[2017] UKUT 176 (TCC)
Appeal number: UT/2015/0140
UT/2015/0141

INCOME TAX — tax avoidance scheme — capital allowances — CAA s 437 — whether FTT entitled to find sham — yes — whether Appellants entitled to relief for sum notionally spent on research when true expenditure much less — no — whether partnership trading — no — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) THE BRAIN DISORDERS RESEARCH LIMITED PARTNERSHIP
(2) NEIL HOCKIN

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

Tribunal: Mr Justice Birss
Judge Colin Bishopp

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 14 and 15 December 2016

Jonathan Bremner, instructed by Berwin Leighton Paisner LLP, for the Appellants

Kevin Prosser QC and David Yates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by The Brain Disorders Research Limited Partnership ("the Partnership") and by Mr Neil Hockin, a member of the Partnership, against a decision of the First-tier Tribunal ("the FTT") dismissing:

   a. an appeal by the Partnership against HMRC's decision to deny its claim for capital allowances pursuant to Chapter 1 of Part 6 of the Capital Allowances Act 2001 ("CAA"); and

   b. an appeal by Mr Hockin against HMRC's decision to deny his claims (i) for interest relief in the tax year 2006-07 on interest paid on borrowings made to fund his contribution to the Partnership and (ii) to set £25,000 of loss relief against his general income for tax purposes.

2. There are six substantive issues to be determined in this appeal:

   (i) The sham issue: whether the FTT erred in law in holding that parts of a research agreement ("the Research Agreement") entered into between the Partnership and Numology Limited ("Numology") were a sham.

   (ii) The quantum issue: whether the FTT erred in law in holding that the Partnership had only incurred expenditure on research and development for the purposes of Chapter 1 of Part 6 CAA to the extent that payments were made to BRC Operations Pty Limited ("BRC") via Numology.

   (iii) The trading issue: whether the FTT erred in law in holding that the Partnership was not carrying on a trade when it incurred expenditure on research and development.

   (iv) The section 362 Income and Corporation Taxes 1988 ("TA") issue: whether the FTT erred in law in holding that, if the Partnership was carrying on a trade, the money contributed by the partners to the Partnership was not used wholly for the purposes of such trade.

   (v) The section 787 TA issue: whether the FTT erred in law in holding that, if the Partnership was carrying on a trade, the partners to the Partnership were not entitled to interest relief because section 787 TA applies.

   (vi) The costs issue: whether it was open to the FTT to make an order for costs in favour of HMRC in the manner that it did.

Background

3. The inter-dependent transactions which implement the scheme were effected on 2 April 2007. The concept was that a taxpayer would make contributions into a partnership. Some of that money could come from their own resources but the bulk would come from very substantial additional borrowings based on loans which might be on limited recourse terms. The vast sums put into the partnership were to be treated as if they were capital expenditure on scientific research into brain disorders in order to attract capital allowances. So the taxpayer could offset those capital allowances, subject to a cap of £25,000, against their own tax bill. Subject to various fees, all the money was to be treated as spent on scientific research because it went from the partnership to Numology. That company supposedly could have done the research itself but also had the right to subcontract, and in fact chose to do the latter; it subcontracted the

research work to BRC in Australia. The agreements included a chain of intellectual property licences and the possibility of future royalties from the fruits of the research.

4. However the amount paid to BRC was not the sum paid by the partnership to Numology. It was a far smaller sum, less than half the amount of the taxpayer's own resources contribution into the partnership. Having been paid down to Numology, the bulk of the money then immediately passed back up again in various forms and went back to the lender banks in various ways. Some was treated as repayments of capital and some as prepayment of interest. Most of what we have described all happened on the same day.

5. The prepayments of interest also generated, or were intended to generate, up front tax relief. In practice the sums lent by the banks never left the bank's accounts. But if the scheme works the taxpayer can now claim tax relief on the scale of the vast additional borrowings.

6. BRC has done some real research (and, we were told, is still doing research) but has not made a profit so far.

7. The FTT set out an outline of the factual background to the case in its judgment. We have borrowed the relevant extracts for the purposes of this appeal below. The judgment summarised the relevant transactions by using simple numbers in which the capital contributed to the Partnership was treated as 100. Thereafter, as amounts had either been borrowed to fund that contribution, or amounts contributed were applied in different ways, the summary referred to the percentage of the 100 involved in each particular transaction. The exact size of the real sum represented by 100 was not wholly clear to us, since different figures appear in different places, but it was in the order of £122 million. Whatever the correct figure, using a round number is a useful way of proceeding. We have adopted the same approach.

8. The scheme is similar to the one addressed in *Vaccine Research Partnership* [2014] UKUT 389 (TCC) and the FTT described the scheme in its original proposed form and as modified as a result of tax changes in March 2007, as follows:

> "**The original proposed scheme, essentially replicating the steps in the Vaccine Research scheme**
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> 6. The original objective of the tax planning was to identify an area of scientific research where the cost of a conventional research programme would be approximately 100, but where the technology, expertise, systems and data bank held by one particular company, would enable the relevant research to be undertaken and accomplished by that unique company for a vastly lesser sum, albeit that the company in question would retain 90% of any net royalties derived from the work programme to reflect the value of its special expertise, data bank etc held prior to the commencement of the research.
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> 7. Without referring to the full detail of how the scheme might have proceeded, the original scheme envisaged that the partnership would pay 100 to a special purpose vehicle or SPV (in fact the Jersey company owned by a charitable trust, Numology Limited ('Numology'), that performed roughly this role in the Vaccine Research scheme). The 100 was said to be the reasonably verified amount that various third party providers would have charged for undertaking the research work in the then conventional manner. Under the contract under which the Partnership paid the 100 to Numology, Numology contracted to undertake the work itself or through the identified sub-contractor, namely the company with the special expertise, systems and data bank referred to in the previous paragraph. That company was the Australian company, BRC Operations Pty Limited ('BRC'). In a research sub-contract, Numology then paid 6 to BRC to undertake the work programme that Numology had undertaken to perform or procure for the Partnership. The further terms of this arrangement were that BRC had licenced its existing intellectual property, its patents and knowhow, in relation to the relevant area of scientific research, namely treatments for certain brain disorders, to Numology, and indirectly to the partnership for £1, and that had then been licensed

back by the Partnership, first to Numology in return for a combination of fixed royalties and fluctuating royalties, and then sub-licensed by Numology to BRC in return simply for fluctuating royalties equal to 10% of the net royalties eventually derived from the improved and enhanced intellectual property following the work programme undertaken by BRC. Under this sub-contract arrangement, the deal with BRC was simply that if the completed work programme delivered royalties or any other reward, BRC would retain 90% of the net revenues, whilst 10% would flow to Numology and on to the Partnership

8. Since Numology had received 100 from the Partnership and applied only 6 in procuring that the scientific research would be undertaken by BRC, the basic plan (ignoring now irrelevant detail) was to be that Numology would acquire various deposits or other financial instruments with its retained 94, less whatever amount had to be paid in fees, to secure its obligation to pay the fixed royalties for which it alone was liable, as mentioned in the previous paragraph.

9. The tax hope and expectation on the part of the Partnership was that, since the partnership had paid 100 to Numology for the scientific research, (that amount being claimed to be what it would ordinarily have cost to undertake the research, and implicitly therefore fair payment), the partnership would be able to claim capital allowances for 100 and the partners would be able to set their respective shares of the allowances against other income. The tax benefit of that early tax relief, coupled then with the secured receipt of the fixed royalties meant that the transaction was appealing to the partners even if the research was unsuccessful, and no 10% royalties were ever received. Hopefully such royalties would be received. The expectation, however, that capital allowances would be available for the full 100, coupled with the secured receipts of fixed royalties that eliminated the more risky expedient of simply investing the entire partnership capital directly in scientific research was the objective of the planning.

The law change in March 2007 and the revisions leading to the scheme as implemented

10. On 2 March 2007, it was announced that partners would only be able to offset £25,000 of losses or allowances in this situation against other income and accordingly the planning had to be very materially altered."

9. The FTT then turned to summarise the detailed transactions in the scheme, as so altered and as it was adopted. The FTT did so as follows and again we will borrow it:

"12. In order to contribute 100 (the eventual actual figure being £122,147,617) to the partnership, the partners borrowed 43 (£53,359,488) from each of two banks, Schroders and Bank of Scotland ('BoS'), these borrowings being arranged by Matrix and integral to the planning. The two borrowings thus provided 86, leaving each of the partners to contribute their share of the remaining required 14. Some of the partners funded their share of the 14 simply from available cash, whilst others borrowed from BoS. These borrowings, usually referred to as 'top-up' borrowings, were not an integral part of the planning, and were simply ordinary bank borrowings, just as some of those partners contributing cash might in fact have borrowed from other banks.

13. There was some fairly irrelevant confusion, principally on the part of the Appellants, as to quite how fees and expenses had been incurred and satisfied. What we were initially told was that when the 100 had been contributed into the Partnership, 4 had been applied by the Partnership in meeting various expenses. Of the remaining 96, all of this was paid to Numology under the research agreement,

under which Numology contracted to undertake or procure the completion of a designated work programme (various elements of the work being given assumed costings, with those costings aggregating to 96).

14. Having received the 96, Numology applied it as follows. While the initial envisaged profile of the fixed royalties payable to the partnership had been spread over the 15-year term which BRC had in which to complete the work programme, following the March 2007 law change it was decided that Numology should pay the partnership 57 immediately after the receipt of the 96 by Numology under the research agreement, as an advance payment of Numology's obligation to pay the fixed royalties mentioned above.

15. We will deal with the onward application of the 57 by the Partnership prior to describing how Numology disbursed its remaining 39 (i.e. 96 minus 57).

16. The terms of the Schroders loan of 43 were that the liability for the interest was a full recourse liability of the individual partners, whilst the liability to repay the principal was limited recourse, only to be discharged out of post-tax receipts of the 10% floating royalties or alternatively the sale proceeds to the Partnership of the licence and the right to the 10% royalties. No such sale was particularly envisaged, and while we will refer below to an option, this was not an integral part of the tax planning.

17. Immediately the partnership received the 57, by way of early receipt of the fixed rentals, the 57 was distributed to the partners, though in fact held at all times in an account in one or other bank. 40 was then immediately paid to Schroders, fully discharging the full recourse liability to pay the entirety of the interest on the Schroders loan. The interest rate was of course considerably higher than that under the BoS borrowing because of the non-recourse terms as regards the principal under the Schroders loan, the BoS loan having no such term.

18. The remainder of the Partnership's, and the partners' early receipt of fixed royalty, namely 17 (i.e. 57 minus 40) was applied in pre-paying the entirety of the interest on the BoS loan, i.e. the loan of 43, and not the interest on any of the top-up loans.

19. Returning to the residue of the 96 held by Numology, namely 39, 29 was contributed to some form of deposit in another BoS Treasury company to secure (i.e. fully secure) Numology's remaining liability to pay the remainder of the fixed royalties to the Partnership over the 15-year term of the transaction, the pre-tax amount of those royalties on receipt by the partnership being sufficient to repay, and specifically designed and charged to repay, the outstanding principal of the BoS loan of 43. In contrast to the position in relation to the 10% royalties to be applied in repaying the principal of the Schroders loan, there was no provision for only the post-tax receipt of fixed royalties to be applied in repaying the BoS loan. The assumption had been that, because full capital allowances would have been received, either those allowances were later being reversed by the receipt of the fixed rentals, or indeed if the losses derived from the capital allowances were being carried forward they would simply be netted off against the receipt of the fixed royalties. In the event that no capital allowances had been secured and that the fixed royalty receipts received by the Partnership and distributed to the partners remained taxable, the entire receipts were to flow automatically in discharge of the BoS loan, and the partners would have to pay the tax on the royalties out of other funds.

> 20. Of Numology's remaining 10, 6 (the actual figure being £ 7,760,427) was paid to BRC under the research sub-contract; 3 was paid by Numology to Schroders for an assignment to Numology of Schroders' remaining rights under its loan (i.e. the limited recourse right to receive a repayment of the principal essentially from and only from the post-tax receipt by the partners of distributions to them of the fluctuating 10% royalties), and the remaining 1 was applied in meeting expenses.
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> 21. The essence of the revised tax planning was of course that if there was a limit on the amount of losses derived from capital allowances that could be set by the partners against other income, it was preferable to diminish the net claim for such losses by arranging for the partnership to have a receipt of income of 57, such that the claim for the net loss was reduced (ignoring the claim for fees and expenses) to 39 (96 minus 57), with the claim for tax relief then hopefully being augmented by relief for 57, the entire receipt of 57 being applied in pre-paying interest on the Schroders and BoS loans.
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> 22. We have mentioned that there was some considerable confusion as to where and how various fees and expenses were met. One suggestion was that the original summary in which we had been told that 4 had been paid as fees and expenses at the partnership level, as mentioned in paragraph 13 above, and only 1 paid as fees and expenses by Numology, as mentioned in paragraph 20 above, may have been wrong. It may have been that the numbers were switched and that only 1 was paid by the Partnership at the top level, and 4 not 1 was paid by Numology. Were this the case, and we will deal with expenses below, it would obviously follow that the basis on which tax relief would have been claimed by the Partnership for the expenses incurred at the Numology level would simply be that more (99 rather than 96) had been paid by the Partnership for scientific research."

10. The FTT went into further detail in relation to the planning of the arrangement and made further findings of fact on the evidence. This careful analysis ran for a further 70 paragraphs of the FTT's decision. Notable findings were these:

a. The scheme was a tax deferral scheme [paragraph 80].

b. The main tax hope was based on an absolute fiction, that the Partnership had incurred capital expenditure of 100 or 99 or 96 on scientific research when in reality it was appreciated by all that no researchers or scientists were ever to receive contributions to their project of more than 6 [paragraph 84].

c. Numology was an artificial SPV which operated at the bidding of Matrix Securities Limited, the promoters of the arrangements ("Matrix") [paragraph 85].

d. The arrangement whereby Numology paid fixed payments or "fixed royalties" was extremely odd. The royalties in no way came from BRC and were not measured in any manner by reference to anything to do with scientific research [paragraph 86].

e. Arrangements whereby BRC had an call option to acquire the licence from the partnership, while having nothing to do with tax planning, was also "totally unrealistic" and "distinctly odd" since it was geared to the 100, 99 or 96 [paragraphs 26 and 87].

f. Everything in relation to the refund of capital expenditure should the project be abandoned was non-commercial. The tribunal held at paragraph 89 as follows:

> "The term, and the requirement to repay some balance of the 6 at the BRC level was perfectly commercial, but the term of the top level research contract that provided that none of the 100, 99 or 96 should be refundable in any circumstances was uncommercial. It is obvious that when the 57 had been paid out immediately following the Day 1 payment to Numology, and the 29 and the 3 were irrevocably dedicated to their two objectives, none of those payments could possibly be refunded (on a failure by BRC to complete the work programme). The terms of the documentation providing, however, for a total non-refund in this situation (even of any realistic residue of the 6), was obviously explained by the fact that any partial refund of 6 would again have undermined the fictitious claim that the much higher amount had been paid by the Partnership to Numology for the scientific research."

(i) The sham issue

11. The first issue for the FTT was whether or not the Appellants' scheme was a sham insofar as it was suggested by the Research Agreement that Numology would undertake the study itself or procure that it be undertaken by BRC. The Respondent's criticisms were directed towards Clause 3.1 of the Research Agreement and the Schedule of work contained within it.

12. Clause 3.1 stated:

> "Numology shall by itself or (subject to the following provisions of this clause 3) through the Appointed Sub-Contractor undertake for the Partnership a programme of research work on the terms of this Agreement."

The Respondent claimed that the first limb of the clause, that Numology would undertake the study itself, was false and a sham on the basis that it was never remotely envisaged, or even possible, for Numology itself to undertake the research work, and the relevant parties were well aware of that.

13. The Schedule to the Research Agreement detailed the matters to be researched in a given order and broke down the individual costings that aggregated to the total of either 99 or 96 (as the FTT said, there was some confusion about the precise proportions, but it does not matter for present purposes) between the numerous individual stages and topics in the total research programme. Again, the Respondent claimed that this was a sham, on the basis that it was neither anticipated nor possible for Numology to carry out this work itself.

14. At [96] the FTT held as follows:

> "… In relation to the Respondents' sham contention, we agree that there was a sham in this case not remotely because any of the parties or indeed the investing partners were intended to be deceived into thinking that the possible aim of sub-contracting to BRC was just one of two realistic possibilities. Of course it was known that it was the only conceivable way of proceeding, and that the alternative contractual provision suggesting that Numology might itself conduct the research was false. The significance of the false claim was that, had it been deleted in accordance with reality, such that Numology's obligation to the Partnership would have been to sub-contract the research to BRC, it could not possibly have been suggested that Numology was ever to pay more than 6, let alone 99 or 96, to BRC in order to procure the scientific research. The falsely worded clause 3 was therefore the foundation of the Partnership's claim for vastly excessive capital allowances, and this is why we decide to strike it down as being a sham. The Respondents' counsel was slightly more hesitant in describing the whole pricing of

the scientific research in the Schedule to the top-level contract, sub-dividing the total expenditure and allocating elements of it to each step and stage in the research, as a sham. We are not so hesitant. By sub-dividing the alleged expenditure of 99 or 96 in this way, inserting all this elaborate nonsense into the Schedule, it becomes clear that the critical drafting of clause 3 is not just some mistaken reference to one irrelevant possibility. The Schedule shines the light on the fact that the whole fiction is indeed intended, and that it is indeed the foundation of the Partnership's claim."

15. The Appellants, represented before us by Mr Jonathan Bremner, maintain that neither Clause 3.1 of the Research Agreement nor the content of the Schedule to the Research Agreement was a sham. They appeal the FTT's decision on this issue on four principal bases:

a. Clause 3.1 reflected the reality of the contractual relationship between the parties and was not a sham.

b. No proper particulars of sham were set out in the Respondent's Statement of Case and the FTT made no adverse findings as to the honesty of the Appellants' witnesses.

c. Even if Clause 3.1 was a sham, that did not mean that the claims for capital allowances could never be for more than the amount paid by the Partnership to BRC.

d. The Schedule was not a sham, because it imposed no rights or obligations on the parties.

16. Starting with the first point about clause 3.1, the Appellants submit that the FTT's conclusion that Clause 3.1 of the Research Agreement was a sham was untenable as a matter of law since the clause did reflect the reality of the contractual relationship between the parties. The Appellants rely on authority from *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (CA) and from *Hitch v Stone* [2001] EWCA Civ 63, [2001] STC 214.

17. In *Snook*, Diplock LJ summarised the meaning of a "sham" at p 802 as follows:

> "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*), *that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*." (our emphasis)

18. In *Hitch v Stone*, Arden LJ set out the relevant principles for assessing potentially sham transactions:

> "62 … I will set out the principles which are in my judgment the relevant principles as respects sham transactions.
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> 63. The particular type of sham transaction with which we are concerned is that described by Diplock LJ in *Snook v London & West Riding Investments Ltd*, above. It is of the essence of this type of sham transaction that the parties to a transaction intend to

create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations. The passage from Diplock LJ's judgment set out above has been applied in many subsequent decisions and treated as encapsulating the legal concept of this type of sham …

64. An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.

65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.

66. Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied ...

69. Fifth, the intention must be a common intention …"

19. These legal principles were not disputed before us.

20. The Appellants submit that Clause 3.1 of the Research Agreement placed Numology under a contractual obligation to undertake the research either by itself or through BRC. That obligation, the Appellants contend, reflected the reality of the parties' contractual relationship (contrary to the FTT's conclusion) and it is irrelevant that it was always envisaged that the work would be carried out through BRC and not by Numology itself. Whether or not the work was sub-contracted, it was Numology which retained the responsibility of ensuring that it was carried out.

21. The FTT further erred, according to the Appellants, in failing to take account of Clause 3.9 of the Research Agreement, which entitled Numology to sub-contract any of its obligations under the Research Agreement to BRC subject to certain conditions. The Appellants submit that there was, therefore, no way in which any third party could be deceived; the agreement spelt out the possibility that Numology could fulfil its obligations under the Research Agreement by sub-contracting its obligations to BRC. The FTT was also wrong, say the Appellants, to criticise the Schedule; it did not impose any obligation on Numology to undertake the research or to incur the costs shown in it, but was merely a means of identifying the steps which would be taken if the research was carried out in a conventional fashion, and the costs which would be incurred if that course were adopted.

22. For these reasons, on the Appellants' case, the Research Agreement did not present obligations which differed from the reality of the parties' contractual relationship, nor did the parties intend to create different rights and obligations from those appearing from the relevant document or give a false impression of those rights and obligations to third parties. According to the Appellants, this means that Arden LJ's criteria in *Hitch v Stone* are not satisfied, and therefore there is no sham.

23. The Respondent, represented before us by Mr Kevin Prosser QC and Mr David Yates, argues that the finding of sham was one clearly open to the FTT on the evidence and, as a finding of fact, is not a conclusion with which it is open to us to interfere. The critical conclusion is that, whatever was recorded

in the agreement, the reality, as all concerned were well aware, was that it was not merely a possibility but a certainty that Numology would subcontract the research to BRC. It is nothing to the point that the Schedule set out a list of steps necessary for conventional research; it was no more than a part of the pretence that Numology might discharge its obligations in that way.

24. We agree with Mr Prosser that the FTT's finding of sham is a finding of fact and that we may interfere with it only on *Edwards v Bairstow* grounds (see *Edwards v Bairstow* [1956] AC 14 itself and the long line of authority following it). We are, however, conscious that a finding of sham, even if it does not imply dishonesty in the ordinary sense, necessarily requires the fact-finding tribunal to be satisfied of an intention to deceive or, at least, to make things appear other than as they are. This is a point to which we shall need to return; for the moment we merely observe that, because of this consideration, we have examined the detail of the FTT's findings with particular care.

25. The FTT had before it all of the relevant documentation, including the various agreements between the Partnership, Numology and BRC and, importantly, a marketing document produced by Matrix, which, as the FTT put it, "made it clear that the scheme was a tax scheme". It also heard the oral evidence of three witnesses, Mr John Hardy, a director of Matrix or one of its subsidiaries, Mr David Williams, advanced as a pharmaceutical expert but whom the FTT did not accept as such because of his connections with BRC, and of Mr Dan Segal of BRC. The conclusions they drew from the evidence were that BRC was seriously engaged in the business of research into brain diseases, and that the work for which it received the 6 (about £7.7 million) was entirely genuine, as indeed the Respondent accepted.

26. However, the FTT went on to describe how BRC came to become involved in the arrangements. On the recommendation of Mr Greg Stoloff of PepTcell, the company which performed the equivalent role to BRC in the *Vaccine Research Partnership* case (Mr Stoloff had a small shareholding in BRC), Mr Segal approached Matrix. His primary motive in doing so appears to have been accepted by the FTT as a means of raising finance for BRC's research programme, but it is clear from the FTT's further findings that he made the approach believing that Matrix might provide that finance by a repetition of the *Vaccine Research Partnership* scheme. Mr Segal spent a substantial amount of time in the UK in early 2007 negotiating with Mr Hardy and he also arranged with MedPharma, a partnership of which Mr Williams was a member, in order to put together the programme of work and the costings which appeared in the Schedule to the Research Agreement. The FTT described that process in some detail, observing that it was undertaken hurriedly, and that the third party organisations asked to provide quotations were given very little time to do so with the consequence that what appeared in the Schedule was of doubtful reliability. What is quite clear from the FTT's findings at [46] to [48], which Mr Bremner did not seriously challenge, is that BRC was expecting to be appointed to undertake the research in exchange for the 6, that it was capable of undertaking it—indeed, as the FTT put it, "had a considerable head start in relation to this project"—and that Numology knew that to be the case before the various agreements were executed. It went on to point out that Numology could not have undertaken the research itself, at least if expenditure of 96 was required for the purpose, because of the contractual obligations to pay royalties and interest up front.

27. Those findings seem to us to represent ample support for the conclusion that the provision in clause 3 of the Research Agreement enabling Numology to undertake the research itself was a pretence. Indeed, it is difficult to resist the conclusion that the exercise of identifying the steps and costings set out in the Schedule was a charade designed to do nothing more than bestow some credibility on the proposition that the 96 was spent on research. In our judgment Mr Bremner's argument that sham is not made out because the agreement made it clear that Numology might subcontract the research to BRC, and that there was no obligation on Numology to incur any particular level of expenditure, misses the point; as the FTT itself said, the pretence which justifies a finding of sham was that some other course might have been adopted, and that an expense greater than 6 might have been incurred, when all concerned knew and intended that BRC would do the work, and that the price it would receive was 6.

28. For those reasons we are satisfied that a finding of sham was open to the FTT on the evidence and the primary findings the FTT reached from that evidence. Before leaving the topic, however, we must deal with some further points made by Mr Bremner. They were that no proper particulars of the supposed sham had been set out by the Respondent in its Statement of Case, and that the FTT made no adverse findings on the honesty of the Appellants' witnesses. We reject these points. The issue was, in our view, squarely before the FTT. Contrary to Mr Bremner's submission it is clear that HMRC's Statement of

Case before the FTT and its skeleton argument before the hearing referred to sham expressly and it is equally clear that the point was put to the Appellant's witness Mr Hardy.

29. Mr Bremner is correct to say that the FTT did not make any finding of dishonesty; on the contrary, it described Mr Hardy, at [34], as "basically honest". We do not, however, and despite the note of caution we have sounded, consider that a finding of sham necessarily implies dishonesty. The pretence here was that 96 or 99 might have been spent on research, but the parties did not go further by pretending that it had in fact been spent on research. This was a tax avoidance, or deferral, scheme, and not evasion, and there was no attempt, as there would be in the case of evasion, to conceal what actually happened, however the parties chose to dress it up. One might disapprove of what was done; but we do not consider it could be said to have crossed the threshold into dishonesty.

(ii) The quantum issue

30. The second issue before the FTT was, assuming there was no sham, what expenditure the Partnership had incurred "on" research and development for the purposes of section 437(1) CAA, which provides that:

> "Allowances are available under this Part if a person incurs qualifying expenditure on research and development."

31. If we are right about the sham issue, the answer is obvious: only 6 was spent on research. We shall nevertheless deal with this issue on the assumption that there was no sham, in case we are found elsewhere to have fallen into error.

32. The Appellants' argument was that, applying principles based on the House of Lords' decision in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 ("*BMBF*") and the Supreme Court's decision in *HMRC v Tower MCashback* [2011] UKSC 19, [2011] STC 1143, all of the 99 or 96 paid by the Partnership to Numology was expenditure "on" research and development. The FTT quite trenchantly disagreed, holding that the principles to be derived from *BMBF* and *Tower MCashback* were not as suggested by the Appellants and finding:

> "108. In the present case, applying the statutory provision quoted in paragraph 32 above purposively, and analysing the facts realistically, it is absolutely impossible to conclude that capital expenditure has been incurred on any scientific research in any amount in excess of 6. Once one addresses all the money movements, it immediately emerges that they reveal that there has been no reality to the claim that capital expenditure of 99 or 96 has realistically been incurred on scientific research. Indeed had everybody involved with this scheme been asked what amount would have been expended or disbursed that would result in scientists or researchers working away seeking to pursue scientific research, inevitably everybody's answer would have been 6. We actually find it difficult to see how it was ever envisaged that the claim for allowances in the higher amount could possibly have been sustained.
>
> 109. The reality is that the allowances were due (assuming at this stage that the Partnership was trading) for no more than 6."

33. The Appellants submit in this appeal that the FTT fundamentally misunderstood the decisions of the House of Lords and Supreme Court respectively in *BMBF* and *Tower MCashback*. First, although at [69] it rejected (on this point agreeing with HMRC) that the questions to be asked were not "did the Partnership pay the right price?", "was it commercial to pay that price?" and "could the Partnership have bought the project for 6?", it went on at [107] to say, quite inconsistently with that rejection, to say

> "The point that emerges from *Tower MCashback* is that if the price paid for the asset, or for scientific research in this case, is significantly in excess of the value of the asset, then one is involved in a serious enquiry as to what exactly is going on, and once that is the case, addressing the money movements can be highly relevant."

34. That statement led the FTT, wrongly say the Appellants, to focus its attention on what was done with the money after it was paid by the Partnership to Numology. As the House of Lords made clear in *BMBF*, the statutory provisions focus wholly on the payer's purpose in making the payment, and say nothing about what the recipient does with the money. The fact that Numology chose to use only 6 to pay BRC, and the remainder for other purposes is irrelevant. It is not even relevant that the money might have gone round in a circle. As Lord Walker put it in *Tower MCashback* at [77],

> "One of the lessons of BMBF is that it is not enough for HMRC, in attacking a scheme of this sort, to point to the money going round in a circle. Closer analysis is required."

35. Yet the FTT had focused on the money movements, and what was done with the money after it was paid by the Partnership to Numology. Instead, the Appellants say, the FTT should have held that:

a. the Research Agreement was an arm's length agreement;

b. all monies were paid to the Partnership before being disbursed to Numology;

c. the price paid by the Partnership to Numology under the Research Agreement was a fair price for the research project if it was conducted on conventional lines (the FTT's comments to the contrary were based on nothing more than speculation) and it was irrelevant that BRC, whose working method was unique, had in fact agreed to do the research for a smaller capital payment and a 90% share of the royalties which might in any event be very valuable;

d. no challenge was made by HMRC to the credibility of BRC's work; and

e. accordingly, all of the 99 or 96 paid by the Partnership to Numology under the Research Agreement was expenditure on research and development within the meaning of section 437(1) CAA.

36. It is pertinent to remember, says Mr Bremner, that the Partnership was dependent on Numology to secure a research project at all; there was no suggestion, and no evidence, that it was capable of entering into a research agreement with BRC or anyone else without the assistance of Numology. This, he said, is an important factor even if the FTT was right about sham, because there could be no question that the Partnership was obliged by the Research Agreement to pay the entire 100 to Numology in order to purchase the research project.

37. Mr Prosser's response is that *BMBF*, *Tower MCashback* and this tribunal's decision in the *Vaccine Research* case are all authority for the proposition that in determining what is "incurred … on research and development" for the purposes of s 437 CAA rather than spent on something else the tribunal is engaged on a factual enquiry, for which purpose it is necessary to adopt, as Lord Hope put it in *Tower MCashback* at [93], "a practical, commercial approach to the reality of the expenditure". Even if one were to disregard the finding of sham it is plain, looking at the commercial reality, that the Partnership incurred no more than 6 on research. It is correct that the yardstick is what was paid rather than what the asset acquired is worth, but it is still necessary to identify what was, realistically, spent on that asset rather than on something else. What the FTT said at [107], to the effect that when there is a substantial disparity between expense and worth, one must ask "what exactly is going on", is a pertinent observation, and the FTT was also right in its view that examination of the money movements was a relevant and appropriate avenue of enquiry. That was particularly the case where, as here, the Partnership paid 99 or 96 to obtain something it knew it could have obtained for 6, against the background of an acknowledged tax avoidance scheme which included the use of various transactions which made little sense in isolation. As the FTT put it at [91], in a finding which was not challenged, "there were many uncommercial features to the individual transactions, virtually all designed to force the ill-fitting pieces to make something approaching a coherent whole."

38. One of the questions in *Tower MCashback* was of a similar nature: what had the LLPs truly spent on software? At [78] Lord Walker pointed out that "the LLPs … did not pay the borrowed money to

MCashback to acquire software rights. Instead they put it in a loop as part of a tax avoidance scheme." It was for that reason that he went on to conclude that only the real amount spent on software should be allowed. The position is much the same here: the Partnership did not incur more than 6 on the research, as all concerned knew and intended would be the case. The balance of 90 or 93 was "put it in a loop as part of a tax avoidance scheme".

39. In our judgment Mr Bremner's criticism of the FTT's examination of the money movements reads too much into what was said in *BMBF* and *Tower MCashback*, and pays too little heed to what the FTT actually did. Lord Walker did not say in *Tower MCashback*, at [77], that there was some sort of prohibition on the examination of money movements; rather, his observation was that circularity of movement is not enough by itself. The observation was, moreover, the prelude to his undertaking such an exercise himself. Later in the same paragraph he said this:

> "In *BMBF* the whole £91m was borrowed by Barclays Finance from Barclays Bank on fully commercial terms (though they were companies in the same group) and Barclays Finance's acquisition of the pipeline was on fully commercial terms. BGE had the whole £91m at its disposal, and though it was disposed of at once under further pre-arranged transactions, those transactions were entirely for the benefit of BGE. BGE had no pressing need for upfront finance (which is not, contrary to what Park J supposed, an essential feature of a leasing scheme capable of generating capital allowances). In the present case, by contrast, the borrowed money did not go to MCashback, even temporarily; it passed, in accordance with a solicitor's undertaking, straight to R & D where it produced no economic activity (except a minimal spread for the two Guernsey banks) until clearing fees began to flow from MCashback to the LLPs."

40. The arrangements in *Tower MCashback* were rather different from those with which we are concerned, and it is not necessary to explain them for present purposes. What is important is Lord Walker's approach, namely to conduct the "closer analysis" of the money movements to which he had earlier referred. He did so in order to advance the enquiry into the expenditure actually incurred, in that case on software, in this case on research. We can see no legitimate criticism of the FTT's having adopted the same course here.

41. We do not think there is much, if any, merit in Mr Bremner's argument about the findings of fact the FTT should have made. The proposition that these were arm's length arrangements in the ordinary sense of that term is, with respect, fanciful; this was a tax avoidance scheme with what the FTT, in our view inevitably, found were artificial elements which made it clear that it was a contrivance. It is true that BRC was, so far as the research agreement is concerned, at arm's length to Numology and the Appellants, but the question is not whether the 6, attributable to that arm's length relationship, was spent on research, but whether the remainder of the 99 or 96 was spent on research. We do not see how it can realistically be said that the arrangements relating to that remainder can realistically be said to be the product of an arm's length relationship; on the FTT's findings of fact they were a device.

42. We do not detect that there was ever any doubt that the monies were paid to the Partnership before being paid over to Numology, but that fact takes Mr Bremner nowhere. It may be that 96 or 99 was a fair price for a conventional research project—although, as we have mentioned, the FTT had some doubts on that score—but that, in our view, is an irrelevance. A taxpayer could not realistically argue that, because he would have to pay £250,000 for a Rolls-Royce, he should receive an allowance of £250,000 when he in fact spent, as he always intended to do, £20,000 on a car in which he could just as easily travel albeit in less luxury. The FTT's findings of fact show that that is exactly what the appellants are attempting to do. The fact that BRC might have charged more but did not because it was to retain 90% of the royalties does not, in our view, affect that conclusion; not only is the scale of the royalties speculative, the test is (at the risk of repetition) what was spent, not what might have been spent. It is, in our judgment, irrelevant that BRC was seriously engaged in research—that fact has no bearing on what was spent.

43. It follows that we do not accept Mr Bremner's argument that 99 or 96 was spent on research. The FTT took the right approach and reached findings of fact which were open to it. We would dismiss the appeal on this ground.

(iii) The trading issue

44. The next issue for the FTT was whether or not the Partnership was carrying on a trading activity for the purposes of section 439(1)(a) CAA. Two alternative but overlapping contentions were considered: (a) that the Partnership was not trading at all, or was not trading in relation to the 99 or 96, and (b) that the Partnership's activity was substantially a non-trading activity, albeit the payment of the 6 from Numology to BRC to sub-contract the research function was a trading activity.

45. The FTT reached the conclusion that the Partnership was not trading at all. Its reasoning was put as follows:

> "112. We conclude that the Partnership's total activity is not a trading activity. Everything in relation to the payment of the 99 or 96 that is destined to pay the 57, the 29 and the 3, and the payment away by Numology of those three items, has nothing whatever to do with any trade. In reality there are major non-trading transactions undertaken in efforts to increase the allowances (by matching additional expenditure with so-called fixed royalties), and with a view to claiming relief for massive pre-payments of interest, and none of those transactions has anything to do with any trade.
>
> 113. It is actually difficult to say that any of the transactions just identified has very much to do with investment either, because there is absolutely no way in which any can generate any net investment return …
>
> 114. Whilst thus we fail to discern any possible investment profit that the Partnership or the partners might derive, our decision is nevertheless that all these money movements are nothing whatever to do with trading, but steps in a scheme designed to generate up-front tax savings. The fact that on the basis of our various decisions they will fail to do that, and at worst for the partners they might generate excess tax liabilities, has no bearing on this conclusion."

46. In considering and rejecting contention (b), the FTT took account of the factors it described in these paragraphs of its decision:

> "117. We are influenced by the marketing and the reality of this scheme which was that it was first and foremost a tax deferral scheme, coupled with secured receipts effectively just to pay off borrowings, and those two features were treated as the basis on which intending partners could sensibly join the Partnership, with the possible receipt of fluctuating rentals being a possible 'add-on'. Without them, however, the scheme was marketed on the basis that it was thought that everything made sense even if there were no receipts of fluctuating royalties.
>
> 118. The next point is that, although the intellectual property is technically licensed to Numology and then the Partnership and then immediately licensed back to Numology and then to BRC, the substance is that an up-front payment is made for possible receipts of net royalties. The Partnership will in no way incur further costs in any trading venture. Many of the fees charged appear to be structuring fees, and certainly not fees that represent on-going expenses of a trade. Furthermore there is no active involvement that might occasion trading losses. There has simply been an up-front payment for a possible revenue stream and that does not appear to us to be a trading activity.
>
> 119. We largely accept the Respondents' claim that at the outset the prospects of there being fluctuating royalties was highly speculative, and akin to a bet. This was not only the view of BRC in November 2007 when the document from which we quoted in paragraph 58 was issued, but this view tallies with the point made above in paragraph 117. This militates against the activity being a trading activity.

120. Neither the Partnership nor Numology had any right of control over how BRC undertook its research project. The absence of any right of control is again a pointer against the trading analysis."

47. The FTT also held that the efficacy of the scheme had resulted in a number of wholly non-commercial arrangements which were inexplicable on trading grounds, supporting the conclusion that the Partnership was non-trading. In particular:

a. The distinctly odd BRC call option to acquire the licence with a floor price geared to what the Partnership had paid Numology, rather than to what Numology had paid BRC for the 10% interest being acquired;

b. A term in the sub-contract between Numology and BRC that if BRC failed to undertake the research, part of the 6 had to be repaid to Numology. There was, however, no equivalent provision in the contract between the Partnership and Numology, and in fact their contract provided that the payment of the 96 was not refundable in any circumstances; and

c. The assignment of the Schroders loan to Numology in return for a payment of 3 was considered by the FTT to be "rather curious", as it means that if the project is successful, and there are significant payments of 10% royalties, Numology will receive the debt repayment. The repayment would be paid out of the post-tax royalties distributed to the partners, who the FTT assumed would be paying tax at 45%, meaning that the assignment deprives the Partnership of approximately £97 million of pre-tax royalties.

48. In relation to the FTT's acceptance of contention (a), that the Partnership was not trading at all, the Appellants submit that the FTT's analysis involved multiple errors of law.

49. First, the Appellants say that the FTT's approach is broad-brush and that it has failed to set out any basis for its conclusion that the Partnership's activities did not constitute a trade, as it was required to do in accordance with the Upper Tribunal's decision in *Vaccine Research Partnership*:

"53. 'Trade' is defined in section 832 of ICTA 1988 as 'including every trade, manufacture, adventure or concern in the nature of trade'. It may be unhelpful to apply a test of 'trade' based simply on a Tribunal's impression regarding its 'ordinary' meaning, given that there is substantial authority which exists on the meaning of the term, as was cited to the FTT (see FTT, paragraph [74]). 'Investment' and the phrase 'non-business activity' also have ordinary meanings. In distinguishing one from another for the purposes of the operation of the tax code, a fact-finding tribunal should make it clear what are the distinguishing features of each type of activity when explaining which categorisation is treated as appropriate in a particular factual context. In this case, HMRC accept that the Partnership undertook a 'business' at the material times: see FTT, paragraph [46]. The FTT needed to set out a proper basis for finding whether or not the Partnership's business qualified as the carrying on of a trade."

50. Second, the Appellants argue that the FTT's reliance at [114] between trading (on the one hand) and "steps in a scheme designed to generate up-front tax savings" was erroneous in law, as the Partnership's motive for entering the transactions is irrelevant to the question of whether the Partnership was carrying on a trade.

51. The Appellants rely on two authorities to this effect: *Lupton v FA and AB Limited* [1972] AC 634 (HL) and *Ensign Tankers (Leasing Ltd) v Stokes* [1992] STC 226 (HL).

52. In *Lupton*, the Appellants rely on the following statement from Lord Morris at [619G-H]:

> "[O]nce it is accepted, as it must be, that motive does not and cannot alter or transform the essential and factual nature of a transaction, it must follow that it is the transaction itself and its form and content which is to be examined and considered."

53. From *Ensign Tankers*, the Appellants point to Lord Templeman's commentary on HMRC's submission (recorded at [234]) that the object of the scheme in question was avoiding tax and not trading:

> "The production and exploitation of a film is a trading activity. The expenditure of capital for the purpose of producing and exploiting a commercial film is a trading purpose. By section 41 of the Act of 1971 capital expenditure for a trading purpose generates a first year allowance. The section is not concerned with the purpose of the transaction but with the purpose of the expenditure. It is true that Victory Partnership only engaged in the film trade for the fiscal purpose of obtaining a first year allowance but that does not alter the purpose of the expenditure …
>
> The Vice-Chancellor referred to authorities in which intentions sometimes illuminated and sometimes obscured the identification of a trading purpose. But in every case actions speak louder than words and the law must be applied to the facts …
>
> The only facts are the 17 documents and the activities which were carried out pursuant to those documents."

54. Third, the Appellants say that it appears that the foundation of the FTT's analysis was that because Numology entered into what the FTT regarded as non-trading transactions, it followed that the Partnership was not trading. According to the Appellants, that approach relied upon an error of law, in that in order to address the question of whether or not the Partnership was trading, the FTT needed to consider the acts of the Partnership and not those of Numology. The Appellants say that the Partnership exploited the fruits of BRC's research by granting a licence over the resultant intellectual property rights, for the purpose of generating taxable profits for the Partnership. The aim of the Research Agreement and the sub-contract with BRC was also in part to undertake research and development which it was hoped would lead to royalties which were not in the nature of investment income. Therefore, the activities of the Partnership, according to the Appellants, cannot be characterised as non-business or a mere investment in an asset. Instead, the Partnership's activity was a business activity which was a trading activity.

55. In relation to contention (b), that in relation to the payment of 6 from Numology to BRC the Partnership was trading even if the larger sum was not, the Appellants' main point is that this result is the opposite of the corresponding result in the *Vaccine Research* case. There, the Upper Tribunal upheld the FTT's finding that the partnership was trading to the extent of the sum actually expended on research, on the grounds that it was a conclusion the FTT was entitled to reach on the evidence. In addition the Appellants contend that the FTT made the following further specific errors of law in its analysis:

a. it had regard to the motivation of the partners for joining the Partnership when this is an irrelevant factor;

b. it reached the view that the substance of the arrangement was that an "up-front payment is made for possible receipts of net royalties" (see the extract from paragraph [118] of the judgment above), thereby, the Appellants say, ignoring the fact that the Partnership was exploiting the intellectual property arising from the research;

c. it held that the speculative nature of the royalties militated against the conclusion that the Partnership was trading (see the extract from paragraph [119] of the judgment above) even though some measure of speculation is a characteristic of any trade, and the project had the prospect, if no more, of very substantial profits;

d. it held that the absence of a right of control by the Partnership or Numology over how BRC undertook the research suggested that the Partnership was non-trading (see the extract from paragraph [120] of the judgment above) when this too is an irrelevant consideration—what matters is whether the research for which the Partnership contracted was carried out, as it was; and

e. it relied on the option arrangements which could not be an indicator, one way or the other, of a trading activity.

56. We are not persuaded by these submissions. Although we have found the FTT's reasoning a little difficult to follow in parts, we are satisfied that it took the right approach to answering the question whether the Partnership was trading, and reached a conclusion which was supported by the evidence. Had there been a straightforward contract between the Partnership and BRC for the undertaking of research in return for 6, with a sharing of any resulting royalties but without the involvement of Numology and the overlay of guaranteed payments, it might well be possible to reach the conclusion that the Partnership was trading despite the highly speculative nature of the transaction. But the proposition that the vast sum supposedly spent on research, whether that is taken to be 100, 99 or 96, was in reality incurred on trading activity is absurd.

57. The essence of the FTT's reasoning is that the research, though entirely genuine from BRC's perspective, was, from the Partnership's perspective, no more than the vehicle by which it was hoping to generate huge tax losses. It is inherent in the FTT's conclusions, as the observations at [117] make clear, that the possible generation of royalties from the fruits of the research was a side issue: if any royalties did result they would be icing on the cake, but the Partnership and its members were in reality indifferent to the matter. We do not agree that the FTT focused on motive; as we read its decision, it analysed the purpose of the transactions rather than the purpose of the participants. In our judgment the FTT's decision contains no error of approach and reaches a finding which was open to the tribunal on the evidence. We also consider that it is irrelevant that the result in *Vaccine Research* was different; the facts and evidence in that case were not identical, in part but not only because of the legislative change to which we have referred, and it is inevitably possible that in carrying out an evaluative assessment two differently constituted First-tier tribunals will come to different conclusions even on the same facts. The test is whether the conclusion was supported by the evidence and, as we have indicated, we are satisfied that in this case it was. It does not seem to us that the FTT's observations, at [121], about the option are of any great significance in this context; the oddity about the option the FTT identified was merely one of several features contributing to the conclusion that the arrangements were uncommercial. We would dismiss the appeal on this issue as well.

(iv) and (v) The section 362 and s787 issues

58. Given our conclusions on the issues of quantum and trading, it is not necessary to address these questions. We should, however, say for completeness that we see no flaw in the FTT's reasoning.

(vi) The costs issue

59. The FTT ordered the Appellants to pay the Respondent's costs before the FTT to be assessed on the standard basis. The Appellants submitted that it was not open to the FTT to order the Partnership to do that because the order was made in response to an oral application, which the Appellants say contravenes Rule 10(3) and 10(5) of the FTT Rules. That is because the Appellants were given no opportunity to make representations and no enquiry was made into the financial means of the partners in the Partnership.

60. The Respondent agreed, as we do, that the FTT should not have made an order for costs without first giving the Appellants an opportunity to make representations. The FTT rules make that quite clear. Therefore the FTT made an error of law. On appeal HMRC made a written application for the costs before the FTT to be dealt with in the same way as the FTT dealt with them.

61. One of the options open to the UT on appeal is to remake the decision. We will do so. We will order the Appellants to pay the Respondent's costs before the FTT to be assessed on the standard basis. There is no reason in this case to enquire into the financial means of the Partnership.

Conclusion

62. For the reasons set out above, we dismiss this appeal.

Mr Justice Birss **Upper Tribunal Judge Bishopp**

Upper Tribunal Judges

Release Date: 8 May 2017