Neutral Citation: [2023] UKFTT 00279 (TC)

Case Number: TC08753

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Location - Edinburgh

Appeal reference: TC/2022/02199
TC/2022/01282

*PROCEDURE – applications to strike out – alleged breach of the Legal Services Act 2007 – whether HMRC officers are parties to proceedings – yes – Tribunal Rules pre 1 January 2010 – whether restrictions – no – whether reserved legal activities – no – applications refused*

**Heard on:** 20 December 2022
**Judgment date:** 10 March 2023

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**

**Between**

**ASSET HOUSE PICCADILLY LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Rory Mullan, KC and Stephen Hackett of Counsel, instructed by Griffin Law

For the Respondents: Phillip Simpson, KC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

**INTRODUCTION**

1. The issue before the Tribunal is what the appellant describes as two materially identical strike-out applications ("the Applications"). The Applications are respectively dated 30 August 2022 for TC/2022/02199 ("the First Appeal") and 21 September 2022 for TC/2022/01282 ("the Second Appeal"). Should the Applications be successful the appellant also sought various ancillary orders.

2. On 7 September 2022, I had refused an application dated 30 August 2022, and opposed by HMRC on 2 September 2022, to sist the Second Appeal pending the result of the Application in the First Appeal. Judge Cannan had directed on the same date that the Application in the First Appeal should be treated as a preliminary matter in those substantive proceedings. Judge Cannan then case managed both appeals and listed this hearing for both Applications.

3. The appellant had unsuccessfully attempted to challenge the case management decisions by Judge Cannan that the Applications be listed together before me to be heard in Edinburgh.

4. In terms of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") the Applications should in fact be described as Applications to bar the respondents ("HMRC") from the proceedings. Hereinafter I shall simply refer to the applications as ("the Applications") but they are applications to bar.

5. HMRC vigorously object to both Applications.

6. The substantive issue in both appeals is an appeal against Information Notices.

7. In the Second Appeal, the Notice was issued on 6 May 2021 under Schedule 36 Finance Act 2008 and related to enquiries into the appellant's corporation tax returns for the accounting periods ended 31 August 2017 and 2018.

8. In the First Appeal, the Notice was issued on 15 July 2021 under paragraph 40, Schedule 16 Finance (No 2) Act 2017 and Schedule 36 Finance Act 2008 and relates to HMRC's suspicions that the appellant was an "enabler" of what were alleged to be abusive tax arrangements.

9. No arguments on the merits of either appeal were advanced in this hearing.

10. The Applications are predicated on the basis that HMRC, and those litigating for them, are conducting themselves inconsistently with the restrictions on the conduct of reserved legal activities provided for in the Legal Services Act 2007 ("LSA"). That is on the basis that these litigations have been conducted "at least partially in England" since the LSA has effect only in England and Wales.

11. The two litigators of HMRC who have conduct of the appeals are not solicitors. The appellant argues that because they are not solicitors they are in breach of section 14(1) LSA in that they had been and continue to be engaged in carrying on a reserved legal activity, namely the conduct of litigation before the Tribunal.

12. The appellant argues that that is an abuse of process and that in the interests of public policy the Tribunal should strike-out HMRC's Statement of Case in terms of Rules 8(3)(b) and 8(7) of the Rules.

13. I heard no evidence. I had Skeleton Arguments from both Mr Hackett and Mr Simpson, KC. I had the Hearing and Supplementary Bundles for the Substantive appeal in the Second Appeal and an Authorities Bundle.

**The appellant**

14. The appellant is a Scottish registered company. The address given on the Notices of Appeal was in Edinburgh and, as the appellant stated in its application for permission to appeal the case management decisions to the Upper Tribunal dated 15 November 2022, both hearings were listed for determination in Edinburgh.

15. In the Application for the Second Appeal the appellant requested that the Application and the substantive appeal be transferred to London.

16. The substantive appeal in the First Appeal remained listed to be heard in Edinburgh immediately following this hearing.

17. Mr Hackett argues that the appellant's solicitors are based in England, as are the appellant's trading office and staff. The appeals were lodged by those solicitors.

**The HMRC litigators**

18. Both litigators are based in England and it is a matter of common ground that neither are solicitors and nor were they supervised by a solicitor. They have conducted litigation in the sense that they have, for example, both served and received documents and they have lodged Statements of Case. They have at all times believed that they were complying with the law and there has been no suggestion that at any time they have acted in any way in bad faith or negligently or inappropriately.

19. It is accepted that both are officers of HMRC.

20. They appear both north and south of the border handling cases from all parts of the UK.

**Elder v HMRC [2014] UKFTT 728 (TC) ("Elder")**

21. Although the topic of the LSA does not feature therein because Rule 11 of the Rules was the issue, Mr Simpson, KC relies on paragraphs 45 to 56 of *Elder* where, in summary, Judge Cannan stated that:-

> (a) Section 2(1) Commissioners for Revenue & Customs Act 2005 ("CRCA 2005") provides that HMRC may appoint staff to be known as officers of HMRC albeit not all employees of HMRC are officers.
>
> (b) Section 2(4) CRCA 2005 provides that "anything (including anything in relation to legal proceedings) begun by or in relation to one officer of Revenue and Customs may be continued by or in relation to another".
>
> (c) Section 13(1) provides that "an officer of Revenue and Customs may exercise any function of the Commissioners".
>
> (d) Rule 1(3) of the Rules defines a "party" as an appellant or respondent in proceedings before the Tribunal and a "respondent" is defined, for present purposes, as "HMRC", that is "Her Majesty's Revenue and Customs" (now, of course His Majesty's Revenue and Customs).
>
> (e) Section 4 CRCA 2005 provides that "the Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs".
>
> (f) In light of those provisions it is clear that an officer may <u>conduct</u> Tribunal proceedings on behalf of HMRC. The officer does not do so as a representative, for the purposes of Rule 11 s(he) does so as a party to the proceedings.

(g) The officer's authority flows from the position as an officer of HMRC exercising HMRC's function of defending appeals.

22. Mr Hackett argued that because that case did not address the LSA it was neither instructive nor determinative.

23. I disagree.

24. As Judge Cannan pointed out at paragraph 48 of *Elder,* section 4 CRCA 2005 makes it clear that the officers are part of HMRC and therefore parties to any proceedings. Given that finding the LSA is not relevant.

25. I cited *Elder* when I declined to sist the Scottish proceedings and, unsurprisingly, I agree with Mr Simpson that it is the short answer to the arguments advanced by the appellant. The officers are parties to the litigation and HMRC does not require a solicitor or representative unless they choose to appoint same.

26. Therefore, in my view, the Applications are entirely without foundation and cannot succeed.

27. However, in case I am wrong in that, I must consider the other arguments and the starting point is the law.

**The Law**

28. Section 14(1) LSA reads:-

"(1) It is an offence for a person to carry on an activity ("the relevant activity") which is a reserved legal activity unless that person is entitled to carry on the relevant activity."

29. Section 12(1)(a) and (b) LSA define "reserved legal activity" as including "the exercise of a right of audience" and "the conduct of litigation".

30. Section 13 LSA provides that whether a person is entitled to carry on a "reserved legal activity" is to be determined solely in accordance with LSA and that person is an "exempt" or an "authorised" person in terms of that activity.

31. Section 207(1) LSA defines "court" as including "a tribunal that was (to any extent) a listed tribunal for, or for any of, the purposes of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 (functions etc of Administrative Justice and Tribunals Council) immediately before the coming into force of the repeal of that Schedule". The First-tier Tribunal ("FTT") is such a listed Tribunal.

32. Section 212(1) LSA states that the territorial scope of all relevant provisions of the LSA is restricted to England and Wales.

33. Paragraph 4(1) Schedule 2 LSA defines "conduct of litigation" as meaning:-

"(a) the issuing of proceedings before any court in England and Wales;

(b) the commencement, prosecution and defence of such proceedings; and

(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)".

34. Paragraph 4(2) of Schedule 2 LSA provides:-

"4(2) But the '*conduct of litigation*' does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction is placed on the persons entitled to carry on that activity."

There is an identical provision *mutatis mutandis* in paragraph 3(2) Schedule 7 LSA in relation to rights of audience.

35. Paragraph 2 of Schedule 7 LSA states that the "appointed day" for that purpose was the day on which section 13 LSA came into force.

36. Article 2(b)(i) of the Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Savings Provisions) Order 2009 means that section 13 LSA came into force on 1 January 2010. At that point both the FTT and the Rules were operational and had been for some time.

37. The Courts and Legal Services Act 1990 ("CLSA") was the predecessor to the LSA and insofar as relevant provided for an exemption in:-

(a) Section 27(b) and (c) for rights of audience where the court has granted same, and

(b) In section 28, where in similar terms to section 27, it is provided that:-

> "a person shall have a right to conduct litigation in relation to any proceedings in the following cases –
>
> …
>
> (c) where paragraph (a) does not apply but he has a right to conduct litigation granted by that court in relation to those proceedings."

38. Section 22(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") requires the Tribunal Procedure Committee to make rules *inter alia* governing the "practice and procedure to be followed" in the FTT. The power to make those rules is to be exercised with a view to securing that "justice is done", the "tribunal system is accessible and fair", proceedings are "handled quickly and efficiently" and the rules are simple and simply expressed (section 22(4)(a) – (d)).

39. Section 22(3) states that Schedule 5 TCEA makes further provision about the content of the Rules and Schedule 5 expressly states that "The generality of section 22(1) is not to be taken to be prejudiced" by that Schedule or any of the provisions of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"). At paragraph 9 under the heading "Representation" It reads:- "Rules may make provision conferring additional rights of audience before the First-tier Tribunal….".

40. Rule 11 of the Rules reads:-

> "**Representatives**
>
> **11.—**(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
>
> (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.
>
> (3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.
>
> (4) A person who receives due notice of the appointment of a representative—
>
> (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person (other than an appointed representative) who accompanies a party in accordance with paragraph (5).

(7) In this rule "legal representative" means [a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act], an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland."

Previously, and specifically immediately prior to 1 January 2010, sub-section (7) read:-

"In this rule 'legal representative' means an authorised advocate or authorised litigator as defined by section 119(1) of the Courts and Legal Services Act 1990, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland."

**The LSA arguments**

41. In the response to the Application in TC/2022/02199, HMRC pointed out that LSA did not apply in Scotland whereupon, having previously requested that the appeals be heard in Scotland, the appellant sought to have both appeals transferred to London. By Directions dated 20 October 2022, Judge Cannan directed that the Applications and the appeal be heard together in Edinburgh.

42. Mr Hackett concedes that it is not suggested that attendance at the hearing of the Applications, nor any other activity undertaken in Scotland, infringes the LSA or indeed that the LSA has any application in Scotland.

43. It does not and yet, as Mr Simpson pointed out, ironically both Counsel for the appellant were appearing in Scotland but were English qualified barristers.

44. Although Mr Hackett advanced various arguments about what amounted to "conduct of litigation", Mr Simpson does not dispute, and he is entirely correct not to do so, that the officers' role is to litigate; the clue is in their job description!

45. The issue is whether what they do falls within the meaning of "conduct of litigation" in paragraph 4, of Schedule 2 LSA.

46. The starting point is whether the litigator's activities fall within the provisions of paragraph 4(1), that is whether they are defending proceedings and performing any ancillary functions in relation thereto before a "court in England and Wales".

47. Mr Simpson's argument is that what is important is the location of the court and not the location of the litigators. Mr Hackett disagrees entirely and says that what matters is where the individual is physically present when working.

48. I heard lengthy argument on where the "conduct of litigation" occurs.

49. Both Counsel canvassed the issues around this Tribunal being a UK Tribunal with jurisdiction in all parts of the UK with a central administration in England but courts in all parts of the UK. Furthermore the Tribunal conducts many hearings by video.

50. Obviously, the appellant argued that if the HMRC officer charged with conduct of an appeal was sitting in an office in England, then the LSA applied. Mr Hackett had some difficulty in dealing with the concept of an officer "hot desking", as we know happens, in offices in Scotland or Northern Ireland where the LSA has no jurisdiction.

51. He also had some difficulty with the issue where cases which are initially processed in England are then listed to be heard in Scotland or Northern Ireland. That is a regular occurrence and these appeals are a good example. His only answer was that it depended where the person drafting the Statement of Case was based.

52. Given home working with Covid, and I raised that spectre, that is simply a lottery.

53. The Tribunal regularly sees Scottish litigants, as was the case with these cases, where the registered office is in Scotland and the appellant was seeking hearings in Scotland but the preliminary conduct of the litigation is handled by litigators based elsewhere in the UK. The conduct of the litigation in terms of physical presence could be anywhere until the final hearing.

54. Mr Simpson argued that once an appeal is listed for hearing then it should be the law of the location of the hearing that applies. Mr Hackett disagrees as that would leave the period before listing in limbo and it might be a case where the litigators were based in Scotland but the hearing was listed for England or Wales.

55. I have highlighted some of the perceived problems with the argument that it is the location of the litigator or the hearing at any point that dictates whether the LSA has any application. However, the real question is the exception to paragraph 4(1) found in paragraph 4(2) ("the exemption").

56. The exemption is available only where, prior to the appointed day when section 13 of, and Schedule 2 to, the LSA came into effect, namely 1 January 2010, "no restriction" was placed on those litigating. (For the avoidance of doubt, Mr Hackett correctly departed from the previous argument for the appellant that the appointed day had been 7 March 2008.) As can be seen from paragraphs 37 to 39 above, the CLSA had provided there was no restriction where the court in question had granted a right of audience and right to litigate. The TCEA has provided the Rules.

57. Mr Hackett argues that the Rules do not use the words "conduct litigation" or "right of audience" and Rule 11 is merely a mechanism to permit representation. Furthermore, it contains a restriction in that Rule 11(2) requires notification to be made of the appointment of a representative.

58. He argues that the Rules do not expressly remove all, and any, restrictions but merely allow a representative to do "anything permitted or required to be done by a party under these Rules" and that does not amount to no restrictions.

59. He relies on the fact that Schedule 5 TCEA sets out provision for the Rules and at paragraph 9 under the heading "Representation" refers to rights of audience but not the conduct of litigation.

60. If Rule 11 did amount to no restrictions, as HMRC argue, then it is *ultra vires* since a statutory offence in relation to conduct of litigation cannot be "swept away" by procedural rules.

61. Mr Simpson argues that the Rules contained no restriction. Although I am not bound by their decision, Judge Beare and Ms Shillaker in *Porter v HMRC* [2018] UKFTT 264 (TC) ("Porter") also found that there were no restrictions. I adopt but do not repeat their reasoning here.

62. I agree with Mr Simpson for the following reasons:-

(a) The enabling legislation in section 22(1) could not be more simply or widely expressed and that is reinforced by paragraph 1 of Schedule 5 which ensures that it is not in any way constrained.

(b) I do not find the argument that because paragraph 9 refers to rights of audience but does not include conduct of litigation, thereby meaning that Parliament did not envisage conduct of litigation being the subject matter of rules, to be a sound argument.

(c) It is trite law that the Tribunal has no Judicial Review function and therefore Rule 11 and the enabling legislation in TCEA are subject to the normal rules of statutory interpretation.

(d) The Rules govern the commencement, conduct and disposal of proceedings. The purpose of Rules of Procedure was explained by Lord Woolf CJ in *R v Sekhon* [2003] 1 WLR 1655 at paragraph 21 as being "… to provide a convenient and just machinery enabling the court to exercise its jurisdiction." Rule 11 must be read in the context of all of the Rules and, in particular, Rules 2 and 5.

(e) The premise of Rule 11 is that a representative can do anything that a party can do. Mr Simpson is correct in stating that that includes lodging a Notice of Appeal (Rule 21(1)), serving a Statement of Case (Rule 25(1)) and serving other documents in the course of proceedings (for example, Rules 26(2), 27(2) and 35(4)) and all of those Rules existed prior to 1 January 2010. Those are all steps in the conduct of litigation and Rule 11 gives representatives, whether legally qualified or not, the power to take all those steps in a litigation. These Rules taken with Rules 2 and 5 implement section 22(4) TCEA.

(f) The CLSA covered both rights of audience and conduct of litigation, as does the LSA. The TCEA and the Rules were in force before section 13 to, and Schedule 2 of, the LSA came into force.

(g) I find that the conduct of litigation is encompassed by the Rules which was Parliaments express intention and it is most certainly not excluded. Rule 11 is not restricted to a right of audience. It encompasses both.

(h) I do not accept that the requirement in Rule 11(2) is a restriction on the conduct of litigation. It is in the same vein as the "administrative" requirements included in other rules. It is simply part of the "machinery" in the words of Lord Woolf and in any event that requirement can be waived by the Tribunal.

63. I simply do not accept Mr Hackett's sweeping assertion that the Rules are merely procedural and the statutory offence in the LSA, which is a substantive primary statutory provision, cannot be "swept away" by secondary legislation.

64. That is to ignore the terms of the enabling legislation.

65. For all these reasons I find that the exemption does apply because immediately before the appointed day there was no applicable restriction.

66. There is therefore no need to address the alleged issues surrounding where litigation is conducted for the purposes of the LSA, but if I had to decide the matter I do not accept the argument that it is where the representative is based. That would certainly be open to extensive abuse.

**Abuse of process**

67. Lastly, if I am wrong on the LSA, Mr Hackett advanced an oral argument that if the officers had acted contrary to the LSA that would be an abuse of process because technically any such breach carried criminal sanctions. That would be contrary to public policy if such a breach were to be implicitly sanctioned by the Tribunal taking no action.

68. He relied on Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ("Hunter") where he explained the rationale for striking-out as being:-

> "… to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its rules of procedure, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

69. Mr Hackett did not persuade me that the fact that the litigators were not legally qualified had caused any unfairness to the appellant let alone manifest unfairness. Indeed it was freely admitted that no aspersions were cast on the conduct of the litigation by the litigators.

70. I cannot accept that there is any question of bringing the administration of justice into disrepute. As Mr Simpson pointed out, on any given working day, there are non-lawyers conducting litigation in the many and varied Tribunals which operate in England and Wales.

71. *Hunter* was decided a long time ago and does not reference Article 6 of the European Convention on Human Rights ("EHCR.").

72. The only basis on which HMRC could be barred from proceeding in this matter would be in terms of Rule 8(3)(b) which is where it "has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly".

73. I pointed out to Mr Hackett that the decision to strike-out proceedings or, in this case, bar HMRC, must be a proportionate response to the conduct that had prompted it.

74. Striking-out is often described as a draconian remedy and modern thinking is that it should only be used as a last resort. I take those principles from the judgment delivered by Lord Clarke in *Fairclough Homes Limited v Summers* [2012] UKSC 26 and particularly at paragraph 61 where he states that "The test in every case must be what is just and proportionate."

75. Finally, as far as public policy is concerned, that is set out in section 24 TCEA (see paragraph 38 above).

76. In my view it is inimical to those principles, which are at the heart of the Tribunal system, to suggest that litigation in the FTT must only be conducted by solicitors if any aspect of the litigation takes place in England and Wales. Here we are dealing with HMRC which is an arm of the State and has resources, albeit limited, but if the appellant is correct then Welfare Rights, CAB, and numerous other organisations would be unable to conduct litigation before Tribunals.

77. I consider the argument on abuse of process to be entirely without merit.

**Decision**

78. For all these reasons the Applications are refused in their entirety.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

79. 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.

**ANNE SCOTT**
**TRIBUNAL JUDGE**

**Release date: 10th MARCH 2023**