[2016] UKFTT 0765 (TC)

# TC05492

**Appeal number: TC/2014/05194**

***CORPORATION TAX – whether payments made wholly and exclusively for the purposes of the trade under s 54 CTA 2009 – appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

| | |
|---|---|
| **THE CROWN AND CUSHION HOTEL (CHIPPING NORTON) LIMITED** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

**TRIBUNAL: JUDGE HARRIET MORGAN**

**Sitting in public at the Royal Courts of Justice, the Strand, London on 7 and 8 March 2016**

**Miss Laura Poots, counsel, for the Appellant**

**Mr Paul Shea, an officer of HM Revenue and Customs, for the Respondents ("HMRC")**

DECISION

1. This is an appeal against amendments made by HMRC to the appellant's corporation tax returns for the accounting periods ended 31 March 2011 and 31 March 2012 on the issue of closure notices on 5 June 2014 in respect of enquiries by HMRC into those returns. The amendments show additional corporation tax due for those periods of a total of £155,355.17 as a result of HMRC denying the appellant a deduction in computing the profits of its trade for certain amounts it paid in those periods. HMRC's position is that the payments were not made wholly and exclusively for the purposes of the appellant's trade as required for them to be deductible under s 54 of the Corporation Tax Act 2009 ("**CTA**").

**Background – summary of the issue**

2. In outline, the appellant operates a family owned hotel business which was established by Mr Jim Fraser. The appellant is owned by Mr Fraser's daughters one of whom, Mrs Powell, is also the sole director. Each of the 6 hotels owned by the appellant is run by a "manager" under what Mr Fraser described as incentive arrangements to encourage the mangers to maximise the profits of the business by giving them a share of it. In 2008 Mr Fraser put an agreement in place between the appellant and Miss Alice Powell, his granddaughter and the daughter of Mrs Powell, he asserts, with a view to the appellant sponsoring Miss Powell in her motor sports activities in return for her undertaking various promotional and advertising activities as regards the hotels. It is the tax deductibility of payments made under these arrangements which is in issue.

3. Section 54(1)(a) CTA provides that:

> "In calculating the profits of a trade, no deduction is allowed for –
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade,"

4. The effect of this statutory provision is well established in case law. The word "exclusively" means that if the expense was also incurred for some other non-trading purpose, it is not deductible. The "wholly and exclusively" issue is to be determined by the object of the taxpayer in incurring the expense. This is a question of fact but in making that factual assessment the tribunal must observe a number of principles. The principles established in the cases are set out in further detail in the discussion section but, in brief, as summarised by Millet LJ in the case of *Vodafone Cellular v Shaw* [1997] STC 734 (at page 742) they are as follows:

> (1) The words "for the purposes of the trade"' mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. A fortiori they do not mean "for the benefit of the taxpayer".

(2) To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.

(3) The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.

(4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

(5) The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is a matter for the tribunal, not for the taxpayer.

5. The appellant argues that, applying these principles, the payments are deductible as the evidence clearly demonstrates that the payments were made with the sole purpose of maintaining and increasing the profits of the appellant's business by advertising the hotels owned by the appellant through Miss Powell's motor sports activities. Any benefit to Miss Powell or the managers of the hotels was an incidental effect of the expenditure.

6. HMRC's position is that the taxpayer's purpose was to support the racing career of Miss Powell, as a result of the natural love and affection on the part of the officers of the appellant. In their view the evidence indicates that this was a conscious motive on the part of the appellant but, in any event, the benefit to Miss Powell was so inevitably and inextricably involved in the making of the payment, that the effect of benefitting Miss Powell must be held to be a purpose with which the payments were made. They also argue that the payments in any event do not qualify as deductible as the appellant's object was to benefit the trade of the managers of the hotels.

**Facts**

7. We have based our findings of fact on the witness evidence of Mrs Eileen Powell and Mr Jim Fraser, who both appeared at the hearing and were cross examined, and the documents contained in the bundles produced to the tribunal. We found Mrs Powell and Mr Fraser to be credible witnesses and we accept their evidence as set out below. We have set out our conclusions on the facts in the discussion section.

*Background to the business*

8. The appellant is owned by Mrs Powell, Miss Powell's mother, and Mrs Powell's sister, Julie Sugawara. Mrs Powell is the sole director of the appellant. This was the case at the relevant periods.

9. The appellant's business was established by Mr Jim Fraser, the father of Eileen and Julie. Mr Fraser is the company secretary and was throughout the relevant periods.

10. Throughout the relevant periods, Mr Fraser ran the business on a day-to day basis and, from his evidence and that of Mrs Powell, was very much the driving force behind the business notwithstanding that he was not the owner or a director of the appellant. He described himself as the key decision maker as regards the appellant's business. He said that Mrs Powell dealt primarily with the paper work. Mrs Powell also described her father as the main decision maker and said that he saw the business essentially as his. Mrs Powell's mother had been involved in the business and had been director and secretary but, following her death, her father made all the business decisions. Although she was the director she had limited time for the business at time in question as she had young children and was involved in her husband's business which employed over 10 people. She knew that legally she could exercise control, given her status as shareholder and director, but whilst she makes it known when she disagrees with her father, he does not really listen. Moreover she did not think it would be right to use her legal authority to overrule Mr Fraser as essentially he was the one who had built up the business.

11. Mr Fraser bought the appellant in 1981 when it owned just one hotel, the Crown and Cushion Hotel in Chipping Norton (the "**CC hotel**"). Over the next 30 years Mr Fraser grew the appellant's business through a number of, what he described as, high risk projects such as the development of a leisure centre, a property renovation project, the purchase of a building business and the operation of a small executive jet business. By 2008 the business comprised 6 hotels (each with a pub and restaurant) with a total capacity of 176 bedrooms. In addition to the CC hotel, the appellant owned the Lismore Hotel at Banbury, the Columbia Hotel at Wellingborough, the Rothwell House Hotel at Rothwell, the Crown Hotel at Blockely and the Crown Hotel at Brackley.

*Arrangements with managers*

12. Initially each hotel was managed solely and directly by the appellant. However from 1997 onwards each hotel has a manager, who enters into an agreement with the appellant, which Mr Fraser described as a form of incentive scheme whereby the manager is able to benefit from the profits generated by the particular hotel he manages. The manager pays a fee to the appellant, which has been described as "rent" in the written agreements between the appellant and the manager.

13. Mr Fraser gave the following evidence as regards the operation of the arrangements with the managers at all relevant times, which in some respects is supported by the documents in the bundle, including the written agreements put in place with the managers (see 15, 16 and 17):

(1) The appellant remained the licence holder of four of the hotels, as regards the licence to sell alcohol on the premises with Mr Fraser and Mrs Powell holding personal licenses. Mr Fraser said that, as licence holder, he often made unannounced visits to the hotels to monitor the quality of the hotels.

(2) The appellant was also the owner of and responsible for all furniture, furnishings and equipment within the hotels. The appellant was responsible for the maintenance, insurance and licensing of the hotels and the equipment within the hotels. Mr Fraser arranged those matters and the costs were taken into account in calculating the appellant's net profits in relation to that hotel.

(3) The manager managed the hotel for which he is responsible on a day to day basis and employed the employees at the hotel.

(4) The fee or "rent" originally agreed with any manager was an annual amount based on the profits that the appellant had been able to generate from the particular hotel. Once the agreement commenced, the fees were then to increase periodically in line with inflation (using the UK Retail Price Index). In effect the arrangement was designed so that the appellant received the profit it expected to make, plus amounts to cover items for which it was responsible such as insurance, repairs and advertising, with the manager receiving a share with the precise amount depending on his good husbandry in managing the hotel. The financial arrangements are further described in 16 below.

(5) The appellant could terminate the agreement with the manager by giving a fixed period of notice. The appellant could reach a new agreement with the same manager or replace the manager with a new manager, at whatever fee could be agreed.

(6) The appellant occasionally covered general expenses such as legal costs. For example, when a claim was made against the manager of the Lismore Hotel in an employment tribunal, the appellant covered his legal costs which were over £10,000. In addition an ex-employee brought a claim against a manager in an employment tribunal and the appellant paid the settlement to the ex-employee due to the appellant's involvement in running the hotel.

(7) Advertising was undertaken both by the manager (in relation to the specific hotel which he/she managed) and by the appellant for the business overall.

(8) Mr Fraser described himself as remaining as the overall manager of the business on a day to day basis. He supervised and assisted the manager of each hotel and was personally heavily involved in ensuring the hotels are run at the required standard. In his oral evidence he said that in practice he would generally ring each hotel 3 or 4 times a day and would visit once a week and sometimes twice. He knew he could not dictate to the manager under the terms of the agreement but he made himself available.

(9) In his witness statement he said that each manager has a "fair amount of autonomy in running their hotel but the appellant is entitled to step in and supervise the running of the business". For example the appellant can determine what drinks are sold at a particular hotel. Moreover, whilst Mr Fraser generally had an advisory and supervisory role there are occasions when he has to be more active. For example, as regards the CC hotel, he had to intervene in 2009 by determining the hours which a manager would work and enforcing regular checks of the heating timers. He also terminated the agreement with a manager early when, due to his active monitoring, he found that the manager had not been running the relevant hotel properly. He said in his oral evidence that this action had been necessary, in particular, as the manager had not been making payments to the appellant, contractors or staff on time. These incidents were evidenced by correspondence between the relevant parties included in the bundle.

(10) Mr Fraser also managed a hotel if the manager is ill or on holiday. He gave the example that one manager was only in attendance at the hotel for about 18 months during a five year period and during that time Mr Fraser and his staff attended that hotel a few times each week.

(11) If the appellant has to terminate an agreement with any manager (as it did in one case as set out above), the appellant manages the hotel until a new manager can be found, taking responsibility for the running costs of the hotel during that time. In that case Mr Fraser would step in on behalf of the appellant and carry out the manager's responsibilities.

14. Mr Fraser described the overall purpose of the scheme as being to give each manager a greater incentive to run that hotel profitably by giving him a direct stake in the profits generated by that particular hotel. In particular the scheme was intended to prevent pilfering and improve customer care in the hotels. The scheme also enabled Mr Fraser to increase the appellant's profit annually in line with UK RPI inflation and to continue to manage and control the business as proprietor. Overall, in his view, the scheme operated as a franchise with both the appellant and the manager being responsible for different aspects of the business and essentially co-managing the hotel.

15. The bundle contained examples of the agreements put in place with managers. The first such arrangement was made in 1997 with Mr Dominic Sanders as regards the Lismore Hotel. Mr Fraser wrote to Mr Sanders on 31 January 1997 explaining the financial effect of the arrangements and the parties entered into a "tenancy agreement" drafted by Mr Fraser himself on 3 February 1997.

16. Mr Fraser made the following main points in the letter of 31 January 1997:

(1) The figures set out in the latest final accounts for the hotel were to be used as the basis of the rents - "The principle being that because you managed the accounts which included your salary in that year, you had managed to achieve a profit and that I would add £20,000 into your salary from these profits providing that you paid me the balance of my profits as a Rent."

(2) The "real profit" would be determined after repairs/replacement, insurance, depreciation and legal/professional costs were added back in as profit. From then onwards, because the manager's salary had been about £20,000 in that year and provided that the manager achieved the same profit performance that he had in the past, the manger would achieve a gross salary of £40,000 per annum.

(3) Mr Fraser agreed to reduce the rent by 5% of the accountant's costs and to set aside £5,000 per annum for maintenance and repairs of equipment and the building and to pay about £1,500 of insurance costs relating to the hotel.

(4) The manager was required to enter into a "tenancy agreement" and to pay 2 months' rent in advance with 1 month of that to be used by Mr Fraser as a bond to be held to cover losses or damages to items on the inventory on its return to Mr Fraser.

(5) The profit/rent was stated to be £7,963.59 per annum.

(6) Mr Fraser stated that "once you take over, if you have any queries on any matter regarding the hotel or its finances, I will always be available to assist".

(7) Mr Fraser said that he had arranged to have all the meters, services etc changed over into the manager's name with effect from 3 February 1997 and that he and his assistant would hand over the inventory and stock and collect all the invoices/bills which were owed as of the handover date of 3 February 1997. From then the manager would be responsible for the payment for all goods and services delivered to the hotel.

17. The agreement of 3 February 1997 included the following provisions:

(1) It was stated that the agreement was a letting of the premises by the appellant to the manager for a fixed term of 10 years in return for a "rent" payable by the manager of £5,506.20 per week plus VAT and to be increased annually in line with UK inflation.

(2) The manager agreed efficiently to conduct the business of licensed victualler within the premises in such a manner as fully to exploit the trading potential of the premises, to maintain and extend the business carried on from the premises and to preserve and maintain the good reputation of the premises with the licensing authorities and the public.

(3) The appellant had the right to enter the premises at all reasonable times to view the state and repair of the premises and broadly to carry out any repairs and alterations it may decide to carry out, if the manager breached his obligations or failed to perform his covenants under the agreement or, if the rent remained unpaid for 7 days or more after the due date or, if the manager became bankrupt (or in certain other events of default).

(4) Either the appellant or the manager could terminate the agreement on not less than 6 months' notice.

(5) The manager had a number of detailed obligations as regards the premises and the hotel business including:

(a) To keep the premises to AA and RAC 2 star standards.

(b) To allow the appellant to exhibit any advertisements or notices which the appellant may require and not itself to show or display or allow to be so shown or displayed any advertisement without the appellant's prior written consent.

(c) To keep the premises clean.

(d) To keep the "house in an orderly manner so that the Licence [meaning the alcohol licence held by the appellant in respect of the premises] is not refused to be renewed or the removal or transfer of the Licence imperilled".

(e) To undertake routine repairs and maintenance.

(f) To pay utilities charges.

(g) To provide the appellant with a copy of the full annual audited management accounts.

(h) To sell beer and other drinks in the same quality as supplied by the appellant on the basis that "the methods of dispensing the specified beers and specified non-beer drinks shall be the methods approved by the [appellant] from time to time".

(6) The appellant agreed to give reasonable advice and help if requested in running the business. It remained the holder of the licence, it undertook to pay for major repairs and to maintain the insurance.

18. In his witness statement Mr Fraser said that the terminology of the agreement was not as precise as it might have been due to the fact that it was an adapted agreement. He explained in his oral evidence that he had based the document on a "tied house" agreement of the type used between landlords of public houses and breweries. He said that whilst it has elements of a tenancy agreement it is in spirit a management or trading agreement. The manager was not strictly a tenant and the monthly fee was not in any real sense rent. It was understood that the manager would be carrying on the business of the appellant. The agreement was very different to an ordinary landlord-tenant relationship as that type of agreement would not include an obligation that the tenant must maintain and extend the trade. He did not accept, therefore, that the agreement was a form of landlord and tenant arrangement despite the terms used in the document. Mr Fraser was taken to the financial statements for the appellant and those of one of the managers which show amounts received by the appellant and paid by the manager to the appellant as "rents". He agreed that these were describing the amounts received from the managers but the terminology was just following the description in the written document which, as he had explained, was just used for convenience as he had used a "tied house" agreement as the basis.

19. It was put to Mr Fraser that from the time when the arrangements with managers were put in place in 2007, the appellant was no longer in the business of providing hotel accommodation. Mr Fraser disagreed. In his view, the arrangements are a medium to allow the appellant to run the hotel albeit that it no longer deals with matters such as buying the stock and paying the staff. He noted that the appellant's

financial statements have never shown any change in the nature of the business; it is still described as a hotel business. The appellant remains the proprietor of the hotels. It is still in overall control of the business, through Mr Fraser, as he had described. The appellant has the control it needs through the terms and conditions of the agreements with the managers (which in any event it can change).

20. It was noted to Mr Fraser that according to the available written agreements with managers there was nothing requiring the appellant to arrange the advertising or promotion of the hotels. Mr Fraser said that he kept the budget for this and used it entirely as he saw fit. The manager could arrange advertising but Mr Fraser could overrule a manager on that and essentially do as he pleased in that respect.

21. He was questioned as to what he had meant in describing the arrangement as similar to a franchise. He said that his understanding of a franchise was simply that the two parties involved were working together.

I*mpact on the business of the recession in 2008*

22. Mr Fraser gave evidence that the recession in 2008 had a significant impact on the hotel business. Some of the managers were unable to pay the agreed fee in full. The appellant agreed to reduce the managers' fees on a temporary basis in a number of cases and these reductions continued across extended periods, as explained in further detail below. The reduced fees paid by the managers inevitably reduced the profitability of the appellant. Particular examples are:

(1) As regards the CC hotel, there was a significant drop in the fees paid by the manager from December 2008 to March 2009 of £42,506. The manager of that hotel from June 2007 onwards had agreed to pay £5,506.20 per week but due to the recession paid £4,808.14 until March 2015. At that time the rent increased to £5,288.96 per week. The hotel had previously been run by a manager who had made a good profit whilst paying the appellant £5,249 per week.

(2) Similarly, for the Crown Hotel, Brackley, the manager was unable to meet the agreed payments for much of the period from July 2008 to March 2009, and instead lower payments were made. The total difference for that particular hotel was a shortfall of £67,336. In 2008 the manager of this hotel agreed to pay £3,800 per week but several discounts were granted such that he only paid £2,900 to March 2015. From that time the rent was increased to £3,262.50 per week.

(3) At the Columbia Hotel, the weekly fees had been maintained at £1,378 since June 2004 until June 2006 when that amount had to be halved until March 2007. In 2008 the manager was once again unable to meet the agreed fees and this continued, with fees fluctuating, until 2011. Arrears and discounts for this hotel in the period from June 2004 to May 2014 were in the region of £74,375.30.

23. Mr Fraser was questioned about the commerciality of the "rent" reductions. He said they were given to reflect the economic circumstances at the time. He did not

give reductions to those managers who were not pulling their weight. Rather they were given to those were clearly trying hard as an encouragement to keep them on board. It was a commercial decision made on the basis that it was in the appellant's interests to ensure that the business could still function by helping the managers where appropriate cope with the adverse conditions in the recession.

*Advertising activities prior to 2008*

24. Prior to the arrangements made with Miss Powell, the appellant used different methods to advertise the hotels and had spent significant amounts of money on press advertising. For example in 1997 the appellant spent £27,260 on press advertising the CC hotel which, as that hotel has 40 bedrooms, equates to £681.50 per room. Mr Fraser calculated that increasing that figure to take account of inflation between 1997 and April 2009 (the start of the racing season in which the appellant first sponsored Miss Powell) is equivalent to advertising expenditure of £944.54 per bedroom per annum. Across all 6 hotels (with a total of 176 bedrooms) that is equivalent to annual advertising expenditure of £166,239.04 as at April 2009.

25. The appellant's hotels are convenient for the Silverstone racing circuit and for many racing teams. The appellant sought to exploit this link with motor racing and the proximity to Silverstone by sponsoring racing drivers. The appellant had done so on a couple of occasions before it entered into the arrangements with Miss Powell:

(1) Daniel Rowbotom was sponsored to the extent of £1,000 on 15 July 2008 and £581.78 on 7 September 2007. Mr Fraser considered that he had the potential to earn monies for the appellant because he was a UK karting champion with a bright future.

(2) Jake Hill was sponsored to the extent of £1,112 on 12 October 2012 for a one off test in a racing car.

26. The appellant also occasionally sponsored a local youth football team by paying for their shorts.

*Arrangements with Miss Powell put in place in 2008*

27. Mr Fraser said that when it became apparent that Miss Powell had a great deal of potential as a racing driver he sought to use her talents to advance the position of the appellant, in particular, to overcome the difficulties faced by the hotel business in the recession. Mr Fraser considered that Alice was an exceptionally talented motor racing driver with better prospects than those drivers the appellant had sponsored previously. She was already attracting substantial media attention in 2008. In his view her ability provided the appellant with a "very attractive advertising opportunity" and her potential meant that "advertising through her would prove to be a prudent use of advertising funds". Therefore, he wanted to put in place an arrangement with Miss Powell in order to increase the profits of the appellant by promoting the hotels and stimulating custom. His aim in doing this was to ensure that the managers would be able make their full "rent" or fee payments to the appellant despite the effects of recession.

28. It was put to Mr Fraser that actually the appellant had no interest in achieving a potential increase in the profits from the hotels as the appellant's share was essentially fixed so that any increase would not benefit it. Mr Fraser said that was not the case as he could change the terms and conditions entered into with managers so that the appellant obtained more money. Also, as he had said, there was a risk that the managers would not be able to pay even the agreed "rent" as a result of the effect of the recession and he wanted to ensure that the full "rent" was received without the temporary reductions he had agreed to. He maintained that he had wanted to spend the money on advertising through Alice to ensure that the appellant received the "rent" under the arrangements with managers. We have set out our conclusion on this evidence in the discussion section.

*Miss Powell's racing career prior to the signing of the 2008 agreement*

29. Miss Powell started racing karts at an early age and by the age of eight was winning club championships.

30. In 2005, when Alice was aged 12, she had taken part in the British Racing Driver Club Formula JICA Karting Championship and was the youngest driver to compete in the competition. Also in that year Alice had beaten adult world class drivers like Craig Dolby and Jamie Green in the "Chase the Champ" series and was the focus of national media. This month long series was a tournament that had been sponsored by Tag Heuer, a major Formula One sponsor.

31. Soon afterwards Alice was presented to HRH Prince Andrew by a British Racing Driver Club talent spotter due to her potential to get to Formula One. That talent spotter had also run the same championship which Lewis Hamilton had won and her endorsement of Alice was highly significant and respected. Likewise Maclaren's Formula One CEO, Martin Witmarsh, has personally endorsed Alice's talent when she was 15.

32. Alice won an "outstanding driver" award and was nominated as a rising star by the British Racing Driver Club. She then wore the "rising star" logo on her racing suit. "Rising stars" are selected out of several hundred young drivers.

33. In 2007 and 2008, Miss Powell competed in the Ginetta Junior Championships where she had good results and attracted national press coverage.

34. Both Mr Fraser and Mrs Powell gave evidence that Miss Fraser had had other sporting interests including, in particular, hockey.

35. Mrs Powell said that in 2009 because Alice was not old enough to hold a road driving licence, in the initial stages of the 2008 agreement, she and her husband had to take Miss Powell to the racing tracks. Since Miss Powell had passed her driving licence test shortly after her seventeenth birthday in 2010, she and her husband seldom attended a race. In some years they had not attended a single race.

*Decision to contract with Miss Powell*

36. As noted, on the basis of Alice's ability and known potential in motorsport Mr Fraser asserted that the appellant had good evidence that advertising through her would prove to be a prudent use of advertising funds. The appellant had first provided assistance when Mr Fraser organised the purchase of a Formula Vee Race Car for £3,000 in March 2006. However, this was used only for a couple of tests as it was not suitable for the type of driving which would attract press coverage. It was sold in August 2006. In August 2007 the appellant's accountants obtained VAT clearance from HMRC to buy and run a Ginetta race car. The appellant's financial statements for the year ended 31 March 2008 show sponsorship amounts of £10,764 paid to Miss Powell which Mr Fraser said were for advertising as Miss Powell was attracting attention in the Ginetta.

37. In 2008, on the probability that Alice would get to Formula One, Mr Fraser decided to discontinue using the Ginetta car. Manor, whose team had included Lewis Hamilton, had one seat left for a driver for the 2009 season. Mr Fraser said that he had to act quickly so as not to lose the opportunity and so it was then that he urged Miss Powell's father, as Miss Powell was then aged only 15, to sign a contract with the appellant immediately.

38. Mr Fraser said that at no time did Alice or her father ask for sponsorship and Mr Fraser did not discuss the 2008 agreement with her. He discussed it briefly with her father before he signed it and he could not recall what was said. Neither Alice nor her father knew the contents of the agreement until shortly before it was signed. The appellant's accountants, who had obtained HMRC's approval for the Ginetta car, endorsed that contract and assured Mr Fraser that two tax experts had advised that the funds payable would be tax deductible despite Alice's family connection to the appellant. Mr Fraser thought that must be right because the agreement was in his view entirely commercial and was intended to provide valuable advertising for the appellant.

39. Mrs Powell said that she was not in favour of Miss Powell entering into the agreement. She is not a risk taker and was uncomfortable with the sums and financial risk especially as she knew little of motor sport. She also felt it was a very long agreement period that favoured the appellant more than Miss Powell. She thought she would have discussed the 2008 agreement with her husband and her daughter but she could not remember what was discussed. She did not feel she could block the agreement through the legal control she has as director and shareholder of the appellant. It did not seem right to stop her father in his business decisions when he was the one who had built up a successful business. She had probably said to her husband and daughter that it was "on their own heads" if they entered into the 2008 agreement as she knew her father would not think twice about implementing the clauses and the agreement was for a long period. She was also concerned for the appellant given that there was a lot of money involved.

40. She was asked if she had tried to stop her daughter entering into the 2008 agreement. She said that she did not want it to happen and so did not want to hear about it.

41. She was asked if she was grateful for the appellant providing funding to Miss Powell. She said that she was not. She did not want the contract to go ahead and, if that meant that Miss Powell could not race in motor sport, then so be it.

*2008 agreement*

42. The appellant entered into a formal written contract with Miss Powell, drafted by Mr Fraser. As Miss Powell was only 15 years of age at the time her father, Mr Tony Powell, signed the agreement on her behalf. Mr Fraser often drafted business agreements for the appellant to save legal fees (as he had done as regards the arrangements with the managers). The main terms of the 2008 agreement are as follows:

> (1) The appellant will provide £160,000 plus VAT annually for Alice Powell for the next four years on the terms and conditions set out in the agreement.
>
> (2) Miss Powell will give the appellant 15% of her racing earnings from competitive motorsport driving for the next 12 years commencing on 1 December 2008.
>
> (3) Cars that Miss Powell will drive during that 10 year period will carry advertising (decals) to promote all the hotels that are owned by the appellant.
>
> (4) Alice will especially promote the Crown Hotel, Brackley by meeting racing teams from Silverstone Race Track and drivers in order to promote the use of all of the appellant's hotels, when requested by the director and the company secretary of the appellant.
>
> (5) In the event of additional sponsorship being provided for Alice's racing by others such as Bristol Street Motors and Travis Perkins, all such monies will be looked after by the appellant for the next 3 years, on condition that sponsorship monies do not exceed £160,000 per annum for four years. In the event of that sum being exceeded at any time during the 4 years, Miss Powell must use these excess monies to provide additional competitive motorsport driving funding, once the 10% has been paid on that residue to the appellant.
>
> (6) Alice will attend product launches, give speeches, and promote products at the premises of sponsors selected by the appellant, by carrying their decals on racing cars, subject to competition regulations, when requested by the appellant, for four years. Likewise she will wear such decals on her driving overalls, subject to competition regulations.
>
> (7) In the event of Alice breaching this agreement, within the 4 year period, Alice must refund all monies paid by the appellant, in addition to a 50% penalty for all such monies that were spent by the appellant on Miss Powell. In the event of such a breach, Alice will still be contracted to paying 15% of her competitive motorsport driving earnings to the appellant until the expiry of the above mentioned 12 year period.

43. Mr Fraser gave evidence, which we accept, that there were a number of typographical errors in the agreement as described above. The reference to a 10 year period in 42(3) above should be to a 12 year period, the references in 42(5) to the next

3 years should be to the next 4 years and to 10% should be to 15%. Mr Fraser also said that although the agreement stated monies were to be paid direct to Alice in fact all funds were paid direct to the racing teams. Mr Fraser said that when HMRC undertook an inspection of Miss Powell's company, Alice Powell Racing Ltd in January 2012 their verbal findings were that Alice's racing was supported by the payments made under the 2008 agreement but Alice had not had any personal benefit from those payments. Mrs Powell, who dealt with that company's affairs at the time, confirmed that she was present when HMRC carried out this inspection and that was what they said.

44. Advertising expenditure of £160,000 a year was not excessive in Mr Fraser's view. In fact he worked out that figure was almost exactly proportional to the amount of advertising expenditure on the CC hotel in 1997 taking into account the size of the business and inflation (as set out above). However, he expected that in any event the appellant would reduce its expenditure on Alice through its entitlements to her sponsorship and earnings during the terms of the contract.

45. Prior to signing the contract Mr Fraser had received verbal pledges of sponsorship from Bristol Street Motors and Travis Perkins for Alice's junior racing. They had already paid £5,532 between them prior to the agreement. They had made pledges for £10,000 and £30,000 respectively for Alice's senior racing career. For that reason he specifically included those sponsors in the terms of the 2008 agreement as set out in 42. So the 2008 agreement included a right for the appellant to recover funds if other sponsors could be found, giving the appellant significant commercial protection.

46. Indeed, the appellant did receive sums under the 2008 agreement, including, for example, 100% of Alice's net winnings from racing in India in 2011 (amounting to £13,500). Bristol Street Motors and Travis Perkins did not, however, produce the pledged sums because they both said it would be inappropriate as they had just made staff redundancies. Mr Fraser said that at the time the contract was agreed he underestimated the seriousness of the recession and generally thought that all monies promised would be paid in due course.

47. Also before the 2208 agreement was entered into, Mr Lambert, a colleague of the owner of Whittelbury Park Hotel at Silverstone, arranged for that hotel to promise to pay £40,000 to Alice but matters ended acrimoniously between the team owner and Mr Lambert when the payment was not made. Just over a year later that hotel went into receivership.

48. Overall Mr Fraser did not consider the advertising expenditure to be a high risk strategy not only because of the expectation that the appellant would recoup some of its initial expenditure but also due to Alice's media position which Mr Fraser thought meant that her duties to advertise the appellant had the potential hugely to increase the appellant's customer base and trade.

49. Mr Fraser was questioned as to his motivations for arranging for the appellant to enter into the 2008 agreement with Miss Powell. He was asked if he had personally

funded her driving. He said that he had personally contributed to financing for Alice in her early karting days and he had spent much time helping her with the race process. He had not spent personal funds later on when she began motor car racing. She wanted to remain in karting but he had persuaded her to transfer to the Ginetta and that had brought people in even from her karting days. There is a camaraderie in the motor sport business and, once people became familiar with the hotels and that Alice was connected with them, then they would stay there.

50. He was asked about his personal feelings on Miss Powell's career and prospects. He said that of course as her grandparent he wanted her to succeed in her chosen career especially as she appeared to be so talented from an early age. He wanted her to realise her full potential. He was very proud of her. When she had been signed to the 2008 agreement at the age of 15 there was no Formula One career as such but that was the hope. However, he was not motivated by personal ambitions for Alice in signing her up to the 2008 agreement. He wanted to sign Alice up so that he could control her because she had such potential which could do so much for the advertising for the hotels. He noted that the appellant had sponsored others in motor sport and other sports although he acknowledged that was for much smaller amounts. The reason for the larger amounts was that he thought that there was much greater potential benefit to the appellant due to Miss Powell's much greater prospects compared with the others the appellant had sponsored. As noted, he was particularly keen to improve the appellant's business given the effects of the recession. Around this time he had actually had to fund the business using funds raised and secured by a mortgage over his own property.

51. It was noted to Mr Fraser that there must be a risk in entering into an agreement with a minor because once reaching adulthood the person may wish to terminate the deal. Mr Fraser noted that Miss Powell's father had signed for her. Mr Fraser considered any risk, which he considered to be small, was worth taking given the potentially very large benefits. He confirmed that he had not suggested to her parents or Miss Powell that she should take independent legal advice. He accepted that the monies were paid to Alice Powell Racing Limited a company owned by Alice but his understanding, as stated above, was that they were paid straight out to the relevant teams.

52. It was put to him that £160,000 was a lot to spend given that Miss Powell was not a known brand or household name at the time (and still is not). Mr Fraser said that she was well known amongst the teams and the industry given that she was so young and a female doing so well which was highly unusual. Alice was gaining access to the teams. Although some members of the public came to the display stands at the race track which Alice manned it was more team members who came along. This access was a key part of the advertising benefit that she brought. He accepted that getting into Formula One is an unpredictable business and that, although she had got a reserve driver spot at one point which made all the headlines at the time, Miss Powell still had not achieved that and still is not a household name.

53. It was put to Mr Fraser that in reality the 2008 agreement was a funding agreement to meet Alice's racing driver needs and that Mr Fraser himself had referred

to it as such in his witness statement. Mr Fraser said this was again just a term. He viewed it in effect as a sponsorship agreement.

54. It was put to Mr Fraser that the agreement was not very precise with little detail such that it cannot be taken to represent the type of contract which would be put in place between third parties acting on an arm's length basis. For example there was no definition of race earnings. He said that in fact he thought he had imposed much more stringent conditions than other sponsors might impose, with his aim being entirely to maximise the benefit for the appellant. He noted that often this type of arrangement in this industry was made informally with no written agreement. He noted that he had included provisions aimed at preventing Miss Powell going off with another sponsor being the penalty provisions.

55. It was noted that in an email of 3 February 2012, Miss Powell had written to a potential sponsor stating that her grandfather's business had funded her for 11 years but that she now needed more funding:

> "My grandfather's business which funded me for 11 years, is not big enough to get me into Formula 1, so I need a good manager or funder to get me there, in the next 2 to 3 years…"

56. Mr Fraser said that Miss Powell was just using poetic licence in referring to the appellant funding her for 11 years as she was trying to get the sympathy of the person she was writing to. He said that Miss Powell had sent out hundreds of these letters trying to get sponsorship.

57. Mrs Powell was asked if she knew how much money was involved in getting into Formula One and if she and her husband could have provided funding. She said that she knew now what sort of amounts were involved but at the time she just knew it was expensive and that Alice would need funding to succeed. She and her husband could not provide that funding. As set out above, she said she was not grateful for the funding being provided as she did not want her daughter or the appellant to enter into the 2008 agreement.

58. It was put to Mrs Powell also that the 2008 agreement was a funding agreement to enable Miss Powell to pursue a racing career. She said that was not her father's intention. He was interested in the advertising for the appellant's business. She had not wanted the appellant to make the payments as she was risk averse as she had said. She accepted that without the funding provided by the appellant Miss Powell could not have achieved what she had but nevertheless that was not the aim of the payments in her father's eyes. She noted that although she was the director of the appellant she did not make the decision for the appellant to enter into the 2008 agreement; her father did.

*Period following the signing of the 2008 agreement*

59. Following the 2008 agreement, the appellant's hotels began to be marketed under the brand "Silverstone Hotels", via the website www.silverstone-hotels.com. Five of the appellant's hotels are less than 45 minutes from most of the Formula One

teams' bases and Silverstone and the appellant actively encourages race-goers and teams to stay at the hotels. One of the hotels (the Crown Hotel in Brackley) has become themed entirely on motorsport to attract fans. Life size cut-outs of Miss Powell were placed in the hotel foyers and racing fans are informed that the appellant sponsors Alice. During the period of the 2008 agreement, the www.silverstone-hotels.com website logo has been displayed on Alice's racing overalls and on her car (as was evidenced in a number of photographs produced in the bundles). The appellant had stands at the race tracks where Mr Fraser handed out promotional leaflets for the hotels and Miss Powell also manned the stand to raise the profile of the hotels. The appellant spent around £300 to £400 each year on promotional leaflets for distribution to teams during the first 4 years of the 2008 agreement.

60. In addition the appellant targeted the racing teams themselves. Mr Fraser, with Alice, is able to access the paddocks and mix with the racing teams and he could form contacts within those teams who he could not otherwise meet. Many of the teams are located close to the appellant's hotels. For example, Mercedes Formula One is about a minute's drive from the Crown Hotel at Brackley and Lotus Formula One is about 8 minutes from the CC hotel. The appellant has created good business relations with a number of teams. Alice still visits Lotus at least once a week and Mr Fraser has met hotel users and staff from there.

61. Mr Fraser stated in his witness statement that the payments made by the appellant to Miss Powell in the four years following the signing of the 2008 agreement were as follows:

(1) £145,241 for the year ended 31 March 2009.

(2) £123,688 for the year ended 31 March 2010.

(3) £288,173 for the year ended March 2011.

(4) £93,277 for the year ended 31 March 2012.

62. He said in his witness statement that the average expenditure was, therefore, £162,594.75 per year over 4 years which equates to 19.74% of overall turnover. In Mr Fraser's view this was a fairly standard proportion of turnover for a hotel to spend on promotions. For example the manager of the Lismore hotel investigated using Groupon to promote that hotel and was told the advertising would cost 30% of all business generated.

63. Mr Fraser did not consider that the sum pledged to Miss Powell and in fact paid to Miss Powell was excessive for the purchase of advertising in motor racing. He said it is difficult to find out exactly what other sponsors pay but, as an example, Lewis Williamson did GP3 with Status Grand Prix at the same time as Alice. Despite her being less experienced and younger she was just 2 places beneath him by the season's end. Mr Williamson's manager told Mr Fraser that his own business had spent up to £100,000 sponsoring Lewis. Others such as ORD Storage apparently also sponsored him to well in excess of that sum during the same period as the appellant was advertising through Alice.

64. Mr Fraser was asked if Alice needed money for her to advance in her racing career. Mr Fraser noted that the monies were not for Alice personally as they always went straight to her team as he had indicated. She had never asked Mr Fraser for any money for her personal funding. Mr Fraser was shown a number of invoices in the bundles from Alice Powell Racing Ltd to the appellant for various amounts as regards "advertising and promotions of Silverstone-hotels.com". He accepted that the monies were paid to this company, which is owned by Miss Powell but said that his understanding was that they were paid straight out to the relevant teams. The payments were made to get her into the team so that she would be more valuable from an advertising perspective. A better profile meant in effect a better product for the appellant.

65. The fact that the amounts were fluctuating and in some periods were less than £160,000 and in some more was noted to Mr Fraser. It was put to him that, if the funding was for a third party, a figure would be agreed and that would be the end of it. He said it was common in sponsorship for amounts to fluctuate so, for example, if someone had a crash a sponsor may pay more because it was in their interests to do so. He was not just paying amounts because Alice is his granddaughter.

66. It was put to Mr Fraser that in fact the appellant was just paying amounts out to Miss Powell as she needed them to advance her career. It was pointed out to Mr Fraser that according to a schedule of budgeted payments in the bundle the appellant had also paid out around £237,000 to Miss Powell in the period from April 2012 to August 2012. If this is added to the above amounts, the appellant had actually paid around £850,000 in total. It was asserted that paying out such substantial sums over a short period further demonstrated that the appellant was just reacting to whatever Miss Powell's racing needs were at the time. Mr Fraser was firm in his view that was not the case. He had been concerned with the appellant's advertising needs only.

67. Mr Fraser later pointed out that he thought the figure for the year ending 31 March 2009 shown in the figures listed in 61 above was a mistake. The amount was actually incurred in respect of the 2008 year as there was no winter racing in the Ginetta in 2009. We accept his evidence in that respect.

*Miss Powell's racing career following the 2008 agreement*

68. Since the 2008 agreement was made Alice continued to be successful in her racing career. Her success led to recognition and publicity, particularly as a result of succeeding as a young woman in the world of motor racing. Highlights include:

(1) Shortly after the 2008 agreement was put in place the former Formula One driver Davina Gallica made unsolicited comments about Miss Powell's potential and that Alice had the potential to earn £15 million per annum.

(2) In 2009 she was also runner up in the 'Young Woman of the Future Award' attended by David Cameron.

(3) In 2010, Miss Powell won the Formula Renault BARC Championship being the first female in history to win the championship and the youngest

person to win the championship since its inauguration in 1995. The press coverage noted that at 17 Alice was a year younger than Lewis Hamilton when he won his first Renault Championship at 18 in a similar car. As a result of this she was awarded the Lord Wakefield Trophy at the Motorsport Association's "Night of Champions" awards.

(4) In 2011 Alice was invited to race in the Indian Grand Prix Formula One support race and her results were on Indian national television and in the press

(5) As a result of the trip to India in 2012 Miss Powell was invited on a trade mission with the Prime Minister David Cameron, who has written a testimonial for her. She was the youngest delegate and primarily promoted British racing car products but also the appellant's hotels.

(6) In 2012, Alice raced in the GP3 Series with the Status Grand Prix team.

(7) In 2014, Alice won the Asian Formula Renault Series and was the UK's first driver to do so for 12 years.

(8) In 2015, Alice was driving with Aston Martin. The Silverstone-hotels.com logo was displayed on their cars and Alice's overalls.

69. It was pointed out that Miss Powell was still not in Formula One but in his witness statement Mr Fraser had said that it was believed that Miss Powell had the potential to earn £15 million (being the reference to the comments of Davina Gallica set out in 68(1) above). Mr Fraser said he thought this was a bit of an exaggeration but at the time it was clear she had the potential. If she had had the money then he thought that Formula One would snap her up but Formula One was changing all the time and without sufficient funds it was impossible to break into it.

70. Miss Powell received the following funds from winnings and other sponsors:

(1) When she was aged 17 Aston Martin paid for her flights and hotels to test drive in France and Germany. Aston Martin has kept her on their radar ever since. Mr Fraser asserted that this success and recognition has, of course, been important in maximising the advertising value for the Silverstone hotels.

(2) In 2011 Mr Rajiv Mitra of Renault in India paid for Miss Powell's flights and hotels on her trip to India as well as for her mechanics, tyres and race fuel. She attended Renault's promotions and was pictured on several Indian billboards with Renault's and Silverstone hotels' logo on her suit. She won $30,000 of which $13,500 (being the amount left after Indian tax) which was paid to the appellant under the terms of the agreement (on which the appellant paid VAT and corporation tax).

(3) A computer company used Miss Powell for an advertising campaign in the US.

(4) In 2012 Status Grand Prix sponsored Miss Powell to the extent of £238,000 for a GP3 international race series. Status verbally pledged sponsorship for the following year but failed to deliver which was a huge disappointment as a second year is crucial to a driver as a vital step to Formula One.

(5) Miss Powell's racing in Asia in 2014 was sponsored by Bristol Street Motors, ImmunAge and a Chinese firm:

(a) ImmunAge sponsored her with £10,000 to promote its products. Miss Powell paid 15% of that sum to the appellant.

(b) £4,800 pledged by Bristol Street Motors was paid direct to the appellant (who paid VAT and corporation tax on that sum).

(c) The Chinese firm paid for Miss Powell's flights/hotels, tyres, fuel and the race team for the car which carried the Chinese firm's and the appellant's adverts for its hotels.

(6) In his witness statement Mr Fraser noted that ImmunAge pay substantial monies to Aston Martin to carry its logos on its racing cars. He said that the appellant gets free advertising from Aston Martin in that Miss Powell has driven for them free of charge in exchange for them promoting Silverstone hotels.

71. Mr Fraser said that the advertising through Alice had had an immense impact on the profitability of the appellant's business. He is aware of motor racing fans and teams using the appellant's hotels and the number of guests staying at the hotels has increased markedly since the 2008 agreement was put in place.

72. Mr Fraser noted that under the terms of the 2008 agreement Alice had to work very hard as, in addition to pursuing her driving career, she was working long hours to promote the appellant's business. The time commitments were such that she ultimately discontinued her A level studies.

73. The mangers have also noticed the impact as, for example, the Lismore Hotel and Rothwell House Hotel often fill to capacity due to Alice's promotions:

(1) Mr Maia e Silva, then the manager of the Crown Hotel at Brackley wrote a letter on 17 November 2012 confirming the impact of motorsport on the customer base at the hotels. He explained that the Crown Hotel "often has an influx of racers" and the hotel "often fills with racing people". Furthermore, when the Crown Hotel filled because of racing he was able to refer surplus bookings to the CC hotel. He said that Mr Fraser and Miss Powell put "enormous effort into promoting the hotel as a motorsport hotel" such as by showing racing teams and drivers around it.

(2) Mr Smith, then the manager of the Lismore Hotel and Rothwell House Hotel, wrote a letter on 14 November 2012 explaining the impact of motor racing on the customer base at those hotels. Mr Smith said that he frequently filled both hotels with racing people. He said that Mr Fraser and Miss Powell brought racing people to the hotels.

74. Mr Fraser has explained that he is aware of motor racing fans and teams making use of the hotels and that the number of guests staying in the Silverstone hotels has increased markedly since the commencement of the 2008 agreement with Alice. This was recorded in the appellant's corporation tax computation for 31 March 2011 as submitted in December 2011. The notes state the following:

> "Despite difficult market conditions, the company's turnover increased during the year as a result of the return of rental income to the correct set levels for each hotel. The director believes this is a direct result of the rebranding of the hotels. The hotels were marketed under www.silverstone-hotels.com which complimented the sponsorship of the director's daughter as a competitive driver in Formula Renault. The races in these championships were broadcast live at peak times on national television. Through its sponsorship the company advertises its properties nationwide through many media outlets. Whilst advertising costs have increased as a result of this, the director believes that the hotels' revenues increased as a direct result of the sponsorship and rebranding and will continue to do so in future years."

75. The appellant suffered from significant reductions in the fees or "rents" paid by the managers during 2009 but by 2011 those reductions had been reduced greatly. A letter dated 25 April 2013 from the appellant's then accountants was put forward as evidence of this. In the letter the accountants noted that for the Crown Hotel in Brackely and the CC hotel the "rent" reductions had amounted to £48,086 and £42,506 (respectively) for the year ended 31 March 2009 and £9,815 and £16,999 (respectively) for the year ended 31 March 2010. However, in each case the reductions had reduced to nil for the year ended 31 March 2011.

76. It was put to Mr Fraser that there is no independent analysis of the effect of advertising through Miss Powell on the appellant's business and that any improvement could just have been due to an upturn in the economy. Mr Fraser pointed to the above evidence and said that he thought from his personal experience of visitors to the hotel and reports from the relevant managers that the improvement in the profits was down to the success of the advertising.

77. In 2012, in the course of HMRC's enquiry, a report was commissioned to value Alice's advertising value, looking at the media coverage received in the year prior to the report. The total media value (including print and broadcast media) was stated to be over £1 million for one year (comprising £379,020 for print media and £638,270 for broadcast media). The report notes that:

> "Whilst there is not an exact science to evaluating the value of media coverage, it is industry practice to use the equivalent advertising value to that of the editorial coverall received. For broadcast media, particularly BBC titles, where money can't buy a presence, conservative estimates have been used. Once these figures have been established editorial is intrinsically more credible than paid advertising, so it is standard to multiply the advertising equivalent by three to calculate the editorial value equivalent." There is no information on who prepared this report.

78. Mr Fraser agreed that this report just gave an indication only to demonstrate Miss Powell's potential value to the hotel business but that it was not possible just to extrapolate from this the actual value to the appellant. It could not be taken as an accurate indication of her media value in any particular year.

79. Mr Fraser gave evidence that in 2011 Miss Powell sought to end the 2008 agreement and engaged solicitors for that purpose. The appellant refused to accept the termination and Miss Powell's solicitors accepted that the agreement was commercial and legally binding upon her. Mr Fraser said that he opposed the attempt to end the 2008 agreement because Miss Powell's success and advertising value was vital for the appellant's business to recover during the recession. He did not want to lose that asset.

80. The only additional evidence produced in support of this was a letter from Hill Dickinson dated 15 October 2013 addressed to "whom it may concern" stating the following:

> "Alice Powell approached us in November 2011 following winning a British Renault Championship, as a result of our connection with motorsport.
>
> We acted on her behalf, briefly, as she wished at that time to terminate the above contract [being the 2008 agreement]. The relationship between her and [the appellant] had become acrimonious and [the appellant] had refused to terminate the contract. We were then instructed that she had decided to accept that the contract was legally binding upon her and that it still had several years left to run and we ceased acting for her in March 2012."

81. Mrs Powell said that she was aware that Miss Powell had instructed a solicitor and wanted to terminate the 2008 agreement in 2011. However, she had no involvement as she felt it was a matter for Alice and her father to sort out between themselves especially as her father had made the decision and they both signed the 2008 agreement. It was not pleasant to have such a disagreement between her father and daughter and she did not want to be involved.

82. Finally we note that HMRC draw some support for their case from the fact that the appellant made a loan to Miss Ellie Powell, the sister of Miss Alice Powell. We note that it is accepted that the loan was made on commercial terms. We have commented on this further below.

**Admission of additional documents**

83. Having heard arguments from both parties, we decided to admit as evidence in the proceedings additional correspondence, comprising a chain of emails between Miss Powell and Mr Fraser in 2015. The appellant had inadvertently sent this correspondence to the tribunal and the tribunal had sent it to HMRC who then asked for it to be admitted as being of potential relevance. We decided that, it was in the interests of justice and fairness for all potentially relevant correspondence to be examined as part of the proceedings although the relevance of and weight to be attached to the documents could not be assessed until the correspondence had been considered in full in the context of the other evidence. In the event we consider that

the statements in this additional correspondence have no material bearing on the issues in dispute here.

84. The correspondence relates to a dispute between Mr Fraser and Miss Powell as regards her living expenses and how they should be funded as well as her future plans for her racing career, Mr Fraser's concern being it appeared that they could impact on her deal with the appellant under the 2008 agreement. HMRC point, in particular, to a statement by Mr Fraser that "£1.5M was spent trying to get you to Fl, and you are more than happy to put us at risk of losing a further £220,000". HMRC state that this evidences that Mr Fraser's intention was to support Miss Powell's driving career. Mr Fraser states that this was simply exaggeration or filibuster in a bid to make his granddaughter do what he wanted her to do and keep her tied in to the deal with the appellant. It was personal correspondence between family members where Mr Fraser was trying to put pressure on Alice.

85. Given Mr Fraser's previous comments on wanting to have control of Miss Powel as a medium or tool whose talents could be used for the benefit of his business and his very clear focus on the business, we consider Mr Fraser's explanation to be entirely plausible. We accept his evidence in this respect. We do not draw any adverse inference as to the credibility of Mr Fraser's witness evidence from the fact that in such correspondence, which was plainly intended to be a private family debate, Mr Fraser exaggerated circumstances in an attempt to bend Miss Powell to his will. We have not, therefore, found it necessary to set out further details of this correspondence.

**Appellant's submissions**

86. As noted, the appellant asserts that the expenditure incurred under the 2008 agreement was incurred wholly and exclusively for the purposes of the appellant's business. It was not a purpose of the appellant to benefit Miss Powell or the managers/their businesses.

*Caselaw relied on by the appellant*

87. The appellant referred to the summary of the principles applicable to determining whether a payment is made exclusively for the purposes of a business set out by Millett LJ in *Vodafone Cellular* at page 742. It is clear from this that the question of whether an expense is incurred wholly and exclusively for the purposes of the trade is to be determined by ascertaining the taxpayer's object, in a subjective sense, in making the payment. In making that assessment the object is to be distinguished from the effect of the payment. Although the test is subjective some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

88. It is helpful also to consider the judgment of Romer LJ in the Court of Appeal in *Bentleys, Stokes & Lowless v Beeson* (1952) 33 TC 49. In that case expenses incurred by a firm of solicitors primarily on providing lunches to clients were held to be

deductible. The appellant referred in particular to the comments at page 504 (which is set out in full in the discussion) and the conclusion that "if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act". It is clear from this decision that the provision of a benefit whether to someone with whom there is a relationship or a third-party does not necessarily preclude expenditure from being deductible. The question is whether or not that result (the benefit to another person) was one of the purposes of the expenditure, or whether it was an effect or result which is inherent in the act.

89. The appellant also refers in particular to the decision of the Special Commissioners in *McQueen v Revenue and Customs Commissioners* [2007] STC (SCD) 457. In that case the taxpayer carried on a minibus business and used motor rallying as a means of marketing the business. He drove the rally car himself, painted in the livery of the business, and the rallies were publicised in newspapers and on television. The Special Commissioner, Sir Stephen Oliver QC, decided that the expenditure was deductible on the basis that Mr McQueen incurred expenditure and participated in events for the purposes of promoting the business and getting the business name and liveries into public awareness. The Special Commissioner reached this decision despite finding that Mr McQueen "derived considerable personal satisfaction from the motor rallying activity".

90. Determining the matter on the basis of the above principles, the sole purpose of the expenditure was to improve the profit-earning capacity of the appellant, in particular by seeking to prevent the need for the appellant to accept reduced fees from the managers as further explained below.

*Benefit to Miss Powell*

91. The evidence demonstrates (and the oral evidence is supported by the documents) that it was not a purpose of the appellant (conscious or unconscious) to fund the racing career of Miss Powell. The expenditure was for the purpose of advertising the appellant's hotels and thereby increasing the profit earning capacity of the appellant, in particular, by seeking to prevent the need for the appellant to accept reduced fees from the managers. As in *Bentleys*, it was inherent in the making of the payments that they would provide some benefit to Miss Powell such as in leading to an improvement in her racing driving performance. But given that the clear objective of making the payments was a business one, any benefit to Miss Powell's racing career was merely consequential and incidental and does not prevent the expenditure qualifying as being deductible.

92. The facts and evidence support this conclusion, in particular:

(1) When the 2008 agreement was entered into Miss Powell was already successful and attracting much attention from the press, in particular, as it is unusual for young female to succeed in motor sport.

(2) It made sense for the appellant to advertise through motor sports given the proximity of a number of the hotels to Silverstone and the racing teams located nearby.

(3) The appellant had, prior to 2008, already sponsored those involved in motor sport and had seen the benefits. However, those drivers were not as successful as Miss Powell. Miss Powell was not a household name but the appellant was not advertising nationally but rather to generate business from the surrounding area and the motor industry sector. It made commercial sense, therefore, to pick a driver who was well known in the industry and Miss Powell already was.

(4) The benefit to the appellant was not just through Miss Powell carrying the hotels' logo on her clothing and car but also through the access the appellant obtained through Mr Fraser to areas he would not otherwise have been able to access to meet team members who he could then mix with further in the hotels.

(5) It is clear that Mr Fraser wanted to protect the appellant's position from the terms of the 2008 agreement. Whatever the enforceability issues he drafted the 2008 agreement to reflect his objective of seeking to promote the appellant's business through Miss Powell.

(6) It is clear that neither Mr Fraser nor Mrs Powell considered that the 2008 agreement was made in order to provide Miss Powell with funding. In fact Mrs Powell was against the 2008 agreement both from the perspective of the appellant and of Miss Powell. Mr Fraser noted that at the time he had charges on his own home in order to obtain funding to support the business. He wanted to get the value of advertising. He would not have entered into the arrangements if he thought the appellant would not obtain a deduction for the payments; it would have been uneconomic to do so. The commerciality of the arrangements was at the forefront of his mind.

(7) It is clear that Miss Powell could not have pursued her racing career without funding. Mr Fraser acknowledges that of course it was an inevitable consequence of the sponsorship that it enabled Miss Powell to race. However, it was inherent in Mr Fraser's desire to use Miss Powell for advertising purposes that she had to race. It was simply the necessary result of his purpose of advertising. The situation is essentially the same as in the *McQueen* case.

(8) There is evidence that the advertising did in fact improve the appellant's position. By 2011 the reductions in amount paid by the managers at the relevant hotels were reduced to nil and the managers have confirmed how vital the promotion was to their business.

(9) The 2008 Agreement was not intended to bring personal satisfaction to Mr Fraser or Mrs Powell by supporting Alice's racing career. Mrs Powell was not supportive of the 2008 agreement (it was signed by Alice's father, not by Mrs Powell). She considered that it benefitted the appellant rather than Alice. Mrs Powell rarely attended races after Alice was able to make her own way to the tracks. Mr Fraser considered the 2008 agreement to be for the benefit of the appellant, not Alice. This was demonstrated in 2011 when Alice attempted to

terminate the 2008 Agreement and engaged solicitors for that purpose. Alice's solicitors, Hill Dickinson, described the relationship between Alice and the appellant as having become "acrimonious". Mr Fraser, acting for the appellant, resisted Alice's attempt to terminate the 2008 agreement because he considered the advertising to be vital to the appellant's business. This clearly contradicts HMRC's argument that the appellant acted as a result of the "natural love and affection" of Mr Fraser and Mrs Powell.

(10) As shown in Mr Fraser's witness statement, the appellant's press advertising spend in 1997 was proportionate to the amount that the appellant agreed to spend through the 2008 agreement, when viewed on an expenditure-per-room basis.

93. HMRC suggest that it is relevant that the appellant made a loan of £165,000 to Ellie Powell (Alice's sister), on the basis that this shows that the appellant "was willing to utilise company assets in order to assist the relatives of the officers" of the appellant. This loan does not assist HMRC's case. The loan was made to Miss Ellie Powell on a commercial basis (as HMRC accept), after Mr Fraser had taken advice from the appellant's accountant.

*Benefit to the managers*

94. As regards HMRC's argument in relation to the mangers, they argue that the relationship between the appellant and the managers was that of landlord and tenant. However, these were labels used inappropriately as Mr Fraser used a "tied tenancy" agreement as the basis for the agreements which he drafted himself. It is clear, from the terms and the evidence of Mr Fraser as to how the arrangements worked in practice, that this was not a landlord and tenant relationship. In any event, the analysis would be the same whether the appellant was conducting a trade or a property business; the profits of a property business are computed on essentially the same basis as those of a trade.

95. It is very clear that Mr Fraser remained very involved in the actual running of the hotels in terms of monitoring standards and intervening where necessary. The fee charged to the managers was based on the expected profit from the hotel (to be increased annually for inflation) less an agreed amount to be retained by the manager as his fee/salary for his work in managing the hotel. If the hotels were not filled, there is clear evidence that the appellant's own profitability suffered. Although the fees agreed with the managers were stated to be fixed (and to increase in line with inflation), this did not play out in reality and the appellant had to deal with the managers' fees flexibly. The appellant had to allow managers to pay fees below those originally agreed and was not able to increase the fees it charged managers. By attracting customers to the hotels, the appellant protected and increased its own profitability.

96. If custom for any particular hotel increased significantly, the appellant could terminate the agreement with the manager and seek to agree a new, higher fee. Equally, if custom for any particular hotel decreased or did not improve, the manager could terminate the agreement with the appellant and negotiate a lower fee. Where a

manager was struggling to pay the existing agreed fee, the appellant responded flexibly by allowing the manager to pay a reduced fee (rather than terminating the agreement and trying to negotiate a new agreement with the same manager or a new, untested manager). The business of the appellant and the manager were wholly intertwined such that it was akin to a type of franchise arrangement as Mr Fraser described it. Essentially there was a single brand which was advertised together.

97. It should be noted that Mr Fraser decided to keep the advertising function for him to control and he retained funds to enable him to do so. The managers could only do so with the permission of the appellant.

98. It is clear from *Vodafone* that it is important to distinguish the purpose of a payment from the effect of a payment. Any increase in the customers staying at a particular hotel would also have an incidental benefit for the manager of that hotel. This is an effect of the payment, not the purpose of the payment. The result is necessarily inherent in the promotion of the appellant's own business. As noted, the fortunes of the appellant's business and the manager's business were intertwined. The same would be true, for example, for a franchise business; the fortunes of the franchiser and the franchisee are intertwined. If one suffers the other suffers, if one improves the other is also likely to improve. The benefit to the manager of the hotel was not a purpose of the appellant's expenditure, it was a consequential effect.

*Additional cases HMRC refer to*

99. The appellant considered that the other authorities referred to by HMRC were not very relevant as they apply the principles established in the cases to the fact of those cases rather than providing any further explanation of the principles to be applied. However, the appellant made the following points in brief:

(1) As regards the Upper Tribunal decision in *Interfish v HMRC [2013] UKUT 0336*, the appellant is not seeking to rely on the ultimate purpose argument which was rejected in that case. The appellant's case, as set out above, is that the object of the payments was to benefit the appellant's business.

(2) This case is entirely different to the circumstances in *Paul Dunkmanton v HMRC* [2013] UKUT 0305 where it was held that it would defy common sense to say that a payment for legal advice in criminal proceedings was not to protect the liberty of the accused. It can hardly be said that it would defy common sense to hold that Mr Fraser's purpose was not to further Miss Powell's career.

(3) The case of *Executive Network (Consultants Ltd) v O'Connor1996] STC (SCD) 29*, where sponsorship payments were held not to be deductible, is also very different on the facts. In that case, there was no formal agreement where it was set out what the taxpayer's expectations were in return for the sponsorship. The commissioners focussed on the fact that it was a family decision to set up and assist Mrs Toms' business as well as to provide a benefit for the sponsor. There was no such joint decision making in this case. It was entirely down to Mr Fraser as to what payments would be made to Miss Powell. Moreover Mrs Powell did not agree with the 2008 agreement being entered into. The appellant

noted that the Special Commissioner was the same in both this case and in *McQueen*. By the time the later *McQueen* case was decided the Commissioner would have had the benefit of *Vodafone* setting out clearly the distinction between purpose and effect.

(4) The case of *Marshall Richards Machine Co Ltd v Jewitt* (1956) 36 TC 511 concerns the relationship between a parent and subsidiary. That is entirely different from the situation where, as here, two businesses are run independently but whose fortunes are intertwined.

(5) HMRC seek to rely on an unpublished decision, *42nd Street Realty Limited v HMRC* (2012) TC/2011/04904 (unreported), but as held at [20] to [22] of *Ardmore Construction Ltd v Revenue and Customs Commissioners* [2014] UKFTT 453 (TC) it is not fair or just for an unpublished decision to be relied on and therefore it should not be admitted.

**HMRC's submissions**

*Case law referred to by HMRC*

100. HMRC also referred to the same passages from *Vodafone* and *Bentleys* as cited by the appellant. As regards the general principles they also referred to the well-known case of *Mallalieu v Drummond* (1983) 57 TC 330. We have set out the passages cited in the discussion section.

101. HMRC referred to two cases which they considered particularly to be of relevance to their argument that the payments were made with the object of benefitting the trade of the managers:

(1) In *Marshall* it was held that a payment made by a UK company as a contribution to the operating expenses of US subsidiary was a payment for the purpose of enabling the subsidiary company to meet its obligations and continue in existence. Therefore (at page 526) "it was not laid out in any sense at all to advance the trade of the parent company. Of course, that was the motive, but it was not the purpose of the payment."

(2) In *Robinson v Scott Bader Co Ltd* (1981) 54 TC 757 the Court of Appeal held that amounts paid by a UK company for the salary and other costs of one of its employee, who was seconded to its French subsidiary when the managing director departed, were deductible. The court noted (at page 772) that the finding of fact "describing the rescue operation being taken to further the taxpayer's business in Europe is a finding strongly in favour of the real purpose being for the trade…..of the [taxpayer]". The court held that:

> "The inevitable result of sending Mr Fearon, at the taxpayer's expense, to France would be to improve the running of the French company and no doubt this would improve that company's financial position. But it does not follow that that was the real purpose of making the payments. It was one of the results, albeit it may well be an inevitable result. It was visa-vis the company in much the

> same position as the provision of lunch by the solicitor in the case referred to above [meaning *Bentleys*]."

102. As regard their argument that the appellant's object was to fund the career of Miss Powell, HMRC refer in particular to the following cases:

(1) The Special Commissioners' decision in *Executive Network* as an example of a case where the court considered the intrinsic duality of purpose where natural love and affection are involved. The facts and conclusions in that case are set out in the discussion section.

(2) HMRC also referred to *McQueen* on which the appellant relied but noted that a different conclusion was reached by the tribunal in another case involving expenditure on motor sports in *42nd Street Realty Limited v HMRC* (2012) TC/2011/04904 (unreported). As noted the appellant objected to this decision being cited because it was unreported. We have considered this issue in the discussion section.

(3) In *Paul Dunkmanton v HMRC* [2013] UKUT 0305 the Upper Tribunal considered the importance of differentiating purpose and effect of expenditure, in connection with the issue of legal fees incurred by the taxpayer in defending criminal charges. The Upper Tribunal concluded at [35] that the tribunal was correct to hold that:

> "the preservation of his business was not the only object which he had in mind when he incurred the legal costs relating to his defence of the criminal proceedings…. The obvious risks of imprisonment for a substantial term, and of a potentially ruinous civil claim for damages, if he were convicted of manslaughter, were matters which he could hardly have ignored, and the FTT clearly considered that they ranked as independent objects of the expenditure which he incurred. Indeed, they thought it would "defy common sense" not to conclude that his main purpose in defending the manslaughter charge was to protect his liberty and personal reputation."

103. Finally HMRC referred to the Upper Tribunal decision in *Interfish v HMRC* [2013] UKUT 0336 concerning the deductibility of payments made by the taxpayer to a rugby club where the taxpayer argued that, although the payments were designed to improve the finances of the rugby club, the ultimate intention was to benefit the company's trade through recognition. The Upper Tribunal concluded that the intention to improve the rugby club's finances could not be said to be incidental. The payments therefore had a dual purpose and were not allowed. The Upper Tribunal rejected the contention that it was possible to differentiate between an intermediate and ultimate objective (at [40])

> "I reject the submission inherent in Mr Peacock's argument that it is useful to consider this case as one in which the attainment of an immediate objective is undertaken in order to attain an ultimate objective. This distinction does not arise from the statute nor is it one made in the cases. The question is not whether different purposes can be characterised as immediate or ultimate, the question is only: what were the actual

objectives of the taxpayer? A taxpayer may have had only the so called ultimate purpose in mind in which case the payment is deductible regardless of that fact that one can analyse the case and see that another purpose could have been in mind too. Equally a taxpayer may have both the ultimate and the immediate purposes in mind, in which case the payment is not deductible regardless of the fact that one may be said to predominate over the other."

104. In this case HMRC's view is that applying the test as set out above by reference to ascertaining the appellant's object in making the payments, it is clear on the evidence that a purpose of the payments is personal, arising through the natural love and affection that the officers of the appellant have for a close family member and/or that the payments were made for the purpose of promoting the managers' hotel trade and not that of the appellant.

105. As set out in the cases the object in making the payments must be distinguished from the effect. As also clear from the cases, although subjective intentions are determinative these are not limited to conscious motives in the mind of the taxpayer at the time of payment. Some consequences are so inevitably and inextricably involved that unless they are merely incidental they must be taken as a purpose (as set out in *Mallalieu* and confirmed in *Vodafone*).

106. Whilst an effect of the payments was promotion of the managers' hotel trades, the object of the payments was to develop Alice Powell's motor racing career. Even if the tribunal accepts that the officers of the appellant only had in mind the security of the appellant's rental income by promoting the managers' hotel businesses (which in any event HMRC does not accept was not for the purpose of the appellant's trade), their natural love and affection for Miss Powell was such that it was a subconscious motive in making the decision. There is an inextricable and inevitable involvement of the natural love and affection for a relative in choosing to fund their business/career (see the *Executive Networks* case referred to above). The development of Miss Powell's motor racing career cannot be said to be an incidental effect of the payments. The 2008 agreement was a funding agreement as opposed to a sponsorship agreement, specifically for the purpose of funding Miss Powell's motor racing career (see *Bentleys* and *Executive Networks*). The fact that the appellant expected something in return for funding Alice (advertising benefit and a share of future earning) does not extinguish the non-trade purpose. This non-trade purpose was intrinsic and cannot be said to be incidental (again citing *Executive Networks* and *Bentleys*).

107. HMRC point to the following factors as supporting their conclusion that there was a conscious purpose of funding Miss Powell's career rather than of benefitting the trade:

(1) HMRC accept that Miss Powell is a talented driver with potential when the 2008 agreement was entered into. However, Miss Powell was aged only 15 when the 2008 agreement was made. She could by no means be described as a household name; she did not have the media status which is commensurate with the level of funding provided by the appellant. Mr Fraser agreed that Miss

Powell was not well known outside the industry. Advertising through Miss Powell could only realistically be expected to achieve a very limited impact if any outside the motor sport industry and a limited impact within it given Miss Powell's limited experience and youth. Whilst the hotels are located near a racing track it is to be expected that a hotel business would cast its advertising net more widely. Even accepting that marketing in the motor sports industry had a material potential benefit for the appellant, there is no real evidence that Miss Powell was the best choice of person for the appellant to sponsor in terms of medial profile and branding. If the aim really was to improve conditions as a result of the recession the appellant could be expected to have wanted to engage with a more well-known individual.

(2) Miss Powell was initially funded by her family. By the time she was 15 when the 2008 agreement was entered into it was clear that she needed more funding to realise her Formula One dream which the family could not provide from their personal funds.

(3) The amount and pattern of the actual payments made by the appellant suggest that they were set by reference to the needs of Miss Powell's racing at any given moment in time. The overall amount paid to Miss Powell exceeded £160,000 per annum and in some years she received more than that and in others less. There is no evidence that the payments were made by reference to the needs and requirements of the appellant's business. No business plan was put in place.

(4) The appellant refers to the anticipated sharing of Miss Powell's earnings in later years as evidence that payments were wholly and exclusively incurred for the purposes of its trade. However, there was a high level of uncertainty in regard to the level of potential earnings from motorsport, in particular, given that Miss Powell was only 15 at the time of the 2008 agreement was signed. The hope of generating an income for the appellant by receiving a share of Miss Powell's inherently uncertain future earnings under the 2008 agreement is not consistent with the contention that the purpose of this expenditure was to promote and turn around the hotel businesses at this time.

(5) The 2008 agreement was made with a minor, without the benefit of that minor or her guardian receiving independent advice. It is doubtful whether the appellant could enforce the terms of the agreement should Miss Powell become economically successful later in the 10/12 year period envisaged.

(6) The 2008 agreement is very brief, lacks clear definitions and detail of specific requirements of what Miss Powell must do and, as noted, was drawn up without the parties to it taking independent advice. It was clearly anticipated that Miss Powell could be expected to do what was necessary due to the close family relationship. Such an imprecise agreement would not have been entered into with a third party.

(7) The sponsorship which Miss Powell received from third parties was very small compared with that received from the appellant.

(8) No evidence has been provided by the appellant to demonstrate why and how it evaluated the costs/benefits of this 2008 agreement against other forms of advertising. No business plan was produced in support.

(9) There is little evidence of the association of the hotel brand with Miss Powell. From the photographs available the hotels branding was not very prominent on Miss Powell's clothes or car. Moreover the branding would have to be agreed with the team. Miss Powell could not use the branding without their agreement. The media value report produced is unreliable as no evidence is available of the methodology use or credentials of the author. Moreover it says nothing of the value to the appellant but rather is in general terms only.

(10) There is no real evidence that any upturn in the profits was attributable to the advertising. It could merely have been due to an upturn in the economy.

(11) After the 2008 agreement had been made, the appellant advanced a loan of £165,000 to Miss Ellie Powell, another of Mrs Powell's daughters. HMRC do not suggest that the loan was made on uncommercial terms, but submit that this arrangement shows that the appellant was willing to utilise company assets in order to assist the relatives of the officers of the appellant.

(12) There is little reliable evidence that Miss Powell attempted to terminate the agreement. The letter from the solicitors was written over a year after the apparent dispute. That Miss Powell may have decided not to pursue this does not mean that the contract was in fact enforceable. It could be the case that she accepted it was or that she did not want an argument with her family. The solicitors stated that acted for a brief period only and ceased to act in March 2012. There was a total of payments to Miss Powell of £244,000 from March to August 2012 which may have been a powerful incentive for her to continue with the arrangement.

(13) The fact that the appellant took advice on the deductibility of the relevant payments is simply not relevant. It is just an adviser's opinion which cannot in any sense be determinative to this factual issue. The taking of advice does not demonstrate that the decision to enter into the 2008 agreement was a commercial one. Mr Fraser must have had doubts about the deductibility of the payments because of the close family connection in order to seek advice. The very fact that he consulted advisers suggests there was another purpose (hence making the deductibility doubtful and the need for advice).

(14) Mr Fraser accepts that the figures for Miss Powell's potential earnings are something of an exaggeration. It can be questioned whether the evidence on the effect of the profits of the advertising may also be an over statement.

108. It was held in *Interfish* that no regard is to be had to any intermediate purpose. HMRC's view is that the intermediate purpose in this case was to develop her career which was not incidental to any business purpose.

*Benefit to managers*

109. The correspondence received from the appellant and its former representative Howes & Co make clear that the expenditure was incurred for the purpose of

increasing and enhancing the trade of the tenant's, which would mean that the rent due from the tenant to the appellant would be paid.

110. The evidence of the agreements between the appellant and the tenants, correspondence between them and the actual payments received, is that the appellant was not running the hotel trade itself; its activity was renting out and maintaining its properties. HMRC acknowledges that the appellant offered a great deal of support and advice to the tenants to assist them, but submits that does not equate with it running a hotel trade.

111. The appellant refers to rent reductions that it granted its tenants to get them through the recession as a reason for promoting the hotels. HMRC submits that the rent reductions simply represented a sound commercial decision any landlord would make, a reduced rent being preferable to a tenant's business failing. The rents were otherwise set in advance and due and payable in accordance with the agreements in place. The appellant had no mechanism to share in any increased profits that marketing or prudent management of the tenants' hotel trades might bring about. The appellant submits that the arrangement is analogous to a franchise. However, a franchisor would receive royalties based on the franchisee's turnover and not just a fixed fee as is the case here.

112. The fact that a purpose of the payments made by the appellant to Miss Powell was for the trade of other businesses, namely the hotel businesses of the tenants, means that the expenditure is not allowable. Such a benefit to those trades was not merely an incidental consequence of the payment, but a conscious motive and purpose of them (*Scott Bader*, *42nd Street & Interfish*). A potential effect of the payments made under the 2008 agreement was that the reliability of receipt of rents by the appellant would be enhanced.

**Discussion**

113. The issue is whether the appellant is entitled to a deduction for payments made under the 2008 agreement in the periods ending 31 March 2011 and 31 March 2012 on the basis that they were incurred wholly and exclusively for the purposes of the appellant's trade (under s 54 CTA).

114. The effect of the statutory provisions is well known. As set out in brief above, the word "exclusively" means that if the expense was also incurred for some other purpose than one for the purposes of its trade, it is not deductible. The "wholly and exclusively" issue is to be determined by the object of the taxpayer in incurring the expense. Determining a taxpayer's object is a question of fact (as recognised by Romer LJ in the *Bentleys* case both parties referred to). However in making that factual assessment of the object of a taxpayer in incurring an expense the tribunal must observe a number of principles.

115. As the taxpayer's "object" in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves), the

tribunal needs to look into the taxpayer's mind at the moment when the expenditure is made as stated by Lord Brightman in *Mallalieu* at page 870.

116. In making that enquiry, the object of the expenditure must be distinguished from its effect. If the sole object of the expenditure was the promotion of the business, the expenditure is deductible, even though it necessarily involves other consequences (as set out in *Vodafone* to which both parties referred). The existence of, for example, a private advantage does not necessarily mean that the expenditure is disallowable.

117. Some results are "so inevitably and inextricably involved in particular activities they cannot but be said to be a purpose of the activity" (as Lord Oliver said in *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898 at 905, [1990] 2 AC 239 at 255). As a result the conscious motive of the taxpayer is not decisive: "it is of vital significance but is not the only object which the fact finding tribunal is entitled to find to exist" as Lord Brightman said in *Mallalieu*.

118. In *Mallalieu* the issue was the admissibility of a claim for the cost of clothing which a lady barrister wore to work. Lord Brightman gave the often quoted example of a medical consultant who has a friend in the South of France who is also his patient:

> "He flies to the South of France for a week, staying in the home of his friend and attending professionally upon him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was a reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition…"

119. Lord Brightman continued, however, to state that whilst a conscious motive may be uppermost in the taxpayers mind, the courts can also "infer other unconscious motives" (at page 370). Whilst Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing she needed clothes to travel to work and clothes to wear at work, and:

> "I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist".

120. He concluded, therefore, that the Commissioners were correct to conclude that the taxpayer's object was both "to serve the purposes of her profession and also to serve her personal purposes."

121. Both parties also referred to the elaboration on these principles in the Court of Appeal decision in *Bentleys*. As noted, that case concerned the deductibility of expenses incurred by solicitors on entertainment such as business lunches with clients. Romer LJ noted that such certain activities such as entertainment necessarily involve a benefit for the recipient but the question remains whether the activity was undertaken solely for business purposes:

> "Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?"

122. He continued that the question is essentially if in truth there is solely an object of business promotion, in which case the expense qualifies for a deduction although the activity necessarily involves some other result and, cases where there is both an object of business promotion and of some other purpose such as indulging some other wish of another person:

> "If the activity be undertaken with the object of both promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. … Per contra, *if in truth the sole object is business promotion*, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act." (emphasis added)

123. The appellant argues that, applying the above principles, the payments made under these arrangements were made with the *sole purpose* of maintaining and increasing the profits of the appellant's business by advertising the hotels owned by the appellant through Miss Powell's motor sports activities. Any benefit to Miss Powell (such as the advancement of her racing career) or the managers of the hotels (such as an increase in the overall profits attributable to the hotel), whilst it may necessarily have followed from the payments being made, was merely an incidental effect of the expenditure.

124. HMRC's position is that, whilst the taxpayer may have been motivated by business objectives to some extent, its purpose was also to support the racing career of

Miss Powell, as a result of the natural love and affection on the part of the officers of the appellant. In their view the evidence indicates that this was a conscious motive on the part of the appellant but, in any event, the benefit to Miss Powell was so inevitably and inextricably involved in the making of the payment, that the benefit cannot but be said to be a purpose of the payments. They also argue that the payments were not made solely for the benefit of the appellant's business as they were made with the object of benefitting the trade of the managers of the hotels.

*Benefit to Miss Powell*

125. We turn first to the arguments as regards the payments being for the benefit of Miss Powell. In addition to the cases on the general principles the parties also referred to decisions of the Special Commissioner as supporting their respective positions. The appellant argues that this case is analogous to the circumstances in *McQueen* (decided in favour of the taxpayer) whereas HMRC argue it is analogous to the circumstances in *Executive Network* (decided in favour of HMRC).

126. In *McQueen* the taxpayer carried on a minibus business and used motor rallying as a means of marketing the business. He drove the rally car himself, painted in the livery of the business, and the rallies were publicised in newspapers and on television. The Special Commissioner, Sir Stephen Oliver QC, decided that the expenditure was deductible on the basis that Mr McQueen incurred expenditure and participated in events for the purposes of promoting the business and getting the business name and liveries into public awareness. The Special Commissioner reached this decision despite finding that Mr McQueen "derived considerable personal satisfaction from the motor rallying activity" and was good at it (at [38]):

> "I see it this way. Mr McQueen took part in motor rallying because he enjoyed it and it gave him satisfaction. If he had not been good behind the wheel it would have been pointless to have incurred the expenditure. In this connection I should mention that Mr McQueen said in evidence that sponsorship of an independent driver would have been so expensive as to have been out of the question. My conclusion, therefore, is that Mr McQueen was using his skill and enthusiasm for motor rallying as the best means available to him for promoting the Garelochhead Coaches business. He enjoyed it and it has given him satisfaction in just the same way as running an evidently successful business has done. Nonetheless the securing of the private satisfaction of success on the rally circuit can, in my view, properly be described as an incidental effect of the payment."

127. He continued at [39] to note the statement in *Vodafone Cellular* that, although subjective intentions are determinative, they are not limited to conscious motives as some consequences are so inevitably and in inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made (at page 742 h). He thought that was not applicable here:

> "There just might be something in the point if the evidence showed, for example, that Mr McQueen was an addict for whom motor rallying was a

compulsion. But that was not the case here. Mr McQueen has many other interests. He is an active local councillor and his preferred leisure activity is sailing."

128. Therefore he concluded at [40]:

> "Standing back and looking at all the circumstances I am satisfied that the particular object that Mr McQueen sought to achieve from the disputed expenditure on motor rallying was the promotion of the Garelochhead Coaches business. On that basis I conclude that the disputed expenditure was laid out wholly and exclusively for the purposes of the Garelochhead Coaches trade."

129. In the earlier *Executive Network* case the Special Commissioner, who was again Sir Stephen Oliver QC, considered the deductibility of sponsorship payments made by a specialist recruitment and personnel consultant company for the information technology industry to an equestrian business owned by the wife of the director and majority shareholder in the recruitment company. The company said the reasons for the sponsorship was that Mr Toms was aware that a number of IT companies were involved in sponsorship of horse trials and show jumping. He thought that the sponsorship would give the opportunity to make contact with those companies and their senior executives. At the relevant time around 35% to 40% of the taxpayer's turnover came from clients who had also been involved in equestrian sponsorship. At page 34 g the Special Commissioner concluded as follows:

> "We are entirely satisfied …..that the sponsorship payments were laid out for the purpose of [the company's] trade. But, however hard we review the evidence we cannot displace from our minds the conclusion that 'personal benefit' played a part in the decision to make the sponsorship payments. The benefit to Mrs Toms' trade was more than an incidental result of the expenditure"

130. The Commissioner continued (at page 34 g to h) to give the factors leading to that conclusions being:

> "the decision to fund Mrs Toms in year 1 in her stocking-up with competition horses which must, we think, have been a joint decision of both Mrs Toms and Mr Toms in which the long-term capital requirements of her personal business were a key ingredient. The decision to provide part of the cost of Mrs Toms' new horse box in year 4 was another decision to lay out funds for the purpose of her business. The annual decision as to the quantum of the sponsorship was, once again, directed as much at the needs of Mrs Toms' business as at the benefits obtained from sponsorship."

131. On that basis, therefore, the Special Commissioners considered (at pages 34 j to 35 b) that the decision makers had conscious motives to further Mrs Toms' business and the children's careers but if that were not correct:

> "the "non-trading result (ie funding Mrs Toms' business as distinct from EN's) was a result that was so inevitably and inextricably involved in the sponsorship activity that the result must have been a purpose of the activity……..Even if the motive to provide funding for Mrs Toms' business and for advancing the equestrian careers of the children had not been a conscious motive (which we think it was), it was we think inescapably one of the objects for incurring the sponsorship expenditure."

132. We note that HMRC also referred to another decision in the tribunal but as that was not published we have decided not to refer to it on the basis of the *Ardmore* decision. In any event, as a general point we note that in these circumstances inevitably these decisions are only of limited assistance. In applying the principles set out in the cases (as described above) the Special Commissioners in these cases simply reached a different conclusion on different findings of fact. Whilst looking at other decisions in a similar context may provide some assistance, the essential task is for the tribunal to determine what the appellant's object was in making the payments in the particular circumstances of this case. That essentially factual question is not to be determined by comparisons drawn with the conclusions reached on the facts of other cases. We have turned first, therefore, to our conclusions on the factual findings in this case as regards the appellant's object in making the relevant payments.

*What was the appellant's object?*

133. We have concluded that on the basis of the evidence set out in full in the facts section above, the appellant's object in making the relevant payments was solely to promote its business. The benefit to Miss Powell in receiving the sponsorship or to the managers as a result of any increase in profits due to the advertising was in each case an incidental effect of the payments; any such benefit necessarily followed from the making of the payments in these circumstances. We are satisfied that the appellant's object was not in any measure to provide any such benefit.

134. We have formed this view based primarily on our assessment of the intentions of Mr Fraser as it was clear that, although he is not the owner and director of the appellant, in practice he is the decision maker for the appellant. That both Mr Fraser and Mrs Powell considered the business to be his and that he is the person who makes the decisions was very clear from their oral evidence.

135. As a general comment we have placed much weight on Mr Fraser's evidence who we found to be a very credible witness. Overall we found him to be extremely focussed on and driven by the business and its needs, as a business he had built up himself. We have no real doubt that, in Mr Fraser's mind, the decision to make payments under the arrangement was an entirely commercial one made purely to benefit the business. As regards the interaction of the appellant's business with Miss Powell's activities it is clear that Mr Fraser regarded Miss Powell as a commodity or tool with which he could generate benefits for the business. He saw her promising talent as a racing driver as an opportunity to gain value for the business which he acted quickly to obtain the benefit of on what can only be regarded as advantageous terms from the appellant's perspective.

136. We do not mean to suggest that Mr Fraser is devoid of love and affection towards his granddaughter or that he does not take pride in her achievements. But it is clear that he is a person who, in business matters, is strong minded and focussed and is able to and does act and take decisions without the nature of a personal relationship influencing his business decision. Indeed far from the close relationship with Miss Powell leading him to seek to benefit her, it appears that Mr Fraser viewed the close relationship as a potential benefit for the business in that he thought he would be able to control Miss Powell in what he required for the business, which he would not be able to do in the same way if he were contracting with a third party.

137. Although we have as noted placed much weight on Mr Fraser's own evidence as to his motivations, we consider that the surrounding facts and circumstances on balance also support our conclusion. In that respect we note the following:

(1) At the time the 2008 agreement was entered into the hotel business was being badly affected by the recession such that Mr Fraser had agreed to a reduction in the amounts paid to the appellant by the managers of the hotels in order to keep the hotels going. The poor results were affecting the expected profits which the appellant was to receive. Around this time he had funded the business using funds raised and secured by a mortgage over his own property.

(2) It is in that context, of needing to turn around the fortunes of the business, that Mr Fraser considered that advertising through Miss Powell could materially assist at this difficult period.

(3) Although at the time 2008 agreement was entered into the hotels were being managed on a day to day basis by the managers, Mr Fraser clearly remained very closely involved indeed. The smooth running of the hotels and their ultimate profitability was clearly of great concern to him and he still considered himself to be the proprietor. Although under the arrangements the appellant was confined to receiving a fixed sum from the managers (as adjusted periodically for inflation), Mr Fraser was keen to ensure the expected amounts were in fact received and that the reductions given could cease. We also fully accept that, given the relatively short term termination rights in the agreements with managers, Mr Fraser would seek to renegotiate if circumstances required it. In that context it is entirely plausible that Mr Fraser was concerned to improve the profitability of the hotel business.

(4) The hotels are close to motor racing tracks and where motor teams are based (5 of them are within 45 minutes distance by car from Silverstone). In that context it is credible that Mr Fraser thought that advertising within the motor sports sector could bring further guests to the hotels both from members of the public who attend races and those involved in the racing industry. The appellant had advertised through others involved in motor sport albeit for much smaller amounts than the payments made under the arrangements with Miss Powell.

(5) Miss Powell was, from the information set out at 29 to 33 above, clearly a promising and talented young driver, who was attracting media attention and publicity, when the 2008 agreement was signed and on an on-going basis. We

accept, as Mr Fraser said, that Miss Powell attracted particular attention not only due to her youth but also given that she is female and it is was unusual for a young lady to be prominent in the motor industry.

(6) Given Miss Powell's media profile and potential as a racing driver and given Mr Fraser's history of acting in an entrepreneurial fashion, we again find it entirely plausible that Mr Fraser saw Miss Powell's promise as a motor car racer as a potential opportunity for his business. As noted above, his comments indicate that he regarded Miss Powell as a highly valuable commodity of much potential value to the hotel business. We accept that Mr Fraser chose Miss Powell to sponsor given these factors and also because he thought he could control Miss Powell, given the family relationship, to maximise the potential value of advertising through a motor driver to the business. Shortly after the 2008 agreement was entered into, the hotels were rebranded as "Silverstone hotels" to reflect the advertising focus on the motor sports sector.

(7) The 2008 agreement was clearly drafted by Mr Fraser with the appellant's position in mind given, in particular, the requirement for Miss Powell to pay a percentage of her earning to the appellant over a 12 year period and the rather punitive penalty provisions should Miss Powell breach the agreement.

(8) We note that there is limited supporting evidence as to the level of actual advertising activities which took place. However, we accept Mr Fraser's evidence as to the advertising activities which took place (see 59 and 60) and that Miss Powell worked hard for the business in promotional activities as supported by the comments of the two hotel managers who sent letters setting out the impact of the advertising on the hotel business (see 72 and 73). The bundles contained images of Miss Powell with the Silverstone hotels branding on her overalls and the car she was driving. We note that Mr Fraser considered the value derived from advertising through Miss Powell related not only to the promotion of the branding in that way but also due to the access she had, and which Mr Fraser also gained, to the areas of the race track where the hotel could be promoted to race team members.

(9) As regards the impact of advertising on the business, it is clear from the evidence presented that the appellant's profits had improved by 2011 as compared with the situation in 2008. However it is not clear to what extent this actually resulted from the advertising as opposed to other factors such as an upturn in economic conditions. We can see that it is as a general matter difficult to assess and provide evidence of a specific measureable impact advertising has on the profits of a particular business. We note the comments of the hotel managers in their letters as to the positive effects of the advertising. We note also that Mr Fraser was very clear that in his view the advertising had a very beneficial effect (see 71). Given our overall impression of Mr Fraser we would find it most unlikely that he would have wanted to continue sponsoring Miss Powell if there were no tangible benefits. We note that whilst Miss Powell has not yet reached the heights she may have hoped for in the racing world she did continue to have success as set out in 68 and 70 above. We also note that whilst Miss Fraser wanted to terminate the 2008 agreement in 2011 Mr Fraser did not want to do so. This indicates that there was value to him/the business in the

arrangements continuing. Overall we conclude that the advertising did have some material benefit to the business although it is not possible to form any conclusion, from the limited information available, on the extent of that impact.

(10) However, we do not consider the lack of evidence as to the precise level of benefit gained from the advertising affects our conclusion. We are concerned with the appellant's object or purpose. Clearly if no real benefit was achieved by the advertising that could be a factor demonstrating that the appellant did not in fact have only a business objective but also some other purpose such as furthering Miss Powell's career. We do not consider that to be the case.

138. HMRC point in particular to the following factors as evidencing that the appellant's real motivation was to support Miss Powell's career:

(a) The youth of Miss Powell and that sponsoring a 15 year old girl was, in their view, highly speculative given that her earning potential in the motor sport industry was uncertain.

(b) £160,000 per year over a 4 year period was a lot to spend given that Miss Powell was not a known brand or household name at the time (and still is not).

(c) There must be a risk in entering into an agreement with a minor that once reaching adulthood they may wish to terminate the deal.

(d) The 2008 agreement is not very detailed and in HMRC's view is not one which a third parties acting on a wholly arm's length basis would enter into.

(e) The payments which were in fact made fluctuated, being less than £160,000 in some years and more than that in other years, which in their view demonstrates that they were made in response to Miss Powell's needs rather than by reference to the business purposes of the appellant.

139. We accept Mr Fraser's statements that he thought the amounts to be paid were relatively small compared with what he considered to be the potential benefits and that any risk around Miss Powell being a minor, which he considered to be small, was worth taking given the potentially very large benefits.

140. We note that, to the extent that this could be held to be risky from the appellant's perspective, given his history in investing in what he described as high risk projects, Mr Fraser is a person who is prepared to take such risks if he thinks the potential benefit justifies it.

141. Clearly views could differ on what level of risk a business should take with a view to a particular result. That another person (such as Mrs Powell who described herself as risk adverse) may not take a decision involving that level of risk does not in our view necessarily affect that the decision can be said to be within a range of what may be considered commercial.

142. We accept Mr Fraser's explanation that the reason for the larger amounts paid to Miss Powell than previous sponsorships was that he thought that there was much

greater potential benefit to the appellant due to Miss Powell's much greater prospects (based on her success as set out in 29 to 33) compared with others the appellant had sponsored.

143. As regards the terms of the 2008 agreement we accept Mr Fraser's comments that in fact he thought he had imposed much more stringent conditions than other sponsors might impose, with his aim being entirely to maximise the benefit for the appellant. He noted that often this type of arrangement in this industry was made informally with no written agreement. He noted that he had included provisions aimed at protecting the appellant and preventing Miss Powell going off with another sponsor such as the provisions regarding the appellant receiving a share of Miss Powell's earnings and the penalty provisions. Although the terms are not lengthy or very detailed and are not such as may be drafted by lawyers, as noted above, we cannot see that these terms could be regarded as drafted with anything other than the commercial needs and protection of the appellant's position in mind. We note that Mrs Powell did not want Miss Powell to enter into the agreement as she considered it to be more favourable to the appellant than to Miss Powell and she had concerns as she had no doubt that Mr Fraser would not hesitate to seek to enforce its terms. Mrs Powell's opinion was that her father was motivated only by business considerations.

144. We do not think that the lack of detail in the provisions of itself detracts from the fact that Mr Fraser was acting from commercial motivations. It was clearly his habit to draft legal documents himself (to save money) as he had done with the agreements with managers. As he said more than once he thought he could control Miss Powell due to the family relationship and it appears that he intended to do so for the benefit of the business through the relatively broad parameters of the provisions in the 2008 agreement which, as noted, were clearly drawn up with the maximum protection of the appellant's position in mind. We note also that Mr Fraser resisted Miss Powell seeking to terminate the arrangement early as she had done in 2011.

145. As regards Miss Powell not being a household name we accept Mr Fraser's comments that he considered her of value to the business as she was well known amongst the teams and the industry given that she was so young and a female doing so well. It was important to Mr Fraser from a business perspective, not only that Alice carried the hotels branding on her overalls and car when driving but also that Alice was gaining access to the teams which also gave Mr Fraser himself access which he would not otherwise have. We do not consider that the fact that Mr Fraser chose to advertise in this sector rather than on a different more nationwide basis affects our conclusion that he was commercially motivated. Indeed, given the location of the hotels, it made good commercial sense to focus on the motor racing community."

146. As regards the fluctuating nature of the payments made by the appellant, we note that the payments exceeded the agreed limit of £160,000 for the year ended 31 March 2011 being £288,173 in total but were less than the limit for the year ended 31 March 2012 being £93,277 (and the payments in other years were also fluctuating). It is also clear from the invoicing arrangements between Miss Powell's company and the appellant, that within a year amounts were paid on a periodic basis and again the

precise amount paid on each occasion fluctuated. Mr Fraser was very clear in his evidence that in deciding what amounts to pay and when to make payments he had in mind only the business needs of the appellant, albeit that, as he said was common in sponsorship arrangements greater investment may be needed from time to time in order to enhance or protect the value of the asset, being Miss Powell. As he noted clearly the advertising would not be of use to the appellant unless Miss Powell was able to race. It is also clear that it was his sole decision when to make payments and of what amount (within the parameters of the agreement). There is no indication that this was a joint decision between him and Miss Powell.

147. It is of course inherent in the nature of the arrangements that Miss Powell was receiving a benefit as a necessary consequence of the payment, by any ensuing advancement of her career. However, in our view, given that we accept that in truth that benefit was not the object Mr Fraser was seeking, the promotion of Miss Powell's career was simply an inevitable result of the payments (as in *Bentleys*).

148. We do not view this case as on all fours with the situation in *Executive Network*. In that case the Special Commissioner concluded that in effect the decision to provide funding for Mrs Toms business was a joint or family decision with the long term capital requirements of her business in mind. The conclusion was that this was therefore the taxpayer's object in making the payments. As noted, we have formed the opposite conclusion on the different facts of this case.

149. We do not consider that there is any authority in the cases that it is simply to be presumed from the close relationship between Mr Fraser, Mrs Powell and Miss Powell that the benefit to Miss Powell was a result that was so inevitably and inextricably involved in the sponsorship activity that the result must have been a purpose of the activity such that furthering Miss Powell's career was inescapably one of the objects for incurring the sponsorship expenditure. The family relationship is clearly a factor which the tribunal must consider in deciding whether the payments were *in truth* made purely for the promotion of the business (citing from *Bentleys*).

150. It is of course quite possible that people may be motivated by personal considerations in addition to or rather than wholly commercial business purposes when entering into arrangements with those close to them. But that is simply part of the factual analysis. In this case, as set out above, in our view the evidence demonstrates that Mr Fraser (as the key decision maker) was not motivated by a desire to further Miss Powell's racing career.

151. This is not in our view analogous to the situation in *Mallalieu* where the purchase of a barrister's clothing is to be taken as made with the object, though not a conscious motive, of "the provision of the clothing that she needed as a human being" such that her object was both to serve the purposes of her profession and also to serve her personal purposes. It is not inescapably inherent in the making of an arrangement with a close relative that the arrangement involves some other purpose than the asserted business purpose. It may or it may not. We have found that it does not.

*Benefit to the managers*

152. As regards HMRC's other argument that the payment were made to benefit the trade of the managers rather than that of the appellant, we consider that there are a number of difficulties with their analysis. We were not presented with detailed arguments on the precise legal nature of the relationship created and we do not consider it necessary to reach a definitive conclusion on that. However, we consider it unlikely that the arrangements operate as a demise of leasehold property.

153. The use of the labels of "landlord" and "tenant" and the references to "rents", whether in in the agreements themselves or in the parties' financial statements, is not determinative of the nature of the contractual relationship between the parties. We note Mr Fraser's explanation that these terms were used as he had drafted the agreement himself using a "tied house" agreement (such as may be entered into between the landlord of a public house and the brewery) which uses those terms. However, it is clear from the terms of the agreement itself that the appellant was not granting the appellant an exclusive right to occupy in return for payments in effect reflecting the value of the occupation right over a specified period of time. The arrangements were rather in the nature of a sub-contracting or management agreement, whereby the manager agrees to carry on the day to day running of a hotel in return for a salary which in part in effect depends on performance as the manager keeps any additional profit over the expected profit.

154. In any event we note the appellant's point that, even if the appellant were to be held to be carrying on a property rental business (which we think it is not), whether it could obtain a tax deduction for the relevant payments would be determined on the same basis as if it were carrying on a trade. The profits of such a property rental business are computed essentially on the same basis as trading profits.

155. Again we have no real doubt from Mr Fraser's evidence that his sole object in the appellant making the payments was to benefit the appellant by attracting customers to the hotels through the advertising with the aim of ensuring that the appellant received the full amount of "rent" or fee, without the reductions which the appellant had given due to the effects of the recession. We note the following:

(1) Although the fees agreed with the managers were stated to be fixed (and to increase in line with inflation), in practice the arrangements were operated flexibly. We accept that it was for commercial reasons that the appellant allowed managers to pay fees below those originally agreed in order to keep the hotels running despite adverse effects of the recession. We also accept that, although the arrangements were for fixed amounts Mr Fraser could seek to renegotiate if, for example, there were a significant upturn in profits and that the relatively short notice periods for termination would potentially enable him to do so. It was very much his view that he ultimately had control over the pricing arrangements in this way.

(2) Notwithstanding the arrangements with the managers, Mr Fraser remained at the relevant time very involved in the actual running of the hotels in terms of monitoring standards and intervening where necessary. It is clear from the

situations where he did intervene that at the time in question he was taking a very proactive role in order to protect and enhance the business he had built up. This was very much not a case of him simply handing over the running of the hotels to managers. Both the terms of the agreements with managers and the way he operated in practice demonstrate that this was the case.

(3) Under the arrangements the advertising function was one of the matters which Mr Fraser decided to keep under his control and he retained funds from the business to enable him to do so. The managers could only do so with the permission of the appellant.

156. Clearly any increase in business due to the advertising would also potentially benefit the managers. It is inherent in the arrangements between the appellant and the managers that their fortunes are wholly entwined. However, again we have found that in truth the appellant's sole object was to benefit its business such that the benefit which necessarily may ensue to the manager if the object is successful is merely an incidental effect of that.

157. We do not consider the case of *Marshall* or *Scott Bader* detract from this conclusion. Those cases concerned the rather different scenario where a payment was made between related group companies and the court reached different conclusions on the facts as to whether the taxpayer company's object was to benefit its own trade or wholly or in part that of the recipient. Those cases apply the principles set out above and do not establish any different principle. The Upper Tribunal's decision in *Interfish* is not relevant. There is no argument being raised that there was an intermediate purpose of benefiting Miss Powell and/or the managers but that the ultimate intention was to benefit the appellant's business. The finding we have made is simply that the sole purpose was to benefit the appellant's business.

**Conclusion**

158. For all the reasons set out above, we have decided to allow the appeal.

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

**HARRIET MORGAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 NOVEMBER 2016**