INCOME TAX and CAPITAL GAINS TAX — negligible value claim — TCGA 1992 s 24(2) — whether shares were already of negligible value at acquisition — whether First-tier Tribunal's affirmative conclusion undermined by its overlooking paragraph of statement of agreed facts — no — finding of negligible value on acquisition fully justified — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2015/0086**

BETWEEN:

ROGER DYER and JEAN DYER **Appellants**

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: Judge Colin Bishopp
Judge Swami Raghavan

Sitting in public in London on 23 May 2016

Mr Roger Dyer, assisted by Mr Gordon Lowthian, appeared for both appellants

Miss Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("the F-tT") (Judge Malachy Cornwell-Kelly and Mr Mark Buffery FCA AIIT) released on 22 November 2013, with neutral citation [2013] UKFTT 691 (TC). The F-tT dismissed an appeal by the appellants, Mr Roger Dyer and his wife Mrs Jean Dyer, against the rejection by the respondents, H M Revenue and Customs ("HMRC"), of their claims that shares held by them in JD Designs Limited ("JDDL") had become of negligible value so as to engage the provisions of s 24 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). It is common ground that, had that section been engaged, Mr and Mrs Dyer would have been entitled to set their capital losses against their net income for the tax years 2007-08 and 2008-09, or to carry them forward, in accordance with ss 131 and 132 of the Income Tax Act 2007.

2. HMRC did not dispute the appellants' contention that the shares were of negligible value at the date of the claim, 26 January 2009. Their position was that the shares had no value when they were acquired on 31 October 2007, and that accordingly they had not "become" of negligible value, with the consequence that s 24 was not engaged. They accordingly issued closure notices, in respect of enquiries into the appellants' relevant self-assessment returns, by which they refused their respective claims for relief. Thus the primary question before the F-tT in the appellants' appeals against the closure notices was whether, as they argued, the shares did in fact have some value on 31 October 2007. The F-tT decided that HMRC were right, and dismissed the appeals. They did not go on to consider, hypothetically, what might have been the value of the shares had the appellants succeeded on the first issue.

3. Permission to appeal was refused by the F-tT and again, on the appellants' written application, by Judge Sinfield in this tribunal. The application was renewed orally, and Judge Sinfield gave permission, in terms to which we come later. He took the view at the time that it would not be possible for this tribunal to determine the appeal without further evidence and that the better course would be to allow the appeal by setting aside the F-tT's decision, and to remit the matter to a differently-constituted panel for re-hearing. With the consent of the parties he made a direction to that effect. However, the parties later agreed that it would after all be possible for this tribunal to determine the matter and that a re-hearing would therefore be unnecessary. Judge Sinfield was asked to, and did, rescind his direction remitting the appeal to the F-tT, and as will become apparent we have found it possible to determine the appeal without hearing further evidence.

4. As before the F-tT, Mr Dyer represented himself and his wife, with assistance from his accountant, Mr Gordon Lowthian. HMRC were represented by Miss Hui Ling McCarthy, who did not appear below.

The law

5. The relevant law gives rise to no controversy and can be shortly stated. Section 24 of TCGA, as it applied as at the date of the claim on 26 January 2009 and so far as relevant to this appeal, was as follows:

> "(2) Where the owner of an asset which has become of negligible value makes a claim to that effect:
>
> (a) this Act shall apply as if the claimant had sold, and immediately reacquired, the asset at the time of the claim … for a consideration of an amount equal to the value specified in the claim."

6. Section 251(3) of TCGA deals with the acquisition of property in satisfaction of a debt. So far as material in this case it is as follows:

> "Where property is acquired by a creditor in satisfaction of his debt or part of it, then … the property shall not be treated as disposed of by the debtor or acquired by the creditor for a consideration greater than its market value at the time of the creditor's acquisition of it …."

7. It was for that reason that the question before the F-tT was essentially simple: did the market value of the shares on 31 October 2007 exceed nil? Although "market value" is a commonly understood concept we need to mention two statutory provisions which bear on the question for the purposes of TCGA. The first is s 272(1):

> "In this Act 'market value' in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market."

8. Section 273 deals with the determination of the value of unquoted shares and securities, as the JDDL shares were. Subsection (3) provides that:

> "For the purposes of [such] a determination … it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length."

The facts

9. The relevant events are also uncontroversial, and what follows summarises the F-tT's findings. JDDL, then called Beautiful Designs Limited, was incorporated on 24 September 2004. By 14 December 2004 it had changed its name and had allotted 100 £1 ordinary shares, fully paid up; all were held by the appellants' daughter, Jenny Dyer ("Miss Dyer"), who was also the company's only director. She did not have a formal employment or service contract with JDDL. JDDL began trading on or about 1 April 2005, using the name "Jenny Dyer London", but ceased trading in late 2008 or early 2009. It was thereafter wound up and ultimately struck off the register of companies on 31 August 2010.

10. At [5] the F-tT described JDDL's trading activities as "boutique fashion design and manufacturing of women's clothes, sometimes with associated jewellery, marketed under the registered marks of 'Jenny Dyer London', 'Jenny Dyer' and a stylised depiction of the letters 'JD'." They went on to observe that those were registered trademarks and that they "were, and still are, all held in Miss Dyer's name alone, following advice that she would thus best avoid a situation where she could lose control of her brand names." It was undisputed that Miss Dyer had built up a significant reputation in the fashion industry and that, by the material date of 31 October 2007, "Jenny Dyer London" in particular had become a valuable trademark. At [9] the F-tT

remarked that there was no written agreement between JDDL and Miss Dyer about the use of her intellectual property, or IP, rights, and that JDDL had made no payment to her for their use. The decision mentions a meeting at which the possibility that JDDL and Miss Dyer might enter into formal licensing agreements was discussed, but records that nothing came of the discussion. It was therefore common ground that at 31 October 2007 JDDL had no formal arrangement for the use of Miss Dyer's IP rights.

11. In the period to 31 March 2006 JDDL made no sales, but was left with a small accounting profit attributable to work in progress and closing stock. In the following two years it made trading losses of £470,291 and £306,617 respectively. It had no, or negligible, assets and was being supported by loans made by the appellants and their family trusts which amounted, at 31 October 2007, to some £800,000.

12. On that date the loans were partially capitalised by the issue to the appellants of shares in JDDL. Mr Dyer acquired 310, and Mrs Dyer acquired 40, £1 ordinary shares at a premium of £999, making a total investment of £350,000. Miss Dyer then held 100 shares, or 22.22% of all the issued shares, Mr Dyer 310 or 68.89% and Mrs Dyer 40 or 8.89%. It is apparent from the F-tT's decision that Miss Dyer remained the sole director. At [26] the F-tT mentioned that JDDL's articles of association contained provisions, common in family companies, restricting the transfer of shares otherwise than to existing shareholders, and conferring on the existing shareholders rights of pre-emption at a price fixed by the company's auditors.

13. Between [18] and [24] the F-tT described four approaches to JDDL from possible investors, the earliest in May 2007 and the last, from Mr K C Ho (who was known to Mr Dyer), in 2008 (the decision records 2005, but it is clear from what follows that this is a mistake). It is apparent from the F-tT's description of them that these were serious approaches, which might have led to significant investment, although in the event none did. We do not need to say any more about the first three approaches, but will need to return to the discussions with Mr Ho later.

14. In about June 2008 Miss Dyer met Mr Andrew Rosen who, the F-tT said, had interests in the United States fashion industry. At first Mr Rosen was also regarded as a potential investor, but instead he and Miss Dyer developed a personal relationship which led to her moving to the United States; we understand that she and Mr Rosen have since married. Although, as we explain below, there were some family discussions before she left the F-tT's finding was that when she moved Miss Dyer effectively abandoned JDDL; it was, as they put it, "rudderless". The discussions with Mr Ho were discontinued, and JDDL ceased trading immediately or almost immediately. As we have said, it was subsequently wound up and struck off.

The issues in this appeal

15. At the oral renewal before Judge Sinfield of the application for permission to appeal Mr Dyer focused on the failure of the F-tT to respect what was said at para 8 of a statement of agreed facts which the parties had put before them, and to which we will come below. Judge Sinfield observed that the F-tT had referred to the paragraph obliquely, but he accepted that they might have misunderstood the argument which Mr Dyer had advanced, and that they might have fallen into error in consequence. It seems to us that Judge Sinfield intended to grant permission to appeal limited to that one issue, but instead his decision notice grants permission without any express limitation. Although Mr Dyer's skeleton argument for this appeal began with propositions about

the F-tT's failure to respect the statement of agreed facts, he went on to make further points which he developed in oral submissions. Miss McCarthy was able to respond to those arguments—indeed, to some extent she anticipated them and made some new points of her own in her skeleton argument—and we came to the conclusion, in view of the ambiguity of the grant of permission, that it was appropriate for us to deal with all of the arguments advanced before us. They resolve into two core issues.

16. The first issue is the nature of the contract, if any, between Miss Dyer and JDDL relating to her services, and to JDDL's position with respect to Miss Dyer's IP rights. We call this the "contract issue". The second issue relates to the manner in which the assessment of the value of the shares, at 31 October 2007, should have been approached; we call this the "valuation issue". We should add, to eliminate any doubt, that the valuation issue is one of principle only.

The contract issue

17. It was common ground that JDDL's articles of association did not bind Miss Dyer to JDDL in any way, and that she was entitled to resign her office of director by written notice. In the event, as the F-tT found, she gave no notice at all but, as we shall explain, that fact is not of importance in itself. The F-tT were urged by Mr Dyer to find that she nevertheless had some other arrangement with JDDL which bound her to it. That was the topic of para 8 of the statement of agreed facts, which was as follows:

> "At no stage did Miss Dyer have a formal employment or service contract with JD Designs Ltd, however there was a *de facto* contract. A formal employment contract would have been put in place had investors outside of the immediate Dyer family entered on the company's share register."

18. As Judge Sinfield observed, the F-tT mentioned para 8 but did not set it out in their decision. They did, however, address the appellants' argument about Miss Dyer's relationship to JDDL as they understood it. They recorded, though without expressly accepting or rejecting them, Mr Dyer's submissions that Miss Dyer was committed to the business, and that her carrying it on between 2005 and 2008 demonstrated the existence of some kind of contract between her and JDDL. They also recorded her own evidence—set out in an email to her father sent in 2010—to the effect that she saw herself as "irrevocably tied" to JDDL, that she would have entered into a formal contract with the company had any of the prospective investors proceeded, and that the possibility of her doing so had been discussed when the conversion of debt to equity took place in October 2007, but it was thought unnecessary while JDDL remained a family company. Miss Dyer did not give oral evidence to the F-tT, and they had only this and another email, to which we refer later, as an indication of her own perception. At [52] the F-tT set out their analysis of the arguments and evidence:

> "… we look first at the question of Miss Dyer's employment. It has been argued by the taxpayers that Miss Dyer was *de facto* an employee of the company on terms which must be inferred from the course of dealing over the years. In our view, this contention struggles to find any supporting evidence. The course of Miss Dyer's relations with the company was marked by the utmost informality which persisted right to the time of her leaving it in 2008, without notice of any sort and without so much as a letter of resignation; so casual and informal was this final act, indeed, that we do not even have a date for it."

19. They then expanded on their reasons for reaching the conclusion that Miss Dyer was not to be treated as, or as if she was, an employee of JDDL:

> "[53] All the documentary references to Miss Dyer's dealings with the company are couched in the language of family relations: writing to her father in 2010 about the position when her parents became shareholders, Miss Dyer said 'we discussed whether to formalise my obligations to [JDDL] – as I recall we decided there was no need as it was all within the family', but that if the hoped-for outside investors had decided to invest she would have been happy to 'enter into a formal contract'. This understanding of matters was shared by Mr Dyer, whose evidence was that 'Jenny and the family were at one in [JDDL] at the key date and beyond. We also know that, as our daughter, Jenny could be relied upon to meet normal family obligations.' Seeking to maintain that a contract existed, the most that Mr Dyer could say was that there was an oral *de facto* contract 'on trust'.
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> [54] None of this evidence is consistent with an intention to create legal relations between Miss Dyer and the company. Testing the matter this way, if the company had wished to challenge Miss Dyer's departure, what terms or conditions could be pleaded in support? Or if Miss Dyer had been told by the company that her services were no longer needed, what case could she have mounted in response?
>
> [55] If a contract is to be implied [*sic*] from circumstances there must at least be an indication of what the employee's obligations are, how her remuneration is to be ascertained and in what circumstances the contract may be terminated. The position was left undefined and it was acknowledged that a contract tying Miss Dyer to the company would be needed if any outsider was to become a shareholder. In the absence of defined terms and conditions of any sort, we conclude that there was no contract between Miss Dyer and the company and that in its absence the hypothetical purchaser would not have proceeded with a purchase of the shares."

20. Mr Dyer's argument before us was that it was never part of the appellants' case that Miss Dyer was an employee of JDDL. Rather, she had a contract for services. The absence of a formal agreement and the absence of precise terms were irrelevant, since Miss Dyer and the company were essentially the same—there was nothing to be gained by her entering into an arrangement which in substance would be a contract with herself. The evidence showed that she was committed to JDDL and its business, as events prior to 31 October 2007 demonstrated. At that time she had not even met Mr Rosen. It was incorrect to judge the position at 31 October 2007 by reference to subsequent events, as the F-tT had done, since that was to exercise, impermissibly, a hindsight test: see *Holt v Inland Revenue Commissioners* [1953] 1 WLR 1488 at 1502, 1503.

21. Mr Dyer added that the F-tT proceeded on a false premise, that Miss Dyer simply left JDDL summarily and without notice. In fact, her desire to move to the United States had been discussed within the family and it had been agreed that she should be allowed to go, that the family should wait and see how matters developed, and that in the meantime JDDL's activities should be suspended and the discussions with Mr Ho should be discontinued. The F-tT's approach, and their finding that she had abandoned JDDL, was wrong because it ignored what was said by Lawton LJ in *Trocette Property Co Ltd v Greater London Council* (1974) 28 P&CR 408 at 420:

> "It is important that this statutory world of make-believe should be kept as near as possible to reality. No assumption of any kind should be made unless provided for by statute or decided cases."

22. The F-tT had also proceeded, he said, on the basis of incorrect assumptions about the inability of outsiders to distinguish between the names "Jenny Dyer", "Jenny Dyer London" and JDDL. The reality was that the names were interchangeable, a factor which demonstrated that JDDL was able to, and did, use Miss Dyer's IP rights without impediment. The F-tT had mentioned, but then disregarded, the second relevant email from Miss Dyer to her father in May 2013 when she had confirmed that she "made her name and designs freely available to [JDDL]", and they had misunderstood the significance of the minute of a meeting of 15 December 2004 between Mr Dyer, Miss Dyer and an accountant. The minute, which the F-tT set out at [9], was in these terms:

> "Basic structure is for [Jenny Dyer London] to become a trading division of a company e.g. JD Designs Ltd, which would then operate under licence from Jenny Dyer and to use her name. Eventually a lawyer generated licence agreement would be required, in the meantime an internal letter would suffice setting out the conditions."

23. At [10] the F-tT mentioned that no internal letter was written, and that no formal agreement was ever entered into. They then described the invoices and purchase orders used by JDDL, both of which contained provisions designed to protect the IP rights in the goods. The documents used the trading name "Jenny Dyer London", without any identification of JDDL, though it is fair to say that Miss Dyer was also not identified as the owner of the IP rights. Mr Dyer argued that the documents were nevertheless evidence that JDDL was protecting the IP rights that it was using, a course it would not have adopted had it had no interest in them. The F-tT dealt with this argument at [12] and [13], but discarded it because they did not consider that the identification of the contracting party as "Jenny Dyer London", with no mention of JDDL, was sufficient to demonstrate to the outside world that JDDL had acquired any interest in the IP rights which, as they had also recorded, were still owned by Miss Dyer personally at the time of the hearing before them.

24. Mr Dyer added that the arrangements between JDDL and Miss Dyer had the consequence, by virtue of s 215(2) of the Copyright, Designs and Patents Act 1988, of conferring ownership of her designs on JDDL, as the commissioning party. This argument, which if valid would apply to designs created by Miss Dyer during her relationship with JDDL, does not seem to have been advanced before the F-tT; we shall return to it later.

25. Mr Dyer devoted a significant part of his skeleton argument to submissions relating to the meaning of a "*de facto* contract". His starting point was the proposition that a contract need not be in writing, but as this is not a matter of controversy we shall not dwell on it. He then drew our attention to some authorities on the circumstances from which it can be determined that a contract has come into existence. In *Air Studios (Lyndhurst) Ltd v Lombard North Central plc* [2012] EWHC 3162 (QB) Males J said, at [5]:

> "In deciding whether the parties have reached agreement, the whole course of the parties' negotiations must be considered and an objective test must be applied … Once the parties have to all outward appearances agreed in the same terms on the same subject matter, usually by a process of offer and acceptance, a contract will have been formed. The subjective reservations of one party do not prevent the formation of a binding contract. Further, it is perfectly possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording or even adding to the terms agreed will need to be

executed subsequently. Whether they do intend to be bound in such circumstances, or only as and when the formal document is executed, depends on an objective appraisal of their words and conduct."

26. Males J then went on to quote the observation of Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 753 at [45], a passage on which Mr Dyer also relied, to the effect that:

> "The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

27. In *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619 Lloyd LJ identified six principles relating to the formation of a contract, of which the most important, in relation to this case, was the sixth:

> "It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

28. Similarly, in *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 157 (Comm) Andrew Smith J observed, at [171], that

> "The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain [a] more detailed definition of the parties' commitment than had previously been agreed."

29. All of the evidence, Mr Dyer continued, showed that in October 2007 Miss Dyer was committed to JDDL. That evidence included not only the emails to which we have referred above, but also a business plan drawn up in late 2007 and directed at prospective investors, demonstrating Miss Dyer's long-term commitment to the company and including provision for the future payment to her of licence fees for the IP rights. Miss Dyer also had, he said, a significant financial interest in JDDL herself,

including as a trustee and beneficiary of the family trusts which had injected large sums of money. It was, he added, highly unlikely that he and his wife would have injected so much of their own money into JDDL had they not been certain that Miss Dyer would honour her side of the bargain.

30. Miss McCarthy accepted that Mr Dyer did not maintain before the F-tT that Miss Dyer was an employee of JDDL, and that to that extent the F-tT were mistaken, but she argued that the error was inconsequential since the result would have been the same had they said there was no contract for services, rather than of employment, between Miss Dyer and JDDL, and in [55] had used the phrase "contractor's obligations" in place of "employee's obligations": the question was simply whether there was a relevant binding contract between Miss Dyer and the company. She went on to examine various parts of the evidence on which Mr Dyer relied, an examination we do not need to repeat now although we shall have to return to some aspects of the evidence in our discussion below. Miss McCarthy's essential point was that the evidence of Miss Dyer's relationship with JDDL was of future intention, or of what would have been done in a given situation, but that nothing which had actually been done imposed any kind of contractual obligation, properly understood, on her, either in respect of her own services or in respect of use of the IP rights.

31. We have dealt with Miss McCarthy's arguments only briefly because we adopt much of her case in the discussion which follows.

32. The starting point must be para 8 of the statement of agreed facts. It is very much to be regretted that it refers to a "*de facto* contract" since no such concept is known to English law: either a given set of facts amounts, as a matter of law, to a contract, or it does not. Thus although the words "*de facto*" may be used, meaningfully, in other contexts, they are meaningless when applied to a contract. That observation is not to be taken as a criticism of Mr Dyer, since the existence of what he thinks of as a *de facto* contract is central to his case, and he based his arguments, before the F-tT and before us, on the assumption that the existence of some contract between Miss Dyer and JDDL had been conceded, albeit the detail might not have been. Miss McCarthy (who bears no responsibility of her own for the drafting of the statement of agreed facts) tried bravely to defend the wording of para 8, but with little success. In our view HMRC should take greater care than they evidently did in this case to ensure that what appears in a statement of agreed facts not only reflects what has actually been agreed but also makes proper sense, and does not mislead taxpayers into thinking, as Mr Dyer plainly did, that a cardinal feature of their case has been conceded when in reality it has not. However, although Mr Dyer has a legitimate complaint that he mounted his arguments before the F-tT on what he then discovered was a false premise, the true position had become clear by the time the appeal reached us and Mr Dyer has had a proper opportunity of advancing the appellants' case.

33. Save in special cases for which statute makes specific provision (and there is no such provision relevant here) there are no requirements of form for the making of a contract, and an oral contract is as valid as one which has been reduced to writing even though it may be more difficult to prove. Thus Mr Dyer is correct to say that it does not matter that there was no written agreement between JDDL and Miss Dyer. However, there are three essential characteristics without which a contract, written or oral, cannot exist as a matter of English law: an intention to enter into a legally binding relationship;

mutuality of obligation; and certainty. In our judgment all of those essential characteristics were lacking in this case.

34. The thrust of Mr Dyer's written and oral submissions was that in the context of what was in substance a family arrangement it was unnecessary to reach a formal agreement, and that it was enough for the parties—in essence Mr and Mrs Dyer, representing their own interests and, notionally, those of JDDL on the one hand and Miss Dyer on the other—to have intended to enter into legal relations, and for there to be an understanding, based on usage, of what those relations entailed. The authorities to which he referred us support that argument, by showing that want of form is not an obstacle, that a contract may be based on usage or understanding, that it is not necessary to agree on every detail, and that it is possible to form an oral contract even if the parties intend that it should be reduced to writing later.

35. What the authorities do not do, however, is overcome the requirement of an intention to enter into legal relations. It is plain from the extracts we have set out above that what was being considered in the cases on which Mr Dyer relied was not whether the parties intended to form a binding contract, but whether what they had agreed was sufficient, that is whether there was a meeting of minds, whether there was adequate identification of the terms of the contract, and whether there was agreement about all of the essential, or necessary, elements. Nowhere is it suggested that the parties can enter into a binding contract without intending to do so albeit, as Lord Clarke said in *RTS Flexible Systems v Molkerei Alois Müller*, intention is to be judged objectively rather than subjectively. In this case, however, the F-tT found, at [54], quoted above, that there was no evidence before them consistent with an intention that a legal relationship between JDDL and Miss Dyer, with regard to her services and the use of her IP rights, should come into existence.

36. That conclusion is a finding of fact which can be challenged on appeal only if it can be shown to be fundamentally flawed—that is, contrary to the evidence, based on no evidence at all, or in some other way irrational: see *Edwards v Bairstow* [1956] AC 14 and the long line of authority following it. The point was perhaps made most succinctly and forcefully by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

37. In our view it is impossible to characterise the F-tT's finding as irrational: the evidence to which they referred at [53], also quoted above, to the effect that "there was no need as it was all in the family" and "Jenny could be relied upon to meet normal family obligations" clearly supported their conclusion that this was a family rather than legal relationship. We do not accept Mr Dyer's subsidiary argument that the F-tT were wrong, at [54], to bring into their consideration of this issue the fact that Miss Dyer left JDDL, without notice, in 2008. Their reference to her doing so did not amount to the use of hindsight, but was illustrative of the reality that there was nothing JDDL could have done to prevent her from leaving. We accept Mr Dyer's case that there was family forbearance when Miss Dyer chose to leave, but the F-tT's rhetorical questions would have been wholly apposite had there been no such forbearance. The F-tT were plainly

correct to conclude that there was no identifiable term of any supposed contract which Mr and Mrs Dyer, or JDDL, could have enforced against her.

38. It is convenient to deal next with certainty. The essential requirement is that the terms of any claimed contract are clear, so that each party knows what his or her rights and obligations are. That is, in substance, what Lord Clarke meant when he said, in *RTS Flexible Systems v Molkerei Alois Müller*, that the parties must have "agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations." The F-tT alluded to this requirement at [55], pointing out that there was no clarity about Miss Dyer's obligations or about her remuneration. In a contract for services one would ordinarily expect to find some definition of the services to be rendered, the hours and place of work, the term of the contract with provisions for early termination, stipulations about holiday or other leave, and clauses providing for the amount of the contractor's remuneration and the frequency of payment. It may be that not all of those provisions would appear in every contract for services, but in this case none did. Most importantly, as the F-tT said, there was no identification of Miss Dyer's duties, and no provision for payment. Mr Dyer sought to meet the first objection by the argument that, within a family arrangement, it was unnecessary to specify what Miss Dyer's duties were to be, and in any event it would be she who would decide upon them herself, and we can accept that there is some substance to that argument. However, if there was any evidence of an agreement, or even understanding, about the amount and frequency of payment of Miss Dyer's remuneration—or evidence that she received payment—the F-tT did not mention it and it was not drawn to our attention. It is also significant, in our judgment, that there was no agreement upon any period of notice: as the F-tT pointed out, Miss Dyer could, and did, depart without giving any notice. She could have done so even in the absence of family forbearance.

39. At [56] the F-tT turned to the IP rights, noting that Mr Dyer had accepted that there was no formal assignment or licence. As we have said, Miss Dyer's evidence, and the appellants' case, was that, nevertheless, JDDL used the IP rights freely, and we do not detect that the F-tT concluded otherwise. The point they made, at [57], was that it was impossible to determine from the evidence what were the terms of any informal licence which might have been granted; it is clear, since she retained ownership, that Miss Dyer did not assign the rights to JDDL. Commonly found terms of an arm's length licence would deal with the nature of the rights, the duration and territorial extent of the licence and the payment, whether of a lump sum or recurring amounts, to be made in exchange for its grant. We can accept that it is implicit in this case that the territorial extent was unlimited, but no other terms were identifiable. For the same reasons as we have given for the conclusion that there was no contract relating to Miss Dyer's services, the absence of identifiable terms of JDDL's use of the IP rights clearly supports the F-tT's conclusion that there was no contract in place governing that use. So too does Mr Dyer's acceptance, which the F-tT recorded at [56], that a formal agreement would be necessary if an arm's length investment in JDDL was to be secured. We should add for completeness that we do not ourselves think it a matter of great significance that outsiders such as suppliers would not be able to determine from the documents with which they were presented by "Jenny Dyer London" that it was JDDL which was using and seeking to protect Miss Dyer's IP rights.

40. The difficulty for the appellants in respect of the mutuality requirement is that, even if it is assumed that identifiable obligations were imposed on Miss Dyer, there was no evidence before the F-tT, no finding by them, and nothing before us about the

corresponding obligations imposed on JDDL. Ordinarily, in the case of a contract, whether of employment or for services, between an individual and a company one would expect to see, as we have already said, some provision for the payment of remuneration, by way of salary or fees, perhaps supplemented by bonuses, or possibly benefits in kind. There was no evidence before the F-tT of any agreement about remuneration—on the contrary, such evidence as there was suggested that the question of remuneration had not even been considered. No doubt Miss Dyer would have benefited from her share of JDDL's distributable profit had any been generated, but that benefit would accrue to her by virtue of her status as a shareholder, and not in exchange for her work. We should also briefly mention Mr Dyer's argument with reference to the Copyright, Designs and Patents Act 1988, an argument which does not appear to have been made before the F-tT, and which we do not think helps him very much. Section 215 applies only to new designs rather than existing designs assigned or licensed to JDDL, and the argument has to assume for its validity that at the time the designs were created, some time before October 2007, there was in place a commissioning arrangement between Miss Dyer and JDDL by which she would produce designs, to become the property of JDDL, in exchange for payment, or alternatively that such an arrangement came into existence when the shares were issued to Mr and Mrs Dyer. But Mr Dyer did not identify any such arrangement. Moreover, we did not understand there to be any evidence that when she left JDDL to move to the USA Miss Dyer left behind designs which JDDL could have exploited.

41. For those reasons we are satisfied that the F-tT's finding that there was no contract between Miss Dyer and JDDL at 31 October 2007 was not merely one they were entitled to reach on the evidence but was correct.

The valuation issue

42. The essence of Mr Dyer's argument was that in valuing the shares in JDDL at 31 October 2007 it is necessary to take into account what the hypothetical willing vendor would have done in order to attract purchasers. Thus it should be assumed that Miss Dyer had done what she had confirmed in later emails she would have done—that is, enter into a contract of employment or for services, and either assign her IP rights to JDDL or license its use of them. He accepted that, as the F-tT said at [58], "any potential investor in the company would have required … the company to have undisputed and unfettered rights to use the Intellectual Property, along with a firm contractual commitment from Miss Dyer to the company", but said that they were wrong to conclude from that observation that, without them, the company was worthless. The evidence showed that arrangements which would satisfy an intending investor could easily have been put in place, and that JDDL with those arrangements would be valuable, as the offer of £800,000 made in early 2008 by Mr Ho demonstrated.

43. He based that argument in part on what was said by Hoffmann LJ in *Inland Revenue Commissioners v Gray* [1994] STC 360 at 372, "that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life." By contrast with estate duty or inheritance tax cases, where the asset whose value is to be determined is as it was at death, the reality in the case of a sale in the open market of shares in a private company is that the current owners and the prospective purchaser would negotiate in order to reach, if they could, a mutually attractive arrangement. It is therefore not realistic to

look at the company as it stands before such negotiations take place. The statutory requirement is that the value of the shares is to be determined by reference to a sale in the open market (TCGA s 272(1)) and not on some other basis, and upon the premise that the intending purchaser is in possession of all the information he reasonably requires (s 273(3)), which would include the readiness of Miss Dyer to enter into a service or employment contract and assign or license her IP rights. That approach, Mr Dyer said, was consistent with an observation of Lord Morris of Borth-y-Gest in *Lynall v Inland Revenue Commissioners* [1972] AC 680 at 696:

> "So a sale in the open market must be assumed and this in some cases will involve an assumption of the satisfaction of such conditions as would have to be satisfied to enable such a sale to take place."

44. Miss McCarthy's response was that the cardinal requirement was that the shares be valued to reflect what a purchaser in the theoretical open market to which TCGA s 272(1) refers would have paid for the shares together with such rights as actually attached to them, on the relevant date: see *Inland Revenue Commissioners v Crossman* [1937] AC 26. The same case is authority for the proposition that, although it had to be assumed that a purchaser could become the registered owner of the shares notwithstanding a restriction on alienation, he would thereafter be bound by that restriction, a factor which would inevitably affect their value. In *Duke of Buccleuch v Inland Revenue Commissioners* [1967] 1 AC 506 the House of Lords made it clear that the fact that in real life the vendor would effect changes to make the property more attractive was to be left out of account. Thus the appellants' case, that what Miss Dyer would have done in order to meet the demands of an intending investor should be taken into account, was incorrect; the shares had to be valued as they were on 31 October 2007, and not as they might have been.

45. We agree with Mr Dyer that what was said in *Crossman* and *Duke of Buccleuch* as well as in *IRC v Gray*, to which Miss McCarthy also referred us, must be treated with a measure of caution, since those cases all related to the valuation of assets on death when somewhat different considerations arise. Nevertheless, some assistance can be derived from them, and in particular the principle that the asset, in this case the shares, must be valued as it is on the relevant date, and not as it might be if certain steps were taken.

46. It is this principle which, in our judgment, shows that the appellants' argument cannot succeed by its own terms. Mr Dyer accepted that (to take one example) Mr Ho would not have proceeded with his investment unless contracts were in place between JDDL and Miss Dyer providing for her continued service to the company and its use of her IP rights, and that he would not have relied solely on the family understanding relating to those matters. It is quite clear that the reason was not that he was not a member of the family, but because the understanding was unenforceable. Mr Dyer's argument that the shares should be valued by reference to the arrangements which would have been put in place had Mr Ho or some other investor been prepared to proceed must fail because the question is not, what would have been the value of the company, structured in a manner which would have attracted an investment from Mr Ho (that is, a company with suitable binding arrangements with Miss Dyer for the provision of her services and the continuing use of her IP rights)? The proper question is, what was the value of the company as it was on 31 October 2007? At that date JDDL, for the reasons we have given, had no contractual rights over Miss Dyer's services, her

trademarks or her designs. Rather, it had an unsuccessful trading history which had led to a substantial level of indebtedness. It had no assets of substance and quite clearly had no value. The F-tT's conclusion that the shares Mr and Mrs Dyer acquired on that date were worthless is in our view unassailable.

47. We should mention for completeness the F-tT's decision in *Spring Capital Ltd v HMRC* [2015] UKFTT 66 (TC). Miss McCarthy suggested that the appellant's argument here resembled the argument advanced by the taxpayers, and accepted by the tribunal, in that case, and she expended some energy in seeking to persuade us that the tribunal was wrong to accept it. We do not think we need to say more than that the question in *Spring Capital* arose in a rather different context and, whether what the tribunal said is right or wrong, we do not derive any assistance from it.

Disposition

48. The appeal is dismissed.

Judge Colin Bishopp

Judge Swami Raghavan

Upper Tribunal Judges

Date of release: 2 September 2016