[2012] UKUT 176(TCC)

Appeal number FTC/70/2010

Capital Gains Tax (CGT) - Enterprise Investment Scheme (EIS) - reinvestment relief – TCGA 1992, Sch 5B – whether subscription for eligible shares - whether amount received by subscriber in relevant period was repayment of debt within Sch 5B –nature of conditions to be satisfied for entitlement to reinvestment relief

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

SEGESTA LIMITED **Appellant**
(formerly Blackpool Football Club Properties Limited)

- and -

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

TRIBUNAL: The Honourable Mr Justice Sales
Judge Sinfield

Sitting in public at The Royal Courts of Justice on 14 May 2012

Michael Sherry, instructed by A I Cherry Limited, for the Appellant

Philip Jones QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Segesta Limited ("Segesta") in relation to a decision by the Respondents ("HMRC") in connection with a claim for Enterprise Investment Scheme ("EIS") reinvestment relief from a charge to capital gains tax, whereby HMRC refused to authorise Segesta to issue an EIS Form 1 to Mr Owen Oyston ("Mr Oyston") in relation to an investment by Mr Oyston involving subscription for 276,494 ordinary £1 shares in Segesta on 16 December 1999. The significance of an EIS form 1 is that it is the mechanism whereby an individual can claim reinvestment relief in respect of capital gains tax which would otherwise be chargeable in relation to capital gains made by him in respect of other transactions. By a decision of the First Tier Tribunal ("the FTT") dated 21 May 2010 – [2010] UKFTT 235 (TC) – Segesta's appeal against HMRC's decision was dismissed. Segesta now appeals to the Upper Tribunal.

2. Mr Oyston was Segesta's principal shareholder throughout the period 31 May 1993 to 31 May 2000. He had made substantial capital gains in relation to a number of transactions in the period up to and including 1994.

3. At all relevant times, Segesta was the holding company for The Blackpool Football Club Limited ("BFC"), owning something in excess of 90% of its share capital. At all material times until 29 June 2000 another company, Zabaxe Limited ("Zabaxe"), carried on business providing administration and management services for Segesta, BFC and other companies which formed part of the group controlled by Mr Oyston.

4. In early 1996 Mr Oyston faced a trial on criminal charges. He was convicted and sentenced to a lengthy term in prison. He was in prison from 23 May 1996 until December 1999.

5. In the period from 1994 to 1999 various sums were paid to BFC, ostensibly as loans made to BFC on behalf of Mr Oyston, and credited to Mr Oyston's loan account with that company.

6. In the first part of the period, the transactions were effected by Mr Robin Oakley ("Mr Oakley"), a trusted employee within the group. However, in about April 1998 it emerged that Mr Oakley had engaged in theft from Mr Oyston and companies in the group, particularly by taking advantage of Mr Oyston's absence in prison to do so (later, in August 1999, Mr Oakley pleaded guilty to eight counts of theft and was sentenced to three years imprisonment).

7. Mr Oyston's wife then assumed control of his affairs and the affairs of the group. In this phase she had to deal with the consequences of the emerging problems created by Mr Oakley's thefts and dissipation of group assets, and

had to move monies around with considerable flexibility to meet such problems as they came to light. During this phase, acting on behalf of her husband, she also arranged for loans to be made to BFC from time to time.

8. While Mr Oakley had control of the group's affairs in 1997 and 1998, he stole substantial sums of money from another company jointly owned by Mr Oyston and the Derbyshire County Council pension fund, called Jebwill Limited ("Jebwill"). The money was diverted via Zabaxe, and then on elsewhere as arranged by Mr Oakley. Mr Oakley then stole from Mr Oyston to repay part of the sums taken from Jebwill via Zabaxe. When Mr Oakley's fraud on Jebwill was discovered, Mr Oyston reached a compromise agreement with Derbyshire County Council by which he personally assumed liability to Jebwill for the sums lost and acquired a right to repayment from Zabaxe.

9. On 16 December 1999, Segesta borrowed £4,147,413 from National Westminster Bank plc which was transferred into the bank account of BFC; BFC paid an equivalent sum into Mr Oyston's personal bank account; Mr Oyston then transferred an equivalent sum to Segesta to make the investment at issue on this appeal, by subscribing for 276,494 ordinary £1 shares in Segesta at £15 per share; and Segesta then reduced its loan from National Westminster Bank plc by the amount of £4,147,413.

10. It is in relation to his subscription for these shares in Segesta that Mr Oyston maintains that he is entitled to EIS reinvestment relief under Schedule 5B to the Taxation of Chargeable Gains Act 1992 ("the TCGA"). HMRC maintain that the arrangements on 16 December 1999 involved Segesta providing BFC with funds for it to pay monies to Mr Oyston by way of repayment of loans to BFC previously made on his behalf by Mr Oakley and Mrs Oyston and also involving repayment of debts due from Zabaxe to Mr Oyston in relation to the Jebwill matter. On this basis, HMRC say that Mr Oyston received value from Segesta in connection with the subscription by him for the shares in Segesta in December 1999, with the effect that by virtue of paragraph 13 of Schedule 5B those shares fail to qualify as "eligible shares" and Mr Oyston is not entitled to claim EIS reinvestment relief in relation to them.

11. Paragraph 13(1) and (2) of Schedule 5B provides as follows:

> "13(1) Where an individual who subscribes for eligible shares ("the shares") in a company receives any value from the company at any time in the seven year period, the shares shall be treated as follows for the purposes of this Schedule-
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> (a) if the individual receives the value on or before the date of the issue of the shares, as never having been eligible shares; and
> (b) if the individual receives the value after that date, as ceasing to be eligible shares on the date when the value is received.

(2) For the purposes of this paragraph an individual receives value from the company if the company-

(a) repays, redeems or repurchases any of its share capital or securities which belong to the individual or makes any payment to him for giving up his right to any of the company's share capital or any security on its cancellation or extinguishment;
(b) repays, in pursuance of any arrangements for or in connection with the acquisition of the shares, any debt owed to the individual other than a debt which was incurred by the company-
(i) on or after the date on which he subscribed for the shares; and
(ii) otherwise than in consideration of the extinguishment of a debt incurred before that date;
(c) makes to the individual any payment for giving up his right to any debt on its extinguishment;
(d) releases or waives any liability of the individual to the company or discharges, or undertakes to discharge, any liability of his to a third person;
(e) makes a loan or advance to the individual which has not been repaid in full before the issue of the shares;
(f) provides a benefit or facility for the individual;
(g) disposes of an asset to the individual for no consideration or for a consideration which is or the value of which is less than the market value of the asset;
(h) acquires an asset from the individual for a consideration which is or the value of which is more than the market value of the asset; or
(i) makes any payment to the individual other than a qualifying payment."

The FTT's judgment

12. The FTT's judgment is a thorough, closely reasoned judgment extending to 115 paragraphs. It examines in careful detail the evidence presented on the appeal to it.

13. Segesta's and Mr Oyston's case was that Mr Oakley had been given an instruction at a meeting in December 1994, also attended by various advisers ("the December 1994 meeting"), that in future all payments to group companies involving use of monies representing Mr Oyston's chargeable gains on other transactions should be by way of subscription for shares, in order to qualify for EIS reinvestment relief under Schedule 5B to the TCGA and so obtain a tax advantage. According to their submission, Mr Oakley had acted in breach of that instruction by making payments to BFC apparently by way of loans rather than by subscriptions for shares, in such a way that the sums so paid could not properly be regarded as debts due from BFC to Mr

Oyston falling within the meaning of paragraph 13 of Schedule 5B. Therefore, when those sums were repaid as part of the arrangements in connection with Mr Oyston's subscription for Segesta's shares in December 1999, Mr Oyston should not be treated as being disqualified on that account under paragraph 13 of Schedule 5B from claiming EIS reinvestment relief.

14. The FTT rejected this submission on the facts. Although Mr Oyston gave evidence that Mr Oakley had been given this instruction at the December 1994 meeting, the FTT found that this was the only direct evidence that this had happened (para. [22]). After an extensive review of other evidence bearing on that question, it found that Mr Oyston's evidence on that point should not be accepted.

15. In our view, the FTT's reasoning on this is careful and cogent. It is unnecessary to set out the full detail of it here (see in particular paras. [10]-[33] and [85]-[99] of the FTT's judgment). Salient points made by the FTT are that Mr Oakley made a note of the December 1994 meeting which did not record any such instruction, and which was in certain respects difficult to reconcile with the idea that such an instruction had been given. There was no other note of the meeting. Evidence was given about the meeting by advisers who attended it, Mr Cherry and Mrs Barrie. On assessment of their evidence, the FTT found that they referred to a general impression or sense from the meeting that payments should be by way of subscriptions for shares rather than loans, but their evidence did not support the conclusion that Mr Oakley had been given an instruction to proceed in that way. Other circumstances in the evidence, relating to the way in which Mr Oakley behaved after the meeting and how he dealt with others, including Mr Oyston himself and Mr Cherry, pointed against the conclusion that he had been given such an instruction or that his discretionary management powers to decide to make loans to BFC from time to time had been removed by Mr Oyston. Accordingly, the FTT found that the payments to BFC arranged by Mr Oakley had indeed been loans; that they had been repaid as part of the arrangements in connection with Mr Oyston's subscription for Segesta shares in December 1999; and that this meant that by virtue of paragraph 13 of Schedule 5B the Segesta shares were not "eligible shares" for the purposes of the TCGA.

16. The FTT did not quantify the amount of the loans so repaid, because it took the view that the proper construction of paragraph 13 of Schedule 5B meant that receipt of *any* value at all of the requisite character by Mr Oyston from Segesta was sufficient to disqualify the Segesta shares from being "eligible shares" for the purposes of the TCGA and EIS reinvestment relief: see paras. [110]-[114] of the decision. This is a point which Segesta seeks to challenge on this appeal. It submits that the FTT should have held that the Segesta shares only failed to count as "eligible shares" (in respect of which EIS reinvestment relief would be available) *to the extent that* the payments in the transactions on 16 December 1999 involved repayment of debts due from BFC to Mr Oyston, and that in relation to the balance EIS reinvestment relief should have been

held to be available. If that is right, Segesta submits that it will be necessary for the case to be remitted to the FTT to make the necessary findings of fact about the extent to which such loans to BFC had been made.

17. Segesta's and Mr Oyston's case before the FTT was that the payments to BFC arranged by Mrs Oyston also should not be treated as loans to BFC, so that again the repayment of money relating to those payments in the course of the arrangements relating to Mr Oyston's subscription for the Segesta shares in December 1999 did not prevent him from being entitled to claim reinvestment relief in relation to that subscription. Segesta also made submissions in relation to those payments based on the rule in *Re Hastings-Bass* [1975] Ch 25 (see now *Pitt v Holt* [2011] EWCA Civ 197, [2011] 3 WLR 19), again seeking to characterise them as payments other than by way of loan.

18. The FTT, however, found on the facts that the payments arranged by Mrs Oyston were in the nature of loans to BFC, and that they were repaid as part of the series of transactions on 16 December 1999: see paras. [100]-[106]. For this reason also, and by reference to its ruling on the proper construction of paragraph 13 of Schedule 5B, the FTT held that the Segesta shares for which Mr Oyston subscribed did not qualify as "eligible shares". Again, the FTT did not find it necessary to quantify the amount of the loans to BFC arranged by Mrs Oyston.

19. In relation to what happened in relation to Jebwill, Zabaxe and Mr Oyston in 1997 and 1998, the FTT said this:

> "*Jebwill*
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> 51. Jebwill Limited ("Jebwill") was a joint venture company owned by Mr Oyston and the Derbyshire County Council pension fund. Mr Oakley was a cheque signatory for Jebwill's bank account, but he had no authority, either from Derbyshire CC or Mr Oyston, to use the funds in that account. Mr Cherry's evidence, which we accept, was that Mr Oakley stole £3,391,350 from Jebwill's account, in two tranches. The first tranche of funds was stolen by Mr Oakley and largely introduced into Zabaxe, from where it was transferred elsewhere, partly to BFC. Mr Oakley repaid these monies, amounting to some £1.6 million, from funds that he took without authority from Mr Oyston out of the proceeds of the EMAP loan notes that were disposed of in December 2006. Mr Oakley then extracted further funds from Jebwill during 1997, totalling about £1.8 million, most of which went into Zabaxe and was then transferred out elsewhere.
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> 52. On discovery of this particular fraud, understandably vigorous action was taken on behalf of the Derbyshire CC pension fund to recover what had been lost. We heard that there was a prospect of

> the Oyston group of companies being put into receivership. Mr Oyston reached a compromise agreement with Derbyshire CC in this respect. He personally assumed liability to Jebwill for the sums lost and acquired a right to repayment from Zabaxe. We were shown no documentation in respect of this arrangement, but Mr Cherry told us that it had been fully documented. From the evidence before us we find that this arrangement was essentially a novation; the consideration that Zabaxe provided for being released from its obligation to pay Jebwill was its agreement to pay Mr Oyston. That, in our view, at that time created a new debt due from Zabaxe to Mr Oyston.
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> 53. The amount so payable by Zabaxe to Mr Oyston by virtue of these arrangements was effectively paid to him as part of the £4,147,413 that Mr Oyston received from BFC on 16 December 1999. Zabaxe was entitled to receive payment from BFC, and directed BFC to pay Mr Oyston directly."

20. On the basis of this analysis and by reference to its ruling on the proper construction of paragraph 13 of Schedule 5B, the FTT held that the Segesta shares for which Mr Oyston subscribed did not qualify as "eligible shares" for this further reason, since the repayment of Mr Oyston by Zabaxe as part of the arrangements in connection with his subscription for the Segesta shares in December 1999 also involved the repayment of a debt owed to Mr Oyston within the meaning of paragraph 13(2)(b) of Schedule 5B. Again, the FTT did not find it necessary to quantify the amount of that repayment.

The appeal to the Upper Tribunal

21. On the appeal to this Tribunal Mr Sherry, for Segesta, made clear that he was limiting the grounds of appeal to be argued to three points.

22. On reflection, Segesta accepted that the FTT's findings that Mrs Oyston's actions in managing the affairs of Mr Oyston and the group in the period when Mr Oyston was in prison had the effect that loans had been made by Mr Oyston to BFC, which loans had been repaid in connection with Mr Oyston's subscription for the shares in Segesta in December 1999 (see para. [18] above), were unassailable on appeal. This put particular emphasis on the first of the grounds of appeal which Mr Sherry maintained, which was in relation to the interpretation of paragraph 13 of Schedule 5B by the FTT (see para. [16] above). If the FTT was correct that *any* repayment of a relevant debt owed to Mr Oyston in connection with the subscription for Segesta shares in December 1999 would disentitle him from claiming re-investment relief in relation to the whole of those shares, then by virtue of the concession in relation to the loans to BFC arranged by Mrs Oyston Mr Sherry accepted that the appeal would have to fail.

23. Therefore, the first ground of appeal pressed by Mr Sherry at the hearing before us was Segesta's submission that the FTT had erred in law in construing paragraph 13 of Schedule 5B in that way. If it were established that the FTT had erred in that respect, Mr Sherry submitted that two further grounds of appeal – in relation to the analysis by the FTT concerning the payments to BFC arranged by Mr Oakley in the period after the December 1994 meeting and in relation to the analysis by the FTT of the Jebwill transactions - would be live and important. If either of those grounds of appeal were made out, a remission of the case to the FTT would be required for it to make further findings to determine the extent of the EIS reinvestment relief to which Mr Oyston was entitled.

24. We address the three grounds of appeal in the order in which Mr Sherry presented them.

(1) Construction of paragraph 13 of Schedule 5B

25. The FTT's reasoning in support of its conclusion on the proper construction of paragraph 13 of Schedule 5B is set out at paras. [110]-[114] of its judgment, as follows:

> "110. We have found that part of the amount of £4,147,410 that was paid to Mr Oyston by BFC on 16 December 1999 was a repayment of debts due to Mr Oyston within paragraph 13(2)(b) of Schedule 5B TCGA. Mr Oyston is therefore regarded as having received value from the Appellant, on the basis that BFC is a company connected with the Appellant. A similar analysis applies in respect of the debt treated as repaid by Zabaxe to Mr Oyston. That value was received in the seven-year period referable to the issue to Mr Oyston of the 276,494 ordinary shares of £1 each in the Appellant that are claimed to be eligible shares. The value was received on or before the date of the issue of the shares (21 December 1999). Accordingly, the effect of paragraph 13(1)(a) is that the shares in question subscribed for by Mr Oyston are treated as never having been eligible shares.
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> 111. Whilst accepting that this was the consequence of a strict application of paragraph 13, Mr Sherry argued that a purposive approach should be adopted and that the Tribunal could conclude that relief should be disallowed only to the extent of the value received. We have considered this carefully, but we are not persuaded that such an approach can be adopted, even on a purposive construction of the provision. Paragraph 13(1) refers to "any value" having been received, and operates wholly by reference to a comparison of the time that any value (as defined) was received with the date of the issue of the shares. Except as we describe below, there is no link between the receipt of the value and the actual funding of the share issue. There is therefore, in our view, no scope for any apportionment by reference to the extent of the value received.

> 112. Where more than one issue of shares is made in the relevant period, there is in our view one circumstance where value received in that period might operate to cause only one (or some) of those issues to cease to be a subscription for eligible shares. Paragraph 13(2)(b) requires the repayment of debt to be "in pursuance of any arrangements for or in connection with the acquisition of *the* shares" (emphasis supplied). This is a reference to a particular subscription for shares. If therefore an individual had, for example, subscribed for shares in two tranches, only one of which was associated with a debt repayment in the relevant period, only that tranche would not be treated as eligible shares. The other tranche would remain as eligible shares, and relief would be available, always assuming that no other value was received in the relevant period.
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> 113. These circumstances do not arise in this case. There was only one subscription for and issue of shares. All the shares comprised in that single issue are "the" shares to which paragraph 13(2)(b) refers. The repayment of the loans, although that represented, on our findings, only part of the subscription price, was wholly for or in connection with the single acquisition of the shares subscribed for by Mr Oyston.
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> 114. Mr Sherry attempted to argue that each share had been acquired for its subscription price of £15, and that on this basis an apportionment should be possible. We cannot accept this. The legislation clearly envisages a subscription for, and issue of, a number of shares, and it would go against the ordinary and well-established accepted meaning of those terms to seek to treat each share as having been individually subscribed for or issued. There was a single subscription and issue of shares, and the repayment of the loans was associated with the shares comprised in that subscription and issue. All of the shares must therefore be treated as never having been eligible shares. Even if we had considered that we were able to accept Mr Sherry's argument, it would have remained the case that the loans were repaid in connection with the acquisition of all the shares, and the result would have been the same."

26. We agree with this reasoning and have little to add.

27. Mr Sherry referred to passages in speeches in the decisions of the House of Lords in *W.T. Ramsay v Inland Revenue Commissioners* [1982] AC 300 (at 323A-D per Lord Wilberforce) and *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] STC 1 (at [28] and [36] per Lord Nicholls) in order to emphasise that the Tribunal should adopt a purposive construction of paragraph 13, as a provision in a taxing statute. Those passages simply emphasise that the approach to interpretation of a taxing statute is the same as the approach to interpretation of statutes in general, in which regard should be had in construing the provision in question to its perceived purpose. That purpose will be inferred from the language of

the provision, its place in the scheme of the statute in issue and other relevant external indications, such as Government White Papers and (in very limited circumstances) statements by the promoter of the legislation in Parliament.

28. In our judgment, the natural interpretation to be given to the words of paragraph 13 as set out by the FTT defines and delimits the purpose of the provision. There is nothing in the scheme of the TCGA or other materials which suggests some different purpose which could lead to the conclusion that paragraph 13 should be given a different and more limited interpretation than that given to it by the FTT.

29. In our view, Parliament has made it plain by the terms of paragraph 13 that strict conditions have to be satisfied if an individual wishes to claim EIS reinvestment relief in relation to chargeable gains made by him, on the basis of a subscription for shares in a company. According to paragraph 13(1), the individual must not receive "*any* value from the company" (emphasis added) in the relevant period, when he subscribes for shares which he wishes to claim are eligible shares. According to paragraph 13(2)(b), repayment in connection with the acquisition of the shares of "*any* debt owed to the individual" (emphasis added) which does not fall within certain defined disregards constitutes the receipt of value by him.

30. It is not possible, on the proper construction of paragraph 13, to divide up the consideration paid for the relevant shares so as to confine the extent of the disqualification from eligibility for EIS reinvestment relief to the extent that loan amounts were repaid, in the manner proposed by Mr Sherry. The word "any" in paragraph 13(1) and 13(2)(b) has its natural meaning, and applies with full force and effect. There is no basis for dividing up the shares in Segesta subscribed for by Mr Oyston into separate packets.

31. The scheme of paragraph 13(2) reinforces that conclusion, since the examples of value received given in the other sub-paragraphs include forms of consideration which cannot readily be divided up into monetary amounts for the purpose of any such allocation exercise as Mr Sherry proposed; and receipt of any value at all under those paragraphs would be sufficient to disqualify an individual from being able to claim the relief. Thus, for example, under sub-paragraph (d), the release or waiver of "any liability of the individual" could be in respect of a liability not delimited in clear monetary terms; under sub-paragraph (f), the provision of "a benefit or facility for the individual" could be a benefit or facility of any kind, not necessarily one delimited in clear monetary terms; likewise, under sub-paragraphs (g) and (h), the value of the "asset" given to the individual or transferred to him at an undervalue or acquired from him for an excessive consideration need not be delimited in clear monetary terms. In these cases, receipt of *any* value by the individual will be sufficient to disqualify the whole set of shares subscribed for from being "eligible shares". There is no

reason to think that Parliament intended any different approach to apply in relation to paragraph 13(2)(b).

32. There is also an obvious reason why Parliament should be taken to have wished to legislate such a strict set of conditions to be satisfied in order to claim EIS reinvestment relief. Use of such conditions greatly simplifies and facilitates the policing by the revenue authorities of the proper use of the relief and operates as a clear safeguard against the possibility of abuse.

33. For these reasons, and also by adoption of the reasons given by the FTT, we reject Segesta's first ground of appeal. Therefore, in light of Segesta's concession in relation to the value received by Mr Oyston in respect of loans arranged by Mrs Oyston (see paras. [16] and [22] above), the whole appeal falls to be dismissed. However, for completeness, we consider the second and third grounds of appeal below.

(2) The Jebwill transactions

34. Mr Sherry criticised the FTT's analysis of the transactions in relation to Jebwill at paras. [51]-[53] of its judgment, set out above. He submitted that the FTT should have analysed the position as one in which payments of Jebwill's money to BFC and Zabaxe as a result of fraud on the part of Mr Oakley should be treated as, in effect, fraudulent payments by Mr Oakley on Mr Oyston's behalf which, when repaid ultimately to Mr Oyston by means of the arrangements on 16 December 1999, should be regarded as restitution of sums due to him rather than repayment of a contractual debt falling within paragraph 13(2)(b) of Schedule 5B. If they were so analysed, Mr Sherry submitted that, in accordance with another part of the FTT's own decision (see para. [77]), it should have concluded that in relation to any money returned to Mr Oyston in the arrangements in December 1999 in respect of the money taken from Jebwill such a return of funds should not be taken to disqualify the Segesta shares subscribed for by Mr Oyston from being treated as "eligible shares" for the purposes of EIS reinvestment relief.

35. We dismiss this ground of appeal. In our view, on the facts as found at paras. [51]-[53] of its judgment, the FTT was plainly correct to treat the reimbursement of Mr Oyston by Zabaxe of sums paid out by him for Zabaxe's benefit to settle claims by Derbyshire County Council and Jebwill against it, pursuant to a contractual arrangement between Mr Oyston and Zabaxe, as the repayment of a debt due from Zabaxe to Mr Oyston for the purposes of paragraph 13(2)(b). The FTT was plainly lawfully entitled to make those findings of fact on the basis of the evidence before it and the reasons it gave.

(3) Payments to BFC arranged by Mr Oakley

36. The third ground of appeal advanced by Mr Sherry was the contention that the FTT reached an erroneous conclusion on the evidence before it, when it found that Mr Oakley had not been instructed at the December 1994 meeting to make all payments to BFC by way of subscription for shares rather than by way of loan: see paras. [13]-[15] above. Mr Sherry submitted that the FTT acted unlawfully in making this finding, within the meaning of the well-known passage in the speech of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14, 36. As Lord Diplock observed in his speech in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A, the concept foreshadowed by Lord Radcliffe is that of "irrationality" on the part of the decision-maker in arriving at the relevant decision or conclusion.

37. Mr Sherry took us to particular passages in the evidence before the FTT and made submissions on them. In particular, he sought to suggest that the FTT had erred and misconstrued the evidence of Mrs Barrie and Mr Cherry in finding that they did not support Mr Oyston's own evidence that the relevant instruction had been given to Mr Oakley at the December 1994 meeting.

38. In our judgment, having reviewed these materials and the reasoning of the FTT as a whole, this ground of appeal is unsustainable. The FTT had the benefit of seeing all of Mr Oyston, Mrs Barrie and Mr Cherry give evidence and was well-placed to assess what they said (and the nuances of it) in the light of that and of all the documentation in the case. The FTT was fully entitled to assess their evidence as set out in its judgment and to make the findings it did. There was no unlawfulness in its approach, nor any irrationality in the conclusions it arrived at.

Conclusion

39. For the reasons set out above, we dismiss this appeal. We conclude that none of the three grounds of appeal put forward at the hearing before us been made out.

TRIBUNAL JUDGE
RELEASE DATE: 29 May 2012