketed through the CHF Fund along with the opportunity for investors to invest in other investee companies of the fund.

This would not have been the case if the Appellant had been truly independent of the CHF Group. The investee companies of the CHF Fund were all competing against each other for funding. Thus, the structure made sense only if each investee company (including the Appellant) were to be seen as part of the greater CHF Group; and

(e) it followed that, in his view, the circumstances described in paragraphs (b) and (c) were irrelevant and the answers in relation to the circumstances described in paragraphs (a), (d), (e), (f) and (g) were supportive of the conclusion that, in all the circumstances, the Appellant did not have objectives of growing and developing its trade in the long-term.

45. Ms Brown made four points in her response to Mr Priestley's submissions, as follows:

(1) first, it was not appropriate to say that each of the investee companies of the CHF Fund was in competition with others for funding. Although they all traded in concepts or shows, each investee company had its own bespoke market. For instance, the Appellant's market was in the two to three-year old pre-school range. That was not true of all the other investee companies;

(2) secondly, whilst Mr Priestley had questioned the basis for the CHF Group's holding a 49% interest in the voting rights and economic equity in the Appellant, he had provided no explanation as to why, if Mr Fenna really had been acting as an employee of the CHF Group in suggesting the Coconut Bay concept to the CCC, the group had not acquired a greater share in the voting rights and economic equity in the Appellant;

(3) thirdly, Mr Priestley's focus on the terms and timing of the investors' exit was misconceived. The relevant issue in this case was the objectives of the Appellant and not the objectives of the investors; and

(4) finally, the relationship between the Appellant and the CHF Group was a two-way process in which both parties benefited. The Appellant benefited from its access to the expertise of CHFE's employees and independent contractors and its access to funding through the CHF Fund, whilst the CHF Group benefited from providing production services to the Appellant and also from its shareholding in the Appellant. If the Appellant prospered, so too did the CHF Group. This was not a case of Mr Fenna's having sub-contracted to CHFE the entire conduct of the Appellant's trade. The strategic control of the Appellant's trade remained firmly vested in Mr Fenna.

Conclusion

46. After reflecting on the submissions of the parties, we have concluded that, on balance, the Appellant has satisfied us that, having regard to all the circumstances existing at the times when the relevant shares were issued, including the circumstances set out in Section 257AAA(3), it would be reasonable to conclude that the Appellant did have objectives to grow and develop its trade in the long term.

47. Before setting out the reasons why we have reached that conclusion, we need to make some observations about the circumstances described in Section 257AAA(3). Those are as follows:

(1) we do not find Section 257AAA(3) to be a particularly easy provision to apply. In the first place, the word "may" in the preamble suggests that the section is intended to operate permissively and not compulsorily, and yet Section 257AAA(1) requires that "all the circumstances existing at the time of the issue of the shares" are to be taken into account. This suggests that, notwithstanding the use of the word "may" in the preamble in Section 257AAA(3), the circumstances set out in Section 257AAA(3) are not just examples of "all the circumstances existing at the time of issue of the shares". They are clearly considered to have special significance and need to be considered in each case where Section 257AAA is potentially in point;

(2) having said that, we do not find it easy to ascertain the relevance of some of the circumstances described in Section 257AAA(3) to the two limbs of the "risk-to-capital condition" requirement set out in Section 257AAA(1). In part, this may be because the circumstances described in Section 257AAA(3) are stated to be doing service in relation to both limbs of the requirement without distinguishing between them and the two limbs of the requirement seem to us to be dealing with very different issues. However, it is also the case that it is hard to identify the relevance of some of the circumstances to the issue which is being addressed from the way that the circumstances are expressed.

For instance, it is easy to understand how the circumstance described in paragraph (a) – the objectives of increasing employees or turnover – has relevance to the question of whether the relevant company has the objective of growing or developing its trade in the long-term. The same could equally be said about the circumstances described in paragraphs (b) and (c). With something of a stretch, it might also be said that the circumstances described in paragraphs (f) and (g) are conceivably relevant as they both go to the question of the ability of the relevant company to raise funds for the purposes of the trade. However, it is not easy to see how the circumstances described in paragraphs (d) and (e) have a bearing on the question of whether or not the relevant company has the objectives of growing and developing its trade in the long-term. In fact, this was amply demonstrated at the hearing when Ms Brown expressed the view that a connection

between the relevant company and one of its sub-contractors would be unhelpful to concluding that the relevant company had the required objectives whereas Mr Priestley considered that any such connection would be positively helpful;

(3) so far as we can determine, the circumstances described in paragraphs (d) and (e) are aimed at identifying cases where the fact that the relevant company conducts its trade through a connected sub-contractor or the manner in which the relevant company has been established or has been managed or held is indicative of its having a purpose of benefiting the business or trade of some other company or group as opposed to its own trade in the long-term. If that interpretation is correct, then Ms Brown is right that a connection between the Appellant and CHFE in this case would be an adverse indicator and not a positive one in terms of the relevant test;

(4) whether or not we are correct in our interpretation of the relevance of the circumstance described in paragraph (d), it is necessary for us to identify whether CHFE, the Appellant's most significant sub-contractor, should be regarded as a person "connected" with the Appellant for the purposes of paragraph (d). Part 5A of the ITA does not itself include a definition of the word "connected" and there is no equivalent in that part to the disapplication of Section 993 which is set out in Section 257(2) for the purposes of the EIS. It therefore follows that the general definition of the word "connected" set out in Section 993 applies for the purposes of Part 5A of the ITA. This means that:

(a) contrary to the submissions of Ms Brown at the hearing, Section 257HJ(3) has no relevance to the question of how "control" is to be measured for the purposes of determining whether two persons are "connected" for the purposes of Section 257AAA. This is because, as is made clear by Section 994, where the word "control" appears in Section 993, it is to be interpreted in accordance with Sections 450 and 451 of the CTA 2010 (see Section 994(1)), and not in accordance with the definition of "control" in Section 995, except where otherwise indicated, and no such contrary indication exists in Section 993. Section 257HJ(3) is dealing with a quite separate and distinct point – which is the meaning of the word "control" in those provisions of Part 5A of the ITA in which the word "control" appears. It has no bearing on the meaning of the word "connected" in those provisions of Part 5A of the ITA in which the word "connected" appears; and

(b) if any one or more members of the CHF Group had "control" over the Appellant at the relevant time for the purposes of Sections 450 and 451 of the CTA 2010, then CHFE will have been a person who was "connected" with the Appellant for the purposes of paragraph (d) because CHFE was a member of the CHF Group (see Section 993(5)).

This conclusion raises a difficult question in the present case because, whilst CHF MGL held only 49% of the voting rights and economic equity in the Appellant, and beneficial ownership of the remaining 51% of the voting rights and economic equity in the Appellant was vested in Ms Hawkins and the investors, legal title to the greater part of the 50% of the shares in the Appellant which were beneficially held by the investors was vested in a member of the CHF Group (CHF Nominees) as nominee for the investors.

Section 451(3) of the CTA 2010 provides that, for the purposes of Section 450 of the CTA 2020, the "rights and powers" held by a nominee "are to be attributed" to the beneficial owners. What the section does not say expressly is:

(i) whether that attribution applies not just to those provisions in Section 450 of the CTA 2010 which refer expressly to "rights" and "powers" but also

to the provision in Section 450 of the CTA 2010 which refers to the possession of share capital or issued share capital; and

(ii) whether the attribution to the beneficial owners which is required by the provision should be regarded as being to the exclusion of the nominee – so that the nominee should be regarded as not holding the relevant rights and powers – or whether the attribution to the beneficial owners should be regarded as being in addition to the nominee – so that both the nominee and the beneficial owners should be regarded as holding the relevant rights and powers.

In the light of the conclusion which we have reached in relation to the risk-to-capital issue below, we do not propose to explore these questions in any detail in this decision but we would note that:

(A) it seems unlikely to us that, in referring to "rights and powers" in Section 451(3) of the CTA 2010, the draftsman was intending to exclude from the ambit of the attribution the provision referring to the possession of share capital or issued share capital as there would be no logic in that approach. Moreover, the phrase "rights and powers" is apt to cover the possession of share capital and issued share capital in any event;

(B) the language in Section 451(3) of the CTA 2010 is compulsory, in contrast to the language in Section 451(4) of the CTA 2010, which is optional – "are to be attributed" as compared to "may also be attributed". This might be taken to imply that, unlike circumstances falling within Section 451(4) of the CTA 2010, the attribution in Section 451(3) of the CTA 2010 should operate to the exclusion of the person who is holding on behalf of the person to whom the attribution is to be made; and

(C) when taking into account the overall purpose of these provisions, which is to cause a company to be treated as being under the control of five or fewer participators if it can be so treated – see Section 451(6) of the CTA 2010 – continuing to treat a nominee as being entitled to rights and powers which are required to be attributed to the beneficial owners would seem to be counter-intuitive as it would mean that the rights and powers in question were being counted twice and that would be dilutive.

For all of these reasons, and with some reservations, we have concluded that, for the purposes of identifying the persons who had "control" of the Appellant in order to determine whether the Appellant and CHFE were "connected" at the relevant time for the purposes of Section 993, the entities which acted as nominees for the investors should be disregarded, with the result that no member of the CHF Group (including, in particular in this context, CHFE) was "connected" with the Appellant for the purposes of paragraph (d).

48. Reverting to the conclusion in relation to this issue which we have set out in paragraph 46 above, the reasons for that conclusion are as follows:

(1) the evidence of Mr Fenna at the hearing was that the intention of the Appellant at the relevant time was to grow and develop its trade in the long-term in the manner described by Mr Wilkins in the AA Letter;

(2) the three-stage process described by Mr Wilkins in the AA Letter - of starting with "webisodes" on YouTube, then moving to longer episodes on more traditional broadcasting channels and then finally looking to monetise the concept still further through licensing and merchandising - seems to us to be an entirely credible commercial model. In that regard, we would distinguish the facts in this case from the facts in *CMAR*, where, in reaching its conclusion that the "risk-to-capital condition" requirement was satisfied by the appellant, the First-tier Tribunal placed considerable store on the fact that the appellant was likely to acquire rights to produce further films in the future – see *CMAR* at paragraph [115] – thereby suggesting that, in the absence of the appellant's having that intention, the appellant might have failed this requirement. Producing films is a very different activity from the activity of exploiting intellectual property rights. In this case, there was a realistic possibility of significant future revenues from licensing and merchandising the Coconut Bay characters and concept if the concept proved to be attractive to the target market and thus there was no need for the Appellant to have had an intention to acquire rights to other concepts or shows in order to establish that it had objectives of growing and developing its trade in the long-term;

(3) the form of the revenue projections in the Investor Brochure was entirely consistent with the model referred to in paragraph 48(2) above in the way that the broadcasting revenue was shown as starting slightly later than the advertising revenue and then the licensing and merchandising revenue was shown as starting after that;

(4) although we were not presented with any evidence in relation to how realistic the relevant figures were, we consider that the person involved in the production of those figures, Ms Johnston, would have believed them to be realistic. This is because the figures were included in the Investor Brochure, a document which was sent to prospective investors in order to induce them to invest in the Appellant. In the circumstances, there is absolutely no reason to suppose that Ms Johnston would have fabricated the figures without any basis for reaching them. In this regard, we would add that it is important to bear in mind that what we are required to determine in this case is what it would be reasonable to conclude were the Appellant's subjectively-held objectives at the relevant time. A genuine belief on the part of the Appellant that the figures were realistic suffices for that purpose, even if the figures might have been wildly optimistic, when viewed in objective terms. Thus, even if we were to conclude that the figures were wildly optimistic, that would merely be a factor to take into account in determining whether the stated objectives were genuinely-held. It would not, in and of itself, prove that the stated objectives were not genuinely-held;

(5) turning to the circumstances expressly set out in Section 257AAA(3):

(a) as regards the circumstance described in paragraph (a), we do not think that the absence of an objective to increase the number of employees is of any significance in this context. There is compelling evidence that trades in the animation sector are generally conducted through sub-contractors for very sound commercial reasons. In the decisions in each of *Pip*, *Inferno* and *CMAR* the relevant First-tier Tribunal accepted that that was a standard approach in the film industry – see *Pip* at paragraphs [82] to [86], *Inferno* at paragraphs [36] and [37] and *CMAR* at paragraphs [116] and [117].

In our view, it is much more relevant to consider whether the objective of the Appellant was to increase the turnover of its trade, and we think that that was the case. The revenue projections in the Investor Brochure showed the aggregate revenues increasing from a high of £50,000 and a low of £18,000 in year one to a

high of £230,000 and a low of £90,000 in year five. Moreover, for the reasons on which we expand in paragraphs 49 to 55 below, we do not think that the fact that the revenue projections in the Investor Brochure do not go beyond year five mean that the Appellant did not intend to grow and develop its trade beyond that year. The revenue projections were produced for the benefit of the prospective investors in the Appellant, whose time horizon in relation to their investment was expected to be between three and five years. Thus, the five-year revenue projections were ample for that purpose;

(b) as regards the circumstance described in paragraph (b), we recognise that there was a significant risk that the Appellant might not receive some or all of the projected revenues. That was the nature of the trade on which it had embarked. However, that did not mean that the Appellant did not have the objective of growing and developing its trade in the long-term. That was simply a risk which the Appellant undertook in carrying on its trade and which it accepted at the outset;

(c) as regards the circumstance described in paragraph (c), we recognise that the Appellant did not have assets which it might have been able to use to secure financing. Until its trade developed to an extent where its intellectual property could be monetised and the licensing and merchandising revenue streams could be used to support indebtedness, the Appellant was necessarily confined to raising funding by way of equity. However, that did not mean that the Appellant intended solely to carry on its trade in the short-term;

(d) as regards the circumstance described in paragraph (d), we have already concluded that the Appellant was not "connected" with CHFE for the purposes of Section 993 and therefore its sub-contract with CHFE was not with a connected person for the purpose of that paragraph; and

(e) as regards the circumstances described in paragraphs (e), (f) and (g), there is no doubt that the circumstances in which the Appellant was incorporated, the ownership structure of the Appellant, the sub-contracting arrangements, the fact that all of the investors in the Appellant invested through the CHF Fund and the fact that opportunities to invest in the Appellant arose as part of arrangements for investors to invest in other investee companies held by the CHF Fund all point towards a close connection between the trade of the Appellant and members of the CHF Group. However, for the reasons on which we expand in paragraphs 49 to 55 below, we do not see how that close connection negates the proposition that the Appellant had the objectives of growing and developing its trade in the long-term.

49. We think that the Respondents have made two related conceptual errors in their approach to this question.

50. The first is that is that they have not distinguished the objectives of the Appellant, as a single entity, from the objectives of the shareholders in the Appellant from time to time – which is to say, in the context of this case, CHF MGL, as the holder of 98% of the A ordinary shares in the Appellant and the investors, as the holders of the B ordinary shares in the Appellant. The objectives of CHF MGL and the investors did not necessarily need to correlate – and, in this case, we think that they did not correlate – with the objectives of the Appellant.

51. The paragraph in the IM relating to exit arrangements and the fact that the revenue stream in the Investor Brochure extended for only five years, on both of which Mr Priestley set so much store, need to be considered with the above point in mind. The investment horizon for investors in the CHF Fund, in common with other private equity funds, was the short to medium-term. An investor subscribing in an investee company through the fund would be

interested in realising a return within that time-frame. The long-term objectives of the investee company would be irrelevant. The CHF Group would have had a similar approach to investee companies, as the exit strategy set out in the IM showed although, in its case, there was the added benefit of any returns which the group might make by way of the contractual arrangements between CHFE and the investee companies in the meantime.

52. For all of the shareholders in the Appellant, the aim was to monetise their investment in the Appellant within three to five years of the first broadcast of the show, as set out in the paragraph of the IM dealing with the exit arrangements. As that section went on to explain, the anticipated exit was for CHF MGL to buy out the investors and then to effect a trade sale, whether to the management of the investee company or to a third party. That is also the reason why the table showing the estimated revenue flows in the Investor Brochure was confined to a five-year time horizon.

53. However, none of that has any bearing on the question of the Appellant's objectives, as the Appellant had an independent existence which could last well beyond the time horizon which was of interest to its shareholders from time to time and, in this particular context, its original shareholders. And, so far as the Appellant is concerned, we are satisfied that the evidence shows that the aim was for it to grow and develop its trade in the long-term through the three stages identified in the AA Letter and by Mr Fenna in his evidence.

54. This leads on to what we consider to be the Respondents' second conceptual error, which is their assumption that there is a dichotomy between the Appellant's having an objective to grow and develop its trade in the long-term and the desire of the CHF Group to grow and develop the CHF Group's businesses and trades. Those two objectives are not mutually exclusive. On the contrary, they can – and in this case we think that they do – overlap.

55. The starting point in the Respondents' thesis is that the Appellant was, in all but name and technical detail, a part of the CHF Group in economic terms. Essentially, they say that, but for the requirements of the SEIS regime, the Appellant would have been incorporated as a member of the CHF Group. Whilst we have some sympathy for that view, we do not think that it follows from it that the Appellant could not have had the objectives of growing and developing its trade in the long-term. Following the transfer of the Coconut Bay concept to the Appellant in August 2017, the CHF Group stood to benefit from the concept in two distinct ways. The first was the benefits associated with the production services which CHFE was due to supply to the Appellant and the second was the return which CHF MGL stood to make from its 49% equity interest in the Appellant. However, the mere fact that the CHF Group stood to make a significant return from the concept in those two distinct ways did not necessarily mean that the concept could not also give rise to a significant long-term return for the Appellant itself. There was a symbiotic relationship between the Appellant and the CHF Group and it was possible for both to prosper from the arrangement in the same way that the publication of a successful novel can produce a healthy return for both publisher and author alike. Therefore, even though we agree with Mr Priestley that the arrangement can be viewed commercially as being of great benefit to the CHF Group, that says nothing about the long-term objectives of the Appellant itself. The First-tier Tribunal in *CMAR* reached a similar conclusion to this in determining that the close relationship in that case between the entity which developed the film scripts and the appellant as the producer of the films using those scripts did not preclude the reasonable conclusion that the appellant had the objectives of growing and developing its own trade in the long-term – see *CMAR* at paragraph [118].

THE ISSUES – THE IP ISSUE

The submissions of the parties

56. It is common ground that:

(1) the IP issue turns on whether the royalties and licence fees which, at the time when the relevant shares were issued, were expected to be received by the Appellant were going to be attributable to the exploitation of "relevant intangible assets", as defined in Section 195(4); and

(2) in turn, this requires an answer to the question of whether those royalties and licence fees were going to be attributable to "intangible assets", as defined in Section 195(6), the whole or greater part in terms of value of which had been created by the Appellant.

57. There was not much debate between the parties in relation to the precise times by reference to which these questions were to be answered. However, Ms Brown appeared to be of the view that those times encompassed the whole of the three-year period following each issue of the relevant shares – because that was "period B" for the purposes of Section 189(1)(b) (see Section 257AC) – whereas Mr Priestley appeared to be of the view that those times encompassed only the part of that three-year period which fell after the entry by the Appellant into the Acquisitions Agreement on 20 February 2019 – because it was only at that point that the Appellant actually started to receive royalties and licence fees.

58. Turning then to the questions themselves, Ms Sheldon submitted that it was clear that, at all relevant times, the royalties and licence fees which were going to be received by the Appellant would be attributable to "relevant intangible assets". This was because, at the time when the Appellant acquired the intellectual property pursuant to the IP Assignment Agreement, the value of the intellectual property was negligible and then the Appellant had proceeded to create the greater part of the value of that intellectual property by commissioning various sub-contractors (through the agency of Mr Fenna) to develop intellectual property and then discharging the invoices of those sub-contractors.

59. Mr Priestley said that he accepted that the value of the intellectual property when it had been acquired by the Appellant was negligible, despite the absence of any external valuation to support that conclusion. However, in his view, none of the expenditure which had been incurred by the Appellant in relation to the development of the intellectual property between that date and the date when Mr Fenna was appointed as a director of the Appellant could be said to have been "created" by the Appellant. This was because there was no evidence that Mr Fenna was working for the Appellant when he commissioned the relevant work. The work had been commissioned by Mr Fenna either in his capacity as the creative director of CHFE or on his own account. Either way, the work in question had not been commissioned by the Appellant.

60. More significantly, even if the Appellant could properly be seen as having commissioned the relevant work, there was a difference between commissioning the development of intellectual property and "creating" intellectual property. The latter required what he termed "creative oversight" of the process and, in this instance, that "creative oversight" was being exercised by Mr Fenna either in his capacity as the creative director of CHFE or on his own account.

61. Ms Brown and Ms Sheldon disagreed. They said that, in this context, the acts of commissioning work to be carried out and then discharging the invoice in relation to that work was sufficient to amount to "creating" the intellectual property resulting from that work.

Conclusion

62. Although we think that the question described in paragraph 57 above is not a straightforward one to answer, we are inclined to agree with Mr Priestley that the times for determining whether the royalties or licence fees were attributable to the exploitation of

"relevant intangible assets" do not include the part of the relevant three-year period following each issue of shares which preceded the execution of the Acquisitions Agreement. This is because a company cannot begin to carry on the "excluded activity" of "receiving royalties or licence fees" until it starts to receive those royalties or licence fees, which in this case was when the Acquisitions Agreement was executed. Having said that, we do not think that anything turns on this question in terms of determining the IP issue for reasons which will become clear from the analysis below.

63. When one looks at the provisions of Section 195, it is apparent that, in order to be able to determine at any time whether the royalties or licence fees (or all but a part of those royalties or licence fees that is not substantial in terms of value) which are received by a company are attributable to the exploitation of "relevant intangible assets", some evidence is required of those of the assets of the relevant company giving rise to the royalties and licence fees:

(1) which fall to be treated as intangible assets in accordance with generally-accepted accountancy practice (because of the definition of "intangible asset" in Section 195(6)); and

(2) which, or the greater part of the value of which, has been "created" by the relevant company.

64. In this case, we have received very little direct evidence in relation to either of those points. However:

(1) we have been shown the 2018 Accounts, the 2019 Accounts and the 2020 Accounts. Each of those accounts was prepared in accordance with generally-accepted accountancy practice and showed that a significant part of the aggregate assets which were held by the Appellant at the end of each of those financial years was categorised as "intangible assets"; and

(2) it is common ground that the value of the intellectual property which was acquired by the Appellant pursuant to the IP Assignment Agreement was negligible at the point of acquisition and none of the evidence which we have been shown suggests that that common view is likely to be wrong.

65. We have therefore concluded that, despite the paucity of the evidence with which we have been presented, on the balance of probabilities, at each time that this question needs to be considered, all (or all but for a part which is not substantial) of the aggregate royalties or licence fees received by the Appellant will have been attributable to "intangible assets" (as defined in Section 195(6)) the whole, or the greater part of the value, of each of which arose following the Appellant's acquisition of the intellectual property on 16 August 2017.

66. This means that the Appellant is entitled to succeed on this issue as long as, in relation to each such intangible asset, the intangible asset in question (or the growth in value of the intangible asset in question) arose by virtue of the "creation" of that intangible asset or that value by the Appellant. In that regard, we are inclined to agree with Ms Brown and Ms Sheldon that the process of commissioning a sub-contractor to carry out work the product of which is the vesting of an intangible asset in the person commissioning the work, or an increase in the value of an intangible asset already held by the person commissioning the work, coupled with the discharge of the invoice of the person who has carried out the work, can properly be described as "creating" the intangible asset or value in question. There is, in our view, certainly no need for a person to carry out work itself through its own employees before it can be said to have "created" the product of that work. Commissioning an independent sub-contractor to carry out the work is no different from commissioning an employee to do so. This conclusion is consistent with the conclusion reached by Judge Popplewell in *Pip* at paragraph [123].

67. We find further support for this conclusion in two ways.

68. The first is in Section 195 itself. Section 195(5) provides as follows:

"(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)."

69. This suggests to us that, where the act of creation by the person doing the work takes place in circumstances where the right to exploit the asset when the work has been completed vests in the relevant company, then the relevant company is to be regarded as having "created" the intellectual property itself. In this case, that was exactly what occurred. The result of the work commissioned by the Appellant was the vesting of that work product in the Appellant and it was the Appellant which derived the right to exploit the work product.

70. The second is somewhat more tangential but is derived from the drafting in Part 8 of the Corporation Tax Act 2009 (the "CTA 2009"). The language used in that Part suggests that:

(1) an intangible asset can come to be held by a company in one of only two ways - either because it is "created" or because it is "acquired" – see, for example, Sections 713(1), 715(4), and 880 et seq. of the CTA 2009; and

(2) there is a dichotomy between expenditure which is incurred on "production" and expenditure which is incurred on "acquisition" – see, for example, Sections 811 and 812 of the CTA 2009.

71. Those provisions indicate to us that there is a clear distinction to be drawn between incurring expenditure on an "acquisition" of an intangible asset – which necessarily involves incurring expenditure on the purchase of an intangible asset that already exists prior to the "acquisition" - and incurring expenditure on the process of giving rise to a new intangible asset or an increase in the value of an existing intangible asset, which is the activity in which the Appellant was engaged in this case.

72. For these reasons, we find in favour of the Appellant in relation to the IP issue.

THE ISSUES – THE DISQUALIFYING ARRANGEMENTS ISSUE

The submissions of the parties

73. Ms Brown accepted the following propositions:

(1) each of the issues of shares in this case, and the spending of money raised by those issues of shares, took place in consequence or anticipation of, or otherwise in connection with, "arrangements". This was inevitable, given the wide definition of "arrangements" in Section 257HJ;

(2) the main purpose, or one of the main purposes, of those arrangements was to secure that:

(a) the Appellant would carry on a "qualifying business activity", as defined in Section 257HG, namely the new "qualifying trade", as defined in Section 189, which it intended to carry on; and

(b) the investors in the Appellant might obtain relief under the SEIS, which was a "relevant tax relief" for the purposes of Section 257CF(2)(a)(ii) pursuant to Section 257CF(6), in respect of the shares which had been issued by the Appellant to raise money for the purposes of that activity; and

(3) that activity was the activity for the purposes of which the issue of the relevant shares raised money.

74. It followed that each of Sections 257CF(2)(a) and (b) was satisfied in this case and that the "arrangements" in question would be "disqualifying arrangements" if either or both of Conditions A and B in Sections 257CF(3) and 257CF(4) were to be satisfied.

75. However, neither of those conditions was so satisfied in this case.

76. As regards Condition A, Ms Brown accepted that the majority of the amount raised by the Appellant had been paid to CHFE under the production services agreements. However, she said that neither CHFE nor any other member of the CHF Group was party to the "arrangements" described above. Those "arrangements" simply involved the issue of shares to the investors and the transfer of the intellectual property to the Appellant in order that it could carry on its new "qualifying trade". No member of the CHF Group was party to either of those steps and therefore no member of the CHF Group was a "relevant person" for the purposes of the condition. In particular:

(1) the exit strategy described in the IM in relation to investee companies in general was not part of the "arrangements". The strategy as so described was merely a general strategy in relation to investee companies held through the CHF Fund. It did not necessarily apply to the Appellant itself and had not in fact been adopted in relation to the Appellant itself. In addition, there were no contractual arrangements in place for those exit arrangements to apply in the case of the Appellant; and

(2) the sub-contracting of production services to CHFE was not part of the "arrangements". That was a provision of services by CHFE in return for payments pursuant to agreements which had been entered into on arm's length, industry-standard terms, in exactly the same way as the provision of services by each of the Appellant's other sub-contractors. Thus, the payments made to CHFE by the Appellant were made pursuant to the relevant production services agreement – whether the oral agreement on the terms of the Draft PSA or the PSA. They had not been made pursuant to any "arrangement" to funnel funds to CHFE.

77. As regards Condition B, again, no member of the CHF Group was party to the "arrangements" described above. This meant that, even if it could be said that, in the absence of the "arrangements", it would have been reasonable to expect a member of the CHF Group to carry on, as part of its business, the whole or greater part of the activities of the Appellant in carrying on, or preparing to carry on, the "qualifying trade", no member of the CHF Group was a "relevant person" for the purposes of the condition.

78. In any event, the Respondents had produced no evidence to suggest that, in the absence of the "arrangements", any member of the CHF Group would have carried on the activities of the Appellant in developing and then utilising its intellectual property. The CHF Group's business was production services and not intellectual property ownership. It was simply not part of the CHF Group's business model to develop and utilise intellectual property itself.

79. In response, Mr Priestley submitted that:

(1) the disqualifying arrangements issue needed to be considered only if we were to find in favour of the Appellant in relation to the first two issues;

(2) the definition of the word "arrangements" in Section 257HJ was extremely wide and, in this case, the "arrangements" in question included everything which was described in the IM in relation to investee companies in general. Thus, the "arrangements" encompassed:

(a) the incorporation of the Appellant;

(b) the transfer of the intellectual property by Mr Fenna to the Appellant pursuant to the IP Assignment Agreement;

(c) the sub-contracting by the Appellant of the production services to CHFE; and

(d) the exit strategy outlined in the IM;

(3) members of the CHF Group were heavily involved in each of the above steps. In particular:

(a) the incorporation of the Appellant was instigated by the CHF Group following the presentation to the CCC;

(b) Mr Wilkins, the chief executive officer of the CHF Group, was the first director of the Appellant;

(c) the issues of the relevant shares to the investors had been arranged by the CHF Fund and the greater part of the shares held by the investors had been held through a nominee company which was a member of the CHF Group (CHF Nominees);

(d) the main sub-contractor to the Appellant was CHFE;

(e) CHF MGL had acquired ninety-eight of the one hundred A ordinary shares in the Appellant; and

(f) CHF TVL had received a licence of the programmes pursuant to the Acquisitions Agreement; and

(4) the above meant that each member of the CHF Group was a "relevant person" for the purposes of Section 257CF.

80. Turning then to Condition A, Mr Priestley said that this was satisfied because CHFE, a "relevant person", had received the majority of the Appellant's funds. Even if:

(1) those funds had been paid to CHFE in return for its provision of production services; and

(2) the payments had been made pursuant to contractual arrangements between the Appellant and CHFE which were on arm's length, industry-standard terms – as to which no evidence had been advanced –

those matters were totally irrelevant in relation to this issue. All that mattered was that the money paid to CHFE had been in consequence or anticipation of, or otherwise in connection with, the "arrangements".

81. As for Condition B, in the absence of the "arrangements", it would have been reasonable to expect a member of the CHF Group to carry on, as part of its business, the whole or greater part of the activities of the Appellant in carrying on, or preparing to carry on, the "qualifying trade" because:

(1) the IM and the evidence of Mr Fenna made it clear that the employees and independent contractors of CHFE were expected to come up with ideas of concepts and shows for investee companies to be held by the CHF Fund;

(2) the Coconut Bay concept had been conceived by Mr Fenna, who was one of those employees. In this context, it made no difference that Mr Fenna had first conceived of the concept long before he had started to work for the CHF Group. The critical issue is that he was employed by the CHF Group at the time that he proposed the concept to the CCC and the Appellant had then been formed to carry on the activity;

(3) the CHF Group's business was the production of shows and the CHF Fund was the medium by which those shows were financed;

(4) the driving force behind the structure used in relation to the Appellant, as with the other investee companies, was to enable the Appellant to derive SEIS and EIS funding. Were that not to have been the case, the activities of the Appellant would have been conducted within the CHF Group;

(5) CHFE did most of the work in relation to the Appellant's trade in any event, through its employees and its network of independent contractors; and

(6) the CHF Group provided a significant distribution channel for the Appellant's shows, pursuant to the Acquisitions Agreement between the Appellant and CHF TVL.

82. These facts meant that, in the absence of the "arrangements", it would have been reasonable to expect the trade of the Appellant to have been conducted by a member of the CHF Group itself and for the CHF Group itself to have obtained the finance in order to do so.

83. Both parties claimed that the decision in *CMAR* and, in particular, the comments in paragraph [132] of that decision, supported its position in relation to Condition B.

84. In *CMAR*, the First-tier Tribunal held that the arrangements which were relevant to that case did not satisfy Condition B because:

(1) there was no evidence that the entity which was in the equivalent position in that case to the CHF Group in this case intended to produce films itself. Instead, it was always the intention that, once films had been developed to a stage when they were ready to be produced, the rights relating to the film would be assigned or licensed to a special purpose production company;

(2) each of, on the one hand, the development of intellectual property rights and, on the other hand, production was capable of constituting a "qualifying business activity" in its own right and the development of intellectual property rights required skills and resources which were distinct from the skills and resources required for production. Therefore it did not see anything inappropriate or unnatural in separating out the two activities;

(3) the Respondents had not invoked the disqualifying arrangements argument in giving their authority to issue compliance certificates in relation to earlier issues of shares by the appellant company; and

(4) the entity which was in the equivalent position in that case to the CHF Group in this case had not itself previously issued shares with the benefit of SEIS. This made it difficult to see how the main purpose of the arrangements was to obtain SEIS relief in excess of that to which that entity might otherwise have been entitled

– see *CMAR* at paragraphs [132] to [134].

85. In giving the first of the reasons set out in paragraph 84 above, the First-tier Tribunal noted that:

"Given that SEIS has a limit of £150,000 for the issuing entity the Tribunal can see that had it been the case that there were multiple special purpose vehicles created upon the creation of the second and subsequent production HMRC may have had a justifiable objection that use of that second vehicle rather than the first fell foul of section 257CF".

86. Ms Brown said that the reasoning of the First-tier Tribunal in *CMAR* strongly suggested that Condition B should not be regarded as being satisfied in this case because the facts in the two cases were similar. For his part, Mr Priestley relied on the fact that the Appellant was just

one of a number of investee companies which had been incorporated by the CHF Fund and therefore these circumstances were precisely those to which the First-tier Tribunal in *CMAR* had said in paragraph [132] of its decision the Respondents might justifiably object.

Conclusion

87. In our view, it is clear beyond any reasonable doubt that the arrangements in this case satisfy Condition A in Section 257CF(3) and that therefore:

(1) the relevant shares in this case were issued and the money raised by the issues was spent in consequence or anticipation of, or otherwise in connection with, "disqualifying arrangements";

(2) the general requirements in respect of the relevant shares are not met because there were "disqualifying arrangements" for the purposes of Section 257C(f); and

(3) the investors who subscribed for the relevant shares were not entitled to SEIS relief in respect of those shares because the condition in Section 257AA(c) was not met.

88. We cannot see how it is possible to reach a contrary conclusion on the facts in this case given the extensive involvement of members of the CHF Group in virtually every aspect of the "arrangements".

89. The "arrangements" in this case clearly involved:

(1) the incorporation of the Appellant;

(2) the acquisition by the Appellant of the intellectual property of Mr Fenna;

(3) the raising of funds by the Appellant by the issue of B ordinary shares to the investors in the CHF Fund in order for the Appellant to be in a position to carry on its "qualifying trade"; and

(4) the Appellant's commissioning the development of various intangible assets and using the funds so raised to discharge the invoices of those whom it had commissioned to carry out that development, as that was essential to the carrying on of that "qualifying trade".

90. Although it ultimately makes no difference to the outcome on this question, it is arguable that the "arrangements" also involved:

(1) the exit strategy outlined in the IM in relation to investee companies in general. This is because, although that exit strategy has yet to be deployed in relation to the Appellant specifically, it is part of the model pursuant to which all of the investee companies were held and, as such, we would see it as being an integral part of the overall "arrangements" in relation to the Appellant as well; and

(2) the licensing of the Coconut Bay programme to CHF TVL pursuant to the Acquisitions Agreement because that was an integral part of the "qualifying trade" carried on by the Appellant.

91. On the basis of that description of the "arrangements", we do not see how it is possible to assert that no member of the CHF Group was a party to the "arrangements" as so described. On the contrary, the fingerprints of the CHF Group are all over every step in the "arrangements". For instance:

(1) the Appellant was incorporated as a result of a successful presentation by Mr Fenna to the CCC, the body described by the IM as being "at the heart of the CHF Media Fund and…key to its success" and composed entirely of employees of the CHF Group, including the chief executive officer of the group, Mr Wilkins;

(2) the concept of Coconut Bay came from Mr Fenna, who was the creative director of CHFE at the time when the Proposal was put to the CCC and, in the words of the IM, like the other employees and independent contractors of CHFE, Mr Fenna was one of the people "whose job it is not only to produce and develop the shows or concepts but also to come up with ideas to be considered for development by the CCC";

(3) 49% of the equity in the Appellant was held by CHF MGL;

(4) all of the investors in the Appellant invested through the CHF Fund – that was the case even for investors in the Appellant who came to invest as a result of advice from financial intermediaries such as Kuber Ventures - and it was the CHF Fund which decided on the deployment of the investors' funds as between the various investee companies. Although the CHF Fund had its own independent manager, the IM made it clear that:

(a) the manager's decisions were based on advice from CHF Enterprises, having consulted the CCC; and

(b) the fees of the manager would be discharged by the investee companies and, if not so discharged, would be recouped by the CHF Fund on exit prior to any dividends' being paid to investors;

(5) the CHF Group paid various initial expenses in establishing the CHF Fund and became entitled to receive various fundraising fees from the CHF Fund on an ongoing basis;

(6) the greater part of the shares in the Appellant which were held by the investors were held through a nominee which was a member of the CHF Group (CHF Nominees);

(7) the first director of the Appellant was Mr Wilkins, the chief executive officer of the CHF Group, the second director of the Appellant was Ms Hawkins, who, although not employed by the CHF Group, was nominated by the CHF Fund to act as the investors' champion in relation to the Appellant and the other investee companies, and the third director of the Appellant was Mr Fenna, the creative director of CHFE;

(8) the IM emphasised that:

(a) to ensure the success of each investee company, each investee company would "have access to the full range of CHF's extensive in-house expertise and support";

(b) the CHF Group would receive various fees from investee companies, including development and production fees, licensing and merchandising fees, and distribution fees; and

(c) the investee companies faced a significant commercial exposure to the CHF Group,

and, in the case of the Appellant specifically, the Appellant had access to the employees and independent contractors of CHFE, paid most of its budget to CHFE under the production services agreements and faced a significant commercial exposure to CHFE;

(9) the revenue projections and budget in relation to the Appellant in the Investor Brochure were prepared by Ms Johnston, the head of the corporate finance arm of CHF Enterprises and a member of the CCC;

(10) the anticipated exit strategy in relation to each investee company outlined in the IM involved, in the first instance, the acquisition by the CHF Group of the shares held

by investors in that investee company, using its own shares in the investee company as leverage; and

(11) the Appellant licensed the Coconut Bay programme to CHF TVL pursuant to the Acquisitions Agreement and CHF TVL was entitled to retain 50% of the gross receipts from its use of the programme.

92. Given all of that, it is plain that several members of the CHF Group were party to the "arrangements" and, as each member of the CHF Group was connected with each other member of the group for the purposes of Section 993, it follows that each member of the CHF Group, including CHFE, was a "relevant person" by virtue of the participation in the "arrangements" of any one or more of those members. If one then asks whether, as a direct or indirect result of spending the money raised from the investors for the purposes of the "qualifying business activity" for which that money was raised, an amount representing the majority of the amount raised was, in the course of the "arrangements", paid to or for the benefit of CHFE, that question can have only one answer, which is that it did. The evidence of Mr Fenna was that more than half of the Appellant's budget was paid to CHFE under the production services agreements and Ms Brown accepted that that was the case.

93. Ms Brown suggested that the payments so made were not made "in the course of the arrangements" but were instead made pursuant to the production services agreements. We do not understand the reasoning underlying that submission. The fact that the production services agreements gave rise to the legal obligation to make the payments (and were therefore the immediate cause of those payments) and that those agreements were on arm's length, industry-standard, terms does not mean that those agreements (and the payments to which they gave rise) did not form part of the "arrangements" which we have described above. On the contrary, the services provided under the production services agreement and the amounts expended by the Appellant in order to obtain those services were at the very heart of the "arrangements". After all, the work in question was central to the Appellant's ability to carry on its "qualifying trade".

94. The conclusion we have reached means that the appeal necessarily fails and it is not strictly necessary for us to consider whether Condition B was also met on the facts of this case.

95. However, for the sake of completeness, we would comment as follows in relation to that question:

(1) given the extensive involvement of the members of the CHF Group in the "arrangements" and the fact that the structure was clearly designed to enable the Appellant to access the reliefs under the SEIS and the EIS, it is tempting to reach the conclusion that, had the "arrangements" not existed, the component activities of the Appellant's "qualifying trade" would have been carried on within the CHF Group;

(2) a factor which points in the direction of that conclusion is that the trades of each of the various investee companies which were held through the CHF Fund, including the Appellant, were heavily dependent on the services of CHFE. This might be taken to suggest that, in the absence of the availability of the tax reliefs, the most natural approach would have been for those investee companies to have been incorporated and held as members of the CHF Group;

(3) on the other hand, it seems to us that Condition B is not asking whether, in the absence of the "arrangements", the component activities of the Appellant's "qualifying trade" would have been carried on within the CHF Group. Instead, it is asking whether, in the absence of the "arrangements", the component activities of the Appellant's "qualifying trade" would have been carried on as part of another business by a member

of the CHF Group. In that context, we can see some force in the submission, based on the reasoning of the First-tier Tribunal in *CMAR* at paragraph [132], that that does not follow if the development and exploitation of intellectual property rights, as distinct from carrying on a trade of production, was not generally part of the activities of the CHF Group. If no member of the CHF Group actually carried on the trade of developing and exploiting intellectual property rights – and we should say that we were not provided with any evidence on this question either way – then that might be taken to suggest that, in the absence of the "arrangements", the component activities of the Appellant's "qualifying trade" would not have been carried on as part of the business of a member of the CHF Group;

(4) more significantly even than that, we have approached this question, so far, on the basis of the assumption that, in the absence of the "arrangements", the component activities of the Appellant's "qualifying trade" would still have been carried on in some way, whether by the Appellant itself or by some other company. However, we can see some force in the submission that that is not a justifiable assumption to make based on the facts in this case and the language in Section 257CF(4). The section does not instruct the reader to assume that the component activities would have been carried on in some way and then ask the reader to determine whether it is reasonable to expect those component activities to have been carried on as part of another business by a relevant person or relevant persons. Instead, it leaves open the possibility that, in the absence of the "arrangements", it would be reasonable to expect the component activities not to have been carried on at all;

(5) in this case, there is persuasive evidence to the effect that the tax incentives offered by the Government in the form of relief under the SEIS and the EIS were essential to the ability of the Appellant to be able to fund the component activities of its "qualifying trade" and that, in the absence of those reliefs, it would have been extremely difficult, if not impossible, for the Appellant or any other person to fund those activities. This suggests that, had the "arrangements" not existed, it would have been reasonable to expect the component activities of the Appellant's "qualifying trade" not to have been carried on at all, whether by the Appellant or by a member of the CHF Group or by anyone else; and

(6) although we find this to be a difficult question to answer, and it would have been helpful to have had further evidence in relation to both:

(a) whether any member of the CHF Group did in fact carry on the trade of developing and exploiting intellectual property rights itself; and

(b) whether, in the absence of relief under the SEIS and the EIS, the component activities of the Appellant's "qualifying trade" would have been impossible to fund,

we are inclined to conclude on the basis of the evidence that we have seen and the points made in paragraphs 95(3) to 95(5) above that Condition B was not met on these facts.

DISPOSITION

96. On the basis of the analysis set out above, we find for the Appellant in relation to the risk-to-capital issue and the IP issue but for the Respondents in relation to the disqualifying arrangements issue, based on the satisfaction of Condition A. In consequence of those conclusions, the appeal is hereby dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

97. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 23 AUGUST 2022

APPENDIX

The relevant provisions of Part 5A of the ITA, along with the relevant provisions of Part 5 of the ITA to which they refer, both in the form which they took at the time of the issues of shares to which this decision relates, are as follows:

Relevant provisions of Part 5A of the ITA

“257AA Eligibility for SEIS relief

An individual (“the investor”) is eligible for SEIS 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 257AAA),

(a) the shares (“the relevant shares”) are issued to the investor,…

(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).

257AAA 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 …

(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 sub-contracted 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….

257AC Meaning of "period A" and "period B"

(1) This section applies for the purposes of this Part in relation to any shares issued by a company….

(3) "Period B" means the period—

(a) beginning with the issue of the shares, and

(b) ending immediately before the termination date relating to the shares.

(4) In this section "the termination date", in relation to the shares, means the third anniversary of the date on which the shares are issued….

257C Overview of Chapter

The general requirements are met in respect of the relevant shares if the requirements of this Chapter are met as to— …

(c) the spending of the money raised (see section 257CC),
… and

(f) no disqualifying arrangements (see section 257CF).

257CCThe spending of the money raised requirement

(1) The requirement of this section is that before the end of period B all of the money raised by the issue of the relevant shares (other than any of them which are bonus shares) is spent for the purposes of the qualifying business activity for which it was raised.

(2) Spending money on the acquisition of shares or stock in a company does not of itself amount to spending the money for the purposes of a qualifying business activity.

(3) This requirement does not fail to be met merely because an amount of money which is not significant is spent for another purpose or remains unspent at the end of period B.

257CF The no disqualifying arrangements requirement

(1) The relevant shares must not be issued, nor any money raised by the issue spent, 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 … , 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 …,

(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 spent as required by section 257CC, 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 257HG(2)), the carrying on of a qualifying trade, or preparing to carry on such a trade, which constitutes that activity,…

“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) SEIS relief in respect of the shares;

(b) EIS relief in respect of the shares;….

257DA 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 new qualifying trades (see section 257HF)…

(8) Where period B begins after the incorporation of the company, the requirement of subsection (2) must have been complied with since its incorporation; but for the purposes of that subsection any interval between the incorporation of the company and the time when it commenced business is to be ignored.

(9) 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; …

“qualifying trade” has the same meaning as in Part 5 (see sections 189 and 192 to 200)….

257HF Meaning of new qualifying trade

(1) For the purposes of this Part a qualifying trade carried on by the issuing company …(the relevant company) is a new qualifying trade if (and only if) -

(a) the trade does not begin to be carried on (whether by the relevant company or any other person) before the two year pre-investment period, and

(b) at no time before the relevant company begins to carry on the trade was any other trade being carried on by the issuing company or by any company that was a 51% subsidiary of the issuing company at the time in question.

(2) In this section

"qualifying trade" has the same meaning as in Part 5 (see sections 189 and 192 to 200);

"two year pre-investment period" means the period of 2 years ending immediately before the day on which the relevant shares are issued…

257HG Meaning of qualifying business activity

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

(a) activity A…

if it is carried on by the company ….

(2) Activity A is –

(a) the carrying on of a new qualifying trade which, on the date the relevant shares are issued, the company …is carrying on, or

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

(i) which, on that date, is intended to be carried on by the company …, and

(ii) which is begun to be carried on by the company …

257HJ Minor definitions

(1) In this Part –

"arrangements" includes any scheme, agreement, understanding, transaction or series of transactions (whether or not legally enforceable)…

Relevant provisions of Part 5 of the ITA

189 Meaning of "qualifying trade"

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

(a) …

(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 - ….

(e) receiving royalties or licence fees,…

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…

(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)….