[2018] UKUT 0396 (TCC)

Appeal number: UT/2018/0056
UT/2018/0057
UT/2018/0058
UT/2018/0059

PROCEDURE – application to strike out – whether appeals have a reasonable prospect of success - construction of section 225 ITEPA 2003 - whether FTT wrong to conclude that, on evidence available, appellants had no reasonable prospect of success - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

(1) THE FIRST DE SALES LIMITED PARTNERSHIP
(2) TWOFOLD FIRST SERVICES LLP
(3) TRIDENT FIRST SERVICES LLP
(4) TRIDENT SECOND SERVICES LLP

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: **Mr Justice Henry Carr**
Judge Greg Sinfield

Sitting in public in London on 12 and 13 November 2018

David Ewart QC and Zizhen Yang, counsel, instructed by Reynolds Porter Chamberlain LLP, for the Appellants

Aparna Nathan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellants are a limited partnership and three limited liability partnerships ('LLPs') which implemented marketed tax avoidance schemes that were disclosed under the DOTAS legislation. Each Appellant carried on a modest business for the purposes of which it employed one or more individuals. In implementation of the schemes, each Appellant entered into a Deed of Restrictive Undertakings with an employee and a third party (defined in the Deeds as "the Recipient"). Under each Deed, the employee agreed to be bound by certain restrictive undertakings as part of entering into a contract of employment and the Appellant made payments to the third party pursuant to the Deed. The schemes were intended to generate losses that could be utilised by individual partners in the limited partnership and members of the LLPs to reduce their liability to UK income tax.

2. The Respondents ('HMRC') opened enquiries into the Appellants' tax returns and, on conclusion of those enquiries, issued closure notices on the basis that the payments were not deductible. The Appellants appealed to the First-tier Tribunal (Tax Chamber) ('FTT'). HMRC made an application to strike out the appeals under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ('the FTT Rules') on the ground that there is no reasonable prospect of the Appellants' case, or part of it, succeeding. In a decision released on 28 February 2018; [2018] UKFTT 106 (TC) ('the Decision'), the FTT (Judge Jonathan Richards) concluded that the Appellants' appeals had no reasonable prospect of success and struck out the appeals.

3. The Appellants now appeal to the Upper Tribunal ('UT') against the Decision.

Legislative framework

4. The relevant legislative provision applicable to all the appeals is section 225 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA 2003'). It provides as follows:

> "225 Payments for restrictive undertakings
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> (1) This section applies where—
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> (a) an individual gives a restrictive undertaking in connection with the individual's current, future or past employment, and
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> (b) a payment is made in respect of—
>
> (i) the giving of the undertaking, or
>
> (ii) the total or partial fulfilment of the undertaking.
>
> (2) It does not matter to whom the payment is made.
>
> (3) The payment is to be treated as earnings from the employment for the tax year in which it is made.
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> (4) Subsection (3) does not apply if the payment constitutes earnings from the employment by virtue of any other provision.
>
> (5) A payment made after the death of the individual who gave the undertaking is treated for the purposes of this section as having been made immediately before the death.
>
> (6) This section applies only where—

(a) the earnings from the employment are general earnings to which any of the provisions mentioned in subsection (7) apply, or

(b) if there were general earnings from the employment they would be general earnings to which any of those provisions apply.

(7) The provisions are—

(a) section 15 (earnings of employee resident, ordinarily resident and domiciled in the UK),

(b) section 21 (earnings of employee resident and ordinarily resident, but not domiciled, in UK, except chargeable overseas earnings),

(c) section 25 (UK-based earnings of employee resident but not ordinarily resident in UK), and

(d) section 27 (UK-based earnings of employee not resident in UK).

(8) In this section 'restrictive undertaking' means an undertaking which restricts the individual's conduct or activities. For this purpose, it does not matter whether or not the undertaking is legally enforceable or is qualified."

5. Section 69 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA 2005') and section 69 of the Corporation Tax Act 2009 ('CTA 2009') provide relief from income tax and corporation tax respectively in relation to payments for restrictive undertakings. Both sections are materially identical and provide, relevantly, as follows:

"69 Payments for restrictive undertakings

(1) In calculating the profits of a trade, a deduction is allowed for a payment—

(a) which is treated as earnings of an employee by virtue of section 225 of ITEPA 2003 (payments for restrictive undertakings), and

(b) which is made … by the person carrying on the trade.

(2) The deduction is allowed for the [accounting period/period of account] in which the payment—

(a) is made, or

(b) …"

6. The effect of these provisions is as follows. A payment made in respect of the giving of a restrictive undertaking by an individual in connection with his or her employment falls within section 225 ITEPA 2003 and is treated as earnings from the employment regardless of who receives the payment. Where a payment falling within section 225 ITEPA 2003 is made by a person carrying on a trade, or anything treated as a trade for these purposes, the payment may be deducted in calculating the profits of the trade or deemed trade for tax purposes.

7. Under Rule 8(3)(c) of the FTT Rules, the FTT may strike out the whole or a part of the proceedings if –

'(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.'

Background facts

8. The Appellant in the first appeal is The First De Sales Limited Partnership ('FDS'). The Appellant in the second appeal is Twofold First Services LLP ('Twofold'). The

Appellants in the third and fourth appeals are Trident First Services LLP and Trident Second Services LLP (together 'Trident').

9. Since he was hearing applications to strike out, Judge Jonathan Richards was not in a position to make findings of fact in the absence of oral evidence, as he noted at [3]. However, he set out facts which he understood to be uncontroversial for the purposes of the strike out application: in respect of FDS at [4] -10]; in respect of Twofold at [15] – [22] and in respect of Trident at [25] – [27]. These facts are uncontroversial and there was no challenge to them on this appeal. Having heard the arguments on this appeal, we provide the following summary of the schemes in outline. The schemes share the following features:

i) Each Appellant was established as either a limited partnership or a LLP;

ii) The Appellants carried on a creative writing profession (in the case of FDS) and acquired estates (agricultural in the case of Twofold and residential and commercial property in the case of Trident) from which they derived a modest income;

iii) The Founder Members of the Appellants sought further partners or members;

iv) The partners or members of each Appellant made capital contributions to that Appellant;

v) FDS employed Victoria Murray, a resident of Jersey, as an administration manager to carry out administrative tasks. Ms Murray was paid a salary of £60,000 per annum; Twofold and Trident separately employed Jason Rose, a resident of Jersey, as an estate manager to manage the estates they owned which were situate in the United Kingdom. Mr Rose was paid a salary of £40,000 per annum by Twofold and £40,000 per annum by Trident (£20,000 per annum by each of the Trident Appellants);

vi) At the same time or shortly after entering into the employment contracts with Mr Rose or Ms Murray, each Appellant entered into a Deed of Restrictive Undertakings with their employee and the Recipient under which, according to the Deeds, the Appellant agreed to pay huge sums to the Recipient (£970 million pounds in aggregate) "solely in consideration of [the employee] giving the restrictive undertakings";

vii) The restrictive undertakings restrict the relevant employee, during and for a period of six months only after termination of his or her employment, from doing certain specified acts, broadly non-competition in a defined area and non-solicitation of former clients and suppliers;

viii) Each Appellant claimed the amount paid pursuant to the Deed of Restrictive Undertakings as a deduction in calculating its business profits for the tax year in which it was paid under section 69 ITTOIA 2005 (in the case of FDS and Twofold) or section 69 CTA 2009 (in the case of Trident); and

ix) The loss generated by the deduction was allocated to the Appellants' partners and members who sought sideways loss relief in respect of their share of the allocated losses.

10. In the case of FDS it was agreed that the income from its creative writing profession was well below £1000 a year. For example, in 2013 - 2014 its annual income was £293. In the case of Twofold, it had acquired an agricultural estate for about £250,000, which it initially financed by means of a loan and it leased the estate for an annual rent of about £3000. At the time that the relevant employee, Mr Rose, started his employment, Twofold had just a single property. Subsequently, on 5 April 2012, it acquired some additional land which was let at an annual rent of £8880 and then, in 2014, it acquired further land for a purchase price of £750,000 which was let at an annual rent of around £12,000. Both Trident LLPs also acquired property. Trident First had purchased a property for about £165,000. Trident Second had acquired property for £135,000. The properties were initially let out for an annual rent of between £5000 and £8000.

11. The details of the tax avoidance schemes were set out in information memoranda in relation to each Appellant. The information memoranda were materially similar and we refer only to the following passages.

12. In relation to Twofold, paragraph 3 of the information memorandum sets out how the scheme is intended to work. It describes, in paragraph 3.4, a restrictive undertaking and how it is taxed under UK tax legislation:

> "The tax legislation provides for a statutory deduction whenever an employer makes a payment for a restrictive undertaking, provided that payment is treated as the earnings of the employee. This means that the LLP would be entitled to claim a deduction for any such payment, regardless of the size of the payment or indeed who it is actually paid to.
>
> This second point will become relevant as the LLP will make a restrictive undertaking payment to a Third Party company who is obviously not the employee. Nevertheless, the legislation is very explicit that 'it does not matter to whom the payment is made, it will still be treated as the earnings of the employee."

13. Paragraph 3.5 asks the question "So the partnership gets tax relief but the employee gets taxed?" and answers it as follows:

> "No, and this is essentially the loophole which Project Twofold exploits. The LLP would get a deduction and yes, the payment would need to be 'treated as earnings of the employee' but that is not the same as those earnings being taxed on the employee. There is no doubt that if the employee was a UK resident individual he would be taxed on the whole of that payment regardless of who it was paid to. However, it seems to be equally certain that a payment made to or for an employee who is not resident in the UK, could never be taxed on him because the wording of the legislation simply does not enable it to be taxed!
>
> Whilst there is usually a symmetry between the tax relief provided the employer and the income taxable on the employee, under Project Twofold we seem to have:
>
> 'One of those cases which will inevitably occur from time to time in a tax system as complicated as ours, where a well-advised taxpayer has been able to take advantage of an unintended gap left by the interaction between two different sets of statutory provisions.' Justice [sic] Henderson in HMRC v D'Arcy [2007] EWHC 163 (Ch).
>
> Our 'gap' arises simply because the employee is not UK resident."

14. Paragraph 3.6 and 3.7 explain that a non-UK taxpayer pays tax on that part of his earnings which are earned in the UK but should not pay tax on that part which are earned abroad and that Twofold has offered employment to a person based in Jersey.

15. There is no reference in the memorandum to the duties of the employee, nor why, in his or her case, restrictive undertakings would be of any value. Nor is there any discussion of the amount to be paid to the employee for the restrictive undertakings, nor any suggestion that it should bear any relationship to the commercial value of the restrictive undertakings. On the contrary, it is clear from the memorandum that none of this matters. The premise is that the employee, as a non-UK resident, cannot be taxed on the payment; that the size of the payment to the employee "does not matter"; and that "the payment will be made to a third party company who is obviously not the employee".

16. The FDS and Trident memoranda contains very similar information. Additionally, the FDS memorandum explains that quantum of the payment to the employee who enters into the restrictive undertakings is irrelevant, as is the motive for the payment:

> "The relevant legislation makes no reference to the motive of the payer or to the quantum of the payment, merely that payment must be for the giving of restrictive undertakings by an employee of the payer."

17. The operation of all of the schemes may be understood by reference to a witness statement of Alan Turner, made on behalf of Trident, and dated 31 January 2018. This statement was served after conclusion of the oral argument, but before judgment was delivered. Mr Turner qualified as a solicitor in Scotland but has lived and worked in the Cayman Islands since April 1988. He is currently a member of the Cayman Islands Law Society and the Caymanian Bar Association. Mr Turner explained at [30] – [31] of his witness statement that on 10 December 2012, Mr Rose, Trident First, and an entity known as 3P Limited ('3P'), a Cayman Island registered and resident company of which Mr Turner is the registered shareholder and a director, entered into a Deed of Restrictive Undertakings under which Trident First agreed "solely in consideration of certain restrictive undertakings given by Mr Rose", to make a payment of £100 million to 3P in one or more tranches and within five business days of the date of the Deed. Also, on 10 December 2012, Mr Rose, Trident Second, and 3P entered into a separate Deed of Restrictive Undertakings, under which Trident Second agreed, "solely in consideration of certain restrictive undertakings given by Mr Rose" to make a payment of £200 million to 3P in one or more tranches within five business days of the date of the deed. Therefore, the Deed purported to value Mr Rose's restrictive undertakings at £300 million, none of which he personally received.

Issues in the strike out application

18. The overall question in all four appeals is whether the Appellants are, in each case, entitled to deduct the payments made under the Deeds of Restrictive Undertakings in calculating the profits of their businesses in the relevant period for tax purposes.

19. The issue for the FTT was whether each Appellant's appeal should be struck out in its entirety under rule 8(3)(c) of the FTT Rules on the basis that "there is no reasonable prospect of the appellant's case, or part of it, succeeding". For the purposes of the strike out application, however, the core issue, as correctly identified by the FTT in [31], is whether the Appellants have a realistic prospect of establishing that at least part of the sums paid pursuant to the Deeds of Restrictive Undertakings were deductible by virtue of

section 69 ITTOIA or section 69 CTA 2009. If so then the appeals should not be struck out. If not, then the FTT had a discretion to strike out the appeals. Whether the payments were deductible depended on whether they fell within section 225 ITEPA 2005.

20. There was no dispute between the parties that, in each case, "an individual [had given] a restrictive undertaking in connection with the individual's current, future or past employment", for the purpose of section 225(1)(a) ITEPA 2005. The particular individual was, in each case, an employee of the Appellant's business at the relevant time.

21. Nor was there any dispute that the terms of the Deed of Restrictive Undertakings, in each case, expressly stated that the relevant Appellant was required to make a payment to a third party "[s]olely in consideration of the Employee giving the restrictive undertakings set out in [the] Deed and for no other purpose or thing". HMRC did not dispute, for the purpose of the strike-out proceedings, that the Appellants had each made a payment to the third party recipient named in the Deed.

22. It is FDS's case that it was, at the relevant time (and still is), carrying on a profession of creative writing and this is not disputed by HMRC for the purpose of these strike-out proceedings. Section 56 ITTOIA 2005 applies section 69 ITTOIA 2005 to professions and vocations as it applies to trades.

23. It is common ground between the parties that Twofold was, at the relevant time (and still is), carrying on business which included what is treated under section 264 ITTOIA 2005 as a separate UK property business, consisting of exploiting the farmland it held (and still holds) as a source of rents. Section 272 ITTOIA 2005 applies section 69 ITTOIA 2005 to the calculation of the profits of a property business as it applies to the calculation of the profits of a trade.

24. It is common ground between the parties that each of Trident First and Trident Second was, at the relevant time (and still is), carrying on business which included what is treated under section 205 CTA 2009 as a separate UK property business, consisting of exploiting the property it held (and still holds) as a source of rents, including undertaking developments and refurbishments in order to enhance the rental prospects. Section 210 CTA 2009 applies section 69 CTA 2009 to the calculation of the profits of a property business as it applies to the calculation of the profits of a trade.

25. The issue in the strike out application was whether the Appellants made a payment, in whole or in part, "*in respect of* the giving of the undertaking".

The Decision

26. In the Decision, at [37] – [50], the FTT addressed the construction of section 225 ITEPA 2003 and, at [51] – [55], its application to the facts.

27. The FTT granted HMRC's application to strike out the appeals on the basis that:

> (1) "the question of construction of s225 ITEPA is that there is no reasonable prospect of the Appellants establishing that the payments were 'in respect of' restrictive undertakings unless they can establish that there was a 'real-world' connection between the payments and the undertakings." [50];
>
> (2) On whether there was a reasonable prospect of the Appellants establishing that a real world connection existed between the payments and

the undertakings, "As a preliminary point, I do not consider that there is a reasonable prospect of establishing that the requisite 'real-world' connection is established solely by the fact that the undertakings were contractual consideration for the large payments made. Such an interpretation would convert the question into a pure question of legal drafting which would be completely at odds with a 'real-world' connection." [51];

(3) On whether there was a reasonable prospect of the Appellants establishing that there was some real world connection between some part of the payments and the undertakings, "the Appellants' evidence fails to satisfy me that there is any reasonable prospect of establishing that the payments are deductible in whole or in part. I do not consider that there is any reasonable prospect of this shortcoming in the evidence being overcome at the hearing." [55]

28. As to the Appellants' evidence, paragraphs [52] - [55] of the Decision are of importance, and we set them out in full below:

> "52. The payments of several hundred million pounds were made in relation to employees on modest salaries whose duties were primarily administrative. The businesses of the appellants were conducted on a modest scale. Even if the employees had the unfettered right to compete with the appellants' businesses after they left, the loss to the appellants could only ever be modest. The restrictive undertakings endured just six months after the employment ceased. Those factors alone strongly suggest that the payments were not 'in respect of' the restricted undertakings and were, instead 'in respect of' a tax avoidance arrangement.
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> 53. In Trident's appeals, Mr Ewart referred me to the following extract from Mr Turner's witness statement in support of a commercial justification for the payments or a 'real-world' connection:
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> > "The undertakings given by Mr Rose were drawn on similar terms to undertakings given by employees everywhere, particularly those engaged in professional positions. For example, it is common place to require employees to acknowledge that the business of their employer is to be kept confidential. Similarly, employees are very often required not to encourage clients (tenants in the case of Trident), or other staff, away from the employer, or to join a competitor business (usually the employee's new employer after his current employment has ceased), as to do so would damage the current employer's business and could cause a financial cost. For example, Trident could ill afford to have had its tenants encouraged to rent different properties that Trident did not own."
>
> For the purposes of this application, I have assumed that Mr Turner's evidence is unchallenged. At most that evidence demonstrates that (i) Trident would not want its tenants to be encouraged to move to different premises; (ii) employees generally are often required to sign restrictive undertakings and (iii) the terms of Mr Rose's undertaking were similar to those signed by employees generally. However, that evidence has not satisfied me that an argument that there was a "real-world" connection between the payment of some £300m and the restrictive undertakings that Mr Rose gave. The evidence of a "real-world" connection in relation to Twofold and FDS was even scantier.

54. It follows that there is no reasonable prospect of the appellants establishing that they are entitled to the entirety of the deduction they have claimed in relation to the restrictive undertakings. Nevertheless, if I thought that the appellants had a reasonable prospect of establishing that they were entitled to some deduction, I do not consider I should strike out the appeal since the act of striking out the appeal would deprive the appellants of the ability to argue for any deduction at all.

55. At the substantive hearing, the appellants bear the burden of proving whether they are entitled to a deduction and, if so, how much that deduction should be. The evidence that the appellants have served does not make out a case for even a much reduced deduction. For example, they have not put forward any evidence as to how much (if any) damage would be caused to their respective businesses if Ms Murray or Mr Rose were free to act as they saw fit after leaving the appellants' employment. They have not put forward evidence to establish whether a payment would be made, and if so how much, in return for restrictive undertakings granted by employees performing the kind of duties that Mr Murray and Mr Rose performed. In short, the evidence does not explain what specific amount businesses like those of the appellants might expect to pay for restrictive undertakings granted by employees like those of Mr Murray and Ms Rose. At the hearing, while Mr Ewart alluded to the possibility that the appellants might obtain some deduction for the payments, he did not refer me to any evidence that they relied upon in support of such an assertion. He submitted, generally, that there is always the prospect of further evidence emerging at the hearing (for example in response to questions asked in cross-examination) that might have a bearing on this issue. However, I attach little significance to this. As matters stand, the appellants' evidence fails to satisfy me that there is any reasonable prospect of establishing that the payments are deductible in whole or in part. I do not consider that there is any reasonable prospect of this shortcoming in the evidence being overcome at the hearing."

Grounds of appeal

29. The Appellants submit that the Decision is wrong in the following two material respects:

(1) the FTT erred in its construction of section 225 ITEPA 2003; and

(2) the FTT wrongly concluded that, on the evidence available, the Appellants had no reasonable prospect of establishing that the payments are deductible in whole or in part.

30. HMRC contend that the Decision reveals no errors of law as identified or at all.

Approach to applications to strike out - legal principles

31. At [30] of the Decision, the judge applied the summary of principles set out by the Upper Tribunal in *HMRC v Fairford Group plc* [2014] UKUT 329; [2015] STC 156 ('*Fairford Group plc'*). The Upper Tribunal held (at [41]) that:

"In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products*

Ltd v Patel [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

32. It was common ground that the application should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Part 24).

33. Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

"i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a

> fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Approach to construction of tax legislation

34. The Appellants contend that any exercise of statutory construction requires careful consideration of the particular provision to be construed, taking into account its particular language, context and background, which includes the question of whether it was designed to impose or to relieve tax, in order to ascertain its purpose.

35. The correct approach to statutory construction of taxing statutes remains that set out in *W T Ramsay Ltd v Inland Revenue Comrs* [1979] 1 WLR 974 ('*Ramsay'*). This is a "purposive approach", generally applicable to all statutory provisions. It was summarised by Lewison J *in Andrew Berry v HMRC* [2011] STC 1057, in a passage cited at [40] of the FTT's Decision:

> "The principle is twofold: and it applies to the interpretation of *any* statutory provision:
>
> (a) to decide on a purposive construction exactly what transaction will answer to the statutory description; and
>
> (b) to decide whether the transaction in question does so."

36. In applying that principle, the Supreme Court in *UBS v HMRC and DB Group Services UK Ltd v HMRC* [2016] UKSC 13 ('*UBS*') noted the essential nature of taxing statutes is that they operate in the real world: see Lord Reed at paragraphs [64], [77], [78]:

> "[64] First, "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, 'in the real world'". Secondly, tax avoidance schemes commonly include "elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge". In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile*, [2002] EWCA Civ 1853; [2003] STC 66, para 66, taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that "to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic." Accordingly, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46; (2003) 6 ITLR 454, para 35, where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always.
>
> …
>
> [77] … it is difficult to accept that Parliament can have intended to encourage by exemption from taxation the award of shares to employees where the award of shares has no purpose whatsoever other than the obtaining of the exemption itself.
>
> [78] The context was one of real world transactions having a business or commercial purpose."

Construction of section 225 ITEPA 2003

Arguments in support of the Appellants' case

37. The key question is what is meant by the simple phrase "in respect of" in section 225. Mr Ewart, on behalf of the Appellants, submitted that the Deeds are determinative of this question. They each state that the payments were "solely in consideration" of the restrictive undertakings. On the Appellants' case, this was sufficient to establish that the payments were "in respect of" the restrictive covenants.

38. In support of this submission, Mr Ewart relied upon a number of arguments: First, he referred to the background which led to the introduction of section 225. Section 225 ITEPA 2003 derives from section 26 of the Finance Act 1950, which was introduced to reverse the effect of the House of Lord's decision in *Beak v Robson* [1943] AC 352. In *Vaughan-Neil v Inland Revenue Commissioners* [1979] 1 WLR 1283; 54 TC 223 ('*Vaughan-Neil*'), Oliver J described, concisely and accurately, the effect of *Beak v Robson* as follows:

> "The general effect of that decision was that a payment in a service agreement specifically stated to be in consideration of the employee's entering into a covenant restraining competition by him after his employment had terminated escaped tax. No doubt the legislature considered that unless something were done to bring such payments within the revenue net this would open the door to a wholesale payment of tax-free emoluments."

39. Having regard to this background, it was submitted on behalf to the Appellants that the ambit and applicability of section 225 ITEPA 2003 as a charging provision should not, therefore, be restricted by adopting an overly narrow construction, an error of law which, according to Mr Ewart, the FTT had made.

40. Secondly, the Appellants submitted that the FTT erred by misunderstanding the case law on the purposive construction which can be given to tax legislation. The relevant cases establish that tax legislation generally applies to transactions which have some real world (or, put another way, commercial) purpose. As a result, some tax provisions have been held not to apply to transactions which have no commercial purpose: see for example *UBS* supra and *Chappell v HMRC* [2016] STC 1980. However, this does not mean that a transaction with some commercial purpose should be entirely ignored in applying a tax provision.

41. The Appellants assert that the transactions under which the restrictive undertakings were given by their employees had a commercial purpose, namely to restrict those employees' activities during and after their employment. They do accept, however, that the amount of the consideration paid for those undertakings was uncommercial. During the course of argument, Mr Ewart accepted the self-evident fact that the payments were grossly disproportionate to the value (if any) of the restrictive undertakings. However, he submitted that there is nothing in section 225 which restricts its application to payments which are an equivalent value for the undertakings given.

42. In support of this proposition, it was submitted that a transaction which has some commercial purpose cannot be ignored when applying a tax provision simply because the consideration paid under the transaction had "no real-world connection" to the promises given in return in the sense that it was not an equivalent value to those promises. It was argued that the FTT overstated what is said in the relevant case law about construing

taxing statutes "generally" and the requirement to demonstrate a "commercial purpose" or a "real world transactions with real world economic effects".

43. It was submitted that the case law quoted by the FTT speaks more guardedly and emphasises the critical importance of focusing on the particular provision under scrutiny, taking care to determine the character and purpose of that provision: see, for example, *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, quoting from *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 (Decision [38]): "The paramount question is always one of interpretation of the particular statutory provision and its application to the facts of the case". It is clear from *UBS* that a Court must determine the purpose of a statutory provision from admissible sources relating to that provision and not simply by analogy from cases on the construction of other entirely unrelated provisions.

44. Thirdly, Mr Ewart submitted that there is no indication from the language, context or background of section 225 ITEPA 2003 that that section should be characterised as requiring the sort of "real-world' connection between the payment and the undertakings" envisaged at [50] of the Decision. To the extent that what is envisaged is that section 225 requires the economic value of the payments to correspond to the economic value of the restrictive undertakings, that sort of economic equivalence is not required for a payment to have been made "in respect of" the giving of an undertaking.

45. It was submitted that the FTT's erroneous conclusion that the case law supported, or even required, a construction of section 225 ITEPA 2003 that applies the section only where there is an economic equivalence between the value of the payments and the value of the undertakings, led it to wrongly dismiss (at [42], [45], [48] and [49] of the Decision) the following clear indications that the section is intended to apply even where no such economic equivalence exists and, indeed, that the section is intended to apply particularly where there is no economic equivalence:

> (1) Adopting such an overly narrow construction would readily open the door to abuse and tax avoidance, potentially allowing a large payment made for a comparatively worthless undertaking to escape being treated as earnings from employment by section 225 ITEPA 2003 and, as such, to escape being taxed under that provision. Mr Ewart illustrated his argument with the following example. If economic equivalence were required, then an employee who had agreed to a restrictive undertaking which was stated in a contract to be in consideration of a payment of £250,000 could seek to avoid payment of tax on that full sum by claiming that the economic value of the undertaking was no more than £50,000. Yet this was precisely the situation that section 225 was enacted with the object of preventing.
>
> (2) That section 225 ITEPA 2003 is intended to be widely construed is apparent in its very language, which is drawn deliberately broadly ("in respect of") and, moreover, provides for a payment to be deemed as earnings from employment regardless of "to whom the payment is made" and regardless of "whether or not the undertaking is legally enforceable or is qualified".
>
> (3) A construction of section 225 that applies the section only where there is some sort of "commercial" or "real-world" connection between the payment and the undertaking is inconsistent with the fact that, where section 225 ITEPA 2003 applies, a deduction is allowed for the person making the

> payment regardless of whether the payment is an expense incurred "wholly and exclusively" for the purpose of that person's business (see section 31 ITTOIA 2005 (in the case of FDS and Twofold) and section 51 CTA 2009 (in the case of Trident First and Trident Second), which provide, respectively, for section 69 ITTOIA 2005 to have priority over section 34 TTOIA 2005 and for section 69 CTA 2009 to have priority over section 54 CTA 2009).

46. Fourthly, Mr Ewart clarified that it is not the Appellants' case that different principles of statutory construction should apply to taxing provisions, as distinct from relieving provisions, and the FTT misunderstood the Appellants' case in this respect (Decision [42]). Rather, the Appellants' case is that the application of established principles of statutory construction must take into account whether the provision under construction is a taxing provision or a relieving one, since that consideration is essential in order to correctly determine the purpose of the particular provision. To construe a taxing provision narrowly as the FTT and HMRC propose, is by definition, to restrict its application, which is not something which Parliament is likely to have intended. Nor was it the Appellants' case that section 225 ITEPA 2003 should be left "stranded on an island of literal interpretation", as HMRC wrongly asserted. It was trite law that taxing statutes should, as ought all statutes, be given a purposive construction.

47. Finally, Mr Ewart submitted that the FTT erred at [43] in approaching the question of construction by applying a rebuttable presumption that the statutory provision was concerned with "real world economic transactions with real world economic effects" and then asking whether the terms of section 225 (and related provisions) were such as to displace that presumption. That is not the correct approach to purposive construction.

Discussion

48. Mr Ewart was correct to observe that the construction of section 225 ITEPA 2003 has not previously been considered by a court or tribunal. However, the construction of the phrase "in respect of" as it appeared in a predecessor provision to section 225 ITEPA, namely section 34 of the Income and Corporation Taxes Act 1970, was considered in detail by Oliver J in *Vaughan-Neil* (supra). The material part of section 34 provided that:

> "34 Surtax to be charged on consideration for certain restrictive covenants etc.
>
> (1) Where—
>
> (a) an individual who holds, has held, or is about to hold, an office or employment gives in connection with his holding thereof an undertaking (whether absolute or qualified, and whether legally valid or not) the tenor or effect of which is to restrict him as to his conduct or activities, and
>
> (b) in respect of the giving of that undertaking by him, or of the total or partial fulfilment of that undertaking by him, any sum is paid either to him or to any other person, and
>
> (c) apart from this section, the sum paid would neither fall to be treated as income of any person for the purposes of income tax for any year of assessment nor fall to be taken into account as a receipt in computing, for the purposes of income tax for any year of assessment, the amount of any income of, or loss incurred by, any person,
>
> the same results shall follow in relation to surtax for the year of assessment in which the said sum is paid as would have followed if the said sum had been paid to the said individual (and not to any other person) as and for the net amount of an annual payment to which the said individual was entitled, being an annual payment

chargeable to income tax from the gross amount of which income tax at the standard rate for that year had been duly deducted under section 52 or 53 of this Act."

49. In *Vaughan-Neil*, Oliver J adopted a purposive construction to section 34, albeit pre-*Ramsay*. As set out in [38] of the Decision, he considered the history of, and background to, the section, which is relied upon by Mr Ewart in these appeals at p.1287. He then considered the construction of the phrase "in respect of" and its application to the facts.

50. At p.1290, the learned judge rejected an argument that it was sufficient to look at the terms of the deed entered into between the parties to determine whether the payment was in respect of the restrictive undertaking:

> "Mr. McCall's answer to this was that the court, in determining whether or not a particular payment is taxable, has to look not at what the parties might have done but at what they actually did. Here the taxpayer did in fact enter into a covenant with his future employer, and whether it had the slightest effect on what would have been the position in any event is entirely immaterial. The covenant is in the deed, and it cannot be treated as written out of it and ignored. With that, of course, I agree, but it does not really seem to me that it answers the crucial question, "Was the payment made 'in respect of' the undertaking?" The deed does not say that it was. Mr. McCall has referred me to a number of dictionary definitions of the phrase "in respect of," but I am not sure that in the construction of this section such delicate refinements of meaning are really of assistance. Broadly, as it seems to me, in its context here the phrase means no more than "for," and the question which has to be answered is, "Was the payment made to the taxpayer so made as the reward or recompense for the giving of the undertaking?"

51. Oliver J continued his analysis at p.1291-2 in an important section which we set out below:

> "I return, therefore, to what I conceive to be the principal point. Was the payment made "in respect of" or "for" the giving of the undertaking in clause 1? I do not think it can be enough simply to look at the face of the deed and to treat the only reality of the transaction as that which emerges from the juxtaposition of the covenant for payment and the taxpayer's covenant to cease practice. *Pritchard v. Arundale* [1972] Ch. 229 was concerned with the not dissimilar question of whether a transfer of shares pursuant to a deed which provided for such a transfer "in consideration of the taxpayer undertaking to serve the company" was an emolument from his employment — a question which involved the consideration of whether it was (to use the words of Upjohn J. in *Hochstrasser v. Mayes* [1959] Ch. 22, 33) a payment made "in reference to the services the employee renders by virtue of his office." That question, to quote again Upjohn J., "is a question to be answered in the light of particular the facts of every case."
>
> In his judgment, Megarry J. emphasised that the question was one of fact and, primarily, of causal connection, and I do not think that the question of whether a payment is "in respect of" the giving of an undertaking is on any different footing. He said this, at p. 238:
>
> > "… whichever of these formulations is applied, and in whatever language, it seems to me that the question of fact must be resolved by looking at the whole of the relevant facts. Mr. Heyworth Talbot's sheet anchor was clause 2 of the agreement. This provided for Mr. Lowe to transfer the shares to the taxpayer, Mr. Arundale, 'In consideration of Mr. Arundale undertaking to

> serve the company as aforesaid.' This, said Mr. Heyworth Talbot, was conclusive: the consideration was made wholly referable to the contract to serve, and although extrinsic evidence was admissible to determine a doubtful meaning, it could not be used to contradict the express terms of the written agreement. His alternative submission was that even if evidence of the surrounding circumstances was admissible, the result would be the same. On these submissions a variety of points arose. The first, and on one view the most important, is that consideration and causation are by no means necessarily identical. Let me assume for one moment that no evidence is admissible to establish that there was a jot or tittle of consideration for the transfer save the taxpayer's undertaking to serve the company. That does not seem to me to answer the question whether or not the payment was made to the taxpayer in reference to, and as a reward for, services rendered by virtue of his office, or in return for acting as or being an employee. If the transfer had been made for no consideration at all, the reason for making it might still have been to reward the taxpayer for his services to the company, and so it might be taxable. Per contra, if the real reason for making the transfer had been not to reward him for his services, but to make him a free gift, or, as in the *Hochstrasser* case, to compensate him for some loss he had already suffered (which, being past consideration, could not be valuable consideration), then I cannot see that to make the agreement to transfer legally enforceable by expressing it to be in consideration of his undertaking to serve the company conclusively ousts the real reason for the transfer. The terms of the agreement are entitled to be given full weight, as part of the surrounding circumstances; but I do not think a contractual expression of consideration is conclusively determinative of causation."

On this aspect of the matter he concluded, at p. 240:

> "In my judgment, the payments must be linked to the services not by mere words but by reality; and to this, contractual obligations may contribute, perhaps substantially, but they cannot pre-empt."

In the instant case the special commissioners approached the question as one purely of construction of the deed. In their reasons for decision they said: 'This is an extremely fine point but that is neither here nor there: the question is whether that is a proper construction of this vital wording.' Certainly that was one question, but I do not, with respect, think that it was the only question. *Pritchard v. Arundale* shows that the critical question is. 'What is the reality?', and not simply, 'What does the deed say?' …"

52. The *Vaughan-Neil* judgment was relied on by the FTT at [46] – [47]. The Appellants sought to distinguish *Vaughan-Neil* on the facts. They submitted that the FTT was wrong to rely on the decision in *Vaughan-Neil* as support for the conclusion that "s225 of ITEPA is postulating a 'real-world' connection between the payment and the restrictive undertaking" where the payment is stated in the Deed to be contractual consideration for the restrictive undertaking".

53. The Appellants point out that the court in *Vaughan-Neil* found there was in fact no restrictive undertaking given in that case. Rather, Mr Vaughan-Neil's agreement to cease practice at the Bar was something that he was "bound to do anyway", in order to enter

into the service agreement with Wimpeys. It was "merely a statement of a necessary and inevitable consequence of assuming the obligations imposed by clause 2 [each party's covenant to enter into a service agreement]" and "the simple undertaking of the very duties which are inherent in and inseparable from the office or employment itself" (see 1292F-H and 1293D).

54. It was also found in *Vaughan-Neil* that the deed did not say that the relevant payment was in respect of the undertaking given. Instead, the deed stated that "the payment was to act as an inducement to the taxpayer to accept the professional and social consequences which flowed from his taking the proffered employment" (see 1290F, 1292D-F and 1293B-C).

55. In our judgment, these factual distinctions are irrelevant. Oliver J construed the relevant section, and then applied the facts to determine the result of the case. The key propositions to be derived from *Vaughan-Neil*, which are equally applicable to the construction of the material part of section 225, are as follows:

i) Was the payment made "in respect of" or "for" the giving of the restrictive undertaking?

ii) This requires the court to consider the "real reason" for the payment.

iii) This question cannot be approached as one purely of construction of the deed. The critical question is: "What is the reality?", and not simply, "What does the deed say?"

56. In the circumstances, we accept the submission of Ms Nathan on behalf of HMRC that section 225 ITEPA 2003 is concerned with commercial, or "real world", payments. The FTT was correct to reject the Appellants' submissions that section 225 ITEPA 2003 should be widely construed given that it had been introduced to address the scope for wide scale avoidance created by the House of Lords' judgment in *Beak v Robson* and there were indications that section 225 was not intended to be limited to commercially justified payments for restrictive covenants. Having rehearsed the arguments advanced by the Appellants ([44]), the FTT rejected them at [45], correctly noting that that there was no reason Parliament would have moved away from its usual approach of requiring a real-world connection between the payment and the giving of the restrictive undertaking. Ms Nathan observed, in our view with justification, that any other construction of a section intended to counter one form of avoidance would open the door to another form of avoidance such as that perpetrated by the Appellants.

57. We reject the argument that this construction would open the floodgates to tax avoidance, and in order to avoid this, Parliament must have intended the question to be determined solely on the basis of the way in which the parties to a deed had chosen to express the drafting. Commercial reality is a broad concept and will generally self-correct tax avoidance. Section 225 cannot be looked at in isolation. In relation to Mr Ewart's example of the taxpayer who sought to avoid tax by claiming that the true commercial value of a payment of £250,000 was in fact £50,000, we consider that HMRC would be entitled sceptically to evaluate such a claim. Even if the factual premise was accepted, then, as Ms Nathan pointed out, there are other provisions pursuant to which the taxpayer might be liable to tax, for example as payment of a dividend or under the distribution or earnings provisions.

58. The Appellants' case on construction does not attribute any meaning to the expression "in respect of". It merely asserts that, in the light of *Beak v Robson* and the perceived need to reverse its effect by legislation, the test is satisfied by consideration of the words of the Deeds. That proposition was rejected by Oliver J in *Vaughan-Neil*.

59. Even without the benefit of the *Vaughan-Neil* judgment, we would have reached the same conclusion. The payment must be in respect of, or for, the restrictive undertaking. The language of section 225 ITEPA 2003, with the use of the phrase "in respect of", requires a nexus between the payment and the giving of the undertaking. This requires the court to have regard to commercial reality, and the real reason for the payment. In the present case, there is manifestly no nexus between, and no commercial rationale, for the grossly disproportionate payments purportedly attributed to the restrictive undertakings.

60. In our judgment, the FTT applied the established *Ramsay* principle of statutory construction in construing section 225 ITEPA 2003: see paras [37], [38], [39], [40]. In particular, in taking into account whether the payments had a commercial purpose and were real world transactions, the FTT applied the observations of the Supreme Court in *UBS* per Lord Reed at paragraphs [64], [77], [78]. In our judgment, the FTT applied the correct principles in determining the construction of section 225 ITEPA 2003, save that we agree with Mr Ewart that the FTT was incorrect to regard the need for real world transactions as a rebuttable presumption. However, it is always possible to pick holes in the wording of a detailed judgment. The FTT was merely expressing that this principle is generally, but not invariably, applicable to tax legislation.

61. We also consider that the FTT was correct to reject the Appellants' submission that, since section 225 ITEPA 2003 is a charging provision, it should be construed any differently to other tax legislation or that the fact that it is a charging as opposed to a relieving provision should result in a wider interpretation. The FTT correctly observed that Lewison J's summary of the approach to statutory construction in *Berry* at paragraph [31] showed that the principle applies to all statutes, not just tax statutes and certainly not just to tax statutes that impose a charge. The task is to construe the provision purposively. Rather than construing section 225 more widely because it is a charging provision, it is necessary to determine whether the payment is made in respect of the restrictive undertaking. In carrying out this task, regard must be had to commercial reality. In every case, it is necessary to determine whether on a realistic view of the facts the payment is in fact made for the giving of the restrictive undertaking. This was the approach adopted by the FTT.

On the evidence, did the Appellants have no reasonable prospect of establishing that the payments are deductible in whole or in part?

Arguments in support of the Appellants' case

62. We have decided that the FTT was correct in its construction of section 225 ITEPA 2003. The payments had to be for the restrictive undertakings. This requires the court to consider the "real reason" for the payment. This question cannot be approached as one purely of construction of the deed. The critical question is: "What is the reality?", and not simply, "What does the deed say?"

63. Nonetheless, the Appellants submitted that the FTT made a second error in concluding that, on the evidence available, the Appellants had no reasonable prospect of establishing that the payments are deductible in whole or in part (Decision [55]).

64. This submission was based (i) upon the assertion in the Deeds that the payments were solely in consideration of the restrictive undertakings and (ii) paragraph [32] of the witness statement of Mr Turner in the Trident appeals quoted by the FTT in [53] of the Decision set out at [28] above.

65. At [53] of the Decision, the FTT assuming Mr Turner's evidence is unchallenged (and HMRC did not challenge that evidence for the purpose of the strike-out proceedings), found that, at most, it demonstrated that (i) "Trident would not want its tenants to be encouraged to move to different premises", (ii) "employees generally are often required to sign restrictive undertakings", and (iii) the terms of those undertakings "were similar to those signed by employees generally".

66. Mr Ewart submitted that the FTT found that the undertakings were commercially necessary and standard in their terms. The FTT could, and should, have concluded that the Appellants had a reasonable prospect of establishing that at least some part of the payments had been made "in respect of", or had had a "real-world connection" with, those undertakings. This was because the FTT could not be sure that no part of the payment was in respect of the undertakings. That was a matter to be decided at a full hearing, after a full examination of the evidence.

67. The Appellants submitted that, given the commercial necessity and standard nature of the undertakings required by the Appellants as employers, they have a real (as opposed to a fanciful) prospect of successfully showing at a full hearing that at least some part of the payments had been made "in respect of" those undertakings. That is sufficient for the strike-out applications to be dismissed. It was not necessary for the FTT to be able to determine, at this stage, the precise amount that was so paid, and the FTT was wrong to strike out the appeals on the basis that it could not make that determination.

Discussion

68. The FTT did not find that the real reason for any part of the payment was in respect of the restrictive undertakings. On the contrary, it expressly rejected that proposition at [52] and [55]. The FTT's findings in [55], set out at [28] above, reject in clear terms the Appellants' evidential case that they had a reasonable prospect of achieving any deduction for the payments.

69. The FTT had ample material to support this conclusion. The Appellants accept that the amount of the consideration paid for those undertakings was uncommercial, and indeed grossly disproportionate. Mr Rose and Ms Murray had limited or no prior experience of the Appellants' activities and in any event had largely administrative roles so that their ability to influence positively or adversely the commercial success of the Appellants' business was limited; the salaries paid to each of Mr Rose and Ms Murray were modest; the scale of the Appellants' activities was modest and the undertakings were only for a six month duration post-termination of employment. Against this background, the FTT rightly held at para [52] that the payments "were not 'in respect of' the restrictive undertakings and were, instead, 'in respect of' a tax avoidance arrangement."

70. Applying the construction of section 225 ITEPA 2003 that we have reached to the facts of the present appeals, it is clear, in our judgment, that the appeals must be dismissed. The payments were not in respect of, or for, the giving of, the restrictive undertakings. The memoranda supported the obvious conclusion that any relationship between the commercial value of the undertakings and the amount of the payments was irrelevant to these schemes, which were entered into solely for the purpose of tax avoidance.

71. In our judgment, the FTT was correct to reject the Appellants' case for a partial deduction, for the reasons that it gave. There was no evidence relied upon to quantify any such partial deduction. During these appeals, consistent with his stance before the FTT, Mr Ewart declined to specify any figure for a partial deduction. Irrespective of the reason for this coyness, the onus was on the Appellants to provide evidence as to the amount of a partial deduction, rather than rely upon a Micawberish hope that something might turn up. Since they failed to do so, the FTT was quite right to reject their case on the facts.

Conclusion

72. Lord Reed's judgment in *UBS* begins with the following, now well-known, observation:

> "In our society, a great deal of intellectual effort is devoted to tax avoidance. The most sophisticated attempts of the Houdini taxpayer to escape from the manacles of tax (to borrow a phrase from the judgment of Templeman LJ in *W T Ramsay Ltd v Inland Revenue Comrs* [1979] 1 WLR 974, 979) generally take the form described in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684, para 34:
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> > "…structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge."

73. That paragraph is apt to describe the schemes which are the subject of this appeal, save in one respect. Houdini always allowed himself a reasonable prospect of escape from the handcuffs in which he was bound. These schemes do not have any reasonable prospect of enabling taxpayers who invested in them to escape from the manacles of tax.

74. The issue concerning section 225 ITEPA 2003 gave rise to a short point of construction. The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants' evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

75. For the reasons given above, the Appellants' appeal against the FTT's decision to strike out the appeals is dismissed.

Costs

76. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Henry Carr

Upper Tribunal Judge Greg Sinfield

Release date: 27 November 2018