[2017] UKFTT 378 (TC)

TC05844

Appeal number: TC/2016/01764
TC/2014/02083

Income Tax – LLP formed to participate in and hopefully win America's Cup international sailing competition – commercial sponsorship, merchandising, hosting income contemplated – whether activities amounted to trade – yes – appellant's appeal allowed - whether trade carried out on a commercial basis and with a view to realisation of profit - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sir Keith Mills — **1st Referrer**
Team Origin LLP — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents and 2nd Referrer**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
DR CHRISTINA HILL WILLIAMS

Sitting in public at the Royal Courts of Justice, London on 25-28 July 2016
Notes on evidence received from both parties on 3 August 2016 pursuant to Tribunal's direction

Kevin Prosser QC, instructed by Pinsent Masons for the 1st Referrer and Appellant

David Goy QC, and David Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents and 2nd Referrer

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DECISION

Introduction

1. TeamOrigin LLP was an entity set up by Sir Keith Mills in relation to the America's Cup – the prestigious and long-running international sailing competition. Under the auspices of TeamOrigin LLP, Sir Keith put together a sailing team which was to participate in and hopefully win the America's Cup, and which would also earn income by way of sponsorship, merchandising, and hosting rights. This appeal concerns an appeal by TeamOrigin LLP and a joint reference by Sir Keith Mills and HMRC which are relevant to treatment of losses made by TeamOrigin LLP as regards both TeamOrigin's and Sir Keith's income tax position namely:

(1) Were the activities of TeamOrigin LLP a "trade" (marketing the team's connection to the America's Cup by earning sponsorship, and if the cup was won from hosting income and other income such as merchandising)? Or, were the activities, as HMRC argue, in aid of Sir Keith's personal ambitions to bring the America's Cup home minimising the cost through raising sponsorship and other income and where, if that could done at a profit, that would simply be a bonus. That issue concerns both TeamOrigin and Sir Keith.

(2) If there is a trade there is then the issue of whether the trade was carried on "on a commercial basis" and "with a view to the realisation of profit" for the purposes of s66 Income Tax Act 2007 – these secondary issues are only relevant to Sir Keith.

(3) The amounts of losses were as follows:

(a) 2007/8: £9,499,520.

(b) 2008/9: £6,462,338.

(c) 2009/10: £6,851,869.

(d) 2010/11: £9,429,975.

2. While the tribunal is not infrequently called upon to consider whether loss relief provisions such as those in issue apply where it is maintained that the LLP is part of a tax avoidance scheme we should emphasise at the outset that this is not one of those cases. There is no suggestion in this case that the affairs of the LLP were in any way structured so as to avoid tax.

3. Although the matters before the tribunal consisted of 1) an appeal by TeamOrigin LLP 2) a reference with Sir Keith as the "1st referrer", given we did not understand there to be any difference in the positions advanced by each, and for the sake of convenience, when we refer in this decision to the appellant's arguments these references also encompass or refer to submissions made in respect of the 1st referrer as appropriate.

Facts

4. The findings of fact which we set out below are drawn from the extensive documentary evidence we had before us, and the oral evidence we heard. In particular, Sir Keith, the driving force and instigator of the appellant, and whose background we shall say a little more about later, had provided a comprehensive (128 page) witness statement exhibiting many various documents relating to the appellant. He was cross-examined at length for over a day and assisted the tribunal with its questions. We found him to be an honest and credible witness who was helpful in assisting the tribunal with its further questions. Although for the reasons explained below at [238] to [260] we did not accept that his recollections as to what his intentions / motivations were at the time as accurate, we accept those recollections were given genuinely and with no intention to mislead.

5. A number of matters were not in dispute: the background facts as to what was done and when, the amount of losses suffered in the years in question, the correctness of the appellant's accounts, and the history of the America's Cup. At this point the key points to note which emerge from the nature of the competition are that, although there are not inconsiderable financial and organisational resources behind the competing sailing team, the winner of the cup is held in the name of a yacht club who then gets to set the terms or protocol of the next competition (including where and when the competition would take place and the specifications as to the vessel) typically in negotiation with another, challenger yacht club. On many occasions the question of whether a yacht club had the right to negotiate, and the agreement of terms took place without controversy but on occasions these issues have resulted in litigation in the New York courts (the cup is available for competition under a New York law charitable trust). The appellant produced a helpful summary of the various twists and turns in the litigation which we include at [117-124] below.

6. Nor was there disagreement that the consequences of winning the right to host the cup would mean that the official challenging yacht club relevant to the facts of this case and the appellant's aspirations to compete, the Royal Thames Yacht Club ("RTYC"), would have had the right to host the America's Cup competition. What was however in dispute, as a mixed question of law and fact, was where, in terms of legal entity, revenues from exploiting the rights to host would have resided. As regards the appellant's negotiations with RTYC we heard evidence from Mr John Stork, Vice Commodore of the club. He too was an honest, credible and helpful witness. (Our findings of fact and the relevant provisions of the documents relating to the agreement are set out in a discrete section to this decision at [95] to [112] below.)

7. We gratefully adopt, with some minor adaptations and insertions, the bulk of Mr Prosser's factual summary which cross referenced Sir Keith's comprehensive witness statement and the exhibits and which covered the background circumstances surrounding the set-up of the appellant, and its sponsorship related, racing, and other activities across the relevant periods. The main area where we depart from his summary of fact relates to those sections which set out the motivations or purpose of the appellant's and Sir Keith's activities as that is a matter in contention. Where relevant we also set out in more detail extracts from the underlying e-mails and documentation produced as regards the activities.

(i) Formation and membership of TeamOrigin LLP ("TeamOrigin")

8. TeamOrigin was incorporated on 4 January 2007, originally under the name Origin Sailing Team (the name was changed soon after), with Sir Keith as one of the two original members, the other being a company called KEM Management Limited ("KEM"), of which Sir Keith was the sole shareholder. With effect from 4 May 2007, a Dutch company called AMIG Netherlands Holdings BV ("AMIG"), a wholly owned subsidiary of LM Loyalty Management Holdings NV, of which Sir Keith was also the sole shareholder, became a new member. TeamOrigin was also registered for VAT on 4 January 2007.

9. On 22 January 2009 a limited liability partnership agreement was executed as a deed between Sir Keith, KEM, AMIG and TeamOrigin LLP. In the section entitled "Background" the agreement set out that:

> "TEAMORIGIN has been established primarily to challenge to win the 33rd America's Cup, and if appropriate also to challenge for, or defend the 34th America's Cup and to compete in such other sailing events as are consistent with this overall objective."

10. The agreement contained a number of relatively standard clauses dealing with incorporation, commencement, banking, capital, division and allocation of profits and losses, drawings, decision making etc. In the interpretation section, the term "Business" (which is referred to extensively throughout the remainder of the agreement in clauses dealing with e.g. intellectual property, accounts and audits, and members' duties and restriction) referred to:

> "the profession, trade or business of challenging to win the 33rd America's Cup, and if appropriate also challenging for, or defending the 34th America's Cup to be carried on by the LLP, the competing in sailing events consistent with supporting the challenge for the America's Cup, commercial arrangements to support the challenge for the America's Cup, or any such other business determined in accordance with this agreement."

(ii) Commercial background, and role of Sir Keith

11. Sir Keith was at all times not only a member of, and major investor in, TeamOrigin, but was also the Team Principal, Chairman and CEO. As such, his motives, aims and purposes in relation to TeamOrigin were also TeamOrigin's.

12. Sir Keith was at the time, and still is, a highly successful entrepreneur, having started and/or invested in a wide range of businesses, including speculative ones with a high risk of failure. He had particular expertise in marketing (he created the Air Miles and Nectar Cards businesses), in the management of sports-related businesses (he was a director of Tottenham Hotspur FC, and set up a yacht-racing business called AT Racing), and in successfully negotiating with potential corporate sponsors in order to raise sports-related sponsorship income (he was CEO and International President of the UK bid for the 2012 Olympic Games and, following success of the bid, he was heavily involved in organising and hosting the Games, including in securing very large sponsorship- including value-in-kind sponsorship and merchandising deals,

despite advertising being banned, such that the Games were able to make an overall profit).

13. As mentioned above, Sir Keith was the Team Principal, Chairman and CEO of TeamOrigin. As such, he was heavily involved not only in high level decision-making but also in day-to-day management of the business, chairing management meetings, arranging and chairing sponsorship meetings, attending sales presentations and publicity events, and so on.

Evidence of Sir Keith's views and motivations

14. Sir Keith was also (and remains) a keen amateur sailor, and as such had a great interest in the America's Cup competition.

15. His evidence as to his motivations which we set out below is in contention and we discuss our conclusions in relation to it later at [238] onwards.

16. His evidence was that he had formed the view that "there was a good opportunity to exploit commercial revenues arising from the [America's Cup] and thereby make a considerable profit in doing so". He set up TeamOrigin LLP "to take all the steps necessary for the purposes of competing in, winning and commercially exploiting the [America's Cup] to make a profit". He was interested in the prestige of bringing home the America's Cup but he was "ultimately interested in building a significant and profitable sporting business that could provide a financial return".

17. His evidence was that "as a businessman [he] would not enter any new venture without a firm view that there was a good prospect of developing a viable, commercial business"; he considered that he "would be in a perfect position to harness the talent, skills, sponsorship and other commercial opportunities required to build a successful business and see a return on any investment"; his "vision was (and still is) to create a professional yacht racing team to compete in, win and defend (on an ongoing basis) the America's Cup and to establish a worldwide, recognisable brand which would, after significant investment… realise substantial multi-million pound profits through sponsorship, advertising, race management services and other commercial opportunities".

18. He was aware that this was high risk, and that the prospect of making a profit was small: as mentioned below, it required TeamOrigin to win the America's Cup twice in succession, but Sir Keith considered that this was both realistic and achievable. In his witness statement Sir Keith explained that after he had concluded extensive research, his view was that that, if done properly, there was a "good opportunity to make a considerable profit." It appears there were others who believed that the commercial potential of the America's Cup could be successfully exploited (as shown by an e-mail from someone involved in another AC team referring to a group who were interested from a commercial perspective which Sir Keith received on 26 December 2006).

19. There were several documents we were referred to by the appellant by way of support for its argument that Sir Keith and the appellant were concerned with making a profit.

20. A 13 December 2006 draft outline business plan referred to potential "returns". In his oral evidence Sir Keith explained that he understood the term "return" to mean profit. Sir Keith's evidence as to the purpose of creating a business plan was that as well as being for prospective investors and sponsors the business plan was created to satisfy himself "…that the appellant was definitely a viable business venture and would make [him] (and other investors) a significant amount of money in due course."

21. The appellant also refers to references in the documents to investors: A note of a meeting between Sir Keith, Rod Carr, Leslie Ryan and Andy Green took place on 16 October 2006. It identified that the need for "Sponsorship/ commercial/ investor resource" – "will need a team to handle set up of investor and sponsor proposal material, target lists and to take on approaches, meetings etc". In a section dealing with "investors/sponsors" there is a bullet "Ideally need for investors who do not come with need for too much involvement in running of team or too large egos". The notes refer to the "need to create a prospectus document which outlines the proposed project, our goals and ambitions, and then covers all areas of team strategy."

22. A branding document dated 23 October 2006 (which, the appellant highlights, pre-dated the meeting with the accountancy firm Smith and Williamson referred to at [39] above) stated:

> "…Our intention, in order to achieve our goal of winning the America's Cup event, is to bring together an influential group of like-minded investors and sponsors to working together with the team in a true partnership spirit, ensuring we maximise on return on investment and exceed our partner expectations."

23. The preceding paragraphs in the document mention "creating a team that can win the America's Cup", widening access into our sport, gathering together a team predominantly of British nationals having expertise gathered from around the world as required to compete at the highest level and a statement that "our determination to win the Cup will underpin everything we do."

24. In June 2007 Sir Keith gave an interview to European Business magazine in relation to the proposed challenge for the America's Cup. When asked whether "he's here for the sailing, or more improbably to make money", his response was:

> "This is the ultimate entrepreneurial challenge…The America's Cup is the ultimate test because it's a completely binary business. If you win you make money, and if you lose, you lose money. So as an investment decision you have to win."

25. In a draft "interview" document given around April 2008 the following reply was given to the question "And what are your real motivations?"

> "Sir Keith: The Cup has to be a commercially viable operation. There is no point hosting the event 12 months after someone has won it….I'm sure if you asked any of the challengers about what makes an event commercially viable we would all probably agree…
>
> So getting back to TeamOrigin we can't just run on indefinitely without a plan with a team of 100+ people. There are no sponsors in the world who would support that, and I can't either…
>
> **So what is TEAMORIGIN doing?**
>
> **Sir Keith:** The obvious message about the next America's Cup, about which we know almost nothing today, are when, where and will be it be commercially viable. We don't know any of those things today but TEAMORIGIN is keeping a small group of people together to firstly – keep abreast of developments and anticipate the outcomes, and secondly – be ready to activate the commercial, technical and sporting plan when the time comes…."

(iii) TeamOrigin's employees and assets in 2007

26. By October 2007, TeamOrigin employed a total of 67 people. Senior employees included: a Director of Marketing and Events (Leslie Ryan), a Commercial Director (Nick Masson), a Finance Director (Dermot Heffernan), Legal Counsel (Robert Datnow), a Racing Team Director (Mike Sanderson), a Helmsman (Ben Ainslie), a Tactician (Iain Percy), a Navigator (Stan Honey), a Shore Operations Director (David Duff), a Principal Designer (Juan Kouyoumdjian), and a Design Coordinator (Andy Claughton).

27. In April and May 2007, TeamOrigin opened offices in London, Valencia, and Portsmouth. The management team were mostly based at an office in St James' Street where another business of Sir Keith's (KEM) was trading from. The office in Valencia was opened because it was considered a presence was needed there in the run up to and during the final of AC32 to see what worked successfully about the event and what did not and in order to host potential investors and sponsors so they could see what they would get for their money. The small office in Portsmouth was set up because initial plans had been made to make Portsmouth the UK version of the America's Cup Village in Valencia.

28. We should flag that around this time the appellant was also in contact and in negotiations with the Royal Thames Yacht Club ("RTYC") with a view to RTYC acting as the designated yacht club for the purposes of the next America's Cup challenge. (It is convenient to set out the detail of the factual background to this relationship in a separate section below at [95] onwards as there is a discrete issue between the parties regarding what particular entity any income from hosting a challenge would have arisen to).

29. In May 2007, TeamOrigin paid €1.5 million (half of which was later refunded) to buy a boat (renamed GBR75) from Alinghi, for the racing team to use for training and competition purposes. In addition, during 2007, TeamOrigin commissioned the design and build of a small number of boats to support the sailing team's training and

for competition purposes. From the middle of 2007 the management team held weekly meetings which were attended by senior members of the management and racing teams, and where necessary professional advisers. Sir Keith did not attend all of these but received the meeting minutes.

30. Around December 2007 Sir Keith's evidence was TeamOrigin was employing around a hundred people falling into three categories: a sailing team with a core of 17, 25 with substitutes in case of injury, then around 30 people in a technical design and build team (and within that the shore team who maintained the boats) and the remainder who were the commercial team (sales & marketing, back office of accounting HR etc.). There were around 15 employees in commercial sales and marketing based in London with the remainder in back office.

(iv) The business plan

31. From January through to September 2007, based on research and market investigations which he had already carried out, Sir Keith and other professionals (who included Nick Masson who had been Alinghi's commercial director and Leslie Ryan who had a lot of sponsorship experience in relation to sailing including the America's Cup) worked on a detailed business plan for TeamOrigin. (Sir Keith's evidence was that this was with a view to presenting the plan to prospective investors and sponsors, as well as to enable Sir Keith himself to evaluate profitability).

32. The business plan projected that if TeamOrigin won two successive Cups (the 33rd and 34th, or the 34th and 35th), and therefore hosted two Cups (the 34th and 35th, or the 35th and 36th), it would make a cumulative net profit. (It is not in dispute that TeamOrigin's plan projected a profit only if TeamOrigin could win two AC's.)

33. On 15 September 2007 the company handling the management of the 32nd Cup, AC Management ("ACM") published the profitability from AC32 which recorded a profit of €66.5m (to be shared 45:45:10) as between Alinghi (racing), the challengers, and ACM respectively.

34. As mentioned above, Sir Keith believed that winning two successive Cups was both realistic and achievable: the Alinghi team, which had itself only been established in 2000, had won the 31st and 32nd Cups in 2003 and 2007. Nick Masson had been Alinghi's former commercial director, and TeamOrigin modelled the projections in its business plan upon Alinghi's success. The business plan identified various income streams including in particular: sponsorship income, merchandising income, income from exploitation of hosting rights, and other hosting related income. The plan explained that hosting income included sponsorship of the America's Cup itself (as opposed to a particular team), income from venues of pre-regattas, income receivable from the main host venue, entry fees receivable from challenging teams, hospitality, berthing commissions, merchandising and television rights. The plan assumed that at the end of each defence TeamOrigin would allocate the net surplus from hosting the event on a similar basis to that operated by Alinghi for the 32nd AC with 45% due to the defending team, 45% due to the challengers and 10% to be retained by the event management entity.

35. The business plan made detailed projections based on TeamOrigin winning the 33rd and 34th Cups. Up to 2009, TeamOrigin would earn about £25 million sponsorship income and about £0.6 million merchandising income, resulting in overall losses totalling about £35million. (More precisely, for the period ending 31 July 2007 to 2009 the total marketing income net of costs was projected to come to £16.781 million and the racing costs (listed as "Design, Build & Shore, Sailing, Administration Capital expenditure totalled minus £51.373 million giving a net figure for those periods of £34.592 million)). Then from 2010 to 2015 it would earn about £129 million further sponsorship income, £5 million further merchandising income, and about £57 million hosting income and £17 million hosting-related income from hosting the 34th Cup. More specifically the net marketing income after costs was projected to be £117.328 million, and the net hosting income (deducting a 45% share of the surplus after costs to go to the defender and also a 45% share after costs to go to the challenger leaving 10% per the Alinghi model) was put at £15.308 million. The cumulative racing costs for the period were projected to be minus £65.810 million giving the profit for those latter periods of £66.826 million. Thus the resulting cumulative net profit putting those two sets of periods together was about £32 million. (The figure of £66.826 million minus the cumulative loss in the early period of £34.592 million was £32.234 million). The business plan did not make detailed projections based on TeamOrigin not winning the 33rd Cup, but winning the 34th and 35th Cups. However, it projected that TeamOrigin would make a cumulative net profit by the 12th year of trading. As the business plan showed, the appellant always recognised that receipt of sponsorship income alone would not suffice to make an overall profit: the plan was based on winning two Cups in succession so that TeamOrigin would also be able to earn hosting income from defending the Cup twice.

36. The executive summary of the September 2007 business plan concluded:

> "On the basis of this Business Plan, TEAMORIGIN is seeking Partners to participate in the business with a view to sharing in the potential profits from defending and organising the America's Cup".

The sponsorship income in the first three years was exceeded by racing and other costs. There were losses in the first three years therefore.

37. The predictions assumed that the 33rd AC would take place in 2009, the 34th in 2013 and the 35th in 2015 and also on the basis that the legal challenge by the Golden Gate Yacht Club (the details of which are in the America's Cup Appendix at [113] onwards) would fail.

38. On 1 November 2007, Ian Crabb e-mailed Sir Keith regarding the potential of private equity investment stating:

> "Best case is invest £2m and get £4m back. Statistically, likeliest outcome is £0 back. No venture firm or LBO firm would invest to get these returns on these probabilities."

Evolving iterations of business plan / advice on need to show profit

39. A meeting between Sir Keith and Smith and Williamson took place on 16 November 2006.

40. A follow up letter dated 28 November 2006 discussed the need to be able to demonstrate that TeamOrigin was carrying on a business with a view to profit for tax reasons (offset of losses against the individual investors' general income and also to ensure recoverability of VAT). The letter mentioned that Sir Keith had previously indicated:

> "an unsuccessful bid would be unlikely to recover more than a small proportion of the costs of mounting the bid, you did indicate that a successful bid…could lead to a substantial surplus".
>
> "…in looking at the structure that might be most appropriate, I have considered the ability for original investors' to "disinvest" with the minimum of difficulty and also have looked at a structure which could be converted into an alternative structure in the event of a successful bid (and therefore in the event of significant taxable income…"
>
> "… it is extremely important that the structure of the LLP is such that we can be sure it is carrying on business with a view to profit. It will, of course, be receiving taxable income in the form of sponsorship income but this in itself may not be sufficient to guarantee that the Inland Revenue accept that the business is carried on with a view to profit. I think that it is very important that the business plan is carefully worded such as to give the venture every possible opportunity of achieving trading status…"

41. On 1 December 2006 Sir Keith e-mailed Leslie Ryan having reviewed the advice stating there were two main issues, the first being to ensure investors whether private or corporate were able to set off losses against their capital gains, and secondly that the organisation was able to recover VAT. The e-mail continued:

> "…In order to accomplish these two objectives the AC organisation needs to be structured with profit in mind. Despite the fact that the chances of making a profit are small, we need to be able to demonstrate to the Inland Revenue that this is a commercial operation. Do you know how Peter dealt with this for GBR Challenge?"

42. Leslie Ryan replied the same day saying:

> "We needed to demonstrate to the IR that we were "attempting" to make a commercial gain out of the venture so I need to show/prove: - that we were actively seeking sponsor and supplier deals – that we were carrying out other initiatives to make a profit – so selling team clothing/merchandising, selling dvds, official magazine…"

43. Sir Keith's explanation in his evidence was that he wanted to be able to attract potential investors by ensuring any investment proposal put to them included the ability to offset early years losses against income. Attracting other investors was difficult unless they could mitigate their risk – all new ventures carry with them a risk

of failure and the capital investment being lost – so investors wanted to be able to offset those losses against capital income.

44. In relation to his statement about the appellant needing to be "structured with profit in mind", and to demonstrate to the Inland Revenue that the operation was commercial Sir Keith's explanation was that he was:

> "simply appreciating that [the business] would, as a start-up, be perceived by potential investors to be unlikely to make profit, and therefore be deemed to be risky so, if losses are capable of being offset, we needed to ensure we did everything so that investors could access the relief."

45. On 7 December 2006 following a meeting which had taken place earlier a draft press release PR question and answer document was circulated to Sir Keith, Leslie Ryan and Andy Green from Pitch PR. The Q&A covered the following topics: 1. Cost /sponsorship 2. Venue/America's Cup general 3. Team 4. Sir Keith Mills 5. General 6. Name.

46. On 13 December 2006, a draft business plan outline was produced. This was only a bare outline. This document appears to have been forwarded by Smith and Williamson ("S&W") in Andrew Pedrette's email of 14 December 2006. In this email it was envisaged that there would be a meeting to "kick-off" the preparation of the business plan.

47. On 20 December 2006, Sir Keith emailed Nick Masson (the appellant' eventual Commercial Director) regarding the terms of a consultancy contract. This email followed on from a meeting the previous week at which Mr Masson had agreed to join TeamOrigin (or "Origin" as was the relevant working title).

48. Also on 20 December 2006, Sir Keith forwarded to Leslie Ryan and Nick Masson a proposal from Portas Consulting in relation to sponsorship and the AC33. Like the LLP deed (entered into later), the proposal spoke of "support" for the British entry in AC33. (Portas Consulting was a firm set up by David Portas, a former McKinsey partner, who had at the time of the Olympic bid advised Sir Keith on sponsorship strategies including valuation of sports properties which Sir Keith referred to as the "David Portas Model".) This document identified various issues regarding the America's Cup:

> "□ Insufficiently large market for the America's Cup in the UK. Whilst the awareness of the event is relatively high this hasn't been converted into a broad following for the event
>
> □ The significant amount of money required to deliver a competitive campaign. Budgets continue to expand driven by a 'money is no object' approach by some campaigns
>
> □ Lack of adequate preparation time and experience to deliver a competitive and successful campaign
>
> □ Careful stakeholder management is critical in this well networked environment

> □ The current perception appears to be that the ROI delivered by the America's Cup for stakeholder is not strong in comparison to other sport right opportunities."

49. On 22 December 2006, Andrew Pedrette chased Sir Keith for a meet-up date for the meeting on the business plan and asked for dates in January 2007.

50. On 4 January 2007, Sir Keith launched TeamOrigin's bid for AC33. The same day TeamOrigin was incorporated. A meeting to discuss the business plan took place on 18 January 2007.

51. On 6 February 2007, Dermot Heffernan sent Sir Keith an email commenting on the figures in the draft business plan:

> ""Some of the big items will be a judgment call, especially about costs…I am less concerned about the income side as we have some assumptions on sponsor income and these are to a certain extent a leap of faith as the degree to which these are verifiable is slight, although we should reference the David Portas model"

52. On 27 February 2007, Andy Pedrette circulated a "further" draft of the business plan. Sir Keith responded by email on 5 March 2007 attaching a mark-up in track changes. The assumption in this model was that TeamOrigin would have a high placing in AC33 and would win AC34. The projection for the cumulative cash position to 2013 was minus £74,357,000. The projection from 2014 to 2019 was £28,591,000 giving a cumulative cash position as at 2019 of minus £45,766,000. If the 10% retained hosting income was stripped out this would be minus £66,730,000. This was the outcome in the event of winning in 2017 and 2019 (AC35 and AC36). As HMRC point out, in the event of a loss, the figures would have been much greater.

53. On 2 March 2007, Frank Akers-Douglas of S&W emailed Sir Keith notifying him of changes to the loss relief rules and in particular the rule for non-active partners – whilst this was not thought to create a difficulty for Sir Keith, it did mean, in S&W's view, that other co-investors were unlikely to get relief.

54. On 23 March 2007, a further version of the business plan was circulated albeit the version in the bundle was recirculated on 26 March 2007 following comments from Sir Keith. As the email of Andrew Pedrette explained, one of the key changes in the model was a switch to assuming that TeamOrigin would win AC33 (see [56] below).

55. The business plan was then sent to AMIG to review. BDO produced a letter of advice dated 30 March 2007, which stated as follows:

> "The business proposition has a high risk profile. Nevertheless, a company can decide to enter into a very risky business. This is a businesslike decision. If the venture is unsuccessful, a substantial loss can arise. The prospects for a profit seem small.
>
> My concern lies in the question whether or not the Revenue can argue that the decision to invest is made to 'satisfy shareholder needs'. The

> document mentions several times that it is Sir Keith Mills that is committed to making this happen. The document also shows that he is a (keen) sailor. These two facts could lead to the Revenue arguing that the decision to invest is made to 'satisfy shareholder needs'."

56. The March 2007 draft stated at 1.1 that TeamOrigin intended to participate in the 33rd America's Cup with a view to winning the right to defend and organise the next edition. In an e-mail from Andrew Pedrette of S & W the focus was "very much on winning the 33rd AC".

57. The September 2007 draft explained:

> "All the costs are based on the assumption that TeamOrigin must be funded to win the America's Cup. Lower costs might be achievable simply to compete with no realistic chance of winning the America's Cup, but that is not TeamOrigin's objective."

58. It projected that TeamOrigin would make a substantial net overall profit if it won the 33rd and 34th America's Cup.

59. On 15 September 2007, Ernesto Bertarelli, syndicate head of Alinghi was quoted in an internet article headed "The 32nd America's Cup competitors receive their share of EUR 66.5 million profit" as commenting:

> "The vision for the 32nd America's Cup was to create a fantastic sporting occasion, in Europe, with a viable commercial business model comparable to other major global sporting events".

(v) Sponsorship activities in 2007

60. In his witness statement Sir Keith explained the concept of "value in kind" sponsorship which he described as a major aspect of many sporting sponsorships. Value in kind sponsorship is an arrangement typically resulting in the provision of products or services by the sponsoring company in lieu of cash payments. The sponsor benefits by getting access to the exploitable commercial potential associated with a business and the business benefits from being sponsored as it removes the need to incur significant initial costs for goods or services (or reduces the costs of those goods or services.) TeamOrigin received such sponsorship and recognised it in its accounts.

61. From January to May 2007 the appellant developed a pricing/rights matrix, identified sectors, researched IP rights and established the office in Valencia mentioned above. From April to December 2007 targeted approaches were made to partners, meetings were held with introducers and agencies and speculative calls were also made. A large number of potential sponsors were contacted. The Commercial team forwarded a spreadsheet to Sir Keith on a weekly basis showing the progress of various negotiations: those sponsors "in contract", those "in dialogue" and those that the team were "prospecting". Sir Keith was heavily involved in trying to secure bigger sponsors (£3 million plus) and lots of meetings were held with high-profile businesses.

62. In July 2007, TeamOrigin entered into a sponsorship agreement with S&W whereby S&W agreed to provide professional financial services to the value of up to £250,000 in return for TeamOrigin granting them the right to call themselves an "Official Advisor" and certain access rights. In August to October 2007, S&W invoiced TeamOrigin for fees totalling £221,791 plus VAT in return for professional financial advice, and at the same time TeamOrigin contra-invoiced S&W for equivalent fees in return for sponsorship services. TeamOrigin's accounts for the year ended 31st March 2008 duly recognised sponsorship income of £221,791.

63. In October 2007, TeamOrigin reached an oral agreement with a sailing clothing company called Henri Lloyd, which agreed to supply clothing up to the value of £250,000 per year to TeamOrigin, for use by its sailors and other staff, and pay a 12.5% royalty on all branded merchandise sales, plus £60,000 cash per year, all in return for TeamOrigin granting them the right to call themselves the official clothing sponsor. Henri Lloyd duly supplied clothing in 2007 to the value of tens of thousands of pounds, including for the Southampton Boat Show and the Cento Cup in Trapani. However, because of the litigation concerning the America's Cup ("the Litigation", see the Appendix at [113] onwards), no formal contract was ever signed (the contract only reached the "draft" stage), and Henri Lloyd did not pay the £60,000 cash per year. Moreover, no invoices or contra-invoices were issued. For these reasons, TeamOrigin's accounts for the year ended 31st March 2008 did not recognise any sponsorship income from Henri Lloyd.

64. In the course of 2007, Sir Keith and others approached potential major corporate sponsors on a regular basis. Positive meetings were held with Skandia, G4S, Caparo Industries, Corum, Peters & May, and Anix. Once the finals of the 32nd America's Cup had started in June 2007, potential sponsors were flown out to Valencia at TeamOrigin's cost, in order to build relationships and showcase the business potential. Likewise, in October 2007, with the J80 (a particular kind of racing yacht) races. However, as explained below, the Litigation created real uncertainty as to when TeamOrigin would be able to compete in the America's Cup, and as a result although TeamOrigin was able to secure the deals mentioned above, it was unable to secure any major sponsorship deals in 2007.

(vi) Racing-related activities in 2007

65. In May 2007, a 40 page "sports team management" document was produced, setting out in great detail TeamOrigin's racing strategy to win the 33rd America's Cup competition. In June 2007, TeamOrigin entered into a contract with the Royal Thames Yacht Club ("RTYC") which agreed to act on TeamOrigin's behalf to issue a notice of challenge in respect of the 33rd America's Cup, and if successful, to defend the Cup, on terms inter alia that TeamOrigin would undertake the commercial exploitation of all rights.

66. In July 2007, after Alinghi, acting under the colours of the Swiss yacht club Societe Nautique de Geneve ("SNG"), won the 32nd America's Cup, SNG accepted a challenge by Club Nautico Espanol de Vela ("CNEV"), a Spanish yacht club formed for the purpose, and SNG and CNEV released a protocol for the 33rd Cup, whereby

inter alia the races would take place in newly designed AC 90 boats in Valencia in 2009. TeamOrigin regarded the new boat design and short cycle as offering a competitive advantage to a new team, and on 23rd July 2007 RTYC on TeamOrigin's behalf lodged an official challenge with SNG, which was duly accepted.

67. In August 2007, meetings were held with the South East England Development Agency ("SEEDA") with a view to arranging for an America's Cup regatta to be held in the UK, and SEEDA agreed in principle to pay €1 million to AC Management, the official organising body of the 33rd Cup, to secure such a regatta.

68. TeamOrigin competed in a number of races in 2007 and in subsequent years, not only to improve racing tactics and crew teamwork, but also, as part of its sponsorship strategy, to publicise TeamOrigin, its brand and its plans.

69. In particular, in October 2007 TeamOrigin, skippered by Ben Ainslie, competed in its first international sailing competition, the 2007 Trapani Cento Cup, a Grade One ISAF match race regatta, against a number of skippers from the 32nd America's Cup, and won.

70. At the end of 2007 (and into early 2008) TeamOrigin purchased an "Extreme 40" catamaran to compete in the iShares Cup and four "J80" boats to be used for training and youth development.

(vii) Decision in December 2007 to scale back TeamOrigin's activities due to the Litigation

71. Initially, TeamOrigin considered that the legal proceedings begun by the Golden Gate Yacht Club ("GGYC") in July 2007 were just a negotiating ploy to enable BMW Oracle (on whose behalf GGYC was acting) to secure a better deal for the protocol for the 33rd Cup, that the dispute would soon be settled, and arrangements would be made for a multi-challenger competition. Sir Keith attempted to mediate between the parties, and TeamOrigin continued with business as normal.

72. However, the Litigation continued, and in November 2007 the New York Supreme Court decided in favour of GGYC. In the light of this development, TeamOrigin decided to reduce its costs by reducing its level of activity (but not to cease altogether) for the time being, until clear and firm information became available to enable it to prepare in full for the next America's Cup competition which would be open to all qualifying challengers.

73. In that connection, at the end of 2007 and in early 2008, TeamOrigin revised its sailing programme for 2008 and its budget, and cut back on staff and other costs. On 19 November 2007 an options review concluded that whatever the immediate outcome of the litigation at the current stage (in the New York Supreme Court) the loser would appeal and therefore there would be no certainty as to the format or timing of the 33rd AC until January 2009. On 27 November 2007 the New York Supreme Court delivered its judgment in favour of GGYC. SNG appealed.

74. On 20 December 2007 TeamOrigin produced a document entitled "TeamOrigin 2008 Sailing Initiative". This included the following statements:

> Section 3
>
> "Our objectives are:
>
> 1. To identify sailing projects that allow the sailing team to work together and develop their crew work in the most competitive environments
>
> 2. To build a programme that can offer sufficient commercial returns to attract funding from commercial partners and provide a stepping stone for ongoing partnerships into our full AC campaign
>
> 3. To attract sufficient commercial funding to operate this campaign at break even or better"
>
> Section 12 "…The main cost drivers in this campaign are the TP52 campaign and the JK 100 project (given their relevance and importance to the sports performance) and, whilst both of these are highly desirable for the sports team, the inclusion of one of these projects in the campaign would serve our commercial needs whilst significantly reducing our financial exposure. It is important to note that the proposal to engage in these sailing campaigns is based on the fact that we will raise the money first, possibly with the exception of the TP52 circuit, given the quality of racing and possibly Keith's personal interest in getting involved in that specific circuit"

75. It proposed offering a sailing programme on a reduced level compared to an AC campaign but at the same time offering sponsors opportunities who might then continue to sponsor TeamOrigin in any challenge for the 33rd AC. It predicted the expected financial result for 2008 as a result of the sailing initiative would be a loss of £1.3million.

76. The appellant refers to the section on "purpose" to illustrate that TeamOrigin's aim was not to race for its own sake:

> "The purpose of this paper is to explore how TeamOrigin can maintain its competitive strength until such time that clear and firm information is available to let us prepare in full the next America's Cup open to all qualifying challengers."

77. Sir Keith hoped that TeamOrigin and others would still be able to compete in the 33rd Cup, albeit that the competition would be delayed. However, as the Litigation continued on into 2008, it appeared that the 33rd Cup might be a Deed of Gift match between Alinghi and BMW Oracle alone, with TeamOrigin and other teams being excluded from the 33rd Cup, and only being able to compete in the 34th Cup. The budget was revised further to reflect this possibility.

(viii) Continued, but scaled back, activities in 2008

78. Throughout 2008, TeamOrigin continued to work, albeit on a reduced scale and in accordance with continuously revised financial and other projections, towards its

plan of winning the 33rd and 34th or 34th and 35th America's Cups, so as to make a net overall profit. In this connection, TeamOrigin kept in touch with existing potential sponsors, continued looking for and talking to new ones, such as Skandia and JP Morgan Asset Management, and took part in a number of sailing races, such as the European iShares Cup Extreme Catamaran Circuit (against Alinghi amongst others) and the CNEV 2nd annual regatta in Valencia (again, against Alinghi amongst others), and linked up with Richard Branson to attempt a record transatlantic crossing, at all times keeping a strict control over the revised budget, and looking for ways to generate income. TeamOrigin competed in the iShares Cup and other competitions in order to raise its profile while the. Litigation ensued.

79. On 7 February 2008 the Finance Director of TeamOrigin, Dermot Hefferman, e-mailed Sir Keith with a cashflow forecast for 2008-2011 predicting a £52,918,536 net cost. It assumed no sponsorship income for 2008 and 2009, and £12.4 million for both 2010 and 2011. (HMRC highlight the difference with the business plan which had forecast income for 2008 and 2009).

80. On 27 March 2008 a note of meeting stated: "It is safe to say there will be no AC racing, no build and no sponsorship this year".

81. No sponsorship income was received in 2008-9. Rental income of £12,618 was received.

(ix) Continued activities in 2009

82. In early 2009, TeamOrigin prepared a new sailing and sponsorship programme, based on the hope that the Litigation would be resolved in March or April 2009 in favour of Alinghi, and that TeamOrigin would be able to compete in the 33rd Cup which would take place in Valencia in July 2010, and that the 34th Cup would probably be held in 2013. In that connection, in early 2009, TeamOrigin began developing a new proposal to obtain sponsorship pursuant to a partnership with The Carbon Trust, a not-for-profit organisation that helped companies to reduce their carbon emissions and become more resource efficient. The idea was for the appellant to donate its naming rights (valued at approximately £10 million per annum) to enable the Carbon Trust to provide the appellant with the know-how and expertise to demonstrate best practice and that in return Carbon Trust would help the appellant in attracting corporate sponsors. (In his oral evidence Sir Keith explained that this figure was an "arbitrary number for a name on a sail" and that the value of sponsorship deals to different companies varied dramatically depending on the sponsoring company. The underlying strategy in donating valuable rights in this way as described in Sir Keith's oral evidence was to "catch a sprat to catch a mackerel".) In addition, TeamOrigin commenced negotiations with McKinsey & Co for it to provide strategic sponsorship and investment advice up to the value of £300,000 in return for becoming an Official Advisor and receiving other rights.

83. On 3 February 2009, as highlighted by HMRC, Mike Sanderson sent Sir Keith an email which included the text of an e-mail addressed to Juan at Juan Yacht Design. The email gave Mr Sanderson's view of the America's Cup:

> "Juan I hope this shows you how committed Keith is to doing the right thing here to give TEAMORIGIN the very best chance of winning the next America's Cup, this is all just a multimillion dollar gamble, but just like we have always said, we believe that we collectively have the right ingredients here to give this a very serious shot."

84. However, on 2 April 2009 the New York Court of Appeals ruled in favour of GGYC/BMW Oracle, and although GGYC announced that it would seek to negotiate with SNG for a conventional, multi-challenger Cup, SNG insisted on a default Deed of Gift match (i.e. a two-boat competition excluding other challengers such as TeamOrigin). Moreover, neither party was willing to enter into discussions regarding the 34th Cup; indeed, it appeared that a multi-challenger event for the 34th Cup would only be announced by the eventual winner of the 33rd Cup.

85. In the light of this continuing uncertainty, in May 2009 TeamOrigin decided against increasing its commercial push until the last quarter of 2009 when, it was hoped, there would be more certainty about the next America's Cup in which TeamOrigin would be able to participate.

86. TeamOrigin further reduced its employee pool, formally terminating the employment contracts of Ben Ainslie and other members of the racing team and undertaking to re-engage them when there was clarity about a multi-challenger Cup in a viably winnable time frame.

87. The appellant continued with the revised sailing programme developed at the end of 2007, to look for sponsors, and to look for ways to generate income, for example by chartering out its boats. Agreement with McKinsey & Co was eventually reached in May 2009, but because of the developments mentioned above, the agreement was expressed to commence only when TeamOrigin filed a challenge for the 34th Cup. Separately, TeamOrigin engaged McKinsey & Co to identify, and assist with developing a strategy to attract key sponsors. During 2009 TeamOrigin, together with six other yacht racing teams, created and funded the World Sailing Teams Association ("WSTA") which, it was agreed, would organise all future America's Cup competitions, for example by negotiating TV, sponsorship and hosting rights, on the basis that the teams would share the resulting revenues. It was proposed that if GGYC/BMW Oracle won the Litigation and then the 33rd Cup, GGYC/BMW Oracle would introduce WSTA as the rights holder and organiser of the America's Cup in that connection and as a way of continuing to obtain income wherever possible. WSTA co-organised the Louis Vuitton Trophy regatta, and for that purpose by an agreement dated 19th October 2009, TeamOrigin chartered one of its boats to WSTA, and also agreed to maintain two boats for WTSA, in return for a race management fee of €650,000 (£614,112) which was duly invoiced and paid.

88. On 15th September 2009, TeamOrigin formally launched its partnership with The CarbonTrust, called "Race for Change", to the media, announcing its intention to continue with its plan to win the America's Cup. In October 2009, TeamOrigin began new discussions with Henri Lloyd, for them to supply further clothing, to the value of about £70,000 in return for a payment of £16,500. The European Product Director of Timberland Europe suggested a collaboration with the appellant but this was not taken

up as the appellant did not want to damage its existing relationship with Henri Lloyd. TeamOrigin continued racing in 2009, for example in the Louis Vuitton Pacific Series in February, the Louis Vuitton Trophy Regatta in November, and in World Match Race Tour events in June, October and December. During June to September 2009 the appellant continued to work on the commercial campaign; the work included preparing presentation materials, filming the appellant's sailing activities to show prospective sponsors, arranging media and promotional events, listing sponsor targets and contacting and meeting potential sponsors.

(x) Continued activities in 2010

89. Following the 33rd America's Cup in February 2010, TeamOrigin decided that it would push its commercial and sailing programmes in 2010 to get into the best possible shape for the 34th Cup. During January 2010 the appellant instructed Portas Consulting to help it with developing the business and to maximise the value it would get out of sponsors. In early 2010 Sir Keith also approached Pitch Consulting to provide an assessment of how the Commercial Team could be incentivised by providing a bonus based on their performance. Pitch produced a Scheme document which provided for a bonus scheme based on £50m net revenue through to 2013.

90. In February an agreement was reached with Gleistein for it to supply ropes to TeamOrigin in return for being granted the right to call itself the official rope supplier and certain other rights; in March potential sponsors were invited to the Louis Vuitton Trophy in Italy; in June, agreement was reached with Linklaters LLP for them to supply services up to £300,000 in value to TeamOrigin in return for being granted the right to call themselves an official supplier and certain other rights, the agreement due to commence upon acceptance of TeamOrigin's entry for the 34th Cup; in July plans were made to invite and entertain over 100 corporate prospects during the August Cowes Week; also in July agreement was reached with Jaguar for it to pay £95,000 plus VAT to TeamOrigin in return for being granted the right to call itself TeamOrigin's Presenting Partner and various other branding and communications rights including appearances from members of the appellant; and the informal agreement with Henri Lloyd was extended. An unsuccessful approach was also made to ATOS.

91. As for racing in 2010, TeamOrigin competed in Louis Vuitton Trophy events in February and June, in the AudiMed Cup in May, and in the Trafalgar Cup at Cowes in August. From May 2010, rumours began circulating that BMW Oracle, the defender of the 34th Cup, was considering racing with catamarans, rather than typical "IACC" design mono-hulls which had been in place for the last 20 years. Between June and September 2010, TeamOrigin undertook analysis to ascertain the impact on its likelihood of winning (or at least being competitive in) the 34th Cup by racing the rumoured catamarans and carried out testings and costings to enable it to decide whether it could afford to participate in a race on that basis. On 2 September 2010 the appellant instructed McKinsey to provide a report on the viability of starting an entirely new venture – this was later produced on 24 September 2010, the report set out case studies on what it was believed was needed to launch a new sports event and covered matters such as talent, a spectator friendly format, sponsorship/funding and

brand/PR strategy. In early September 2010 Sir Keith was having discussions with Ben Ainslie and Grant Simmer about the commerciality of the appellant entering into the LV trophy event in Dubai, in particular whether they would be entertaining people that would give the appellant real prospects of obtaining sponsorship. The appellant ended up withdrawing from the event.

92. On 13 September 2010, the protocol for the 34th Cup was published, to the effect that the Cup competition would take place in 2013 (not 2014 as was then expected) using wing-sail catamarans. In the light of this development, and based on the analysis TeamOrigin had undertaken in relation to racing catamarans, Sir Keith concluded that the protocol and class rules for the 34th America's Cup meant that it would not be commercially viable for TeamOrigin to compete, and on 1 October 2010 announcements to that effect were made to TeamOrigin's staff via a conference call and an e-mail and to the media.

93. Sir Keith's e-mail of 1 October 2010 to everyone in the business explained:

> "…having analysed the format of the racing, the proposed boat, the timetable, the rules and cost of competition, I am simply not convinced that this event will be commercially attractive to our potential sponsors and most importantly that it will be a engaging, fair and a winnable contest".

Position as at July 2016

94. Sir Keith explained in his oral evidence that TeamOrigin, in conjunction with Land Rover BAR, were preparing to compete in the next (35th) America's Cup World Series that was to take place in Bermuda. A new entity, BAR holdings which traded under Land Rover BAR ran the racing aspect of the business, and TeamOrigin was the organiser of the event. The Land Rover BAR entity had 130 employees, had attracted over £33m of 3rd party investment, £17m worth of sponsorship and was forecasting £46-47m worth of sponsorship including value-in-kind and other sales by the end of 2017. His view was that Land Rover BAR was effectively executing what TeamOrigin would have executed had it been able to without the litigation difficulties and the uncommercial protocol for AC34.

Circumstances surrounding the RTYC agreement

Whether commercial rights associated with hosting would have accrued to RTYC rather than TeamOrigin – background facts and documents

95. As explained in more detail later, under the terms of the 1887 Deed of Gift, only properly established yacht clubs can challenge for and defend the America's Cup, and organisations such as TeamOrigin that wished to challenge and defend had to do so in the name of a yacht club. The Deed of Gift is however silent as to the ownership of the hosting rights.

96. Mr Stork, the Vice Commodore of the Royal Thames Yacht Club, was interested in getting involved as it would enhance the reputation of the club and re-

energise the club, as there was a group of younger members many of whom knew the members of the TeamOrigin crew. He met with Sir Keith, was impressed with his professional and business-orientated approach and was happy to explore making an arrangement. Mr Stork led the negotiations with Sir Keith at TeamOrigin along with Mr Stork's club colleague Rear Commodore Gwynn Lawrence (who dealt with membership and finance related matters at RTYC).

97. On 19 April 2007 Mr Stork e-mailed Sir Keith:

> "I have just posted the attached letter and have also enclosed a revised draft term sheet with our suggested changes, we are looking forward to talking things through."

98. Mr Stork's letter of the same date explained that RTYC were keen to be involved. In the draft Term Sheet the club explained it anticipated needing to pay at times for costs that had not been budgeted for and that there should be additional funds available so they were not "watching pennies". It proposed that it was paid £50,000 exclusive of VAT. Under the heading "costs and revenue" the document stated:

> "TeamOrigin covers all the costs of the challenge and any defences. Schedule of projected costs and reasonable expenses of the club to be agreed which TeamOrigin would pay in advance so the club will not be out of pocket."
>
> "Any return to the club of the bond or additional fee is to be held in trust for TeamOrigin's benefit."
>
> "TeamOrigin would be entitled to receive and retain all benefits, including capital, sponsorship, grants, advertising revenues, revenue through merchandising sales and other benefits, arising directly or indirectly from the project [defined as the challenge and the defence] or the exercise of rights under the agreement.
>
> Where any such money is received by the club it will be held on trust for the benefit of TeamOrigin absolutely."

99. An agreement between RTYC and TeamOrigin was later executed. Both Mr Stork and Sir Keith gave evidence which covered the circumstances surrounding the finalisation of the agreement, their understanding of it, and their views on how the future relationship between the RTYC and TeamOrigin might work out if TeamOrigin were successful. We will deal with these aspects of their evidence after setting out the terms of the agreement.

Terms of the RTYC Agreement

100. Clause 5 entitled "Defence" provided:

> "5.1 During the period after the date of this Agreement until a date no later than three (3) months prior to the date of the last race of the Event;

> 5.1.1 the parties shall enter into the Joint Venture Agreement in accordance with the JV Heads of Terms and/or such other terms as the parties may agree;
>
> 5.1.2 the parties shall establish the Joint Venture Company in accordance with the JV Heads of Terms and/or such other terms as the parties may agree;
>
> …"

101. The JV heads of terms were defined as "the heads of terms in schedule 3…"

102. Clause 10 dealt with "Costs and revenue" and clause 10.4 provided that TeamOrigin was to be entitled to:

> "receive and retain all benefits, economic or otherwise (including without limitation, capital, sponsorship, grants, advertising revenues, revenue from merchandising sales and other benefits), arising directly or indirectly from the conduct of the Challenge, the Club becoming or acting as Challenger of Record, TEAMORIGIN's participation and involvement in the Event, the Club's involvement in the Event and, subject to the terms of Clause 5 arising from any Defence(s), excluding for this purpose any sums paid to the Club directly by TEAMORIGIN under this Agreement."

103. In Schedule 3 the Heads of Terms set out that the company would be one which was limited by shares and established in England and Wales (unless TeamOrigin decided another form or jurisdiction would be more appropriate and in which case the principles further set out were to apply to the alternative form/jurisdiction). The company was to have two members, the club and TeamOrigin with TeamOrigin subscribing for and being issued 75% of the authorised share capital (£100) such that it had 75% voting rights and with the club having the corresponding remainder and the quorum for meetings being two. There was to be a maximum of four directors with TeamOrigin having the right to appoint three and the club one and with a quorum of for board meetings of three (at least two TeamOrigin directors). The purpose of the JV Company was stated as being "to exploit, organise and manage the rights in Defence of the America's Cup granted to it by the Club…" which were further defined as the rights variously to appoint the defending syndicate, exploit any pre-regatta series, or challenger selection series, to negotiate various protocols and terms of challenge.

104. Clause 2.13 provided that:

> "Any profits of the JV company shall be distributed as the joint venture company shall decide and in making such distribution the JV company may have regard to the contribution of the club towards the defence and the America's Cup in general."

Mr Stork's and Sir Keith's understanding of the negotiations and agreement

105. Mr Stork was the Vice Commodore of RTYC and also the Chairman of Royal Thames Yacht Club between 2005 and 2008. His career background was in market

research and executive search/ careers advice. He had been a racing / cruise sailing enthusiast for the past 60 years and a member of RTYC since 1972.

106. He confirmed that Sir Keith's recollection of events and the statements made were consistent with his own understanding during the relevant period. Mr Stork's objective in the negotiations was to ensure the challenge and defence would enhance the club's reputation and that it would not lose money. To the extent there were any profits in the venture it was expected these would go to TeamOrigin. He did not recall any particular attention to the shape of the arrangement between the parties in the event of a defence. It was agreed that the parties would address those matters in due course. He recalls that Schedule 3 was not considered in detail and the issue of structure was to be essentially "parked" to be considered later. Mr Stork's evidence was that subject to protecting its reputational interests RTYC would have agreed to any appropriate management or corporate structure that fitted the needs of TeamOrigin and which would ensure TeamOrigin owned the economic rights to any defence.

107. Sir Keith's evidence was that the finer details of the document were dealt with by Robert Datnow, (TeamOrigin's in-house solicitor). There was time pressure as TeamOrigin wanted the certainty that RTYC would challenge on their behalf and there was only a short time (July 2007) for challenging yacht clubs to submit their challenges.

108. Sir Keith was aware that one of the issues in the ongoing litigation was whether the relationship between Alinghi and the defending yacht club (CNEV) was contrary to the terms of the Deed of Gift. There was a tension between on the one hand meeting the Deed of Gift condition that control of conditions and specifications should vest in the yacht club on the one hand and the desire of the commercial organisation to have this. He was aware that Mr Datnow was considering this concern. (In fact Mr Datnow had obtained some preliminary but inconclusive advice from a New York law firm on the matter). Sir Keith did not believe the issue had been fully resolved by the time the RTYC agreement was resolved. His belief now was that the JV structure was a provisional attempt to deal with the issue (by creating a decision making vehicle in respect of the rights formally held by RTYC as trustee under the Deed of Gift so that both RTC and TeamOrigin could have voting rights).

109. Sir Keith could not recall whether he read the detail of the agreement before he signed it. He was sure that when signing he did not believe there would be a JV structure with 25% going to the club (on the basis this it would make no commercial sense to have done this.) In cross-examination Sir Keith recollected there was some mechanism described to him as protecting TeamOrigin and the club but he did not know the detail. He accepted the priority was to get the challenge in and that what might have happened to the commercial rights later was a detail that might be sorted out in due course if need be.

110. He had no doubt that as and when it came to implementation of the agreement an agreement would have been reached which was consistent with the negotiations in

the Term Sheet. His evidence was that it was neither parties' intention the revenues and profits would be earned by a JV company.

111. The September 2007 business plan prepared by S&W made no mention of any profit share with RTYC or the JV company. Sir Keith was sure that before taking any steps in relation to the defence he would have sought professional advice to ensure TeamOrigin was structured in the most appropriate way. Had he been advised that the RTYC agreement required economic rights to be transferred to the JV Co and what that would mean to TeamOrigin's profitability and tax loss position he would have insisted the RTYC agreement be clarified to reflect the term sheet and to ensure the economic rights were held by TeamOrigin.

112. No advice had been taken in relation to tax or accountancy regarding the JV company.

Appendix: the America's Cup

Background

113. In 1851 the original trophy was won by an American syndicate and, in 1857, it was renamed the America's Cup trophy and donated to the New York Yacht Club ("NYYC") by a Deed of Gift which created a New York law charitable trust providing for the Cup to be available for perpetual international competition. Any yacht club meeting the requirements specified in the Deed of Gift had the right to challenge the club holding the Cup.

114. The NYYC won the Cup from 1857 to 1983 inclusive. Until 1970 there was always only one challenger, called the challenger of record. This was the default position under the Deed of Gift, and so a competition between the holder and the challenger of record was called a Deed of Gift (or DOG) match. However, for the 1970 America's Cup, interest in challenging was so high that the NYYC decided for the first time to allow the challenger of record to organise a regatta among multiple challengers, with the winner being substituted as challenger and going on to compete against the defender in the actual America's Cup match. From 1983 onwards, the competition between the challengers has been sponsored by Louis Vuitton and the winning challenger is awarded the Louis Vuitton Cup. In practice, the successful defender of the America's Cup would negotiate with another yacht club to be the challenger of record, on the basis that they could expect to agree on the protocol. Except for the America's Cup races in 1988 and 2010, the winner of the Louis Vuitton Cup has always had the right to challenge the current defender for the America's Cup. The two exceptions were due to litigation.

115. As to how it was decided who counted as the "first challenger", Sir Keith explained that as soon as the winner (the new Defender) crossed the line documents would be exchanged through the Commodores with a friendly yacht club. Being a Challenger of Record gave the challenger a seat at the negotiating table. During 2007 Sir Keith's evidence was that he had had a number of negotiations with Ernesto

Bertarelli who was head of the Swiss team about RTYC being the Challenger of Record.

116. As regards the 35th America's cup the Defender has agreed to work with a committee made up of all the challengers and has agreed that it cannot change the rules of the AC without the agreement of the majority of the Challengers.

1988 (27th) America's Cup: litigation

117. The San Diego Yacht Club ("SDYC") won the 1987 Cup. Soon afterwards, a surprise Deed of Gift challenge was made by a New Zealand syndicate called Mercury Bay Boating Club ("MBBC"). This resulted in legal proceedings, with the New York Supreme Court deciding that the MBBC's challenge was valid, and ordering the SDYC to accept it and negotiate mutually agreeable terms for a match, or race under the default provisions of the Deed of Gift.

118. In the event, the SDYC and the MBBC did race in a DOG match in September 1988, with the SDYC using a catamaran. The MBBC lost, but returned to court, arguing that the race was unfair. The New York Supreme Court agreed, but its decision was eventually overturned.

1992 (28th) – 2007 (32nd) America's Cups

119. There was no litigation in relation to the 1992, 1995, 1999, 2003 or 2007 America's Cups: on each occasion, the protocol was agreed without controversy, the Louis Vuitton Cup regatta took place between a number of challengers, and the winner then raced against the defender for the America's Cup. The 2003 (31st) and 2007 (32nd) Cups were won by Alinghi, racing under the colours of the Societe Nautique de Geneve ("SNG") yacht club. Management of the 32nd Cup was handled by a company called AC Management ("ACM"). It was reported in the press that a surplus of €66.5 million had been made, which was to be divided 10% to ACM, 45% to SNG, and the balance between the remaining teams.

2010 (33rd) America's Cup

120. In July 2007, SNG accepted a formal challenge by CNEV, a Spanish yacht club newly formed for the purpose, for the 33rd Cup. SNG and CNEV released a protocol, including a new design of boats (AC 90), with provision for disputes to be resolved by arbitration (before the AC33 Arbitration Panel), and that once again AC Management would be the official organising body.

121. On 20 July 2007, however, Golden Gate Yacht Club ("GGYC"), a US club, acting on behalf of BMW Oracle, began legal proceedings in the New York Supreme Court claiming that since CNEV had never run a regatta it was not qualified to be the challenger of record, and at the same time filed its own challenge, claiming to be the first club to have filed a conforming challenge, and therefore the challenger of record in place of CNEV. Despite the litigation, SNG continued to work with other teams, including TeamOrigin which had submitted a challenge through RTYC, on the

protocol for the 33rd Cup. On 7 September 2007, the AC33 Arbitration Panel confirmed CNEV as the challenger of record.

122. However, GGYC, which had not signed the contractual protocol, did not accept the Arbitration Panel's decision, and continued with the court proceedings. On 27 November 2007, the Supreme Court ruled in favour of GGYC, ordering SNG to meet GGYC's challenge under the default Deed of Gift terms unless they could agree on a protocol. However, they could not agree. Instead, SNG appealed against this decision to the Appellate Division of the New York Supreme Court.

123. On 13 March 2008 the Court confirmed its order. On 29 July 2008 the Appellate Division reversed the lower court ruling, finding that CNEV was the rightful challenger of record. In the light of that ruling, SNG and CNEV released a new protocol, based on a mono hull design with a smaller crew. In November 2008, however, GGYC appealed against the Appellate Division's decision to the New York Court of Appeals (the final appeal court). On 2 April 2009, the Court of Appeals decided in favour of GGYC, holding that a club could not qualify as a challenger if it had not previously held a regatta. GGYC then announced that it would seek to negotiate with SNG for a conventional, multichallenger Cup, and a number of yachting clubs urged them to reach agreement.

124. However, SNG stated that it would not negotiate for a multi-challenger regatta and insisted on a default Deed of Gift match. On 14 May 2009 the court ordered races to take place in February 2010, unless the parties could agree on another date. There were further legal disputes about location and timing, finally ending in October 2009. The 33rd Cup races between BMW Oracle Racing and Alinghi eventually took place in February 2010, with BMW Oracle Racing as the winner.

2013 (34th) America's Cup

125. The challenger of record was Club Nautico de Roma ("CNR"). A joint press conference was held on 6 May 2010 to plan for the event, in which it was stated that the planning process would include the creation of a new class of boats in conjunction with all teams.

126. A draft protocol was released in June 2010, but this did not include a "class rule". When the protocol was published on 13 September 2010, the new class of boat was a wingsail catamaran. These boats proved to be so expensive that CNR and 10 other challengers withdrew; only 4 teams could afford to compete.

Law

Trade

127. "Trade" is defined in s 989 of the Income Tax Act 2007 ("ITA 2007") as including any venture in the nature of trade.

Section 66

128. Section 66 of ITA 2007 provides :

> "(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year –
>
> (a) On a commercial basis; and
>
> (b) With a view to the realisation of profits of the trade.
>
> (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits."

Issues:

(1) Whether the LLP's activities constituted a trade in the tax years 2007-8, 2008-9, 2009-10, 2010-11.

(2) If they did constitute a trade whether relief for losses arising in such trade were restricted by s66 Income Tax Act 2007

Case law on meaning of "trade"

129. In *Ransom v Higgs* [1974] 50 TC 1 (pg781), Lord Reid in discussing the definition of "trade" referred to the term as one which was:

> "…commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services".

130. In *Eclipse 35 v HMRC* [2015] STC 1429 Sir T Etherton C, as he then was, set out, having stated that it was a matter of law 1) whether some particular factual characteristic was capable of being an indicator of trading activity and 2) whether a particular activity was capable of constituting a trade:

> "Whether or not the particular activity in question constitutes trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles."

131. Other case law referred to by the appellant posed the question of :

> (1) whether the taxpayer was a serious undertaking earnestly pursued (*Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 2 QB 65 at pg 76 per Widgery J (the case concerned whether a building was used for a process "carried on in the course of trade or business" in article 2(2) of the Town and Country Planning (Use Classes) Order 1950)),
>
> (2) whether the activity was 1) actively pursued with recognisable continuity, 2) was a substantial undertaking measured by its accounts and

3) whether it was conducted on sound and recognised business principles *CCE v Morrison's Academy* [1978] STC 1 at pg. 8 per Lord Cameron. (this case concerned the interpretation of "in the course of business" in s2(2) Finance Act 1972).

Inter-relationship between trade,"commercial basis" and "with a view to the realisation of profit"

132. Both parties' positions entail accepting that the test of trade, commercial basis and "with a view to the realisation of profit" are not one and the same. The Respondents say the inter-relationship between whether something is a trade and fulfilment of the s66 tests ("commercial basis" and "with a view to realisation of profit") is not clear. However they do not suggest that an activity can never be trading if not carried on a commercial basis and with a view to realisation of profit. Having said that the way HMRC have put their submissions very much focussed on the idea that commerciality and profit-making were a common thread running through the three tests (of i) trade, ii) commercial basis iii) with a view to realisation of profit). In contrast the appellant put forward three specific roles for the different tests. As is now clear from Court of Appeal's decision in *Samarkand v HMRC* [2017] EWCA Civ 77 (at [90] of Henderson LJ's judgment) the profitability and commerciality tests are not mutually exclusive and necessary overlap to an extent which will vary from case to case. This proposition was regarded as binding by Nugee J in *Seven Individuals v HMRC* [2017] UKUT 0132 (TCC) at [44]). Both these decisions were given after the hearing in this appeal and so were not addressed in the parties' submissions at the hearing but for present purposes it is sufficient to note that the Court of Appeal's decision leaves open the possibility that there may be a category of activity which even if it meets neither or both of the commercial basis and with a view to realisation of profit requirements (such that losses may not be relieved under s66), may nevertheless constitute a trade.

Likelihood of profit being made

133. More significantly the parties were at particular odds as to the relevance of the likelihood of profit being made. In considering whether operations have a commercial character HMRC argue the most relevant consideration is the likelihood of the activity making a profit. By contrast, beyond the situations where it is just not possible to make a profit, the appellant says this factor is irrelevant. (The appellant accepts that the likelihood of profit may be an evidential indicator as to a person's subjective intention (as to which see further discussion below) but emphasises that it is one that may be displaced).

134. By way of support for their argument Mr Goy, for HMRC referred to *Religious Tract and Book Society v Forbes* (1896) 3 TC 415 concerning the activity of "colportage". This was explained by Lord Templeman in *Ensign Tankers* as follows:

> "a society founded for the diffusion of religious literature sent out agents who travelled from door to door with the object of engaging a customer in religious discussions so as to spread the gospel while selling the Bible and religious tracts."

135. The sales were carried out at a loss and Lord Templeman noted it was held that the agent there was a missionary and not a trader. It was held that book sales made through colportage were not a trading activity. In the *Forbes* the Lord President noted that:

> "the business carried on is not purely that of pushing the sale of their goods, but that on the contrary the duty of the salesman is to dwell over the purchase and make it the occasion of administering religious advice and counsel. Now under these conditions it seems to me to be impossible to hold that this is a business, trade or adventure, which is unfortunately resulting in loss. It is really a charitable mission in which the sale of the Scriptures is made the occasion for doing something more than merely effect the sale of books."

136. Colportage was contrasted with the Society's bookshops which were for selling books at commercial prices and did so at a profit. The bookshops were accepted to be trading (even though the purpose of the shops, having made the profit was to put the profit made towards the charity.) As all three of their Lordships noted, the public were appealed to for subscriptions to make up the shortfall in respect of the colportage (but not the bookshops).

137. Mr Prosser, for the appellant, submits the case can be understood as being one where, looking at what was done objectively (proselytising in circumstances where a profit could not be made), it was obvious there was no trade.

138. As to the issue of likelihood of profit, we note that this was a case where the Lord President accepted that the activity could not be carried on at a profit. It therefore fell into the area conceded by the appellant as not giving rise to a trade, namely that there cannot be a trade where there is no possibility of profit. We agree with the appellant the case may be understood as not about asking about the motivations of why something is done but looking at what and how it was done i.e. how in particular the books were sold, but also the surrounding circumstances (e.g. that losses were filled with public subscriptions). Indeed the case was referred to by Lord Templeman in his judgment in *Ensign* along with others (including *Iswera* discussed below) with the preface:

> "intentions sometimes illuminated and sometimes obscured the identification of a trading purpose. But in every case actions speak louder than words and the law must be applied to the facts."

139. The topic of likelihood of profit was also considered (albeit in the context of the "commercial basis" test) by the FTT in in *Acornwood LLP v HMRC* [2014] FTT 416 (TC) where Judge Bishopp explained: –

> "[370] Thus we take the draftsman to have used the phrase 'on a commercial basis' to mean in accordance with ordinary prudent business principles, and not in the manner of the amateur or dilettante to which Robert Walker J referred. No business is certain to succeed, and the making of a loss, or of only modest profits, is not necessarily an indication that its proprietor has not pursued the trade on commercial lines. But if, as Mr Blair demonstrated, it can be shown

> that at the moment the business was started, the prospect of recovering the capital invested, even without a surplus, was dependent on the realisation of an unrealistically high profit with the consequence that loss was, if not certain, then much more probable than not, it does not seem to us that it can fairly be said that those embarking on the trade can have entertained a serious profit motive, and their claim to have intended to conduct the trade on commercial lines must, at the least, be doubtful. The amateur may be content to make a loss since the pleasure of the activity is reward in itself; the ordinarily prudent commercial person would not enter into a partnership whose business was more likely than not to result in a loss.
>
> [371] In essence, the difference between the parties can be resolved only by an analysis of the evidence in order to determine whether the making of a trading profit by each partnership was a genuine, meaning real and earnestly pursued, objective, or, even though there was a hope of and potential for trading profit, any profit which did result would be little, or even nothing, more than a potential incidental benefit of an activity in reality pursued for other reasons."

140. This extract points to the inter-relationship between the likelihood of profit and the reasons someone has undertaken an activity. To the extent the last sentence of [370] in the extract above suggests entry into a business which was more likely than not to result in loss would mean there was no trade Mr Prosser challenges this as being incorrect. We did not understand HMRC to be relying on the FTT's decision to this effect however, rather, that the significance of likelihood, as Mr Prosser accepted, is that a small likelihood of profit might be taken as evidence that the taxpayer had other reasons for undertaking the activity. It was important to remember that in this role as an evidential indicator of intent or purpose, the question of likelihood would only raise a presumption as to intention or purpose which could be rebutted.

Relevance of speculation

141. A related point of difference between the parties is as to the role of speculation (i.e. the more uncertain the profit sought from the activity pursued the more speculative the activity).

142. The appellant argues speculation is a highly relevant indication of trading. Speculative ventures, by definition, have uncertain outcomes; large initial costs are incurred and losses made because large revenues depend on the outcome of one or more hoped for uncertain events. It would be wrong to say a venture only becomes a trade when the uncertain hoped for events actually happen. A speculative venture carried on with a view to profit is a trade whether or not the trader is confident about his predictions.

143. As referred to by the appellant, in the Upper Tribunal's decision in *Eclipse* Sales J endorsed (at [71]) the FTT's view that an element of speculation was a characteristic of the concept of trade and that it was right to treat it as a highly significant factor.

144. HMRC accept that speculative ventures regularly involve trading but argue it does not follow that anything done when the prospect of profit is speculative is trading. (They refer to an extract at [81] from the UT's decision in *Eclipse* where the tribunal noted that the contingent receipts were "so very highly speculative and remote as to make it implausible to think that it was of any real substance or provided any significant commercial reason why anyone would enter into the arrangements".)

145. We note how the issue was treated by the Court of Appeal in *Eclipse* following the appeal to that court. As summarised by the then Chancellor in the Court of Appeals' decision (at [123]) there were two aspects to the LLP's activities. The first was that a payment of £503 million would be repaid with interest over a 20 year term and would produce a profit unrelated to the success or otherwise of the sub-licensed rights. As noted by the UT (at [80]) there was no significant speculative aspect to the terms of the arrangement and in the Court of Appeal the Chancellor noted this aspect had the character of an investment. In relation to the second aspect (the possibility of the LLP obtaining a share of contingent receipts) the Court of Appeal agreed with the FTT that this aspect was:

> "in real and practical terms insufficiently significant in the context of the LLP's business as a whole to lead to a proper characterisation of Eclipse's business as one of trade".

146. The relevance therefore of the income was not that it was too speculative, in that it was too unlikely to occur, but that it was too insignificant in the context of the LLP's business.

147. In conclusion we agree with the appellant that there is authority for the proposition that speculation is a highly relevant indicator. The mere fact that speculative activity is engaged in does not mean however that there is a trade – it depends on how it sits with all of the relevant activities undertaken by the taxpayer. Furthermore as indicated by the extract HMRC refer to (and echoed in the FTT's decision in *Acornwood* (see above [139]), where an activity is highly speculative it may indicate that the activity is being pursued for other reasons.

148. As the appellant argues, unless a profit is impossible, the fact that the likelihood of profit is small and therefore the activity is speculative does not point against there being a trade. Furthermore there appeared to us to be no authority which we were referred to for the proposition that likelihood of profit, apart from serving as an evidential indicator of purpose, was in and of itself a relevant or highly determinative factor of whether there was a trade. As Mr Prosser pointed out, authorities such as *Ransom v Higgs* make no mention of likelihood of profit.

149. That this is so, should not be a startling conclusion; there are any number of situations where the probability of profit may be low but where a business is clearly trading e.g. a poor trading environment due to a deep recession, the start-up of a business in a risky sector where most businesses fail and where there is stiff competition from well-established incumbents, or where businesses typically have to endure a number of years of loss before having any hope of becoming profitable.

150. However, relying on *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes* 5 TC 159, a decision of the Court of Exchequer (Scotland) Mr Goy argues the facts must be looked at objectively to indicate whether they disclose "a scheme of profit-making". The facts concerned a company which bought property and resold it. Contrasting the case where an owner of an ordinary investment chooses to realise it and obtains a greater price which was not subject to income tax under Schedule D, and the situation where what was done was the carrying on or carrying out of business Clerk LJ framed the issues as follows:

> "Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?"

151. Mr Prosser depicts this case as being concerned with the trade v. investment type issue; it was not saying that profit-making is a pre-requisite, but we note that in any case the appellant's acceptance (that where profit making is impossible then there is not a trade) means that it is not in dispute that, at the very least, the possibility of a profit being made will be an element of whether there is a trade.

152. *Risk /reward* - One aspect which is not dealt with in the authorities we were referred to but which must follow as regards the relevance of likelihood of profit to assessing someone's reasons, is the scale of likely profit or loss. Where there is a low likelihood of profit but if that outcome is achieved the rewards are high that might not point towards there being other reasons for the activity in the same way as a situation where there is a low probability of profit, and further the profits are low when they are achieved as compared to the outlay.

Commercial purpose / activities?

153. HMRC emphasise the question is one of whether there is a genuine commercial purpose to the transaction and refer to Millet J's judgment in *Ensign Tankers v Stokes* [1989] STC 705 at pg 762 where he stated:

> "In order to constitute a transaction in the nature of trade, the transaction in question must possess not only the outward badges of trade, but also a genuine commercial purpose"

154. The appellant says the test of purpose is a subjective test and Millet J's reference to genuine commercial purpose does not survive given what Lord Templeman said in the House of Lords in *Ensign* (i.e. his statement at pg 743 that:

> "[Millet J] referred to authorities in which intentions sometimes illuminated and sometimes obscured the identification of a trading purpose. But in every case actions speak louder than words and the law must be applied to the facts)"

Nothing is added by having an objective test as it is accepted that the taxpayer's activities are to be examined objectively.

155. As to the relevance of a subjective purpose test the appellant refers to the Privy Council's decision in *Iswera v CIR* [1965] 1 WLR 663 *(Privy Council).* The facts of

that case concerned a taxpayer who had bought a large plot of land near to a school at which her daughters were to attend, financing the purchase through sub-dividing and selling some plots to others and using the proceeds towards the purchase of the plots, retaining two for her family's house. The tax authority contended the whole transaction was an adventure in the nature of the trade. The Supreme Court of Ceylon affirmed the first instance decision which had found it necessary to consider whether the dominant intention connoted an adventure in the nature of trade. Upholding the Supreme Court's decision the Privy Council noted:

> "The case is unusual in that on the one hand there are here many of the ordinary characteristics of trading while, on the other hand, the result was that the appellant, in addition to making a profit, obtained what she had been seeking — an opportunity to reside near her daughters' school. There appears to be little authority dealing with a case of this kind…"

156. Their Lordships went on to hold:

> "It may seem that too much emphasis has been put on motivation, but that is probably due to the nature of the argument submitted for the appellant. Before their Lordships, counsel for the appellant came near to submitting that, if it is a purpose of the taxpayer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In their Lordships' judgment that is going much too far. If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances."

157. The appellant highlights that a tribunal or court only needs to look to intention or purpose where the acts are equivocal. As to what constitutes equivocal acts, the likelihood of profit is not, they argue, a consideration as HMRC appear to suggest.

158. *Tribunal views on Iswera*: In our view the case demonstrates that something can be trading if the activities display the characteristics of trading even if the taxpayer's objective is some goal other than profit-making. (It is also consistent with Robert Walker J's examples in *Wannell v Rothwell* (which we come on to discuss – see [165] onwards below) of a hobby market gardener or art gallery / antique shop owner who has their own personal purpose reasons for carrying out the trading activity)).

159. It also seems to us, from the terms of the decision, that the exercise of looking at the purpose or object was not meant to be a determinative test but a filter or lens through which to view facts, if those facts were equivocal. Also, while *Iswera* may suggest that in such circumstances an intention to make profit is consistent with pushing equivocal characteristics over the boundary into the category of trade, it does not necessarily mean that anything less than a desire to make profit (for instance ambivalence as to whether profit is made) points towards a conclusion that there cannot be a trade.

160. As to whether (if the facts are equivocal) the enquiry into purpose or object is subjective or objective, we agree for the reasons the appellant outlines that the test is subjective. It is also consistent with *Iswera* where the reference to the taxpayer "who gets what he wants" suggests a subjective enquiry.

161. The focus is, as Mr Prosser suggests, very much on looking at what the taxapyer did and considering whether that amounted to a trade. We consider this issue as regards the particular facts of this case further at [188] onwards.

Activities: case-law on commencement /substance / duration / continuity / dormancy

162. As to the issue of when any trade carried on by the appellant commenced, the appellant referred us to the High Court's endorsement (in the judgment of Henderson J as he then was) of the test the Special Commissioner (Charles Hellier) set out in his decision in *TowerMCashback* :

> "Every case will turn on its facts but in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin."

163. In relation to the issue of whether a trade had ceased, the appellant also referred us to *Kirk & Randall Limited v Dunn* [1924] 8 TC 663. That case concerned a building / engineering work company which had sought unsuccessfully during a period 1914 to 1920 to obtain contracts although expenses continued to be incurred. The issue was whether the trade had continued in this period or whether a new trade had begun in 1920 when, with fresh capital and a different business policy, a number of profitable contracts were obtained. In the High Court, Rowlatt J overturned the Special Commissioner's decision that a new trade had begun noting that a company might have a year when it was holding itself out for business but nothing came of it, yet that this would not effect a break in the life of a company for income tax purposes.

164. The appellant relies on the case for the proposition that when a person has started trading and then something happens to cause there to be difficulties in the business but the person has not abandoned it but is still trying, this does not mean the person has ceased trading. We agree with the appellant's submission, and also note that in *Kirk* a lack of success from such attempts to get contracts over a prolonged period also did not mean there was no trading activity.

Commercial basis

165. The High Court considered the meaning of the term "commercial basis" in *Wannell v Rothwell* [1996] STC 450. The facts concerned speculative financial activities carried out by a former commodities and futures trader making purchases and sales on his account from a home office. (By way of background we note the following: The Revenue's argument was recorded as being whether the taxpayer was carrying on a trade on a commercial basis. Similarly the appellant's argument was depicted as twofold: was the taxpayer trading and if so was it trading on a commercial basis? The legislation under consideration (s 170(1) of the Income and Corporation Taxes Act 1970) did not split commercial basis and "with a view to realisation of

profits" into two parts as is the case in s66 ITA 2007. It is a little unclear therefore whether the parties and the judge were specifically considering only the "commercial basis" part or the whole of the section as a composite whole).

166. In Robert Walker J's view (at pg461g) the commissioner had found the appellant was trading, and had made findings that the taxpayer "was aiming at profits—quick profits—and it is implicit in what he said about the taxpayer's experience and method of operating that he had a reasonable prospect of achieving profits…the grey area is as to whether [the taxpayer's] admitted casualness or lack of self-discipline made his trading activities uncommercial". Those comments and the passage excerpted below are more consistent with the judge seeing the "with a view to realisation of profits" element in s170(1) ICTA 1970 as having been satisfied and the focus being on the question of "commercial basis".

167. At page 461 Robert Walker J explained:

> "I was not shown any authority in which the court has considered the expression 'on a commercial basis', but it was suggested that the best guide is to view 'commercial' as the antithesis of 'uncommercial', and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante. There will no doubt be many difficult borderline cases …for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale."

168. This extract has been referred to many times in subsequent cases. In *Samarkand v HMRC* [2015] STC 2135 the Upper Tribunal set out at [96]:

> **"**'Commercial' and 'with a view to profit' are two different tests but that does not mean that profit is irrelevant when considering whether a trade is being carried on a commercial basis. The reference in *Wannell v Rothwell* to the serious trader who is seriously interested in profit is not only relevant to deciding whether a person is a serious trader or an amateur or dilettante. We consider that the FTT were right when they said, at [253], that the serious interest in a profit is at the root of commerciality. We also consider they were correct in regarding 'profit' in the context of commerciality as a real, commercial profit, taking account of the value of money over time, and not simply an excess of income over receipts".

169. In the oft-quoted statement above from *Wannell* the notion of someone who has a serious interest in profit is contrasted with someone who is an amateur and dilettante. As to what a "serious interest" might mean, in our view the formulation

seeks to exclude someone who is dabbling, someone who does not care one way or the other about whether a profit is made, and that behaviour manifests as someone who is an amateur or a dilettante. However the disregard shown by Robert Walker J to a person's skills would mean that an amateur, or a dilettante (who by the nature of having been described as such might very well lack the skills and experience in the activity) could still be a trader if they had, despite their shortcomings, organised themselves or acted in such a way which meant they were serious about making a profit. For example they might compensate for their lack of skills / experience by outsourcing or hiring appropriate skilled employees.

170. Mr Prosser's submissions accept that the reference in *Wannell* to someone with a "serious interest in profit" is not satisfied by a person's subjective interest in profit; rather it is geared towards asking whether the way they are carrying on the trade is consistent with someone who has a serious interest in profit-making. His submission effectively presaged the Court of Appeal's endorsement in *Samarkand* of the Upper Tribunal ("UT's) decision in that case to the effect as noted by Nugee J in *Seven Individuals* that:

> "[45]…A trade run on commercial lines seems to be a trade run in the way that commercially-minded people run trades. Commercially-minded people are those with a serious interest in profits…If therefore a trade is run in a way in which no-one seriously interested in profits (or seriously interested in making a commercial success of the trade) would run it, that trade is not being run on commercial lines…
>
> [46] …the concept of a trade carried on on commercial lines has an objective element to it, and cannot be satisfied by proof merely that the trade is well organised and that the trader had a purely subjective hope or desire to make a profit."

171. We were also referred to a further excerpt from the FTT's decision *Acornwood* which is supportive of the appellant's conception of the "commercial basis" test being about the way business is conducted:

> "[369]…One may set out with a clear business plan, with adequate capital and other resources, and with a commitment to devote the necessary time to the trade, yet still fail because of unexpected market conditions, because the choice of commodity was ill-judged or because of misfortune. As we see it, the legislation (which, after all, is aimed at relieving losses) is not intended to penalise those who, despite their best efforts, are unsuccessful, but rather to exclude those who, despite their desire for profits, do not conduct their trading activities in a manner which, all things being equal, are conducive to the generation of profits".

172. As to the appellant's argument that, the commercial basis test does not present a means to attack the viability of the taxpayer's underlying business proposition we can see that there is some implicit support for this proposition in Robert Walker J's judgment in *Wannell* (if it were not correct why would it, as Robert Walker J

suggests, be necessary to disregard the taxpayer's shortcomings in skill, capital or experience?)). However, following the UT's decision in *Seven Individuals* it appears an objective assessment of not only the likelihood of profit but also the level of profit will be highly relevant. At [54(3)] Nugee J set out:

> "The likelihood of profit seems to be central to an assessment of its commerciality…[a person seriously interested in commercial success] would be unlikely to regard a trade which had a remote possibility of a small profit as worth carrying on as a commercial venture, even though it could be said that there was a realistic possibility of profit."

173. As indicated above by the excerpt from *Acornwood* [371] (extracted at [139] above) a low likelihood of profit may be relevant to this test too from an additional perspective: to the extent the low likelihood suggests the activity is being pursued for a non-commercial reason and that in turn may make it more likely (although not inevitable) that the way in which the activity is being conducted will also be non-commercial.

With a view to realisation of profit

174. Both parties are agreed the test posed is a subjective one. Both are agreed there can be more than one objective (although HMRC submit the objective, even if does not need to be primary must be serious and admit it is possible that a person can have more than one serious objective). Mr Prosser submits that as long as making a profit is one of the person's real aims and not completely incidental then that is good enough for the purposes of the test. Mr Goy, emphasises a mere hope of profit not enough.

175. We agree the test is subjective for the reasons set out by the appellant. The conclusion follows from the language of section which may be contrasted with other sections of ITA which also set out the test in relation to profits but in a way which clearly directs an objective test. Section 74(2) (which is relevant to the relief in s72 for individuals for losses in the first years of trade) defines that a trade is commercial if it is:

> "…carried on throughout the basis period for the tax year a) on a commercial basis and b) in such a way that profits of the trade could reasonably be expected to be made in the basis period or within a reasonable time afterwards."

176. The conclusion that the test is subjective is also consistent with *Walls v Livesey* [1995] STC (SCD) and *HMRC v Kitching* [2013] UKFTT 384.

177. In *Walls v Livesey* the taxpayer let furnished holiday accommodation. The Special Commissioner explained:

> "5. The issues in this appeal come to this, whether the taxpayer can satisfy, firstly, the words 'with a view to the realisation of profits' which appear in s 504(2)(a) (so as to be entitled to treat his letting activities as a trade for tax purposes) and in s 384(1) (so as to be entitled to obtain relief for losses under s 380); and, secondly, the words 'in such a way that profits in the trade … could reasonably be

> expected to be realised in that period or within a reasonable time thereafter" (so as to be entitled to obtain relief for losses under s381).
>
> 6. These two statutory expressions are not the same and in my opinion they provide two tests. The first is a subjective test and the second an objective test…
>
> …
>
> 8. (a) Now, I have no doubt, having heard the taxpayer's evidence, that he satisfies s 504(2)(a). The lettings I find are made on a commercial basis and with a view to the realisation of profits. The inspector accepts that the first limb of this condition in sub-s (2)(a) is satisfied but challenges the second. I find the taxpayer had neither purpose nor interest in adopting any other course than the realisation of profits. Satisfying sub-s (2)(a), it follows that the taxpayer satisfies s 384(1)."

178. Beyond expressing the test was subjective, the facts of the case did not lend themselves to any more detailed interpretation of the test because at [8] of the decision the Special Commissioner found that "the taxpayer had neither purpose nor interest in adopting any other course than the realisation of profits". The question of what the position would be if there was another purpose, and whether in that situation the test would still be met did not therefore arise for decision.

179. In *HMRC v Kitching* [2013] UKFTT 384 the First-tier tribunal (Judge Cannan) was concerned exclusively with the "with a view to the realisation of profit" test. At [26] Judge Cannan explained by reference to predecessor legislation how 66(3), an objective test, deems "with a view to the realisation of profit" but does not preclude there being other evidence which shows the test is satisfied. (It is on this basis – other evidence namely the appellant's object of realising profit – which the appellant relies on to fulfil the test.) The FTT found the appellant there must have known a profit would not be realised the way the business was being carried out. The subjective test there was therefore not satisfied.

180. As to the relevance of the likelihood of profit being made as discussed above (at [140]) in relation to extract of the FTT's decision in *Acornwood*, likelihood of profit may serve as an evidential indicator (that may be rebutted) as to a person's motive - the less likely the profit, the more likely there is some other reason for undertaking the activity.

181. There was no authority to which we were referred on the question of whether realisation of profits had to be a main or primary purpose or the extent to which other purposes were also permitted. Both parties admit the possibility of multiple purposes, and we agree that is consistent with the drafting of the provision. It appears to us that there is no material difference between Mr Goy's description of the intention to realise profit being a "serious" one and Mr Prosser accepting it had to be a "real" objective which was not completely incidental. While we did not understand either submission to suggest a gloss on the words of the legislation both notions essentially capture the idea that the intention must be something of substance. In our view that approach is consistent with the presence of the deeming provision on reasonable expectation of profit. In the absence of the deeming provision something of substance

must be shown to enable a person to access loss relief. If it was a very low threshold there would be little value to the deeming provision.

182. Beyond leaving open the possibility of multiple purposes which cross at least some minimal threshold and the test being subjective there is little more we can say on the legal test. The issue will be one of whether the facts of the case fulfil the statutory test; namely whether, taking account of the facts and circumstances the appellant has demonstrated that it carried on any trade "with a view to the realisation of profit".

183. As will be seen from our conclusions on the application of the subjective test to the facts of this case, and taking account of the way the case was argued before us, we have not considered it necessary to address the nature of any objective element of the test as discussed in the decisions given subsequent to the hearing of this appeal (*Samarkand* and *Seven Individuals*). Those decisions do not appear to put in question the proposition accepted by the parties on the case argued before us that if the taxpayer lacked the requisite subjective intent then the statutory test was not fulfilled. The appellant's case was put specifically in relation to Sir Keith, and through him the appellant, having a subjective view to realise profits.

Summary of legal propositions:

184. Drawing the above discussion together, the legal propositions from the case law we were referred to may be summarised as follows:

(1) In relation to the question of whether the appellant was carrying on a trade the tribunal must look at all the facts in the light of the legal principles. If the taxpayer's acts are equivocal, then the tribunal can look at the taxpayer's purpose or objective. If it does that then the taxpayer's purpose or object will be looked at from a subjective point of view. The focus of enquiry is on the activities undertaken. If the taxpayer has a motive unrelated to profit this does not necessarily mean there is not a trade if the activities amount to trading activities. But, if there is a profit making motive this may swing the balance towards finding that there is a trade on otherwise equivocal facts.

(2) The "commercial basis" test concerns the way in which the trade is carried out. The issue is whether the trade is carried out in a way which is consistent with the way someone who is seriously interested in profit would carry it out. Following the UT's decision in *Seven Individuals* the likelihood and level of profit are central to fulfilment of the test.

(3) The "with a view to realisation of profit" test is a subjective test. There must be some substance to it although it does not have to be a sole or primary objective.

(4) Beyond situations where it is impossible to make a profit (in which case there is no trade), the likelihood of profit being made is relevant as an evidential indicator when discerning a person's subjective intention (this applies both on the trade question where the activities are equivocal and on

the question of "with a view to realisation of profit"). The more unlikely a profit, the less likely a finding that the taxpayer was acting with the intention of making a profit although such a finding could be displaced by evidence to the contrary.

Application to facts:

185. While there are various points of factual dispute which we come on to discuss it is useful to note at the outset that the following facts were common ground between the parties:

(1) What TeamOrigin did (the detail on the appellant's racing and sponsorship activities as set out in the appellant's skeleton and which cross-referred to Sir Keith's evidence was not contested).

(2) Sir Keith's aims, motives, and purposes regarding TeamOrigin were also TeamOrigin's.

(3) TeamOrigin managed its affairs in a professional manner not as an amateur or dilettante.

(4) TeamOrigin admits it always knew the prospect of making a profit was small (although as we have already flagged the appellant argues this issue is besides the point).

(5) That TeamOrigin wanted to obtain as much sponsorship as possible. Further there was no suggestion that Sir Keith would not have liked to have made profit.

Was the appellant carrying on a trade in the relevant periods?

Parties' submissions

186. The appellant points to the fact the appellant was a serious undertaking earnestly and actively pursued with recognisable continuity which was substantial as measured by its accounts. It was conducted on sound and recognised business principles by reference to a budget. A detailed business plan was devised and overseen by experienced professionals. It was a commercially-structured professional sports business. The activity was of a kind commonly conducted by those seeking to profit from it, namely the provision of sponsorship, merchandising and hosting services for reward – services were provided to customers on commercial arm's length terms. The racing was conducted to facilitate the provision of those services. The activities were highly speculative and were carried on with the purpose and object of making a profit. There was evidence TeamOrigin began trading in August 2007: it recruited staff, opened offices internationally, bought a boat, and held positive meetings with sponsors. It produced a detailed "sports team management" racing strategy for winning the 33rd America's Cup. It entered into an agreement with RTYC and through the club lodged an official challenge which was accepted. It held meetings with SEEDA, entered into informal sponsorship with Henri Lloyd in relation to clothing supplies and with Smith & Williamson. There was evidence that TeamOrigin continued trading until October 2010 – although it scaled down it

continued racing, looking for sponsors. It was not racing for its own sake but to aid discussions with sponsors as without sailing there was no TeamOrigin "product". Various sponsorship agreements were entered into between May 2009 to July 2010. It is accepted the appellant ceased trading on 1 October 2010 (when it announced it would no longer be competing).

187. HMRC emphasise that the activity must have a commercial character, looked at objectively. In looking at commerciality, likelihood of making profits is the most relevant consideration – here it was wholly unlikely a profit would be made. The activity was carried out principally because of Sir Keith's desire to participate in the America's Cup. It fell within the example given by Judge Bishopp in *Acornwood* where profit was an incidental benefit of activity in reality pursued for other reasons

Discussion

188. It follows from the tribunal's conclusion on the legal analysis above that the questions raised by both parties as to 1) the object of the appellant's activity, and 2) those of HMRC's arguments which speak to the likelihood of profit being made, (except the question of whether profits were impossible we shall come on to) are to be put to one side in the initial analysis (which focuses on the question of whether what the appellant was doing constituted a trade). Those arguments would be relevant however if the facts on trading were considered to be equivocal, and, assuming it was concluded that there was a trade, when considering whether any trade carried on by Sir Keith was carried on with a view to realisation of profit and on a commercial basis, and we shall therefore return to them as appropriate later on in our decision.

189. Before considering each basis period, it is useful to first address two general issues. It is clear from the activities undertaken that these were racing activities on the one hand and seeking to obtain sponsorship and other income on the other: The questions which arise are: 1) whether in principle the activity of obtaining sponsorship income is, as the appellant argues one typically carried out as a trading activity 2) whether racing was a separate activity and not part of any trade in getting the sponsorship income 3) whether profit was impossible because of the RTYC issue.

Sponsorship activity and racing interconnected?

190. It is convenient to deal with 2) first: we were referred by the appellant to Rowlatt J's judgment in *Scales v George Thomson* which put the question as follows:

> "…was there any interconnection, any interlacing, any interdependence, any unity at all embracing [the two businesses]".

191. HMRC argue there was no commercial justification for racing without commercial funding. It cannot have been because of sponsorship because in 2008 TeamOrigin decided not to continue its sponsorship campaign as it was damaging to its long term goals.

192. We agree with the appellant there was no separate activity of racing. Developing and honing the skills of the sailing team by competing in races was

necessary in order to put forward a credible team which could compete in the America's cup. Sponsorship income and in turn merchandising and hosting income could not have been obtained without racing. There was an interconnection, interlacing and interdependence between the two activities – the racing activity was conducted not only with a view to increasing the prospects of success in the America's Cup but also as a vehicle to make sponsorship attractive (as shown by the efforts in obtaining publicity / filming of the races, and the thought process the appellant engaged in when weighing up whether it would be worthwhile racing at the Louis Vuitton event in Dubai). As regards HMRC's point that racing continued in 2008 despite there being no plan to seek sponsorship; Sir Keith's evidence (see [78] above) was that the appellant kept in touch with existing potential sponsors and that it continued to look for and talk to new ones such as Skandia and JP Morgan Asset Management. As he explained, sponsorship was sought for the appellant's Revised Sailing Programme and there was a balancing act between not compromising the existing relationships in relation to America's Cup related sponsorship but also taking advantage of the possibility that sponsors of the Revised Sailing Programme would also be potential targets for sponsorship in relation to the America's Cup. In our view the fact that the racing activity would keep the appellant's profile visible so as to enhance potential future sponsorship efforts, rather than existing sponsorship efforts, did not make the two activities any less interconnected.

Whether commercial sponsorship amounts to trading?

193. As to 1) above the key question is whether the activity of seeking commercial sponsorship is a trading activity. Are the activities of obtaining sponsorship income per *Ransom v Higgs* "operations of a commercial character by which the trader provides to customers for reward some kind of goods or services"?

194. Some activities are so self-evidently trading the court is simply able to confirm that this is the case, for instance in *Ensign* Lord Templeman was able to unequivocally state: "The production and exploitation of a film is a trading activity".

195. The activity of seeking commercial sponsorship is perhaps less instantly recognisable as a trading activity but has received some prior judicial consideration. *British Olympic Association v Winter* [1995] STC (SCD) 85 concerned an association which, amongst other activities, sought and successfully obtained commercial sponsorship against the backdrop of, as the name of the appellant suggested, a large-scale sporting endeavour. Although we did not receive any detailed submissions on this case, having considered it further, we think it is actually supportive of the idea that seeking and obtaining commercial sponsors against the backdrop of a sporting endeavour is something which is prima facie capable of amounting to a trade even though the facts of that case in relation to the set-up of the association were significantly different from the facts of the present appeal.

196. In that case the Inland Revenue were seeking to levy corporation tax on the grounds that the company was trading. As well as seeking prospective sponsors the appellant was doing lots of other activities (e.g. public educative functions). Its objects did not appear to be trading objects, and the appellant was described as a non-

profit-making institution which existed broadly to promote the Olympic ideal and incidentally to ensure that the best possible Olympic team was sent to each games. The sending of the team to the Olympic Games and the fact it was financed by "innumerable small gifts" from the public was contrasted by its commercial approach when dealing with prospective sponsors. It was noted that the whole sponsorship appeal programme depended on the belief on the part of the potential sponsors that a high quality team would go to the Barcelona Olympics and would perform well. Viewed as a whole the Special Commissioner concluded that its activities were not commercial. It is implicit in the decision, however, that if there had been simply sponsorship in return for use of the appellant's logo (which combined the Union flag with the Olympic rings) then that could amount to trading. The decision is supportive of the idea that obtaining sponsorship in a commercial way in respect of a sporting endeavour (but where there is no non-commercial contribution (e.g. from public contribution) to the sporting endeavour) then that activity could amount to a trading activity.

197. The fact that obtaining sponsorship income in a commercial way in relation to a sporting endeavour may be viewed as trading is entirely consistent with the description in *Ransom v Higgs* of a person providing services to a customer for reward. In this case the customer is the corporate sponsor who receives the commercial benefits of e.g. increased publicity and brand awareness and/or opportunities to court clients or reward employees, and in return the appellant receives a monetary benefit or a benefit in kind.

198. While it is not clear from the facts of *British Olympic Association* whether any sponsorship income that was accounted for took the form of value in kind sponsorship, there appears to us to be no reason to disregard a "value in kind" as a reward from the potential trader's point of view – it is of value as it means that costs that otherwise would be incurred are no longer incurred. (As we discuss below the approach taken to obtaining value in kind sponsorship might, however, be a factor that is relevant to take into account when analysing the object of the appellant's activities.)

199. We conclude that obtaining sponsorship income for a sporting endeavour is in principle at least capable of being a trading activity, whether the income is in money or in kind.

The RTYC issue – argument that profit is impossible because any profit would have ended up in the JV company not the appellant

200. The relevant factual background is set out above at [95] onwards above. In brief the concern raised by HMRC is that profit was not possible so far as the appellant was concerned (because even if a profit had been made it would have ended up in the joint venture company and not within the appellant).

201. HMRC maintain that the appellant is unable to prove profits could ever have arisen in TeamOrigin – there was no reason to think the JV or other corporate would have been abandoned with profits transferred back to TeamOrigin (then exposed to

Sir Keith's high tax rate rather than corporate tax rates). It had not been established whether TeamOrigin intended to receive hosting profits and doubt was cast on whether TeamOrigin had a view to profit for itself as opposed to a combined result for itself and the organising entity. The revenues would arise in a separate entity (the JV company) and that the appellant's income from shares in that entity would not be trading income. Absent any agreement the obligation was to do what was set out in clauses 5.1.1 and 5.1.2. TeamOrigin was obliged to enter into a JV agreement and form a JV. It is not known what Sir Keith/TeamOrigin would have wanted if they had won the 33rd America's Cup – would they have wanted the JV to operate on its terms or something else? Mr Goy submits that unless the appellant can show that it is more likely than not that the hosting income would accrue to TeamOrigin then it is very difficult to say TeamOrigin could at least pass the test of "with a view to realisation of profit". Mr Goy also submits the agreement was rushed into, commercial considerations took second place, the commercial activity's role being to support the racing.

202. The appellant's case is that the terms of the agreement left room for manoeuvre: referring to "such other terms as the parties may agree" (and that in any event the parties would have been amenable to varying, and would have varied the agreement to come up with a structure which meant TeamOrigin held the relevant rights when it was realised that the legal concerns (which did not require a separate entity not only to manage but also to own profits) were misconceived. If there had been any role for a JV company at all it would have been as acting as a manager getting the sort of share (10%) that the AC management company would have got for Alinghi.

203. Mr Prosser articulated at least two possibilities that would have happened once it was appreciated no separate legal entity for profit sharing was indicated: 1) the JV company could have been dispensed with and terms which envisaged cooperation directly between TeamOrigin and the clubs would then be implemented 2) the JV company would remain but would contract with TeamOrigin to provide services and in that way the bulk of the revenues would have flowed out of the JV company to TeamOrigin. But, either way the profits would not have remained in the JV. Sir Keith would have got advice on an efficient structure and made sure the profits were in the "right" i.e. the most tax efficient place.

204. *Tribunal views*: For the purposes of this issue all we have to consider is whether it was *possible* for profits to arise to the appellant; the appellant does not have to show that it was more likely than not that profit *would* arise in the appellant. It is clear to us that the relevant parties were amenable to taking steps to amend the agreement so we cannot regard it as being set in stone. In none of the periods in question can it be said that there was no trade because it was impossible to make a profit. This point does not therefore stand in the way of the appellant's case that it was carrying out a trade.

Did a trade ever commence and if so did it continue in each year in issue?

205. The facts as to each year are set out in an earlier section to our decision. It is not in dispute that these activities happened, or given our conclusion above, that activity

in pursuance of obtaining income by way of commercial sponsorship could amount to the carrying on of a trade.

206. The appellant submits that the trade began at the latest in August 2007 when the agreement was entered into with S&W to receive income for services. The appellant scaled down its activities but did not abandon them – the racing activities needed to get sponsorship income continued and there was some success in getting sponsorship in the period.

207. HMRC's case is that the existence of the litigation surrounding the America's Cup and the subsequent uncertainty in relation to AC33 and AC34 meant the appellant never had an opportunity to commence trading. Control of terms by the defender made it an inherently uncommercial environment to operate in. Even if there was a "double win" there is no evidence this would have been profitable (there was no evidence as to profitability of Alinghi cf ACM). Commercially, matters were always on hold. In the absence of raising any form of sponsorship during 2008, 2009 and 2010 (with the exception of £95,000 in January / July 2010) and without any efforts to raise sponsorship during much of this time there was no arguable basis for saying TeamOrigin was trading. As regards 2010 and the ramp up of activity there was still uncertainty as to competitiveness if multi-hulls were used. The activity was preparatory activity in anticipation of TeamOrigin becoming a competitor. All substantial sponsorship was entirely contingent on taking the step of competing which it never did. The suspension of activities extended even further when it must have been apparent in mid/late 2009 that AC33 Deed of Gift match would only happen in 2010 and AC34 in 2013/14 instead of 2011.

208. In our view, the above depiction of HMRC is inaccurate in some respects and fails to take account of certain relevant circumstances. First, we think the value in kind sponsorship deals must also be taken account of, not just the monetary value ones.

209. Second, and importantly it does not recognise that the activity of seeking out and building a relationship which is conducive to the sponsorship agreement is part and parcel of the trading activity; the HMRC depiction looks only to whether there has been a contract concluded. However, the question of whether there is a trade is not simply about what actual income came in but what activities were conducted in pursuance of the trade.

210. If many more contracts had been won on a regular continued basis that would make it easier to find there was a trade, but the fact that despite the significant time and effort, by all accounts that was put into sourcing and nurturing potential sponsors but without the hoped for results, does not mean there was no trade. The facts of *Kirk v Randall* where the directors incurred expenses e.g. for travel to potential clients over a prolonged period, well illustrate that even where there is a taxpayer who is unsuccessful despite his or her efforts at winning the business that gives rise to the activity upon which their trade is based, there may nevertheless be a trade.

211. To the extent that a prolonged period of incurring expense but with no results might reveal an objectively low likelihood of profit, this position is also consistent with our conclusion above that likelihood of profit (beyond situations where it is impossible to achieve a profit), is, at least in the initial analysis, not relevant.

212. While it might be argued the situation in *Kirk* was distinguishable because there was not an inherently uncommercial environment hampering the prospects for profit, we do not think that is a valid ground of distinction. In both cases it was possible to achieve sponsorship agreements or to conclude contracts with customers. The facts of *Kirk* indicate that the lack of success was due to the way the business was structured / lack of capital and that when these were remedied successful trading became possible. There appears to be no reason to differentiate between poor prospects for concluding contracts / agreements for reasons of capital / business policy from poor prospects due to external factors. (The points about the environment in which the appellant traded being uncommercial and whether there was evidence the appellant would make a profit even with a "double win", are in essence points about likelihood of profit and we consider them when considering that issue below at [243] onwards).

213. Third, as a matter of fact it is not correct to say that there were periods where no efforts were made to obtain sponsorship. There were periods where the work was scaled down, but sourcing sponsorship was always on the appellant's agenda in some shape or form, whether by direct approaches or by reviewing and researching potential contacts, or making the sponsorship proposition more attractive through visible racing events. According to the business plan (premised on winning AC33 and AC34) up to 2009 TeamOrigin was to earn £25 million sponsorship income. That required a serious amount of effort / resource and this was borne out in practice; significant resources – employees (multiple employees in a commercial department), money spent on external consultants e.g. Portas Consulting, time, strategy – were devoted to getting commercial sponsorship deals. The facts show extensive ongoing efforts were made in relation to sponsorship, researching and laying a future foundation for fruitful sponsorship discussions.

214. As regards the point that many of the contracts that were obtained did not kick into force until the happening of an external event this did not mean they were of no value, but that the likelihood of them leading to a profit was uncertain (which for the purposes of this stage of the test is irrelevant). They also show the parties must at least have thought there was a possibility that the litigation difficulties would be resolved, it being unlikely that commercial parties would spend time and effort on reaching an agreement that they thought would prove to be academic.

Are the facts equivocal (per test in Iswera)?

215. What factors are relevant in deciding whether the facts fall into the category of those which are equivocal? In our view the object of the activities cannot itself be the basis upon which facts are thought to be equivocal because what then would there be by way of extra light to be thrown on the equivocal facts by proceeding to examine the object? Nor could the likelihood of profit be a reason for saying the facts are equivocal as that is only relevant to the extent it informs the object (which itself is

only relevant if the objective facts on the activities carried out are equivocal). The facts of this appeal are far removed from *Iswera* where the appellant did not have the "set-up" of a trading organisation indicating a trade; it can well be seen how the Privy Council thought the facts in *Iswera* were equivocal.

216. In our view, the activity of seeking to obtain sponsorship income (against a backdrop where combined with other activity there was a possibility of unlocking other types of income e.g. merchandising and hosting income and a possibility of profit even it that was not realised) and when conducted within a business-like set up, was unequivocally a trading activity.

217. Although the choice of the vehicle through which to conduct the activity (an LLP) is not of course determinative (the issue of whether an LLP is trading being one which frequently lands at the tribunal's door) it is consistent with trading activity.

Conclusion on "trade" issue

218. The appellant was carrying on a trade throughout the basis periods in issue (i.e. August 2007 and the years 2008/09, 2009/10 (starting on 1 April (the accounting year end being 31 March from 2008) and from 1 April 2010 to October 2010).

219. We should point out that if we were wrong on our conclusion above that the facts were unequivocal as regards the trade issue we have considered whether it makes any difference to the conclusion when the facts are viewed in the light of the taxpayer's object. For the reasons set out in more detail in the remainder of this decision, the object was that of competing but doing so at an acceptable cost and of creating a future platform for commercialisation of the event more generally. Those objects would not in our view detract from the activities viewed in the context of the appellant's operations, being ones which were consistent with the carrying on of a trade.

Was the appellant trading on a Commercial basis? Application to facts

220. This issue only arises if it is established that there was a trade. Mr Prosser's submissions emphasised the test was about *how* trade is carried out; it does not ask *should* the trade have been carried out in the first place, or should it be continued. If is correct that the questions of commerciality is limited in that way then we would accept the test would be satisfied for the reasons below.

221. Referring back to Robert Walker J's judgment in *Wannell* (at [165] above) there is no suggestion on the part of HMRC's case that the appellant was an amateur or dilettante, and HMRC accepts the appellant's activities in question were managed in a professional manner. Nevertheless they make a range of further arguments. Some of these, go to the inherent uncommerciality of the America's Cup for the years in question (due to the defender's advantage in setting terms, the particular litigation, the "money is no object" approach of some of the others' campaigns). If the commercial basis test is limited in the way Mr Prosser suggests then these arguments may be put

to one side as they go to the environment in which the appellant operated rather than the way it operated.

222. HMRC nevertheless argue that the appellant (regardless of the uncommercial conditions of the America's Cup) operated in a manner whereby the focus was on racing as opposed to generating income or justifying its levels of expenditure on the basis of a commercial return. As explained in the section above at [190] onwards on the interconnectedness of the racing activity and obtaining sponsorship, the racing was not a separate activity pursued in isolation.

223. As the appellant points out it did react to changing circumstances; scaling down its activities to reduce costs. There were budgetary controls, consideration of the cost-effectiveness of the racing in terms of profile and the effectiveness for future sponsorship (e.g. consideration over whether to go to race at the Louis Vuitton event in Dubai or not). All of these features were consistent with a trader who was acting in a commercial way.

224. HMRC also argue that the appellant knew or should have known after the initial failures in generating sponsorship revenue that the appellant's position was unlikely to change for the foreseeable future, yet they continued to incur significant expenses for several years without any realistic possibility of recouping such expenditure. The appellant's answer is that the view of a third party (in this case HMRC) as to whether a trade is being carried on so as to afford a reasonable expectation of profits is irrelevant to this test (that is covered in s66(3) which the appellant does not rely on).

225. In our view HMRC's argument that the appellant's manner of acting was uncommercial (in the manner suggested by Mr Prosser's submissions) does not tally with our assessment of the facts. In the years in question it was not unrealistic to plan on the basis that the America's Cup event would be held although there would be uncertainty as to its timing and terms. Although actual sponsorship was thin on the ground there was interest from potential sponsors in getting involved when there was more certainty, and there were even those prepared to go to the trouble of committing to sponsorship on a contingent basis. It was not uncommercial in our view to persist with racing activity for the purposes of profile raising and raising competitiveness of the sailing team (given the competitive strength would correlate to more interest in sponsorship and a greater likelihood of accessing other income streams). We agree that in cutting back on costs the appellant was acting in a commercial way.

226. HMRC also submit as being inconsistent with commerciality the fact that naming rights said to be worth £10 million per annum were given away, and say it is surprising that there was no substantial reworking of the appellant's commercial outlook in the light of this.

227. Sir Keith explained the rationale at [82] of the strategy of donation and his judgment that the appellant would attract more money by having the Carbon Trust on board than not. There is nothing in his explanation that strikes us as uncommercial.

228. As to any omission to rework the business plan it is clear to us that the appellant continued to scrutinise and monitor its costs. Sir Keith explained there was no point revising the business plan in detail in the absence of the necessary information to put sensible assumptions together. Again in the circumstances we do not see that the appellant can be said to have been behaving uncommercially.

229. HMRC refer to a document put together by the appellant entitled "Moving forward in 2008" in which it is stated that a decision had been taken to "decommercialise the alternative sailing programme". In cross-examination Sir Keith was not able to assist on what this bullet point in the presentation document referred to, but it is clear from the remainder of the document which referred to continuing activities relating to researching and seeking sponsors that the appellant had not abandoned its commercial activities.

230. In relation to the RTYC issue we note the way in which the appellant engaged with the issue (taking legal advice, seeking to keep options open so as to not fall foul of possible New York trust law issues, and being open to further changes in the future) could not be described as uncommercial.

231. However given what is said in the UT's decision in *Seven Individuals* (see above at [172]) it appears that at the level of the FTT at least, the underlying objective viability of profit is part of the commercial basis test. Taking account of the law as clarified by that decision, given the small likelihood of profit and low return (discussed at [243] below) we would find that the appellant was not acting on a commercial basis because someone seriously interested in profit would not engage in a trade with such a likelihood of profit or level of return.

Conclusion

232. Our conclusion is that the commercial basis test would be satisfied in each of the relevant basis periods if the test is limited in the way Mr Prosser submitted. But on the basis the test is the wider one apparent from the UT's decision in *Seven Individuals* we find it is not satisfied. (We acknowledge this conclusion has been reached without the benefit of further submissions from the parties on the relevant legal test but given our conclusion on the "with a view to realisation of profit" issue below means the question referred to us on whether s66 presented a restriction would be answered the same way irrespective of the conclusion on this limb of the test, and given on the face of it the wider test appears binding at the level of this tribunal, we did not think it appropriate to delay the issue of this decision by requesting further submissions).

(b) Section 66(2) – was the trade carried on at all times "with a view to the realisation of profits"

Application to facts:

233. As discussed above the test raises the question of whether the appellant had a subjective aim of realising profit. It is agreed that Sir Keith's aims, motives and purposes regarding TeamOrigin were also TeamOrigin's; the appellant therefore needs to establish that throughout each of the relevant basis periods Sir Keith was carrying on the trade with a view to realisation of profits. The appellant acknowledged that Sir Keith's purposes throughout included obtaining the prestige and satisfaction of winning the America's Cup and bringing it back to the UK but argue that this aim went hand in hand with making a profit which was also an aim. HMRC argue Sir Keith's purpose was to win the America's Cup but at an acceptable cost.

234. In making findings of fact as to what Sir Keith's purposes were and whether, included among them was the aim of realising profit, we were called upon to consider a variety of sources of evidence together with the parties' competing arguments on the weight and relevance of that evidence. In particular the evidence took the form of: (1) Sir Keith's witness statement and oral evidence dealing with what his intentions were (2) documents setting out both internal and external statements made by Sir Keith and others. (Extracts and summaries of Sir Keith's evidence and the documents are set out above at [14] onwards). We also consider various other features relating to the activities of the appellant, the likelihood of profit being made (which as discussed above serve as evidential indicators) and as regards Sir Keith's aims at the time.

Sir Keith's evidence / documents and business plan

235. Sir Keith maintained throughout his oral and written evidence that he aimed to make a profit and not merely win at an acceptable cost. The appellant highlights that Sir Keith was a reliable and truthful witness who gave careful, credible consistent evidence and that the tribunal should accept his evidence as to his motives even though HMRC do not. HMRC say the tribunal is not however left with the stark choice of either accepting the truth of what Sir Keith said as to his intentions or finding his evidence as untruthful; subjective intent must be judged by all the evidence including the various actions taken by Sir Keith at the time. While HMRC do not suggest Sir Keith has intentionally sought to mislead the tribunal, they say that he has convinced himself of a narrative which appears to be contradicted by the documents dating from 2006 and early 2007. TeamOrigin was launched without regard to obtaining a profit; and if profit was the motivation the absence of references to this in the documents was remarkable: the first clear reference to profit was in the letter from S&W (see [40] above). After the business plans produced in or around March 2007 and September 2007 there was no meaningful reference or analysis of profit in the documents (although there were many examples of analyses of budgets and sponsorship income (showing a net loss). The business plan did not appear to have been updated: there was no evidence the September 2007 business plan (primarily modelled on competing in 2009) was reworked to see if profit was actually feasible when there was a switch to a 2011 event. Also when on 20 February 2008 Mike Sanderson circulated the revised 2011 campaign budget premised on two

scenarios both with cost of sponsorship predicted at £45m there was no reworking of the business plan to say whether and when profit would be realised, which was surprising given the difficulties caused by the ongoing litigation relating to the America's Cup and the financial crisis.

236. As regards the documents, the appellant takes issues with this depiction of the facts and points to various documents which while not referring in terms to profit, referred to "return" "surplus" "viability", "investors". The Brand document (see above at [22]) mentioned return on investment and this document (noting this document was produced before S&W's advice). S&W's summary of what Sir Keith had said to it before the meeting referred to a surplus being made.

237. Sir Keith's own evidence referred to some of these terms and he was questioned on his understanding in particular on the meaning of "commercial viability". HMRC highlight an answer given in examination in chief to the effect that a commercially viable event was one which attracted a big consumer footprint, whether through TV or at the event which would attract the commercial interest of sponsors. On the other hand when the lack of references to profitability was brought up in cross-examination (but it was acknowledged there were references to commercial viability) Sir Keith's explanation for the term was that in his mind "commercial viability is profit".

Discussion

238. *Sir Keith's evidence on his intention conclusive?* – Although the test for this leg of s66 is subjective, and it must be obvious that the starting point to finding out what was in someone's mind is to ask them, we agree with HMRC that a person's oral evidence as to their subjective intent is not conclusive; it must be assessed in the light of the all the other evidence of surrounding circumstances. When a witness gives evidence about what his or her intentions or state of mind was at a particular point in time, the witness is effectively expressing an opinion after internally assessing their recollections as to what their state of mind or intention was at a particular point in time; that may or may not reflect what their actual state of mind was. Furthermore the fact that their recollection is not accurate does not necessarily mean the person is being untruthful as they may genuinely and honestly believe that their intention or state of mind was the one stated in their evidence to the tribunal. Whether the person's recollection or judgement is accurate or not will involve, as HMRC suggest, consideration of all the surrounding facts and circumstances.

239. *Lack of reference to profits in documents / use of terms synonymous with profit*: Although, aside from the September 2007 business plan, there were no references as such to "profit", as the appellant points out various concepts synonymous with profit were mentioned and we have reviewed these in the context of the various documents. The impression we formed was that they are more consistent with an appellant intent on achieving racing success at an acceptable cost, and longer term commercialisation of the America's Cup for participants and host venues generally, than specifically with a view to realising profit in the appellant:

(1) Notes of a preliminary meeting which took place on 16 October 2006 (see [20] above) refer to the term "investor" which on the face of it suggests that there were persons sought who would expect a financial return. The discussion in relation to investors appears to acknowledge that some potential investors would want to get involved in running the team. The impression this paints is of investors who would not necessarily be persons who were interested in financial profit but who wanted to get involved for other reasons.

(2) In relation to the statement referred to in the document of 23 October 2006 (extract at [22] above), as HMRC point out, it is noteworthy that it is contained in a section on brand positioning (and that no figures showing a possible profit had been drawn up as at that stage). The reference to "ensuring we maximise on return on investment and exceed our partner expectations" comes across as marketing speak which is designed to convey an impression in the reader – of the dynamic, committed and professional nature of the venture.

(3) As regards the 13 December 2006 outline business plan the reference to "returns" (which Sir Keith explained he understood to mean profit) when viewed in context comes across as tentative and low-key. In the executive summary it features low down a list of ten bullets as "potential returns ultimately" – the others being "brand, two phases of business, two cup campaign, management team, challenge team, funding requirements and sources, attractions for sponsorship, form of investment, non-financial benefits to investors?"

(4) In considering the extract from an interview with Sir Keith in the CNBC European Business magazine article of June 2007 (extract at [24] above) the PR/marketing context and Sir Keith's track record of success in this area must be taken into account. Like any business publication interview it presented a platform to portray the operation as an exciting, well-run venture which it would be attractive to be associated with. In our view the comments do not offer a reliable window into Sir Keith's actual thoughts at the time. Given the business nature of the magazine and its audience, that Sir Keith no doubt had an eye to maximising commercial sponsorship, it seems unlikely to us that Sir Keith would focus in his interview answer on a desire to compete for other reasons e.g. a personal interest in sailing.

(5) In an April 2008 draft interview (see above at [25]) when asked what his real motivations were Sir Keith replied "the Cup has to be a commercially viable operation". However the answer speaks more to the America's Cup event as a whole (and commercial viability as explained in his answer in examination in chief) rather than a specific profit for the appellant.

(6) The LLP agreement defined "the business" by reference to "commercial arrangements to support the challenge".

240. We also agree with HMRC's observation that references to profit are conspicuously absent in the documents. As regards the meeting on 16 October 2006 it is notable that the focus of this meeting and the proposed prospectus document was wider issues such as goals, ambitions and strategy but that there was no discussion of profit. The interactions between Sir Keith and his tax advisers S&W, and between Sir Keith and Leslie Ryan in November / December 2006 (set out at [39] onwards above) are also consistent with the impression that profit-making was not a purpose in and of itself of the proposed activities. Rather, it was appreciated that demonstration of such a purpose was relevant to being attractive to potential investors.

241. At the other end of the period Sir Keith's e-mail to staff informing them of the rationale for winding down activity (extract at [93] above) said nothing about the impact of the changes on the profitability of the appellant.

242. *No reworking of business plan as regards impact on profit* –As for the intervening period a significant revealing factor in our view is the lack of any evidence that further profit impact calculations were performed as the former assumptions were changed or rendered uncertain. It is of course not in dispute that the appellant acted in a professional manner, or that it had employees tasked with financial planning. In line with that while the September 2007 was reviewed the resulting revisions were limited to cashflow forecasts and revisions to costs and sponsorship income. We were referred for instance to correspondence in this regard between Mr Hefferman and Sir Keith in an e-mail of 27 July 2008 enclosing a cashflow forecast scenario. As mentioned above Sir Keith's answer in his oral evidence was that there was no point revising the business plan in detail in the absence of the necessary information to put sensible assumptions together. The point is not so much that the business plan was not formally revised – it should not matter what particular documentation format was used - but rather that there appears to have been no internal workings or thought processes looking at the longer range view and the prospects for profit (whereas working assumptions had, it appeared to us, been made in terms of cost and sponsorship income). We would expect that an appellant who had an aim to realise profit would revisit their likely profit calculation and undertake work to see how that profit was impacted; they would be interested in working back from the revised figure to consider what changes needed to be made to ongoing costs to preserve the prospect of profit, or if profit was not possible when originally planned to determine at what point it could be achieved.

243. *Likelihood or prospect of profit as guide to intention:* As to the prospects of profit – it is agreed this was low. Sir Keith's explanation in evidence was that he was aware that start-ups were always risky and that TeamOrigin was at the riskier end of the spectrum. Profit was possible, and Sir Keith had sought to mitigate as far as possible with his background research the risks and uncertainties. We agree with his assessment that it was not simply a gamble, or a "leap of faith".

244. Sir Keith's description of the venture being "binary" in the European Business was explored in oral evidence; he recounted how some of his previous ventures such as Air Miles and the Nectar Card had also been binary in the sense that there were key milestones / contracts that had to be achieved in order for a profit to be made. In so far

as this makes the point that the risk involved in a business may centre around a key event or contingency, we acknowledge that such a feature is not inconsistent with there being trade, or a trader who has an intention to realise profit, and the likelihood of the event being the one desired will be relevant to the likelihood of profit. But, the analogy does not in our view assist us with the question of whether Sir Keith had an aim to realise profit. In each case the situation needs to be analysed to see whether the "win/lose" event was in reality viewed as a stepping stone to the realisation of profit. Where there are other possible reasons for undertaking the "win/lose" event there is more cause to examine whether there truly was an aim to realise profit.

245. The appellant maintains, contrary to HMRC's view, that Sir Keith knew that Alinghi, the racing syndicate, specifically had made a profit (as opposed to ACM the organiser) as a result of a press article (referred to at [33] and [119] above). However while we agree with HMRC that there is nothing in the article confirming Alinghi itself had made a profit (it is clear the reference to "viable commercial business model" was talking about the surplus achieved by the event organisers), it does not detract from Sir Keith coming to the view that a profit might be possible. For a variety of reasons (the defender's advantage in setting terms, the ongoing litigation) we agree the likelihood of a profit being made was small. The relevance of this is that it is a factor which points towards there being other reasons for pursuing the activity (although not of course a conclusive one and we discuss below whether the other evidence is sufficient to rebut it.)

246. HMRC also highlight the relatively modest anticipated returns when compared with the amounts to be expended. HMRC say that once the 10% for the organising entity is stripped out the projected profit was £16.9m. As the appellant points out this is a substantial sum but this does not detract from the point that to get this sum a large amount of capital needed to be put at risk (£60m). Given the high risk of losing significant capital in return for a small chance of an average return (28.2% over eight years) HMRC question whether profit was really the motivation of Sir Keith in launching the TeamOrigin campaign. We agree this level of return is a further question mark but all the more so when considered with the small probability of success. In such circumstances, given the small probability of success we would expect someone who was motivated to realise profit to expect a higher return by way of compensation for the risk. Again we acknowledge the factor is a rebuttable presumption as to subjective intent. The fact there appeared to at least one group who were at the outset of the relevant period interested in achieving profit from participating in the America's Cup (see [18] regarding an approach from another team) does not in our view assist with whether Sir Keith was doing what he was doing with a view to realising profit. While the appellant's lack of follow up might be seen as consistent with Sir Keith having his own plans for commercialisation it is equally consistent with the objective of profit not being something on his agenda.

247. *Relevance of RTYC issue (no profit arising to appellant?) to likelihood of profit*: As indicated in our discussion on the trade issue we have concluded that it was at least possible that the agreements would be amended in such a way that profit would arise to the appellant. The question of how likely that was to be the case would obviously also have an impact on the issue of how likely it was that the appellant would itself

realise a profit (as opposed to achieving an economic benefit e.g. through returns on shares held in the joint venture company contemplated by the agreement if that had been left in place.)

248. The question raised is whether, if the appellant was successful in AC33 that when they came to organise the defence they would *not* have put in place a Joint venture structure *and* would have put in place an arrangement whereby trading profit arose to the appellant? In our view there is insufficient evidence to make such a finding. But, equally there is enough evidence on the part of Mr Stork and Sir Keith to mean we cannot make a finding that it is more probable than not that the agreement *would* have been left unamended and that the Joint Venture structure would have been used. There is no clear view as to what would have happened as the reality was the issue was "parked". On the one hand the fact the issue had been parked could, as HMRC argue, be revealing to the extent it shows ambivalence to the mechanism by which profits having arisen in a separate joint venture entity would be returned to TeamOrigin. On the other hand it is not inconsistent with the parties ultimately seeking to use an arrangement where trading profit arose to the appellant but worrying about the detail later (especially given the friendly terms that existed between the parties and also taking into account that it was acknowledged that the likelihood of profit arising was small). In our view the lack of clarity around what was to happen is not an especially strong factor which assists us on the objective likelihood of profit.

249. What is, in our view, more pertinent, and a reason why the issue is not as significant to the appellant's case as HMRC suggest, is the appellant's subjective understanding of what was to happen. Sir Keith's evidence was that he could not recollect any detail about the joint venture arrangement –he thought the terms were as set out in the term sheet. He therefore had no reason to believe that if profits occurred that they would not arise as trading profit in the appellant.

250. *Significance of what has happened since*: As to the evidence of has happened to TeamOrigin since (see [94] above) it was not suggested to us, and there was no evidence on which to so conclude, that the new arrangements were destined to achieve profit. Rather the significance of that evidence was that the appellant's projections as to sponsorship income / commercial sponsor interest were not unrealistic. The subsequent performance does not alter the view however that at the relevant time for this appeal the prospects of profit were small (i.e. a scenario which has a small probability of occurring is no less of a small probability scenario (when viewed at the outset) just because the hoped for outcome materialises as it could just be an instance of the event with small probability occurring.)

251. *Awareness of profit /circumstances in which profit could be achieved does not equate to an aim to realise profit:* While we accept that Sir Keith was aware of the possibility of profit (for instance because of what he is reported by S&W as having told them before his meeting with them and later because of the assumptions of a double win and the profit figures in the business plan) this awareness that profit could be achieved does not mean that one of his aims in carrying out the trade was to realise profit.

252. Similarly the appellant's argument that his objective of winning were one and the same with him having an objective to realise a profit because a win was necessary to achieve a profit, does not necessarily equate to him having had a view to realise profit. This is not because of the low likelihood of profit *per se* which HMRC say is relevant but because although a double win was a gateway to profit, and Sir Keith knew this to be the case, whether profit would be realised was not inevitable but would depend on many variables around the detail of the event and indeed external circumstances, and it is inconceivable that someone with Sir Keith's experience of business would think that profit would *inevitably* follow from a double win. The situation might be different if an outcome inevitably followed from one aim (e.g. that profit would inevitably follow from racing success), and that consequence was appreciated by the person whose subjective intention was at issue, but that is not the case here.

253. *Approach to value-in-kind sponsorship* – we have considered whether the approach taken as between seeking value in kind sponsorship vs. monetary sponsorship might provide additional colour to the appellant's aims. If the starting point or focus was to seek sponsors irrespective of what value in kind they might provide preferring money income first, and then agreeing to value in kind on a reactive basis that would, in our view, be more consistent with a profit realisation object than, if for instance, the person had started with a list of the goods or services that were needed to compete / sail and then had sought to find sponsors to provide those by way of value in kind. That latter approach would be more consistent with an approach of wanting to compete but at an acceptable cost.

254. From Sir Keith's witness statement and the sponsorship contact sheets he referred to, the appellant's approach was to target potential sponsors with whom Sir Keith had a point of contact. The fact these contacts and later contacts matrices produced by the appellant covered a wide variety of sectors which had nothing to do with sailing-related equipment or services, does not suggest the appellant's starting point was to seek provision of specific goods and services related to the racing. There were for instance multiple contacts sought in banking and financial services. There is also no indication the appellant's starting point was to seek value in kind deals as opposed to monetary deals. These features are ones which tend to support the appellant's case.

255. *Properly incorporated as LLP*: The appellant highlights that there has been no challenge to the fact the appellant was properly incorporated as an LLP (s 2(1) of the 2000 Act provides that for an LLP to be incorporated, the subscribers must be "associated for carrying on a lawful business with a view to profit.") It is not correct in our view to say that just because there has been no challenge the tribunal must accept that the subscribers were associated "with a view to profit" for the purposes of the 2000 Act. Even if they had been that would necessarily help with the question of whether the appellant was carrying out the activities with a view to profit in the relevant periods. At best it shows that the vehicle for the activities, an LLP, was not inconsistent with one that might be used for trading activity.

Looking at the circumstances in the round - conclusion

256. Not only was there a low prospect of success but as HMRC point out the anticipated returns when compared to the amounts expended were modest. As discussed above both these factors point towards the activity being entered into for some reason other than realisation of profit. The question then is whether that presumption is rebutted by other evidence.

257. In favour of the appellant is the appellant's own evidence, and the approach taken to obtaining sponsorship (the value in kind vs. monetary issue described above). Against the appellant, is the absence of meaningful mention of profit and in particular the lack of focus on profit when the circumstances changed as a result of the ongoing litigation.

258. In our judgment, Sir Keith's evidence and the approach taken to VIK sponsorship are outweighed by the analysis of the contemporaneous documents and the evidence as the how the appellant acted at the time. In our view how the appellant acted and the documents it produced at the time provide a more reliable guide to Sir Keith's intentions than Sir Keith's recollections of what his intentions were. The presumption that arises from the low likelihood of profit being achieved and there being a low return are not in our view displaced. There were other reasons for the trading activity: these were principally to bring the cup home at acceptable cost and beyond that to create a platform for future commercialisation of the America's Cup event for host venues, participants and competitors alike.

259. It is this feature which perhaps explains Sir Keith's later assessment of his purpose as setting up TeamOrigin in order to realise profit. With his background of business success, drive, association with sporting business success, and his eye to the future commercialisation of the America's Cup as a whole, the lack of a specific profit making aim in relation to TeamOrigin would present a gap in the otherwise consistent portrait of someone who sought financial reward from their entrepreneurial efforts. We can see how it would unconsciously be tempting to complete the picture in a coherent way but this was not borne out by the reality. It is clear from the evidence that Sir Keith is a seasoned and accomplished business man. He takes big risks but for commensurately big rewards (e.g. Air Miles / Nectar). Here the reward did not justify the risk and there were other reasons driving what he was doing – prestige in achieving a sought after sporting triumph, making impact of bringing commercial order to an inherently uncommercial set-up (laying the ground work for others and indeed successors to TeamOrigin to make money from the competition in the future). This objective was described in his witness statement as a wider ultimate objective after winning, and making money – but we find it came in at an earlier point and ran in tandem with the objective of winning – e.g. in commissioning work with McKinsey on setting up alternative contests. He was not doing what he was doing in the way of commercial activity to realise profit specifically for TeamOrigin but as a means of financing and mitigating the cost of his main object which was to bring the America's Cup to the UK.

260. We agree with HMRC. The picture that is built up when looking at how the appellant acted and what it did is one of a well-run sailing competitor who wanted to

compete in the America's Cup at an acceptable cost (and also who had a wider objective of creating a platform for commercialising future events).We are not satisfied that the appellant's objectives in doing what it did included the objective of realising profit.

Conclusion on "with a view to realisation of profit"

261. It has not been demonstrated that the appellant satisfied the "with a view to the realisation of profit" requirement in any of the relevant basis periods in issue.

Overall conclusion

262. Our decision is:

(1) **Trade**: The appellant was carrying on a trade in each of the relevant periods.

(2) **Commercial basis**: The trade was not carried on on a commercial basis in each of the periods. (This is on the basis of the wider test apparent from the UT's decision in *Seven Individuals*).

(3) **With a view to realisation of profit**: The trade was not carried on with a view to realisation of profit in any of the relevant periods.

263. The appellant's appeal against the closure notices which had concluded TeamOrigin's activities did not constitute a trade is therefore allowed for the years 2007-8 to 2009-10 (the trade having ceased in October 2010 – if the parties are unable to agree the relevant figures they may revert to the tribunal).

The reference

264. The reference from HMRC and Sir Keith asked for a determination on various questions which, as follows from our conclusions above we answer as follows:

Question 1: Did TeamOrigin's activities constitute a trade in 2007-8? **Answer: Yes**

Question 2: If TeamOrigin's activities constituted a trade in the years 2007-8 to 2011-12, whether relief for losses arising in such trade was restricted by s66 ITA 2007 (the s74 ITA issue having fallen away as no relief is sought under that section)? **Answer: Yes.**

265. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 3 MAY 2017