



137TACD2020

BETWEEN/

[APPELLANT]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

1. This is an appeal under the Customs Act, 2015 against the following determinations of a designated officer:
 - (a) Determination dated 31 July 2017 relating to a notification of customs debt of €396,946.28 dated 29 May 2017 for the period 1 June 2014 to 31 December 2014.
 - (b) Determination dated 26 February 2018 relating to a notification of customs debt of €564,857.61 dated 3 January 2018 for the period 3 January 2015 to 30 June 2015.
 - (c) Determination dated 20 September 2018 relating to a notification of customs debt of €796,169.38 dated 28 May 2018 for the period 1 July 2015 to 30 April 2016.



2. The appeal relates to the customs value of imported goods and whether the payment of a royalty or licence fee should be included in the value.

Background

3. The Appellant operates a large network of *[redacted]* in Ireland. In the course of the *[redacted]* business, the Appellant imports a range of products for sale in Ireland which incorporates the intellectual property of third parties, namely *[Licensor A]* (hereinafter “[*Licensor A*]”) and *[Licensor B]*, a division of *[redacted]* (hereinafter “[*Licensor B*]”).
4. The Appellant entered separate licence agreements with *[Licensor A]* and *[Licensor B]*. The main licence agreements referred to during the hearing were:

[Licensor A]

- (A) Licence Agreement No. *[redacted]* dated 14 September 2011 (and amendments thereto);
- (B) Licence Agreement No. *[redacted]* dated 5 November 2015

[Licensor B]

- (A) Licence Agreement No. *[redacted]* dated 15 May 2013 (and amendments thereto);
 - (B) Licence Agreement No. *[redacted]* dated 21 July 2015
5. The licence agreements are governed by the law of England and Wales.
 6. In Licence Agreement No. *[redacted]*, *[Licensor A]* granted to the Appellant a non-exclusive licence to use the creative works and trademarks of *[Licensor A]* to design, create, manufacture or source, and sell products in *[redacted]* operated by



- the Appellant in consideration for the payment of royalties by the Appellant to [Licensor A].
7. In Licence Agreement No. [redacted], [Licensor B] granted to the Appellant the non-exclusive right to use the intellectual property of [Licensor B] to design, create, manufacture or source, distribute or sell products in [redacted] operated by the Appellant in consideration for the payment of royalties by the Appellant to [Licensor B].
 8. The Appellant does not manufacture the products incorporating the intellectual property of [Licensor A] and [Licensor B] but rather has entered into arrangements with third parties based outside the European Union to manufacture the products for onward sale to the Appellant. The Appellant imports the products into Ireland from those third parties.
 9. From the date of entry into the licence agreements with [Licensor A] and [Licensor B] above, the Appellant imported products into Ireland and accounted for customs duties using the transaction value method, which is based on the amounts invoiced by the third parties and not including the royalties payable to [Licensor A] and [Licensor B] as part of the valuation.

Legislation

10. Article 29 of Council Regulation (EC) 2913/92 (Customs Code) provides:

“1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

(a) ...



- (b) ...
 - (c) ...
 - (d) *that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.”*
11. Article 32 of Council Regulation (EC) 2913/92 (Customs Code) provides:
- “1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:*
- (a) ...
 - (b) ...
 - (c) *royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.*
 - (d) ...
 - (e) ...”
12. Article 143 of Commission Regulation (EC) 2454/93 (Implementing Provisions) provides:
- “1. For the purposes of Articles 29(1)(d) and 30(2)(c) of the Code, persons shall be deemed to be related only if:*
- (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) *one of them directly or indirectly controls the other;*
 - (f) ...



- (g) ...
(h) ...”

13. Article 157 of Commission Regulation (EC) 2454/93 (Implementing Provisions) provides:

“1. For the purposes of Article 32(1)(c) of the Code, royalties and licence fees shall be taken to mean in particular payment for the use of rights relating:

- to the manufacture of imported goods (in particular, patents, designs, models and manufacturing know-how), or*
- to the sale for exportation of imported goods (in particular, trade marks, registered designs), or*
- to the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods).*

2. Without prejudice to Article 32(5) of the Code, when the customs value of imported goods is determined under the provisions of Article 29 of the Code, a royalty or licence fee shall be added to the price actually paid or payable only when this payment:

- is related to the goods being valued, and*
- constitutes a condition of sale of those goods.”*

14. Article 159 of Commission Regulation (EC) 2454/93 (Implementing Provisions) provides:

“A royalty or licence fee in respect of the right to use a trade mark is only to be added to the price actually paid or payable for the imported goods where:

- the royalty or licence fee refers to goods which are resold in the same state or which are subject only to minor processing after importation,*



- the goods are marketed under the trade mark, affixed before or after importation, for which the royalty or licence fee is paid, and
- the buyer is not free to obtain such goods from other suppliers unrelated to the seller.”

15. Article 160 of Commission Regulation (EC) 2454/93 (Implementing Provisions) provides:

“When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157(2) shall not be considered as met unless the seller or a person related to him requires the buyer to make that payment.”

16. Annex 23 – Interpretative Notes on Customs Value of Commission Regulation (EC) 2454/93 (Implementing Provisions) provides:

“Article 143(1)(e) One person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.”

17. Commentary N° 11 of the Customs Code Committee (Customs Valuation Section) on the application of Article 32(1)(c) CC in relation to royalties and licence fees paid to a third party according to Article 160 of Reg. (EEC) N° 2454/93 provides:

“1. **Relevant legal criteria and general principles**

Article 32(1)(c) of the Customs Code (Reg. (EEC) n° 2913/92) (CC) and Article 157 of its implementing provisions (Reg. (EEC) n° 2454/93) (IP)

In accordance with Article 32(1)(c) CC, the royalties and licence fees are to be added to the price actually paid or payable if they relate “to the goods being



valued” and are paid as “a condition of sale of the goods”, provided that such royalties and fees are not already included in the price actually paid or payable.

Articles 143(1)(e), 160 and Annex 23 IP (Interpretative Notes to Article 143 (1)(e))

Are the payments a condition of sale?: Even if the actual sales contract between the buyer and the seller does not explicitly require the buyer to make the royalty payments, the payment could be an implicit condition of sale, if the buyer was not able to buy the goods from the seller and the seller would not be prepared to sell the goods to the buyer without the buyer paying the royalty fee to the licence holder.

According to Article 160 IP “When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157(2) IP shall not be considered as met unless the seller or a person related to him requires the buyer to make that payment”.

In the context of Article 160 IP, when royalties are paid to a party who exercises direct or indirect control over the manufacturer (resulting in a conclusion that they are related under Article 143 IP), then such payments are regarded as a condition of sale. According to Annex 23 IP – Interpretative Notes on Article 143(1)(c) “one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.”

The following elements should be analysed to determine if there is control:

- [1] – the licensor selects the manufacturer and specifies it for the buyer;
- [2] – there is a direct contract of manufacture between the licensor and the seller;
- [3] – the licensor exercises actual control either directly or indirectly over the manufacture (as regards centres of production and/or methods of production);
- [4] – the licensor exercises actual direct or indirect control over the logistics and the dispatch of the goods to the buyer;



- [5] – the licensor nominates/restricts who the producer can sell their goods to;
- [6] – the licensor sets conditions relating to the price at which the manufacturer/seller should sell their goods or the price at which the importer/buyer should resell the goods;
- [7] – the licensor has the right to examine the manufacturer’s or the buyer’s accounting records;
- [8] – the licensor designates the methods of production to be used/provides designs etc;
- [9] – the licensor designates/restricts the sourcing of materials/components;
- [10] – the licensor restricts the quantities that the manufacturer may produce;
- [11] – the licensor does not allow the buyer to buy directly from the manufacturer, but, through the trademark owner (licensor) who could as well act as the importer’s buying agent;
- [12] – the manufacturer is not allowed to produce competitive products (non licensed) without the consent of the licensor;
- [13] – the goods produced are specific to the licensor (i.e. in their conceptualisation/design and with regard to the trade mark);
- [14] – the characteristics of the goods and the technology employed are laid down by the licensor.

A combination of such indicators, which go beyond purely quality control checks by the licensor, demonstrates that a relationship in the sense of Article 143(1)(e) IP exists and hence the payment of the royalty would be a condition of sale in accordance with Article 160 IP.

It should be noted that, in individual cases, other kinds of indicators may also exist. It should also be noted that certain indicators carry more weight and show more strongly than others that the licensor exercises restraint or direction over the manufacturer/seller, which therefore could in themselves constitute a condition of sale.”



Issue

18. Insofar as establishing a pathway through the legislative framework for the purposes of the within appeal, the following provides an overview:

-Article 29 of the Customs Code provides that the customs value of imported goods is the transaction value, which is the price actually paid or payable for the imported goods, adjusted, where necessary, in accordance with Articles 32 and 33, provided, *inter alia*, that the buyer and seller are not related.

-Article 32 of the Customs Code sets out the elements which should be added to the price actually paid or payable for the imported goods in order to determine their customs value. According to Article 32(1)(c) royalties and licences fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable, should be added to the price actually paid or payable for the imported goods.

-Article 157(2) of the Implementing Provisions provides that when the customs value of imported goods is determined under the provisions of Article 29 of the Customs Code, a royalty or licence fee should be added to the price actually paid or payable only when this payment: -is related to the goods being valued; and - constitutes a condition of sale of those goods.

-Article 159 of the Implementing Provisions provides that royalties or licence fees are only added to the price actually paid or payable for the imported goods where:
-goods are resold in the same state or subject only to minor processing after importation; - goods are marketed under the trade mark; and -the buyer is not free to obtain the goods from other suppliers unrelated to the seller.



-Article 160 of the Implementing Provisions provides that when the buyer pays royalties or licence fees to a third party, the conditions provided in Article 157(2) shall not be considered to be met unless the seller or a person related to the seller requires the buyer to make that payment.

-Article 143 (1)(e) of the Implementing Provisions provides that persons shall be deemed to be related if one directly or indirectly controls the other. Annex 23 of the Implementing Provisions provides that a person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

19. In *GE Healthcare GmbH -v- Hauptzollamt Düsseldorf* (C-173/15), a reference to the Court of Justice of the European Union relating to the above provisions of the Customs Code and Implementing Provisions, the Court made the following preliminary observations (at paragraph 30, 31, 32 and 35):

“At the outset, it should be borne in mind that, according to settled case-law of the Court, the objective of EU law on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. The customs value must thus reflect the real economic value of imported goods and therefore take into account all of the elements of such goods that have economic value.

In particular, by virtue of Article 29 of the Customs Code, the customs value of imported goods is, in principle, the transaction value, that is to say, the price actually paid or payable for the goods when they are sold for export to the customs territory of the European Union, adjusted, where necessary, in accordance with Article 32 of that code.



Article 32 of the Customs Code sets out the elements which must be added to the price actually paid or payable for the imported goods in order to determine their customs value. Thus, according to Article 32(1)(c) of the Customs Code, royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and licence fees are not included in the price actually paid or payable, must be added to the price actually paid or payable.

...

Thus, the adjustment laid down in Article 32(1)(c) of the Customs Code is to be applied where three cumulative conditions are satisfied, namely that, first, royalties or licence fees have not been included in the price actually paid or payable, second, they are related to the goods being valued and, third, the buyer is required to pay those royalties or licence fees as a condition of sale of the goods being valued.”

20. For the purposes of this appeal, the legislative context may be summarised in the following manner - the customs value of goods imported by the Appellant is the transaction value. The transaction value is the price actually paid or payable for the goods. The price may be adjusted. Royalties and licence fees are added to the price actually paid or payable for the goods if the royalties and licence fees are ‘*related to the goods being valued*’ and a ‘*condition of sale*’ of the goods being valued, to the extent that such royalties and licence fees are not included in the price actually paid or payable. As the Appellant pays the royalties or licence fees to a third party, the requirements of being ‘related to the goods being valued’ and a ‘condition of sale’ are not considered as met unless the seller or a person related to the seller requires the Appellant to make the payment. A person is deemed to be related only if one of them directly or indirectly controls the other.

21. The parties agree that the royalties paid by the Appellant to [*Licensor A*] and [*Licensor B*] are not included in the price actually paid or payable for the goods



imported. The parties agree that the payment of royalties by the Appellant to [Licensor A] and [Licensor B] relates to the goods imported by the Appellant. Therefore, as regards the cumulative conditions referred to **GE Healthcare GmbH**, the first and second conditions are satisfied as regards the payment of royalties by the Appellant to [Licensor A] and [Licensor B]. The issue for determination relates to the third of the cumulative conditions, namely, whether the payment of royalties by the Appellant to [Licensor A] and [Licensor B] is directly or indirectly a condition of sale of the goods being valued. In the context of the within appeal, and having regard to the legislative framework, this involves a consideration of whether the seller (the manufacturer) or a person related to the seller (being [Licensor A]/[Licensor B]) requires the Appellant to make the payment of royalties; for [Licensor A]/[Licensor B] to be related to the manufacturer this involves a consideration of whether [Licensor A]/[Licensor B] are deemed to be related to the manufacturer by virtue of [Licensor A]/[Licensor B] directly or indirectly controlling the manufacturer, meaning deemed control if [Licensor A]/[Licensor B] are legally or operationally in a position to exercise restraint or direction over the manufacturer. If the payment of royalties by the Appellant to [Licensor A] and [Licensor B] constitutes a ‘condition of sale’, then the royalties are added to the price actually paid or payable for the goods imported by the Appellant in determining the customs value.

22. In considering ‘condition of sale’ as referred to in Article 32(1)(c) of the Customs Code and Article 157(2) of the Implementing Provisions the Court in **GE Healthcare GmbH** observed (at paragraph 56, 57, 58 and 59):

“It should be borne in mind that Article 157(2) of Regulation No 2454/93, which lays down the conditions for the application of Article 32(1)(c) of the Customs Code, provides that royalties or licence fees must be added to the price actually paid or payable where that payment is, first, related to the goods being valued and, second, constitutes a condition of sale of those goods.”



However, neither Article 32(1)(c) of the Customs Code nor Article 157(2) of Regulation No 2454/93 specifies what is meant by ‘condition of sale’ of the goods being valued.

In that regard, the Customs Code Committee has taken the view, in paragraph 12 of Commentary N° 3 (Customs Valuation Section) on the incidence of royalties and licence fees in customs value that ‘the question to be answered in this context is whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee. The condition may be explicit or implicit. In the majority of cases it will be specified in the licence agreement whether the sale of the imported goods is conditional upon payment of a royalty or licence fee. It is not, however, essential that it should be so stipulated.’

Regard should be had to the guidelines provided by that commentary, as stated in paragraph 45 above.”

23. As regards Commentary N° 11 of the Customs Code Committee, the parties agree that it is an appropriate interpretation tool in interpreting ‘condition of sale’. In **GE Healthcare GmbH** the Court observed (at paragraph 45):

“The conclusions of the Customs Code Committee, although they do not have legally binding force, nevertheless constitute an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such may be regarded as a valid aid to the interpretation of the Code.”

Foreign Law

24. In considering whether the payment of royalties constitutes a condition of sale, the licence agreements with [*Licensor A*] and [*Licensor B*] are to be analysed. The



licence agreements are governed by the law of England and Wales. The manner of dealing with the law of a foreign jurisdiction is set out by Clarke J. in the Supreme Court judgment of **Walsh -v- National Irish Bank Limited** [2013] 1 IR 294, which involved an application by an authorised officer of the Revenue Commissioners seeking an order directing the bank to furnish information, documentation and particulars concerning customer accounts held at its branch in the Isle of Man (at page 339 and 340):

“[36] ..However, it does need to be noted that, in the ordinary way, foreign law is treated as a matter of fact to be established, in the Irish courts, in the ordinary way by sworn evidence of that fact. An affidavit from an appropriately qualified lawyer is the normal way in which evidence as to foreign law is to be established. Likewise, a party who wishes to dispute such evidence is required to put forward its own contrary evidence from a likewise suitably qualified lawyer. In the case of a dispute, then it may well be necessary that both lawyers be cross-examined so as to assist the Irish court in coming to a conclusion.”

[37] It should, in that context, be clearly understood that reference to case law or other materials from foreign jurisdictions is not an appropriate way, in the absence of evidence from a suitably qualified lawyer making reference to such materials, to establish the law concerned. Irish courts may well have occasion to consider the case law of other jurisdictions which may provide persuasive authority as to the proper approach to be adopted in like circumstances in Ireland. However, when so doing the Irish courts are simply referring to materials which may be of assistance in interpreting Irish law. Where an Irish court is required, for the purposes of determining the proper result of litigation, to reach a conclusion as to relevant foreign law, then such a conclusion cannot be reached simply on the basis of counsel referring the Irish court to statute or case law from the relevant jurisdiction.”



25. Clarke J. continued (at page 348 and 350):

“[60] In that context it does seem to me to be important to emphasise a distinction between two different types of circumstances where questions of foreign law may be relevant. In the first type of circumstance, foreign law is relevant because, in accordance with the principles of Irish private international law (or increasingly frequently by virtue of relevant European Union regulations) it is, as a matter of Irish law, required that the Irish courts apply an appropriate foreign law in determining a specific dispute. In a particular context, Irish private international law or appropriate European Union regulation may mandate that the law to be applied in respect of a contractual dispute is the law of a specific foreign jurisdiction. In hearing evidence of, and determining, the relevant principles of the specified law of contract, the Irish courts are doing no more than applying Irish private international law. Such an exercise is not really concerned with the comity of courts. Rather, it is a necessary part of the proper determination of a legal dispute in accordance with Irish law precisely because Irish law recognises the law of a foreign jurisdiction as being applicable rather than Irish law. Such cases are not ones where the Irish courts are obliged, in accordance with Irish principles of comity, to recognise the jurisdiction of the courts of a foreign country.

..

[65].... it is desirable that the courts have available to them an appropriate level of assurance so that the court can determine with confidence what the true position in the law of the relevant foreign jurisdiction actually is...”

26. The Appellant presented evidence from [Expert A] Q.C., a suitably qualified lawyer in the law of England and Wales. The Revenue Commissioners did not present a counterview as to the relevant foreign law and no expert witness was put forward.



On that basis, the Appellant submits that the evidence of [*Expert A*] must stand as unchallenged and undisputed evidence. The Revenue Commissioners submit that the evidence of [*Expert A*] is confined to setting out the relevant legal principles to be applied in interpreting the licence agreements under the law of England and Wales. The Appellant submits that [*Expert A*] must give evidence on the relevant principles and then proceed to apply those principles to the licence agreements, as the licence agreements are the building blocks to considering whether the payment of royalties constitutes a ‘condition of sale’ and [*Expert A*] is the appropriately qualified lawyer to give evidence on the licence agreements.

Evidence - [*Expert A*] Q.C.

27. [*Expert A*] Q.C. presented a declaration of his professional background, qualifications, experience and independence. [*Expert A*] is a barrister practising in England and Wales and has been in continuous practice since [redacted] to date. He was appointed Queen’s Counsel in [redacted].

28. [*Expert A*] gave sworn oral evidence. [*Expert A*] presented a written opinion, which he adopted as his evidence. [*Expert A*] confirmed that he was instructed to provide his opinion on applicable principles of the law of England and Wales in respect of contractual interpretation and how such principles bear on the interpretation of the licence agreements referred to at paragraph 4 above. [*Expert A*] confirmed the scope of his opinion as aiming to identify principles of interpretation applicable to a contractual agreement governed by the law of England and Wales which appear to him to be relevant to the licence agreements in the context of the dispute between the Appellant and the Revenue Commissioners, in order to facilitate the interpretation of the licence agreements in the context of that dispute, rather than attempting to provide a definitive interpretation of the licence agreements.



29. [Expert A] stated that the law of England and Wales is that an objective approach is taken to the interpretation of a contractual agreement. It is not the subjective intentions of the contracting parties that are to be ascertained and given effect rather the meaning that a reasonable person would have given to the contractual wording read in its relevant context. [Expert A] stated that this encapsulates the approach that the law of England and Wales takes to interpretation of contracts generally including commercial agreements, which includes licence agreements covering intellectual property rights.

30. [Expert A] identified case law representing sources of the law of England and Wales in respect of contractual interpretation. [Expert A] stated that the approach to contractual construction was summarised in the following passage from Lord Steyn in the House of Lords' case of *Sirius International Insurance Co -v- FAI General Insurance Ltd* [2004] 1 WLR 3251 (at page 3257):

“The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.”

31. [Expert A] considered a helpful summary of the modern law and an overview of the applicable principles of contractual interpretation is to be found in *Harry Greenhouse -v- Paysafe Financial Services Ltd* [2018] EWHC 3296, wherein the court stated (at paragraph 11):

“The modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean



to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases of the House of Lords and Supreme Court recognising the modern approach, which marks a shift from an older more literal approach, include Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL, especially at 912-913 (per Lord Hoffmann giving the leading speech), and Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900. The Supreme Court in Arnold v Britton [2015] UKSC 36, [2015] AC 1619, clarified that the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. In Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, at [14], Lord Hodge, with whom the other Supreme Court Justices agreed, said that there was no inconsistency between the approach in Rainy Sky and that in Arnold v Britton: 'On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.' His Lordship also pointed out, at [12], that contractual interpretation 'involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated..'"

32. [Expert A] stated that the above passage provides a point of reference when considering what approach should properly be taken to the interpretation of a contract governed by the law of England and Wales. [Expert A] stated that the agreements the subject matter of this appeal are agreements licensing intellectual property rights which are a species of commercial contracts. Their interpretation is subject to the general principles of contractual construction. [Expert A] referred to the judgment of **Hudson Bay Apparel Brands LLC -v- Umbro International**



- Limited* [2009] EWHC 2861 (Ch) as an illustration of general contractual principles being used by an English court to guide interpretation of an agreement licensing the distribution of consumer goods.
33. [Expert A] stated that the principles he selected were confined to the fundamental principles of contractual interpretation on the basis that those principles seem germane to the interpretative exercise in the within appeal.
34. [Expert A] stated that a reasonable reader's understanding of a document is capable of being affected by relevant background circumstances reasonably available to both of the contracting parties. In the absence of relevant background circumstances, the natural meaning of the words used in the licence agreements, taking account of the provisions of the whole licence is, in his opinion, what a reasonable reader would understand the terms of the licence agreements to mean.
35. The evidence of [Expert A] with regard to Commentary N° 11 will be referred to at the appropriate juncture below.

Commentary N° 11 of the Customs Code Committee

36. [Expert A] stated that his focus was confined to assisting the Appeal Commissioner in understanding the applicable principles of the law of England and Wales and providing comments on the interpretation approach adopted by the Revenue Commissioners with regard to the licence agreements and the extent to which those applicable principles have a bearing on that interpretation.
37. [Expert A] stated that where he considered the Revenue Commissioners interpretation of the terms of the licence agreements, when associated with a specified indicator in Commentary N° 11, was not plausibly to be attributed to a reasonable person reading the terms in the light of the whole agreement having



relevant background information, [Expert A] expressed his opinion that such interpretation offends against the fundamental requirement of contractual interpretation to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties. [Expert A] stated that where he considered the Revenue Commissioners interpretation of the terms of the licence agreements, when associated with a specified indicator in Commentary N° 11, was an interpretation which, in his opinion, was within the bounds of the approach to contractual interpretation required by the law of England and Wales, [Expert A] stated that he considered it was a matter for the Appeal Commissioner, having regard to those views, to consider whether those terms which are within the bounds of the approach to contractual interpretation required by the law of England and Wales, are to be read as bearing on an indicator in Commentary N° 11 and, if so, the extent thereof, in determining whether the payment of royalties constitutes a ‘condition of sale’. [Expert A] stated that as the dispute is between one contracting party (the Appellant) and a third-party (the Revenue Commissioners) then less significance is given to the background circumstances and the approach is discerning the meaning of words based on their natural meaning in the contractual context.

[Licensor A]

[1] The licensor selects the manufacturer and specifies it for the buyer

For the purposes of this indicator, the Revenue Commissioners refer to clause 5.1 and clause 9.2 (a) (b) (c) (d) (f) and (g) of the licence agreement. Clause 5 relates to ‘Grant of Rights’. Clause 5.1 grants to the Appellant a non-exclusive licence to use the licensed material to design, create, manufacture or source, and sell the products to consumers in accordance with the terms of the agreement. Clause 9 relates to ‘Manufacturing/Sourcing’ and comprises clause 9.1 (definitions), clause 9.2 (ILS Program) and clause 9.3 (Product Quality and Safety). ‘ILS Program’ is defined as meaning ‘the requirements and procedures to be implemented and maintained by Retailer to ensure compliance with international



labor standards as set forth in the Code.’ ‘ILS Minimum Compliance Standard’ means ‘that a Facility is shown by a Code Assessment not to have (i) child labor, (ii) involuntary labor, (iii) coercion and harassment, (iv) discrimination, (v) health and safety workplace violations, or (vi) interference with freedom of association.’ Clause 9.3 refers to the [Licensor A] [redacted] Guidelines and the full responsibility of the Appellant for the quality and safety of the products. It also refers to the duty of the Appellant to use the licensed material to promote the continuing goodwill thereof and to achieving reasonable solutions that preserve the goodwill and reputation of [Licensor A] and the licensed material.

The Revenue Commissioners state that ‘while in this instant the licensor does not select the manufacturer’, the agreement includes requirements for the Appellant to request the consent of [Licensor A] to use a facility by providing a completed [redacted] prior to a facility being used; that a facility must comply with [Licensor A]’s [redacted] or similar standards; ongoing monitoring activities of a facility to confirm compliance with the Code; remediation plans to be implemented on a facility; and circumstances leading to a cessation of production at a facility (including for non-compliance with ILS Minimum Compliance Standards) or immediate termination of authorisation of a facility (for egregious violations such as child labour).

[Expert A] stated that if the Revenue Commissioners are interpreting clause 5.1 and clause 9.2 as provisions concerned with licensor selection and specification of the manufacturer, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would consider the provisions capable of having that meaning. [Expert A] stated that the agreement does not provide for the licensor to select the manufacturer and specify it for the buyer.



[2] There is a direct contract of manufacture between the licensor and the seller

For the purposes of this indicator, the Revenue Commissioners refer to clause 9.2 (a) (c) and (d). The Revenue Commissioners refer to the requirement for the Appellant to request the consent of [*Licensor A*] to use a facility by providing a completed [*redacted*] prior to a facility being used; that a facility must comply with [*Licensor A*]'s [*redacted*] or similar standards; ongoing monitoring activities of a facility to confirm compliance with the Code; remediation plans to be implemented on a facility; and circumstances leading to a cessation of production at a facility (including for non-compliance with ILS Minimum Compliance Standards) or immediate termination of authorisation of a facility (for egregious violations such as child labour).

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 9.2 (a) (c) and (d) as provisions concerned with whether there is a direct contract of manufacture between the licensor and the seller, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would consider the provisions capable of having that meaning. [*Expert A*] stated that the agreement does not provide for, or support the existence of, a direct contract of manufacture between [*Licensor A*], as licensor, and the Appellant's third-party manufacturer.

[3] The licensor exercises actual control either directly or indirectly over the manufacture (as regards centres of production and/or methods of production)

For the purposes of this indicator, the Revenue Commissioners refer to clause 9.2 (i), clause 9.3.2 and clause 17.3. Clause 9.2 (i) relates to 'Prohibited Manufacturing Countries and Parties' and prohibits manufacture in certain countries or by certain specified parties. Clause 9.3.2, under 'Product Quality and Safety', provides that before the Appellant puts any products on the market, the Appellant must follow reasonable and proper procedures for quality control testing to ensure the products comply with all applicable product safety



laws; and to permit [*Licensor A*] to inspect testing, manufacturing and quality control records and procedures and to test products for compliance with product safety and other applicable laws. Clause 17.3, under ‘Rights and Obligations upon Termination’, relates to transferring title of specified items from the Appellant to [*Licensor A*] and destroying or transferring physical possession of specified items from the Appellant and the Appellant’s manufacturers to [*Licensor A*] on termination.

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 9.2 (i), clause 9.3.2 and clause 17.3 as having a meaning that supports the licensor exercising actual control either directly or indirectly over the manufacturer as regards centres of production and/or methods of production, this approach to interpretation is within the bounds of approach to contractual interpretation required by the law of England and Wales.

[4] The licensor exercises actual direct or indirect control over the logistics and the dispatch of the goods to the buyer

For the purposes of this indicator, the Revenue Commissioners refer to clause 6.4. Clause 6.4, under ‘Distribution’, states ‘*Upon [Licensor A]’s request, Retailer agrees to give [Licensor A] written notice of the first ship date of each Product.*’

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 6.4 as a provision concerned with whether the licensor exercises actual direct or indirect control over the logistics and the dispatch of the goods to the buyer, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would consider the provision as capable of having that meaning.



[5] The licensor nominates/restricts who the producer can sell their goods to

For the purposes of this indicator, the Revenue Commissioners refer to clause 8.3. Clause 8 relates to ‘Approvals’ and clause 8.3, under ‘Production Samples’, relates to the Appellant providing a production sample of a product to [*Licensor A*] for approval of all aspects of the product and permitting [*Licensor A*] to disapprove a production sample based on unacceptable quality of the artwork or the product as manufactured; that no modification of an approved production sample must be made without the prior written approval of [*Licensor A*]; that no test runs, seconds or irregulars may be sold without the prior written approval of [*Licensor A*], and unless approved for sale by [*Licensor A*], the Appellant must destroy all such test runs, seconds or irregulars.

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 8.3 as a provision concerned with whether the licensor nominates/restricts who the producer can sell their goods to, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would take the provision as capable of having that meaning.

[6] The licensor sets conditions relating to the price at which the manufacturer/seller should sell their goods or the price at which the importer/buyer should resell the goods

For the purposes of this indicator, the Revenue Commissioners refer to clause 24. Clause 24 relates to ‘Preservation of [*Licensor A*]’s Goodwill’ and provides that the rights and powers retained by [*Licensor A*], as well as the obligations and limitations on the Appellant, are necessary to protect the licensed material, including all intellectual property rights associated therewith, and, specifically, to conserve the goodwill and good name of [*Licensor A*] entities; the provision describes certain types of prohibited conduct by the Appellant regarding the production, marketing, advertising, sale or use of any products



including conduct relating to prices below cost or so far below prior sales practices as to suggest that the products are second-rate, low-quality, low-value, unwanted or counterfeit products, but without prejudice to the Appellant's absolute discretion to sell products at such legal prices as it may determine.

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 24, and specifically prohibited conduct (iv) as provisions concerned with the licensor setting conditions relating to the price at which the manufacturer/seller should sell their goods or the price at which the importer/buyer should resell the goods, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would consider the provisions as capable of having that meaning. [*Expert A*] referred to the specific reference in clause 24 to the absolute discretion of the Appellant to sell products at such legal prices as it may determine and to other parts of the licence agreement, particularly clause 5.5 which provides '*Nothing in this Agreement shall be deemed to imply any restriction on Retailer's freedom to sell the products at such prices as Retailer shall determine..*'.

[7] The licensor has the right to examine the manufacturer's or the buyer's accounting records

For the purposes of this indicator, the Revenue Commissioners refer to clause 9.2 (c), clause 7.2.2 and clause 12. Clause 9 relates to 'Manufacturing/Sourcing', clause 9.2 relates to 'ILS Program' and clause 9.2 (c), under '[*Licensor A*] Monitoring', permits [*Licensor A*] to engage in monitoring activities of facilities to confirm compliance with [*Licensor A*]'s [*redacted*] or similar standards and to an immediate termination of authorisation to use a facility for egregious violations such as child labour. Clause 7.2.2, under 'Reporting', obliges the Appellant to give [*Licensor A*] access to its point-of-sale information system, however, [*Licensor A*] will not be provided access to any information on non-[*Licensor A*]



products; such point-of-sale information includes retail sales, retail sell-through information, inventory and order information. Clause 12 relates to ‘Records: Audits’ and obliges the Appellant to keep accurate records of all transactions relating to the agreement and permits [*Licensor A*] to examine, copy and make extracts from all such records and any other records and to inspect physical stocks of products which [*Licensor A*] reasonably deems appropriate to verify the accuracy of the Appellant’s statements or to confirm the Appellant’s performance.

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 9.2 (c), clause 7.2.2 and clause 12 as having a meaning that supports the licensor having a right to examine the buyer’s accounting records, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales. [*Expert A*] stated that the licence agreement gives [*Licensor A*] the right to inspect specified records of the Appellant which could be capable of being accounting records.

[8] The licensor designates the methods of production to be used/provides designs etc. For the purposes of this indicator, the Revenue Commissioners refer to clause 8.1 and clause 8.2. Clause 8 relates to ‘Approvals’. Clause 8.1, under ‘Concepts’, obliges the Appellant, before commercial production, to submit for [*Licensor A*]’s review and written approval, all concepts, all preliminary and proposed final artwork, and all 3-dimensional models. Clause 8.2, under ‘Pre-Production Samples’, obliges the Appellant to submit for [*Licensor A*]’s written approval a pre-production sample of each product.

[*Expert A*] stated that the Revenue Commissioners did not refer to clause 8.3, under ‘Production Samples’, which relates to the production stage (as opposed to the pre-production stage) and which obliges the Appellant to provide a production sample of a product to [*Licensor A*] for approval of all aspects of the product and permits [*Licensor A*] to disapprove a production sample based on unacceptable quality of the artwork or the product as manufactured. [*Expert A*] stated that the relevance of the provisions to the within indicator is a matter for the Appeal Commissioner.



[9] The licensor designates/restricts the sourcing of materials/components

For the purposes of this indicator, the Revenue Commissioners refer to clause 3 and clause 8.4.2 (iv) (vii) (viii) and (ix). Clause 3 relates to ‘Term’ and provides the end date as the date by which products shall no longer be manufactured, distributed or sold, subject to any sell-off permitted under the agreement. Clause 8 relates to ‘Approvals’, and clause 8.4 relates to ‘Packaging, Promotional Materials and Advertising’. Clause 8.4.2 applies in respect of products for which [Licensor A] mandates the use of [redacted]. [Licensor A] design a multi-level and multi-layer [redacted] with a [Licensor A] [redacted] in the centre which is produced for [Licensor A] and used by retailers producing certain types of products. Clause 8.4.2 (iv) obliges the Appellant to purchase and obtain [redacted] only from one of the suppliers listed in the agreement. Clause 8.4.2 (vii) obliges the Appellant to affix [redacted] which have been approved by [Licensor A] to the products in accordance with the latest [Licensor A] guidelines on [redacted] and to record the serial numbers of any [redacted] used. Clause 8.4.2 (viii) provides that the Appellant will provide a safe and secure storage for [redacted] and maintain a full inventory of [redacted] stock. Clause 8.4.2 (ix) obliges the Appellant to report the serial numbers of [redacted] each quarter.

[Expert A] stated that clause 3 concerns the term of the agreement and does not on its face concern what a reasonable reader would regard as relating to designation or restriction on sourcing of materials/components. [Expert A] stated that if the Revenue Commissioners are interpreting clause 8.4.2 as having a meaning that supports the licensor designating/restricting the sourcing of materials/components, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales. [Expert A] stated that there are no restrictions on sourcing of materials or components generally in clause 8.4.2. There are restrictions on sourcing of [redacted] which require to be added to certain products.



[10] The licensor restricts the quantities that the manufacturer may produce

For the purposes of this indicator, the Revenue Commissioners refer to clause 17.2 and clause 24. Clause 17 relates to ‘Rights and Obligations upon Termination’ and clause 17.2 provides that the Appellant agrees that from the expiration or termination of the agreement, the Appellant shall neither manufacture nor cause products to be manufactured. Clause 24 relates to ‘Preservation of [Licensor A]’s Goodwill’ and provides that the rights and powers retained by [Licensor A], as well as the obligations and limitations on the Appellant, are necessary to protect the licensed material, including all intellectual property rights associated therewith, and, specifically, to conserve the goodwill and good name of [Licensor A] entities; the provision describes certain types of prohibited conduct by the Appellant regarding the production, marketing, advertising, sale or use of any products including conduct relating to quantity levels significantly above prior practices or at prices below cost or so far below prior sales practices as to suggest that the products are second-rate, low-quality, low-value, unwanted or counterfeit products.

[Expert A] stated that if the Revenue Commissioners are interpreting clause 17.2 as a provision concerned with restrictions on the quantities that the manufacturer may produce, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would regard the provision as capable of having that meaning. [Expert A] stated that whether clause 24 has a bearing on the within indicator is a matter for the Appeal Commissioner.

[11] The licensor does not allow the buyer to buy directly from the manufacturer, but, through the trademark owner (licensor) who could as well act as the importer’s buying agent

The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.



[12] The manufacturer is not allowed to produce competitive products (non licensed) without the consent of the licensor

The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.

[13] The goods produced are specific to the licensor (i.e. in their conceptualisation/design and with regard to the trade mark)

For the purposes of this indicator, the Revenue Commissioners state that ‘all goods which are the subject of this agreement are specific to the licensor with regard to their conceptualisation/design and trade mark’ and refer to clause 8.1, clause 8.4.2 and clause 8.4.3 as the controls exercised by [*Licensor A*] over production. Clause 8 relates to ‘Approvals’. Clause 8.1, under ‘Concepts’, obliges the Appellant, before commercial production, to submit for [*Licensor A*]’s review and written approval, all concepts, all preliminary and proposed final artwork, and all 3-dimensional models and [*Licensor A*] may approve or disapprove such concepts, artwork and models in its absolute discretion. Clause 8.4 relates to ‘Packaging, Promotional Materials and Advertising’. Clause 8.4.2 applies in respect of products for which [*Licensor A*] mandates the use of [*redacted*]. [*Licensor A*] design a multi-level and multi-layer [*redacted*] with a [*Licensor A*] [*redacted*] in the centre which is produced for [*Licensor A*] and used by retailers producing certain types of products. Clause 8.4.3 refers to custom coding programs and to the Appellant complying with obligations including identification systems, coding programs and labelling requirements established by [*Licensor A*].

[*Expert A*] stated that whether clause 8.1, clause 8.4.2 and clause 8.4.3 has a bearing on the within indicator is a matter for the Appeal Commissioner.



[14] The characteristics of the goods and the technology employed are laid down by the licensor

For the purposes of this indicator, the Revenue Commissioners state that ‘[Licensor A] exercise strict control over the characteristics of the goods and production by requiring that it exercises control over all concepts, artwork and models’ and refer to clause 8.1. Clause 8 relates to ‘Approvals’ and clause 8.1, under ‘Concepts’, obliges the Appellant, before commercial production, to submit for [Licensor A]’s review and written approval, all concepts, all preliminary and proposed final artwork, and all 3-dimensional models and [Licensor A] may approve or disapprove such concepts, artwork and models in its absolute discretion.

[Expert A] stated that whether clause 8.1 has a bearing on the within indicator is a matter for the Appeal Commissioner.

Attachments to the Licence Agreement

The four attachments to the licence agreement were referred to by the parties in the context of Commentary N° 11:

Attachment 1 – Code of Conduct for Manufacturers

This provides that [Licensor A] are committed to:

- a standard of excellence in every aspect of their business and in every corner of the world;
- ethical and responsible conduct in all their operations;
- respect for the rights of all individuals; and
- respect for the environment.

[Licensor A] expects these same commitments to be shared by all manufacturers of [Licensor A] merchandise and, at a minimum, [Licensor A] require that all manufacturers of [Licensor A] merchandise meet certain standards, which are described under the following headings: Child Labour; Involuntary Labour; Coercion and Harassment; Non-



discrimination; Association; Health and Safety, Compensation, Protection of the Environment; Other Laws; Subcontracting; Monitoring and Compliance; and Publication.

Under ‘Subcontracting’ the Code provides that manufacturers will not use subcontractors for the manufacture of [*Licensor A*] merchandise or components thereof without [*Licensor A*]’s express written consent, and only after the subcontractor has entered into a written commitment with [*Licensor A*] to comply with this Code of Conduct. Under ‘Monitoring and Compliance’ the Code provides that manufacturers will authorise [*Licensor A*] to engage in monitoring activities to confirm compliance with the Code of Conduct and that manufacturers will maintain on site all documentation that may be needed to demonstrate compliance with the Code of Conduct. Under ‘Publication’ the Code provides that manufacturers will take appropriate steps to ensure that the provisions of the Code of Conduct are communicated to employees, including the prominent posting of a copy of the Code of Conduct, in the local language and in a place readily accessible to employees, at all times.

Attachment 2 – [redacted]

The application provides that [*Licensor A*] will verify the information and determine whether a facility will be authorised to produce licensed products and that production of licensed products authorised under the applicable agreement may begin once a signed [*redacted*] is received from [*Licensor A*]. ‘Facility’ is defined as the retailer’s own or third-party manufacturers, vendors, factories, suppliers and other facilities.

Attachment 3 – List of authorised [redacted] suppliers and [redacted] suppliers

The attachment provides contact details for the authorised supplier of [*redacted*] and [*redacted*], which is the same company.

Attachment 4 – Prohibited Manufacturing Countries and Parties

The attachment provides details of countries under trade restrictions by the [*redacted*] and countries in which [*Licensor A*] has also temporarily suspended manufacturing. The



attachment provides details of certain sanctioned parties with which the [redacted] prohibits doing business. The attachment provides details of countries where [Licensor A] has imposed special requirements.

[Licensor B]

[1] The licensor selects the manufacturer and specifies it for the buyer

For the purposes of this indicator, the Revenue Commissioners refer to clause 9.1 and schedule 7. Clause 9 relates to ‘Manufacturing/Sourcing’. Clause 9.1, under ‘Purpose of Manufacturing/Sourcing Provisions’, provides that for the purpose of quality control and improvement of the manufacture of products, the Appellant agrees not to assign its right to manufacture the products to any third-party manufacturer without obtaining the prior written approval of [Licensor B]; that the Appellant shall cause an approved manufacturer to sign the document in schedule 7; prohibits the Appellant from utilising any manufacturer in certain countries or regions unless prior written approval is obtained from [Licensor B]; permits [Licensor B] to prohibit a country or region where a government has imposed a trade ban; obliges the Appellant to undertake that all of its approved manufacturers are of bona fide reputation and that all products will be manufactured in accordance with applicable local laws and regulations; and provides that the Appellant guarantees the obligations of the manufacturer but the Appellant remains fully liable for all obligations under the agreement and [Licensor B]’s approval of a third-party manufacturer does not release the Appellant from its obligations under the agreement or constitute a waiver of obligations. Schedule 7 is the ‘[redacted]’, which is presented in the form of a letter from a manufacturer to [Licensor B] wherein the manufacturer notifies of their engagement as the manufacturer of the products the subject matter of the licence agreement and agrees to be bound by the provisions of the licence agreement which are applicable to the manufacturer, including but not limited to the right of [Licensor B] to examine the books of accounts, records and premises of the manufacturer with respect to the manufacture of the products. The manufacturer agrees that the products will be manufactured solely for the Appellant and the manufacturer will not sell or otherwise distribute the products for any



other purpose. The manufacturer warrants and undertakes to conduct their business in accordance with all applicable local and international laws and regulations, including all applicable labour laws and regulations. The manufacturer warrants and undertakes to adhere to the [redacted] guidelines of [Licensor B]. The manufacturer acknowledges and agrees that their failure to adhere to their obligations entitles [Licensor B] and/or the Appellant to terminate their engagement immediately by written notice. The manufacturer agrees to surrender and relinquish all rights to the licensed material and/or artwork to [Licensor B]. The manufacturer confirms to have product liability and/or general liability insurance which is valid for the duration of the licence agreement. The manufacturer understands that engagement as manufacturer of the products is subject to the written approval of [Licensor B]. The letter provides for [Licensor B] to sign the letter to show that [Licensor B] agree and accept the engagement of the manufacturer.

The Revenue Commissioners state that ‘while in this instant the licensor does not select the manufacturer’, the agreement stipulates that all manufacturers be separately authorised by [Licensor B] and that manufacturers provide undertakings directly to [Licensor B] in accordance with clause 9.1 and the ‘[redacted]’ in schedule 7. The Revenue Commissioners refer to the prohibition of utilising a manufacturer in certain countries or regions and the guarantee by the Appellant of the obligations of the manufacturer with respect to [Licensor B].

[Expert A] stated that whether clause 9.1 has a bearing on the within indicator is a matter for the Appeal Commissioner. With regard to the part of clause 9.1 referred to by the Revenue Commissioners on the prohibition of utilising a manufacturer in certain countries or regions, [Expert A] stated that if the Revenue Commissioners are interpreting this part of clause 9.1 as a provision concerned with licensor selection and specification of the manufacturer, this approach to interpretation would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the



parties because it does not seem plausible, in his opinion, that a reasonable person would take the provision as capable of having that meaning.

[2] There is a direct contract of manufacture between the licensor and the seller

For the purposes of this indicator, the Revenue Commissioners refer to clause 9.1 and schedule 7. These are described at [1] above.

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 9.1 and schedule 7 as having a meaning that supports the existence of a direct contract of manufacture between the licensor and the seller, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales.

[3] The licensor exercises actual control either directly or indirectly over the manufacture (as regards centres of production and/or methods of production)

For the purposes of this indicator, the Revenue Commissioners refer to clause 2.2, clause 9.1, clause 17.1 and schedule 7.

Clause 2 relates to ‘Products’ and clause 2.2 provides that the Appellant will adhere to and, when doing business with third-party manufacturers, the Appellant will cause all such manufacturers to adhere to the [redacted] guidelines of [*Licensor B*]. [*Expert A*] stated that whether clause 2.2 has a bearing on the within indicator is a matter for the Appeal Commissioner.

Clause 9 relates to ‘Manufacturing/Sourcing’ and clause 9.1 relates to ‘Purpose of Manufacturing/Sourcing Provisions’. The Revenue Commissioners refer to the part of clause 9.1 that the Appellant agrees not to assign its right to manufacture the products to any third-party manufacturer without obtaining the prior written approval of [*Licensor B*]; that the Appellant shall cause an approved manufacturer to sign the document in schedule 7; prohibits the Appellant from utilising any manufacturer in certain countries or regions



unless prior written approval is obtained from [*Licensor B*]; and the Appellant guarantees the obligations of the manufacturer but the Appellant remains fully liable for all obligations under the agreement and [*Licensor B*]'s approval of a third-party manufacturer does not release the Appellant from its obligations under the agreement or constitute a waiver of obligations. The Revenue Commissioners refer to the part of schedule 7 that the manufacturer agrees to be bound by the provisions of the licence agreement which are applicable to the manufacturer, including but not limited to the right of [*Licensor B*] to examine the books of accounts, records and premises of the manufacturer with respect to the manufacture of the products and the manufacturer understands that engagement as a manufacturer of the products is subject to the written approval of [*Licensor B*].

[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 9.1 and schedule 7 as having a meaning that supports the licensor exercising actual control either directly or indirectly over the manufacturer as regards centres of production and/or methods of production, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales. However, with regard to the reference to the part of clause 9.1 on the guarantee of obligations, [*Expert A*] stated that if the Revenue Commissioners are interpreting this part of clause 9.1 as a provision concerned with the exercise of direct or indirect control by a licensor over a manufacturer as regards centres of production and/or methods of production, this approach to interpretation of this aspect of the agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would take the provision as capable of having that meaning.

Clause 17 relates to 'Rights and Obligations upon Termination'. The Revenue Commissioners refer to the part of clause 17.1 that the Appellant will destroy, and cause all the Appellant's manufacturers to destroy, any moulds, plates, labels or other items used to reproduce the licensed material, and return all artwork of the licensed material to



[*Licensor B*]. [*Expert A*] stated that if the Revenue Commissioners are interpreting this part of clause 17.1 as a provision concerned with the exercise of direct or indirect control by a licensor over a manufacturer as regards centres of production and/or methods of production, this approach to interpretation of this part of the agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would take the provision as capable of having that meaning.

[4] The licensor exercises actual direct or indirect control over the logistics and the dispatch of the goods to the buyer

The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.

[5] The licensor nominates/restricts who the producer can sell their goods to

For the purposes of this indicator, the Revenue Commissioners refer to the ‘[redacted]’ in schedule 7. The Revenue Commissioners refer to the part of the letter in schedule 7 which provides that the manufacturer acknowledges and agrees to manufacture the products solely for the Appellant and will not sell or otherwise distribute the products for any other purpose whatsoever.

[*Expert A*] stated that if the Revenue Commissioners are interpreting this part of schedule 7 as having a meaning that supports the licensor nominating/restricting who the producer can sell their goods to, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales.

[6] The licensor sets conditions relating to the price at which the manufacturer/seller should sell their goods or the price at which the importer/buyer should resell the goods



The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.

[7] The licensor has the right to examine the manufacturer's or the buyer's accounting records

For the purposes of this indicator, the Revenue Commissioners refer to the '[redacted]' in schedule 7 and clause 13. The Revenue Commissioners refer to the part of schedule 7 that the manufacturer agrees to be bound by the provisions of the licence agreement which are applicable to the manufacturer, including but not limited to the right of [*Licensor B*] to examine the books of accounts, records and premises of the manufacturer with respect to the manufacture of the products. Clause 13 relates to 'Records: Audits' and obliges the Appellant to keep accurate records of all transactions relating to the agreement and to preserve the records for two years after the expiration or termination of the agreement; and to the right of [*Licensor B*], for the purpose of confirming the Appellant's performance under the agreement, to examine, copy and make extracts from the records and any other records which [*Licensor B*] reasonably deems appropriate to verify the accuracy of the Appellant's statements or performance.

[*Expert A*] stated that if the Revenue Commissioners are interpreting schedule 7 and clause 13 as having a meaning that supports the licensor having a right to examine the manufacturer's or buyer's accounting records, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales.

[8] The licensor designates the methods of production to be used/provides designs etc

For the purposes of this indicator, the Revenue Commissioners refer to clause 8 and clause 10. Clause 8 relates to 'Approvals and Quality Control' and comprises clause 8.1 (concepts), clause 8.2 (pre-production samples), clause 8.3 (production samples), clause 8.4 (packaging, promotional materials and advertising), clause 8.5 (timing) and clause 8.6 (licensee responsibility for quality and safety of products). Clause 10 relates to 'Samples:



Labels’ and obliges the Appellant, or its producers, to provide [*Licensor B*] with five samples of each product from the first production run of each product; and provides that certain information will appear on permanently affixed labelling on each product so that the public can identify the supplier of the product.

The Revenue Commissioners state that ‘while [*Licensor B*] do not provide designs it does exercise strict control over production from the concept design phase through to manufacturer of the approved finished goods. This control is extended to packaging material also.’ The Revenue Commissioners refer to clause 10 as ‘specifies the information to be included on products so as to identify the supplier of the products.’

[*Expert A*] stated that the interpretation of clause 8 by the Revenue Commissioners appears selective in that it omits reference to the quality control aspects in those provisions. The principles of construction of the law of England and Wales require a contextual assessment which involves the interpretation of the term the subject of interpretation viewed in the light of the whole term and the whole contract.

[*Expert A*] stated that whether clause 8 has a bearing on the within indicator is a matter for the Appeal Commissioner. [*Expert A*] stated that if the Revenue Commissioners are interpreting clause 10.2 as having a meaning that supports the licensor designating the methods of production to be used, this approach to interpretation is within the bounds of the approach to contractual interpretation required by the law of England and Wales.

[9] The licensor designates/restricts the sourcing of materials/components

For the purposes of this indicator, the Revenue Commissioners refer to the pre-approval requirements and clause 9.1. Clause 3 relates to ‘Grant of Rights’ and provides that [*Licensor B*] grants the Appellant the non-exclusive rights to design, create, manufacture or source, distribute or sell products to the public. There are pre-approval requirements in clause 8 (relating to production) and in clause 9 (relating to manufacturing). The Revenue Commissioners refer to the part in clause 9.1 which prohibits the Appellant from utilising



any manufacturer in certain countries or regions unless prior written approval is obtained from [*Licensor B*].

[*Expert A*] stated that if the Revenue Commissioners are interpreting the pre-approval requirements and the territory restrictions as provisions concerned with the licensor designating/restricting the sourcing of materials/components to be used or used in the finished product, this approach to interpretation of this aspect of the licence agreement would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would take the provisions as capable of having that meaning.

[10] The licensor restricts the quantities that the manufacturer may produce

For the purposes of this indicator, the Revenue Commissioners refer to clause 4.3 and clause 17.1. Clause 4 relates to ‘Distribution’ and clause 4.3 provides that on a quarterly basis the Appellant must provide [*Licensor B*] with information regarding buying plans, sell-through projections including product assortment, projected sales price and promotional plans, described as ‘forecasts’. Clause 17 relates to ‘Rights and Obligations upon Termination’ and clause 17.1 provides that upon the termination or expiration of the agreement all rights granted to the Appellant shall revert to [*Licensor B*] and the Appellant will neither manufacture products nor cause products to be manufactured; the Appellant agrees that products manufactured during the term of the agreement will be in quantities consistent with anticipated demand so as not to result in an excessive inventory build-up immediately prior to the end of the term of the agreement; and the Appellant will destroy, and cause all the Appellant’s manufacturers to destroy, any moulds, plates, labels or other items used to reproduce the licensed material and return all artwork of the licensed material to [*Licensor B*].



[*Expert A*] stated that if the Revenue Commissioners are interpreting clause 4.3 and clause 17.1 as provisions concerned with restrictions on the quantities the manufacturer may produce, this approach to interpretation would appear to offend against the requirement to ask what the term viewed in the light of the whole contract would mean to a reasonable person having all relevant background knowledge reasonably available to the parties because it does not seem plausible, in his opinion, that a reasonable person would take the provisions as capable of having that meaning.

[11] The licensor does not allow the buyer to buy directly from the manufacturer, but, through the trademark owner (licensor) who could as well act as the importer's buying agent

The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.

[12] The manufacturer is not allowed to produce competitive products (non licensed) without the consent of the licensor

The Revenue Commissioners do not refer to any part of the licence agreement in relation to this indicator.

[13] The goods produced are specific to the licensor (i.e. in their conceptualisation/design and with regard to the trade mark)

For the purposes of this indicator, the Revenue Commissioners refer to clause 8 and clause 12.2(a). Clause 8 relates to 'Approvals and Quality Control' and comprises clause 8.1 (concepts), clause 8.2 (pre-production samples), clause 8.3 (production samples), clause 8.4 (packaging, promotional materials and advertising), clause 8.5 (timing) and clause 8.6 (licensee responsibility for quality and safety of products). Clause 12 relates to 'Copyrights and Trademarks' and comprises clause 12.1 (definitions), clause 12.2 ([*Licensor B*] ownership of all rights in licensed material and trademarks), clause 12.3 (product technology ownership), clause 12.4 (design elements ownership) and clause 12.5 (further assurances).



The Revenue Commissioners state that ‘[*Licensor B*] exercise strict control over production from the concept design phase through to manufacturer of the approved finished goods. This control includes trade marks and packaging material also.’ The Revenue Commissioners refer to new materials created by a third-party being included in the definition of licensed material and to the Appellant obtaining a full assignment of rights to the new material from the third-party to [*Licensor B*].

[*Expert A*] stated that whether clause 8 and clause 12.2 has a bearing on the within indicator is a matter for the Appeal Commissioner. [*Expert A*] stated that the interpretation of clause 8 by the Revenue Commissioners appears selective and omits reference to the quality control aspects in those provisions.

[14] The characteristics of the goods and the technology employed are laid down by the licensor

For the purposes of this indicator, the Revenue Commissioners refer to clause 8 and state ‘[*Licensor B*] exercise strict control over the characteristics of the goods and production from the concept design phase through to manufacturer of the approved finished goods. This control includes trade marks and packaging material also.’ Clause 8 relates to ‘Approvals and Quality Control’ and comprises clause 8.1 (concepts), clause 8.2 (pre-production samples), clause 8.3 (production samples), clause 8.4 (packaging, promotional materials and advertising), clause 8.5 (timing) and clause 8.6 (licensee responsibility for quality and safety of products).

[*Expert A*] stated that the interpretation of clause 8 by the Revenue Commissioners appears selective and omits reference to the quality control aspects in those provisions.



Evidence – [Witness A]

38. The witness stated that she held the position of [redacted] in the Appellant since she joined the company in July 2013 until her recent appointment as [redacted] in the Legal Services section. Prior to joining the Appellant, the witness was a [redacted] in the Customs and International Trade section of [redacted] based in London.
39. The witness stated that the Appellant operates a centralised clearance customs system whereby the final declarations and customs duty payments for most goods imported by the Appellant are made in [redacted], even for those goods which are physically imported to another country. The witness stated that the Appellant made the operational decision to centralise customs operations in one Member State and that [redacted] was selected as it is the [redacted].
40. The witness stated that the Appellant does not manufacture any products and that all suppliers and factories are third parties. The witness stated that the supplier is the entity with whom the Appellant contracts to supply the products and the manufacture of the products may be carried out by the supplier or the supplier may use a factory, either related to the supplier or unrelated to the supplier. The witness stated that neither the supplier nor the manufacturer are related to the Appellant.
41. The witness stated that the business model of the Appellant was structured on having a buying office in Dublin for all [redacted] in the [redacted]. A buyer, who is an employee of the Appellant, will form a concept for a product based on market research and knowledge. A product may be designed internally in the Appellant or a buyer may work with a supplier on how to design a product. A factory will manufacture an ‘initial sample’ of the product and based on that sample the buyer will establish where that product will be manufactured. The selected manufacturer will manufacture a ‘production sample’ which is the final sample. At that point, the



- Appellant will raise a purchase order and the selected manufacturer will manufacture the products and ship the products to the country of destination.
42. The witness presented a [redacted] which included a [redacted] as a sample of a product incorporating the licensed material of [Licensor A]. The witness stated that the buyer develops a specification pack which details what the buyer wants the product to look like, for example, in the sample [redacted] the buyer would specify the [redacted]. The specification pack represents the buyer's concepts and ideas for the product and may include fabric swatches, colour swatches and different designs around [redacted]. The witness stated that a buyer may draw sketches and has the competence to operate computer-assisted design software, however, the buyer would not have the technical capacity with regard to the requirements for the factory. The witness stated that the creative elements of the design were produced by the Appellant.
43. The witness stated that given the volume and range of products within [Licensor A], the Appellant may use [Licensor A] designers to design the product but the design is based on the detailed specification pack provided by the Appellant. The witness stated that [Licensor A] has no creative input into the product and using [Licensor A] with regard to design was a technical function and an aspect of the relationship between the parties which evolved over the years as a convenience for the Appellant. The design is returned to the Appellant and the Appellant will select a manufacturer to manufacture an 'initial sample'. The witness stated that because of the volume and range of products within [Licensor A], [Licensor A] attend the premises of the Appellant to inspect the 'initial sample' rather than the samples being delivered to [Licensor A]. If [Licensor A] approves the 'initial sample' the Appellant proceeds with selecting a manufacturer and raising a purchase order. If [Licensor A] does not approve the 'initial sample' the product is redesigned, returned to the factory and the process begins again. The witness stated that the



- Appellant does not manufacture the category of products for which the hologram is required.
44. The witness stated that if a factory has a [redacted] in place this means that the Appellant is not required to submit a further [redacted] to [Licensor A] if that factory has been selected by the Appellant to manufacture the products. The factory may be manufacturing products for other retailers who also have an agreement with [Licensor A]. It is the responsibility of the Appellant to ensure that a factory has a [redacted]. The period of a [redacted] is three years. However, the witness stated that the Appellant undertakes an audit of factories every year to ensure compliance with the Code of Conduct operated by the Appellant. If a factory complies with the Code of Conduct operated by the Appellant, then [Licensor A] accepts the findings of the audit by the Appellant and extends the [redacted] for that factory because the Code of Conduct operated by the Appellant is no less than the Code of Conduct operated by [Licensor A]. The Code of Conduct operated by the Appellant includes a red/amber/green system whereby if the audit results in an ‘amber’ finding the factory will continue to manufacture but with monitoring by the Appellant and then be re-audited, however if the audit results in a ‘red’ finding the factory will cease manufacturing immediately.
45. The witness stated that the inclusion of a clause in the licence agreement on compliance with the Code of Conduct operated by [Licensor A] related to protecting the integrity of the brand; the values of [Licensor A] as a family-owned company particularly given the child orientated association with [Licensor A]. The witness stated that the inclusion of prohibited countries and persons in the licence agreement related to protecting reputation and brand, as neither [Licensor A] nor the Appellant would desire publicity from being involved with a country or person that has negative associations.



46. The witness stated that for the period from June 2014 to April 2016, the arrangement between the Appellant and [*Licensor A*] involved [*redacted*] items across [*redacted*] product categories. The witness stated that during the same period the Appellant had approximately 600 [*redacted*] in place. The witness stated that the licence agreement with [*Licensor A*] in 2015 did not materially change the operational relationship between the parties from the licence agreement in 2011 with regard to selecting and auditing a manufacturer.
47. The witness stated that the purchase documents, being the documents representing the engagement by the Appellant for the products, includes a purchase order which provides details of supplier, factory, destination, product details, quantity and cost. There is a purchase order number for the product category. There are also specific purchase order numbers relating to destinations, which are the numbers tracked through the other purchase documents. The other purchase documents include a packing list, a supplier invoice and a bill of lading (which describes the shipper/exporter as the factory). The purchase documents are generated by the Appellant. The witness stated that [*Licensor A*] are not involved in the purchase process.
48. The witness stated that the purpose of providing information to [*Licensor A*] on the ship date of a product was to ensure that a product was not placed in the [*redacted*] before [*Licensor A*] released the [*redacted*] associated with a [*redacted*]. The witness stated that she was not aware if the Appellant provided [*Licensor A*] with actual shipping notices. The witness stated that, as regards seconds or irregulars, the Appellant does not sell seconds or irregulars and would not place seconds or irregulars in the [*redacted*] to protect their reputation. The witness stated that [*Licensor A*] are not involved in pricing decisions by the Appellant or pricing arrangements between the Appellant and the manufacturer. [*Licensor A*] do not impose restrictions on quantities or customers.



49. The witness stated that, as regards reporting, the Appellant produces a quarterly report for [*Licensor A*] in the form of a spreadsheet created by the Appellant which includes details of gross quantity of sales, returns, net quantity of sales, price, net sales and net royalty. Thereafter, the Appellant receives invoices from [*Licensor A*] for royalties and discharges the invoices. The witness stated that her understanding was that the quarterly report represented the extent of the information received by [*Licensor A*] for the purposes of royalties.
50. The witness stated that [*Licensor B*] were less prescriptive than [*Licensor A*] in terms of manufacturers. The witness stated that [*Licensor B*] were satisfied to rely on a manufacturer complying with the Code of Conduct operated by the Appellant and the annual audit process undertaken by the Appellant. The witness stated that the agreement in 2015 did not change the operational relationship between the parties and that while the agreement may appear more onerous it was a template agreement used by [*Licensor B*] for licensees.
51. The witness stated that when making products incorporating [*Licensor B*] licensed material, the process was different to the process for [*Licensor A*]. The Appellant will create designs in conjunction with a factory. While [*Licensor B*] have the right to inspect a product sample, the [*Licensor B*] approach is more spot-checking of products. The witness stated that the purchase process and the purchase documents with regard to [*Licensor B*] was similar to [*Licensor A*]. The witness stated that the reporting process with regard to [*Licensor B*] was similar to [*Licensor A*]. The witness stated that [*Licensor B*] are not involved in the purchase process or pricing. [*Licensor B*] do not impose restrictions on quantities or customers. The witness stated that, similar to [*Licensor A*], the prohibited countries and persons in the licence agreement related to protecting reputation, as neither [*Licensor B*] nor the Appellant would desire publicity from being associated with a prohibited country or person.



52. Under cross-examination, the witness stated that under the licence agreement [*Licensor A*] had the right to monitor and inspect but that [*Licensor A*] did not do so. The witness stated that the Code of Conduct operated by [*Licensor A*] included a heading ‘Subcontracting’ which provided that a manufacturer would not use subcontractors for the manufacture of [*Licensor A*] products. The witness stated that the Code of Conduct operated by the Appellant did not have a similar heading, however, this restriction was provided for in the standard terms and conditions of the Appellant. The witness stated that the Code of Conduct operated by [*Licensor A*] included a heading ‘Publication’ which provided that the Code of Conduct be communicated to employees including prominent posting in a place readily accessible to employees. The witness stated that the Code of Conduct operated by the Appellant did not include a similar heading. The witness stated that, in certain respects, there are differences between the Codes of Conduct operated by [*Licensor A*] and the Appellant. The witness stated that the wording of the [*Licensor B*] [redacted] did place a restriction upon the manufacturer to only manufacture products for the Appellant and not sell the products for any other purpose. The witness stated that although the licence agreement provides for the [redacted], however, the witness understanding was that the letters are not used with regard to the Appellant.

Submissions on behalf of the Appellant

53. The Appellant submits that the customs value of imported goods is capable of being influenced by the relationship between the parties, the parties being [*Licensor A*]/[*Licensor B*], the Appellant and the seller (manufacturer). The issue for determination is whether the payment of royalties by the Appellant to [*Licensor A*] and [*Licensor B*] is directly or indirectly a ‘condition of sale’ of the goods being valued. The Appellant submits that, in circumstances where the Appellant’s relationship with the manufacturers do not require the payment of royalties by the Appellant to [*Licensor A*]/[*Licensor B*], the focus is on whether, as a result of the



licence agreements, [*Licensor A*]/[*Licensor B*] can manage the production and sale of the goods (beyond quality control) such that they can influence the price of the goods being sold by the manufacturer to the Appellant. The matter for consideration is whether [*Licensor A*]/[*Licensor B*] exercises direct or indirect control over the manufacturer.

54. The Appellant submits that an analysis of the licence agreements is required in order to determine whether the payment of royalties constitutes a condition of sale. The Appellant submits that, based on *GE Healthcare GmbH*, the consideration may be framed as whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee, which condition may be explicit or implicit; and based on Commentary 25.1 on Article 8(1)(c) of the World Customs Organisation Customs Valuation Agreement the consideration may be framed as whether the buyer is unable to purchase the imported goods without paying the royalty or licence fee.
55. The Appellant submits that the wording of Article 143 provides that a person is deemed to be related only if one of them directly or indirectly controls the other. The article does not provide for control of aspects of a business of another or control of certain entitlements of another. A person being associated in business with another person does not result in them being considered related for the purposes of Article 143. The Appellant submits that the words used in Article 143 are relevant in examining the licence agreements as the agreements may include restraints or directions addressed to another, however, these are limited and for a particular purpose.
56. The Appellant submits that Commentary N^o 11 refers to a combination of indicators which suggests that the consideration is not simply the presence of one indicator. Furthermore, the commentary refers to a combination of indicators ‘which go beyond purely quality control checks’ which is a recognition that a licensor can



include restraints or directions related to quality control. The Appellant submits that if the licence agreements have an explicit reference to ‘quality control’ then those provisions are disregarded in a consideration of the indicators. The Appellant submits that Commentary N° 11 includes reference to certain indicators carrying more weight and showing more strongly that the licensor exercises restraint or direction over the manufacturer. No guidance is offered within Commentary N° 11 with regard to which indicators carry more weight, however, the Appellant submits that certain indicators, for example indicator [1] which provides that the ‘licensor selects the manufacturer and specifies it for the buyer’ would be a strong indicator of ‘control’, whereas other indicators are more peripheral. The Appellant submits that Commentary N° 11 does not present as a tick box or quantitative exercise, in that, if a majority of the indicators are present this means control. The consideration is whether the licensor directly or indirectly controls the manufacturer having regard to the contractual relations and circumstances.

57. The Appellant submits that where [*Expert A*] does not state that an interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation, this means that the Appeal Commissioner, having been apprised of the principles of contractual interpretation of the law of England and Wales, views the licence agreements as a whole, considers the context of a provision, considers the natural meaning of the words used and what the provision would mean to a reasonable reader, in examining whether [*Licensor A*]/[*Licensor B*] directly or indirectly controls the manufacturer. Commentary N° 11 allows a restraint or direction to ensure quality control and clauses which are for the purposes of quality control are excluded from the analysis under Commentary N° 11.
58. The Appellant submits that intellectual property is a valuable asset and owners of intellectual property will strive to protect and maintain the intellectual property by setting out the requirements under which the intellectual property may be used in a limited way. In this appeal, the owners of the intellectual property are [*Licensor A*]



- and [*Licensor B*] and the contractual arrangements regarding the use of the intellectual property are between the Appellant and [*Licensor A*]/[*Licensor B*]. There is no contractual nexus between the manufacturer and [*Licensor A*] or [*Licensor B*]. The arrangements are between the Appellant and the manufacturer. The Appellant submits that, to the extent that [*Licensor A*] or [*Licensor B*] may provide for restraints or directions which bear on the manufacturer, this is related to [*Licensor A*] or [*Licensor B*] protecting and maintaining the value of the intellectual property and preserving their reputation. The Appellant submits that as the Appellant has ultimate responsibility under the licence agreements, the Appellant has the incentive to uphold the standard of the manufacturer.
59. The Appellant submits that the ‘propositions’ put forward by the Revenue Commissioners arise from a review of the licence agreements and are a summary of the interpretation of the Revenue Commissioners of the licence agreements. The Appellant submits that the analysis of the Revenue Commissioners is inappropriately focused on certain clauses without regard to the whole of the licence agreements, fails to have regard to the context of the clauses, is selective as to the language used and parses language in a manner which does not respect the entirety of a clause. The analysis is incomplete and/or inaccurate. The Appellant submits that the clauses relied on by the Revenue Commissioners fall into two broad categories: quality control and protection of intellectual property.
60. For example, the Appellant submits that clause 8.1 and 8.2 of the licence agreement with [*Licensor A*] does not refer to quality control because it is pre-production, but clause 8.3, dealing with production samples, includes a right of [*Licensor A*] to disapprove a production sample based on unacceptable quality of the artwork or the product as manufactured. The Appellant submits that clause 9.3 refers to the Appellant covenanting, warranting and representing ‘that each product and each component of each product distributed hereunder shall be of good quality and free of defects in design, material and workmanship’. Clause 9.3 is under clause 9 which



relates to ‘Manufacturing/Sourcing’. The Appellant submits that the focus of clause 8 and clause 9 is quality control.

61. The Appellant submits that clause 8 of the licence agreement with [*Licensor B*], which is headed ‘Approvals and Quality Control’, explicitly refers to ‘for the purposes of quality control’ in relation to concept, pre-production, production and packaging/promotional materials/advertising. The Appellant submits that clause 9 of the licence agreement, which is headed ‘Manufacturing/Sourcing’, explicitly refers to ‘for the purposes of quality control’ in the context of the Appellant assigning the right to manufacture the products to a third-party manufacturer and requiring the approved manufacturer to sign the [redacted] in schedule 7. Therefore, the Appellant submits, quality control frames the engagement with a third-party manufacturer and the content of the letter in schedule 7 must be viewed in that context.
62. The Appellant submits that clause 9 of the licence agreement with [*Licensor A*] relates to protection of intellectual property and not exercising control over the manufacturer. The clause makes the Appellant responsible for the manufacturer and for ensuring that the manufacturer complies with the Code of Conduct, meaning that [*Licensor A*] are ensuring that it is the Appellant who is held to account to [*Licensor A*] at all times.
63. With regard to indicators [1] to [14] in Commentary N^o 11, and having regard to the evidence of [*Expert A*], the Appellant submits:

[*Licensor A*]

[1] [*Licensor A*] does not select a manufacturer nor does it specify the manufacturer for the Appellant. The Revenue Commissioners rely on clause 5.1 and clause 9.2. [*Licensor A*] are seeking to ensure that the manufacturer of the products meets certain standards.



[*Expert A*] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[2] There is no direct contract of manufacture between [*Licensor A*] and the manufacturer. The Revenue Commissioners inappropriately focus on the quality control and ethical standards imposed through clause 9 and seeks to suggest that the inclusion of such provisions constitute a form of control exercised by [*Licensor A*]. [*Expert A*] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[3] [*Licensor A*] does not exercise actual control over the manufacturer, either directly or indirectly, whether as to the centres of production or methods of production. It is important that the language is ‘actual control’ rather than simply ‘control’. The Revenue Commissioners rely on clause 9.2, clause 9.3 and clause 17.3. [*Licensor A*] are prohibiting contractual relations with certain specified countries and parties but are in no way specifying or limiting the scope of any manufacturer which the Appellant may appoint beyond the specified prohibitions. Clause 17.3 relates to the position when the licence agreement terminates and reflects [*Licensor A*]’s need to ensure that a manufacturer does not retain its intellectual property and inappropriately continue to use same.

[4] [*Licensor A*] does not exercise actual direct or indirect control over the logistics and the dispatch of the goods to the Appellant. The Revenue Commissioners rely on clause 6.4. This clause is directed to the provision of information and not control. In essence, [*Licensor A*] require the Appellant to give written notice of the first shipment date for each product to inform [*Licensor A*] when goods are going into the [redacted] and does not constitute any form of control over logistics. [*Expert A*] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[5] [*Licensor A*] does not nominate or restrict who the manufacturer can sell the products to. The Revenue Commissioners rely on clause 8.3. This clause is directed at



restricting the use of seconds or irregulars which is related to the quality of the product. [Expert A] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[6] [Licensor A] does not set conditions relating to the price at which the manufacturer sells the goods to the Appellant or the price at which the Appellant resells the goods. The Revenue Commissioners rely on clause 24. The Revenue Commissioners are selective in not referring to clause 5.5 which states that the Appellant has the freedom to sell the products at such prices as the Appellant shall determine and to the explicit reference in clause 24 to the absolute discretion of the Appellant to sell the products at such prices as the Appellant may determine. [Expert A] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[7] [Licensor A] does not have the right to examine the ‘accounting records’ of the manufacturer or the Appellant. The Revenue Commissioners rely on clause 9.2, clause 7.2.2 and clause 12. There is no definition of ‘accounting records’. The Appellant submits that this refers to accurate and up-to-date records of all dealings which allow its financial position to be measured with reasonable accuracy. [Licensor A] are entitled to engage in monitoring activities for the purpose of confirming compliance with ethical standards. [Licensor A] are entitled to access the point-of-sale information system of the Appellant but only in relation to [Licensor A] products. [Licensor A] are entitled to access records for the purpose of verifying the accuracy of statements from the Appellant. While [Licensor A] are entitled to access specified records in relation to [Licensor A] products and for specified purposes, this does not mean [Licensor A] have the right to examine the ‘accounting records’ of the Appellant.

[8] [Licensor A] does not designate the methods of production to be used. The Revenue Commissioners rely on clause 8.1 and clause 8.2. Clause 8.1 and 8.2 relate to ‘concepts’ and ‘pre-production’ and the Appellant submits the purpose of the provisions is quality control. This purpose can be discerned when read with clause 8.3 which relates to



‘production samples’ and includes an explicit reference to quality. As regards design, the evidence of [Witness A] was that [Licensor A] has no creative input into the product and using [Licensor A] with regard to design is a technical function and an aspect of the relationship with [Licensor A] which evolved over the years as a matter of convenience.

[9] [Licensor A] does not designate or restrict the sourcing of materials or components. The Revenue Commissioners rely on clause 3 and clause 8.4.2. [Licensor A] requires the Appellant to use certain [redacted] on certain products from an authorised supplier. The Appellant submits that, while [Licensor A] designates a particular component, the purpose of this provision is protection of intellectual property. The evidence of [Witness A] was that the Appellant does not manufacture the category of products for which the hologram is required. The licence agreements are templates used in relation to all retailers and not all provisions apply to the Appellant.

[10] [Licensor A] does not restrict the quantities that the manufacturer may produce. The Revenue Commissioners rely on clause 17.2 and clause 24. Clause 17.2 deals with how matters are to be dealt with after the agreement has been terminated, it deals with when rights to manufacture come to an end. [Expert A] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation. Clause 24 relates to the preservation of goodwill and does not restrict the quantities the manufacturer may produce but rather the Appellant acknowledges that it will not, *inter alia*, produce in a manner or environment or at quantity levels significantly above prior practices as to suggest that the products are second-rate, low quality, low value, unwanted or counterfeit products.

[11] The Revenue Commissioners appear to accept that this indicator does not apply.

[12] The Revenue Commissioners appear to accept that this indicator does not apply.



[13] The Appellant accepts that the goods produced (when they incorporate [*Licensor A*] licensed material) are specific to [*Licensor A*] in their conceptualisation/design and with regard to the trademark. The Appellant submits that this is to be expected in the context of a licence agreement which permits the manufacture of products the subject of a trademark.

[14] [*Licensor A*] does not lay down the characteristics of the goods and the technology employed. The Revenue Commissioners rely on clause 8.1. Clause 8.1, clause 8.2 and clause 8.3 refer to approvals from [*Licensor A*] for concepts, pre-production samples and production samples. These relate to ‘production’ and not ‘technology employed’. The Appellant submits that the purpose of the provisions is quality control.

[*Licensor B*]

[1] [*Licensor B*] does not select a manufacturer nor does it specify the manufacturer for the Appellant. The Revenue Commissioners accept that [*Licensor B*] does not select the manufacturer, however, the Revenue Commissioners rely on clause 9.1 and schedule 7. The Appellant submits that the Revenue Commissioners failed to have regard to the wording in clause 9.1 which makes clear the purpose of that provision as being ‘for the purpose of quality control and improvement of the manufacture of the products’.

[2] There is no direct contract of manufacture between [*Licensor B*] and the manufacturer. The Revenue Commissioners rely on clause 9.1 and schedule 7. Clause 9.1 is restricted to a manufacturer who is manufacturing the products under assignment of the Appellant’s right to manufacture and not manufacturers that do not come within that description. In relation to schedule 7 and the ‘[redacted]’, it derives from clause 9.1 which is expressly ‘for the purpose of quality control’; it binds the manufacturer to the relevant provisions of the licence agreement and does not constitute a contract of manufacture; and the letter makes clear that the manufacturer is to adhere to certain child labour and other laws. The Revenue Commissioners rely on the ‘[redacted]’ being directly between [*Licensor B*] and the manufacturer, however, the Appellant submits the Revenue



Commissioners failed to have regard to the subject matter of the letter, being the licence agreement.

[3] [Licensor B] does not exercise actual control either directly or indirectly over the manufacture (as regards centres of production and/or methods of production). The Revenue Commissioners rely on clause 2.2, clause 9.1 and clause 17.1. Clause 2.2 requires adherence to [Licensor B] [redacted] guidelines as outlined in schedule 4. Schedule 4 provides for business to be conducted according to standards of integrity and ethics, which are described in the context of employment; health and safety and environment; and intellectual property and ethics. Schedule 4 states that the International Labor Organisation (ILO) Core Labor Conventions, as established by the tripartite United Nations affiliated agency, served as the foundation upon which much of the guidelines are based. The Appellant submits that the purpose of this provision is protection of intellectual property. Clause 9.1 is restricted to a manufacturer who is manufacturing products under assignment of the Appellant's right to manufacture. The Appellant submits that the wording in clause 9.1 makes clear the purpose of that provision as being 'for the purpose of quality control and improvement of the manufacture of the products'. Clause 17.1 obliges the destruction of any moulds, plates, labels or other items used to reproduce the licensed material and return of artwork on the expiration or termination of the agreement. The Appellant submits that as clause 17.1 relates to expiration or termination it is not relevant. To the extent that the Revenue Commissioners rely on the guarantee of obligations in clause 9.1, [Expert A] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[4] The Revenue Commissioners appear to accept that this indicator does not apply.

[5] The Revenue Commissioners rely on schedule 7. In relation to schedule 7 and the '[redacted]', it derives from clause 9.1 which is expressly 'for the purpose of quality control'. The letter states that the manufacturer is required to sell 'the products' (defined in clause 2.1) solely to the Appellant. While the letter includes a restriction, it is confined



to ‘the products’ and does not seek to go beyond same to any other products which the manufacturer may produce. The Appellant submits that the limitation is to be expected in the context of goods bearing a trademark.

[6] The Revenue Commissioners appear to accept that this indicator does not apply.

[7] The Revenue Commissioners rely on clause 9.1, clause 13 and schedule 7. Clause 9.1 is restricted to a manufacturer who is manufacturing the products under assignment of the Appellant’s right to manufacture. The Appellant submits that the wording in clause 9.1 makes clear the purpose of that provision as being ‘for the purpose of quality control and improvement of the manufacture of the products’. In relation to schedule 7 and the ‘[redacted]’, the letter provides that [*Licensor B*] is entitled to examine the manufacturer’s books of account, records and premises but in respect of ‘the manufacture of the products’. The Appellant submits that the letter does not purport to be a general entitlement to examine accounting records. Clause 13 obliges the Appellant to keep accurate records of all transactions relating to the agreement. The Appellant submits that this does not go as far as accounting records. The agreement provides that [*Licensor B*] has the right to examine all such records for the purpose of verifying the accuracy of the statements made by the Appellant.

[8] The Revenue Commissioners accept that [*Licensor B*] does not provide designs. The Revenue Commissioners rely on clause 8 and clause 10 in relation to methods of production. Clause 8 relates to approval from [*Licensor B*] on concepts, pre-production samples, production samples and packaging/promotional materials/advertising. The Appellant submits that the wording in clause 8 makes clear that each provision is ‘for the purpose of quality control’. Clause 10 relates to labels and the information to be included on labels and packaging so that the public can identify the supplier of the product. The Appellant submits that, at best, this relates to a limited aspect of production.



[9] [*Licensor B*] does not designate or restrict the sourcing of materials or components. The Revenue Commissioners rely on clause 9.1. Clause 9.1 relates to a prohibition on manufacturers of finished products in certain specified countries. [*Expert A*] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation.

[10] [*Licensor B*] does not restrict the quantities that the manufacturer may produce. The Revenue Commissioners rely on clause 4.3 and clause 17.1. Clause 4.3 relates to information being given to [*Licensor B*] on buying plans and sell-through projections. The Appellant submits that this is an information provision. To the extent that the Revenue Commissioners rely on clause 4.3, [*Expert A*] stated that the interpretation of the Revenue Commissioners offends against the requirements of contractual interpretation. Clause 17.1 relates to the Appellant agreeing to cease the manufacture of the products on the expiration or termination of the agreement. It also provides that, during the term of the agreement, quantities manufactured shall be consistent with anticipated demand so as not to result in an excessive inventory build-up. The Appellant submits that as clause 17.1 relates to expiration or termination it is not relevant as it relates to when the right to manufacture ends rather than the quantities that the manufacturer can produce.

[11] The Revenue Commissioners appear to accept that this indicator does not apply.

[12] The Revenue Commissioners appear to accept that this indicator does not apply.

[13] The Revenue Commissioners rely on clause 8 and clause 12.2. Clause 8 relates to approval from [*Licensor B*] on concepts, pre-production samples, production samples and packaging/promotional materials/advertising. The Appellant submits that the Revenue Commissioners failed to have regard to the wording in clause 8 which makes clear the purpose of that provision as being ‘for the purpose of quality control’. Clause 12.2 relates to [*Licensor B*] ownership of all rights in the licensed material and the assignment of rights,



titles and interests in the licensed material and new material to [*Licensor B*]. The Appellant submits that this is an ownership of rights provision.

[14] The Revenue Commissioners rely on clause 8. Clause 8 relates to approval from [*Licensor B*] on concepts, pre-production samples, production samples and packaging/promotional materials/advertising. The Appellant submits that the Revenue Commissioners are selective in their interpretation of clause 8 and fail to have regard to the wording which makes clear the purpose of that provision as being ‘for the purpose of quality control’.

64. The Appellant submits that the consideration is whether there is control over the manufacturer through the lens of the licence agreements. The Appellant submits that the cumulative effect is that neither [*Licensor A*] nor [*Licensor B*] exercises direct or indirect control over the manufacturer. Consequently, the payment of royalties by the Appellant to [*Licensor A*] and [*Licensor B*] does not constitute a ‘condition of sale’ and the royalties should not be added to the price actually paid or payable in determining the customs value of the imported goods.

Submissions on behalf of the Revenue Commissioners

65. The Revenue Commissioners submit that the consideration is whether there is direct or indirect control by [*Licensor A*]/[*Licensor B*] over the manufacturer based in the third country.

66. The Revenue Commissioners submit that the Appellant is entitled to engage a manufacturer, authorised by [*Licensor A*]/[*Licensor B*] and subject to restraints and directions imposed by [*Licensor A*]/[*Licensor B*], on the explicit agreement that [*Licensor A*]/[*Licensor B*] are paid royalties. The Revenue Commissioners submit that the Appellant is not permitted to design, create, manufacture or source products without the payment of royalties. The Appellant is not free to obtain products from



- manufacturers without the payment of royalties or from manufacturers that have not been authorised by [*Licensor A*]/[*Licensor B*]. The transaction between the Appellant and the manufacturer cannot take place without the payment of royalties to [*Licensor A*]/[*Licensor B*]. The Revenue Commissioners submit that there were no tailored agreements between the Appellant and the manufacturers, the sales documentation was standard, proforma and generic in nature.
67. The Revenue Commissioners submit that whether or not the licence agreements are ‘non-exclusive’ is irrelevant and has no bearing on the issue for determination. The Revenue Commissioners acknowledge that certain approvals were required for quality control purposes, however, it is submitted that the level of control provided for in the licence agreements goes beyond quality control such that [*Licensor A*]/[*Licensor B*] exercises control over the manufacturer and how the manufacturer operates in respect of the products.
68. The Revenue Commissioners submit that [*Licensor A*]/[*Licensor B*] restricts the quantities that the manufacturer may produce and to whom the manufacturer may supply as the licence agreements provide that on expiration or termination the Appellant shall neither manufacture, produce nor cause products to be manufactured, thereby making clear that the Appellant’s entitlement to manufacture products is contingent upon [*Licensor A*]/[*Licensor B*] allowing manufacturing to take place and only for the duration of the licence agreements. [*Licensor A*]/[*Licensor B*] can effectively halt the sale of products between the Appellant and the manufacturer by withdrawing the authorisation of the manufacturer to manufacture the products. [*Licensor A*]/[*Licensor B*] can effectively halt the design, creation, manufacturing and sourcing of products between the Appellant and the manufacturer by withdrawing from the licence agreements.



69. In the ‘Report on Third Party Licence Agreements’ prepared by the Revenue Commissioners there are statements numbered 1 to 29 under the heading ‘[Licensor A]’ and statements numbered 1 to 21 under the hearing ‘[Licensor B]’. In the outline of arguments on behalf of the Revenue Commissioners, the statements are reproduced with a paragraph referring to the statements as observations from a review of the licence agreements. The outline of arguments state that, in the context of the observations, it is important to consider, when the licence agreements are construed as a whole, whether [Licensor A]/[Licensor B] exercises direct or indirect control over the manufacturer, resulting in a conclusion that the parties are related under Article 143, such that the royalty payments constitutes a condition of sale. The outline of arguments state that the combination of indicators, as outlined in the statements and in the comparison between Commentary N° 11 and the licence agreements produced by the Revenue Commissioner, satisfies the control test in Commentary N° 11. The Revenue Commissioners submit that the statements are indicators, separate and additional to the indicators in the comparison produced by the Revenue Commissioners on Commentary N° 11, which are all relevant in the consideration of whether the royalty payments should be included in the customs value. The Revenue Commissioners submit that, in considering the observations numbered 1 to 29 for [Licensor A] and 1 to 21 for [Licensor B], regard should be had to the evidence of [Expert A] on those observations.
70. With regard to observations number 1 to 29 for [Licensor A], [Expert A] comments on number 4, 5, 8, 9, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29. With regard to number 9, 13 and 14, [Expert A] comments that the provisions relied on are directed at the Appellant, however, the provisions may affect third-party manufacturers through the Appellant. With regard to number 20, [Expert A] comments that the provision relied on directs the Appellant to cause manufacturers to transfer physical possession of items used to reproduce the licensed material. With regard to numbers 22, 23, 24, 25 and 26, [Expert A] comments that in respect of the totality of the goods being licensed, it is only [redacted] which [Licensor A]



- require to be sourced from a supplier that is stipulated by [*Licensor A*], and that all other aspects are not subject to source restrictions with the Appellant free to obtain them from manufacturers without restriction. [*Expert A*] comments that the [redacted] appear to be a device used to monitor the integrity of royalty payments. With regard to the remaining observations, [*Expert A*] comments include that the provisions relied on are directed at, or bear upon, the Appellant; or the Appellant remains fully responsible for obligations; or there is no provision in the agreement; or the provisions must be viewed in context.
71. With regard to observations number 1 to 21 for [*Licensor B*], [*Expert A*] comments on number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20. With regard to number 11 and 17, [*Expert A*] comments that the provision relied on may affect third-party manufacturers through the Appellant. With regard to number 4, [*Expert A*] comments that the observation is stated too broadly and the restriction, in the provisions relied on, appears to be more limited. With regard to number 5, [*Expert A*] comments that it is not all ‘accounting records’ that [*Licensor A*] is entitled to inspect but certain accounting records and for specified purposes. With regard to the remaining observations, [*Expert A*] comments include that the provisions relied on do not on their face relate to all manufacturers but to manufacturers who are manufacturing as assignees of the Appellant’s right to manufacture; or there is no provision in the agreement.
72. The Revenue Commissioners submit that it is understandable that large conglomerates such as [*Licensor A*] and [*Licensor B*] will take whatever steps are deemed necessary to maintain the integrity and value of their intellectual property, however, the licence agreements go beyond quality control. Quality control would be understood as being at a product level. The Revenue Commissioners submit that, in the context of [*Licensor A*]/[*Licensor B*], the control is predominantly indirect in nature. The Revenue Commissioners submit that the control exercised by [*Licensor A*]/[*Licensor B*] over the manufacturer, which is imposed through the Appellant, is



to safeguard the intellectual property, and goes beyond quality control, even though maintaining quality will go towards maintaining the brand and value of the intellectual property. The Revenue Commissioners submit that the safeguards imposed by [*Licensor A*]/[*Licensor B*], with regard to Codes of Conduct and other obligations, are to maintain the value of those companies by safeguarding the valuable asset that is the intellectual property.

73. The Revenue Commissioners submit that the evidence of [*Witness A*] demonstrated that the person in control of design and specification of the factory requirements was [*Licensor A*] and that, rather than being disconnected with the process, was being driven by [*Licensor A*] who were involved in the decision-making. The control over the manufacturer may be indirectly through the Appellant, however, the evidence demonstrated that there is a high degree of control brought to bear by [*Licensor A*] on the operation of the licence agreements. The Revenue Commissioners submit that the level of control exercised by [*Licensor A*]/[*Licensor B*] was not surprising given the significant sums of money involved.
74. The Revenue Commissioners submit that, as elucidated by [*Expert A*], in construing the licence agreements regard must be had to the business purpose, the overall picture of the agreements. The Revenue Commissioners submit that the main thrust of the licence agreements is safeguarding the brand. The obligations imposed by the licence agreements go beyond quality control. The Revenue Commissioners refer to, as examples, [*Licensor A*] specifying the tags and packaging, the monitoring activities over the manufacturer, the restriction on the manufacturer using licensed material for any unauthorised purposes, the requirement for the manufacturer to transfer items used to reproduce the licensed material on termination, and the right to inspect accounts. The Revenue Commissioners submit that the prohibited conduct in the licence agreement includes production, which has a bearing, indirectly, over the manufacturer. [*Licensor A*]/[*Licensor B*] are exerting control over the manufacturer. The Revenue Commissioners submit that where the



licence agreements explicitly refer to ‘quality control’ it gives rise to a strong suggestion that the provision relates to quality control, however, the provision should be examined in context and having regard to overall business purpose or common sense.

75. The Revenue Commissioners submit that while both parties can pinpoint interpretations of the licence agreements which may suit their respective submissions, regard must be had to the overall agreements. The Revenue Commissioners submit that ‘control’ ‘restraint’ ‘direction’ are words of similar effect. The Revenue Commissioners submit that each case will depend on their own facts and agreements and that consideration can be given to any aspect that may have a bearing on whether there is direct or indirect control. Commentary No 11 is non-exhaustive as regards the factors to be considered. It is a balancing exercise. The Revenue Commissioners submit that the control exercised by [*Licensor A*]/[*Licensor B*] over the manufacturers goes beyond quality control checks. The Revenue Commissioners submit that the payment of royalties by the Appellant to [*Licensor A*] and [*Licensor B*] constitutes a ‘condition of sale’ and the royalties should be added to the price actually paid or payable in determining the customs value of the imported goods.

Analysis and Findings

76. The parties agree that the issue for determination is whether the payment of royalties by the Appellant to [*Licensor A*] and [*Licensor B*] is directly or indirectly a ‘condition of sale’ of the goods being valued. In the context of the within appeal, and having regard to the legislative framework, this involves a consideration of whether the seller (the manufacturer) or a person related to the seller (being [*Licensor A*]/[*Licensor B*]) requires the Appellant to make the payment of royalties; for [*Licensor A*]/[*Licensor B*] to be related to the manufacturer this involves a consideration of whether [*Licensor A*]/[*Licensor B*] are deemed to be related to the



manufacturer by virtue of [*Licensor A*]/[*Licensor B*] directly or indirectly controlling the manufacturer, meaning deemed control if [*Licensor A*]/[*Licensor B*] are legally or operationally in a position to exercise restraint or direction over the manufacturer. If the payment of royalties by the Appellant to [*Licensor A*] and [*Licensor B*] constitutes a ‘condition of sale’, then the royalties are added to the price actually paid or payable for the goods imported by the Appellant in determining the customs value.

77. Article 32(1)(c) of the Customs Code and Article 157(2) of the Implementing Provisions refer to ‘condition of sale’. However, neither Article 32(1)(c) nor Article 157(2) specify what is meant by ‘condition of sale’ of the goods being valued. Article 157(2), Article 143(1) and Article 143(2) use the word ‘only’ and Article 160 uses the word ‘unless’. These words must be given meaning. As referred to in *GE Healthcare GmbH*, the Customs Code Committee (Customs Valuation Section) in Commentary N^o 3 expresses the view that the consideration is whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee, which condition may be explicit or implicit. The Customs Code Committee (Customs Valuation Section) in Commentary N^o 11 expresses the view that the consideration of whether the payment could be an implicit condition of sale is if the buyer was not able to buy the goods from the seller and the seller would not be prepared to sell the goods to the buyer without the buyer paying the royalty fee to the licensor. Commentary 25.1 on Article 8(1)(c) of the World Customs Organisation Customs Valuation Agreement expresses the view that the consideration is whether the buyer is unable to purchase the imported goods without paying the royalty or licence fee.
78. In determining whether the payment of a royalty or licence fee constitutes a ‘condition of sale’, the particular facts and circumstances pertaining to an Appellant, including the contractual relations between parties evidenced in documents such as licence agreements and sales documentation, are considered.



79. In this appeal, the licence agreements are governed by the law of England and Wales. As described by the Supreme Court in *Walsh -v- National Irish Bank Limited* [2013] 1 IR 294, foreign law is treated as a matter of fact to be established by sworn evidence. Clarke J. stated that an affidavit from an appropriately qualified lawyer is the normal way in which evidence as to foreign law is established and a party wishing to dispute that evidence is required to put forward its own contrary evidence from a likewise suitably qualified lawyer. As the licence agreements with [Licensor A] and [Licensor B] stipulate that the law to be applied is the law of England and Wales, therefore, Irish law recognises the law of the foreign jurisdiction as being applicable to the licence agreements rather than Irish law. As stated in *Walsh*, it is desirable that I have available an appropriate level of assurance to determine, with confidence, the true position of the law of the relevant foreign jurisdiction. The Appellant presented evidence from [Expert A] Q.C., a suitably qualified lawyer in the law of England and Wales. [Expert A] gave sworn oral evidence and presented a written opinion, which he adopted as his evidence. The Revenue Commissioners did not present a counterview as to the relevant foreign law and no expert witness was put forward. The parties differed as to the nature and extent of the evidence that should be offered by [Expert A]. In that regard, the Appellant relied on the judgment in *Walsh*. The Revenue Commissioners did not refer to case law.
80. I accept the evidence of [Expert A] that the applicable principles of contractual interpretation of the law of England and Wales is to ascertain the meaning of the words used by applying an objective and contextual approach, and that one must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). I accept the evidence of [Expert A] on the application of the relevant legal principles to the



licence agreements. I have carefully read the licence agreements and considered the whole of the licence agreements and the context of the words therein, having due regard to the principles of contractual interpretation of the law of England and Wales. In the course of the analysis of the licence agreements above, I refer to headings as a matter of shorthand and convenience, and, as stipulated in the licence agreements, no substantive meaning or effect has been given to the headings.

81. The commentaries from the Customs Code Committee are a valid aid to the interpretation of the Customs Code. Commentary N^o 11 serves as an interpretation tool in construing ‘condition of sale’ and the indicators to be analysed in considering ‘control’. The commentary provides a list of fourteen indicators. The following statements in the commentary are relevant when considering the indicators – that a combination of the indicators which go beyond purely quality control checks by the licensor may demonstrate a relationship of control; that, in individual cases, other kinds of indicators may also exist; and that certain indicators carry more weight and show more strongly than other indicators that the licensor exercises restraint or direction over the manufacturer. There are no uniform descriptions used in the commentaries, which can complicate the analysis. For example, there is buyer, importer, seller, supplier, manufacturer, and producer; or control, actual control either directly or indirectly, and actual direct or indirect control.

82. In ease of considering the indicators in Commentary N^o 11, they may be grouped in terms of indicators relating to the manufacturer (indicator 1, 2, 5 and 12), to manufacturing/production (indicator 3, 8, 9, 13 and 14), to sales of products (indicator 4, 6, 10, 11) and to reporting (indicator 7). In considering the indicators in Commentary N^o 11, and the Revenue Commissioners interpretation of the licence agreements in that context, I have carefully read the indicators and the clauses referred to by the Revenue Commissioners, in considering whether the



clauses referred to correlate to the wording in the indicator, and whether, to a reasonable reader, the clauses have a bearing on the indicator.

[Licensor A]

83. In submitting that [Licensor A] exercises control over the manufacturer by reference to the indicators, the Revenue Commissioners rely on clause 8 and clause 9 in the licence agreements with regard to the manufacturer; clause 3, clause 8, clause 9 and clause 17 with regard to manufacturing/production; clause 6, clause 17 and clause 24 with regard to sales of products; and clause 7, clause 9 and clause 12 with regard to reporting.
84. Having considered the whole of the licence agreements and the context of the words therein, having regard to the principles of contractual interpretation of the law of England and Wales established by [Expert A] and the application of those principles to the licence agreements, and having regard to the facts, materials, evidence and submissions of both parties, I determine that while the licence agreements may bear upon the manufacturer, [Licensor A] are not legally or operationally in a position to exercise restraint or direction over the manufacturer to such an extent that [Licensor A] directly or indirectly controls the manufacturer. The Appellant is the contracting party with [Licensor A] and has the responsibility under the licence agreements with regard to the manufacturer making the products. The products are manufactured for the Appellant and sold by the Appellant in their [redacted]. [Licensor A] seeks to protect the intellectual property which is being incorporated into the products. The extent that restraints or directions in the licence agreements may bear upon the manufacturer, these are framed within specified purposes, including quality control, verification, compliance with standards or providing information, and, on balance, the cumulative effect does not equate to [Licensor A] directly or indirectly controlling the manufacturer.



85. The contracting parties to the licence agreements are [*Licensor A*] and the Appellant. The material licensed under the agreements comprise creative works and trademarks. [*Licensor A*] grants the Appellant a non-exclusive licence to use the licensed material to design, create, manufacture or source, and sell products incorporating the licensed material to consumers. [*Expert A*] described this as the crux of the licence agreement in terms of providing a licence to use intellectual property in products. Royalties are only payable by the Appellant to [*Licensor A*] following sales of products. The royalties are calculated on net retail sales, which is the quantity of products actually sold multiplied by the actual price paid for the products less returns and applicable sales taxes. The Appellant sells the products at prices determined by the Appellant.
86. The licence agreements provide that the rights and powers retained by [*Licensor A*], and the obligations and limitations on the Appellant, under the licence agreements are necessary to protect the licensed material, including all intellectual property rights associated therewith, and, specifically, to conserve the goodwill and good name of the [*Licensor A*] entities. The licence agreements refer to the Appellant's duty to use the licensed material to promote the continuing goodwill thereof and to cooperate with [*Licensor A*] to preserve the goodwill and reputation of [*Licensor A*] and the licensed material. The licence agreements provide that [*Licensor A*] will suffer material and irreparable damage if the Appellant breaches or threatens to breach the agreement.
87. With regard to manufacturers and manufacturing/production, the licence agreements oblige compliance with a [*redacted*] and the submission of a [*redacted*] for [*Licensor A*] to determine whether a manufacturer will be authorised to make products. The Appellant is responsible for ensuring a completed [*redacted*] is provided to [*Licensor A*] and that manufacturing only commences on receiving a [*redacted*] signed by [*Licensor A*]. The Appellant is responsible for ensuring that a manufacturer complies with a Code of Conduct and for implementing monitoring



activities over a manufacturer to ensure compliance with the Code. [*Licensor A*] has the right to engage in monitoring activities of the manufacturer to ensure compliance with the Code of Conduct. The licence agreements provide that egregious violations, such as child labour, result in an immediate termination of authorisation to use a manufacturer. The Appellant is prohibited from manufacturing products in specified countries and by specified persons. [*Licensor A*] rely on the commitment given by the Appellant that the products will be good quality and that approvals given by [*Licensor A*] in no way lessen or mitigate the Appellant's full responsibility for the quality and safety of the products. [*Licensor A*] has the right to inspect testing, manufacturing and quality control records and procedures and to test products for compliance with product safety and other applicable laws. The evidence of [*Witness A*] was that [*Licensor A*] accepts the findings of the audits undertaken by the Appellant in renewing or extending a [*redacted*]. The witness stated that a manufacturer selected by the Appellant may have an existing [*redacted*], as the manufacturer may be manufacturing products for other retailers who also have an agreement with [*Licensor A*]. The witness stated that during the period under appeal the Appellant had approximately 600 [*redacted*] in place. The witness stated that neither [*Licensor A*] nor the Appellant would desire publicity from being associated with a prohibited country or person for reasons of protecting their reputation and brands.

88. The licence agreements oblige the Appellant to neither manufacture products nor cause products to be manufactured from the expiration or termination of the agreement. The end date of the agreements is the date by which products are no longer to be manufactured, distributed or sold. The agreements oblige the Appellant to transfer title of specified items used to reproduce the licensed material to [*Licensor A*] and obliges the Appellant to destroy or transfer physical possession of the specified items from the Appellant and the Appellant's manufacturers to [*Licensor A*] on expiration or termination. These obligations relate to expiration or termination of the licence agreements.



89. With regard to approval procedures, the licence agreements oblige the Appellant to submit concepts, pre-production samples, production samples and packaging/promotional materials/advertising to [Licensor A] for written approval from [Licensor A]. With regard to production samples, there is an explicit reference to quality. The agreements also impose obligations in respect of products for which [Licensor A] mandates the use of [redacted]. The Appellant is responsible for complying with the approval procedures. The evidence of [Witness A] was that the Appellant develops the concept/idea and specification pack for the product. [Licensor A] are involved in a technical capacity in developing the technical requirements for the manufacturer, however, [Licensor A] has no creative input into the product. The witness stated that the Appellant does not manufacture the category of product for which the hologram is required.
90. With regard to sales of products, [Licensor A] may request notice of the first shipping date of products. The licence agreements oblige the Appellant to refrain from conduct which includes the production, marketing, advertising, sale or use of any products at quantity levels significantly above prior practices or at prices below cost or below prior practices, as to suggest that the products are second-rate, low quality, low value, unwanted or counterfeit products. This does not restrict the Appellant's freedom to sell the products at such prices as the Appellant determines. The evidence of [Witness A] was that [Licensor A] are not involved in pricing decisions by the Appellant or pricing arrangements between the Appellant and the manufacturer. The witness stated that [Licensor A] does not impose restrictions on quantities or customers. The sales documentation for products comprise a purchase order, packing list, supplier invoice and bill of lading. The purchase order refers to the terms and conditions of the Appellant.
91. With regard to reporting, the licence agreements oblige the Appellant to report to [Licensor A] on a royalty statement form. [Licensor A] has the right to access the



point-of-sale information system of the Appellant but limited to [*Licensor A*] products. [*Licensor A*] obliges the Appellant to keep accurate records of all transactions relating to the agreement and permits [*Licensor A*] to examine, copy and make extracts from records and to inspect physical stocks of products which [*Licensor A*] reasonably deems appropriate for the purpose of verifying the accuracy of the Appellant's statements or to confirm the Appellant's performance. With regard to [redacted], [*Licensor A*] has the right to examine the records of sales and shipments against the amount of [redacted] purchased from [*Licensor A*] or its authorised supplier. If the number of products sold to consumers exceeds the [redacted] purchased, a mechanism is provided to fix an amount of damages by reference to the royalties. The evidence of [*Witness A*] was that reporting involved a quarterly report provided to [*Licensor A*] in the form of a spreadsheet created by the Appellant. The witness stated that the Appellant does not manufacture the category of product for which the hologram is required.

92. In all the circumstances, I find that [*Licensor A*] does not directly or indirectly control the manufacturer. Consequently, [*Licensor A*] and the manufacturer are not deemed to be related within the meaning of Article 143.

[*Licensor B*]

93. In submitting that [*Licensor B*] exercises control over the manufacturer by reference to the indicators, the Revenue Commissioners rely on clause 9 and schedule 7 in the licence agreements with regard to the manufacturer; clause 2, clause 8, clause 9, clause 10, clause 12, clause 17 and schedule 7 with regard to manufacturing/production; clause 4 and clause 17 with regard to sales of products; and clause 9, clause 13 and schedule 7 with regard to reporting.
94. Having considered the whole of the licence agreements and the context of the words therein, having regard to the principles of contractual interpretation of the law of



England and Wales established by [Expert A] and the application of those principles to the licence agreements, and having regard to the facts, materials, evidence and submissions of both parties, I determine that while the licence agreements may bear upon the manufacturer, [Licensor B] are not legally or operationally in a position to exercise restraint or direction over the manufacturer to such an extent that [Licensor B] directly or indirectly controls the manufacturer. The Appellant is the contracting party with [Licensor B] and has the responsibility under the licence agreements with regard to the manufacturer making the products. The products are manufactured for the Appellant and sold by the Appellant in their [redacted]. [Licensor B] seeks to protect the intellectual property which is being incorporated into the products. The extent that restraints or directions in the licence agreements may bear upon the manufacturer, these are framed within specified purposes, including quality control, verification, compliance with standards or providing information, and, on balance, the cumulative effect does not equate to [Licensor B] directly or indirectly controlling the manufacturer.

95. The contracting parties to the licence agreements are [Licensor B] and the Appellant. The intellectual property licensed under the agreements comprise designated characters, depictions, still scenes, design elements and trademarks. [Licensor B] grants the Appellant the non-exclusive rights to design, create, manufacture or source, distribute or sell products incorporating the licensed material. Royalties are only payable by the Appellant to [Licensor B] following sales of products. The royalties are calculated on net retail sales, which is the number of products actually sold multiplied by the actual price paid less returns and applicable sales tax. The Appellant sells the products at prices determined by the Appellant.
96. With regard to manufacturers and manufacturing/production, the licence agreements provide that the Appellant will not assign its right to manufacture the products to any third-party manufacturer without having obtained the prior written



approval of [*Licensor B*]. The Appellant is responsible for ensuring that an approved manufacturer signs the [redacted]. The licence agreements explicitly state that the manufacturing/sourcing provisions are for the purpose of quality control and improvement of the manufacture of the licensed products. The licence agreements oblige the Appellant to undertake that all of its approved manufacturers are of bona fide reputation and that all products will be manufactured in accordance with applicable local laws and regulations. The agreements oblige the Appellant to guarantee the obligations of the manufacturer with respect to [*Licensor B*]. The Appellant remains fully liable for all obligations under the agreement and [*Licensor B*]’s approval of a third-party manufacturer does not release the Appellant from its obligations under the agreement or constitute a waiver of obligations. The [redacted] derives from the manufacturing/sourcing provisions and the manufacturer agrees to be bound by those provisions of the licence agreements which are applicable to manufacturers. The Appellant is responsible for the consistent quality and safety of the products and their compliance with all applicable laws. The Appellant is prohibited from manufacturing products in specified countries or regions. The evidence of [*Witness A*] was that [*Licensor B*] are satisfied to rely on a manufacturer complying with the Code of Conduct operated by the Appellant and with the audit process undertaken by the Appellant every year to ensure compliance with standards. The witness stated that neither [*Licensor B*] nor the Appellant would desire publicity from being associated with a prohibited country or region for reasons of protecting their reputation and brands. The licence agreement in 2015 incorporates the audit process of the Appellant and attaches the Code of Conduct operated by the Appellant to the agreement.

97. The licence agreements oblige the Appellant to ensure that third-party manufacturers adhere to [redacted] guidelines of [*Licensor B*]. The [redacted] guidelines refer to the commitment of [*Licensor B*] to conduct business according to standards of integrity and ethics and that the International Labor Organisation (ILO) Core Labor Conventions served as the foundation on which the guidelines



- are based. The licence agreements oblige the Appellant to affix identification details on the products so the public can identify the supplier of the products. The licence agreements oblige the Appellant to assign rights, titles and interests in the licensed material and any new material to [*Licensor B*] and requires the Appellant to obtain an assignment of rights from any third-party involved in the creation of new material so that the assignment by the Appellant vests full rights of new material in [*Licensor B*]. The licence agreements oblige the Appellant to destroy, and cause all the Appellant's manufacturers to destroy, any moulds, plates, labels or other items used to reproduce the licensed material, and return all artwork of the licensed material to [*Licensor B*] on expiration or termination of the agreements.
98. With regard to approval procedures, the licence agreements oblige the Appellant to submit concepts, pre-production samples, production samples and packaging/promotional materials/advertising to [*Licensor B*] for written approval from [*Licensor B*]. The licence agreements explicitly state that the approval procedures are for the purpose of quality control. The Appellant is responsible for complying with the approval procedures. The evidence of [*Witness A*] was that the Appellant develops the concepts/ideas for the products in conjunction with the manufacturer. The witness stated that while [*Licensor B*] have the right to inspect a product sample, the approach of [*Licensor B*] is more spot-checking of products.
99. With regard to sales of products, the licence agreements oblige the Appellant to provide information to [*Licensor B*] on buying plans, sell-through projections including projected sales price and promotional plans. The licence agreements oblige the Appellant to manufacture products in quantities consistent with anticipated demand for the purpose of avoiding an excessive inventory build-up immediately prior to the end of the agreements. The evidence of [*Witness A*] was that [*Licensor B*] are not involved in pricing and does not impose restrictions on quantities or customers. The sales documentation for products comprise a purchase



- order, packing list, supplier invoice and bill of lading. The purchase order refers to the terms and conditions of the Appellant.
100. With regard to reporting, the licence agreements oblige the Appellant to provide [Licensor B] with a statement containing detailed information relating to net retail sales and royalties. The agreements oblige the Appellant to keep accurate records of all transactions relating to the agreement and grant a right to [Licensor B], for the purpose of confirming the Appellant's performance under the agreement, to examine, copy and make extracts from the records and any other records which [Licensor B] reasonably deems appropriate to verify the accuracy of the Appellant's statements or performance. In the [redacted] the manufacturer agrees to be bound by the provisions of the licence agreement which are applicable to the manufacturer, including but not limited to the right of [Licensor B] to examine the books of accounts, records and premises of the manufacturer with respect to the manufacture of the products. The [redacted] derives from the manufacturing/sourcing provisions, which explicitly states are for the purpose of quality control and improvement of the manufacture of the licensed products. The evidence of [Witness A] was that reporting involved a quarterly report provided to [Licensor B] in the form of a spreadsheet created by the Appellant.
101. In all the circumstances, I find that [Licensor B] does not directly or indirectly control the manufacturer. Consequently, [Licensor B] and the manufacturer are not deemed to be related within the meaning of Article 143.

Determination

102. In respect of the appeal against the determinations dated 31 July 2017, 26 February 2018 and 20 September 2018, and for the reasons set out above, I determine that the determinations should be varied with respect to the payment of royalties by the Appellant to [Licensor A] and [Licensor B]. I determine that the payment of





royalties by the Appellant to [*Licensor A*] and [*Licensor B*] does not constitute a condition of sale of the goods being valued and the royalties should not be added to the price actually paid or payable in determining the customs value of the imported goods.

103. This appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

6 MAY 2020

