Neutral Citation: [2022] UKFTT 00464 (TC)

Case Number: TC08664

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/00591

PROCEDURE - application for an issue to be determined at preliminary hearing - Wrottesley v HMRC considered - application refused

Heard on: 29 November 2022
Judgment date: 07 December 2022

Before

TRIBUNAL JUDGE ALEKSANDER

Between

EPAMINONDAS EMBIRICOS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Kevin Prosser KC and Barbara Belgrano, counsel, instructed by Moore Family Office Limited, chartered accountants

For the Respondents: Sebastian Purnell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. By way of background, HMRC opened enquiries into Mr Embiricos' UK tax returns for 2014/15 (opened on 1 December 2016) and 2015/16 (opened on 28 November 2017). The principal focus of HMRC's enquiries has been whether Mr Embiricos was entitled to be taxed on the remittance basis. It is not disputed that Mr Embiricos has a Greek domicile of origin, however HMRC assert that he has acquired a domicile of choice within the UK and is therefore ineligible to use the remittance basis of taxation.

2. On 13 June 2018 Mr Embiricos applied to this Tribunal for a final closure notice in respect of the 2014/15 enquiry. This application was subsequently amended to an application for a partial closure notice ("PCN") in respect of Mr Embiricos' domicile status.

3. On 1 March 2019, HMRC issued an information notice requiring Mr Embiricos to provide information regarding the amount and source of his foreign income and gains received anywhere in the world during 2014/15 and 2015/16. Mr Embiricos appealed against the information notice on the basis that the information requested was not reasonably required for the purposes of checking his tax position because (i) HMRC could and should issue a partial closure notice under s28A Taxes Management Act 1970 ("TMA") on the issue of domicile only, or (ii) HMRC could and should refer the issue of domicile to the Tribunal under s28ZA TMA.

4. The application for a PCN and the appeal against the information notice have been the subject of extensive litigation. At first instance, this Tribunal allowed both the application for a PCN and the appeal against the information notice. As the Tribunal had granted the application for a PCN, it held that it followed that the appeal against the information notice must also succeed. But the Tribunal decided that if HMRC were to successfully appeal the decision on the PCN, then the appeal against the information notice would automatically be refused (decisions of this Tribunal on appeals against information notices cannot be appealed to the Upper Tribunal). The Upper Tribunal subsequently overturned this Tribunal's decision in respect of the PCN, and the Court of Appeal upheld the decision of the Upper Tribunal (reported at [2022] EWCA Civ 3). An application by Mr Embiricos for permission to appeal to the Supreme Court was refused shortly before the hearing of the applications that are the subject of this decision.

5. No enquiry was ever opened by HMRC into Mr Embiricos' 2013/14 return. However, on 29 March 2021. HMRC issued a discovery assessment in respect of that year pursuant to the extended timeframe for assessment in Schedule 18, Finance (No. 2) Act 2017. The assessment was made on the basis that Mr Embiricos had acquired a domicile of choice within the UK by 2013/14 and was not eligible to be taxed on the remittance basis. The amount assessed is £9,924,960. The assessment was made on a "best judgment" basis as Mr Embiricos has not provided HMRC with any details relating to his non-UK income.

6. Mr Embiricos has appealed against the assessment, on the grounds that:

   (a) he has not acquired a domicile of choice within the UK ("the domicile issue"); and

   (b) even if he has, the amount assessed is excessive ("the liability issue") because his overseas income in that year was approximately £50,000.

The notice of appeal had raised other ground which are no longer being pursued.

7. HMRC's enquiries into the 2014/15 and 2015/16 returns remain open and are not before this Tribunal.

APPLICATIONS

8. By application dated 21 June 2022, HMRC applied for Mr Embiricos' appeal to be stayed pending the determination of his application for permission to appeal to the Supreme Court. As the Supreme Court has now refused permission to appeal, that application has become otiose.

9. One of the consequences of the decision of the Supreme Court is that Mr Embiricos' appeal against HMRC's March 2019 information notice is now treated as having been dismissed. The information notice (which had effectively been in abeyance until that decision) is now "live", and Mr Embiricos has agreed to provide the information required to HMRC by 28 February 2023.

10. At the hearing, HMRC applied to amend their application. The amended application was for a stay to Mr Embiricos' appeal until 2 May 2023 (namely, 60 days after receipt of the information required by the information notice). Mr Embiricos' representatives, whilst opposing the substance of HMRC's amended application, raised no procedural objection to the amendment being made at the hearing.

11. Also before me is a counter-application made by Mr Embiricos that the liability issue be stayed, or alternatively the domicile issue be determined as a preliminary issue. At the hearing this was (in my view, correctly) pursued solely as an application for the domicile issue to be treated as a preliminary issue, and not as a stay of the liability issue.

LEGAL PRINCIPLES AND APPROACH

12. The Tribunal has power to direct that an issue in proceedings can be dealt with as a preliminary issue by rule 5(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules"). Rule 5 also includes powers to extend time limits and to stay proceedings.

13. The relevant parts of rule 5 are as follows:

> (1) Subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007] and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction –
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> […]
>
> (e) deal with an issue in the proceedings as a preliminary issue;
>
> […]
>
> (j) stay (or, in Scotland, sist) proceedings;
>
> […]

14. In exercising my powers under the FTT Rules, I am required by FTT Rule 2 to give effect to the overriding objective to deal with cases fairly and justly.

15. There is no dispute between the parties about the relevant legal principles and the approach to be taken in deciding whether a matter should be determined as a preliminary issue. The parties disagree, however, as to the application of those principles to this case. In their skeleton arguments and submissions, both parties refer to the decision of the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 (TCC) which discusses the proper approach to the question of whether to order a hearing of a preliminary issue. Mr Embiricos contends that the domicile issue satisfies the criteria set out in *Wrottesley*. HMRC disagree and submit that it is more appropriate for the domicile issue to be addressed at a full hearing of the appeal.

16. In *Wrottesley*, the Upper Tribunal set out, at [28], eight key principles to be considered by a tribunal when dealing with an application for a preliminary hearing as follows:

> (1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
>
> (2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.
>
> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
>
> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way - (3)(a) above.
>
> (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.
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> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
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> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.
>
> (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

WROTTESLEY CRITERIA

17. The parties made their submissions with reference to the *Wrottesley* criteria, and I therefore consider in turn each principle in *Wrottesley* in relation to the domicile issue being heard as a preliminary issue, but bearing in mind that the power to order the hearing of a preliminary issue should be exercised with caution and used sparingly.

18. Exactly what was meant by "with caution and sparingly" was the subject of some debate between the parties, but they both agreed that it would be "out of the ordinary course" for the Tribunal to direct a hearing on a preliminary issue.

Succinct knockout point

19. It is accepted by both parties that if the domicile issue were to be resolved in Mr Embiricos' favour, which would dispose of the appeal altogether, and there would be no need for the Tribunal to have to go on to consider the liability issue. They both accept that this means that the domicile issue is potentially a "knockout point".

20. Where the parties differ is as to whether the domicile issue is a "*succinct* knockout point" (my emphasis).

21. I was referred to the decision of the House of Lords in *Boyle v SCA Packaging* [2009] UKHL 37 and Lord Hope's speech in particular:

> [9] It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in *Tilling v Whiteman* [1980] AC 1 at 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law. That the power to hold a pre-hearing exists is not in doubt: […]. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in Na*tional Union of Teachers v St Mary's Church of England (Aided) Junior School. (Governing Body)* [1995] ICR 317 at 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in *C J O'Shea Construction Ltd v Bassi* [1998] ICR 1130 at 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.
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> [10] In *Ryder v Northern Ireland Policing Board*, [2008] NIJB 252 at [16] Kerr LCJ said:
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>> 'A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points—see, for instance, [*McConnell v Bombardier Aerospace/Short Brothers plc* [2007] NICA 27, [2009] IRLR 201] and *Cunningham v Ballylaw Foods Ltd* [2007] NICA 7. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided.'
>
> I would respectfully endorse those observations. The problem in this case is not so obviously one of overlap or inappropriate compartmentalisation. Mrs Boyle's complaint that she was subjected to harassment and aggressive and hostile treatment is a distinct issue, although it seems likely that the effects that this may have had on her, if established, will not be capable of being

> determined without the leading of more medical evidence. It is rather the cost and delay that has been caused by separating out those aspects of the case from the question whether she was a disabled person within the meaning of the Act. The separation of these two fundamental issues, which are likely to be present in mania disputed disability discrimination cases, will rarely be appropriate even if the parties are in favour of it. Furthermore the decision to hold a pre-hearing review must not be regarded as the end of the process of case management. If separation is resorted to, every effort must be made to ensure that pre-hearing reviews are dealt with the least possible delay, bearing in mind that the merits cannot be addressed until the preliminary issues have been resolved in the claimant's favour.

22. Mr Prosser submitted that "succinct" was used by the Upper Tribunal in *Wrottesley* in a relative sense – comparing the length of the hearing on the preliminary issue relative to the subsequent substantive hearing, and I note that Lord Hope's speech in *Boyle* refers to a "relatively short hearing", as does sub-paragraph (3) in *Wrottesley*. He submits that a hearing on domicile as a preliminary issue would be succinct when compared with the length of a subsequent substantive hearing on the liability issue.

23. Mr Prosser submits that if domicile were to be determined as a preliminary issue, the hearing would be two days – three at most. It is agreed that Mr Embiricos was resident in the UK in the years in question, and that his domicile of origin is in Greece. The only point in dispute is whether he has acquired a domicile of choice within the UK. Mr Prosser says that the law relating to acquisition of a domicile of choice is clear and well established – namely whether Mr Embiricos has settled within the UK with the intention of remaining here indefinitely. This has been expressed in leading cases as having an intention to "end his days" within the UK. Mr Prosser says that the evidence in relation to Mr Embiricos' intention can be addressed in a single day. He says that the background facts (such as the time spent in the UK, the location of Mr Embiricos' business activities, family, and assets) are not disputed and could be addressed in an agreed statement of facts. It is likely that witness evidence would be given by Mr Embiricos, his wife, and another person. They would provide witness statements which would be taken as read as their evidence in chief – so the only evidence that would need to be given orally at the hearing would be HMRC's cross-examination, which he estimated would take less than one day - as this would be limited to Mr Embiricos' intentions when coming to and living in the UK. Submissions would take another day. Mr Prosser conceded that cross-examination might extend to a second day – so a maximum of three days in all.

24. In contrast, Mr Prosser submitted that the hearing relating to the liability issue would be much longer. There would be a substantial volume of documentary evidence, especially as HMRC appear to have based their discovery assessment on Mr Embiricos being a beneficiary and/or settlor of offshore trusts, which would mean that the underlying income and gains of those trusts (and companies in which those trusts held shares) would need to be reviewed. The Tribunal would also need to address whether exceptions relating to commercial transactions applied to any underlying income or gains attributed to Mr Embiricos. Mr Prosser said that it was unlikely that Mr Embiricos would be a witness at the liability hearing, instead the evidence would be given by the trustees and professional advisors who would have a more detailed knowledge of the amounts of income and gains potentially within the scope of UK tax, and would be better placed to give evidence on the commerciality issues. Mr Prosser estimated that a hearing on liability would be six days (and if HMRC considered that they would take more than one day in cross-examination of witnesses at a domicile preliminary hearing, it was likely that Mr Prosser would have underestimated the time taken for cross-examination at the liability hearing, so six days would be an underestimate).

25. Although the authorities suggest that preliminary hearings are best suited to pure questions of law, Mr Prosser submitted that this was not a hard and fast rule – and that there were many examples of domicile questions being heard as preliminary issues. I was referred to a number of High Court cases where the jurisdiction of the court depended on the domicile of one of the parties, and domicile was decided as a preliminary issue. Indeed, there are examples of domicile being considered as a preliminary issue in this Tribunal – the well-known case of *Gains-Cooper v HMRC* [2007] STD (SCD) 23 being but one example.

26. Mr Purnell submitted that Mr Prosser's time estimates were optimistic (he expressed himself in much stronger language at the hearing). Although he agreed with Mr Prosser that it might be possible for the parties to reach agreement on a statement of facts not in dispute, the reality was that any such statement was likely to be anodyne and not particularly useful to the Tribunal. He submitted that a hearing to determine the domicile issue would need to be listed for seven days. He submitted that there would need to be a reading day for the tribunal panel, and that the cross-examination of Mr Embiricos would take several days, with additional time required for the other witnesses. His experience in dealing with domicile issues was that cross-examination of the taxpayer was lengthy, as the taxpayer's biographical history would need to be reviewed in detail – in this context he referred me to the judgement of Mummery LJ in *Aguilian v Cyganik* [2006] EWCA Civ 129 at [46(1)]:

> Although it is helpful to trace Andreas's life events chronologically and to halt on the journey from time to time to take stock, this question cannot be decided in stages. Positioned at the date of death in February 2003 the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death.

27. As Mr Embiricos had not yet responded to HMRC's extant information notice (and previous requests for information and information notices had either been refused or successfully appealed – for reasons that I do not propose to address in this decision), HMRC had no knowledge of Mr Embiricos' unremitted income and gains, or the nature of any trusts of which Mr Embiricos might be a settlor or beneficiary. Mr Purnell therefore had no basis on which to estimate the length of a hearing on the liability issue. But, for the sake of argument he was prepared to accept Mr Prosser's estimate, recognising that it may turn out to be inaccurate once the details of Mr Embiricos' income and gains became clearer.

28. Mr Purnell referred me to paragraph [51] of the Upper Tribunal's decision in *Wrottesley*. In that case the potential preliminary issue also related to domicile (although domicile of origin), and the Upper Tribunal noted that four witnesses would be cross-examined and there would be documentary evidence to be considered. In *Wrottesley* the tribunal considered that a reasonable time estimate for a preliminary hearing would be three days, compared with ten to twelve days for a full hearing. This, submits Mr Purnell is not so very different from this case, where the time estimates are:

> (a) at their shortest, 2 days for a preliminary hearing as compared with 8 days (2+6 – Mr Prosser's estimate) for a full hearing;
>
> (b) at their longest, 7 days for a preliminary hearing as compared with 13 days (7+6 – Mr Purnell's estimate – on the assumption that Mr Prosser's estimate of 6 days to determine the liability issues was correct) for a full hearing.

Yet in *Wrottesley* the Upper Tribunal found that a three-day preliminary hearing was not "succinct" when compared with ten to twelve days for a full hearing.

29. I agree with Mr Purnell that Mr Prosser's time estimates for a preliminary hearing on domicile are unrealistic and hopelessly optimistic. A reading day will be required for the tribunal panel to read into the case. It is likely that Mr Embiricos will be cross-examined by HMRC's counsel for several days, and there will be cross-examination of two other witnesses. At best, I find that the preliminary hearing would need to be listed for five days (including a reading day), but seven days is likely to be more a more realistic estimate.

30. In the absence of any indication of the nature of Mr Embiricos' overseas assets and income, and whether he is the settlor or beneficiary of overseas trusts, it is not possible for me to make any findings on the likely time required for the hearing of the liability issue. Like Mr Purnell, I therefore will use Mr Prosser's estimate of six days for the sake of argument.

31. I find that – taken in isolation – five to seven days for a preliminary hearing is not "succinct", nor is it "relatively succinct" when compared with a time estimate for a full hearing of eleven to thirteen days (being the time estimate for hearing the domicile issue plus the time estimate for hearing the liability issue). This criterion weighs significantly in favour of not directing a hearing of a preliminary issue.

Relatively short hearing without delay

32. There are two aspects to this criterion. The first is whether determination of the domicile point will require only a relatively short hearing, and the second is how long it would take to list a hearing of the preliminary issue, as compared with a hearing of the full case.

33. There is one other aspect of this appeal which does not neatly fit into any of the *Wrottesley* criteria, but which might usefully be addressed here – which is the Mr Embiricos' age. He is 79. There is no evidence before me that he might be in poor health, or that his memory is fading. But Mr Prosser, very reasonably, submits that in the light of his age it would be prudent for any hearing in which he is to give oral evidence should happen sooner rather than later. Mr Prosser submits that Mr Embiricos' evidence would only be relevant to the domicile point.

34. I have found that the hearing of the preliminary issue would not be relatively short.

35. As regards delay, the practice of the Tribunal is not to set down a hearing until after evidence has been exchanged. The Tribunal's standard directions generally provide for witness statements to be exchanged roughly ten weeks after HMRC have provided their Statement of Case (something which is yet to occur in this appeal), and for the parties subsequently to provide dates to avoid for a hearing in a window starting approximately six months after the delivery of the Statement of Case and ending ten months after the delivery of the Statement of Case. This timetable may be extended if the parties seek (and are granted) extensions of time for delivery of their documents and witness statement. Given the nature of the issues in this appeal, I consider that it is likely that extensions of time would be sought, and given, for the delivery of documents and the exchange of witness statements in this case in view of the complexity of the issues.

36. The timing and duration of the hearing window will depend on the time estimate for the hearing. Longer hearings generally require a longer hearing window for listing than shorter hearings - this is due to a number of factors, including the availability of court space and judicial resources, but in my experience the main factor governing delay in listing is usually the availability of counsel and the witnesses, rather than the availability of court space (providing the hearing is to take place at one of the Tribunal's principal venues) or judicial resource. It seems likely that both parties will be represented by leading and junior counsel at substantive hearings. Their more limited availability (and the availability of witnesses) for longer hearings is likely to be the main issue for a delay in listing longer hearings than shorter ones.

37. Depending therefore on when HMRC deliver their Statement of Case, I find that it is likely that a preliminary hearing of two or three days for the domicile issue would be listed in the first half of 2024. The listing of the hearing for the liability issue could not take place until the domicile issue was finally determined. Allowing time for the preparation and release of the Tribunal's decision, and on the assumption that the preliminary issue was decided in HMRC's favour and was not appealed, I find that a hearing of six days for the liability issue would probably be listed in the first half of 2025.

38. However, I have found that a more realistic time estimate for a preliminary hearing on domicile is five to seven days. In which case the window for "dates to avoid" would need to be longer to allow for the more limited availability of counsel and the witnesses for a longer hearing. I find that it is likely that a preliminary hearing of five to seven days for the domicile issue would be listed in the middle of 2024. The listing of the hearing for the liability issue could not take place until the domicile issue was finally determined. Allowing time for the preparation and release of the Tribunal's decision, and on the assumption that the preliminary issue was decided in HMRC's favour and was not appealed, I find that a hearing of six days for the liability issue would probably be listed in the middle of 2025.

39. If instead, all issues were to be determined at a single full hearing lasting eleven to thirteen days, I find that this would probably be listed towards the end of 2024.

40. Whilst I recognise the point raised by Mr Prosser in respect of Mr Embiricos' age, given my findings on the likely dates for listing a preliminary hearing when compared with the likely dates for listing a full hearing, I find that a delay of around six months is unlikely to make a material difference to the quality of his evidence or the risk of his death in the interim. Indeed, I consider that there is a possibility that Mr Embiricos may need to give evidence in respect of the liability issue (should the commerciality of trusts and underling entities be in dispute) which would suggest that it would be better for a full hearing to be listed in order to avoid risk of delay whilst any appeals against the decision on the preliminary issue are resolved (this risk is addressed in more detail below).

41. I find that, on balance, the application of this criterion weighs against directing a preliminary hearing under this criterion.

Could separate determination of the issue adversely affect determination of the other issues?

42. Mr Purnell submits that there is a risk that directing the hearing of a preliminary issue could adversely impact HMRC's continuing enquiries into Mr Embiricos' returns for 2014/15 and 2015/16, and to obtain disclosure of Mr Embiricos' overseas income and gains for 2013/14 (the year under appeal). Both parties recognise that the information sought in the 2019 information notice would not give complete disclosure of all of Mr Embiricos' overseas income, gains, and assets for tax purposes. In particular, it does not seek information about any trusts of which Mr Embiricos may be a settlor or beneficiary. HMRC are therefore likely to require additional information in order to determine the quantum of tax at issue if the domicile issue is decided in their favour.

43. Such information (relevant to the liability issue) could be sought by an information notice in respect of the open years under enquiry, or by an application to the Tribunal for disclosure in respect of the assessment under appeal. Mr Purnell's submission is that if HMRC sought such information, it would be challenged by Mr Embiricos on the grounds that it was unreasonable for HMRC to seek this information unless and until the domicile issue had been decided in HMRC's favour. It is not disputed that Mr Embiricos has previously successfully challenged HMRC's requests for information (entirely in accordance with his rights). Because the periods under enquiry and the period under appeal are a considerable time ago, Mr Purnell

submits that there is a material risk that this information may be lost Mr Embiricos does not have to respond to the information requests until after the domicile issue is determined. There are in addition risks due to Mr Embiricos' age, such as risk of failing memory or even death.

44. Mr Purnell submits that the requirements of the overriding objective in FTT Rule 2 have to be applied equitably to both parties, and that I have a duty to ensure that both parties are treated fairly and justly – which would include ensuring that HMRC are not fettered in their overall powers relating to the collection and management of taxes by (effectively) preventing them from being able to obtain information about Mr Embiricos' overseas income and gains (including income and gains that may be attributable to him as a settlor or beneficiary of overseas trusts) – and ordering a preliminary hearing on the domicile issue would have the effect of fettering HMRC from obtaining information on the liability issue until after the domicile issue was resolved.

45. Mr Prosser's response is that any challenge by Mr Embiricos would end up before this Tribunal, either as a hearing in respect of HMRC's application for disclosure, or as an appeal against the information notice. In either case, it would be up the Tribunal to determine whether HMRC's notice or application should succeed. In making that determination the Tribunal would take account of the risk that information might no longer be available once the domicile issue was determined (given the lapse of time, or Mr Embiricos' age – and the risk of failing memory or even death).

46. Mr Prosser also submits that it is not open to me to consider the impact of directing a preliminary issue on the progress of HMRC's enquiries into the 2014/15 and 2015/16 tax years. These are not before the Tribunal, and it is no part of the Tribunal's objects (including the overriding objective) to manage the relationship of HMRC with taxpayers outside appeals and applications before the Tribunal.

47. I agree with Mr Prosser. First, I have no jurisdiction in respect of the open enquiries. These are not before the Tribunal. Rule 2, which sets out the overriding objective, is limited to "cases" before the Tribunal, and is therefore not engaged in respect of the open enquiries.

48. In the event that HMRC were to issue further information notices in respect of the open enquiries and Mr Embiricos were to appeal against them, then those would become "cases", and the Tribunal would (at that time) need to consider the grounds of Mr Embiricos' appeal and the reasons why HMRC required the information. It may be that an argument that it was necessary for the relevant information be provided in order to ensure that it was preserved (notwithstanding that Mr Embiricos' domicile status was before the Tribunal) may weigh in favour of dismissing a potential appeal against the notices – but that would be for the Tribunal to decide at the time on the basis of the evidence and submissions made at that time.

49. As regards applications by HMRC for disclosure in respect of this appeal – again, if Mr Embiricos were to challenge the application, the Tribunal would need to consider the application on its merits at that time (taking account of the overriding objective), and (if asserted by HMRC) the risk that information might dissipate by the time a hearing in respect of the liability issues were to be listed.

50. I find that this criterion does not weigh against directing a preliminary hearing.

Is there a risk of overall greater delay?

51. Mr Purnell submits that there is a risk of an overall greater delay if the Tribunal's decision on the preliminary issue were to be appealed to the Upper Tribunal (and potentially onwards to the Court of Appeal and the Supreme Court).

52. The timetables given above are inevitably something of a "finger in the air" exercise. And they also assume that the Tribunal's decision on the domicile issue is not appealed.

53. Mr Prosser submits that an appeal is highly unlikely, given that appeals only lie to the Upper Tribunal on matters of law and not on matters of fact. As the issues in dispute between the parties will be factual (given that the application of the law on domicile of choice is not in dispute), an appeal could only realistically be made on an *Edwards v Bairstow* basis, which was highly unlikely.

54. Mr Purnell disagrees. He submits that the Tribunal will have to address issues of mixed law and fact, and questions such as the "adhesiveness" of statements of intention are questions of law. Mr Purnell submits that it is a requirement of HMRC's litigation policy that they file an appeal against any tribunal decision where counsel advise that there is a greater than 50% prospect of success. He notes that Mr Embiricos has challenged and appealed closure notices and information notices in respect of the open enquiries, and submits that it is likely that Mr Embiricos would appeal against any decision of this Tribunal if he were advised that the appeal was arguable.

55. I disagree with Mr Prosser's assessment that the issues with which the Tribunal would have to grapple in determining Mr Embiricos' domicile are likely to be pure issues of fact (against which no appeal lies), I agree with Mr Purnell that the Tribunal will have to address mixed issues of fact and law, in respect of which a right of appeal could arise. I am not sure that Mr Purnell's submissions accurately reflects HMRC's policy on appeals – but I recognise that (given the amounts involved) it is possible (indeed likely) that either party would appeal against a decision that went against them if they thought that there was a realistic prospect of success. There is therefore a significant possibility that the hearing on liability issues could be delayed pending the final resolution of the domicile issue on appeal. Although it is an extreme case, I note that the *Gaines-Cooper* litigation has only recently returned to the First-tier Tribunal for the determination of quantum matters – the original hearing of the preliminary issue of domicile and residence having taken place in 2006, and Mr Gaines-Cooper having died in the intervening period.

56. I find that there is a material risk of overall delay by ordering a hearing of a preliminary issue. If all issues are addressed at one full hearing, it is likely that a final decision at first instance will be released following a hearing towards the end of 2024. However, if a preliminary hearing is directed, and that preliminary issue is appealed, the liability issue is unlikely to be resolved (at first instance) until early 2026. I find that there is a material risk that directing a preliminary hearing could significantly delay the resolution of this appeal at first instance.

Could a preliminary hearing mean no further hearing will be required?

57. A determination of domicile as a preliminary issue (if decided in HMRC's favour) will not dispose of all the issues in the appeals, and so a further hearing would be required to resolve the liability issue. If, however, the domicile issue is resolved in Mr Embiricos' favour, that will resolve the appeal, and no hearing on the liability issue will be required. I find that it is clear from [28(6)] of *Wrottesley* that there is no requirement that a preliminary hearing must be determinative of the entire proceedings. The Upper Tribunal only stated that the First-tier Tribunal must consider whether there was any possibility that determination of the preliminary issue could mean that there was no need for a further hearing. This criterion is satisfied.

Would a preliminary hearing reduce costs, or the time required for preparation or substantive hearing?

58. The submissions of both Mr Prosser and Mr Purnell are that there is little (if any) overlap in the matters to be resolved in relation to domicile or liability.

59. Mr Purnell referred me to paragraph 11 of Lord Hope's speech in *Boyle* (cited above) and the risk that separating out the different elements of the appeal will increase costs and cause

delay. I have found that there is a material risk of delay. I find also that there is a material risk of an increase in the costs incurred by the parties if the domicile issue is heard as a preliminary issue. This is because the domicile issue could be appealed separately from an appeal on the liability issue – resulting in two separate "chains" of appeals to the Upper Tribunal (and possibly beyond), rather than a single chain of appeals in respect of the case as a whole.

60. I find that not only is the resolution of the domicile issue as a preliminary issue unlikely to reduce the time required in relation to the liability issue, but also that dealing with the domicile issue at a preliminary hearing carries the risk of increased costs and delay. I find that this criterion weighs against directing the hearing of a preliminary issue.

Is a preliminary hearing consistent with the overriding objective?

61. In considering whether to deal with an issue as a preliminary issue, the Tribunal must seek to give effect to the overriding objective of the FTT Rules to deal with cases fairly and justly (rule 2(1)). That objective includes dealing with the case in ways that are proportionate to the complexity of the issues and avoiding delay so far as compatible with proper consideration of the issues.

62. I have addressed the parties' submissions in relation to HMRC's information powers above, and have found that directing a preliminary hearing would not engage the overriding objective as regards HMRC's open enquiries. As regards any applications that HMRC might make for disclosure in relation to the appeal against the discovery assessment, the overriding objective will need to be considered and applied by the Tribunal in relation to any such application as and when such applications are made.

63. I find that given the complexity of the issues before the Tribunal and the amounts involved, it would not be disproportionate to direct a preliminary enquiry. However, I have found that making such a direction carries a material risk of delaying the overall resolution of the appeal, and that this risk weighs more heavily against holding a preliminary hearing than the fact that such a hearing would not be disproportionate to the issues in dispute. Overall, I find that the requirements of the overriding objective favour do not favour holding a preliminary hearing.

CONCLUSION ON PRELIMINARY HEARING

64. Having weighed up the various factors above, I consider that criteria supporting having a preliminary hearing on domicile are outweighed by the contrary factors. Mr Embiricos' application that there should be a preliminary hearing of the domicile issue is dismissed.

EXTENSION OF TIME FOR SERVICE OF STATEMENT OF CASE

65. HMRC's amended application was that the appeal be stayed until 2 May 2023 (being 60 days after the due date for service by Mr Embiricos of the information required by the information notice). I indicated to Mr Purnell that I would be reluctant to direct a general stay in this matter for such a length period of time. At my suggestion he re-amended the application to be instead an application for an extension of time for service of the Statement of Case until 2 May 2023.

66. Mr Purnell submits that HMRC need this time in order to digest the information supplied by Mr Embiricos which will be required for the preparation of their Statement of Case.

67. Mr Prosser did not raise any procedural objection to either the amendment or reamendment of HM'C's application.

68. He noted that the information sought by the information notice relates to the open enquiries into the 2014/15 and 2015/16 returns and does not relate to the discovery assessment. And as HMRC issued the discovery assessment in March 2021, he submits that they should be

able to set out the basis on which that assessment was issued on the basis of the information in their possession in March 2021. Mr Purnell's response to this submission is that some of the information sought be the information notice (such as details of bank accounts and sources of income) may be relevant to the 2013/14 tax year as well.

69. I note that the Tribunal has power to increase as well as decrease (or overturn) tax assessments. Should it transpire that information provided by Mr Embiricos during the course of this appeal (or at the hearing) justify an increase in the amount of the discovery assessment, then HMRC could apply to amend their Statement of Case, or the Tribunal could (of its own motion) increase the tax assessed.

70. I agree with Mr Prosser that HMRC should be able to prepare and file their Statement of Case on the basis of the information already in their possession, without the need for the information required by the information notice.

71. However, I also consider that it is in the interests of fairness and justice that the Statement of Case filed by HMRC should not have to be the subject of frequent amendment. To the extent that the responses to the information notice are relevant to the Statement of Case, it would be better if they were incorporated into the Statement at the outset, rather than the Statement having to be later amended to incorporate them. I find that the dispute before this Tribunal would be conducted more efficiently if HMRC were able to utilise the information to be provided by Mr Embiricos in the preparation of their Statement of Case.

72. I therefore grant the extension of time sought, and direct that HMRC should file their Statement of Case by 2 May 2023.

NEXT STEPS

73. Typically, the Tribunal will issue directions in a standard form following the filing of the Statement of Case. However, it is likely that the timetable imposed by the Tribunal's standard form directions will not be appropriate for an appeal of this nature. It will therefore be more efficient for the parties to seek to agree directions appropriate to the circumstances of this case for the Tribunal to review and approve. I direct that the parties seek to agree draft directions for the future conduct of this appeal, and that such draft directions be filed with the Tribunal within six weeks of the date on which this decision is released. In the event that the parties are unable to agree on a draft, they are each to serve their respective drafts on each other and on the Tribunal within 6 weeks of the release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 07th DECEMBER 2022