Neutral Citation Number: [2009] EWHC 1440 (QB)

Case No: HQ08X03183

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2009

Before :

MR JUSTICE JACK

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Between :

	RIG HOLDINGS L.P. **(A LIMITED PARTNERSHIP REGISTERED IN DELAWARE)**	**Claimant**
	- and -	
	AEROFLEX TEST SOLUTIONS LIMITED **(formerly IFR SYSTEMS LIMITED)**	**Defendant**

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Mr Laurent Sykes (instructed by **Gibson Dunn & Crutcher LLP**) for the **Claimant**
Mr Matthew Cook (instructed by **Birketts LLP**) for the **Defendant**

Hearing dates: 15 - 18 June 2009

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Judgment**Mr Justice Jack :**

Introduction

1. This is a claim for money alleged to be due under provisions contained in a Tax Deed entered into in conjunction with the sale of a company.

2. The claimant is RIG Holdings, L.P., a limited partnership registered in Delaware. It claims as the assignee of Racal Instruments Group Limited, 'the Seller', a company incorporated in England, which was its subsidiary until it was sold in September 2004. By a Stock Purchase Agreement dated 31 July 2003, 'the SPA', the Seller sold to IFR Systems Limited, a company incorporated in England, now called Aeroflex Test Solutions Limited, 'the Buyer', the shares in Racal Instruments Limited, a company incorporated in England, now called Racal Solutions Limited, 'the Company'. The Buyer is the defendant and is a subsidiary of Aeroflex Incorporated, a company incorporated in Delaware, 'Aeroflex Inc'. Aeroflex Inc was also a party to the SPA. The Tax Deed under which the claim is made was also made on 31 July 2003. On the same date a letter was signed by the Seller, the Buyer, and Aeroflex Inc whereby consent was given for an assignment to the claimant by the Seller of rights under the Tax Deed as set out in the letter. This consent was given because it was anticipated that the claimant would in due course dispose of the Seller. On 27 September 2004 a document headed 'WSG Payment Assignment Agreement', 'the Assignment' was entered into between the Seller and the claimant whereby the Seller assigned to the claimant the Seller's rights

under the Tax Deed with respect to payment as set out in the assignment.

3. The claim is made under clause 13 of the Tax Deed, which is headed 'Pre Closing Straddle Period Losses'. The Closing refers to 31 July 2003 and the Straddle Period is defined in clause 8.5 as 'the accounting and fiscal period in which the Closing Date occurs'. The accounts of the Company were prepared on an annual basis to 31 December. The Company was anticipated to have made a loss in the 7 months to 31 July 2003. This loss would have reduced its asset value and so also the price to be paid to the Seller. If the Company made a profit in the last 5 months of the year, that profit would be reduced or extinguished by the prior loss and to that extent tax would be saved. The purpose of the relevant provisions of clause 13 was to give back to the Seller the tax benefit of those earlier losses in so far as they were utilised in 2003. If there was no profit in the last 5 months, they would not be utilised in that year and, if they were utilised in a subsequent period, that fell outside the clause and the Seller got nothing. So, to take a simple example, if the loss for tax purposes in the first seven months was £100,000 and there was a profit for tax purposes in the final five months of £50,000, the profit would be extinguished by the loss and the Seller would get 30% of £50,000 being the notional tax saved.

4. The clause was plainly drafted on the basis that the Company's accounting period would continue to end on 31 December. There were substantial trading losses in both the first seven months and the final five months of 2003. I here broadly accept the schedule prepared by Mr Derek Smith, an accountant and a director of the defendant, which is at page 1105 of the trial papers. Prima facie there would be no claim. However, in order to bring the Company into line with its American holding company the Company's accounting date had to be changed to 30 June, which was the date to which Aeroflex Inc's accounts were prepared. This was achieved by preparing statutory accounts for an 18 month period to 30 June 2004. This meant that tax returns had to be prepared for two periods, the 12 months to 31 December 2003, and the 6 months to 30 June 2004. In the first 6 months of 2004 the Company made a profit: here again I broadly accept Mr Smith's figure calculated on page 1105. In accordance with established practice and section 72 of the Income & Corporation Taxes Act 1988 the trading loss over the 18 month period was apportioned between the 12 months of 2003 and the first 6 months of 2004. That apportioned trading loss for 2003 is less than the actual trading loss for the first 7 months of 2003, and so, it is said, for the purpose of clause 13 there was a profit in the last 5 months of the year (that is, the sum necessary to reduce the loss for the first 7 months to the loss over the year). The claim is essentially for 30 per cent of that profit as tax notionally saved. I say 'essentially' because, as will appear, the claim was also put on an alternative basis.

5. It is asserted by the claimant that, pursuant to the procedure set out in part in the Tax Deed and in part incorporated from the SPA, the calculation has become final and is not open to challenge by the Buyer, the defendant.

<u>The contractual provisions</u>

6. The relevant clauses of the Tax Deed and the SPA were to the following effect. Clause 13.1 defined 'Notional Loss' as the amount of any loss, meaning a trading loss, computed in notional tax computations for the Company for either the first 7 months of 2003, called 'the First Relevant Period', or the final 5 months of 2003, called 'the Second Relevant Period'. Clause 13.2(B) provided that, if a Notional Loss arose in the

first 7 months but not in the final 5 months of 2003, the Buyer should on 1 October 2004 pay the Seller an amount equal to any amount of corporation tax that would have been payable by the Company in respect of the accounting period ending on 31 December 2003 but for the actual utilisation of the 7 month loss to reduce such corporation tax. Clause 13.5 set out a mechanism for ascertaining the position under clause 13.2(B).

7. Clause 13.5(A) provided that the last day of the 7 months should be treated as the end of an accounting period of the Company, and the amount of Loss occurring in respect of each period should be calculated on that basis.

8. Clause 13.5(B) provided that no later than 1 October 2004 the Buyer, at its cost, should procure that the Company prepare:

> "a corporation tax computation for (i) the statutory accounting period of the Company ending on 31 December 2003 and (ii) a notional corporation tax return for the Second Relevant Period."

So the Buyer was to procure that the Company should prepare two tax computations, one for the year, and one for the 5 month period. The second would be notional as it was for a notional tax return.

9. Clause 13.5(B) went on to provide that clause 2.6 of the SPA should apply to the preparation and agreement of the two tax computations as if they were 'the Proposed Closing Balance Sheet and the calculation of the Pre-Closing Tax Liabilities' referred to in clause 2.6. Clause 2.6 is a very substantial clause dealing with the Closing Balance Sheet, and its adaptation for the purpose of clause 13 has its difficulties. The intended effect so far as is relevant to the present dispute is, however, sufficiently clear. The computations to be prepared by the Company were to become binding on the parties, i.e. the Seller and the Buyer, on the sixtieth day after the Seller's receipt of them unless, within the 60 days, (i) the Seller gave written notice of agreement and then they were to become binding from the Buyer's receipt of the Seller's notice, or (ii) the Seller gave written notice of disagreement specifying the disagreement. If the Seller gave notice of disagreement, there was to be a 15 day period to reach agreement. If no agreement was reached, the disagreement was to be submitted within 10 days for final determination by PricewaterhouseCoopers, or, failing their willingness to act, another firm selected by agreement.

10. Clause 13.5(C) provided that no later than 1 October 2004 the Seller, at its cost, should prepare a notional corporation tax computation for the First Relevant Period, the 7 months to 31 July 2003. The Buyer was to procure that the Company gave assistance, at the Seller's cost. Clause 2.6 of the SPA was likewise to apply to the preparation and agreement of the computation.

11. Clause 13.5(D)(i) provided that in preparing the notional tax computations for the 7 month period and the 5 month period and the tax computation for the period ending on 31 December 2003, the year, the Seller and Buyer should 'adopt the tax reporting policies and practices adopted by the Company in preparation of its tax computation for the period to 31 December 2002'.

12. Clause 13.5(D)(ii) provided that, in that preparation, for the purpose of computing any

Notional Loss if should be assumed, if not actually the case, that the Company made claims and elections with a view to maximising the loss incurred by the Company in such periods.

13. Clause 13.6 provided for a refund by the Seller if it appeared that the Seller had been overpaid following final agreement by the Revenue of tax returns for the Company for the year ended 31 December 2003.

14. Clause 14 incorporated into the Tax Deed most of the provisions of clause 7 of the SPA. Clause 7.1(b) prohibited assignment save that, in the case of the Seller, the Seller might assign to any Qualified Defence Buyer. Clause 7.1(c) provided that amendments and waivers must be by signed written instrument. Clause 7.3 provided that notices and demands should be in writing and given by delivery in person, by facsimile or by registered or certified mail, and, in the case of notices to the Buyer, to Aeroflex Inc and its lawyers.

What happened

15. The auditors of the Company were KPMG but the company used Deloitte for advice as to tax and to prepare its tax returns. The person most involved for Deloitte was Matthew Hodges. Alex Harman is a partner in the ultimate holding firm of the claimant and is its secretary. He is based in the United States. The person most involved for the Company was Danny Shaw, its finance director. The communications were mostly by e-mail.

16. On 13 May 2004 there were e-mail exchanges between Mr Harman and Mr Hodges about the preparation by Deloitte of the computation of the Company's tax liability for 2002 using information provided by Mr Shaw. The preparation seems to have been well-advanced. Mr Harman copied the e-mails to Mr Shaw. The trial correspondence begins with this. Plainly there were earlier communications. The situation was that Deloitte was doing the work and Mr Harman was following progress. On 21 June Mr Harman e-mailed Mr Hodges that he was happy with Deloitte advising the Company on its 2003 taxes. This must have been preceded by something to raise the question. An e-mail from Mr Shaw on 28 June 2004 states that the 2002 return had been submitted to the Revenue. On 6 July he referred to Deloitte covering the Company's '2003/4 tax calculation and return'. On 4 August Mr Harman asked a colleague for 'an update on the calculation of [the Company's] pre-closing (pre 7/31/03) 2003 tax liabilities'. He said 'Presumably D&T is helping us with this.' He was told that it would be followed up with Deloitte, and on 5 August that Mr Hodges would speak to him. On 18 August Mr Hodges e-mailed Mr Harman that Mr Shaw was providing information for the pre-closing tax liabilities. It is plain from the e-mail that he and Mr Harman had spoken. Mr Harman's response shows that the reason why there was an urgency was that the Seller was being sold at the end of that September. On 8 September Mr Harman e-mailed Mr Shaw, with a copy to Mr Badlato of Aeroflex Inc. He stated that the Tax Deed required the preparation by the Buyer and Seller of corporation tax computations for the three periods identified in the Deed by 1 October 2004. He asked when the information required by Deloitte would be available. Mr Shaw replied on 13 September that the deadline was tight. On that day he also reminded Mr Hodges that the company had changed its statutory accounting period 'so are looking for the tax comp[utation] to cover the period Jan 03 to June 04 as well as covering the various periods covered in the Sale and Purchase Agreement.'

17. On the same day, 13 September 2004, Deloitte sent Mr Shaw an engagement letter giving the terms under which Deloitte offered its corporation tax services for the period to 30 June 2004. The engagement letter was back-dated to 1 September 2004. It stated that Deloitte would act as the Company's tax agents for the preparation and submission of the tax return for the accounts for the 18 month period to 30 June 2004. It said: 'This will include a detailed calculation of the pre and post closing corporate tax liabilities of the company following its change of ownership on 31 July 2003.'

18. On 16 September 2004 Mr Steve Parker, Financial Controller of the Company, sent an e-mail to Mr Hodges. It was copied only to Mr Shaw. Mr Parker attached substantial financial information. He explained that monthly records ended with the last Friday in each month, and that the last set of accounts at the point of acquisition reflected transactions up to 25 July 2003. Any transaction from then up to 31 July were incorporated into August. On 10 November Deloitte told Mr Shaw by e-mail that draft corporation tax computations for the Company had been prepared for the periods to 25 July 2003 and 30 June 2004, and asked for information on a number of points. On 1 December Mr Harman asked Mr Hodges if there was progress on finalising the tax computations. The answer came that Mr Hodges had broken his ankle. On 3 February 2005 Mr Harman asked again. On 4 February Mr Hodges replied that he could not finalise the draft tax computations until the accounts figures, the statutory accounts being prepared by KPMG, were finalised. On 9 March Deloitte sent Mr Shaw the current draft computations to 25 July 2003 and the full period to 30 June 2004, saying that they were still draft and subject to review. Earlier e-mails show that KPMG had still not completed the statutory accounts. On 20 May Mr Shaw sent Deloitte the statutory accounts prepared by KPMG for the 18 months to 30 June 2004. On 15 July Mr Hodges asked Mr Shaw for a copy of KPMG's audit adjustments schedule.

19. Finally, on 20 October 2005 Mr Hodges e-mailed Mr Shaw: 'Please find attached the tax returns and computations for the period of account ended 30 June 2004, together with a covering letter. Also enclosed are the calculations for the notional period ended 25 July 2003.' This was not copied to Mr Harman. The attached letter dated 19 October stated under the heading 'Notional period ended 25 July 2003':

> "As prescribed in the Sale & Purchase agreement we also enclose the tax computation for the first notional period up to the date of completion, i.e. to 25 July 2003.
>
> The enclosed tax return calculates the results for the twelve month accounting period ended 31 December 2003 based on UK tax rules (as detailed in the tax computation for period ended 30 June 2004). Accordingly, the tax results for the second notional period from the date of completion to 31 December 2003 may be calculated as the difference between the taxable profit/(loss) for the notional period and the accounting period ended 31 December 2003."

One document enclosed was in respect of the period ended 25 July 2003. It calculated the Schedule D case 1 profit/loss as a loss of £4,051,860. The main challenge to this computation is that it runs to 25 July and not to 31 July. The point was made by Mr Smith in his evidence that sales tended to be recorded towards the end of a month. The computation was done on the basis of the results for the period.

20. A second document enclosed by Mr Hodges started with the operating loss of the

Company for the 18 months to 30 June 2004, namely £4,650,369. It added back items which required 'add-back' as they were not tax-deductible, or were not tax-deductible in that form. This gave an adjusted profit of £427,366. That profit was then split between the 12 months to 31 December and the 6 months to 30 June in the proportion of 12 to 6. That gave a profit of £285,171 for the 12 months to 30 December. Deductions allowable for tax were then made to give a loss for tax purposes of £2,709,060 for that 12 month period. The equivalent figure for the 6 months to 30 June 2004 was a loss of £766,087.

21. The claimant relies on the calculation proposed in Deloitte's letter to give the outcome for tax purposes in the 5 month period to 31 December. The loss for the year is given as £2,709,060. If the loss of £4,051,860 for the first 7 months (actually to 25 July) is deducted, a profit of £1,342,800 for the 5 months is shown. The notional tax on that at 30 per cent is £402,840.

22. On 20 October 2005 Mr Hodges also sent to Mr Harman the tax computation for the 18 months to 30 June 2004 and for the period up to 25 July 2003. He said:

> "As regards the calculations for the second notional period up to 31 December 2003 we would expect the tax results for the second notional period to be calculated as the difference between the results for the tax accounting period ended 31 December and [the results up to 31 July 2003].
>
> As you can see, the computations show a tax loss ….. for the first notional period of c.£4m and for the 12 month period to 31 December 2003 of c.£2.7m. Accordingly, based on UK tax rules, we would expect the taxable profits for the second notional period to be c.£1.3m, against which losses of the first notional period have effectively been offset to leave no tax payable.
>
> Please note that we do not have a detailed knowledge of the mechanism under the Sale & Purchase agreement and we suspect the complication caused by Aeroflex extending their accounting period to 30 June 2004 was probably not anticipated when the agreement was drafted. We recommend that you discuss the attached schedules with your lawyers."

23. On the same day, 20 October, Mr Shaw replied to Mr Hodges suggesting that it might be tax advantageous for the Company to calculate the loss in the 12 months to 31 December 2003 rather than apportion the losses for the 18 months. On 27 October Mr Shaw sent an e-mail querying the method of calculation for the last 5 months of 2003 as suggested by Deloitte. He said:

> "I also have a query on your covering note regarding the notional period ended 25 July 2003, in the second paragraph you state that the tax results for the second notional period from the date of completion to 31 December 2003 may be calculated as the difference between the taxable profit/(loss) for the first notional period and the accounting period ended 31 December 2003. As discussed the issue I have is that the tax computation for the 12 month period ended 31 December 2003 and notional period from January 2003 to the date of completion (25 July 2003) have been computed on a different basis i.e. the 12 months to

> December is based on a time apportioned method and the period up to the date of completion is based on an actuals basis, I therefore disagree with the statement that the tax results for the second notional period can be deduced from the current computations as they haven't been completed on a like for like basis.
>
> Could I therefore ask you to produce a notional computation for the first notional period based on a time apportioned method as used in the computation for the 12 months to December 2003."

So there had been a discussion and Mr Shaw was unhappy with the suggested means of calculation for the 5 months to 31 December 2003. Mr Hodges replied the same day, saying:

> "In terms of the calculation for the second notional period we suspect that when the tax deed was drawn up a long period of account for RIL was not envisaged. Unfortunately we are not close enough to the mechanism in the SPA to understand how the results should be apportioned across the first and second notional period under these circumstances. Based on the information available to us, one possible method was to calculate the difference between the results for the first notional period and those for the 12 month period ended 31 December 2003 (as prepared under UK tax rules and common practice), albeit that they are arguably calculated on a different basis.
>
> Equally we recognise that there may be other appropriate methods for example on an "actual" basis, or, as you suggest, on time apportionment basis. As requested, I set out below what the calculations would be if it was on a time apportionment basis:
>
> First notional period loss (7 months to July 2003) £1,580.285
>
> Second notional period loss (5 months) £1,128.775
>
> Total "Wireless" losses for 12 months to 31/12/03 £2,709.060
>
> Please note that the above calculations are for illustrative purposes only and we assume that the final method of apportionment under the SPA will be agreed upon by both parties."

24. Mr Hodge's reply was copied to Mr Smith. So Mr Smith knew that computations were being done and that there was an uncertainty about the method. Mr Smith suggested in evidence that he had no knowledge of what Mr Shaw was doing. I cannot accept that. I think that he knew in at least general terms that the process was proceeding between Mr Shaw and Mr Hodges, and was content with that.

25. On 22 February 2006 Mr Harman wrote on behalf of the claimant to Aeroflex Inc. Aeroflex Inc were named in clause 7 of the SPA as the party to whom notice must be given. Mr Harman stated that, as Aeroflex knew, the Seller had 'assigned all of its rights with respect to the Tax Deed' to the claimant. He set out the calculation which I have described and asked for payment of £402,840 with interest from the 'payment date' of 1

October 2004. This letter received no reply. Mr Harman said that he also tried to contact Aeroflex on a number of occasions by other means but could not do so. This lack of response does no credit to them. On 7 April 2008 the claimant's solicitors wrote to Aeroflex Inc stating that £402,840 was due with interest. The letter stated that e-mail and voice-mail enquiries to Aeroflex's counsel had been ignored. There was no reply. On 7 July 2008 the solicitors wrote again. Among other matters the letter stated:

> "For your information, we attach copies of the corporation tax computations supporting the calculation of the Section 13(B) Payment. These computations were prepared in conjunction with the management of RIL, and are consistent with both RIL's tax returns and RIL's filed accounts for the 18 months ended 30 June 2004.
>
> We would note that, not only has no objection been raised to the claim made by RIG Holdings as set out in its letter of 22 February 2006 but, indeed, the time for making any such objection has expired."

It enclosed the computations made by Deloitte of the loss of the Company for tax purposes to 25 July 2003, and for the 12 months to 31 December 2003. There was no reply. On 1 August 2008 the claimant's solicitors wrote to the defendant threatening proceedings unless they heard from the defendant by 8 August. They did not. The claim form was issued on 14 August 2008. No explanation for the repeated failures of Aeroflex Inc to respond has been provided.

26. On 24 April 2009 Deloitte wrote a letter to Mr Smith at Aeroflex Burnham Limited. It has been agreed that the letter should be admitted in evidence. In the course of it it was stated:

> "We understood that RIL wanted assistance with calculating the post closing tax computations, as documented in our engagement letter. It was not clear the extent to which RIL may have intended to use such calculations to discharge obligations under the Tax Deed but, in the event, RIL did not provide us with sufficient information to prepare detailed calculations for the period from the date of the change in ownership up to 31 December 2003 and, as a result, this work was not undertaken.
>
> We noted that one possible way to calculate the tax results for this period was to take the difference between the tax calculations for the period up to the change in ownership and those disclosed in the statutory return for the 12 month tax accounting period ended 31 December 2003. However, we observed that these computations are calculated on different bases and that both parties to the Tax Deed would need to agree on how the mechanism in the Tax Deed should work in the light of the extended statutory accounting period for RIL.
>
> In an email of 27 October 2005, you additionally requested that we compute the taxable results for the period to 31 July on a time apportioned basis using the results for the 12 month tax accounting period ended 31 December 2003 as per the tax return. We provided draft calculations on these bases, but we received no further instructions from any officer of RIL."

<u>Does the claim succeed?</u>

27. It is logical to take first the allegation that the defendant is barred from disputing the claim by reason of the operation of clause 2.6 of the SPA as adapted to clause 13.5 of the Tax Deed. The claim has two aspects. One is the tax loss for the 7 months to 31 July 2003. The second aspect is the alleged tax profit for the 5 months to 31 December 2003. In respect of the second the claimant has to show that the Company prepared a computation which was provided to the Seller, in order for it to have become binding pursuant to clause 2.6. There is no such document. All that there is is Deloitte's e-mail to Mr Harman of 20 October 2005. This suggests how a profit might be calculated but states that in the circumstances legal advice should be taken. There is nothing at all coming from the Company or the Buyer, and nothing from Deloitte's which can be suggested as being provided on behalf of them. Deloitte's e-mail of 20 October to Mr Harman has understandably never been served on Aeroflex Inc.

28. Whether or not the computation for the 7 months to 31 July 2003 became binding seems unimportant. The issues are not straight forward and were not fully argued. I will express some tentative views only. The computation was finally provided to Aeroflex Inc under cover of the solicitors' letter of 7 July 2008. The 60 days had not expired when the proceedings were begun. It was provided by solicitors for the claimant and not the Seller. It covers the period to 25 July rather than 31 July. That period was taken by Deloitte at the request of the Company: See paragraph 18 above. Clause 13.5(B) required the Seller to procure the Company to prepare the computation. I tend to the view that there was ostensible authority on the part of Mr Shaw and the Company on behalf of the Buyer to propose the slightly different period. Mr Harman was leaving Mr Shaw to deal with the computation. That runs into clause 7.1(c) of the SPA, but there would be a meritorious argument that in the circumstances the clause had itself been waived. The point that it was not provided by the Seller turns on the effect of the assignment. It was accepted that the right to payment had been assigned subject to notice being given. Notice was given by letter of 22 February 2006. It is nonsensical that the Seller should have provided the computation once the Seller had been sold on and its right to payment assigned. That situation was foreseen on 31 July 2003. I would hold that by implication claimant could present the computation as the assignee even though there was no express transfer of that right.

29. The inability of the claimant to rely on any computation in relation to the final 5 months was in effect recognised by its reliance on the principle that a party cannot rely on its own breach of contract to defeat a claim, citing *Mackay v Dick* (1861) 6 App Cas 251. The Buyer has failed to procure the Company to prepare a notional tax computation for the final 5 months of 2003, and that is a breach of contract. It is now open to the claimant to show what the computation should have shown and to make a claim on that basis. This could either be a claim for the sum which is shown to be due or, as was submitted on behalf of the Buyer, for damages for failure to perform the obligation. There would seem to be no difference in outcome.

30. I have set out how the claimant says that a profit should be calculated for the 5 month period in accordance with the suggestion by Deloitte. As is apparent the production of a profit is only possible by the combination of four matters: first, the 18 month statutory accounting period; second, the computation of loss in the first 7 months on an actual basis; third, the existence of a profit in third period (the 6 months to 30 June 2003); and fourth the computation of loss over the 12 months by apportioning the 18 month loss and so taking advantage of the third period profit. If the computation is done on the basis that the company's statutory accounting period was 12 months to 31 December 2003, a

loss is shown for the 5 month period. If the computation is done on an apportioned basis for both periods in 2003 using the 18 month figure, a loss is shown for both.

31. It is apparent from clause 13 of the Tax Deed that it was drafted on the basis that the Company's accounting period was, and would remain, 12 months to 31 December. Further clauses 8.5 and 13.5(D)(i) require 'past practice' to be followed. It is arguable that nothing so fundamental as a change of accounting date was there in mind. But that would merely support the view that such a change contrary to the underlying intent should not be taken into account. In my judgment on the true construction of the clause the computations required by clause 13.5(B) and (C) are to be performed on the basis that the Company's accounting period was a 12 month period to 31 December. It was not a breach of the Deed to change the period, but the change is something to be ignored for the purpose of clause 13, whether or not it might otherwise benefit one party or the other. The profit which was made in the 6 months to 30 June 2004 is irrelevant. The cut off date is 31 December 2003. It follows that the claim fails.

32. If, contrary to my conclusion, the computations for the two periods in 2003 are to be carried out taking account of the 18 month period and the apportionment of trading results between 2003 and the first 6 months of 2004, I find no justification for calculating the 7 month tax loss on the basis of actual results and deducting the outcome from the apportioned results for the year to compute the tax profit or loss for the remaining 5 months. It was submitted that clause 13.5(A) showed that the 5 month figure was intended to be a 'residual' amount, that is to say, what was left after the computation of the year's figure and the figure for the first 7 months. I do not find support for that in the wording of the clause. Further because of the particular basis on which the computations were to be made – I refer to clause 13.5(D)(ii), the figures for the two periods might not together give the same result as the tax computation for the year. Lastly, as is already clear, if the results for the 7 month and 5 month periods are calculated on an apportioned basis, both show a loss as there was a loss overall.

33. The claimant's advisers accepted that the calculation which I have so far considered might appear unduly favourable to the claimant, and so an alternative was advanced. It was as follows. The actual tax loss for the 7 months was £4,051,860, which was based on a book profit of £2,241,513. Because this was a part of an 18 month period apportioned under section 72, one third, i.e. 6 months' worth from 18, of the book profit, £746,424, was to be attributed to the last 6 months of the period. So the loss to be included in the 12 month computation becomes £3,305,436. If the loss for the 12 months calculated as before, namely £2,709,060, is deducted, there is a profit of £596,376 for the 5 months to 31 December 2003. This is ingenious, but in my view has no justification.

34. The claim fails.