



TC02904

Appeal number: TC/2011/04786

CORPORATION TAX – Group relief – whether the trade of the loss-making company was being carried on in the relevant accounting periods with a view to the realisation of gain in the trade, or so as to afford a reasonable expectation of gain in the trade – sections 393A(3) and 393A(4) ICTA 1988 – loss-making company carrying on the trade of running a football club or fielding a football team – found on the facts that the trade was not being carried on at the relevant times so as to afford a reasonable expectation of gain in the trade – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GLAPWELL FOOTBALL CLUB LIMITED

Appellant

and

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
MS HELEN FOLORUNSO**

**Sitting in public at London on 18 and 19 October 2012 and 17 January 2013
(Written submissions dated 1 February 2013, 18 February 2013 and 1 March
2013 were received after the appeal had been heard)**

**Laura Poots, Counsel, instructed by Crouch Chapman, for the Appellant
Simon Foxwell, Advocate, HM Revenue & Customs, for the Respondents**

DECISION NOTICE

Introductory

5 1. The appellant, Glapwell Football Club Limited (“GFC”), appeals against a
discovery determination for GFC’s accounting period running from 1 June 2007 to 29
February 2008 (“GFC’s February 2008 Period”), an amendment to GFC’s corporation
tax return for the accounting period running from 1 March 2008 to 30 September 2008
10 (“GFC’s September 2008 Period”), and an amendment to GFC’s corporation tax
return for the accounting period of 12 months ending on 30 September 2009 (“GFC’s
2009 Period”). All three appeals raise the same, single, issue: whether GFC’s losses in
those periods respectively are eligible to be surrendered by way of group relief under
section 403 Income and Corporation Taxes Act 1988 (“ICTA”) to GFC’s holding
company, Denticheck Limited (“Denticheck”), a company which is, in turn, owned
15 and controlled by Dr Colin Hancock (“Dr Hancock”). Denticheck carries on a trade
or profession of dentistry.

2. The figures for GFC’s turnover and losses in the relevant periods are agreed. In
GFC’s February 2008 Period, its turnover was £51,397 and its loss was £90,574. In
GFC’s September 2008 Period, its turnover was £149,397 and its loss was £91,735.
20 In GFC’s 2009 Period, its turnover was £95,177 and its loss was £120,454.

3. The issue of whether GFC’s losses are eligible to be surrendered by way of group
relief under section 403 ICTA depends on whether the losses are ‘excluded from
section 393A(1) [ICTA] by section 393A(3) [ICTA]’ – see: section 403ZA(2)(a)
ICTA, which is to that effect.

25 4. Thus, attention is focussed on section 393A(1) and (3) ICTA. Section 393A(1)
provides for general relief for trading losses of a company, and section 393A(3)
provides, so far as relevant, as follows:

‘... a loss incurred in a trade in any accounting period shall not be relieved under [section
393A(1)] unless-

- 30 (a) ..., or
(b) for that accounting period the trade was being carried on on a
commercial basis and with a view to the realisation of gain in the trade ...’

5. Section 393A(4) ICTA applies, so far as relevant, to the interpretation of section
393A(3)(b) as follows:

35 ‘For the purposes of [section 393A(3)] above-

- (a) where at any time a trade is carried on so as to afford a reasonable
expectation of gain, it shall be treated as being carried on at that time with a
view to the realisation of gain.
(b) where in an accounting period there is a change in the manner in which
40 a trade is being carried on, it shall be treated as having throughout the
accounting period been carried on in the way in which it was being carried
on by the end of that period.’

6. The question for our determination is whether at the relevant times the trade of GFC, which was the trade of running a football club based in the village of Glapwell in Derbyshire, was being carried on with a view to the realisation of gain in the trade. Further, if we decide that the trade was at any time being carried on so as to afford a reasonable expectation of gain, we must conclude that it was at that time being carried on with a view to the realisation of gain in the trade. During GFC's February 2008 Period there was a change in the manner in which GFC's trade was being carried on, in that in the summer of 2007 the Glapwell first team began to be operated through GFC, rather than through the Glapwell Football Club ("the Club"). Therefore it is agreed between the parties that for the purposes of GFC's February 2008 Period we need to examine the way in which GFC's trade was being carried on in February 2008.

7. GFC's case is that its trade was at all relevant times being carried on with a view to the realisation of gain in the trade, and so as to afford a reasonable expectation of gain. The Respondents ("HMRC") accept that at all relevant times GFC's trade was being carried on on a commercial basis (cf. section 393A(3)(b) ICTA) and they also accept that where a trade is being carried on with a view to the realisation of gain, that gain need not be realised (or be expected to be realised) within the relevant accounting period. However, HMRC assert that GFC's trade was not (on the facts) being carried on with a view to the realisation of gain in the trade, and particularly, that it was not being carried on at any relevant time so as to afford a reasonable expectation of gain.

8. We heard oral evidence from Mr Kevin Gee, the Operations Director of GFC, Dr Hancock, the Chairman of GFC, and Mr William Taylor, a director of GFC. All witnesses provided Witness Statements (Mr Taylor provided two) and all were cross-examined by Mr Foxwell. We also had before us a bundle of documents. From the evidence we find the following facts – where we state the evidence given, we should be taken to have accepted it and found facts accordingly, unless there is an indication to the contrary in this Decision.

30 **The facts**

9. The Club had been run for some time by the Caton family, in particular Roger Caton and his wife Ellen, before June 2006 when Mr Gee became Assistant Manager. He also became Commercial Manager. At a meeting held on 6 February 2007, Mr Gee asked Dr Hancock to become Chairman of the Club. This was seconded by Roger Caton and Dr Hancock accepted the appointment. We mention at this point that Mr Gee and Dr Hancock both had considerable experience in football management, Mr Gee as a player and later a coach and as Development Officer at Notts County FC and their centre of excellence for youngsters aged 13 to 16, and Dr Hancock as a player and Director and Chairman of Aldershot FC for a significant period.

40 10. At the meeting on 6 February 2007, the incorporation of GFC was proposed and subscriptions were made for shares in GFC. At a meeting of the Club on 1 March 2007, a due diligence report prepared by Mr Gee was presented. This was a comprehensive document which identified weaknesses and strengths of the Club as it was then being run. The weaknesses were analysed, whereas the strengths were not.

The strengths included a good football side, honest and hard-working people, a bar that could generate more money, potential for ground development and to 'increase the 30 year lease', availability of potential investment, a good management team in place, and a young squad that could compete higher. The weaknesses were summarised as: poor audit control, lack of identified responsibilities, political history, not enough competitive pricing, poor gate receipts, insufficient revenue from the bar, poor communications within the management, too much break-even philosophy – i.e. a disposition to carry on doing things which do not generate money without reference to the board – inadequate security in the ground, a 30 year lease, which deters serious investors from investing in the Club, and too much of Ellen Caton's time being 'taken up washing the kit, time which could be used more prudently on audited accounts'.

11. In evidence, Mr Gee said that at that time he thought the Club had a 30 year lease from Glapwell Parish Council, but when he saw the document he realised that it was an annual renewable licence. However, a letter in our papers to Dr Hancock from solicitors, Fraser Brown, of Nottingham, dated 5 August 2009 'confirms' that the Club occupied the football ground and changing rooms at Hall Corner by virtue of a licence made in 2006, which was for a period of 30 years for a licence fee of £850 per annum, less £700, provided the Club maintains and prepares the football ground 'to include the cutting of the grass'. That letter explains that the only basis on which the licence could be terminated was if the Club was in breach of any of their undertakings as follows:

1. To pay the Licence Fee
2. To keep the changing rooms clean, tidy and clear of rubbish
3. Not to use the changing rooms in such a way as to cause a nuisance, damage, disturbance, annoyance or inconvenience to any neighbouring or adjoining property
4. No to do any thing which might constitute a breach of any statutory requirement or which might affect the insurance of the changing rooms
5. To observe any reasonable rules and regulations as the Council may impose governing the use of the football ground and changing rooms
6. Not to make any improvements, alterations or repairs to any part of the changing rooms or football ground without the Council's consent, but such consent not to be unreasonably withheld
7. To maintain and prepare the football ground, including the cutting of the grass
8. To maintain the changing rooms
9. To permit the Council the use of the football ground and changing rooms on the giving of 14 days' notice in writing'

12. At the same time (the meeting on 1 March 2007) a profit and loss forecast for the Club was prepared by Mr James Doody, of Bradshaw Doody, Chartered Certified Accountants, of Chesterfield. It showed and anticipated rise in bar takings from the 2007/08 season (£12,000) to the 2009/10 season (£41,975) and other rising takings

from a lottery, a snack bar, a corporate room, a raffle, the gate (rising from £2,700 in 2007/08 to £6,900 in 2009/10) and advertising boards (rising from £4,000 in 2007/08 to £15,000 in 2009/10). Against this there were anticipated rises in expenses, in particular in players' costs (from £13,000 in 2007/08 to £45,000 in 2009/10) and property costs and maintenance (from £1,600 in 2007/08 to £5,000 in 2009/10). The net result was a forecasted deficit in 2007/08 of £288, a forecasted deficit in 2008/09 of £2,085 and a forecasted surplus in 2009/10 of £784. These forecasts were accompanied by a cash flow forecast, showing that the Club would remain in funds.

13. It appears possible that there was some tension in that Dr Hancock referred at the meeting to the due diligence report, which, as indicated above, was critical of much of the way in which the business of the Club had been conducted, saying that it was informative and that he 'hoped the three 'Cs weren't offended'. We take this to be a reference to Roger Caton, Ellen Caton and Paul Caton. However we also note that the minutes of the meeting record that both Dr Hancock and Roger Caton thanked Mr Gee for the report.

14. In June 2007, Mr Gee went on to prepare his own drawings showing how the site at which the Club played (Hall Corner, Glapwell) could be improved. This was essentially a sketch of how the Club building could be reorganised to enhance the entertainment (dining, bar and disco) facilities and improve the facilities for dance, badminton and squash. These drawings comprised Mr Gee's 'vision' of how the existing facilities could be developed and he took as his model another club, Beeston Hockey Club, where Notts County Football Club (a club for which Mr Gee had previously worked) used to train.

15. Also in June 2007, the Glapwell First Team began to be operated through GFC. The junior groups continued to play under the auspices of the Club. Originally the members of the board of GFC had been Roger Caton, Ellen Caton, James Doody, Mr Gee and Dr Hancock. However at this time (June 2007) James Doody resigned citing lack of sight of any accounting files from the Caton family and the Catons' resignation was invited following reports of irregularities. Roger and Ellen Caton offered their resignations at a meeting of the Club under Dr Hancock's chairmanship on 28 June 2007. It appears therefore that tension, as referred to above, was probably increased by these developments.

16. Because the annual licence of the Hall Corner site from Glapwell Parish Council to the Club did not offer sufficient security of tenure – either to satisfy the football leagues' requirements, at any rate in the long term, or to attract meaningful grants – Dr Hancock and Mr Gee met with Glapwell Parish Council in June 2007. At that meeting Dr Hancock and Mr Gee asked the Council for a more secure tenure of the Hall Corner site – as a minimum, a lease for a term of 15 years was asked for – and they explained that their plans for the Club and for GFC were to improve the existing facility for football, as well as to work with the cricket club that played at the top of the ground, hoping to construct a new sports facility including new dual purpose changing facilities and a gymnasium attracting grant aid. The meeting did not go well and Mr Gee and Dr Hancock felt that the Council 'were sceptical of our vision', but it was agreed that the existing licence to the Club would remain in place and it was left

open that a formal application for a lease could be made. In the meantime, Mr Gee and Dr Hancock hoped that the Council might become more amenable to their plans, particularly as they proposed that the Club should put on various charitable events in an effort to increase local goodwill.

- 5 17. An email sent by Mr Gee on 21 June 2007 before the meeting indicates some awareness of possible tension. He wrote:

10 'There has been too much political history between the two organisations [the Club and the Parish Council] over past few years (good and bad), but the only way we can both move forward and achieve the same goals for the Parish of Glapwell is to start and work closely together'

18. Also in our papers is an email dated 21 June 2007 sent by a Ms Marian Stockdale, a County Council member who had met with the Parish Council and had:

15 'put a case forward for partnership working tonight in a vain hope that clearing the deck and starting afresh would help move the ambitious plan you have for Glapwell as a whole forward in the near future'.

The email went on to say that she had met with some opposition and had suggested further that:

20 'grievances etc. be addressed to clear up any misgivings and rumours. I asked that all issues from the past be left behind and a positive approach to young people acknowledged whilst the elderly of the community be respected at the same time.'

She went on:

25 'There is I feel a little jealousy emanating from the district's direction regarding youth club provision which they wish to control from the village hall. Can I suggest that you make it clear in a subtle way that there is room for more than one organisation to help young people and many variety ways of doing it?'

- 30 19. There is a letter dated 27 June 2007 from Dr Hancock to Mr Skinner MP noting Dr Hancock's dissatisfaction that his approach to Mr Skinner 'for a meeting to research and lobby support for a programme of initiatives designed to benefit the community at Glapwell, Bramley Vale and Doe Lea' had been shunned because it had been taken as an invitation to him to influence the Parish Council.

35 20. GFC had a plan for increased playing success, and promotion, for the Glapwell first team. At the end of the 2006-07 season, under Roger Caton's direction, the team had finished 6th in the Northern Counties East Football League Premier Division (Level 9). The team played in that Division in the 2007-08 season and secured promotion at the end of the season to the Northern Premier League Division One South (Evo-Stik League Northern Premier First Division South) (Level 8). The team played in that Division in the 2008-09, 2009-10 and 2010-11 seasons, losing in the final of the play-offs for promotion at the end of the 2009-10 season. Over 1,000 people attended that play-off.

21. The target of promotion from Level 9 to Level 8 within two seasons had been set in 2007 (and had been planned by Roger Caton). However, further promotion depended in part on improvement of the facilities at Hall Corner. Further promotion up the 'football pyramid' would have required regular improvement to the facilities and compliance with the more stringent ground grading regulations laid down by the football authorities.

22. Dr Hancock formed the view in 2007 that in the long term if the desired-for playing success was to be achieved it would be necessary to find another playing venue. In the words of his Witness Statement: 'Hall Corner would not have been able to accommodate the size of operation that higher standards would introduce'.

23. He therefore inspected possible alternative sites at Bramley Vale and Rowthorne in 2007, but they were not thought to be suitable.

24. The revised financial statements for GFC's February 2008 Period were signed off by Dr Hancock on 29 May 2009. In the Directors' Report, under the heading of "Going Concern" it is stated that 'The directors and shareholders have indicated their intention to continue to support the Football Club'. The financial statements were not audited. The operating loss was stated as £90,276 before a property revaluation credit of £32,880. Staff costs were stated as £79,714. The holding company was stated as a creditor for £148,778.

25. Dr Hancock's evidence was that during GFC's February 2008 Period more than £120,000 had been invested in the physical infrastructure of Hall Corner to meet competition requirements in respect of facilities and ground grading regulations and to attract sponsors and local support. He mentioned investment in new changing rooms, a medical room, male, female and disabled toilets, equipment, turnstiles, extra seating and flood lighting upgrades, a marquee, refurbishment of the club house, a covered walkway to connect the refreshment points and so on. However we note that the accounts record additions to the tangible fixed assets of only £49,090, split between buildings and improvements (£44,500), ground equipment (£1,590) and fixtures and fittings (£3,000).

26. Moving forward to events in GFC's September 2008 Period, it was GFC's evidence that a two-phase strategy was being developed. 'Phase 1' would be achieving the promotion of the first team to Level 8 and acquiring a lease on Hall Corner to provide the security necessary in the immediate future for the first team's pitch and eventually to be left to the junior groups when the first team transferred to a new stadium. 'Phase 2' would be the acquisition and development of a new stadium.

27. 'Phase 2' was not implemented in any practical sense at all before 'late 2008' when Mr Taylor said he made an approach on behalf of GFC to Mrs Kath Jephson regarding the acquisition of land belonging to her and her husband, situated on the Chesterfield Road, Glapwell (A617), for the new stadium. There had been planning permission granted for a hotel on this site, but it had lapsed. The evidence was vague as to precise dates. There is a minute of a meeting on 25 September 2008 of Mr Gee with the youth team management which records that it was mentioned that there was a

5 'derelict farmhouse and land on Mansfield Road' and that Mr Gee would 'look into
ownership of this'. We note that the Directors' Report in the financial statements of
GFC for GFC's 2009 Period (approved by the board on 14 May 2010) state that Mr
Taylor was appointed a director on 1 March 2009 (although we accept that formalities
10 delayed the formal appointment and that he was informally committed to be a director
in late 2008). We find that Mr Taylor's initial approach to Mrs Jephson was probably
made towards the end of 2008, after September 2008, that is, after the end of GFC's
September 2008 Period. Mr Taylor (now retired) had spent all his working life in the
construction industry, but had had a lifelong interest in football, having played as an
15 amateur, been a referee for 23 years reaching a very high standard, and having been a
lifelong fan of Mansfield Town FC and latterly Vice-President and a director of that
club.

28. We have copy emails from Mr Gee to Dr Hancock dated 29 August 2008 and 18
September 2008. They indicate further tensions as respects the Catons, and an
15 exchange of thoughts about a coaching centre which, Mr Gee said, would 'take 5
years to achieve its aim'. He went on:

'I think it could be a great success but need land and financial backing first. Once stabilised
then the serious grants would come in but will take at least 5 years possibly longer dependent
upon timescales to develop the land.'

20 29. Therefore, to summarise, at the end of GFC's September 2008 Period matters had
not materially changed since 28 February 2008 with regard to the implementation of
Phase 1, and Phase 2 had not commenced.

30. The financial statements for GFC's September 2008 Period were signed off by Dr
Hancock on 29 May 2009 (the same date as the revised financial statements for
25 GFC's February 2008 Period were signed off). In the Directors' Report, under the
heading of "Going Concern" it is again stated that 'The directors and shareholders
have indicated their intention to continue to support the Football Club'. The financial
statements were not audited. The operating loss was stated as £99,673. Staff costs
were stated as £79,772. The holding company was stated as a creditor for £241,413.
30 The increase in the indebtedness to the holding company (£92,635) accounted for
almost the entire operating loss.

31. Mr Taylor's evidence was that ground improvements and refurbishments were
carried out at Hall Corner over a 15 month period (we assume over 2008 and 2009)
which cost £42,000 and were 'funded solely by the directors'. The improvements
35 were made so that Hall Corner would meet the requirements for teams playing at
Level 8 and also Level 7. In cross-examination he accepted that that figure was a
valuation and that GFC had used volunteer labour. The accounts for GFC's
September 2008 Period show no additions to tangible fixed assets and the accounts
for GFC's 2009 Period show additions of only £8,500 – being motor vehicles. It may
40 be that the reason for this was that the improvements and refurbishments were not
funded by GFC, but by the directors.

32. In November 2008, the Glapwell Parish Council informed GFC of a planning
breach at Hall Corner which GFC had to remedy at its own cost (rebuilding a listed

wall in natural stone and re-siting gates, fencing and hoardings and concreting new pathways at a cost, according to Mr Taylor, of £2,800 – although apparently not recognised as improvements in the accounts). On 7 January 2009 heads of terms for a lease was offered to Dr Hancock by Glapwell Parish Council as follows:

- 5 1. A 5-year lease to GFC outside the 1954 Business Tenancy Act;
2. Renewal of the lease to be subject to a satisfactory relationship during the operation of the lease. Extension of the lease would be considered on application to the Council.
- 10 3. ‘The main condition of the lease is the provision of two thirds of the available playing time for the use by local community teams’. The Council to retain the right to identify these teams.
4. All infrastructure plans to require the permission of the Council before commencement.
- 15 5. An annual rent of £3,000 subject to offset for the expenditure incurred by GFC in maintaining the facilities for community use. ‘This would effectively result in a nil rent to the club’.
6. GFC to meet the Council’s reasonable legal expenses.

33. These heads of terms were again presented to Dr Hancock for agreement in a letter from the Glapwell Parish Council on 10 June 2009.

20 34. Mr Gee informed Dr Hancock by email on 1 August 2009 that he had been informed that the Football Foundation would require a minimum lease term of 10 years before considering the making of grants. Further, the terms offered were unsatisfactory in that they did not give the Glapwell first team priority of fixtures.

25 35. On 24 August 2009, Glapwell Parish Council wrote to Mr Gee informing him that, at a meeting of the Parish Council on 30 July 2009, the members had discussed the ongoing delays in finalising the lease offered to GFC in January 2009 and ‘an apparent reluctance by you to accept the heads of terms previously offered and agreed’. The Council had decided to offer the lease to Glapwell Gladiators JFC – the junior club. ‘As part of the lease the Gladiators [were] required to offer usage of the
30 ground to [GFC] on the current 2/3:1/3 split’.

36. Fraser Brown, Solicitors, on behalf of the Club wrote to Solicitors for the Glapwell Parish Council on 25 September 2009 insisting on the Club’s right to the continued benefit of the 30-year licence renewed in 2006.

35 37. At the end of GFC’s 2009 Period, therefore, there was no prospect of completing the implementation of ‘Phase 1’ as originally envisaged, because the required lease of Hall Corner to GFC was not forthcoming. Dr Hancock’s thoughts turned to the possibility of a ground share with Mansfield Town Football Club. At some point before the commencement of the 2010-11 season, GFC entered into a ‘Ground Share’

agreement with Mansfield Town FC but this agreement ended (causing GFC to return to Hall Corner under highly unsatisfactory conditions) during that season, because Mansfield Town FC was in dispute with its landlord and the teams were locked out of Mansfield Town FC's ground (Field Mill).

5 38. Meanwhile, as recorded above, Mr Taylor had approached Mrs Jephson regarding a possible acquisition of her land on the Chesterfield Road. This had led Dr Hancock to discuss the matter with Mrs Jephson. A letter dated 2 July 2009 from Fraser Brown, Solicitors, to Mrs Jephson, marked 'Private & Confidential', indicated that Dr Hancock had offered to pay a non-refundable option fee of £7,500 for an option to
10 purchase the land at a fixed price of £240,000 at any time within 'the next 2 years'

39. A letter from Mrs Jephson dated 27 July 2009, which we quote in full, addressed to Fraser Brown, Solicitors, refers to that letter from them. Mrs Jephson's letter was as follows:

'Re Land at Glapwell

15 Apologies for the delay in replying to your letter of the 2nd instant, we was awaiting certain information before we replied.

We believe Mr Hancock of Glapwell Football Club Ltd must be mistaken with regard to negotiations re purchase of above. We asked him to make an offer based on whether the site would be suitable for him. We informed him we was already involved with an architect and had
20 spent monies looking to develop the land ourselves, but if an offer was acceptable we would consider same.

We do not wish to enter into an option which will tie up the land for two years and hold up our own work so far, it would have had to be a substantial offer based on future use but the land purchased now. If nothing came to fruition with his plans we would be left with starting from
25 scratch and therefore jeopardizing our own plans so far.

We hope the above explains our views on the matter.'

40. Dr Hancock's evidence was that an agreement with Mrs Jephson for the acquisition of the Chesterfield Road site was achievable – indeed that it had been agreed with Mr and Mrs Jephson that GFC would have two years in which to develop
30 their plans and that Mr and Mrs Jephson would sell GFC part of the land sufficient for their project – and on that basis plans and drawings for a new complex on that site were drawn up by Osel, architects and development consultants, for GFC. Those plans and drawings and a topographical survey, commissioned in the spring of 2010, involved expenditure of some £3,900, which was the only expenditure actually
35 incurred in connection with 'Phase 2' to which, after the identification of the Chesterfield Road site, Mr Taylor had given the codename 'Operation Sunrise'. This followed a meeting between Mr Taylor, Dr Hancock and David Foreman, an architect, on 16 January 2009 at which, according to a contemporaneous note drawn up by Mr Taylor, the 'Sunrise' project was discussed, including the question of
40 approaching the planning authority, Bolsover District Council, with the project. Mr Taylor's evidence was that the planning authority acted very slowly. Mr Gee stated in his Witness Statement that GFC was given an option on a 12 acre site following negotiations with Mrs Jephson – but we have not seen an option document and it is

not suggested that any money was laid out for an option. It is to be noted that HMRC were not informed of the existence of 'Operation Sunrise' before the submission of Witness Statements in March 2012. GFC says that this was because of miscommunication between the directors and the firm of accountants who were
5 handling the enquiry and dealing with HMRC.

41. As at the end of GFC's 2009 Period, 'Phase 1' had not been fully implemented and the strategy for adapting it was the prospect of a ground share agreement with Mansfield Town FC. As to 'Phase 2', whatever plans were being formed for the Chesterfield Road site and whatever verbal understanding was reached between GFC
10 and Mr and Mrs Jephson regarding it, we find that no enforceable agreement for its acquisition (or for the acquisition of any option over the land) had been reached, and the likelihood of reaching any such agreement at all was far from certain and not such as to form a realistic basis for an expectation that the site would in fact be acquired by GFC, given that Mrs Jephson had her own plans for the site, which were progressing.

42. The financial statements for GFC's 2009 Period were approved by the board and signed on 14 May 2010. In the Directors' Report, under the heading of "Going Concern" it is again stated that 'The directors and shareholders have indicated their intention to continue to support the Football Club'. The financial statements were not audited. The operating loss was stated as £135,184. Staff costs were stated as
15 £99,250. The holding company was stated as a creditor for £361,931. The increase in the indebtedness to the holding company (£120,518) again accounted for by far the greater part of the operating loss.
20

43. Our task is to decide whether as at (a) 29 February 2008, (b) in the period 1 March 2008 to 30 September 2008, and (c) in the year from 1 October 2008 to 30 September
25 2009, GFC's trade was being carried on with a view to the realisation of gain in the trade, or alternatively, whether GFC's trade was at those times being carried on so as to afford a reasonable expectation of gain. Granted that in deciding these matters, we can and should take account of the prospects for the trade in succeeding periods, it nevertheless seems to us that the evidence relating to events and matters taking place
30 after 30 September 2009 is of relatively minor significance except to the extent that it throws light on events and matters taking place in the period between 29 February 2008 and 30 September 2009.

44. However, we received much evidence as to events after 30 September 2009. That evidence was as to a notice to quit served by Glapwell Parish Council on the Club on
35 7 April 2010, its resistance by the Club on legal grounds, and the service on 13 May 2010 by Glapwell Parish Council of a notice revoking the Club's licence to occupy the Hall Corner ground. We were also told about the ground share agreement with Mansfield Town FC and its premature termination. We received evidence as to the result of these developments, that the board of GFC unanimously agreed that GFC's
40 plans could not be progressed at that time, and would be 'put on hold' (as per Dr Hancock's Witness Statement) and that the first team was withdrawn from the competition with effect from the 2010-11 season and played after that in the Central Midlands League (Level 11).

45. We also received much evidence as to the commerciality of the development which the directors of GFC would like (or would have liked) to embark on on the Chesterfield Road site. GFC's case, as stated in its 'Submissions on the Evidence' of 1 February 2013, was that 'during the relevant accounting periods', i.e. between 1
5 June 2007 and 30 September 2009, it was carrying on a trade which comprised both running the Glapwell FC first team and using that team as the basis for developing and operating a stadium and sports complex. It was explained that the football team was the key to the success of the sports complex because the complex would be based around a football stadium and football academy. The team was to act as the 'shop
10 window' for the new stadium and complex. The decision to put 'Phase 2' 'on hold' before the start of the 2010-11 season was taken because, without a ground, the first team could no longer play at the standard needed to act as the 'shop window' for a sports complex and academy.

46. Dr Hancock's evidence was that the development on the Chesterfield Road site
15 would include a hotel with about 120 bedrooms, a football stadium with an initial capacity of 3,000 and potential to expand, headquarters comprising offices and meeting rooms, an indoor arena suitable for multiple sports, an indoor cricket arena, hospitality function rooms, an education, media and medical centre for academy players and artificial training pitches which would be available for public hire as well
20 as for GFC's use.

47. The academy was intended to focus on late developing players aged 14 to 19, who would be offered football training combined with education. This was a particularly important idea from Mr Gee's viewpoint. He knew that Ilkeston FC had obtained funding to give education to children with football training and Notts County FC had
25 developed a business model to produce one player to sell on at a profit and two players to play at county level, while giving others the experience which an academy could offer. He hoped that profits could be made by GFC by the sale of academy players (ideally with a 'sell-on clause' which would increase the income stream) or the exploitation of their image rights.

30 48. The development, once completed, would produce revenue streams from match day tickets, bar sales and catering, the public hire of sporting facilities and of meeting and hospitality facilities, the rental of office facilities (as had been achieved by Fleetwood FC according to Mr Gee's evidence), catering sales, fees for ground shares obtained from other clubs, medical facilities and services and the education centre.
35 As regards the hotel, GFC had two options, either to sell the site with planning permission for profit or to develop the hotel itself or in a joint venture with another party and run it for a profit.

49. The anticipated cost of the development had not been worked out in any detail. Dr Hancock's estimate given at a meeting with HMRC on 6 July 2012 was that it
40 would be £3.5m. In oral evidence he said it would be £3m. In GFC's 'Submissions on the Evidence' it is stated that he had said it would be between £4.2m and £4.5m. In any case, it was proposed that the costs would be met by a mixture of funding from third-party investors, Dr Hancock personally on the sale of his dentistry interests, grants from organisations such as the Football Foundation (he mentioned more than

once that he had had discussions with Lord Pendry, the President of the Football Foundation), and the proceeds of sale of – or joint participation in – the hotel, or its site with the benefit of planning permission.

50. We received a copy of a letter dated 10 October from Mr Paul Kirby, who states he is ‘a past member of the FA Council’ and confirms that he has known Dr Hancock for some 35 years and spent ‘significant time’ over the 2009-10 season ‘discussing, meeting, looking over and advising [him] on Glapwell FC and the potential of the site that would accommodate the new stadium next to a new hotel with other sporting facilities that we agreed would prove to be an ideal investment’. He added that ‘it was obvious to all that the Sports Academy would prove very successful in encouraging football lads who never quite made it to be given a further opportunity to succeed in football’.

51. We find that Dr Hancock did have general discussions with potentially interested parties with regard to possible funding for the development, after the end of GFC’s 2009 Period and before the decision was taken about a year later to withdraw the first team from the competition.

52. We also find that Dr Hancock carried out research into the prospects for an academy, by visiting on various occasions the John Fretwell Sporting Complex between Mansfield Woodhouse and Market Warsop to understand the operation of that centre. Dr Hancock was also aware that it would soon be permitted to use 4G artificial playing surfaces in lower league football and that this would give an opportunity to derive significant hire revenue. Mr Gee told us about a lucrative revenue stream from a 3G pitch built for a cost of £750,000 and subject to a ground share between Romulus FC and Sutton Coldfield. He said that it would pay for itself within 3 years.

53. Mr Gee also said in evidence that it would be perfectly possible for GFC to make money from the ‘sale on’ of promising players and cited Quorn FC as an example. They had ‘built a fantastic stadium on one pair of legs’ and had ‘sold’ Luke Varney with a sell-on clause. Such sales had resulted in Quorn FC receiving £1.5m.

54. We find that, despite the paucity of relevant documentation, GFC, through Dr Hancock, Mr Gee and Mr Taylor, in the 2009-10 season seriously and genuinely entertained the hope of bringing ‘Phase 2’ to fruition by a development on the Chesterfield Road site.

The Submissions

55. Miss Poots, for GFC, submitted that GFC’s trade during the relevant accounting periods (that is, before 1 October 2009) was both running a football team (the Glapwell first team) and using that football team as the basis for developing and operating a stadium and sports complex, and that it was reasonably intended by GFC’s directors that the development of the sports complex would result in profits for GFC. As with most businesses, she argued, the venture required upfront capital and income expenditure and involved risk.

56. Although the actual expenditure on 'Phase 2' ('Operation Sunrise') was, she accepted, limited – and it was incurred after the close of the last period with which the appeal is directly concerned – this had little significance, because major expenditure would not have been incurred until an application for planning permission was made or prepared. She submitted that it would have been illogical for GFC to seek to raise external finance and pay large sums to begin a tendering process before planning discussions had concluded, so the fact that these steps were not taken does not support HMRC's argument that 'Operation Sunrise' was not seriously pursued.

57. The success of the Glapwell first team was crucial to the success of the sports development but, Miss Poots submitted, the business plan was not built on the team achieving unrealistic promotions higher and higher up the football pyramid. It was built on the team achieving a promotion which was demonstrated by the evidence to be realistic, and then sustaining that level before achieving further promotion.

58. The fact that GFC made losses and that the ticket sales and bar takings were unlikely to cover the costs it incurred did not show that GFC's trade was not being carried on with a view to the realisation of gain in the trade, because it failed to take into account the complete change of business plan. Miss Poots submitted that that change had taken place in the summer of 2007 and GFC's business plan from that time on clearly did not rely on ticket sales and bar takings alone to produce profits.

59. Mr Foxwell, for HMRC, submits that the losses made by GFC between March 2007 and September 2009 cannot be surrendered by way of group relief to Dentichack because there was no reasonable expectation of gain in the trade during the relevant accounting periods, even of a gain to be made at some distant point in the future. He submits that, on the evidence, 'Operation Sunrise' and 'Phase 2' were 'merely a possible idea for the distant future' and that there can have been no reasonable expectation of gain from 'Operation Sunrise' before 30 September 2009 (the end of GFC's 2009 Period). Further, he submits that 'Phase 2' was 'not seriously pursued' on the basis that no finance was raised, no planning permission was formally sought, no grants were applied for, no building work was tendered and no academy or hotel was publicised. He relies on Mr Gee's email of 18 September 2008 in which he told Dr Hancock that it would take at least 5 years to develop the land.

60. Mr Foxwell referred to the Glapwell first team's small fan base as a factor pointing to the unreasonable nature of any expectation of profit from 'Phase 2'. He submitted that it was not reasonable to expect a village football club with an annual turnover of £70,000 to develop a £2m hotel as a part of a larger complex. He submitted that the hope that profits would be derived from sales of players from the academy was unrealistic, it not having been established where customers would come from, and the examples of clubs at Glapwell's level selling players were 'a mere handful'.

61. Mr Foxwell drew our attention to the fact that Mr Gee's due diligence report did not involve any consideration of a future stadium development, but was based on the intention of getting the existing club onto a sound footing at Hall Corner.

5 62. Mr Foxwell submits that the directors of GFC only seriously considered finding a new pitch for the Glapwell first team to play on when, in January 2009, Glapwell Parish Council offered an inadequate lease, or later, when, in August 2009, litigation against the council commenced. He contends that we should bear well in mind that relations with Glapwell Parish Council were ‘very negative’ throughout.

63. He submits that we should also be mindful of the accumulating losses incurred, asking ourselves whether it was realistic for GFC to expect that it could continue with a plan that would not come to fruition for years, during which period further losses would accumulate, leading to further write-offs of the loans from Denticheck to GFC.
10 GFC’s accumulated losses as at September 2010 stood at £511,000 (which we find as a fact).

64. Mr Foxwell submits that the fact that HMRC were not told about ‘Operation Sunrise’ before the witness statements in the present appeal were served suggests that the project had no substance (if it existed). He submits that we should not accept
15 GFC’s explanation that this situation resulted from a failure of communication with the accountants acting for GFC in HMRC’s enquiry.

65. He submits that all the risks which bedevilled ‘Operation Sunrise’ were known at June 2007 – in particular, the negative attitude of Glapwell Parish Council, the slow planning procedures of Bolsover District Council, the poor health of Mr Jephson, the
20 urgent need to find a secure playing venue, the poor gate takings which did not match salaries, the need for investors and the need to comply with league rules. Any view that all of these obstacles could be overcome would have been unreasonable.

Discussion and Decision

66. As indicated above, it was argued by HMRC that the appeals ought to be
25 dismissed because there was no reasonable expectation of gain in the trade carried on by GFC at any relevant time, that is, at the end of GFC’s February 2008 Period and in GFC’s September 2008 Period and GFC’s 2009 Period.

67. That argument addresses the test set out in section 393A(4)(a) ICTA, where it is stated that, for the purposes of section 393A(3), where at any time a trade is carried on
30 so as to afford a reasonable expectation of gain, it shall be treated as being carried on at that time with a view to the realisation of gain.

68. The argument does not however address the question directly posed by section 393A(3) – if it is a different question – namely, whether the trade was being carried on with a view to the realisation of gain in the trade.

35 69. That would be a different question if the view was taken – as a matter of interpretation – that section 393A(4)(a) added a further test for the relief of losses to that provided by section 393A(3), namely that even if a trade was *not* being carried on with a view to the realisation of gain in the trade, losses could be relieved if it was being carried on so as to afford a reasonable expectation of gain.

40 70. Considering only the statutory language, we regard this as a tenable interpretation, so that there would be two routes to the relief of losses, the first being that a

company's trade was actually being carried on with a view to the realisation of gain – which would be a matter of establishing the subjective intentions of the directors, and the second being that the trade was being carried on so as to afford a reasonable expectation of gain – which would be a matter of establishing the objective circumstances in which the trade was being carried on.

71. However, the result of such an interpretation would be that losses would be relieved if a trade was not (objectively) being carried on so as to afford a reasonable expectation of gain, provided that it was (subjectively) being carried on with a view to the realisation of gain in the trade. On the whole, we regard this as being a perverse result and probably not in accordance with the intention of Parliament when the legislation was enacted. Construing the legislation purposively, we disregard it.

72. We prefer the interpretation, effectively that addressed by HMRC's submissions, that section 393A(4)(a) applies to clarify the test in section 393A(3)(b), so that the test there stated – 'carried on with a view to the realisation of gain in the trade' – means 'carried on so as to afford a reasonable expectation of gain in the trade'.

73. We therefore proceed to analyse the evidence and our findings of fact to reach a conclusion as to whether at the relevant times GFC was carrying on its trade so as to afford a reasonable expectation of gain in that trade.

74. Another point which occurs to us on the statutory language, which was not addressed at any length by the parties in submissions, is the evident requirement that a gain of which there is, for the purposes of section 393A(4)(a) ICTA, a reasonable expectation, must be a gain in the same trade as the trade in which the losses, which are sought to be relieved, have been incurred.

75. The trade carried on by GFC at 28 February 2008 and in GFC's September 2008 Period and GFC's 2009 Period was undoubtedly a trade of running a football club based in the village of Glapwell – or fielding the Club's first team. There can be no question of GFC's trade at those times encompassing the operation of a hotel, or a speculative development of a hotel site, or the operation of a football academy. Nor, we consider, could we conclude that GFC's trade then operated included the operation of a sports complex, such as was envisaged by the directors as part of 'Operation Sunrise' or the operation of an extensive hospitality or property rental enterprise.

76. It is always a question of degree, which is often difficult to determine, as to the circumstances in which a trade, which naturally can and does evolve over time, ceases to be the same trade as it has been hitherto, and becomes a new, or different, trade.

77. We do not have to decide whether GFC's trade did change in this way before 1 October 2009, because, as at 30 September 2009, as we have found, no enforceable agreement for the acquisition by GFC of the Chesterfield Road site had been reached, and no enforceable option over the site had been acquired and the likelihood that such an agreement would be reached or such an option would be acquired was not such as to form a realistic basis for an expectation that the site would in fact be acquired by GFC.

78. All the hopes and intentions of the directors of GFC in relation to ‘Operation Sunrise’ or ‘Phase 2’ in practice depended on acquiring the Chesterfield Road site. Although we accept that those hopes and intentions were seriously and genuinely entertained by Dr Hancock, Mr Gee and Mr Taylor in the 2009-10 season and we take
5 into account that they then hoped and intended that the Club’s first team would act as the ‘shop window’ for the new stadium and complex, we find that the trade of GFC at all relevant times – that is, up to 30 September 2009 – was the trade of running the Club’s first team, or, as all the relevant Directors’ reports put it: ‘the running of a
10 football club based in Glapwell’, and did not include any of the other profit earning elements envisaged by ‘Operation Sunrise’. We also hold that in considering the expectation of gain in that trade in the periods after 30 September 2009 we should not assume that GFC’s trade as then carried on would, or could, evolve to include those other profit earning elements.

79. Therefore we consider that it is correct for us to disregard any expectation of gain
15 from these elements in reaching our decision as to whether GFC’s trade at the relevant times was being carried on so as to afford a reasonable expectation of gain.

80. This conclusion is really fatal to GFC’s case which is based on establishing the proposition that GFC was, at the relevant times, ‘carrying on its trade with the intention of using the first team as the basis for a profitable business venture
20 comprising the development of a sports complex and a football academy’ (see: Miss Poots’s Skeleton Argument at paragraph 36). GFC’s case was that the profits to be reasonably expected to arise from the sports complex and the football academy (not to mention the hotel) were such as to establish a reasonable expectation of gain in GFC’s trade for the purposes of section 393A(4)(a) ICTA. For the reasons given above, we
25 cannot accept that proposition.

81. Looking at the position at 28 February 2008 (the end of GFC’s February 2008 Period), an operating loss of £90,276 had been incurred and the turnover of £6,592 and other operating income of £44,805 (as per the accounts) was not sufficient to fund the staff costs of £79,714. At that point GFC was indebted to its holding company for
30 £148,778. The Directors’ Report stated that the directors and shareholders had indicated their intention to continue to support the football club and for that reason the accounts had been prepared on a going concern basis.

82. As at 1 March 2007 (before Dr Hancock had had time to establish himself as Chairman of the Club, and less than a month after GFC was incorporated), Mr
35 Doody’s profit and loss forecast for the Club had shown a forecast deficit for 2007-08 of £288, a forecast deficit of £2,085 for 2008-09, and a forecast surplus of £784 for 2009-10. GFC itself commenced trading on 1 June 2007 and incurred the operating loss of £90,276 referred to. Although Mr Gee’s due diligence report presented on 1 March 2007 shows that he, and through him GFC, were alert to the need to improve
40 performance in the trade as it was then being operated, the fact remains that the foundation of any sustainable improvement – namely, sufficient security of tenure for the ground on which the Glapwell first team would play home matches – was simply not there. The fundamental problem which made it next to impossible to improve performance in the trade was the poor relationship between the Club and GFC on the

one hand and Glapwell Parish Council on the other. That relationship, always poor in the relevant periods, deteriorated from the unsatisfactory meeting in June 2007, to the offer of a 5 year lease affording inadequate security on 7 January 2009, to the offer of a lease by Glapwell Parish Council to the junior club, Glapwell Gladiators JFC, on 30 July 2009, to commencement of litigation between GFC and the Parish Council, to the service of a notice to quit by the Parish Council on GFC on 7 April 2010 and to the service of a notice revoking the Club's licence to occupy the Hall Corner ground on 13 May 2010 – these last events being outside the periods directly relevant to the appeal.

83. Against that background, and taking into account that as at 30 September 2009 no alternative ground for the Glapwell first team's home matches had been secured – a ground share agreement with Mansfield Town FC (itself in the event fraught with difficulty) being the most realistic option – we conclude that the trade was not being carried on as at 28 February 2008 so as to afford a reasonable expectation of gain.

84. Similar considerations apply in relation to GFC's September 2008 Period. During that period a further operating loss of £99,673 was sustained and staff costs of £79,772 exceeded turnover and operating income, which totalled £49,397, while GFC's indebtedness to its holding company increased by £92,635. During this period the insecurity of the Club's (and therefore GFC's) tenure of the Hall Corner ground remained unsatisfactory, and there was no reasonable expectation of its improving. Further, in that period no suitable alternative ground had been identified. The Directors' Report again indicated that the accounts had been prepared on a going concern basis only by reference to the directors' and shareholders' indication of their intention to continue to support the club. We conclude that GFC's trade was not being carried on in GFC's September 2008 Period so as to afford a reasonable expectation of gain.

85. Finally, in relation to GFC's 2009 Period, as we have said above, although the Chesterfield Road site was identified in that period, no enforceable agreement for the acquisition by GFC of the Chesterfield Road site had been reached by 30 September 2009, and no enforceable option over the site had been acquired by that date, and the likelihood that such an agreement would be reached or such an option would be acquired was not, at that date, such as to form a realistic basis for an expectation that the site would in fact be acquired by GFC.

86. During GFC's 2009 Period a further operating loss of £135,184 was sustained and staff costs of £99,250 exceeded turnover and operating income, which totalled £95,117, while GFC's indebtedness to its holding company increased by £120,518. The Directors' Report again indicated that the accounts had been prepared on a going concern basis only by reference to the directors' and shareholders' indication of their intention to continue to support the club. We conclude from the evidence that GFC's trade was not being carried on in GFC's 2009 Period so as to afford a reasonable expectation of gain.

87. Even if we had considered it right to have regard to the directors' expectation or hope of income to be derived in future periods by GFC from the profit earning

elements envisaged by 'Operation Sunrise', whether those directly related to GFC's trade of running a football club based in the village of Glapwell (or fielding the Club's first team) or those only indirectly related to that trade, we would have concluded that the expectation of gain from those sources as at any relevant time was too vague and too remote, in terms of time, to ground a conclusion that GFC's trade was, at any relevant time, being carried on so as to afford a reasonable expectation of gain. We bear in mind that delay in achieving income from the elements envisaged by 'Operation Sunrise' would have involved the accruing of further losses on a large scale in the meantime. There is the additional important objection that the directors' expectation or hope of income to be derived in future periods by GFC from the profit earning elements envisaged by 'Operation Sunrise' was not supported by objective evidence which we could consider convincing. Convincing objective evidence would have been necessary to establish that the trade was being carried on so as to afford a reasonable expectation of gain, but all GFC was able to adduce was anecdotal evidence of examples where other clubs had made money in different ways without any analysis of whether or how the circumstances were such that GFC would be able to profit from or imitate those examples.

88. For the reasons we have given, we dismiss the appeal in relation to all relevant periods.

Applications for permission to appeal this Decision

89. 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.

**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 30 September 2013