Neutral Citation: [2024] UKFTT 956 (TC)

Case Number: TC09337

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/09504

INCOME TAX – whether the "Sales of Occupation Income provisions" contained in ss 773 to 789, of chapter 4 of Part 13 of the Income Tax Act 2007 apply to a capital sum received on the sale of assets/services to a company – yes – appeal dismissed

Heard on: 14 to17 November 2022 and 13 and 14 December 2022
Judgment date: 25 November 2024

Before

TRIBUNAL JUDGE HARRIET MORGAN

Between

MR RUPERT GRINT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Marre, of counsel, instructed by Clay GBP

For the Respondents: Ms Belgrano and Ms Dilpreet Dhanoa of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appeal is made against HMRC seeking to impose £1,801,060 of tax on Mr Grint in respect of the tax year 2011/12 under "the Sales of Occupation Income provisions" contained in ss 773 to 789, of chapter 4 of Part 13 of the Income Tax Act 2007 ("**the provisions**"). Unless expressly stated otherwise, (1) all references in this decision to legislation are to the provisions, and (2) all references to Mr Grint are to the appellant.

Part A – Background

2. In outline:

(1) Mr Grint is an actor who started filming the first Harry Potter film in 2001, the year in which he turned 13. From that time (until his death), Mr Grint's father, Mr Nigel Grint managed his business affairs. On 1 August 2011 (a) Clay 10 Limited ("**Clay 10**") was incorporated, with Mr Grint as the sole shareholder and his father, as the company's sole director, and (b) it appears an agreement was concluded for Mr Grint to provide services to Clay 10 for the provision of his acting services except in the USA (albeit no signed version of this document was produced).

(2) At that time Mr Grint had rights, under contracts with third parties, to be paid in respect of films in which he had already acted, as well as the prospect of generating earnings in the future. These rights, together with what was described as business information, records relating to the acting and goodwill attaching to his name and reputation, were transferred to Clay 10 on 13 October 2011. The total consideration paid for the assets was £8,586,814.10 which was expressed to be (a) £4,086,814 as consideration for income from contracts accruing to Mr Grint under general accounting principles at the date of the sale; and (b) £4,500,000 as consideration for rights, records and goodwill. Evidence was put forward that the parties agreed to leave the sale price outstanding so creating a debt due from Clay 10 to Mr Grint. The debt was recognised for accounting purposes in a spreadsheet headed "Shareholders Loan Account".

(3) For the tax year 2011/12 Mr Grint accounted to HMRC for the sum of £4,086,814 as income and for £4,500,000 as a capital gain in respect of which he claimed entrepreneurs' relief and paid capital gains tax on the gain at the rate of 10%. Mr Grint withdrew sums from Clay 10 over the following years on the basis they were a repayment of the debt of £4.5 million he asserts was created on completion of the transfer of his business to Clay 10.

(4) On 23 January 2014, HMRC opened an enquiry into the Mr Grint's tax return for the tax year 2011/2012. On 11 July 2019 HMRC issued a closure notice ("**the closure notice**"). The closure notice states: "I have amended your tax return by treating the capital amount you obtained on the sale of your business as income arising under s 778 ITA 07." In the computation of income tax due in the closure notice, credit was given for the £448,940 of capital gains tax paid by Mr Grint.

3. Mr Grint submitted that he correctly paid capital gains tax on £4,500,000 on the basis that he received a capital asset from Clay 10, namely, the right to call for payment of the debt owed to him. HMRC's view remains that the capital sum should be treated as an income receipt under the provisions.

4. Section 773 provides an overview of the provisions and sets out a condition for their application as follows:

"773 Overview of Chapter

(1) This Chapter imposes a charge to income tax—

(a) on individuals to whom income is treated as arising under section 778 (income arising where capital amount other than derivative property or right obtained), and

(b) on individuals to whom income is treated as arising under section 779 (income arising where derivative property or right obtained).

(2) Income is treated as arising under those sections only if—

(a) transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation, and

(b) *the main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax*." (Emphasis added.)

5. Mr Marre submitted that neither s 778 nor 779 can apply because the transaction and/or arrangements do not have as one of their main objects the "avoidance or reduction" of income tax within the meaning of s 773(2)(b). I refer to this as the avoidance test.

6. Section 776 contains the charging provision:

"776 Charge to tax on sale of occupation income

(1) Income tax is charged on income treated as arising under—

(a) section 778 (income arising where capital amount other than derivative property or right obtained), or

(b) section 779 (income arising where derivative property or right obtained).

(2) Tax is charged under this section on the full amount of income treated as arising in the tax year.

(3) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(4) This section is subject to section 784 (exemption for sales of going concerns)."

7. Section 777 sets out the conditions for ss 778 and 779 to apply as follows:

"(1) Sections 778 and 779 apply only if conditions A to C are met in respect of an individual.

(2) Condition A is that the individual carries on an occupation wholly or partly in the United Kingdom.

(3) Condition B is that transactions are effected or arrangements made to exploit the individual's earning capacity in the occupation by putting another person (see section 782) in a position to enjoy—

(a) all or part of the income or receipts derived from the individual's activities in the occupation, or

(b) anything derived directly or indirectly from such income or receipts.

(4) The reference in subsection (3) to income or receipts derived from the individual's activities includes a reference to payments for any description of copyright or licence or franchise or other right deriving its value from the individual's activities (including past activities).

(5) Condition C is that as part of, or in connection with, or in consequence of, the transactions or arrangements a capital amount is obtained by the individual for the individual or another person.

(6) For the purposes of subsection (5), the cases where an individual ("A") obtains a capital amount for another person ("B") include cases where A has put B in a position to receive the capital amount by providing B with something of value derived, directly or indirectly, from A's activities in the occupation.

(7) In this Chapter "capital amount" means an amount in money or money's worth which does not fall to be included in a calculation of income for purposes of the Tax Acts otherwise than as a result of this Chapter."

8. It was common ground that the conditions for either s 778 or s 779 to apply as set out in s 777 are satisfied albeit that the parties differ as to precisely what the "capital amount" constitutes. The dispute is whether, if these provisions are in point at all, s 778 or s 779 applies. These provisions are as follows:

> "778 Income arising where capital amount other than derivative property or right obtained
>
> (1) This section applies if the capital amount obtained as mentioned in section 777(5) does not consist of—
>
> (a) property which derives substantially the whole of its value from the individual's activities, or
>
> (b) a right which does so.
>
> (2) The capital amount is treated for income tax purposes as income arising to the individual.
>
> (3) The income is treated as arising in the tax year in which the capital amount is receivable.
>
> (4) A capital amount is not regarded as having become receivable by a person for the purposes of this section until the person can effectively enjoy or dispose of it."
>
> "779 Income arising where derivative property or right obtained
>
> (1) This section applies if—
>
> (a) the capital amount obtained as mentioned in section 777(5) consists of—
>
> (i) property which derives substantially the whole of its value from the activities of an individual, or
>
> (ii) a right which does so, and
>
> (b) the property or right is sold or otherwise realised.
>
> (2) For the purposes of subsection (1), it does not matter whether the capital amount is obtained on one occasion or on two or more occasions (for example, because the individual acquires a stock option and subsequently exercises it).
>
> (3) Income of an amount equal to the proceeds of sale or the realised value is treated for income tax purposes as income arising to the individual.
>
> (4) The income is treated as arising in the tax year in which the property or right is sold or otherwise realised."

9. The parties also referred to ss 780 and 781 which provide as follows that:

> "780 (1) For the purposes of this Chapter, account is to be taken of any method, however indirect, by which -
>
> (a) any property or right is transferred or transmitted, or
>
> (b) the value of any property or right is enhanced or diminished.
>
> (2)Accordingly—
>
> (a) the occasion of the transfer or transmission of any property or right however indirect, and
>
> (b) the occasion when the value of any property or right is enhanced, may be an occasion when tax is charged under this Chapter.
>
> (3) Subsections (1) and (2) apply in particular—
>
> (a) to sales, contracts and other transactions made otherwise than for full consideration or for more than full consideration,
>
> (b) to any method by which any property or right, or the control of any property or right, is transferred or transmitted by assigning—
>
> (i) share capital or other rights in a company,
>
> (ii) rights in a partnership, or
>
> (iii) an interest in settled property,

(c) to the creation of an option and the giving of consideration for granting it,

(d) to the creation of a requirement for consent and the giving of consideration for granting it,

(e) to the creation of an embargo affecting the disposition of any property or right and the giving of consideration for releasing it, and

(f) to the disposal of any property or right on the winding up, dissolution or termination of a company, partnership or trust

"781 (1)This section applies if it is necessary to determine the extent to which the value of any property or right is derived from any other property or right for the purposes of this Chapter.

(2)Value may be traced through any number of companies, partnerships and trusts.

(3)The property held by a company, partnership or trust must be attributed to the shareholders, partners or beneficiaries at each stage in such manner as is appropriate in the circumstances."

10. The provisions dealing with closure notices in ss 28A and 31 of the Taxes Management Act 1970 ("**TMA 1970**") are also relevant. Section 28A provides as follows:

"28A Completion of enquiry into personal or trustee return [...]

(1) This section applies in relation to an enquiry under [section 9A(1)]4 of this Act.

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—

(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or

(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and –

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions."

11. Section 31 TMA provides that an appeal may be brought against "(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)".

12. Mr Marre submitted that (1) Mr Grint is not taxable under the provisions because the avoidance or reduction of income tax was not one of the main objects of the transfer of rights and goodwill to Clay 10 so the avoidance test is not met, (2) if the provisions do apply to the transaction, then any income deemed to arise to him can only arise under s 779. Mr Grint received a "capital amount" in the form of money's worth, namely, the right to payment of the debt owed to him by Clay 10. This was both property (a right to payment of a debt is a chose in action) and a right (because a right to repayment is a right). Clay 10's assets were entirely derived from his activities and the value of the "capital amount" received by Mr Grint was therefore derived from his activities, (3) on that basis, the closure notice was issued on the wrong basis: (a) it stated the wrong conclusion, namely that Mr Grint is subject to tax on the "capital amount "under s 778; Mr Grint appealed against that conclusion, (b) it applies to the wrong year of assessment: income is deemed to arise under s 779 only if (s 779(1)(b)) and when (s 779(4)) the property or right was "sold" or "otherwise realised". During the 2011/12 tax year Mr Grint merely held the "capital amount" in money's worth; it was "realised" by being turned into money only in the 2012/13 tax year.

13. HMRC disputed all of these points. Ms Belgrano submitted that (1) the avoidance test is met, (2) it is correct that s 778 applies rather than s 779, (3) even if s 779 applies, the closure notice was validly issued whether the tribunal finds that s 778 or s 779 applies as (a) it covers a charge calculated by reference to s 779 or s 778, and (b) if s 779 does apply, the income is deemed to arise under that provision in the tax year 2011/12.

14. I have decided that (1) the avoidance test is met, (2) the "capital sum" in the form of the right to £4.5 million of consideration to be left outstanding as a debt is taxable as income under the provisions in the tax year 2011/12 on the basis that the requirements for s 779 to apply are met, (3) the closure notice was validly issued.

Part B – Evidence and facts

15. I have found the facts on the basis of (1) the documents in the bundles, (2) the evidence given by Mr Grint, Mr Daniel Clay and Mr Richard Smethurst of Clay & Associates LLP, later called CKL, ("**CK**") who were appointed by Mr Grint as his "tax advisors" and implemented these arrangements. All of these witnesses attended the hearing and were cross-examined, and (3) the witness statement of Mr Nigel Grint,which he made prior to his death. My views on the credibility of the witnesses were formed at the time of the hearing. I found the witnesses to be credible and honest.

Overview of relevant documents and correspondence

16. CK were appointed by Mr Grint as his "tax advisors", as shown by the engagement letter dated 16 July 2009 between CK and Mr Grint. This stated:

> "We shall be pleased to act as your personal tax adviser in the UK with immediate effect….We will advise you of the amounts of tax and National Insurance contributions to be paid and the dates by which you should make the payments…"

17. The bundles contained an unsigned "Services Agreement" dated 1 August 2011 between Clay 10 and Mr Grint ("**the Services Agreement**"). This provided that, Clay 10 "engages…[Mr Grint] and…[Mr Grint] hereby irrevocably agrees to non-exclusively render the Services [defined in clause 1.1 as, broadly, acting services] to…[Clay 10]…" worldwide but excluding the USA. This included a provision that: "The company [Clay 10] agrees to act as collecting agent but has absolutely no entitlement to the income." I refer to this provision as "the collecting agent provision".

18. On 5 August 2011, Mr Clay wrote to Mr Nigel Grint to update him "on the position with regards incorporating Rupert's business into a limited company" and said:

> "The motivation for incorporating Rupert's business is that as a self-employed person he is currently subject to income tax at 50% plus NIC at 2% on nearly all his earnings, particularly the bonuses and residuals that will continue to flow from the Harry Potter films. We can shelter this income from a 52% tax rate by operating the business through a limited company. Income received by the company will only be subject to Corporation Tax at a maximum rate of 26%.
>
> An important element of this process is recording the values of the following at date we transfer the business:
>
> 1. Work in progress – income earned by Rupert but not yet received
>
> 2. Goodwill – Rupert's skills and reputation as an actor.
>
> The value of work in progress will be charged to income tax in Rupert's final period of self-employment, which would be the case even if we were not to incorporate the business. We can however justify certain reductions in the value to be assessed to income tax, so that a greater proportion of receipts in the future are subject to lower rates of Corporation Tax.
>
> The value of goodwill is important as the new company will be treated as owing consideration equal to that value to Rupert. This deemed sale price for goodwill between

> Rupert and the company will give rise to a gain with capital gains tax payable by Rupert at 10%. This tax will be payable on January 31, 2013. This is very effective tax planning, as Rupert can then extract income from the company tax-free up to the amount he is owed by the company for the sale of goodwill to it. This income will only have incurred Corporation Tax at a maximum of 26% and capital gains tax at 10%, as opposed to income tax and NIC at 52%. …"

19. On 13 September 2011 Mr Smethurst emailed Mr Nigel Grint enquiring as to whether he had "had an opportunity to sign and return to us the forms we require to complete the incorporation of Rupert's business". The email explains that:

> "Warner Bros are ready to execute the documents assigning Rupert's rights to the new company. We also currently have payments on hold from Warner Bros until the incorporation is completed so that these payments benefit from the lower tax rates in the company…"

I refer to this as "**the email relating to on hold payments**".

20. An Asset Purchase Agreement dated 13 October 2011 ("**APA**") provides that Mr Grint (the "Seller") "has agreed to sell" and Clay 10 (the "Buyer") "has agreed to purchase" the "Business" together with the "Assets". The "Business" was defined as "the provision of acting services and (sic.) exploitation of public image and motion pictures". "Assets" are defined as "the property, rights and assets of the Business to be sold and purchased pursuant to clause 2.1".

21. HMRC do not accept that Mr Grint's "goodwill" could be sold to Clay 10 because the "goodwill" is personal to him but it was common ground that nothing in this case turns on that.

22. It is unclear when the APA was signed but the parties treated it as effective from 13 October 2011. An agenda for a meeting with CK on 17 November 2011 provides that the first point on the agenda was "Rupert to sign purchase agreement please.".

23. Clause 2.1 of the APA provides that Mr Grint "shall sell with full title guarantee and free from all Encumbrances" and Clay 10 "shall buy, with effect from the Completion Date" (which means 13 October 2011) the Business and:

> "2.1.1 the Transferable Goodwill [which is defined as the goodwill, custom and connection of the Seller in relation to the Business which is separable from the Seller, and the Buyer's right to represent itself as carrying on the Business in succession to the Seller];
>
> 2.1.2 the Business Information [which is defined as all information, know-how and techniques (whether or not confidential and in whatever form held) which in any way relate, wholly or partly, to the Business]
>
> 2.1.3 the Contracts [which are defined as all contracts the Seller has entered into on or before the Completion Date with third parties in respect of the Business including without limitation all contracts relating to (a) the provision of acting services (b) the exploitation of public image and motion pictures], including the Rights to Exploit Motion Pictures [which are defined in clause 1.1 as all rights under the Contracts to share in revenues generated from the exploitation of the Harry Potters (sic.) Pictures]
>
> 2.1.4 the Work in Progress [which is defined as the income from contracts accruing to the Seller under general accounting principles as at the Completion Date];
>
> 2.1.5 the Records [which are defined as the books, accounts (including VAT records and returns), Contracts, all the other documents, papers and records relating to the Business or any of the Assets];
>
> 2.1.6 all other property, rights and assets owned by the Seller and used, enjoyed or exercised or intended to be used, enjoyed or exercised primarily in the Business at the Completion Date."

24. Clause 3.1 of the APA provides that the consideration payable by Clay 10 to Mr Grint for the Business and the Assets is the "Purchase Price", which is stated to be £4,086,814 in

consideration for the purchase of the "Work in Progress" and £4,500,000 in consideration for the purchase of the "Transferable Goodwill, Rights to exploit the public image, rights to exploit Motion Pictures, Business Information and the Records".

25. The valuation of Mr Grint's business for the sale was carried out by CK, who calculated the "Work in Progress" at the value of £4,086,814 specified in the APA. This was calculated as being the remaining fixed fee from the sixth and seventh Harry Potter films of £3,856,814 plus an estimated £230,000 of "residuals" from all Harry Potter films for the quarter ended 30 September 2011. To determine a value for the balance, CK estimated the "residuals" would provide income of USD$300,000 per quarter for the next 6 years, giving a value of USD$7,200,000 or £4,500,000.

26. The APA required Clay 10 to pay the Purchase Price to Mr Grint at Completion (12pm on 13 October 2011). The amount payable to Mr Grint by Clay 10 was shown in a "Shareholder's Loan Account" with Clay 10 as credited to Mr Grint it seems on or around 13 October 2011.

27. The APA contained provisions headed "Third Party Consents and Assignment of the Contracts" which provided that:

> "[i]f any Third Party Consent is required to transfer a Contract to the Buyer and such Third Party Consent has not been obtained prior to Completion, the Seller shall use all reasonable endeavours after Completion to obtain such consent as soon as possible following Completion and to effect any transfer or assignment or novation of that Contract…".
>
> "[i]n so far as any Contracts are not delivered or formally transferred, novated or assigned to the Buyer at Completion…the Seller shall be deemed to hold all such Contracts on trust for the Buyer"
>
> and the Seller "shall use all reasonable endeavours to procure that the Buyer shall be entitled to the benefit, of those Contracts, to receive the income therefrom…"

28. The APA also provided that:

> "Neither party may assign or transfer any of its rights, benefits or obligations under this agreement."
>
> "This agreement and the documents referred to in it constitute the whole agreement and understanding of the parties…"
>
> "Any variation of this agreement must be in writing and signed by or on behalf of the parties."

29. A Deed dated 13 October 2011 was entered into by Mr Grint, Clay 10 (referred to as "Newco"), Mr Nigel Grint and Mr Grint's mother, Joanne Grint, Warner Bros Pictures, VeeEye Limited and DDDCo Limited which relates to Harry Potter films in which Mr Grint acted ("**the Deed**"). It is executed by both Mr Grint and Mr Nigel Grint as some of the agreements relating to the Harry Potter films were entered into by Mr Nigel Grint as Mr Grint's guardian at the time. The three Warner Bros companies are the parties with whom the initial agreements were entered into or assigned to. Under the Deed:

(1) Mr Grint and the Guardian assigned to Clay 10 "by way of present assignment of present and future rights, title and interest, all right, title and interest of whatsoever nature of…[Mr Grint] existing or arising under the Existing Agreements [where the Existing Agreements are those relating to the Harry Potter films], including without limitation all of…[Mr Grint's] entitlement to future payments pursuant to and in accordance with the Existing Agreements…".

(2) Clay 10 instructed the Warner Parties to pay all monies due to it pursuant to the assignment to its bank accounts and provided details of those accounts.

(3) Copies of notices and statements relating to such payments and due to Clay 10 were to be sent to Mr Nigel Grint and CK.

(4) It was provided that Clay 10 shall be "bound by the terms of the Existing Agreements" and shall "discharge or cause…[Mr Grint] to discharge all obligations under the Existing Agreements….".

(5) Clay 10 undertook to "procure that…[Mr Grint] shall render to the Warner Parties all further services to which the Warner parties…are entitled in accordance with the terms of the Existing Agreements…"

(6) The Warner Parties "agree to pay to…[Clay 10]…instead of to…[Mr Grint], all payments that would otherwise have been payable to…[Mr Grint] pursuant to and in accordance with the Existing Agreements and which have not been paid prior to the date of this Deed".

(7) Mr Grint and the Guardian "unconditionally and irrevocably release each of WBP, VeeEye and DDDCo from all of their respective obligations…remaining to be discharged on or after the date of this Deed under the Existing Agreements, and all of their respective liabilities…under or in respect of the Existing Agreements. Accordingly, each of WBP, VeeEye and DDDCo shall discharge in favour of…[Clay 10] rather than…[Mr Grint] all of such obligations and liabilities under or in respect of the Existing Agreements falling to be discharged on or after the date of this Deed, including all payments that would otherwise have been payable to…[Mr Grint] pursuant to and in accordance with the Existing Agreements."

(8) There was an undertaking by Mr Grint to render to the Warner Parties "all further services to which the Warner Parties (or any of them) are entitled in accordance with the terms of the Existing Agreements…".

(9) The "Applicable Law" of the Deed was English law.

30. There was some debate about the effect of the agreements, in particular, the Services Agreement. Overall it appears that, in effect, from 13 October 2011 onwards pursuant to these agreements, subject to some exceptions (notably as regards Mr Grint's work in the US), Mr Grint's acting services were largely provided through Clay 10 which received the fees he would otherwise have received for doing so.

31. An agenda headed "RUPERT GRINT – MEETING ON 17 NOVEMBER 2011" included the following:

"3. Consideration for goodwill to be lodged to director's loan account. Able to extract post CT profits (25% CT) at effective tax rate of 10%.

4.Valued WIP at incorporation at £4.086m. Income tax payable on this in 2011/12.

Again extract actual cash tax-free from directors' loan account when WIP realised.

…

WICKED MANAGEMENT LTD

1. Winding-up company. Treated as ceased trading on 31/10/11.

2. Need to wait 3 months after ceasing trade before we can actually wind-up.

3. In the meantime and moving forward suggest Mr & Mrs Grint invoice as a partnership.

4. Monies in company will be distributed subject to CGT at 10%. Estimated distribution of £1,230,000 (being £932k at bank and £300k debtors)."

I refer to this as "**the November agenda**".

32. As set out below, Wicked Management Limited ("**Wicked**") was a private limited company in which Mr Grint's parents were the shareholders and directors. Wicked invoiced significant fees to Mr Grint: £531,661 for 2010, £754,176 for 2009, as recorded in the 31 October 2010 abbreviated accounts and £386,619 for 2008, plus accrued income of £161,979, as recorded in the 31 October 2008 unaudited abbreviated accounts. HMRC submitted that the facts surrounding the winding up of Wicked are relevant to the credibility of statements made

by Mr Nigel Grint in his witness statement about the importance of trading through a limited company.

33. On 23 November 2011, Mr Clay sent an email to Mr Nigel Grint, which included the following statements:

> "Dear Nigel,
>
> Further to our meeting last week, I have set-out below where we currently stand in respect of Clay 10 Ltd and Wicked Management Ltd, plus the current bank account balances.
>
> Clay 10 Limited
>
> As discussed, Rupert's self-employed business has been taken over by this company effective from 13 October 2011. As previously advised, this will save considerable tax moving forward. Profits of the company will only be subject to Corporation Tax at a maximum rate of 25%, whereas whilst Rupert was self-employed, profits were subject to income tax and national insurance at a top rate of 52%.
>
> We have sold goodwill of £4.5 million from Rupert to the company, and the company therefore currently owes Rupert £4.5m. Rupert only has to pay capital gains tax on this sale at a 10% rate. This means he can extract up to £4.5m of future profits of the company (post Corporation Tax), having only paid 10% tax personally.
>
> Over and above this, Rupert can retain profits in the company. Eventually we can wind-up the company and assuming that the tax law has not changed, there may be scope for Rupert to again access the retained profits at a 10% tax rate.
>
> In transferring the business to the company, we did have to value the income earned to 13 October by Rupert, but not yet paid to him. We arrived at a figure of £4,086,814. Whilst this income will be received by the company, it will actually be taxable upon Rupert at current income tax and national insurance rates in the tax year 2011/12.
>
> The amount of £4,086,814 will be a debt due from the company to Rupert, until it is received and paid-out to Rupert.
>
> In summary, therefore, Rupert can be paid a total of £8,586,814 (goodwill plus income already earned) from the company in the future without further personal tax liabilities arising. This will appears (sic) in the accounts as a "director's loan" until it is fully repaid.
>
> Rupert/Clay 10 Ltd - Bank Balances
>
> (i) Total balance on Rupert's personal bank accounts: £4.5m
>
> (ii) Total balance on Clay 10 Ltd bank accounts: £776,250
>
> We will look to simplify the number of bank accounts Rupert has personally as he will no longer require "business accounts".
>
> Wicked Management Limited
>
> The plan is to now wind-up Wicked Management Limited. The company will be treated as ceasing to trade on 31 October 2012. This will enable you and Joanne to access all the profits within the company at a 10% rate of tax. This will amount to just over £1 million of profits. After the 10% tax due, you and Joanne will have cash of circa £900,000 available to invest etc.
>
> There is currently £932,538 cash in the Wicked Management bank accounts. This balance will increase as we collect commissions due from Rupert up until 31 October.
>
> We can only wind-up the company and distribute the funds to you once the company has not traded for 3 months. Therefore we will be aiming to do this in February 2012. In the meantime, we will complete the company's final accounts, Tax Returns and deregister for VAT. We will also need to pay any outstanding tax liabilities of the company.
>
> As Wicked Management Ltd is no longer trading from 31 October, yourself and Joanne should begin to invoice Rupert personally from November 2011 onwards. We will treat you as in partnership together. We are making arrangements to register you with HMRC

as self-employed and obtain a VAT Registration number. We will also contact the bank with regards to ensuring that the partnership has appropriate bank accounts.

I hope the above is clear but if you have any queries, please let me know. …"

I refer to this as "**the November email**".

34. The accounts of Clay 10 filed at Companies House show that for the period ended 31 August 2012 there was "Cash at Bank" of £11,032,144 and its bank statements confirm that there was USD$14,730,685.45 in the account at 6 March 2012 and a balance of USD$15,188,179 in the account as at 5 April 2012. Clay 10 made bank transfers to Mr Grint on at least the following dates:

29 August 2012- £2,800,000;

8 March 2013- £230,000; and

21 March 2013- £2,237,510.80.

Evidence in witness statements

35. Mr Clay made the following main points:

(1) He is a director of CK, a tax advisory and accountancy business, that he established in 2008. During the last 19 years, he has advised upon most areas of UK taxation, and has a particular expertise in advising individuals and businesses in the media and entertainment industries and has many clients that work within the international film industry.

(2) He was the principal partner/director responsible for attending to Mr Grint's affairs since the firm was engaged in 2009. Since July 2009 CK have provided many accountancy related services to Mr Grint and corporate entities under his control, including bookkeeping, business management services, accounts preparation, personal and corporate tax compliance and advice on VAT compliance

(3) Given that Mr Grint is a very successful actor in the film industry, CK have always had an approach of taking an active role in reviewing his business financial affairs regularly, and ensuring his affairs are organised as efficiently as possible from a financial, commercial and fiscal perspective.

(4) Mr Grint's business affairs were principally handled by his father, Mr Nigel Grint and CK's interactions, as a firm, have accordingly been with him. Mr Grint is often away, or otherwise engaged, and in Mr Clay's experience he simply trusted Mr Nigel Grint to handle the financial side of the business.

(5) CK met with Mr Nigel Grint, on a regular basis to discuss and review the status of Rupert's affairs, and consider possible actions to protect and promote his interests. On some occasions, Mr Grint may also attend these meetings, although that is rare.

(6) Mr Clay and his father Mr Nigel Clay (a fellow partner in CK at the time) went to meet Nigel Grint on 17 March 2011 at a hotel in Hertfordshire, for one such regular discussion. During that meeting, the subject of potentially changing the status of Mr Grint's business from self-employed to a limited company was covered:

"I recall that Nigel Grint had various sound business reasons for this quite apart from tax concerns but, as Rupert's accountants, our focus was inevitably on the tax side. It made sense to put on a formal footing the long-standing arrangement that Nigel Grint ran the business, and incorporating it with Nigel Grint as the director was the most obvious way to achieve this.

We therefore briefly discussed the commercial and legal merits of operating a business through a limited company, being primarily the protection afforded by limited liability. Nigel Grint, having experience of the business world, was enthusiastic to have this added protection in place for Rupert and for the profits Rupert's business accrued. I

> did not have the impression that Nigel was motivated by the tax effects of incorporating the business and I certainly did not have the impression that Rupert had any particular knowledge or interest in the tax treatment of his earnings before or after incorporation.
>
> I recall that, as Rupert's accountants, we explained to Nigel Grint the different tax treatment that would follow from an incorporation of the business, primarily the lower rates of Corporation Tax on business profits when compared to the higher rates of income tax for self-employed persons."

(7) They left the meeting with instructions from Mr Nigel Grint to further explore the details of incorporating the business and to make preparations for completing the exercise, potentially in July 2011. This preliminary target date was chosen, as it was felt it would provide sufficient time to make preparations and "it was also anticipated that Rupert would be due significant acting fees in late 2011, and hence it made sense to enjoy all the benefits of limited liability company as early as possible".

(8) Mr Clay set out details of the steps CK took to implement the arrangements including that CK considered "a valuation of the said contractual rights by reference to the projected residual income due to flow from the rights as advised by Rupert's legal representatives" and "evaluated the likely value of work-in-progress that would exist in the self-employed business at incorporation and that should be declared for income tax purposes in the final period of self-employment".

(9) CK provided an update on the subject to Mr Nigel Grint by way of the August email in which they:

> "reminded the client of the reduction in tax on business profits as a result of incorporating the business. We also explained the need to assess the value of the intangible assets that would be transferred into the company by Rupert, as well as the value of the work-in-progress that would be accrued to the date at which the self-employment would cease. In regards to the intangible assets, we explained that this would trigger a liability to capital gain tax with the value reached being treated as consideration outstanding to Rupert from the company. We confirmed that we were in the process of working on the valuations of the intangible assets and work-in-progress, with the assistance of Rupert's lawyers.
>
> I did not, in the course of this email, deal with any non-tax aspects of incorporation because, as Rupert's accountants, it was that side of the deal which concerned us by this stage….
>
> In regards to the contractual rights, we projected the likely residual income and bonuses that could flow from the recently completed Harry Potter Pictures based on the performance of the earlier Pictures, and arrived at the valuation of £4,500,000. We quantified the work-in-progress by reference to Harry Potter acting fees that we knew should be forthcoming. We produced a formal valuation report."

(10) Standard legal document templates were used for the APA and Services Agreement and the standard legal wording was not revised, other than to enter the details specific to the client's circumstances. As this was a transaction between Mr Grint and a company that would be under his control as the sole shareholder, with his father as the sole director, it was not deemed necessary to consider revising the standard legal wording to any extent, beyond entering the core data above. In other words, there was no risk of the parties to the transaction taking litigation action against each other or falling into any form of dispute over the intended effects of the agreements.

(11) It was the mutual understanding of all parties involved as to the nature of the assets being transferred, and that the consideration payable by the company for those assets would be left outstanding to Mr Grint, as a debt, until such time when he would draw down the sum from his loan account with the company.

(12) The legal agreements would have been forwarded to Mr Nigel Grint for approval and readiness to complete the transfer of the business. He understood they would take effect from 13 October 2011 and he believes that Mr Nigel Grint and Mr Grint were agreed on this.

(13) Mr Clay attended a meeting with Mr Nigel Grint on 17 November 2011 to ensure that all loose ends were tied-up in relation to the incorporation. This included ensuring that Mr Grint had signed the APA, and the Services Agreement. Mr Nigel Clay signed the APA on behalf of Clay 10, as he was a director of C&A Company Secretarial Services Ltd, which in turn was the Company Secretary of Clay 10. In addition, Mr Clay ensured that Mr Grint and his parents had signed the Deed.

(14) Mr Clay referred to the November email and said this "reiterated the basic tax implications of the incorporation as a reminder for Nigel, including the reduction in the immediate rate of tax payable on business profits" and reminded him that:

> "we had valued the contractual rights at £4,500,000 and the work-in-progress at incorporation at £4,086,814, the latter being subject to income tax and national insurance in the final period of self-employment. I re-emphasised that these two sums would be a debt due of £8,586,814 from Clay 10 Ltd to Rupert."

(15) In the accounting period to 31 August 2012, the total income of Clay 10 Ltd was £10,372,923 as disclosed in the company's financial statements for the period. As part of the accounts preparation process for the 2012 financial year, CK also reviewed the statement of the debt outstanding between Clay 10 and Mr Grint. There are opening credits of £3,663,454.28 and £4,500,000 in favour of Mr Grint in respect of consideration due for the work-in-progress and the contractual rights transferred to Clay 10 respectively. The loan account journal prepared refers in error to 1 August 2011 as the date of credit, but it should of course have stated 13 October 2011 as the relevant date.

(16) In later tax years, beginning with the 2013/14 tax year, Mr Grint provided some acting services in a self-employed capacity. This would have been confined to a limited number of acting jobs, and the preference would always have been for Clay 10 to provide the services if possible. The reason for these confined cases is that:

> "UK actors working in the United States are subject to local US withholding taxes and the IRS will not recognise a UK limited company providing the services as a the taxable person. Instead, the IRS direct that withholding tax paperwork can only be issued in the name of the individual actor or actress. In the circumstances, it has been routine practice for actors and actresses to contract for US based services in their own name. If they do not, the ability to claim relief in the UK for the significant withholding tax suffered would be lost and this would obviously be financially painful, and not in line with the intention of the international withholding tax systems and treaties. I exhibit as [Exhibit DJC4] the only contracts entered into personally by Mr Grint, albeit a copy of document 38 has not yet been located."

(17) All other acting, voice-over and promotional assignments were undertaken by Clay 10 following the incorporation.

(18) To the extent that any of the documents produced do not appear to be fully signed or dated:

> "I find this to be a common occurrence with the entertainment industry, and particularly the film industry. Contract negotiations and discussions will very often go down to the wire and it is not unusual for contracts to be completed only after filming has started and people are already providing their services. As a result of these tight timelines for completing negotiations, it is simply a matter of fact that the documents are not always completed perfectly. I have never known a case where anyone has contended successfully that the documents were not legally binding for this reason."

36. Mr Smethurst set out that he is currently a director at CK, he joined the firm in 2011 as a manager and worked with Mr Clay and was involved in drafting the emails in the bundles and taking the action required to implement the arrangements. He also commented that in the film and entertainment world it is not unusual for documents to be unsigned or undated and that none of the people involved would have seen anything unusual with this at the time and there is no question that the relevant documents were agreed and acted on as binding by all relevant parties.

37. Mr Nigel Grint made the following main comments in his witness statement:

(1) He said (a) he had managed Mr Grint's business affairs since he first started acting and took decisions including the one to set up these arrangements with Mr Grint's best interests in mind, (b) he was keen for Mr Grint to begin trading through a limited liability company as his own person experiences had demonstrated the benefit of limited liability and he discussed this with Mr Grint who as usual was happy to take his advice, (c) there were a number of incidents in his family history and Mr Grint's business dealings which demonstrated the importance of protecting Mr Grint and his income from litigation by third parties which lead to him wanting to use a company at this time and he also thought Mr Grint was likely to have a long and successful career ahead of him such that operating through a company was the best way forward, (d) he also thought it would enable him to run the business administratively and formally with a position of legal authority over what was expected to be a long and successful career, (e) when he discussed this with CK in March 2011 he was aware that over the coming months Mr Grint would be receiving income under his contracts with Warners and it made no business sense to wait to incorporate until after these sums were received, (f) CK advised on the financial and fiscal implications of incorporation, (g) he probably would have explained the non-tax reasons for the incorporation but they would not have focussed on them in discussions given CK's role and he thought the tax benefits were explained to him at the March meeting.

(2) He set out some details of the email correspondence and noted that his principal aim was to ensure that Mr Grint had the protection of a limited company and the tax benefits were collateral to that. Mr Grint did not proceed with the incorporation due to the tax treatment.

(3) He referred to being asked by Mr Smethurst to sign VAT application forms and bank account opening forms in his capacity as director as an example of how incorporation enabled him to run the affairs of the business in an administratively convenient way.

(4) He set out some details of the transactions including that he thought that the consideration was in effect a debt owed to Mr Grint and that he would be able to withdraw sums from Clay 10 in settlement of the debt as and when the cash reserves allowed and as and when Mr Grint required the funds.

(5) He set out that Clay 10 received over £10 million in the first accounting period, and he confirmed the amounts withdrawn by Mr Grint from Clay 10 were as set out above.

38. Mr Grint made the following main comments in his statement: (1) he left business matters to his father, his father was the driving force behind and made the decision to undertake the arrangements, he believed his father to be entirely honest and honourable and that he took the decision with his best interests in mind as he said in his statement, (2) he had little knowledge of or recollection of the events in question but knew his father had a good working relationship with Mr Clay and would have been closely involved, (3) setting up the company was not a matter of great interest to him but he thought it likely he would have been told by his father

that from October 2011 he was to work for Clay 10 and draw a salary, (4) he had no particular reason himself for the incorporation but recalled his grandfather had some issues which may have been relevant to his father's thinking. He agreed it should be set up but did not have a particular view on whether he should or would pay less tax. He did not recall if tax was discussed with him.

Role of CK and interaction with Mr Grint and his father

39. Mr Grint confirmed he is an actor and was involved since he was about 13 with the Harry Potter films and made significant profits from the films well before any of these arrangements were put in place and paid tax as a self-employed actor on that income.

40. Mr Smethurst thought that since incorporation Clay 10 had received in excess of £20 million of acting fees income. Mr Clay confirmed that, as shown in Mr Grint's tax returns, he received an annual salary from Clay 10 of £50,000. Mr Smethurst said that since 2012/13 Mr Grint would have continued to receive a salary, and there have been occasions on which he has received a dividend from the company. Mr Smethurst thought that there may have been more than only one dividend paid to Mr Grint of £100,000 in 2017/2018.

41. Mr Grint thought he may have done further work under the Harry Potter contracts in about 2011/2012 in relation to the Harry Potter theme park although he was not sure if that was via Warner Brothers; it might have been Universal. It was very much a separate thing from the Harry Potter films.

42. Mr Clay confirmed that he was a director of CK, the business acted for Mr Grint since 2009 and the firm acted as a tax adviser to him, he was paid by Mr Grint to provide tax advice, amongst other things, and it was mainly him and Mr Smethurst who were involved in Mr Grint's affairs. He said (1) he was mainly involved in the client relationship and was the one who meet with the client, (2) Mr Smethurst was primarily involved in everything behind the scenes, and (3) in the earlier days of the business he generally signed things but later Mr Smethurst became a director of the business, and then had signing authority.

43. Mr Smethurst confirmed he is a director of CK and in the context of these arrangements provided tax advice to Mr Grint and Mr Nigel Grint. He added that, due to the nature of accountancy business, he gets involved in a whole raft of points which could be accountancy, tax advice, general discussions on business matters. He said that Mr Clay had the client-facing role, he would go to the meetings and would have any telephone conversations or any other forms of discussions with the client, whereas he basically worked behind the scenes on putting together the advice and in general he would have drafted quite a lot of the emails; he would have been substantially involved in that.

44. In examination in chief, Mr Clay was asked to comment on how the relationship with Mr Grint and his father operated:

(1) He was taken to the following comment in Mr Nigel Grint's witness statement:

> "…I took the responsibility for considering the advice provided by [CK]...and, in light of that advice and for all the reasons I had for considering Rupert's business should be carried out through a limited company, deciding to proceed with the incorporation. I would have briefed Rupert on the general issues and provided him with an overview of the actions we intended to take, but in the main I made these business decisions based on my own judgement, with Rupert's best interests in mind. Rupert was happy to accept my recommendations. He certainly did not proceed with incorporating the business because of the tax treatment..."

(2) He said that as far as he was aware, Mr Nigel Grint would have updated Mr Grint. Mr Grint never had a total grasp on his affairs, be it accounting or be it taxation or be it anything to do with the management of his business and businesses. Mr Nigel Grint would have made those decisions, and on the basis that he was happy with them, Mr

Grint would have been happy with them as well. Mr Nigel Grint was in control and dealt with and managed all of Mr Grint's affairs. Neither Mr Clay nor anyone else of whom he is aware managed Clay 10's affairs or took decisions relating to Mr Grint's business during Mr Nigel Grint's lifetime: Mr Nigel Grint ran Mr Grint's entire affairs. Everything to do with Mr Grint's day-to-day businesses, Nigel ran.

(3) Mr Grint confirmed that his father managed his business since he was about 13. He said:

> "it was an arrangement that I was very happy with…I have always wanted to kind of concentrate on the work, so I have never really had much of a grasp on everything. I think I have five accounts and when I ever needed money for anything…those accounts were kind of periodically topped up by my father, it was very rare that I would need to ask for money to be put on them. But that would be the situation, I would just ask my father and he would do it. He was a signatory on the accounts."

(4) Mr Grint confirmed that his father was involved in his Harry Potter contracts and would have understood them. He said his father would have had guidance from his US lawyer, Warren Dern, who was involved from the first movie. He confirmed that he is still self-employed in relation to certain US film work and that he thought that was to avoid him being taxed twice. He accepted that his father would meet Mr Clay to discuss his tax position. He said tax formed part of their advice, and their work, but he would describe them as more of a general accountant: "It was a kind of number of things that they managed for me. I wouldn't say predominantly it was a tax thing". He agreed that in the engagement letter, they were appointed as his tax advisers and accountants to prepare his returns and in the context of these arrangements, they provided tax advice and not financial advice.

45. Mr Clay said that, as regards the incorporation of Clay 10, he met with the client and Mr Smethurst dealt with all of the mechanics and everything behind it. He did not remember specifically when he first met with the client about the incorporation but knew it was discussed at the meeting on 17 March 2011 because that was when "we agreed and we pushed forward with that". He confirmed that it was only him, his father and Mr Nigel Grint at the meeting and that at that meeting Mr Nigel Grint gave instructions to proceed with the incorporation.

46. Mr Smethurst joined CK in June 2011 and said in his statement that he "immediately began assisting Dan...in the process of incorporating ... At that stage the client had already instructed that they wished to proceed with the incorporation." He said that in referring to the client he meant Mr Nigel Grint and Mr Grint in their entirety: "the way it worked is Rupert was the engaging client but…Nigel was also a client of the firm, but Nigel represented Rupert on all of these matters…if we took an instruction from Nigel, it was basically the instruction of Rupert as well". He confirmed that he did not have direct contact with Mr Grint and Mr Clay would have told him that the client had already instructed them. He just knew Mr Clay would have told him "The client wants to incorporate their business into a limited company". Otherwise, he would not have been able to carry on and do the work. He could not remember being told why this was.

47. Mr Clay confirmed that (1) CK prepared the Services Agreement and the APA and the Deed was prepared by Warren Dern, (2) his view is that one of the important reasons Mr Nigel Grint had for giving instructions to carry out these arrangements is that he wanted to obtain limited liability protection because that was very important to him. It was put to him that if that had been an important reason English lawyers would have been instructed to look at these documents. He said the documents were created by UK lawyers but then agreed that he did not know where they came from or who drafted them originally. He agreed that if someone told him it was important for them to obtain limited liability protection, he would tell them to get legal advice on the relevant documents. He cannot recall whether he specifically advised Mr

Nigel Grint to take such advice. It was put to him that if he had given that advice it would be recorded in writing but it is not. He said CK took legal advice regarding the contract with Warners thatMr Grint had at that time with his US lawyers and, in effect, that the contractual position does not affect limited liability: a company provides limited liability regardless. When pressed he said he does not really have a response and then that he did not agree that shows very clearly that limited liability protection was not a purpose or not an important purpose of Mr Nigel Grint in giving him instructions to proceed with these arrangements. He maintained it was a reason.

48. Mr Smethurst confirmed that (1) Mr Grint or his father engaged the services of a US lawyer as regards the Deed. When asked why US lawyers were appointed when it was subject to English law, he said Mr Grint only ever had a US entertainment lawyer and it would not be unusual at all for a US entertainment lawyer to advise on contracts on a worldwide basis. He thought the Deed was subject to English law because some of the production companies are in the UK. But that was speculation, (2) no English lawyers were instructed on any of these arrangements, and (3) Warren Dern did not advise on the APA and the Services Agreement. He said in examination in chief that it would have been Mr Nigel Grint and Mr Grint who made the decision to enter into the APA and neither he nor Mr Clay played a decision-making role in that.

49. Mr Clay did not agree that he was not telling the truth when he said that limited liability protection was important given that no English lawyers gave advice on the contracts and he does not know who drafted these allegedly important contracts. He said he disagreed; limited liability was important to Mr Nigel Grint.

50. Mr Clay did not accept that his role included providing Mr Nigel Grint, on behalf of Mr Grint, with advice on how to avoid tax if he considered it to be legal tax avoidance. He suggested it was a case of structuring all affairs as efficiently as possible:

(1) He accepted that, if these arrangements had not taken place, Mr Grint would have paid income tax on the £4.5 million amongst all the other income received and that he gave advice on these arrangements.

(2) He did not accept that he gave advice on avoiding tax. He said there was still tax at a lower rate "so we are not avoiding it" but agreed that "on that specific sum [£4.5 million] we were avoiding income tax, yes."

(3) He did not accept that they were also avoiding income tax on all of the other income or receipts that then arose to Clay 10 on the basis that if Mr Grint "chooses to take a salary or chooses to take a dividend, he is going to bear the tax rates similar to that of a self-employed individual".

(4) He agreed that receipts that come from Mr Grint's acting activities would have been subject to income tax, absent these arrangements but were not subject to income tax (on the appellant's view), and his intention was it would not be, but was subject to corporation tax rates instead. He said that (a) income was not in the hands of Mr Grint but in the hands of the company, and therefore to put it into the same end position, Mr Grint would have had to suffer income tax in a similar way as he would have as a self-employed individual. It is just that in this case he does not pay income tax until he chooses to take that money out of company. That is the difference, (b) moreover he was subject to capital gains tax on the £ 4.5 million, and (c) any future income that he was going to receive would not be subject to income tax in the same way as income from a self-employment but to get the money into the same place Mr Grint would have been subject to income tax at the dividend rates.

(5) Mr Clay did not accept that the section of the November email which refers to the tax benefits of winding up Clay 10 demonstrates that he provided advice as to how to avoid income tax and reduce it. He said :

> "This is part of the picture. We did not wind the company up. So that never happened. Again, that was the legislation at the time…I am pretty sure there is something in this bundle that shows that I explained the fact that income tax would be chargeable and - a company purely defers the income tax rate until the individual chooses to take the money out of the company…I did confirm how to reduce the income tax, clearly…Not to avoid it, because there is still tax due."

(6) He accepted that (a) he advised on reducing the overall income tax and on avoiding income tax on £4.5 million, and (b) Mr Grint had already made significant income before any of these arrangements took place.

(7) He did not accept that had limited liability protection been a reason for carrying out these arrangements, they would have been carried out much earlier. He said he cannot comment on that because he did not advise Mr Nigel Grint or Mr Grint prior to 2009. When pressed, he said he thought the reasoning for not incorporating sooner was that the only client was Warners, and Mr Grint had them over a barrel by virtue of the fact that he was one of the three stars in Harry Potter, so the risk with Warners was minimal. When he was working for others, other production companies, other film companies, then that risk needed to be protected. He said that was in his opinion because he did not deal with Mr Grint when he was first contracted to Warners or up until 2009. So, he was only making assumptions here.

51. When asked if his understanding was that Mr Grint had just delegated authority to his father to give him instructions and Mr Grint was happy to go along with whatever his father said, Mr Clay said that as far as he was aware, Mr Nigel Grint would discuss it with Mr Grint but he could only give his opinion on that. He thought that following the meeting in March, Mr Nigel Grint would have discussed it with Mr Grint. He did not speak to Mr Grint personally; there was no direct communication with Mr Grint. He confirmed that there is no document from CK, him or Mr Smethurst to Mr Grint at all and there would not have been any correspondence directly with Mr Grint.

52. Mr Clay said he could not recall if he provided tax advice at meetings with Mr Nigel Grint and:

> "We might have touched on tax advice, accounts, property sales, businesses, what's he got filming coming up, the banking, what finances are where, financial advisers reports, to what cars he got, to a whole plethora of things. So it would cover everything really. It potentially could have covered tax advice yes, but I couldn't tell you exactly what…We are not just accountants and tax advisers, we also label ourselves as "business managers", which is a US concept whereby we deal with all of the finance - you could call it a "financial concierge". So for some clients we will pay their bills, we will buy them a car, we will buy them a house, we will arrange financial advisers to sort out a mortgage, we will get insurance for the property through brokers. We will pay their bills. We will do a lot more than per se an accountant/tax adviser would do. We would get involved in a wide variety of things, as much or as little as the client wanted. So…we weren't just tax advisers…business management services, which covered a whole raft of things as well as the other four points in that…So for some clients we would deal with their whole finances."

53. Mr Clay did not recall if there was an agenda for the March meeting. He was not aware of any notes or minutes of the meeting. He could not remember who raised the prospect of incorporation. He did not agree that this was tax planning suggested by him to Mr Nigel Grint for the benefit of Mr Grint. When it was put to him that these transactions and arrangements were planned by him as tax planning, he said that he does not know who instigated it, but obviously his job is to provide the tax advice, and that is what he did: "This was the

firm's…planning yes, we were involved in it substantially, yes". He said that he accepted tax was a contributing factor but it was not the overriding decision in his opinion; rather it is that of limited liability and of managing Mr Grint's business.

54. Mr Clay accepted that Mr Grint engaged him/CK as his tax advisers to advise him on tax, amongst other things, and that is what he did, and Mr Grint paid him for it and took his advice, albeit through Mr Nigel Grint, and the only advice he had been able to find was that on the list sent to HMRC which is tax advice. He said tax advice:

> "was our job so we looked at it…in my view it wasn't an important implication but it was an implication…one of the results was the tax position but as I said earlier, it wasn't the driving force behind this. We provide tax advice and therefore tax advice is in our correspondence, it is going to be, that is what we are paid to do."

55. He agreed that Mr Grint wanted tax advice on these arrangements and that, so far as he is aware, Mr Grint did not want any other advice apart from perhaps from US lawyers and he explained to Mr Nigel Grint, and Mr Grint through him, that there would be in his view a significant tax saving because of corporation tax rates applying rather than income tax rates. He said: "Again, that is my job to do that." When it was put to him that he did that because the tax benefits were very important to them and to CK, he said: "They were important to us as it is our job to do it, if we didn't do it, someone else would…Clients will move if we are not performing…In any service industry, it's exactly the same." He did not agree that they were also very important to Mr Grint and Mr Nigel Grint and that is the reason they wanted to implement these arrangements.

56. It was put to him that the benefit that Mr Grint, Mr Nigel Grint and he all hoped would be brought into effect from these arrangements was that Mr Grint would avoid income tax on some sums completely and reduce it through the corporation tax rates. He said:

> "Yes, but as I said earlier, other taxes kick in to negate any benefit, potentially…Dividend taxes…On the additional income there is no income tax per se, there is corporation tax but if Rupert chooses to take £1 out as dividends, there is dividend tax on top of that which negates any benefit from being self-employed or operating through a company…So if…Rupert chose to take all of the money out of the company as a dividend, the combined tax rates of corporate plus the dividend rate would equal that, about, of him being self-employed….you are putting money in Rupert's pocket and saying he is avoiding income tax, by only putting it in the company's pocket. If you follow that through to put it into Rupert's pocket, he has suffered corporate taxes and then he has suffered dividend taxes which equates to the same rate give or take 1% as he would as if he was self-employed."

57. It was put to Mr Clay that all of these transactions were intended to enable tax to be avoided or reduced. He said:

> "It doesn't reduce the overall liability, it reduces the upfront liability, so it just purely delays the tax liability until a later date. That is all a company provides you with, a deferral system to pay tax when you choose to take that money out of company…if you take the money out of the company it doesn't reduce your liability, it purely defers your liability to when you choose to take a dividend. And that is the same in any company within the UK."

58. It was put to Mr Clay that the August email shows that the whole purpose or motivation, for him/CK, Mr Nigel Grint and Mr Grint, of all of these arrangements was sheltering income from income tax. He said he was pretty sure in some other correspondence there is reference to paying dividend tax when one takes the money out of the company. When pressed he said he disagreed and "my job is to notify the tax savings and the tax position. So that is what I am going to do." When taken to other tax sections in the correspondence he said "my email is referring to tax again because I am Rupert's tax adviser. I'm not anything else, so I refer to -- I am clear what…the tax position is, not something that I am not paid to do. That is my job basically... I disagree, and if Nigel was here so would he…The tax planning element of this

was my job to convey to the client…..the reason for doing it was the limited liability, et cetera, et cetera." It was put to him that is not what this email says but he did not agree that if the motivation for incorporating the business was limited liability or administrative convenience or anything else, he would have recorded it in this email. He was taken to the November email in which he spoke of winding up Clay 10 and it was put to him that these arrangements are all "very effective tax planning". He said that is correct because he was explaining the tax savings but he did not agree that is why the transactions were carried out by Mr Nigel Grint and Mr Grint.

59. Mr Grint agreed that his father took the decision at the meeting on 17 March 2011 to put these arrangements in place. He had no recollection of being in any meeting or any particular conversation about it. He agreed that focusing on the situation before these arrangements, his father would basically take decisions about his business with his advisers without him being there. He said "that is kind of in general how it worked. I mean from time to time I would attend a meeting, from memory, but, yes for the most part I trusted my father to kind of handle all these matters and yes, it worked well". He confirmed that his father did this even when he was an adult, this continued, he was very happy with that and, so far as he knows, these arrangements were not to do with enabling his father to run his business, because he was already doing that.

60. He said his father was the one making the decisions in that matter. He did not know who came up with the arrangements. He accepted that CK made very important decisions as part of these arrangements such as where Mr Smethurst dealt with putting payments on hold but said he does not fully understand it. He seemed to accept that CK provided the documents and made important decisions as regards those.

61. Mr Grint said that he had no memory really of March 2011 or whether it was happening. He said "I have a vague memory of Clay 10 becoming more part of my life and becoming a name that I know. But the actual inception and anything concerning that meeting, I really can't remember". He agreed that his understanding is that his father gave the instruction to implement these arrangements to CK and he went along with what his father decided. He said "I wholeheartedly trusted him" and he "was happy to follow his advice". He agreed that he would have gone along with it based on his father's reasons, for doing things. He said "I trusted his instincts and…I am sure he would have had a conversation with me about it after that meeting and kind of put forth the pros…I trusted him". He did not remember a conversation he had with him after the meeting.

62. When it was put to him that any conversation would have been about the tax benefits of these arrangements, he said that he does not remember and "tax has never been something that I have been personally very concerned with" and he did not think it was something his father would talk to him about:

> "I have been very fortunate, tax isn't something that I have ever really been kind of worried about or not something I have actively - yes, I can't remember but I wouldn't really have thought he would talk to me about those things."

63. He did not remember his father giving him specific advice about these arrangements. He agreed that he paid CK to provide tax advice, that they suggested these arrangements to shelter his income from income tax and they provided "very effective tax planning". It was put to him that the emails show that the motivation or the only purpose of these arrangements was to avoid him paying income tax on his earnings by swapping from income tax to a lower rate of corporation tax. He said he accepted the tax was clearly a consideration but he did not know if it was an important consideration: It was not something that he would consider important but it is clearly a factor. He then seemed to accept it was an important factor or purpose, as so far as he knew that was his father's view but said that he did not think it is the sole purpose.

64. He was taken to a letter dated 30 June 2017 from CK to HMRC which states that he took the decision to operate his business through Clay 10 based on discussions with his professional advisers. He said that was true through his father and he imagined that is what the letter means and "it was my decision by proxy of my father." He thought the reference to his professional advisers was to Mr Clay, Mr Smethurst and CK and perhaps his US lawyer who dealt with all kind of contracts, for various different productions, some negotiations, deals, within the contract and any other kind of legal matter in the industry or outside of it. He was not instructed to implement these arrangements; CK were instructed to do that. The letter states: "Many peers within his industry were beginning to operate their business through limited companies at the time and take advantage of the commercial benefits of a corporate entity, and hence it was felt appropriate for Mr Grint to follow suit." He had no recollection about discussing this with his father, Mr Clay or Mr Smethurst or anyone at all.

Further evidence on the reasons for incorporation

65. In his witness statement, Mr Grint said the following:

> "I would like to express that my father was an entirely honest and honourable man. There is no question in my mind that everything stated in his statement would have been entirely true to the best of his knowledge and belief.
>
> Where possible, I have confirmed what he said. But because of his very important role in my life and business and, more recently, my limited company, there are matters about which he gave evidence of which I have no knowledge. In relation to these, I can only say that I have no doubt at all that his evidence was truthful."

66. He did not accept that some of the written evidence in his father's witness statement is not true, in particular, that his principal aim was to ensure that he had protection of a limited company and that tax benefits were collateral to that. He accepted he did not have personal knowledge of the facts referred to in his father's statement and so cannot confirm whether they are true.

67. As regards the reasons for incorporation, in examination in chief, Mr Grint noted that (1) in statement his father alludes to an incident where quite early on in his career, around 2005 he decided to part ways with his then agent who subsequently sued him which was a fairly messy and costly experience. He thought that definitely would have been something that would have emphasised the importance and benefit of limited liability for his father. He was not sure why it took another 5 to 6 years to incorporate his business, (2) as regards the concern due to his grandfather, he said he was very young at the time, and was not very involved. He remembers it was always kind of a kind of cautionary tale that they spoke about quite often but he cannot really speak to why they did not do anything about it at the time. His grandfather lost his property, declared himself bankrupt and it was a big point of distress for his grandparents.

68. In cross examination it was put to him repeatedly, for a number of reasons, that these arrangements were put in place solely for tax reasons and that is what he/his father cared about. He was candid that he had little recollection or knowledge of the events in question and consistent in his response that he thought tax was an important factor but not the only factor based on his reliance on his father's comments being true:

(1) He explained that "after Potter I was kind of beginning to work a lot more kind of abroad and on kind of much more heavy schedule kind of TV shows, so it kind of - it was useful, for sure, that my dad could operate and kind of work and manage things without me being there". He was asked how these arrangements affect that because he had said that his father did that before anyway. He said:

> "Yes, he did…I am unaware of the kind of intricacies and the mechanics of other matters. I am sure there were other things that he could sign without me being there and that is how I understood it".

(2) He could not give an example of this because:

> "I am kind of quite removed from any of these things, I don't really handle….this kind of side of the business. So I am not sure…I guess I am speculating that there would be things that I don't understand and don't have much interest in, honestly."

(3) Mr Grint confirmed that his understanding was these arrangements were not about his father being able to run his business, being able to put it on a formal footing and manage it more efficiently because, so far as he was concerned, that was already happening.

(a) When it was put to him that nothing changed for him in that respect following these arrangements, he said:

> "Not from memory but…there was a lot going on. The nature of my work is quite kind of manic in some respects…that period especially was…quite chaotic, so…I don't really have much memory…nothing I can really recall. Apart from that I wasn't really signing as much things possibly. But yes, not that I can recall."

(b) He accepted in effect that he was not signing fewer things once Clay 10 was in place. He later agreed that his father used to take care of all the details of his business and that did not change before and after these arrangements.

(c) He was taken to the comment in his father's statement that these arrangements "would put on a formal footing the arrangement that had existed since Rupert's first acting jobs" and "would enable me to run the business administratively and formally with a position of legal authority…" He said initially that it was on more of a formal footing, his father could sign on his behalf, before this it was a lot more kind of ad hoc, but then that he did not know. He confirmed that before Clay 10, his father was a signatory on his bank account and from his point of view, it did not really change, the arrangement was very similar. He said the contracts he carried on signing for Clay 10 were often brought to him directly on set but he imagined there were a lot of other documents within the kind of mechanics of everything that his father would have signed for.

(4) Mr Grint did not have any recollection of any discussions about limited liability with anyone:

(a) He confirmed that he did not have any recollection of discussing his grandfather or limited liability with his father in the context of these arrangements but said it was always very much in the consciousness of his father. It was put to him that if that had played any part in why his father gave the instruction to carry out these arrangements, he would have spoken to him about it, he said:

> "It's possible but…we had a very kind of laid back relationship, we didn't really go into depths about kind of business matters…I liked not being involved and able to concentrate on my work…we never sat down and had meetings about things, we never really spoke at length on matters like this. So it is not surprising to me that it wouldn't have kind of come up."

(b) He was taken to his father's witness statement where he said: "I will consult and keep Rupert informed on major issues and decisions, but it's very much a case I take care of the details". When pressed he said again that it was possible his father had raised it but he did not recall it and did not know. He said that he could not in all honesty remember him speaking to him about these arrangements at all and that it is "an unusual arrangement, I know, perhaps in hindsight I should have had more of a grasp but I didn't…this arrangement kind of worked for me at the time, and…I can't recall a conversation, no".

(c) He accepted that something must have been said to him as he signed documents such as the Deed but he could not recall; it just was not really of much interest to him. It went a little bit over his head in the technicalities of it, but he was sure he was on board. It was put to him that he would have been on board because he would have been told that these arrangements were intended to enable him not to pay income tax on his earnings and reduce his overall tax liability by being subject to lower corporation tax rates. He said he could not remember, but knowing his father that was not really something that he was particularly motivated by, and he did not imagine he would have put it to him in that way.

(5) It was put to Mr Grint that the relevant emails in the bundle show his father was motivated by tax. He said he thought this shows that "in Dan's capacity as a tax adviser, it is what I would expect, the kind of information for him to be articulating to my dad…". He accepted that Mr Clay was providing this because this information was important to his father.

(6) He confirmed that his father often made decisions on his behalf and in relation to these arrangements, he was happy to go along with his decision for the reasons his father set out. He said:

> "There would have been a conversation, it wouldn't be that he would just do things without consulting me at all…he definitely would have gone over it with me briefly, the kind of bare bones of it, ordinarily, yes. So…yes, on my behalf for sure"

(7) He said he could not really say why there was a delay in incorporation given his father's apparent reasons for it.

(8) He accepted he could not confirm the truth of what his father said about the meeting of March 2011 as he had no recollection of that or of discussions and that he had no recollection of a discussion about him beginning trading through a limited company. He confirmed that he drew money out of Clay 10 when he needed it. He seemed to accept that these arrangements cannot be about limited liability protection and keeping money safe within a company because he had taken it out personally for his own personal use.

(9) He was taken to the following comment in his father's statement:

> "The July date was identified because we all understood that transferring the business would take a little time, but for all the reasons above I was keen to get it done as soon as possible. Dan Clay and I were also aware that over the coming months, Rupert would be receiving payments under his Warner Brothers contracts. Given that we were intending to incorporate the business, it made no business sense to wait until after these had been received before the business was incorporated…As I have set out above, my principal aim remained to ensure that Rupert had the protection of a limited company and the tax benefits were collateral to that."

Mr Grint confirmed that he cannot recall and does not know about these particular facts in this statement and cannot confirm that they are true. He said he was "speaking on the honesty of his father"; he had reason to doubt him. It was put to Mr Grint that the emails show that in fact it was not business sense for the relevant payments to go to Clay 10 rather than to him, it was done so they would suffer a lower rate of tax. He said he did not doubt tax was a consideration, but it was part of the bigger picture, not the whole thing. He then agreed it was an important factor for him for the purposes of these arrangements but said it was not the only purpose or the main purpose: "it was definitely something they were obviously talking about…it was clearly factored in, for sure, but I still - I don't see it being the main purpose, personally".

(10) He accepted that all the advice from CK in the relevant emails was tax advice, not financial advice or any other advice and that CK were responsible for planning and implementing these arrangements.

(11) He was taken to his father's statement that: "Although I would probably have explained the non-tax reasons to them, our discussions would not have focused on other matters beyond Rupert's tax position." He accepted that if his father had had non-tax reasons that were important to him, he would of course have told CK about them. When it was put to him that tax was the only important thing to his father, he said his father would have explained the non-tax reasons to CK in the meetings but it is possible that those non-tax reasons would not be of interest to tax advisers - he did not know.

(12) It was put to him that the August email which his father referred to as confirming a lower rate of tax states that the motivation of these arrangements was sheltering income from tax and that these arrangements were all about "very effective tax planning". He said that he cannot deny tax is mentioned a lot but he did not know whether it could be said it was the only concern.

(13) Mr Grint accepted the advice in the relevant emails was all tax advice and that those emails set out the purpose for which these arrangements were being carried out, namely, to shelter his income from income tax. He said that was not the sole purpose but in those emails it appeared to be the sole purpose. When it was put to him that it was because of these tax effects that his father was willing to proceed he said it was part of the consideration but he did not know whether it was the sole purpose. He accepted it was an important purpose. He later said that tax was definitely an important element, but he thought had those benefits not been there, his father would still have gone ahead

(14) It was put to him that the fact that, as he said in his statement, his father decided what should be done on the basis of CK's advice and that CK's advice was all about tax, shows his father's main consideration was tax. He said there was also accounting advice in a broad sense as well, and he didn't think it was purely focused on tax but it was absolutely an element of it. He accepted that in these arrangements there was a lot of tax advice and a good portion of the advice in the emails was tax advice.

(15) In his statement he commented that he was sure it is true that, as his father said, he took the decision to set up the company with his best interests in mind. He agreed that not paying income tax on his income and swapping 52% income tax rates for lower rates of corporation tax is in his best interests. He accepted that is the reason why his father took the decision to instruct CK to implement these arrangements. He said he trusted his father with all these affairs and that is as far as it goes with him really.

(16) It was put to him that contrary to what he said in his statement his father's reason for incorporating the business was precisely because of the tax treatment that would follow and, as he went along with his father's decision for the reasons his father had, he also had that reason. He maintained that it was not the only intention but accepted that it was an important intention.

(17) He accepted again that tax was definitely part of the conversation, one of the important parts but not the only important part.

(18) He accepted that his father ran the affairs of his business in an administratively convenient way both before and after these arrangements. He said he could not really comment when it was put to him that that shows that this is no reason why these arrangements were carried out.

(19) He confirmed that he was aware that Clay 10 received money from Warners in relation to the Harry Potter "residuals". It was put to him that his comment that setting up Clay 10 was not a matter of great interest to him was because, so far as he was concerned, the only difference it would make is a tax difference. He said it was of no interest to him because he does not have much understanding and it has never been something he has been involved with. His father dealt with all of these things. His only

desire was to just continue with his work, it was of no interest because it just didn't interest him. He trusted his father to look after it, but:

> "in terms of…what it actually did, what it meant…it didn't feel like a significant thing to me, and I viewed it more as something a lot of people in my position did and my peers did, so it just didn't seem like a big deal."

(20) He initially said that saving tax was not of interest to him but he knows that is part of CK's work and their business, but it's not particularly something he is focused on. He agreed that he pays CK to provide tax advice which means saving him tax or reducing or avoiding his tax liability where it is legal to. He said he is not averse to saving tax in any way, but "it's just not something I particularly feel like I have any knowledge of or am involved with. It's just not part of my world. But I accept…it's part of my relationship with CK" and he accepted avoiding a 52% rate of income tax on his income and paying lower rates of CT instead, is a benefit to him that would have been absolutely of interest to him and his father. He added that he has a little understanding of these things, but he agreed "in kind of basic terms".

(21) It was put to him that (a) his father said that since Clay 10 began trading it entered contracts for the provision of his acting services and he exhibited two examples but did not refer to the fact that there were also contracts for the provision of his services that Mr Grint entered into personally, and (2) his father was aware of the full picture and this shows that tax was so important that where there was a tax reason for doing so, Mr Grint would contract in his own name. He said he thought it was more complicated as it was to stop him from paying tax twice but his knowledge on this again is very limited: "My understanding was that in America I would be paying tax twice and going self-employed in America would it was a slightly different thing, was my understanding."

(22) It was put to him that the November email was about saving considerable tax and shows that was the whole purpose of these arrangements. He accepted that in the context of this email, tax is an important part. He said: "I can only speak for my father's honesty. I believe him to be honest. Yes. I stand by that." In his statement he said he confirmed that "I have never intended to avoid tax on any fees paid on account of my acting." He confirmed that he understood HMRC's stance is that that is not correct based on the email advice.

69. In re-examination he said that he "did not know" was what he should have said in response to most of the occasions when counsel put to him that tax was an important part of these plans, and the plan was to avoid paying income tax. He said that is because "I don't truly understand a lot of what is in this case really". He did not recall being shown the relevant emails in 2011 and did not have any memory of discussing their contents with his father in 2011. He thought it is fair to say that his comments on them are borne out of reading them today and listening to the other witnesses. He could not say what part those emails would or would not have played in his father's thinking. He said that when he asked his father for funds he did not know what the source of the funds was. That was not part of the conversation: "As far as I was concerned I was happy with just having money on my card. It wasn't really a point of interest of which account or where it originated from". He noted that in one of the emails on reflection there was practical issues, legal process - other issues, not just tax. He did not remember the November meeting.

70. In examination in chief Mr Clay gave the following evidence as regards the reasons for incorporation:

(1) He said that he could not remember how the subject of incorporation came up.

(2) He said that in wanting to incorporate Mr Nigel Grint was not swayed by the tax benefits. The business reasons comprised wanting to administer Mr Grint's affairs more

efficiently through Clay 10, and to have limited liability was very important to Mr Nigel Grint as well. Mr Grint working on Harry Potter films for many years and only working for Warners, was coming to an end and he wanted that protection because there was going to be multiple film companies, TV companies, that he was going to be hopefully contracting with. So that limited liability was more important. I refer to this as "**the multiple entities reason**". He added that Mr Nigel Grint's own father came unstuck by not having limited liability previously, so he was very keen to get that protection for Rupert. He was branching out from Warner Brothers and doing multiple projects. Apart from that he thought the merits of incorporation for Mr Nigel Grint were as he said in his statement to be able to administer Mr Grint's affairs and manage those affairs more efficiently, to have the limited liability and also, as CK demonstrated, the tax benefits as well. He said he did recall giving advice that, as set out in Mr Nigel Grint's statement if Mr Grint were to then withdraw profits from the company by way of salary or dividends, further taxation would be payable at a personal level.

71. He said in effect that tax concerns were one of reasons Mr Nigel Grint had for carrying out these transactions but it was not the important reason and if all reasons are important reasons, then it is an important reason:

> "There were three main reasons, of which tax was one. But similarly tax wasn't the driving force for Nigel's decision in this. I felt -- in my opinion, it was the fact that the running of the business could be - would be more efficient with the corporate structure as well as the limited liability, as I touched on before. Added to that -- and our role was that of tax advisers. So obviously part of that forms the tax advice."

72. He was questioned on why incorporation would make things more efficient:

(1) He said:

> "getting hold of Rupert to sign papers, to agree papers, to engage in what he needed to engage in was very difficult. Not just from our side but also Nigel's. Rupert was rarely around. He was abroad a lot. And therefore Nigel as director could manage the finances a lot more efficiently with the banking, could also deal with any signing of paperwork, the annual accounts, the VAT, the book-keeping, the personal tax returns, the corporate tax returns. He could control that and the flow of that a lot better than having to revert to Rupert on those matters."

(2) He confirmed that as regards the annual accounts, the VAT, the book-keeping, and the bank accounts generally, even before these arrangements were carried out, Mr Nigel Grint was doing all that for Mr Grint but said that it was not easy for him: "To get approvals for the bank, to get approvals…for all of the paperwork, as I have mentioned. This provided him the ability to approve and action what needed actioning". He agreed a fair summary was that a non-tax reason for these arrangements was that it was difficult to get Mr Grint to sign paperwork, and therefore this would all make it easier because Mr Nigel Grint would sign it.

(3) Mr Clay was taken to:

(a) Three documents which Clay 10 entered into for the provision of Mr Grint's services which were signed by him on behalf of Clay 10. They were dated 10 December 2012, 1 June 2016 and 22 August 2016. He said that Mr Grint would sign things if he was available and around; where Mr Nigel Grint could get him to sign documents he would get him to sign but Mr Grint is a hard man to get hold of. He agreed that Mr Nigel Grint could have signed it. He said he thought that from 2012 to 2016 Clay 10 entered into numerous other contracts.

(b) An "inducement letter" relating to one such contract which said: "If lender [Clay 10] were to be dissolved or cease to exist for any reason whatsoever or should fail, be unable, neglect or refuse to perform and observe all of the terms and conditions of the

agreement... I [Rupert Grint] shall at your election be deemed substituted as a party to the agreement in place of lender." It was put to him that this just removes any protection of limited liability. He said: "In reality it is not going to occur because Rupert is Clay 10. So that in my view is slightly obsolete". He disagreed that it is not credible that obtaining limited liability protection was an important objective of any of these arrangements in the face of a clause like this:

> "I would say I am not a lawyer but on the basis that it's slightly like - how would I put it – turkeys voting for Christmas. In reality, it's not going to happen…Because Rupert is in control of what happens with Clay 10 and the services he provides there - from there on…Clause 4 is simply not going to happen as I said, so my view -I don't think it is that relevant. But again I am not a lawyer…"

It was also put to Mr Grint and Mr Smethurst that the inducement letter shows that obtaining limited liability protection is not why these arrangements were carried out. Mr Grint said, in effect, that he could not explain that and did not know why it is different. Mr Smethurst was also taken to the contracts signed by Mr Grint. Mr Smethurst said this shows that there were certain circumstances where limited liability may not take effect but does not prove there was no benefit of limited liability to Mr Grint's business. He did not accept that this inducement letter shows that it was no purpose and even no effect of the arrangements to have limited liability protection.

(c) Mr Clay was taken to clauses in one other agreement which had similar effect HMRC noted that there are at least 2 others in the bundles and at least 2 other agreements signed by Mr Grint on behalf of Clay 10. It was put to Mr Clay that in light of this it was no purpose and no effect either of these arrangements that Mr Grint would not need to sign paperwork and that limited liability protection would be obtained. He did not agree; limited liability was part of the reasoning for these arrangements.

73. It was put to Mr Clay that he brought up this tax planning at the meeting around the time that the rates of income tax had gone up, and that the entrepreneurs' relief that could be claimed had gone up and that made him think that there was an opportunity for tax planning. He said that he cannot recall who first raised the point on incorporation. It was put to him that he said in his witness statement that he recalled these various sound business reasons that he says Mr Nigel Grint had. He was taken a letter dated 20 February 2014 from HMRC to CK in which HMRC asked for the reasons for the incorporation of the business and to the response of 4 April 2014 in which CK said: "All business people have the right to decide if they should operate their business as self-employed individuals or through a limited company. We fail to see how this question relates to the issue under review." It was put to him that he did not give there the reasons he now gives for incorporation of the business. He said that was because at the time they did not see there was a reason for that line of questioning and there was no reason to go further so they did not expand. He did not agree that he did not give these reasons because he did not recall any business reasons for the incorporation of the business. It was put to him that before sending this response he would have checked what Mr Nigel Grint or Mr Grint thought. He said:

> "No, Nigel made it quite clear he was very passionate about incorporating the business and quite passionate about getting that limited liability…I didn't say any of the reasons because I felt that the question was irrelevant. If I felt it was relevant, I would have given the same reasons that we have explained."

74. Mr Clay was taken to the following correspondence with HMRC:

(1) A notice to provide information and produce documents dated 14 August 2017 in which HMRC asked for:

> "Copies of all contemporaneous communications and correspondence between you and your advisors in connection with the setting up of Clay 10 Limited and the transfer of your self- employed acting business to the company on 13 October 2011 – to include (but not limited to) emails, notes of telephone calls, notes of meetings and documents and presentations demonstrating the advantages and disadvantages of the transactions taking place, including any commercial reasons."

(2) CK's response dated 13 October 2017 in which they said they were only able to find certain emails in response to that question as follows:

> "In response to the notice issued under schedule 36 Finance Act 2008, we have reviewed all our files and we have only been able to identify the following (and enclosed) as relevant to the information you have requested:
>
> (a) Email of 5 August 2011 to Mr Grint's Father.
>
> (b) Email of 11 August 2011 to Mr Grint's Father.
>
> (c) Email of 13 September 2011 to Mr Grint's Father.
>
> (d) Agenda for meeting of 17 November 2011.
>
> (e) Email of 23 November 2011 to Mr Grint's Father."

As set out below HMRC put to the witnesses that these emails are all about avoiding income tax, reducing income tax, and this being tax planning. It was put to Mr Clay that in this letter he said: "We are making further enquiries to get confirmation of what Mr Grint's actual objectives were, regardless of the advice given, in this case." He did not know if the reference was to Rupert or Nigel and said he would defer to Mr Smethurst and noted that he did not sign this letter: "It is in my name. Because everything from the company goes out in my name. I would have to double-check with Richard on that as to which Mr Grint it was."

(3) A letter of 20 December 2017 where he said: "Further to your letter of 27 October, and correspondence since...we have discussed with our client his intentions when incorporating his business and we can now report back" and referred to Mr Nigel Grint having a strong belief in limited liability, and Mr Grint's grandfather, having suffered unduly.

He did not accept that the fact that there was no mention of putting the business arrangements on a formal footing is inconsistent with that being a reason for these arrangements being carried out. He then said he could not think of a good reason for it not being mentioned. He was asked why he needed to make enquiries about these objectives when in his witness statement he said that he recalled from the March 2011 meeting that Mr Nigel Grint had various sound business reasons. He said he does not know. He did not agree that the only explanation is that no business reasons were discussed at the 17 March 2011 meeting. He said they did discuss the reasons for incorporation and he does not know why he was not able to give them when HMRC asked for them and he could not think of a good reason.

(4) A letter dated 29 March 2016 from HMRC to CK in which HMRC asked for some "background information regarding the reason Mr Grint decided to start operating his business through a limited company" and his response in which he said:

> "Mr Grint took the decision to operate the business through a limited company based on discussions with his professional advisers. Many peers within the industry were beginning to operate their business through limited companies at the time and take advantage of the commercial benefits of a corporate entity, and hence it was felt appropriate for Mr Grint to follow suit."

When asked if he discussed peers taking advantage of commercial benefits with Mr Grint, he said "I vaguely remember discussing some of Mr Grint's colleagues and how they

were structured, but apart from that, no, not really. I think it may have been a discussion at some stage with Nigel. I can't really recall to be fair." He said that the statement in the letter was true. He confirmed that tax was one of 3 important reasons for the arrangements. He was asked what the commercial benefits were that he referred to. He said:

> "You have the limited liability, the commercial - tax is a benefit clearly in this instance ...I don't know - that is what I would suggest, yes…But again, six years ago is a mighty long time. I can't - as I have said, the two commercial benefits as I have seen, I have just told what you they are…Again, a lot of these letters were drafted by Richard Smethurst. So again some of these questions are potentially more appropriate to him."

75. It was put to Mr Clay that in his statement he said: "We therefore briefly discussed the commercial and legal merits of operating a business through a limited company, being primarily the protection afforded by limited liability." When it was put to him that as he is not a lawyer, he was not advising on the protection afforded by limited liability; he said:

> "I think there is a general understanding of what limited liability is, but...I think…Nigel understood what that limited liability was as he had set up companies previously…Obviously through the company…we would have said that limited liability is provided…A company would provide you with limited liability…Nigel already was aware that they would provide him with limited liability protection, as he had done it before for exactly that reason. So...he understood what limited liability protection meant…he had set up companies for that sole reason. We would have discussed limited liability and the company would provide that limited liability protection."

76. When asked whether he advised Mr Nigel Grint on limited liability protection, he said:

> "No, because he already knew what it was. We would have discussed it...it wouldn't have…been for me to say X, Y and Z because he already knew that having set up companies previously to provide again limited liability protection…I am only talking in layman's terms with regard to that."

77. Mr Smethurst was also taken to the correspondence referred to above and it was put to him that the emails in the bundles are the only documents found in terms of advice or anything else in response to the HMRC's question about the commercial reasons for the transaction. He said:

> "as accountants we are obviously going to refer to the accountancy and tax position and…that is the purpose of our records. I expect Rupert and Nigel, not being in the professional services business, would not be keeping meeting notes, keeping files of emails…I don't think there was anything in email between us and them, I think it was all verbal if…So it was unfortunately limited to what we had on file, which is obviously going to be of an accountancy and tax-related nature. It would be hard to find evidence of phone calls that Nigel and Rupert would have had together or if they had conversations they are not going to have meeting notes from the time, are they?...I would have only, you know, gone to the work of preparing written advice and sending an email or drafting an email for Dan to send in terms of providing technical or helpful advice of accountancy and tax-related matter or something to do with the mechanics of incorporating the business. I wasn't going to spend chargeable time the client has to pay for writing emails about - asking him why was he incorporating the business et cetera. So I wouldn't expect that to be on our files as an accountancy firm…we didn't always keep meeting notes, so obviously there is an agenda for a meeting there. If there had been meeting notes from 17 November 2011 they would be in this bundle. So it is a criticism you may make, but my point is there would have been meetings but there aren't notes. Important things might have been said that the meeting, I appreciate what you are saying, you might expect every accountancy firm in the country to keep meeting notes of everything that happens, but in reality that is - that doesn't always happen in my experience."

78. Mr Smethurst did not accept that if anything other than tax had been an important reason for carrying out these arrangements, that reason would have been recorded in the emails that he sent. He said looking at it in hindsight the reasons for the incorporation are very important but, at the time, the commercial reasons would not have concerned him, in terms of providing accountancy and tax services. It did not affect what he was doing at the time. He confirmed that he had not seen any contemporaneous document in these bundles that refers to anything other than tax motivations. He emphasised again that records were not kept of all the meetings, the clients, in their conversations together as father/son, would not have kept notes and they and CK would not have thought it important to keep notes for the commercial reasons for the incorporation or, in CK's case, that it was within the scope of their work.

79. It was put to him that by the time he drafted the August email, he would have known that the motivation for these arrangements was to shelter income from the 52% rate of tax. He said: "Yes, I mean the way I read this email and would have put it together is from the view of a tax adviser". He accepted in effect that this email shows that there was motivation in relation to tax savings and confirmed that he did not know at this point of any other alleged motivations. He said that was because he was purely in his role as tax manager concentrating on the tax treatment of the incorporation, and all the other things "you can see in the evidence where I am helping to co-ordinate the process of incorporating the business". He could not recall any conversation with Mr Clay on what the client said in terms of their own motivations and as he was not at the meetings or privy to any phone calls he cannot add anything on that. He did not recall asking Mr Clay about it:

> "it was a long time ago so…I might not remember a conversation that happened…as I didn't have that direct communication with the client…it's not something that is going to be in my memory…if you are in a professional firm and your partner or your director or your senior asks you to do something, you might say, "Let's talk about what does this mean technically", but you are not necessarily going to question why the client wants it done…That email sets out, as far as I am concerned, the tax treatment."

He agreed that there is tax planning in what was referred to in this email and there is a tax saving.

80. In his witness statement Mr Smethurst said the August email "focused on the accounting and tax implications of the incorporation as well as some of the logistics" and "it was not CK's role to comment or advise on the commercial aspects and reasons". He was asked what he had in mind as "commercial aspects and reasons". He said he was referring to the reasons for incorporating the business. His understanding was the client will have had commercial reasons for incorporating the business but he did not know what they were. He said that when "we have gone into the inquiry process, obviously I have talked with Daniel Clay and drafted letters on the basis of what the commercial reasons of the client were based on their discussions" but in 2011 he was not "privy to the conversations about anything with the client about their reasons for incorporating the business". He agreed that when he wrote the August email he did not know about any commercial aspects and reasons. He added that the point is:

> "we were writing as accountants and tax advisers, so why would we start talking about the commercial reasons for incorporating the business? That was the client's side of things, to decide if they wanted to incorporate or not, so we were going to talk about accountancy and tax."

81. He agreed he did not put commercial aspects and reasons in the email because he did not know any but added that, as an accountant and tax adviser, he would not go to the trouble of listing out commercial reasons anyway. The client is not paying him to write to them about the decisions they have made themselves. He said counsel was assuming all accountants would keep a record of every commercial aspect of any transaction they are involved in/advising on and in his experience that is not the case.

82. He confirmed that in 2011 he had not been told about non-tax reasons for the incorporation. He confirmed that he was the author of the letter from CK of 30 June 2017 in which he referred to Mr Grint's peers and was involved in drafting the letter of 20 December 2017. He was asked how he would have known to draft these if he had not been told at the beginning why this was being done other than for tax reasons. As regards the first letter, he said in 2017 he thought he must have discussed the response to the question with Mr Clay. He could not recall any direct conversation with the client; still at that point Mr Clay had direct contact with the client. Similarly he would have drafted the later letter through discussions with Mr Clay and with his input on what the client had said. So he was completely reliant on what the client would have provided to Mr Clay as to his reasons. He was not privy to those conversations with the client.

Evidence regarding Wicked and winding-up

83. In examination in chief Mr Clay and Mr Smethurst gave the following evidence about the arrangements relating to Wicked:

(1) Mr Clay said this was a company that provided income for Mr Nigel Grint for the management of Mr Grint's affairs. So it formally defined a commission basis for Mr Nigel Grint to receive commissions for running Mr Grint's business and work interests. He confirmed that it did not do anything other than contract with Mr Grint/Clay 10 and had no other clients or any third party relations.

(2) Mr Clay said he did not really recall why Wicked was wound up. He noted that as it only had one client, Mr Grint, the father/son, parent/child relationship did not require that limited liability to continue. Mr Grint's filming with Harry Potter with regards to the date had come to an end so the income in Wicked was going to greatly diminish. So he thought that the feeling must have been that there was no requirement for Wicked, either from a limited liability position or having that company structure going forward.

(3) Mr Smethurst said that he did not know why Mr Grint's parents provided those services through this company or why a decision was taken to wind it up.

84. Mr Clay was taken to (1) the 2009 accounts of Wicked which show an amount of £240,617 as due from Mr Grint and the 2010 accounts which show the company invoiced fees of £531,661 (2009 £754,176) to Mr Grint, a family member and a related party creditor balance owed to Mr Grint of £291,010, and (2) documents relating to the winding-up of Wicked including a striking off application dated 23 February 2012 presented by Mr Smethurst. It was put to him that it is not credible that Mr Nigel Grint considered limited liability to be important given that at around the same time as these arrangements were being implemented, he and his wife decided to strike-off Wicked. He said:

> "Wicked only had one client and it was the son of Nigel and Joanne, so that corporate protection wasn't important in this instance…obviously if you are dealing with multiple companies, the general public for example and things like that, you would want to protect yourself through the limited liability route. Whereby you are dealing with your son, it means that potentially that protection isn't as important as it is in other instances…Harry Potter…had come to an end by then so, the income for Wicked had dropped down…That is just from…I am putting two and two together really."

85. He could not recall discussing this with Mr Nigel Grint. He did not agree that he did not raise this at the meeting because Nigel did not say that limited liability was important to him. Limited liability was important. He was asked why Wicked was set up in the first place as on his analysis, it was never needed. He said that he was not advising Mr Grint at the time and does not know what was going through Mr Nigel Grint's mind when Wicked was set up or what the advisers were saying at the time as their reasons for doing it. So it is all speculation really.

86. Mr Clay was taken to Clay 10's financial statements for 2013 which show that BS Management charged it commissions of £162,598 in that year and in 2012, £671,385. He confirmed that BS Management is the partnership which Mr Nigel Grint and his wife Mrs Joanne Grint operated once Wicked was wound-up. It was put to him that the figures had not "greatly diminished" as he had said. He said that he regarded a drop from £671,000 to £162,000 as substantially diminished. He noted that he had also given other reasons for the winding-up, and that, as far as he is aware, the levels went further down than that over the following years and that is getting to the stage where that is diminished significantly.

87. He was asked if he remembered discussing the multiple clients reason for incorporating with Mr Nigel Grint in relation to Clay 10. He said he thought it would have been discussed. When pressed he said that a reason for having the limited liability protection was because Mr Grint was going outside of Warners and contracting with multiple parties. So he was pretty sure they discussed it because it was part and parcel of the limited liability factors as Mr Grint was dealing with other multiple film studios and TV studios or production companies. He just presumed that was a factor as regards Wicked. He confirmed that he had not seen any document that sets out this multiple clients reason for incorporating. He did not accept that this is a reason he had invented to support the argument that Mr Nigel Grint's purposes for instructing him to effect these arrangements was limited liability protection.

88. Mr Clay was taken to the November email in which there is reference to the tax benefits of winding up Clay 10 and it was put to him that part of the plan was that £4.5 million would be extracted by Mr Grint when he wanted and needed it. He said: "As his tax adviser, yes, I covered - again…the tax issues and that was the position arising from that £4.5 million". He said he assumed Mr Nigel Grint and Mr Grintwere aware of this. It was put to him the email overall shows this was about a tax-efficient way of avoiding income tax and then getting the money out of the company tax-free. He said: "As his tax advisers yes, that is what we covered in this email, yes."

89. Mr Clay was taken to the section of the November email dealing with Wicked and the statement that when the company ceased to trade, that would enable Mr Grint's parents to access all the profits within the company at a 10% rate of tax. He said "legislation at the time allows you to do that, so that was carried out with [Wicked]" and in effect that Mr Nigel Grint must have thought that was a good idea - as he did the wind-up. When it was put to him that this shows actually limited liability was not important to Nigel, he disagreed and reiterated that: "It was important. To him, for Nigel and for the protection of Rupert. As far as [Wicked] is concerned, I have explained that - the reasons why it was probably felt it wasn't pertinent" and:

> "the income - just over £4 million is chargeable to income tax as we know. The 4.5 was chargeable to corporation tax, and then capital gains tax. And then any money in the company over and above that is chargeable to corporation tax and dividend tax and salary income tax. If Rupert chose to take all the funds out of the company, then the tax rate would be similar to that as if he was self-employed."

90. It was put to Mr Clay that is not what he said at the time and he suggested that Clay 10 would be wound up, having got the tax saving on the CT rates the company could then be wound up and tax extracted at 10%, like for Wicked. He said that it could have been but it was not and:

> "if Rupert chose tomorrow to take all of the income…out of [Clay 10] tomorrow, he would suffer income tax at the same or similar-ish rate as if he was self-employed on every penny over and above the £4.5 million that has ever been received by Clay 10…it is purely a tax deferral, not a tax avoidance or a tax reduction. It is just that a company purely allows you to defer the income tax until you choose to take the income out of the company. That was my point I was making earlier."

91. It was put to Mr Clay that is not his advice in the emails, where he called this "very effective tax planning" and not a deferral mechanism. He said it is quite clear that it is, because that is the tax system in the UK:

> "as Nigel says here [in his witness statement] He knows that by virtue of the fact I have told him that and it's clear that is the position…The figures for salary were £37,500 and £50,000 a year. let's say there is £1 million in the company…if he doesn't need that money, he doesn't need to take it out today. He can take it out in 20 years' time, he will be subject to the tax rate in 20 years' time which will be, I am pretty guaranteed, it will be similar to that as if he was self-employed. We are not avoiding - this is not tax avoidance. This is…purely deferring a tax liability until you need the income. That is what a company is all about."

92. It was put to Mr Clay, in effect, that if limited liability had been any sort of objective in these arrangements, he would not have suggested in his advice that eventually Mr Grint can wind up the company and extract the profits at 10%. He said: "Because I am explaining the tax position as my role as his tax adviser…I can't pick and choose what I tell my clients. I need to tell my clients the tax position at the time". He did not agree that if limited liability had actually been a reason for Mr Grint through Mr Nigel Grint, he would have had to say: "By the way, you need to take advice, this will get rid of any limited liability."

93. Mr Clay agreed the £4.5 million avoids income tax but said it was replaced with capital gains tax: "So…if we were avoiding one, we have created another. It's not that we have avoided the tax system totally, we have purely avoided income tax." He agreed that there are no other contemporaneous documents showing any other objective of the arrangements.

94. In his statement Mr Smethurst set out a summary of some points in the November email but did not refer to the comments on the substantial tax saving. It was put to him that as he drafted the November email, he knew that Wicked was being wound up so that Mr Grint's parents could access all the profits, paying only 10% tax. He said he thought he knew they wanted to wind up Wicked and it was his role to advise on the tax effect and get the paperwork ready to do that but he was not involved in any conversations as to why they wanted to wind it up. He said the reference in the email to that being the "the plan" just meant "you have told us you want to wind up Wicked Management, so that is what we are going to do, "the plan" in a very kind of informal sense". He did not accept that his description of the email gives a misleading impression or that it makes it clear that the objective of these transactions, on any view an important objective, was avoiding or reducing Mr Grint's liability to income tax.

Role of CK other than in giving tax advice

95. Mr Clay explained that Clay 10 was an off-the-shelf company that CK set up and chose the name. It was put to him that this shows not only that tax was the reason for these arrangements being carried but also that CK were involved and in charge of the whole process. He said: "We were putting the pieces together that we did, which consisted of most of the process. But being his professional advisers I would expect that to be the case". He disagreed that tax was the one thing that mattered.

96. Mr Smethurst said that CK would have used a formation agent to incorporate the company who would have provided "the standard mem and arts" and nothing changes. They would get a lawyer involved only if the client wanted some particular protection which would not usually be the case in a two man/one man company like Clay 10.

97. In his witness statement Mr Clay said that CK did not provide non-tax advice on the incorporation because they are accountants and "it was that side of the deal which concerned us by this stage". It was put to him that tax was the side of the deal that concerned him at all stages. He said "I am Rupert's tax adviser, so yes". He said, in effect, that his written advice is all about tax and he did not advise on anything else. It was put to him that is not right as he/CK deal with the incorporation of Clay 10 and he agreed CK would have picked the

memorandum and articles of association and they dealt with the Services Agreement and APA. He did not agree that this shows tax was plainly the only objective as Mr Nigel Grint and Mr Grint, were asking tax advisers to implement the arrangements:

> "For the other reasons that I said yesterday, tax was not the only driver in forming Clay 10…To me as his tax adviser, of course it was an important driver for me…As far as I am aware, it wasn't…a main driver…It was a driver, as I said. It was a consideration that…obviously a consideration for Nigel and Rupert...as far as I was aware…it was a consideration but it wasn't the main consideration. Of course it was a consideration. That had effects, material effects."

98. In an email Mr Clay said: "In order to transfer Rupert's business, we must agree an appropriate legal process with Warner Bros for transferring the rights…Warren Dern is currently liaising with Warner Brothers and draft documentation has been prepared." He said that did not mean that CK was in charge of this process. It would be down to Mr Grint's US lawyer because he was dealing with Warner Brothers Inc in the US because they owned Warner Brothers UK. He accepted he was involved in the process in that he was copied into the emails.

99. In examination in chief, Mr Clay and Mr Smethurst said the following regarding the effective dates and terms of the documents:

(1) They both confirmed that (a) their understanding was that the APA would take effect from 13 October 2011 and the Services Agreement from 1 August 2011, (b) references in the correspondence with HMRC to the Services Agreement being entered into in October 2011 is an error; it should have said 1 August 2011. The October date is when the APA took effect.

(2) Mr Clay did not recall why the Services Agreement was not signed and did not know if it was ever signed; he did not think it was. Mr Smethurst also did not know if the Services Agreement was ever signed.

(3) Mr Clay said that the obligation in the APA to pay the consideration was in reality fulfilled as a debt to Mr Grint. Mr Smethurst similarly said the price was paid by being credited to the Mr Grint's shareholders' loan account; it was not paid in cash, it created a debt that was recorded on the loan account.

(4) They were both taken to the document headed "Shareholders' Loan Account" and confirmed that it contained an error in showing the date of a credit for goodwill sold on incorporation of £4.5 million as arising on 1 August 2011; the date should have been 13 October 2011. Mr Clay said that would have been an error by an accounts junior at the time just when preparing this supporting document. This just went to support the accounts, it would not have formed part of any submitted paperwork to Companies House or anything. Mr Smethurst described it as a bookkeeping error.

(5) Mr Smethurst was taken to a document described as an "extract" from the "Shareholders' Loan Account" in which the date of credit for goodwill sold on incorporation of £4.5 million was shown as arising on 14 October 2011. He thought this had come into being as follows:

> "What I believe happened here is during the course of...the early stages of the inquiry with the Revenue into this…they asked for some form of document showing how the purchase consideration was dealt with, and then we will have asked our accounts team to provide an extract…I presume…the accountants have looked at it and realised well, actually that is wrong, it should never have been 1 August, let's correct it to 14 October, which seems a fair thing to do if they spotted an error in their book-keeping. I certainly can't recall making that instruction [to make that change] myself….No, I can't recall him [Mr Clay] making that instruction either."

(6) They were both taken to the collecting agent provision. Mr Clay said it was put in the Services Agreement to provide purely for the company to receive income on behalf

of Mr Grint when he is contracted in his self-employed capacity. Mr Smethurst gave a similar explanation and said he could not recall if that ever happened but it was in there because it would not be uncommon for Mr Grint to contract directly in the case of US acting work.

100. Mr Smethurst confirmed that CK provided the Services Agreement. He was pretty certain it would have come from a legal template a solicitor provided on previous transactions and said CK "just entered the factual information, so we entered the dates, the consideration…in relation to the [APA], the assets being transferred in relation to the Services Agreement, the term of the agreement; the factual details…" Mr Clay did not know where the templates for the Services Agreement or the APA came from.

101. Mr Clay said that he had not made a correction to the date given in his statement for when the Services Agreement took effect (from 13 October 2011 to 1 August 2011) in examination in chief was just an oversight. In his witness statement he said he attended a meeting with Mr Nigel Grint on 17 November 2011 "to ensure that all loose ends were tied up in relation to the incorporation" and this included ensuring that Mr Grint had signed the APA and the Services Agreement. He agreed that he was now saying that the Services Agreement was not signed. He said his initial comment in the witness statement was just wrong and it was oversight not to correct this earlier. In his statement he said that he ensured Mr Grintand his parents had signed the Deed. He agreed that he meant that CK arranged for that; he just checked that everything had been signed, that was all. He agreed that the Deed was signed by 13 October 2011.

102. Mr Clay was asked if he was able to give the evidence he gave in examination in chief regarding the Services Agreement because he decided what should have been in it and in the APA. He said: "the fundamental agreement would have stayed the same, but I suppose we obviously could change or add clauses. From memory, we did, in that instance" and he then agreed that he/CK took the decision as to what was in these documents.

103. As regards the collection agent provisions:

(1) Mr Smethurst said he could not remember if CK added this provision. He thought it was possible the template could have already included that because it would have been provided on a previous transaction involving an entertainment client. He noted that CK certainly did not remove it and accepted they decided the content of at least this agreement: "We would have read through it…in the main we would have just been concentrating on adding in the factual details".

(2) Mr Clay said this was in the Services Agreement because it was prudent to prevent double tax, to make sure that the double tax treaty is effective when Mr Grint works in the US. Otherwise he would be taxed at 70% plus on every pound he earns which is not the intention of the treaties.

(3) He was asked why the US is excluded from the definition of territory in this agreement. He said that is because the USA has a taxing system like no other country, and does not recognise "foreign loan-out companies" when an individual actor performs services in the US. They disregard that company and impose withholding taxes at an individual basis:

> "….if Rupert went to the US to perform, to do a film let's say, or a show of some description…the US would withhold taxes on that money, and then….when that money goes into the UK company, obviously the withholding taxes are on an individual basis, not a corporate basis. So corporation tax would then be due, and then further income tax would be due on the same money. So it protects the individual when performing in the US because the US is…a…strange obscure tax system, that that does that."

(4) He added that US film companies do not allow you to contract through a UK company when performing in the US. So that clause gave the ability for Mr Grint not to suffer tax of around 70% when performing in the US.

(5) He agreed he is not a US lawyer or tax lawyer, but said he has worked for 15 years closely with the US/UK tax treaty, and had a number of clients both going to the US and coming back from the US and so understands the way in which the system works.

(6) Mr Clay was asked in effect why this provision was needed given the agreement does not apply to the US at all. He said: "Yes, clause 2.3 is in there to allow Rupert to contract individually when he makes a film, does a TV show, in the US. that document is very, very poorly drafted" and in hindsight it should have been expanded. On this point Mr Smethurst said this about how the agreement is intended to operate:

> "this agreement is just about providing services when they are outside of the US. 2.3 is about the fact that there will be cases where you go and work in the US and you will be working as a freelance, self-employed person. But the company may agree to act as a collecting agent, so the company isn't providing the services of Rupert Grint in that situation, they are just acting as a collecting agent and holding or taking the income on his behalf. But, as it says, they would have no actual entitlement to that income, the company that is…the only occasions in which Rupert would have, as far as I am aware, worked in his own name would be when he worked in the US…my logical conclusion is that the intention of 2.3 is to deal with a situation where Rupert is acting in the US but the company collects, as administrative agent, the fee on his behalf…That is my understanding of obviously having read this document again. That is my understanding…and my memory of what we intended at the time…We, as in myself and anybody at Clay Knox who was advising on the matter"

(7) Mr Clay later explained that withholding tax would be suffered in the US, and that credit for it would be claimed against UK taxes. So, for example, if Mr Grint earned money in the US in his self-employed capacity and paid $100,000 in withheld taxes in the US, and his UK liability was $120,000 or the equivalent, he would be paying that additional $20,000 to HMRC and the US tax authority would have taken the $100,000. He confirmed that he advised that for US work Mr Grint should contract in his own name because of that tax point and because if he contracted through Clay 10, it would be subject to corporation tax and if Mr Grint then decided to take that money out, he would not be able to claim the credit against his self-employed income which is deemed in the US, so in effect he would be taxed at somewhere north of 70%. He agreed that Mr Nigel Grint and Mr Grint followed his advice on this.

(8) It was put to him that where there was a tax reason for doing so Mr Grint just gave up any alleged limited liability protection of these arrangements and entered into contracts on his own behalf again. He agreed and said that was because a tax rate of over 70% is not attractive to anybody and would mean that there would be no point in working in the US at all, which would severely affect his career and earning capacity going forward…nobody would purposively put themselves in a position where they are going to be paying over 70% in tax whereby they cannot do that following the legislation and double tax treaties in place. He agreed that Mr Grint and Mr Nigel Grint cared about his advice on the tax in relation to all of these arrangements. He did not agree that it was the only important factor.

(9) Mr Smethurst agreed that if CK had wanted to change a clause, they could have done so but said he did not know if they thought about the collecting agent provision or not. He agreed the position was the same as regards the APA. He agreed that he/CK were very much in a decision-making role in that sense and said "we provided and prepared to a certain extent, we entered the factual information in these documents. At the end of the

day, they were given to the clients to approve, so ultimately they had the decision-making power to sign them or not as clients." He accepted that as a practical reality matter, CK decided this should be i these terms in the Services Agreement. He said they were "in stronger position in terms of our experience and knowledge than the client to think about these clauses".

(10) Mr Smethurst did not know if Mr Nigel Grint and Mr Grint would have read this clause. He cannot remember focusing on it at the time, it might not have been anything that anybody gave any consideration to.

(11) It was put to Mr Smethurst later that this provision was included as, as Mr Clay had explained, it was intended that Mr Grint would contract in a self-employed capacity when he did US work so that he could claim withholding tax credit against income tax. He said withholding tax was one reason and the other reason was that the US studio would not contract with a UK limited company. He said that was just his common knowledge of how the entertainment industry works as regards US-based work. He said, in effect, that an important reason was not to pay tax at "what most people would probably think an inequitable/unequitable amount of taxes by paying tax twice on the same income because you can't claim a credit under the international treaty systems".

104. It was put to Mr Clay that his earlier evidence that he had not taken decisions relating to establishing Clay 10 is not true in light of his above evidence that he did take decisions about what went into important documents. He agreed that "clause was our decision, yes" and they could have amended the APA completely and, as his tax advisers, they understand the US position and the client does not, and therefore those decisions were taken by CK. He then agreed they decided what went in the APA. He did not agree that demonstrates that the only objective that mattered to these arrangements was the tax and that, if anything other than tax had mattered, CK would not have been drafting and deciding what went into these agreements.

105. Mr Clay did not agree that limited liability cannot have been important because when there was a tax reason not to act through the company, that is what happened. He said: "We have paid tax. We have paid a significant amount of taxes. What we did, did not negate tax to zero…Our job was to do that and that is what we are paid to do". He agreed they were both happy that that is exactly what you should do in the context of these arrangements. He said "From a tax perspective, yes. But as I said, that wasn't the only reason."

106. Mr Smethurst was taken to a couple of agreements between a promoter and Clay 10 under which it appeared that for work in Japan and the UK Mr Grint was to receive fees for autographs and photos directly and not through Clay 10. He thought there might be legal reasons for this but that was guesswork as to why that is.

107. Mr Clay and Mr Smethurst were taken to the November agenda:

(1) Mr Clay was taken to the following notes: "Able to extract post-CT profits (25% CT) at effective tax rate of 10%, "Valued [work in progress]…income tax payable...", "extract actual cash tax-free…Nigel please ensure that everything is in [Clay 10's] name in future - not Rupert personally". He said again that "From our perspective…being tax advisers we are going to talk about the tax, aren't we?" He agreed that the second note is about who should enter into contracts and he was saying it should be Clay 10. He did not agree that he was able to give that advice because he knew tax was the only thing that mattered to Mr Grint and Mr Nigel Grint. He said: "Nigel had a huge amount going on at the time, well, always had a huge amount going on and this was always to reinforce that fact, that was all. The reason why that was in there, I suspect".

(2) There was also a reference to a question for Nigel Grint "has Lloyds sent forms to Nigel G to provide access to Dan to manage company bank account?" He explained that to make Mr Nigel Grint's life easier, he had authority on some of the bank accounts to

set up payments but not to finalise them, such as VAT payments, he could set them up and save Nigel doing that really. It was only authority for him to notify the bank of a transfer, they would set it up, and they would contact Nigel to authorise it. He was not sure if he contacted the bank about transfers to Mr Grint because Mr Nigel Grint ordinarily transferred money when Mr Grint needed it. He thought they never had any authority over any of Mr Grint's personal accounts of which there were around six to eight.

(3) It was put to Mr Smethurst that it is fair to say from the agenda that the meeting was entirely about tax. He said it was obviously written from the perspective of CK who were concentrating to get right the tax and accountancy implications of the incorporation. He agreed that "we helped to put together the mechanics of it". It was put to him that CK were in charge. He said, in effect, that the clients appointed CK to co-ordinate the process and mechanics for them.

(4) He agreed that making sure the contracts were in the right name is more than a tax point. It was put to him that contracts were not entered into in Clay 10's name when Mr Grint wanted to claim tax credits. He said that no one in their right mind would go to work in the US and contract in the name of a limited company as the tax rate would be horrendous and it is not how it is intended under international tax law to work, that tax is incurred in both countries on the same income and "you wouldn't get a film studio to agree to contract with you in that way because it just doesn't work from an IRS tax administration point of view. I have seen that plenty of times of late". He then said the point in the agenda about the contracts, was just "general business advice to Nigel: you need to be on top of contracts in the future to make sure that they are named in Clay 10 because Rupert is providing his acting services through Clay 10 going forwards". He added that most of CK's clients work in the UK and US so they work very closely with US tax lawyers and have good knowledge of the US tax system in regards to how it works with the specifics of the entertainment industry. It was put to him that this was in the agenda because that was important for tax. He said he thought there is a wider purpose to it. It made a difference to tax but CK deal with a lot of business administration-type issues for clients where they are not familiar at all with things like contracts or, very basic business points. He said that it would have been a consideration in putting that point on the agenda that things CK were covering in their role was taxation and it was expected that going forwards Mr Grint's acting income would be subject to corporation tax not income tax. So "it would obviously be necessary to remind the client, have the contracts in the correct name, in the name of the company going forwards, otherwise it would still be self-employed income". He maintained however that:

> "there is a much wider spectrum of why that point is there, which is just the general point, you have incorporated your business therefore your contracts going forward should be in the name of the company that you have incorporated into. And you are quite right, if they didn't do that then they would be paying income tax as a self-employed person."

108. It was put to Mr Clay that his comment in his statement that a lax attitude was common in the entertainment industry to signing and dating documents is not correct. He was taken to emails from Mr David Blaikley to Tom Collier in relation to the Deed in which he said: "The deed will have to be dated as at the date upon which it is executed, and not before." He said his comment is a generalised comment: "It is my opinion and as a firm we deal with a huge amount of people in the entertainment industry." He said he could not point to any document in these bundles which supports his comment but there are plenty of examples. It was put to him that all that mattered to him/CK, and Mr Nigel Grint and Mr Grint was avoiding Mr Grint having liability to income tax or reducing it. He said:

> "No, because it is - it does happen in the entertainment industry…No, we don't have evidence in front of us but it is - it has been widely publicised, examples of it, in the national press…But as an example, there has been significant publicity about the fact that contracts weren't signed and haven't been entered into…that is my opinion from understanding the entertainment industry and how it works. And that is a generalisation. So specific to this point, I take your comments. But that is my comment generally and my opinion, which - I have worked in the industry for many years."

109. Mr Smethurst did not accept that the reason no care was taken over the documents was because the only important objectives was avoiding or reducing Mr Grint's liability to tax. He said so far as he was aware tax planning wasn't the objective for Mr Nigel Grint and Mr Grint but then he accepted that as he said earlier he did not know their objectives.

110. He said that in his comment in his statement he did not mean that every contract in the entertainment world is unsigned or dealt with in an incomplete manner but that it is common, in his experience. It was put to him the lack of care is apparent from the facts that, as he had accepted the APA should have been amended, the Services Agreement was not signed, it should not have said what it says in the collecting agent provision and no UK lawyers were involved. He noted that counsel was showing him one example of where a document had been signed but it would not surprise him if there are documents in this bundle that have not been signed. He had seen plenty of scenarios, especially in the entertainment industry, where there has been a lack of care over documents:

> "I can think of cases where people have started providing services on films without even having contracts in place. That is the business, I'm afraid. I still don't agree that the lack of care somehow proves this is a tax reason for the transaction…"

111. Mr Smethurst said that when he commented in his statement that none of the people involved in these transactions would have seen anything unusual with it at the time he was referring to him, Mr Clay, Mr Nigel Grint and Mr Grint and that he was making a "certain assumption that they will have been used to it, having been dealing with the entertainment industry themselves". He did not accept that as far as all the persons were concerned, these transactions and the arrangements were intended to avoid or reduce Mr Grint's income tax liability and that is why they collectively didn't take care over documents. As regards UK lawyers he said he felt at the time comfortable that they knew what the agreements did because they had been originally written by a UK solicitor and CK were just filling in the factual details. Also he cannot remember an occasion where he has sat down with a client and then had to go to a solicitor to explain that a limited liability company gives you limited liability. It's just basic business knowledge. He would not need specialist legal advice unless there was something peculiar that the clients were concerned about or a specific point in relation to limited liability, that they are trying to get protection for.

112. Mr Clay was taken to an email from Mr David Blaikley to Mr Tom Collier dated August 10, 2011 in which there is a comment that: "Whilst we are essentially accommodating your client's request with regard to certain arrangements he is putting into place for his own affairs (and happy to do so in terms of the deed) I don't want to commit us to anything further that might be required in the future". It was put to him that this shows that as far as Warners were concerned these were just arrangements that Mr Grint was putting into place for his own reasons, not limited liability and, if it had been for limited liability, Warners would have said: "Well, hang on a minute, we are not having it that you suddenly change the terms of our deal". He said he did not know.

113. Mr Clay was also taken to an email from Mr Collier to Mr Blaikley on 10 August 2011 which states: "In clause 2.3, with reference to the words 'after the date of this deed' – let's just be clear that this includes the payment that was contractually due to be paid to Artist promptly following 31 July 2011 (ie that such payment will be paid to NewCo and not to Artist)." He

agreed that is a reference to the "on hold" payment again. It was put to him that his reason for deferring the payment was in order for Mr Grint to avoid income tax, whatever happened to that payment. He said: "Yes, but it may not have avoided income tax…I can't think of another reason, no - apart from to avoid tax".

114. Mr Clay agreed that the only benefits that he was referring to in his statement as regards the timing of the incorporation are tax benefits, but said: "I am his tax adviser and therefore my role is to talk about the tax benefits, not discuss other things that are outside of the tax benefits". He did not agree that those tax benefits were the only benefits that Mr Nigel Grint and Mr Grint were interested in and said the other benefits were discussed. He said in effect that he would not necessarily have recorded it in the advice he gave.

115. Mr Clay and Mr Smethurst were taken to the email from Mr Smethurst to Mr Nigel Grint relating to on hold payments which Mr Clay and Warren Dern were copied into and in examination in chief Mr Smethurst was asked how work in progress was valued and dealt with:

(1) In examination in chief:

(a) Mr Smethurst said this related to "accounting for income tax in the final period of Rupert Grint's self-employment for the amount we deemed to have been earned by him at that date" so they were "looking backwards and also looking at the contracts…he had entered with Warner Brothers at that time and what we thought would be due to him as of that date in terms of services he had already provided" to them.

(b) He was taken to an email from Warners in which it was stated: "... the payment that was contractually due to be paid to [Mr Grint] promptly following 31 July 2011 (ie, that such payment will be paid to [Clay 10] and not to [Mr Grint])." He said in fact the sum referred to was part of the work in progress which was to be charged to tax in Mr Grint's hands in the final period of self-employment before the incorporation of his business.

(c) He said that looking at the position in detail now the statement he made in the email relating to the on-hold payments is not accurate because the amount that was paid immediately after the incorporation, ie the amounts he referred to as Warners having on hold "were part of work in progress hence subject to income tax and National Insurance as a self-employed person", and therefore did not, as he said in that email, benefit from the lower rates of tax in the company.

(2) When it was put to Mr Clay that the email shows the importance of tax, he said: "Again, I would say my job is to make sure…any client is minimising their taxes. Correctly and fairly. And again this is an instance of that."

(3) It was put to him that Mr Grint or Mr Nigel Grint must have given the instructions to put payments on hold for the tax reasons set out in this email. He said he did not know and had no comment really.

(4) When pressed Mr Clay said, in effect, that the purpose of this was to take advantage of the corporate structure, and therefore paying corporate taxes at the rate at the time of 25/26%, and if Mr Grint then chose to take that money out income taxes would follow giving a net tax position similar to that of income tax, which was at 50%.

(5) It was put to Mr Clay that his plan was that eventually this would all be wound up, and profits would be extracted at 10%. He said that did not happen, so it is immaterial and the tax rate was not 10% as Mr Grint was suffering tax at a corporate rate of 25/26%, so the £4.5 million that was taxed at 10% on Mr Grint had already suffered a tax of 26% at a corporate level: "So the overall tax rate for Rupert on that £4.5 million was over

32%...The position was we went from 50% down to over 32/33% of tax…" When pressed he said he completely disagreed.

> "That is the legislation…place at that time. Legislation changes. That was a plan but that wasn't a plan that was carried out…that is immaterial to this - to the point that you are making… I am his tax adviser and therefore have a duty to tell him the tax positions and potentially advise him how to mitigate taxes where possible. That is my job. I am paid to do that…that wasn't a plan that was carried out. So I feel it's irrelevant."

(6) Mr Smethurst agreed that the intention in writing the email was for the relevant payments to benefit from lower tax rates in the company. It was put to him that only Mr Grint could have given instructions to put these payments on hold because they were due to him from Warners. He said that in a strictly legal sense that may certainly be right under the contractual position. But in practice these things are normally left to the lawyers and accountants to discuss and agree. He thought that he gave the instruction to Warners to hold the payments. He agreed that he had a decision-making role in relation to how the assignment of contracts was dealt with in detail, how the payments would flow before and after, but said that he did not have a decision-making role in incorporating the business. As regards the mechanics of the contracts moving into the company, and discussions about Warner Brothers regarding payments, "yes, certainly I might have been making some decision, and using my own judgement there" but it was the client who decided to incorporate their business. He added that the reality of everyday business life is things get delegated from the person who has the legal responsibility, so "clients delegate to us to deal with things on their behalf, and make decisions when they don't have time to do it themselves": This is kind of an example, there was a constant flow of income from Warner Brothers and Mr Grint and Mr Nigel Grint would have delegated obviously the accounting of that and understanding the timing of that to CK as their accountants.

(7) Mr Smethurst did not accept that tax was very important to Mr Grint and Mr Nigel Grint because they delegated to him when payment should come for the tax reason that he set out in the email. He said they delegated this because they thought "we were in a better position and have the time on our hands just to manage all of that, including tax aspects and everything else in relation to that. Obviously there are lots of different things - just general business management to deal with in that regard". It was put to him that this was actually quite a big decision because Warners wanted to make it very clear that the payment was due and payable and he had told them not to pay it. He said that obviously it was something Warners had to flag, that they had monies that were due to be paid out to Mr Grint. He did not comment on whether it was important or not.

Valuation and consideration

116. As regards the consideration of £4.5 million:

(1) Mr Clay agreed that even if Clay 10 had ended up receiving more or less than CK's prudent approach, in terms of the income/the residuals, the consideration for the sale was going to be £4.5 million; the amount of consideration would have been the same even if the valuation of the residuals as £4.5 million was an understatement or was an overstatement.

(2) He said in effect that his understanding was that Mr Nigel Grint, Mr Grint, and CK had a mutual understanding that the consideration would be left outstanding as a debt "... until such time when he would draw down the sum from his loan account with the company." He thought that in practical terms Mr Grint would have just said, "I need some money for purchase of X" to Mr Nigel Grint and then Mr Nigel Grint would have actioned the withdrawal out of the company or instructed CK to do so. He did not know

about any times when that was not the case. It was put to him that the APA could only be varied in writing and clearly provides for the consideration to be paid immediately on completion. He accepted that as far as he is aware there was no written document relating to the outstanding debt but said that his understanding is that the parties agreed that Clay 10 would not pay the consideration, including the £4.5 million, on completion in cash, as it says under the APA, and instead Mr Grint would draw that money out of Clay 10. He said that there was not sufficient cash in Clay 10 to pay him. He agreed that there was nothing stopping Mr Grint requiring Clay 10 to borrow to pay him the cash but questioned why commercially that would happen. He agreed that it was part of the plan that Mr Grint could draw down the loan account as and when. He noted that if Clay 10 chose to borrow that money, it would have cost a huge amount to service that debt given the interest rate at the time and thought if he didn't require that money, then Mr Grint would not have put pressure on the company.

(3) When asked if there was no doubt that the money from Warners was definitely going to be paid to Clay 10, Mr Clay said that from a legal point of view the Deed covered that off and "in our minds there would have been no doubt that Warners were going to pay the money".

(4) He agreed that (a) once Clay 10 had received the money, Mr Grint wanted it to remain in Clay 10's bank account until he decided to draw it, so the money in that account was at Mr Grint's disposal; he could draw on it anytime he wanted. He added that was the case only after corporation tax had been paid, (b) even if Clay10 had paid lots of corporation tax and did not have the cash, Mr Grint could have required it to borrow, (c) before these arrangements Warner would have paid £4.5 million to Mr Grint as his self-employed income; if the company had not received it, Mr Grint would have received it, (d) under the APA, Clay 10 agreed to pay £4.5 million to Mr Grint for the sale of his business, (e) Clay 10 received £4.5 million from Warners pursuant to these arrangements, in particular the APA and the Deed, which was at Mr Grint's disposal to draw out when he wanted to, and (f) Mr Grint could have required the company to borrow but he did not.

(5) He did not agree that therefore the £4.5 million went round in a circle. He said that was just the valuation figure, it was unknown what figures were going to come through and it was only over a period that £4.5 million came into the company. He noted that the company paid tax on every pound that came into it, and then Mr Grint could draw the net against his loan account. So if £4.5 million was received by Clay 10, its corporate tax liability would be circa £1 million and it would only have £3.5 million to pay to Mr Grint. It would have to receive £6 million in order to pay Mr Grint £4.5 million. He made the same points as before about this not constituting tax avoidance:

> "we are paying tax at the corporate rate, which is 25%...Rupert avoided self-employment tax…but created, by virtue of Clay 10, corporation tax of 26% and capital gains tax of 10%. So he didn't negate it to zero at all…he didn't avoid it, he still paid significant taxes…That was a reduction in…overall rate of tax. As I said, from 50% on the 4.5, from 50% - ignoring the 2% National Insurance because that is not a tax, 50% was the income tax rate, and with the 10% plus corporation tax you get to somewhere nearly 33%...Of course, because it goes into the company and Rupert is the shareholder…it's always going to be a circle".

(6) He agreed that then it eventually comes back out in cash when the company had enough cash.

(7) It was put to Mr Clay that the second that Clay 10 had cash of £4.5 million it could have paid it to Mr Grint; it did not need £6 million in to pay that. He said it could have but then it would have potentially been left without being able to pay HMRC. He was not sure if Mr Grint took any dividends but said that is irrelevant because he might not

take dividends out for another 20 years but when he did he would pay tax. It was put to him again that the plan was that would never happen and the company would be wound up on extraction of profits with only a 10% tax charge. He said tax legislation means you cannot do that now but that was the position for one year only. So that would not happen.

(8) He confirmed that when in his witness statement he said "...it was not deemed necessary…", he meant that would have probably been an internal decision of CK. He said it was really his evidence that Nigel/Rupert told him he needed legal protection from a liability limited liability company and he agreed that he could use template documents without really needing to amend them on the basis that there was no risk to them entering litigation. HMRC submitted that if these arrangements had had anything to do with any purpose of obtaining legal protection through a limited company that is not how the contracts would have been done.

117. In his witness statement Mr Smethurst said that (1) he instructed the accountancy team to assess the likely value of work in progress, he helped to review the VAT implications and was involved in calculating the capital gains tax that would be due on the transfer of the business to the company, and (2) he recalls that "Rupert and Nigel undoubtedly both understood the assets being transferred, and the consideration payable…". He said he has this understanding from looking at the emails that were sent to Mr Nigel Grint and the agenda and from knowing that Mr Clay went to meetings with him and discussed the incorporation and they agreed what was going to happen.

118. Mr Smethurst gave the following evidence:

(1) He thought the plan was that Clay 10 would owe Mr Grint £4.5 million for the relevant rights, as debt immediately due to Mr Grint on 13 October 2011 so that Mr Grint could have required Clay 10 to borrow the money to pay him on that day. He said that it is within the realms of possibilities. Clay 10 would then receive cash from Warner Brothers for Harry Potter, amongst other receipts.

(2) He did not accept that there was no doubt that that money from Warners would come in. He said things do happen so there is not 100% certainty that payment was going to be made. In valuing future income streams as an accountant, "you always build in some kind of discount for the fact that payment may not be received, as a general principle. Obviously you make a judgment call depending on the situation and you might think in relation to a film, film residuals, perhaps there is a small chance that payment won't be made because there could be some event where there is breach of contract".

(3) He agreed there was very little doubt that Warners would pay the money to Clay 10 that he was expecting them to pay for residuals but said he would still build in some doubt "because things always go wrong in the real world….whenever you are performing a valuation, there is…speculation involved" about future performance. He confirmed, however, that in fact the valuation did not actually factor any discount for any sort of doubt of payments not coming in. He said that he expected that was because there would not be any material discount given the record of Warners paying on time. He said he stood by the valuation and did not carry out any other. He agreed that the residuals were paid.

(4) He agreed that the valuation and the consideration under the APA would have been exactly the same if the valuation had turned out to be an overestimate or an underestimate.

(5) He did not accept that no other valuation needed to be carried out because the value of the consideration had been fixed, in it was not going to be affected by Mr Grint's activities as an actor. He said he did not understand the logic there: he did not see why CK would then do another valuation unless they doubted their first valuation for some reason whether the consideration was fixed or variable.

(6) He said (a) he did not believe it was CK's idea that the consideration would remain outstanding, (b) he could not remember any conversations or who decided that exactly but it would not have been "our position to tell the client when he takes his profits from Clay 10", and (c) he could only assume it would have been Mr Nigel Grint/Mr Grint who decided.

(7) He did not accept that if there had been any commercial objectives other than tax savings, he would have known about them at the time of transactions. He said (a) he has been involved in other transactions with other clients, where he did not have an understanding of their commercial thoughts/motivations, (b) he worked closely with Mr Clay but said it was not necessarily the case that Mr Clay would have told him if there had been important commercial objectives, (c) it is a very busy office, with lots of client work going on so they would not necessarily have the time to sit round and talk about the commercial objectives of a client.

(8) He did not accept that he would have known if they had been important because he/CK, were responsible for implementing all of these arrangements as well as planning. He said:

> "We are given a mandate to do certain things as accountants and tax advisers…it's not within our mandate to make sure…we are satisfied with the commercial objectives of the client….we are only talking about that obviously in hindsight…At the time, we wouldn't have thought commercial objectives were an important issue for us….or certainly myself to be aware of or be noting down on files".

He did not accept that is because they were not important to Mr Nigel Grint and Mr Grint for the reasons he had already given or that given that he/CK were instructed to plan and effect these arrangements, they would have had to know why they were being done. He said he could not give examples of other clients and confidential information but there have been so many scenarios where he did not know the detail of the commercial objectives of the client but was asked to do certain things from a tax and accountancy point of view. So:

> "in the real world…I don't think it is credible that accountants and tax advisers know all the commercial background to every transaction they get involved in or the commercial objectives as you say".

(9) As regards Mr Grint requiring Clay 10 to take a loan to pay him £4.5 million Mr Smethurst said that (a) as a shareholder obviously he controlled the company so he could have decided the company should take lending, and (b) he could not think of any legal reason or anything that would have prohibited him from asking Clay 10 to pay him by way of finding finance.

(10) He accepted that Mr Grint wanted the cash to remain in Clay 10's bank account until he decided to draw it. He noted that it would have to be with the agreement of the director of the company. He said he had no knowledge of whether Mr Nigel Grint ever said no when Mr Grint wanted or needed funds out of Clay 10. He accepted that, as far as he knows and understood the plan, Mr Grint could access any cash in Clay 10 when he wanted to subject to Mr Nigel Grint signing off as director. He accepted that the plan was for Mr Grint to draw out the £4.5 million without any further tax charge on him but made the point he was subject to capital gains tax on £4.5 million and corporation tax was payable by Clay 10 on the receipts.

(11) He agreed that Mr Grint drew the money out of Clay 10 and it was transferred to personal accounts that he had and Mr Grint could retain profits in the company. He did not accept that the plan was that eventually Mr Grint could wind up the company and suffer tax only at 10% again. He said that was one option and in fact he has taken dividends. In the November email he was saying it will be wound up or this is definitely

the plan but rather that is one avenue, as a possible option. He acknowledged he did not provide alternatives but said that as a tax adviser he would highlight the most beneficial options. He was "just putting in there one of the possible benefits" as an option. It would be for Mr Grint and Mr Nigel Grint to decide if they ever wanted to close the company, or if they wanted to take income out during the lifetime of the company, so:

> "I was just highlighting one option…It wasn't my plan to close down a company that I didn't control, I was literally just their adviser so...I advised it as one option in future. And I am writing a fairly - it is not much longer than a page-long email. I didn't at that stage go into every option that existed for dealing with profits in a company. It is what - as a tax adviser, it is one I highlighted because it is obviously good for the client to know tax-efficient options."

(12) Mr Smethurst thought it sounded right that as of August 2021, Clay 10 had total reserves of £23 million that had not been drawn as dividend, apart from the few cases where he might have contracted personally due to it being US work, in the main nearly all of his income for his acting services since incorporation of Clay 10 has been paid to Clay 10, if he needed to fund his lifestyle he would have to withdraw funds from Clay 10. He commented that does not mean he is holding all the money in the company so he can liquidate it in the future and only pay 10% tax plus the fact that the entrepreneur's relief limit is only £1 million so he would not have a 10% tax rate if he closed his company down.

119. Mr Grint gave the following evidence:

(1) Mr Grint confirmed that he asked his father to top up his personal account periodically and he would do that and did not remember him ever saying no.

(2) He accepted that the plan was that to avoid him paying income tax on his earnings, the business would be operated through Clay 10, CK provided his father with the Services Agreement, which included a clause that is intended to carve out the USA for tax reasons, and possibly tax reasons plus a reason about filming in the US.

(3) He said that at the time he did not know that CK provided valuations of the rights that would be transferred under the APA and did not recall that one of the amounts that he would be owed by Clay 10 was £4.5 million and that amount would be left outstanding and he did not know he could have demanded at any time that Clay 10 pay him that money and require it to borrow to do so. When it was put to him that once Clay 10 received actual cash he wanted it to stay in Clay 10's bank account until he decided that he wanted it transferred to his bank account, he said he was not sure he was really aware of that kind of arrangement and "honestly I don't know". He confirmed that he knew that the Harry Potter "residuals" money was being paid into Clay 10's bank account, he wanted it to stay in that bank account until he asked his father to transfer it to his account and he knew that he could access that cash in Clay 10's bank account simply by asking his father at any time and it would be very, very unlikely he would say no and he could not remember an occasion when he did. He said he was not aware of the tax implications of withdrawing the money. That is something he entrusted others to take care of. It is not something he really knew anything about. He accepted that it was part of the plan of these arrangements, that he could draw this money out basically to spend it himself personally as he wished but added that he did not know if it was ever formally outlined like that.

(4) He did not accept that it was part of the plan that he could keep profits from his acting in Clay 10 and eventually, assuming that tax law did not change, wind it up and access the profits only paying 10% tax. He said: "This is really the first I have ever seen of that…I have no recollection of that ever being discussed with me." He accepted that in the relevant email CK were presenting this as an option; it did not sound like a definite thing.

(5) He said in effect that he was not aware he could have required Clay 10 to borrow to repay the debt it owed him. He said that is beyond his knowledge and his personal understanding of everything is not complete. It was put to him that the only purpose of all these arrangements was him avoiding income tax and on any view reducing his liability to income tax. He said he understands HMRC's position. He did not accept that limited liability or any of the other alleged commercial reasons were not at all important and were not actually reasons at all for carrying out these arrangements for either him or his father. He said: "I think they definitely contributed to the bigger picture…that is my understanding, my belief." He accepted tax was an important part but not the most important part and he can see the benefit of limited liability, to him it seems like a more efficient way of running things but he does not have much recollection of being at these meetings or really having much understanding of the arrangements at all.

120. Mr Clay and Mr Smethurst were questioned about the document which Mr Clay appeared to refer to in his witness statement headed "Clay 10 Limited. Shareholders loan account (R Grint) - extract" which against a date of 14 October 2011 shows "Goodwill sold on incorporation" with the figure £4.5 million:

(1) Mr Clay said this was purely an internal accounting document. He agreed it was inconsistent with the "shareholders' loan account". He did not know when the extract would have been created. The accounts department in the office would have created it. He thought it was not created for the purposes of this litigation, but would come from the accounts' working papers. He agreed that in CK there are inconsistent accounts' working papers with regards to dates. He said he had no comment when it was put to him that this document was created to fix an error in the paperwork for the purposes of this litigation.

(2) Mr Smethurst was asked how the accounts department would have possibly imagined it was the wrong date in the "shareholders loan account". He said there would have been quite a period of time between the preparation of that document and then of the extract. So his presumption was that:

> "by that stage they would have become more familiar with the background to the company, they would have on file the [APA]…They may have reviewed it a number of times for the purposes of completing statutory accounts…So…a bookkeeper or probably an accounts manager would probably have reviewed the [APA] at some point in completing statutory accounts and they would have been aware by that point that the assets weren't purchased on the date of incorporation. They were purchased…on that October 2011 date…That is speculation, yes, I don't - I can't give you cast-iron 100% fact how that happened due to the time that has passed."

(3) Mr Smethurst agreed that it is unusual that the extract refers to "DC witness statement". He thought that in the preparation for putting this bundle together, somebody has referenced it as that but he was "pretty clear very clear…that was provided to the Revenue during the inquiry, so…it wouldn't have the reference "witness statement" at that point in time because nobody would know at that point we were going to be entering a tribunal hearing and there would be witnesses". When it was put to him that the provision of this document to HMRC was misleading he said he thought it is "a fair thing to provide the Revenue with the correct facts" and the extract is correct in that it shows the correct date on which the assets were legally transferred into the company. He added that:

> "perhaps we could have been more thorough and…perhaps in that letter there should have been a disclosure that we have corrected this from the original book-keeping record. But I still say that is giving accurate information to the Revenue in the course of the inquiry…this is just an extract because it only covers the period of 1 August to 31 October and so we were giving the Revenue what they had asked for, which is to see how the goodwill was dealt with and the work in progress. And we must have made

the decision that the further entries on [the shareholder loan] weren't relevant to their request."

(4) He explained the reference in the extract to 14 October 2011 as a typo which "is not great" obviously it should show 13 October 2011. He agreed it is misleading in that somebody has failed to put the exact correct date but he said it shows the substance of the transactions, and how they were accounted for and that anybody reviewing this matter would want to see:

"there are mistakes but I don't think there is any intention to mislead…I would characterise it as an effort to tidy up mistakes made in book-keeping records. I don't think there would be any intention to mislead…"

(5) Mr Clay was taken through the entries in the "shareholders' loan account". The entries included (1) on 29 August 2012 a "Transfer to Rupert Grint eSaver account" of £2.8 million, (2) on 8 March 2013 and 21 March 2013, "Private property purchase" of £230,000 and £2 million, (3) on 2 May 2013, a "Transfer to Rupert Grint Lloyds account" and (4) on 30 May 2013, a "Private property purchase". He confirmed the accounts referred to were personal accounts of Mr Grint's and the property referred to was personal property of Mr Grint. It was put to him that this shows that on no view was limited liability protection an effect even of these arrangements. He said he did not follow this and it would always be the case, that if someone took money out of the company, that money is not protected by any limited liability.

121. In re-examination he was taken to another contract which Clay 10 entered into which Mr Nigel Grint signed on behalf of Clay 10.

Part C – Submissions and decision

Was there a main purpose of the avoidance of reduction of tax

Submissions

122. HMRC made the following main submissions on the tax avoidance issue:

(1) The reference to a "main" object is a reference to an important object: see *Travel Document Service v RCC* [2018] STC 723 and *Lloyds TSB Equipment Leasing (No 1) Limited v HMRC* [2014] STC 2770 ("*Lloyds*").

(2) The *Lloyds* case concerned the application of the test whether the "main object or one of the main objects" of the transaction was "to obtain a writing-down allowance". Rimer LJ (with whom Patten and Kitchin LJJ agreed) held that, even if each transaction in the relevant series served a genuine commercial purpose, it did not follow that the obtaining of the capital allowances was incapable of also being *a* main object of the transactions, even if it was not *the* main object of the transactions at [65]:

"The apparent deficiency in [427] is, in my judgment, that although the FTT was no doubt entitled to find that each transaction in the relevant series served a genuine commercial purpose, it does not follow that the obtaining of the capital allowances was incapable of also being a main object of the transactions, even if it was not the main object of the transactions. The FTT does not explain why it was not such a main object. In my view, the likely explanation for this omission is, as Judge Nowlan concluded, that the FTT was wrongly influenced by Melluish into the assessment that, provided all the transactions were entered into for genuine commercial reasons, the obtaining of the capital allowances was necessarily an immaterial, subservient consideration. In my view, however, that does not follow. Even if each of the transactions was entered into for a genuine commercial purpose, it may still be the case that a main object of structuring them in the way they were was to obtain the capital allowances; and the FTT's findings in [218] to [230] might be said to provide a factual basis for a finding that it was."

(3) In this case, it is necessary to consider the objects of the parties to the transactions including the object(s) of company directors and shareholders (see *Brebner v IRC* [1967] 2 AC 18 ("*Brebner*") and any other party who had significant involvement in the transactions and/or arrangements (see the approach in *HFFX LLP & Ors* [2021] UKFTT 36 (TC) ("*HFFX*") at [225] to [229]), in particular (i) Mr Grint, (ii) Mr Nigel Grint and (iii) Mr Clay and Mr Smethurst. CK's emails make it clear that the main object (and, on any view, one of the main objects) of these transactions and/or arrangements is the avoidance or reduction of liability to income tax. The advisors' objects, the seeking of advice in relation to the transactions and/or arrangements and the content of the advice is relevant to identifying whether the statutory test is met, particularly given the extent of CK's involvement in the arrangements: see *Addy v IRC* [1975] STC 601, *Marwood Homes Ltd v IRC* [1999] STC (SCD) 44 and *HFFX* at [225] to [229].

(4) The evidence (in particular the documents from CK) shows that the main object, or on any view one of the main objects of the transactions and/or arrangements, was the avoidance or reduction of liability to income tax. It is tax avoidance to seek to avoid income tax by transferring Mr Grint's business including "valuable rights in relation to the Harry Potter films which produce an ongoing stream of residuals" (as they were described for the purposes of carrying out the valuation of £4.5 million), so seeking to avoid an income tax liability in respect of that ongoing stream of residuals. It is even more plainly tax avoidance given that it was contemplated, at the outset of, and as part of, the arrangements, that the £4.5 million would be drawn by Mr Grint from Clay 10 (Mr Grint could "extract income from…[Clay 10] tax-free" (see the August email) and that profits could be accumulated in Clay 10, before winding the company up to extract profits "at a 10% tax rate" (see the November email). The other objectives put forward are not credible objects of the transactions and/or arrangements. There is no contemporaneous evidence of any other purpose and it appears that the only advice obtained was tax advice (save perhaps in relation to the detailed drafting of the Deed).

123. Mr Marre submitted that HMRC incorrectly apply the avoidance test:

(1) The avoidance test is a threshold condition to be applied before the specific conditions giving rise to a charge to tax under the relevant provisions are engaged. The relevant question is: absent these provisions, did the transactions have a tax avoidance object? If, as is the effect of HMRC's stance, any income which satisfies the relevant conditions for s 773 to apply must necessarily be inferred to have a tax avoidance objective, then the tax avoidance threshold would serve no purpose. It would be rendered otiose and that cannot be what Parliament intended. For the purpose of these provisions tax avoidance is not any transaction involving the transfer the rights to occupation income; rather the provisions apply where the object of the transactions/arrangements is to conflict with the will of Parliament. That accords with how tax avoidance has been described in the relevant judicial authorities.

(2) The reference to a "reduction of liability to income tax", expands the test to catch schemes designed to conflict with the will of Parliament but which do not successfully eliminate all charges to income tax and only artificially reduce the charge to income tax. The word "reduction" is part of a composite phrase. If it were construed without reference to the word "avoidance", that word would be rendered otiose and there would be no threshold motive test. The use of the word in the composite phrase mirrors the word "reduce" where it appears in the judicial authorities on the meaning of tax avoidance cited below (see in particular *CIR v Challenge Corporation Ltd* [1987] [1986] UKPC 45 ("*Challenge Corporation*")). If s 773 applies wherever there is a reduction of a person's liability to income tax, whether or not it bears the hallmarks of tax avoidance set out in the caselaw, then it would necessarily apply every time there was tax avoidance as well

as in a vast number of cases where there is not. That cannot be what Parliament intended, otherwise there would be no purpose in including a word "avoidance" at all.

(3) Historically there have been schemes falling within the definition of tax avoidance which involve the transfer of occupation income to a corporate vehicle which then itself seeks not to pay tax on those receipts (see, for example, *Black Nominees v Nicol* [1975] STC 376). This is not such a case. These provisions self-evidently do not define tax avoidance as any transaction involving the transfer of a right to occupation income.

(4) In this context, it is relevant that Part 13 is headed: "Tax Avoidance". It was recognised by the House of Lords in *R v Montilla* [2004] UKHL 50, [2004] 1 WLR 3141 (see [32] to [36]) that headings and sidenotes were admissible aids to construction.

124. Mr Marre agreed with HMRC that, on the authority of *Brebner*, the "object" of a transaction/arrangement must be ascertained by reference to the subjective intention of the relevant parties. He submitted, however, that the parties whose intentions are relevant are only Mr Grint and Mr Nigel Grint; the subjective intentions of CK or its directors are not relevant:

(1) In the *HFFX* case the tribunal noted (a), at [225], the decision in *Oxford Instruments UK 2013 Ltd v Revenue & Customs* [2019] UKFTT 254 (TC) ("*Oxford Instruments*") that: "The significance of the tax advantage to the relevant taxpayer is a matter of subjective intention, which necessarily involves a careful analysis of all the reasons the taxpayer had for entering the transaction" and, (b) at [227], that in that case it was said at [101] that: "If the evidence in this case pointed to the fact that…the directors of the Appellant were just acting as the puppets of the directors or employees of OI Plc and simply acceding, without independent thought, to the requests made of them…then the intentions of the directors or employees of OI Plc might well inform my findings in relation to the intentions of the Appellant" and (c) at [228] that "the same principle applies when another party is significantly involved in the decision-making involved in the arrangements."

(2) CK's emails are heavily weighted towards covering tax points although not exclusively so. However, the scope of work undertaken by CK did not usurp the decision-making of Mr Grint or Mr Nigel Grint. CK were engaged to advise Mr Grint in respect of tax and they were asked to produce some documents and liaise with third parties in respect of establishing Clay 10 and the sale of Mr Grint's business to Clay 10, including the valuations. They were not decision-makers.

125. Mr Marre relied on the following authorities in support of his interpretation of the terms " "tax avoidance" and "reduction".

(1) *IRC v Brebner* [1967] 2 AC 18 at 30 where the issue related to certain transactions entered into in connection with the long and short-term financing of arrangements to defeat a threatened takeover bid of a company in which the taxpayers were interested as shareholders and as directors which involved the extraction of cash from the company by way of a capital reduction rather than by declaration of a dividend. It was plain that the taxpayers had obtained a tax advantage as a result of arranging the reduction of capital which HMRC could cancel unless the person who obtained it could show that the transaction or transactions were carried out (a) either for bona fide commercial reasons or in the ordinary course of making or managing investments, and (b) that none of them had as their main object, or one of their main objects, to enable a tax advantage to be obtained. In considering the main object test Lord Upjohn said this:

> "….when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong, as a *necessary* consequence, to draw the inference that, in adopting the latter

course, one of the main objects is, for the purposes of this section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."

(2) *Challenge Corporation* is a New Zealand case, where shares in a company were sold to Challenge Corporation Limited ("C") for a price equal to $10,000 or 22.5% of the loss in the company of $5.8 million which proved to be deductible from the assessable income of C's group of companies. The question was whether the contract for the sale was void as against the New Zealand tax authorities under a provision which stated that would be the case if and to the extent that, directly or indirectly the contract's "purpose or effect" was to reduce liability to income tax. C argued this provision did not apply as the legislation specifically provided for losses to be transferred between group companies. Mr Marre referred to the following comments of Lord Templeman:

"There are, however, discernible distinctions between a transaction which is a sham, a transaction which effects the evasion of tax, a transaction which mitigates tax and a transaction which avoids tax…

The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax…

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs.

Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had."

Mr Marre submitted that this shows that if, as the result of tax planning, there is a genuine reduction in a taxpayer's income so that there is a commensurate reduction in his tax bill, and the taxpayer accepts the fiscal and economic consequences of his actions, that is tax mitigation and not tax avoidance.

(3) *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655, in particular, (a) Lord Templeman's reference to his own comments in *Challenge Corporation*, (b) his comment that: "There is nothing magical about tax mitigation whereby a taxpayer suffers a loss or incurs expenditure in fact as well as in appearance" and (c) Lord Goff's comments at page 681B:

"Like my noble and learned friend, Lord Templeman, I approach this case on the basis that there is a fundamental difference between tax mitigation and unacceptable tax avoidance. Examples of the former have been given in the speech of my noble and learned friend. These are cases in which the taxpayer takes advantage of the law to

plan his affairs so as to minimise the incidence of tax. Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable. Again, examples have been given in the speech of my noble and learned friend. The question in the present case is into which of these two categories the transaction under consideration falls."

(4) *CIR v Willoughby* (1997) 70 TC 57 which concerned the application of the "transfer of assets abroad" legislation then in place to transactions involving transfers of assets to an insurance company including whether the deferral of a liability to United Kingdom income tax can constitute the avoidance of liability to income tax for the purposes of those provisions and whether on the facts as found (a) the purpose of avoiding liability to taxation was the purpose or one of the purposes for which the transfer of assets or any operation associated therewith was effected; or b) that transfer and any operations associated therewith were bona fide commercial transactions and not designed for the purpose of avoiding liability to taxation. I refer to this as the motive test. Lord Nolan said this as regards the motive test at page 116:

"[Mr. Henderson Counsel for the Revenue, submitted that] ... tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. ...

My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of "tax avoidance", the more so since they owe much to the speeches of Lord Templeman and Lord Goff of Chieveley in *Ensign Tankers (Leasing) Ltd. v. Stokes* 64 TC 617, [1992] 1 AC 655 at pages 675C-676F and 681B-E. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who have received such fiscal encouragement in various forms over the years. This, no doubt, is why the holders of qualifying policies, even those issued by non-resident companies, were granted exemption from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. *But it would be absurd in the context of s 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of s 741 is a course of action designed to conflict with or defeat the evident intention of Parliament*." (Emphasis added.)

(5) Mr Marre submitted that that these seminal cases still represent current judicial thinking is shown by *UBS AG v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 13 ("*UBS*") where, at [1] Lord Reed said:

"In our society, a great deal of intellectual effort is devoted to tax avoidance. The most sophisticated attempts of the Houdini taxpayer to escape from the manacles of tax (to borrow a phrase from the judgment of Templeman LJ in *W T Ramsay Ltd v Inland Revenue Comrs* [1979] 1 WLR 974, 979) generally take the form described in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684, para 34:

> '... structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge.'"

126. Mr Marre further submitted that:

(1) The evidence is clear that saving income tax was not a main objective. Mr Grint was broadly aware of the benefits of running a business through a limited liability company but his sole main objective was to enable his father to continue to run the business aspects of his acting career in an efficient manner. Mr Nigel Grint might have been open to or even pleased to mitigate tax but that was not one of his main objectives. Rather, his main objectives were to ensure that Mr Grint benefitted from the protection afforded by limiting liability and that he would be able to continue to run his business affairs in an efficient manner. Tax mitigation was not a main objective or a driving reason behind the arrangements in Mr Nigel Grint's mind nor in Mr Grint's mind. Any tax benefits derived from the transfer to Clay 10 were explained to Mr Nigel Grint by CK but that they were tangential to these main objects and were not themselves main objects. When Mr Clay wrote to Mr Nigel Grint of 5 August 2011, with details of the tax rates, he was acting in the capacity of accountant and advising specifically on the tax aspects of the proposed transaction, rather than reflecting the importance of these "Savings" in the context of Mr Nigel Grint's other objectives. The same applies to the advice given in respect of taxation in the other emails. The limited scope of CK'S remit is reflected in the engagement dated 16 July 2009.

(2) However, if the tribunal decides that there was a tax-related objective, it can only be a tax mitigation objective and not a tax avoidance objective. Even if CK's objective was a relevant subjective intention, they did not provide advice on avoidance but on mitigation. They were not offering a magic wand or a Houdini-like escape from tax. They were, at most, advising their clients to undertake a commercial transaction with the effect of mitigating Mr Grint's income tax bill:

(a) To run a business through a limited company is a perfectly normal way of running a business, which is encouraged and provided for by Parliament and Mr Grint accepted the economic and fiscal consequences of so doing. This was not an arrangement involving "the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed" (see in particular the highlighted comment in *Willoughby*).

(b) The hallmarks of avoidance were not present, there was nothing artificial, there was nothing magical, the tax consequences were not divorced from economic reality, nothing went round in a circle, Mr Grint did not find himself before and after in the same position, save for a tax saving. He did not take actions which conflicted with the will of Parliament. If this is tax avoidance, it is impossible to see how the well-established line between avoidance and mitigation can exist at all. For there to be a tax avoidance motive or a tax reduction motive HMRC must point to something artificial: the artificial provision of an advantage. There must be total avoidance or reduction of tax payable involving an element of pretence, something unreal or magical a Houdini-like escape, and a conflict with Parliamentary intention.

(c) It was not an offer of freedom from tax that was described by CK: it was an offer of a lower prescribed rate of tax for profits received by a company. Mr Grint simply reduced his income tax liability for the future by means specifically granted to him by

Parliament. The steps had the consequence of mitigating or deferring Mr Grint's income tax bill by arranging his affairs in such a way that income and income tax was reduced, but without crossing the line to tax avoidance. It must be borne in mind that (a) Clay 10 paid tax at the stipulated rates on everything paid into it (and it received sums of over £20 million) (b) Clay 10 and Mr Grint paid tax at the stipulated rates on everything he drew out of it as salary and dividends and he continues to do so, and (c) Mr Grint paid tax on the statutory basis and at the applicable statutory rates on £4.5 million received on the sale transaction, a sum arrived at on a conservative valuation for the capital assets disposed of. It is not tax avoidance for Mr Grint to avail himself of entrepreneur's relief for the sale of business assets he had built up from the age of 13, under a statutory regime established by Parliament to encourage the growth of business enterprises, even if it were sold in part in order to secure that the company paid corporation tax on the income. Tax avoidance would be if there were a "magic wand" shaken so the company itself did not have to pay corporation tax. The fact that the transaction results (subject to changes in rates of taxation) in a lower tax bill cannot be tax avoidance; Mr Grint was merely taking into account the respective rates of income tax, corporation tax and capital gains tax in structuring his affairs and accepting a statutory invitation to own and work for a limited company.

(d) Incorporating a company which might one day be wound up and advising on that possibility is not advising on tax avoidance. And entering into transactions with the objective of incorporating a company that might be wound up is not entering into a transaction with the objective of tax avoidance.

127. Ms Belgrano further submitted that:

(1) Mr Marre misapplies the authorities he refers to and fails to correctly identify Parliament's intention. HMRC accept that a taxpayer does not necessarily have a tax avoidance purpose if, when faced with a choice as to how to structure a commercial transaction, he structures it in a manner which is more tax efficient than other ways. However, that proposition is irrelevant to this situation, in which the transactions and/or arrangements were carried out with the purpose of tax avoidance. Parliament's intention or purpose falls to be identified, amongst other things, by its enacting this legislation (which only applies to impose a charge if income is not treated as belonging to a particular person under any other provision of the Tax Acts) which is intended to counter the avoidance or reduction of income tax where a person turns their income into a capital amount. In the context of these provisions, it is clear that Parliament considers that swapping rates of income tax for lower rates of corporation tax is avoidance of liability to income tax. There is nothing in the language of the statute or the context that justifies that reading in of a requirement for artificiality and a narrowing of the statute. In this case there is plainly avoidance, not mitigation, of a liability to income tax.

(2) Neither the tribunal in *HFFX* nor the UT in *Bluecrest* applied these provisions by reference to a test that requires artificiality or circularity or magical results. This is not a situation where there was a commercial objective apart from tax and where tax was an effect or an incidental benefit of that. *HMRC v Fisher & Others* [2021] EWCA Civ 1438, (see [84] to [92]) shows that the proposition that transactions/arrangements concerning tax "mitigation" rather than "avoidance" is not relevant where the transactions/arrangements were carried out with the purpose of avoiding liability to tax. This case concerned the "transfer of assets abroad" legislation and Ms Belgrano referred to the part of the decision dealing with the application of the motive test.

(3) The avoidance test is met if the main object or one of the main objects of the transactions or arrangements is the reduction of liability to income tax even in the absence of "avoidance". That is how the UT approached the legislation in *BlueCrest* at [136],

where it held that: "The legislation was drafted very widely and was intended to extend to any arrangements made to exploit an individual's earning capacity where the main object (or one of the main objects) was to avoid or reduce liability to income tax." It is also how the tribunal applied the test in *HFFX*, see in particular [240]-[242] of the decision (although an appeal against this decision was heard by the UT on 13 and 14 July 2022). In each case the tribunals just referred to the word "reduction" in the normal way, and not on the basis it requires any artificiality or circularity.

(4) Mr Marre wrongly seeks to conflate the two limbs of the statutory test and thereby fails to give effect to the words chosen by Parliament contrary to the principles set out *R (on the application of O (A Child) v Secretary of State for the Home Department* [2022] UKSC 3 ("*Secretary of State*") at [29]:

> "The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used"…More recently, Lord Nicholls of Birkenhead stated:
>
> "Statutory interpretation is an exercise which requires this court to identify the meaning borne by the words in question in the particular context.'
>
> …Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purposes of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme:
>
> > "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.""

(5) Had Parliament intended to impose a test by reference to the actual elimination of charges or the failure to "successfully eliminate all charges to income tax" it would have done so.

(6) The legislation under consideration in the *Oxford Instruments* case referred to in *HFFX* and to which Mr Marre refers is different; it specifically asks about the company's purposes in contradistinction to s 773(2)(b), which asks what the main object or one of the main objects *of the transactions or arrangements* is. With that in mind it is plainly relevant to consider the objects of CK as the advisors.

128. Mr Marre replied that:

(1) He could not find in the *Fisher* case support for the proposition that the avoidance/mitigation distinction is irrelevant in considering the purpose test.

(2) In *Bluecrest* the UT clearly uses "to avoid or reduce" as a composite phrase and the comment HMRC rely on simply refers back to the overall scope of the provisions in the context of the partnerships in question which is then subject to the avoidance test. The UT cannot be taken to say there that "reduction" is anything other than part of the composite phrase. *HFFX* is nothing more than persuasive as it is a tribunal decision and, in any event, it does not shed material light on how the term reduction is to be interpreted.

I note that since the hearing the *HFFX* case has been considered in the UT ([2023] UKUT 73 (TCC)) and Court of Appeal ([2024] EWCA Civ 813). The UT upheld the tribunal's decision that the avoidance test was met at [114] to [125] but the Court of Appeal did not consider the avoidance test. The UT considered the approach in *Brebner* and concluded on this point at [127] that: "In circumstances where…..[the relevant person] knew about the tax benefit, was interested in it, and that it was important to him, it was perfectly open to the FTT to say tax reduction was one of the main purposes of the arrangements".

(3) There is nothing controversial in the *Secretary of State* case. The comments that provisions must be read in context supports Mr Grint's construction of the composite phrase "avoidance or reduction" and of ss 778 and 779. Nothing in the other case law which HMRC refers to undermines this construction and, rather, supports it.

Decision on tax avoidance issue

129. To recap, s 773 which is described as providing an overview states that (1) the relevant provisions impose a charge to income tax (a) on individuals to whom income is treated as arising under s 778 or s 779 (sub-s (1) and (2) income is treated as arising under those sections only if (a) transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation (sub-s (2)(a)), *and* (b) the main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax (sub-s (2)(b)). It is not disputed that the condition in sub-s (2)(a) is satisfied; the dispute is whether the avoidance test in sub-s (2)(b) is also met.

130. It is well established that tax legislation is to be interpreted in accordance with usual principles of construction which include taking a purposive approach. Mr Marre relied on comments on what constitutes "tax avoidance" and "tax mitigation" in a number of cases in which either a similar test to the avoidance test has been considered in a different context, or a purposive approach has been applied to a transaction designed to obtain some tax advantage. He cites these comments as support for the proposition that for the avoidance test to be met the transactions/arrangements must have the object or a main object of "the avoidance or reduction of liability to income tax" through some artificial or contrived means producing a magical result rather than simply through achieving the beneficial tax results which follow from entering into arrangements such as these for a person to provide the services of his occupation through a company. I do not accept, however, that this is how the relevant provisions are to be interpreted whether on the basis of the comments to which he referred or otherwise.

131. The importance of interpreting legislation in context was set out in the *Secretary of State* case. In line with this, in what is widely recognised as a succinct and accurate summary, Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 (2004) 6 ITLR 454, at [35] that, on a purposive approach to tax legislation, the "ultimate question is whether the relevant statutory provisions, construed purposively, were intended to the apply to the transaction, viewed realistically". For many years now we have been told by the courts at the highest level repeatedly (in more recent times in *UBS* to which Mr Marre referred) that on a purposive approach (1) the question is *always* one of what the particular statutory provision under consideration requires, and (2) the illustrations set out by the courts of elements of transactions which it may be appropriate to ignore on a purposive approach, are just that, examples and not pre-conditions or hallmarks the fulfilment of which necessarily means that a transaction does not have the tax effects those undertaking it intend to achieve.

132. It is clear, therefore, that sub-s (2)(b) must be interpreted taking account of its immediate context, the other provisions in s 773, and of the wider context of the overall scheme of the relevant provisions:

(1) It is apparent, in particular, from the charging provisions in s 776 and the conditions for the provisions to apply in s 777, that the relevant provisions are intended to subject individuals who carried out an occupation in the UK to income tax on capital sums obtained by them (on their behalf) as part of, in connection with or in consequence of transactions or arrangements made to exploit the individual's earning capacity in the occupation by putting another person in a position to enjoy all or part of the income or receipts derived from the occupation (or anything derived directly or indirectly from such income or receipts). Section 773 (a) provides an overview of the relevant provisions/an explanation of their intended scope, namely, by stating in sub-s (1) that they apply to

impose a charge to income tax where ss 778 or 779 apply, and (b) imposes an overriding condition that a charge will apply only if the requirements in sub-s (2) are met. The condition in sub-s (2)(a) mirrors part of the condition in s 777 but that in sub-s (2) (b) is not otherwise stated elsewhere.

(2) With that in mind, the natural interpretation is that in sub-s (2) the legislature is making a distinction between (a) cases where the aim of ensuring that no or, a reduced, amount of income tax is due on sums which, absent the transactions/arrangements, would be taxed as income from an occupation, is the main or a main object with which the relevant transactions/arrangements are made/effected, and (b) cases where there is no such aim or it is merely a collateral, incidental or lesser aim/consequence that does not constitute a main object, such as where there is some other main object/objects with which the transactions/arrangements are made/effected. The purpose and operation of the overall provisions and the link between sub-s (2)(a) and (2)(b) clearly suggests that in these provisions the legislature intended to subject individuals to income tax where the or a main object is to pay no or less income tax through the very type of transactions/arrangements which the provisions are otherwise designed to capture. I can see no reason, whether on the basis of the caselaw or otherwise, to read in any requirement that to fall within the relevant provisions the transactions/arrangements must be made/effected with the intention to render sums not subject to income tax altogether or in part due to transactions/arrangements involving artificiality, magical results or monies moving in a circle and/or which involve something more than a sale of occupation income to a company in circumstances such as these.

133. There was no dispute that in considering whether the avoidance test is met, the tribunal must consider the subjective intentions of Mr Grint and Mr Nigel Grint but there was a difference of view as to whether the intentions of CK are also relevant. Having regard to the relevant caselaw as outlined above, my view is that (1) the intentions and purposes the tribunal must examine to see if the avoidance test is met are those of the actual decision makers, namely (a) Mr Grint, as the person who disposed of his "business" to Clay 10 and the shareholder in Clay 10 and (b) Mr Nigel Grint, as Mr Grint was clear that he had little knowledge of the arrangements and why they were put in place and that he relied on his father to make decisions on his behalf albeit that his father may have discussed matters with him (although he did not recall any such discussions). Mr Clay, Mr Smethurst and Mr Grint were clear that Mr Nigel Grint was the decision maker in relation to these arrangements; he was the person who decided to go ahead with them and Mr Grint was clear he went along with what his father decided. Hence, Mr Nigel Grint's purposes and objectives, so far as they can be discerned, are to be attributed to Mr Grint, (2) CK's intentions and purposes are relevant only so far as they shed light on the intentions and purposes of Mr Grint and Mr Nigel Grint. Whilst CK took all necessary steps to implement these arrangements on behalf of Mr Nigel Grint/Mr Grint, it was not their decision to go ahead or not.

134. On the basis of all the evidence (1) I accept that it was of some importance to Mr Nigel Grint, acting on behalf of Mr Grint, for Mr Grint to operate through a company as that afforded limited liability protection, for the reasons given by him, Mr Clay and Mr Grint and that is one of the reasons why these arrangements were put in place. That obtaining the obvious benefits of limited liability protection was an object of the arrangements is plausible particularly in light of the fact that in 2011 Mr Grint was looking ahead to a long and successful career and moving on to new projects after his success in the Harry Potter films. I do not accept, however, that this was the most important object to which the tax benefits of the arrangements were collateral in light of the evident importance of the tax benefits, and (2) I accept that Mr Nigel Grint may have thought there was some benefit to acting through Clay 10 in terms of administrative convenience but not that this was a main or an important object of his. It is difficult to see that

acting through Clay 10 would mean that Mr Nigel Grint could run Mr Grint's business affairs in an more efficient manner. No evidence was presented which shows how this would affect matters and Mr Grint said that nothing had really changed as regards the administrative arrangements following Clay 10 being put in place.

135. I do not accept that the factors which HMRC point to show that the evidence regarding limited liability and administrative convenience as matters of importance to Mr Grint lacks all credibility.

(1) I cannot see that the evidence that limited liability was a concern is undermined by the fact that Mr Grint could withdraw £4.5 million from Clay 10 and that he did so in 2012/13 or that for specific reasons he sometimes still contracted in his own name or in some limited instances took on a secondary personal liability (for example, if Clay 10 were to breach an agreement). It remains the case that the arrangements provided limited liability protection except in certain specified circumstances and that there may have been a commercial reason to act without limited liability in some instances does not demonstrate that this was not the overall object.

(2) The fact that Warner Brothers did not object to Mr Grint limiting his liability in respect of the Harry Potter contract says nothing about Mr Grint's objects.

(3) HMRC assert that the fact Mr Nigel Grint chose to dissolve Wicked undermines his evidence. We do not know why he chose to use Wicked and then dissolve it. Mr Clay's evidence is speculation although the reasons he put forward for its dissolution make sense. In any event, Mr Nigel Grint's intents as regards a company set up for his own purposes and not for use by Mr Grint do not shed any material light on his/Mr Grint's objects as regards Clay 10.

(4) Nor can I see that it sheds material light on the parties' objects that it appears greater care could have been taken over the documents or that Mr Nigel Grint/Mr Grint did not take specific advice on the incorporation or the documents from a lawyer (other than from Warren Dern). Whether the objects were tax related or otherwise, it would be advisable for matters to be documented correctly. I accept Mr Clay's evidence that Mr Nigel Grint was familiar with what it means in legal terms to operate through a company.

(5) I do not consider it material that CK did not immediately put this forward as an object in the early stages of HMRC's enquiry. I accept Mr Clay's explanation as to the stance that he/CK took in replying to HMRC at that time.

(6) The witnesses' explanations as to why there is no note of a meeting where Mr Nigel Grint/Mr Grint set out his desire for limited liability were believable.

(7) HMRC noted that there is no explanation why incorporation did not take place until many years after the incidents with Mr Grint's grandfather and his agent, Mr Grint could not recall discussing this in the context of these arrangements and he had made significant income well before these arrangements. In their view, the timing is explicable by the fact that the new 50% rate of income tax rate became effective from 2010/11, the increase of entrepreneurs' relief to £5 million of gains at 10% was effective from 22 June 2010 and the increase of entrepreneurs relief to £10 million of gains was effective from 6 April 2011. It is not clear why incorporation took place at this particular stage. Mr Clay's reasons for this make sense but again that was his speculation. The position as regards entrepreneurs' relief may well have influenced matters. However, this of itself is not sufficient to undermine the evidence that limited liability protection was of concern to Mr Nigel Grint.

136. I find that one of the main objects of Mr Nigel Grint/Mr Grint in implementing these arrangements was to ensure that Mr Grint would not be subject to income tax on £4.5 million attributed to the "goodwill" he sold to Clay 10 and, in overall terms, to reduce the tax liability

he would otherwise have had on his receipts from his work as an actor and any related matters. The witnesses all accepted and the email correspondence also demonstrates that achieving this tax result was a benefit to Mr Grint and that it was an important matter and a main objective. This is reinforced by the fact that, subject to Warren Dern advising on the Deed, CK were instructed, in effect, as the sole advisers and implemented and co-ordinated all matters. The fact that obtaining limited liability protection and administrative convenience were also in Mr Nigel Grint's mind as reasons why incorporation was a good plan, does not detract from the clear focus in the written correspondence on the tax advantages of the arrangements. As set out in the caselaw the parties referred to a person may have "a main objective" of obtaining a tax benefit/reduction in tax even if there were other genuine commercial reasons for the transactions; that does not mean that the obtaining of the tax advantage was necessarily an immaterial, subservient consideration and in my view here it was not. On that basis, the requirement in s 773(2) is satisfied and the relevant provisions are in point.

Does section 778 or 779 apply?

Submissions

137. Mr Marre submitted that if, as I have found, these provisions are in point, s 779 is applicable and not s 778:

(1) The amount of consideration treated as capital consideration was not paid to Mr Grint in money and so is only a "capital amount" if it is "money's worth". Mr Grint received money's worth from Clay 10 for the transfer of the relevant assets to it consisting of realisable property in the form of the right to call for payment of the debt owed to him which derived its value from his activities.

(a) As a matter of fact and law, under the APA Mr Grint had an enforceable right to payment which is property as a chose in action. The APA does not in fact specify how payment should be made. It sets out a value but not a method nor a type of asset required to discharge payment.

(b) The correspondence between CK and Mr Nigel Grint demonstrates that he knew that the payment would be made by the creation of a debt. In any event, this falls into the category of cases which the Supreme Court has accepted can vary an agreement without writing and it was so varied: the common intention of the parties that the sum would be left outstanding (as evidenced by emails and the witness evidence), together with Mr Grint's obvious detrimental reliance in transferring his business to Clay 10, creates an estoppel of the type contemplated by the Supreme Court in [16] of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 ("*Rock Advertising*").

(c) In either case, the resulting effect is that, as a matter of economic and legal reality Mr Grint had a proprietary right to payment. He did not have money. The right to payment was monies worth.

(2) Without Mr Grint's historic activities, Clay 10 would never have been paid anything under the contracts assigned to it, and without his ongoing activities, Clay 10 would not have the prospect of any future earnings. There is no question of needing the capital amount to vary or to be capable of variation for it to fall within s 779.

(3) Alternatively, if Mr Grint did not obtain a right or property from Clay 10 then he cannot have obtained anything constituting a capital amount at all for the purposes of s 778. It is not open to HMRC to invoke s 778 (as they have done in the closure notice) in a case where they fail to identify a relevant receipt.

(4) Section 779 applies only if the property or right is "sold or otherwise realised" (s 779(1)(b)); the money's worth must be turned to account for a charge to arise. Section 779(4) provides the logical conclusion to the deeming provision - that income is treated

as arising in the year when the capital amount is deemed to be income under s 779. Hence, the legislation defines the property/rights at the moment of receipt as a capital amount and, in common with the whole scheme of taxation relating to capital assets, there is no tax charge levied until the asset is "realised". The purpose of s 779 is to deem the receipt of value, when the property is realised, to be income rather than a capital receipt. Therefore, if these provisions apply to this transaction at all, Mr Grint's receipt of a capital amount is artificially treated as an income receipt at the time when the capital amount is realised under s 779.

(5) The money's worth received by Mr Grint was realisable when in effect he had the benefit of the outstanding consideration for the sale but it was "realised" only in the 2012/13 tax year when Clay 10 made payments of the debt due to him. Clay 10 received income, pursuant to the APA and the assignment of the rights to income to it, during the 2011/12 tax year. But nothing happened to the debt it owed to Mr Grint until the 2012/13 tax year. The dates on which Mr Grint's money's worth was realised all fall in the 2012/13 tax year or later

(6) The cases referred to below are relevant as they deal with the question of when, for general purposes, sums due under a debt are received. In each case, the principle has been recognised that a debt does not give rise to taxable payment until it is actually paid:

(a) In *Leigh v IRC* [1928] 1 K.B. 73 the taxpayer contended that interest owed but unpaid in the years 1914-1918 ought to have been taxed in those years. A debt arose because of the unpaid sums. The debt was paid in 1921 and the IRC contended that the sums were taxable only on receipt and therefore liable to surtax in 1922. Rowlatt J found for the IRC on the basis that:

> "[i]t is to be remembered that for income tax purposes "receivability" without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it. The meaning of the section must be "receivability" speaking of a debt which has been received, and means the date on which it is paid as distinct from the date on which it was accruing."

(b) In *Dewar v IRC* [1935] 2 K.B. 351 the taxpayer contended that no tax was due on interest payable on a legacy he had received under a will on the basis that the interest had been waived. The IRC contended that the amounts due were payable because the taxpayer could have asked for the debt to be paid at any time, so the sums were at his disposal. Lord Hanworth MR observed:

> "The respondent [taxpayer] has made, in his capacity as legatee, no demand for the full payment of the legacy, or at the material times he had not, and he has made no demand for payment of interest upon it.
>
> The money is left in this way, that if he were minded to ask for 40,000l., or a part of it, it would have been possible for him to have been paid and to have received it. But the fact is he has not done anything at all in respect of that, and the money has not been appropriated to his use, it has not been deposited at his direction, and it is not lying under his name, either in the hands of the bank or any other agent.
>
> It is not quite easy to see why this total sum of 40,000l. should be claimed, because upon the facts indicated in the table of payments it does not appear that the 40,000l. is a sum which would have been payable if the legatee had made a demand, which as I say he has not done."

(c) He continued by citing Rowlatt J's comments in *Leigh* with approval and said that:

> "the reason why you make up the return for the particular year is that you look to see in the course of that twelve months what has been received and it may be

> that a good debt will be paid in a subsequent twelve months and not in the twelve months in respect of which you are making your declaration, and you cannot anticipate that the money will come in in its proper place in the following twelve months. I think Rowlatt J. was right in saying that for income tax purposes receivability without receipt is nothing."

(d) These principles were applied more recently by Neuberger J (as was) in *Girvan (Inspector of Taxes) v Orange Personal Communications Services Ltd* [1998] STC 567. The headnote provides:

> "Held – (1) As a matter of ordinary language interest, which was accruing and was being compounded, was income and arose when it was paid. In the instant case, following the arrangements agreed between O and the bank, while the interest was accruing and had not been called by O, it was an accruing debt which was the antithesis of income, since, so long as the debt was wholly unpaid, there was no income, and once it was wholly paid, the payment was income, and the debt had ceased to exist. O had the right at any time to obtain the interest, either by asking for it or by closing the deposit account, but it would not have obtained the interest until it had asked for it or had closed the account or until January 1993. O had not done anything in respect of the interest, the interest had not been appropriated to O's use, it had not been deposited at O's directions, it was not lying under O's name or in the hands of the bank, and it had not enured for O's benefit until it was paid in December 1992. Moreover, a payment to an account set up by the bank in its own name for internal accounting purposes was not a payment in the commercial world."

(7) The definition of "money's worth" provided by s 62 of the Income Tax (Earnings and Pensions) Act 2003 is also relevant, as: "something that is - (a) of direct monetary value to the employee, or (b) capable of being converted into money or something of direct monetary value to the employee." *Abbott v Philbin* is authority for the proposition that a payment in money's worth is realisable and not realised albeit that case concerns employment income tax. The approach of the court was, broadly, that income tax is payable on assets received from an employer as a reward for services when they are capable of being converted into money, namely, when they are un-realised money's worth. The time at which "money's worth" is "realised" is the time at which it is turned into money. That this is the correct analysis is supported by Parliament's use of the composite phrase "sold or realised"; it is clear that something has to happen to the property/rights received as money's worth. Their simple creation gives rise to the capital amount. That alone is insufficient to deem the capital amount to be income.

(8) Hence, HMRC have issued an invalid closure notice because (a) it relates to s 778 and not s 779, and (b) it was issued for the wrong tax year; under s 779 the charge to tax arises only in the 2012/13 tax year.

138. HMRC submitted that the correct taxing provision is s 778 and the capital amount is taxable in the tax year 2011/12:

(1) Mr Grint received a capital amount and (a) whether that is regarded as cash or a creditor's right for the purposes of s 778 he could "effectively enjoy or dispose of" the capital amount in the 2011/12 tax year and it was therefore "receivable" in that year, (b) the cash or creditor's right is not property or a right which "derives substantially the whole of its value from…[Mr Grint's] activities". The £4.5 million consideration under the APA was calculated by reference to ownership of valuable rights in relation to Harry Potter films which produce an ongoing stream of "residuals" being sums which depended on various things such as box office success. However, the value of the consideration was fixed at £4.5 million; it did not change depending on whether more or less residuals were received by Clay 10. It arises as a result of the sale of rights, not Mr Grint's activities

in the past or future or any activities. It is simply cash consideration for the sale, and (c) on that basis, income equal to the capital sum is treated as arising in that year.

(2) Under the APA, which could not be varied other than in signed writing and was not so varied, the capital amount, comprised an amount in money of £4.5 million, as the consideration payable by Clay 10 to Mr Grint on completion. On the basis of the decision in *Rock Advertising* any oral variation was not valid.

(3) Under the APA at 12 pm on 13 October 2011, Clay 10 was obliged to pay £4.5 million cash. It did not pay cash at that time, but Mr Grint had a right to it, and, as Mr Clay said, the debt which Clay 10 owed to Mr Grint was "as good as" his own personal money. There was no real risk that Clay 10 would not receive cash. There was no real doubt that Warner Brothers would pay the residuals, there was only one valuation and the basis of the valuation did not include any element of risk that Warner Brothers would not pay.

(4) On the basis that the consideration was left outstanding (which HMRC do not accept), the capital amount is "receivable" by Mr Grint in the 2011/12 tax year for the purposes of s 778(4)):

> (a) On this basis, Mr Grint obtained a creditor's right to £4.5 million, being money's worth capable of being converted into money (see *RCC v London Clubs Management Ltd* [2020] 1 W.L.R. 5144), which he could immediately enjoy against Clay 10 as an on demand debt (for example, by suing for the cash; by requiring Clay 10 to borrow the money) or dispose of (for example, by assigning his rights). In effect his right was "as good as" money: (a) Clay 10's financial statements for the period ended 31 August 2012 state that, "During the period a loan existed between the company and Rupert Grint. At the balance sheet date the amount due to Rupert Grint by the company was £5,982,041. No interest is charged in respect of this loan." Accordingly, there were no restrictions on any right to draw the cash, (b) there were no restrictions placed on Mr Grint's creditor's right: he could have assigned it or borrowed against it and he could force Clay 10 to borrow to pay him the cash immediately, (c) 2 payments from Warners that would have been paid prior to the incorporation were put on hold by Mr Smethurst and there was no real doubt that those payments and the others would be paid when they were due, as they were, (d) Mr Grint wanted cash to remain in Clay 10 when it was received by Clay 10 so that he could draw it from Clay 10 as and when he wanted to, which is what happened, and (e) as noted the amount of the consideration was fixed and would not be more or less than £4.5 million even if the "residuals" had been more or less than what was expected. Moreover, the nature of the creditor's right makes it clear that it falls within s 778: a credit to a loan account does not have to be "sold or otherwise realised" in order to identify the value derived from the individual's activities.
>
> (b) Further and in any event, Mr Grint was able to enjoy or dispose of the creditor's right to £4.5 million once Clay 10 received funds of £4.5 million, which it did in the 2011/12 tax year because that money was readily available to him and was at his disposal. Mr Grint was the sole shareholder of Clay 10, he had control of it and had immediate access to the cash, which was unreservedly at his disposal (see *Garforth v Newsmith Stainless Ltd* [1979] STC 129 ("*Garforth*") and *Aberdeen Asset Management plc v HMRC* [2014] STC 438 ("*Aberdeen*")). Mr Nigel Grint always actioned Mr Grint's requests and would not have refused to do so. This was entirely consistent with the object of the arrangements, namely to allow Mr Grint to draw significant amounts of cash from Clay 10 for his personal purposes whilst avoiding or reducing his liability to income tax and is also

confirmed by Mr Nigel Grint who said that Mr Grint "would be able to withdraw funds from the company in settlement of the debt as and when cash reserves in Clay 10 would allow, and as and when Rupert required the funds".

139. Ms Belgrano submitted that even if s 779 applies, the income tax charge on the capital amount would still arise in the 2011/12 tax year. In that case, the relevant property/rights were "sold or otherwise realised" for the purposes of s 779 in the tax year 2011/12 when the £4.5 million in Clay 10's accounts was at Mr Grint's disposal. The "realised value" (s 779(3)) of the property/rights would be £4.5 million and that property/those rights would be "realised" (s 779(4)) when Clay 10 received cash of £4.5 million in the tax year 2011/12 for the reasons as set out above. On the hypothesis that (contrary to HMRC's case) the property/rights derive substantially the whole of their value from Mr Grint's activities, the analysis would appear to be that he had property/rights to £4.5 million cash whose value was traced through to the contracts assigned to Clay 10. On that analysis, when those contracts bore fruit and Clay 10 received £4.5 million, which Mr Grint was free to draw whenever he wished, Mr Grint's property/rights to £4.5 million cash were realised (on any sensible reading of the word). Although Mr Marre equates the meaning of "realised" with "payment" that does not assist him because, as set out above, Mr Grint was the sole shareholder of Clay 10, he had control of it and had immediate access to the cash, which was unreservedly at his disposal, which amounts to payment in the tax year 2011/12 (see *Garforth* and *Aberdeen*).

140. Mr Marre replied as follows:

(1) As regards the nature of the property/right received and when it is taxable:

(a) Even on HMRC's analysis that Clay 10 was obliged to pay a cash sum in order validly to perform its obligations, Clay 10 failed to pay a cash sum and Mr Grint therefore acquired a right to enforce payment. That right is a chose in action.

(b) There can be no pretence that Mr Grint received cash when he did not. If Mr Grint had been forced to sue Clay 10 for his money, because it would not pay its debt, it would have been no defence for Clay 10 to say it had paid him his money already, because the debt would have been treated as a payment for PAYE purposes. The fact that the property or right could be converted into cash if Mr Grint called for his cash, does not affect the analysis. It should be noted that the directors' approval of payments by Clay 10 was in fact necessary, even if it was very likely to be granted.

(c) HMRC's focus on when Mr Grint had access to the £4.5m may be a relevant question in an employment tax context but it is irrelevant in this case and so are the provisions and caselaw dealing with what constitutes a payment for PAYE purposes. The relevant provisions apply only by reference to capital amounts received or placed at the disposal of the taxpayer which are not otherwise charged to income tax. There will inevitably be something of value in the hands of the taxpayer. The question is not when Mr Grint might have realised the capital amount but when he did so. These provisions do not ask when the payment is at the taxpayer's disposal, or when money's worth is received but when it is realised. This legislation defines the property or rights at the moment of receipt as a capital amount and the purpose of s 779 is to deem the receipt of value for income tax purposes to be when the property or right is realised. In effect, ss 779(1)(b) and 779(4) deem the capital amount to be income only when it is turned to cash on Mr Grint's right to payment being realised. Section 779(4) does not delay the moment of deeming beyond the moment when the capital asset comes within s 779 to begin with. The capital amount received is artificially treated as income at the moment

when the capital amount is realised under s 779. Under these provisions, it is the moment of realisation that matters.

(2) There is no basis in the case law on statutory construction to enable HMRC to invent a requirement that Mr Grint's creditor's right is not property/a right which derives substantially the whole of its value from his activities unless its value is not fixed and fluctuates by reference to his activities:

(a) The wording in s 777 is very similar in that it refers to "Income or receipts... derived from the individual's activities" and includes "Payments for any description of copyright or licence to or franchise *or other right deriving its value from the individual's activities (including past activities)*" (Emphasis added.)

(b) Hence, the statutory code obviously, and uncontroversially, looks at the activities of the individual on a realistic basis, and looks at past and future activities, and s 778 asks: (1) is the capital amount property or a right, (2) if so does it derive its value substantially from those past or future activities of the individual or from something else? Section 778 can apply only if the capital amount received is not such a property or a right. Some property or rights, such as shares or a creditor's rights may not derive their value from the activities of the individual if, for example, they do not owe their value substantially to the activities of one person but to those of a large number of people, including or even apart from the individual. All the value in Clay 10 derives from the activities of Mr Grint past and future. Without him/his activities Clay 10 and the right to money owed by Clay 10 would have no value.

(c) The capital sum under s 777(5) will inevitably be sale consideration, but that does not answer the question of from what it derives its value. It is notable that s 777(3)(b) uses the words "directly or indirectly" derived from the activities of the individual. Whilst those words are not repeated in s 778 or s 779, as noted the word "activities" in those sections should be construed by reference to the relevant activities giving rise to the income under s 777.

(d) HMRC's approach to construction again conflicts with that set out in the *Secretary of State* case. The words used in the statute must be construed in context. The statute in context looks at both the past and the future activities of the individual.

(3) It is clear that where this requirement is satisfied, s 779 applies and s 778 cannot apply. A distinction is clear from s 773 which refers to 778 as applying when: "... a capital amount other than derivative property...[is]obtained." HMRC's reference to receivability is misconceived. It only applies if s 778 is in point which it is not. The two sections deem the relevant income to be deemed to arise at different times: under s 778 income is deemed to arise in the tax year when the capital amount is receivable whereas under s 779 it is deemed to arise only if and when the derivative property is "sold or otherwise realised"; something has to happen to the derivative property before the deeming occurs.

141. Ms Belgrano further submitted that:

(1) Mr Marre's approach impermissibly seeks to replace the correct statutory question with the question *why* the relevant capital amount was obtained. In fact the provisions require consideration of the source of the value of the creditor's right and, in that context, it is relevant to ask, whether the value of that right would change depending on the results of the individual's activities. The fact that, as Mr Marre submits, without Mr Grint's activities, he and Clay 10 would have never agreed to a sale of the relevant rights for £4.5 million or that Clay 10 would not have had any assets/money but for Mr Grint's activities does not mean the creditor's right derives its value from those activities. The £4.5 million

is simply consideration for a sale and, whilst the nature of the rights sold informed their valuation, it is an illogical leap to conclude that means that that sum derives its value from those activities. It is simply cash and it cannot be said that Clay 10 was unable to pay Mr Grint because it could have borrowed the funds. The factors that Mr Marre refers to do not affect the value of a £4.5 million demand debt. Mr Clay and Mr Smethurst confirmed that only one valuation was ever carried out, and only one valuation ever needed to be carried out.

(2) Mr Marre notes that s 777 contains similar language but that provision asks a different question, whether the arrangements are made to exploit an individual's earning capacity by putting another person in a position to enjoy all or part of the income or receipts derived from the individual's activities or anything derived directly or indirectly from those income or receipts. On the other hand s 778 asks whether there is property or a right which derives substantially the whole of its value from the individual's activities.

Decision

142. In my view, the provisions of s 779 apply to these arrangements and not those of s 778. Mr Grint received a "capital amount" obtained as mentioned in section 777(5) which, for the purposes of s 779(1) consisted of property/a right which derived substantially the whole of its value from the activities of Mr Grint which was "otherwise realised" in the 2011/12 tax year such that income is treated as arising in that year (under s 779(4)).

143. Mr Grint received "money's worth" in the form of a right to receive £4.5 million as consideration for the sale of his business to Clay 10 which it was agreed was to be left outstanding as a debt. I consider that this is a circumstance where a party would be precluded from relying on the clauses in the APA which provided that the agreement could only be varied in writing and that the agreement represented the entire agreement. In *Rock Advertising* Lord Sumption said this at [15] and [16]:

> "If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.
>
> The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause.

> *At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering In Gl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).* (Emphasis added.).

In this case the parties all acted on the basis that the consideration was to be left outstanding as a debt and all relevant subsequent actions were taken on that basis.

144. The value of that property/right substantially "derived" from, in the normal sense of that term as "came from", the activities of Mr Grint, as the relevant rights/assets which Clay 10 received were valued by reference to his earnings from his Harry Potter contracts as £4.5 million and satisfaction of that right was to be funded in effect from receipts in respect of those activities. HMRC's stance that £4.5 million is simply consideration of a fixed sum for a sale of the relevant rights is so narrow that it is difficult to see what sort of property/right could be caught on their approach. That such consideration is a fixed sum which is not adjustable according to actual sums received in respect of the relevant activities could perhaps indicate that it is not substantially "derived from" those activities; for example, that may be the case if there is no realistic prospect of the activities generating the specified sum. However, that is not the case here. HMRC themselves emphasised that there was a high degree of certainty that the estimated sums would in fact be received (as they were).

145. In including a requirement for there to be a sale of the relevant property/right or for it to be "otherwise realised" (s 779(1)) and providing that income is deemed to arise only when such an event occurs (s 779(4)), the legislature plainly contemplates that some event other than the mere creation of relevant property/right is required to trigger a charge to tax on the capital amount. It is clear from the use of the terms "sale" and "realised", as viewed on their natural, plain meaning, that the intention is to tax the relevant "capital amount" as income as and when the value of the relevant property/right constituting that amount is obtained/received by the taxpayer such as when, in a straightforward case, the relevant right is sold in return for a cash sum. In my view, the term "otherwise realised" viewed in context, in light of the overall purpose of the relevant provisions, can and should be interpreted to encompass also circumstances where the cash value of the relevant right/property comes into being, and whilst it is not paid to/received by the individual, it is available to the relevant individual/is unreservedly at his disposal, in the sense that the payment/receipt of that cash value into his hands is within his control. I note that if the legislature had intended that only actual receipt of a sum/value would trigger the tax charge, they could have referred simply to the value of the relevant property/right being otherwise "received". The choice of referring to such value being otherwise "realised" suggests that something other than actual receipt of the value suffices, namely, on the natural meaning of that term, that it becomes fully available in the sense described. The cash value of the consideration due to Mr Grint of £4.5 million became available to Mr Grint in that sense in the 2011/12 tax year: (1) in 2011/12, as is undisputed, Clay 10 received sufficient funds under the contracts assigned to it to pay that sum to Mr Grint, (2) at that time, Mr Grint could have simply demanded payment of those funds to him in repayment of the debt he was owed, as and when he required it and as the sole shareholder of Clay 10, he had the relevant control over it, to ensure that all necessary action would be taken for that to happen.

146. I have made the above conclusions on the basis of my interpretation of the relevant provisions applying a purposive approach to their construction. I note that (1) the case law which HMRC referred to is not directly in point given that it relates to the meaning of "payment" for PAYE purposes, and (2) the case law which Mr Marre referred to demonstrates that the courts have often taken the view that sums due under a debt/loan are not taxable until actually received. However, they were decided in different contexts and do not prevent the

tribunal taking a different view on a purposive construction of when a sum may be said to be "otherwise realised" for the purposes of these provisions.

Closure notice issue

Parties' submissions

147. HMRC submitted that should the tribunal find that s 779 rather than s 778 applies, the closure notice is nonetheless valid and the appeal should be dismissed for the following main reasons:

(1) The scope and subject matter of the appeal is defined by the conclusions stated in the closure notice and by the amendments made to the return and HMRC are entitled to put forward different legal arguments to support the adjustment contained in the closure notice: see *Tower M Cashback LLP 1 v RCC* [2011] STC 1143 ("*Tower*") and *Investec Asset Finance Plc v RCC* [2020] EWCA Civ 579 ("*Investec*"). The charging provision in s 776 applies to both s 778 and s 779. Those sections simply impose a different measure for the charge and determine precisely when the charge arises.

(2) Under the heading, "My decision", HMRC's closure notice states that: "I have amended your tax return by treating the capital amount you obtained on the sale of your business as income arising under s 778 ITA 07. The capital amount is to be treated for income tax purposes as income arising to you and charged under s776 ITA 07.…"Accordingly, the charge imposed by HMRC, which resulted in the amendment to the appellant's tax return, was under s 776. That is the charging which applies to both s 778 and s 779. Those sections simply impose a different measure for the charge and determine precisely when the charge arises.

(3) Both HMRC's primary argument that s 778 applies and HMRC's alternative argument in relation to s 779 deal with a tax charge under s 776. The point is that the amount returned as capital by Mr Grint is chargeable to income tax, and there is no dispute on quantum. There is a difference between the parties as to precisely whether 778 or 779 applies, but, whichever applies, the fundamental conclusion that the capital sum is subject to income tax under s 776 and not capital gains tax, as Mr Grint argues, is unchanged. On HMRC's case, the tax charge under s 776 applies in the tax year 2011/12 whether s 778 or s 779 applies. HMRC's alternative argument on s 779 is therefore squarely within the scope of the closure notice and of this appeal.

(4) Moreover, prior to closing the enquiry, HMRC had explained by letter to Mr Clay dated 31 May 2019 that:

> "…HMRC's view is that s.778 is the correct charging provision here, but even if s.779 is the correct one we know that there was enough money in the account so the SOOI provisions should apply to the tax year 2011/12. Therefore whether s.778 or s.779 applies the result is the same, the SOOI provisions are triggered in 2011/12.
>
> …It is clear from our respective positions that the enquiries will not be settled by agreement and I will now close my enquiries into your clients 2011/12 ITSA Return on the basis that the capital sum obtained by your client is to be treated for income tax purposes as income arising to him in that year. Any appeal will be heard together with your appeal against the 2012/13 assessment..."

(5) See also HMRC's letter dated 11 July 2019 accompanying HMRC's closure notice, to the same effect:

> "…I am writing to tell you that I have reached a conclusion to my enquiry and I am issuing a closure notice for the tax year ended 05 April 2012. Please find a closure notice enclosed. I have amended your tax return by treating the capital amount you obtained on the sale of your business as income arising under s778 ITA 07. The capital amount is to be treated for income tax purposes as income arising to you and charged under s776 ITA 07. …

> My view is that s. 778 is the correct charging provision, but even if s.779 is the correct one we know that there was enough money in the account so the SOI provisions should apply to the tax year 2011/12. Therefore whether s. 778 or s. 779 applies the result is the same, the SOI provisions are triggered in 2011/12."

148. If the tribunal concludes that the closure notice itself needed to refer to both s 778 and to s 779 in the alternative, HMRC rely on s 114 TMA. The inclusion of the reference to s 779 as an alternative argument in the accompanying letter rather than in the closure notice would be a "mistake, defect or omission" in the closure notice and the person to be charged, the basis of the charge and the amount of the charge were at all times clear to Mr Grint. Accordingly, should the tribunal find that s 779 rather than s 778 applies, the closure notice is nonetheless valid and the appeal should be dismissed.

149. Mr Marre submitted that the cases HMRC cite are not authority for the proposition that a closure notice is valid when it assesses a taxpayer to tax by reference to a statutory section which does not apply:

(1) *Tower* is authority simply that HMRC can defend a closure notice by making different arguments in respect of why a statutory section applies from that underpinning the conclusion in the closure notice. In this case, the subject matter of the closure notice is quite clear. HMRC cannot now seek to invoke a different statutory section by the back door just because their attempt to assess the tax year 2012/2013 in a discovery assessment was cancelled on internal review. That would be unjust. HMRC seek to advance a wholly different conclusion in reliance on a wholly different statutory section. In reliance on *Tower* HMRC can argue that s 778 applies irrespective of the fact that they disagree that a credit to a loan account is not a right, or irrespective that they may choose to characterise what Mr Grint has in his loan account differently. However, HMRC are stuck with their conclusion; otherwise the whole appeal procedure becomes totally unjust. That is the conclusion against which Mr Grint appealed. HMRC's reliance on s 778 and not s 779 can be traced through the entirety of the correspondence.

(2) *Investec* was all about quantum; it was not concerned with the statutory section that HMRC concludes in the closure notice applies. The ratio of *Investec* is that it is for this tribunal to determine the scope of the closure notice. The closure notice in this case is admirably clear and the surrounding enquiry correspondence leaves no room for doubt. The closure notice assesses to tax by reference to the deemed income arising under s 778 and if no deemed income arises under s 778, the conclusion and not merely the legal reasoning in the closure notice is wrong and the closure notice cannot stand

(3) Section 114 is simply not in point. It exists to prevent assessments failing for reasons of form rather than reasons of substance.

Decision

150. It is not disputed that it is clear from the principles set out in *Tower* and *Fidex Ltd v HM Revenue & Customs* [2016] EWCA Civ 385 ("*Fidex*") that the scope of the appeal in a case such as this is to be determined essentially by the subject matter of the conclusions and amendments set out in the closure notice. As set out below, Henderson J (as he then was) said, in the passages from his judgment expressly approved by Lord Walker in the Supreme Court in *Tower*, that the tribunal cannot stray beyond that. The courts have emphasised that the tribunal is not merely acting as an arbiter between the parties but in the public interest in determining the correct amount of tax due. Inevitably, the exercise involves balancing the protection for the individual and the public interest in the payment of the right amount of tax. So, whilst the legislature has, as Henderson J set out in *Tower*, provided for the drawing of a line by reference to the subject matter of the conclusions, precisely where to draw that line,

taking into account this balancing exercise, is left to the tribunal to determine on the facts of the particular case.

151. In *Tower*, a limited liability partnership, claimed capital allowances under s 45 of the Capital Allowances Act 2001 in relation to expenditure it claimed it had incurred on a software licence agreement. In their enquiry HMRC focused on a particular provision in s 45, being s 45(4), which withholds first year allowances for expenditure on software rights "if the person incurring it does so with a view to granting another person a right to use or otherwise deal with any of the software in question". In their closure notice, HMRC said "as previously indicated my conclusion is: the claim for relief under section 45 is excessive". The closure notice was sent with a covering letter which stated: "I am satisfied that the *Tower MCashback* scheme fails on the section 45(4) point alone." HMRC later wanted to rely on a new argument, namely, that the taxpayer had not incurred the expenditure in buying the software licence within the meaning of s 45 because over 75% of the funds needed for the purchase had been borrowed against security provided by the seller on uncommercial terms. The Special Commissioner ruled in favour of HMRC that he had jurisdiction to consider the new argument. Mr Justice Henderson reversed this in the High Court (*HMRC v Tower MCashback LLP 1 and Another* [2008] EWHC 2387, [2008] STC 3366) but the Court of Appeal (*HMRC v Tower MCashback LLP 1 and Another* [2010] EWCA Civ 32, [2010] STC 809) and the Supreme Court decided in favour of HMRC.

152. Mr Justice Henderson made the following comments which were referred to by the Supreme Court:

(1) At [113] he noted that there was no express requirement for the officer to set out his reasons for his conclusions and that what mattered "is the conclusion which the officer has reached upon completion of his investigation of the matters in dispute, not the process of reasoning by which he has reached those conclusions."

(2) He said, at [115], that there is a principle of tax law "to the general effect that there is a public interest in taxpayers paying the correct amount of tax…[which] still has at least some residual vitality in the context of section 50" such that the Commissioners must:

> "be free in principle to entertain legal argument which played no part in reaching the conclusions set out in the closure notice. Subject always to requirements of fairness and proper case management, such fresh arguments may be advanced by either side or may be introduced by the Commissioners on their own initiative."

(3) He then said, at [116], that this did not mean that an appeal against a closure notice "opens the door to general roving enquiry into the relevant tax return". Rather:

> "The scope and subject matter of the appeal will be defined by the conclusion stated in the closure notice and by the amendments (if any) made to the return. The legislation does not say this in so many words, but it follows from the fact that the taxpayer's right of appeal under section 31(1)(b) is confined to an appeal against any conclusion stated or amendments made by a closure notice. That is the only appeal which the Commissioners had jurisdiction to entertain."

(4) At [128], he noted that "the result may from the Revenue's point of view be characterised as conferring a windfall benefit on the taxpayer" but that another way of looking at the limitation on the scope of the appeal is as:

> "part of the protection given by Parliament to taxpayers under the self-assessment system. There is always a balance to be struck between the interest of individual taxpayers on the one hand and the interest of the State and the general body of taxpayers on the other hand. Parliament has decreed how the balance is to be *struck*…"

153. In the Court of Appeal, the majority of Moses LJ and Scott Baker LJ (with Arden LJ dissenting) largely appeared to agree with the reasoning of Henderson J but reached a different conclusion in applying those principles:

(1) Moses LJ also noted the public interest in the correct amount of tax being paid and, at [29], that the self-assessment regime contains a system of checks and balances which, at [31], it is not to be supposed that Parliament intended to be overridden by the retention of a system of "thoroughly uninformative notices of assessment and notices of appeal". He noted, at [31] and [32], that HMRC accepted some restriction being that it is implicit in the statutory scheme that an appeal "is confined to the subject matter of the conclusions and any amendments stated in the notice"(as was held by Dr John Avery Jones CBE in *D'Arcy v Revenue and Customs Comrs* [2006] STC (SCD) 543) but, at [33], "it all depends what one means by the 'subject-matter'."

(2) Moses LJ referred, at [34], to Henderson J's comments at [113] and [116] and concluded, at [35], that he was driven (by the relevant provisions in the context of the restrictions imposed on HMRC's power to amend a self-assessment) to the same view as Henderson J:

> "The subject matter of this appeal is defined by the subject matter of the enquiry and the subject matter of the conclusions which close that enquiry. But that statement of principles serves only to give rise to further questions and problems. As this appeal demonstrates, there is likely to be controversy as to how one draws the boundaries of the subject matter of the conclusions stated in the closure notice. Are reasons for the conclusion to be distinguished from the conclusion stated, and if so, how?"

(3) At [37], he warned against too rigid an approach noting that, as Parliament had not chosen to identify some legal principle on this issue, it would be wrong for the court to attempt to do so and any such statement of principle "is likely to condemn both taxpayer and the Revenue to too rigid a straitjacket" and may "prevent a taxpayer from advancing a legitimate factual or legal argument which had hitherto escaped him or deprive, on the other hand, the public of the tax to which it is entitled."

(4) At [38], he said that "with those nebulous observations" he would leave it to the Commissioners (now the tribunal) to identify the subject matter of the enquiry and thus the subject matter of the conclusions in which exercise the tribunal will have to "balance the need to preserve the statutory protection for the taxpayer afforded by notification that the inspector has completed his enquiries and the need to ensure that the public are not wrongly deprived of contributions to the fisc."

(5) He continued, at [41], to state that it is to the tribunal that the statute looks to identify what s 28ZA describes as the subject matter of the enquiry:

> "The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of that enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the Special Commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the Special Commissioner subject only to his obligation to ensure a fair hearing."

(6) At [42], he expanded on this as follows:

> "Protection of the public requires, at the least, that other issues arising from the subject matter of the enquiry ought to be considered, if necessary, by the fact-finding tribunal. In *D'Arcy* [2006] STC (SCD) 543 at para 11, the Special Commissioner ruled that the scope of an appeal against a conclusion or amendment made by a closure notice will depend on the facts. The conclusion in that case was, as described by Dr Avery Jones, very specific and relied upon the *Ramsay* principle. But the Special Commissioner

> permitted other issues arising from the facts to be advanced since the tribunal must form its own view on the law without being restricted to what the Revenue stated in their conclusion or the taxpayer states in the notice of appeal (see para 13). I see no reason for confining that view merely to legal issues. Provided a party can be protected from ambush, the only limitation on issues which might be entertained by the Special Commissioner is that those issues must arise out of the subject matter of the enquiry and consequently its conclusion, and be subject to the case management powers to which I have referred."

(7) He concluded, at [51], that the closure notice did not of itself allow so restricted a view of the subject matter of the appeal as had been decided by Henderson J. Whilst "it did refer to previous correspondence which clearly focused on section 45(4), the closure notice itself was in plain terms a refusal of the claim for relief under section 45".

154. In the Supreme Court, Lord Walker, at [15], approved Henderson J's comments at [113], [115] and [116] of his judgment noting that he had reached his conclusion "despite having correctly made" those observations. He then referred, at [16], to the comments of Moses LJ, at [32] and [41] of his decision, concluding, at [17], that there was "little if any difference" between the majority of the Court of Appeal and Henderson J as to the principles to be applied; the difference was as to the application of those principles. He preferred the approach of Moses LJ.

155. Lord Walker cautioned, at [18], against the decision being taken as encouragement to draft every closure notice in wide and uninformative terms although, "if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms". As both Henderson J and the Court of Appeal observed, unfairness to the taxpayer can be avoided by proper case management during the course of the appeal. He noted that similarly, Dr Avery Jones observed in *D'Arcy v HMRC* [2006] STC (SCD) 543, para 1:

> "It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that either party can (and in practice frequently does) change their legal arguments. Clearly any such change of argument must not ambush the taxpayer and it is the job of the Commissioners hearing the appeal to prevent this by case management."

156. Lord Hope said, at [83], that, as the right of appeal under the relevant provision is against the conclusion stated in or amendment made by a closure notice, "it is desirable that the statement by the officer of his conclusions should be as informative as possible". He noted that the closure notice was in very bald terms and whilst "the statute does not spell out exactly what it means by the words 'his conclusions'…taxpayers are entitled to expect a closure notice to be more informative".

157. He continued, at [84], that such notices "are seldom, if ever, sent without some previous indication during the enquiry of the points that have attracted the officer's attention. They must be read in their context." In that case, as the officer drew attention to his previous indications and sent a covering letter which cast further light on the approach, he did not think that it was unfair to the taxpayers to hold that the issue as to their entitlement to allowances should be examined as widely as may be necessary to determine whether they are indeed entitled to what they have claimed. Furthermore:

> "while the scope and subject matter of the appeal will be determined by the conclusions and the amendments made to the return, s 50 of TMA does not tie the hands of the commissioners (now the Tax Chamber) to the precise wording of the closure notice when hearing the appeal."

158. In *Fidex*, the issue was whether under a complex scheme, the appellant had generated an allowable loss of nearly €84 million where Fidex sought to obtain the benefit of a specific rule in the loan relationship provisions (para 19A in the relevant provisions). In their closure notice, HMRC referred only to their argument on that provision but later sought to argue that the debit was not allowable under a different provision in the loan relationship rules. It was held that the tribunal was right to conclude that the subject matter of the enquiry/the closure notice and of the review related to the admissibility of the debit claimed and that the new argument could be raised as an additional ground upholding that conclusion.

159. In setting out a comprehensive review of *Tower*, Kitchin LJ noted, at [43], that the appellant drew attention to the use by Moses LJ in his judgment of the phrase "the subject matter of the enquiry" but, at [44], that he did not think Moses LJ had meant to expand the permissible scope of an appeal in his use of this phrase beyond that contemplated by Henderson J nor did he understand the Supreme Court to have sanctioned any such expansion. In his view, Moses LJ was, "doing no more than explaining that the closure notice must be considered in context and in light of the enquiry that preceded it".

160. He concluded, at [45], that the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court which, so far as material to that appeal, may be summarised in the following propositions:

> "i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> iii) The closure notice must be read in context in order properly to understand its meaning.
>
> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

161. He noted, at [51], that in his view the UT had been right not to take too rigid an approach as though this was a question of statutory construction. He agreed with the UT that "it is not appropriate to construe a closure notice as if it is a statute or as though its conclusions, grounds and amendments are necessarily contained in watertight compartments, labelled accordingly". He also thought they had rightly emphasised that "while there must be respect for the principle that the appeal does not provide an opportunity for a new roving enquiry into a company's tax return", the tribunal is not deprived of jurisdiction "where it reasonably concludes that a new issue raised on an appeal represents an alternative or an additional ground for supporting a conclusion in the closure notice". He said, at [64], that just as Lord Hope observed in *Tower*, it was not unfair to Fidex to hold that the issue as to its entitlement to the debit should be examined as widely as might be necessary to determine whether it was indeed entitled to what it had claimed.

162. With the principles set out in the cases in mind, viewing the closure notice in context, this is not a case where it is difficult to determine where to draw the line as regards the scope of the matter under appeal. The subject matter of the conclusions and amendments set out in the closure notice is plainly whether Mr Grint is subject to income tax on the capital sum of £4.5 million under the provisions in the tax year 2011/12. HMRC's primary argument is that a charge arises under s 776 on the basis that the requirements for s 778 to apply are met. It would be unduly restrictive to prevent HMRC arguing that a charge arises on the basis that the requirements for s 779 to apply are met given that (1) this is simply a different provision in the same set of overall provisions, (2) this argument requires consideration of some of the same and/or similar issues as arise under HMRC's primary argument, (3) if the argument is successful, it would result in precisely the same tax charge on the same sum in the same tax year as would apply if HMRC were successful in their primary contention, and (4) that HMRC

considered a charge could arise by reference to s 779 was set out in the correspondence relating to the closure notice. In those circumstances, to hold that the question of whether income tax is due on the "capital sum" can be examined as widely as might be necessary to determine if that is the case does not lead to a roving enquiry and/or result in any unfairness to Mr Grint.

163. On that basis, it is not necessary to consider whether s 114 TMA applies.

164. For all the reasons set out in this decision, this appeal is dismissed.

165. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

Release date: 25th NOVEMBER 2024