Neutral Citation Number: [2024] EWHC 1102 (Admin)

Case No: AC-2023-LON-000713

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2024

Before :

MR JUSTICE SHELDON

- -

Between :

OCULUS LTD	**Claimant**
- and -	
(1) COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Defendants**
(2) GRIFFITH ANDERSON LTD	

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Setu Kamal (instructed by **Direct Access**) for the **Claimant**
Alan Bates (instructed by **HMRC Solicitor's Office**) for the **First Defendant**
The Second Defendant did not appear and was not represented.

Hearing dates: 11 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Sheldon:

1. I have before me an application for reconsideration of a decision not to grant the Claimant, Oculus Limited, interim relief against the Commissioners for His Majesty's Revenue and Customs ("HMRC"). Interim relief was refused on the papers by Collins-Rice J on 13 February 2023. Along with that renewal application, I will also determine the question of permission to proceed with the Claimant's application for judicial review, as there is much overlap between the two questions.

Background

2. The background to this matter is that the Claimant is a company registered in Malta. It provides the services of its workers to third parties. It operates in the United Kingdom through two agents: Griffith Anderson Ltd ("GAL"), and Umbrella Contracts Ltd.

3. On 29 September 2022, the HMRC wrote to GAL indicating that it was contemplating issuing a Scheme Reference Number ("SRN") to GAL under the provisions dealing with the disclosure of tax avoidance schemes ("the DOTAS regime") set out in the Finance Act 2004 (as amended).

4. The effect of issuing an SRN was explained by Mr Kamal, Counsel for the Claimant, as follows:

   (a) the Claimant's agent would be required to communicate the SRN and other 'prescribed information' to its workers within 30 days;

   (b) the issuance of the SRN places a threefold obligation upon the Claimant's workers:

   (i) the Claimant's workers would have to provide 'prescribed information' to any person: (1) who the client might reasonably be expected to know is or is likely to be a party to the arrangements or proposed arrangements; and (2) who might reasonably be expected to gain a tax advantage in relation to any relevant tax by reason of the arrangements or proposed arrangements. The information prescribed for these purposes is the name and address of the promoter; a description of the arrangements; the SRN; and the date on which the SRN was issued.

   (ii) the Claimant's workers would have to provide further 'prescribed information' to the Claimant. This is specified as the Unique Tax Reference Number of the worker.

   (iii) the Claimant's workers would have to provide further 'prescribed information' relating to the tax advantage to HMRC: (1) the SRN; and (2) the year in which the tax advantage arises. This must be included in the worker's tax return.

5. Among other things, therefore, the effect of these information provisions would be that HMRC would know which taxpayers were connected with a particular scheme.

6. The background to why HMRC was contemplating issuing an SRN to GAL is that HMRC suspected that GAL (and Umbrella Contracts Ltd) were promoting arrangements which were, or might be expected, to give rise to a "tax advantage" to the scheme users.

7. In the letter of 29 September 2022, HMRC explained that it was its understanding that:

> "Users of the arrangements (Scheme Users) require an umbrella company to enter a contract with an end client to provide their services and receive payments.
>
> - The user enters into a Contract of Employment with Umbrella Contracts Ltd ("UCL") being the UK registered umbrella company.
>
> - At the same time the user is "onboarded" by Griffith Anderson Limited ("GAL").
>
> The UCL Contract of Employment stipulates that the employee will work on client assignments and in so doing will be an employee of UCL. The employment agreement provides that UCL will pay the employee at least the National Minimum Wage ("NMW") pay rate together with any commission to be paid under the Commission Plan."

8. HMRC further explained that it understood that scheme users would send timesheets to UCL after completing work for a recruitment agency or end user, and UCL would then invoice the recruitment agency or end user for the services carried out. UCL would retain a percentage of the funds paid for the services, and the balance would be paid in two ways: an amount set by the National Minimum Wage, which was paid subject to deduction of tax and national insurance contributions, and a second payment which is paid without any deductions. HMRC explained that it was its view that:

> "this scheme enables Scheme Users to obtain a tax advantage. An equivalent individual who did not enter the scheme, working for the same end clients, would have the right to receive 100% of the gross contract value relating to the services they have provided net of both income tax and NIC.
>
> By entering into the scheme, Scheme Users give up this right and in return receive a NMW salary (net of tax and NIC) and secondary payments that have not had a deduction for tax and NICs. The aggregate amounts received by Scheme Users in the form of NMW and secondary payments are higher than the net income they would have received had they not used the scheme. The principal reason for this is that tax is not deducted from the secondary payment that Scheme Users receive.
>
> HMRC has seen no evidence of the existence of any Commission Plan, which could in principle give rise to additional taxable income at some point in the future. It is therefore evident that the scheme puts Scheme Users in an economically similar position (but with less tax to pay) than they would otherwise be in . . .

> As set out above, we suspect that the arrangements enable or might be expected to enable a tax advantage because they are intended to avoid or reduce the charge to income tax on salary which Scheme Users would otherwise have received had they not entered into the arrangements.
>
> We consider this tax advantage is one of the main benefits that might be expected to arise from the arrangements. (We suspect the arrangements are also expected to avoid or reduce the amount of NICs which the employer would otherwise be required to deduct from salaries before payment to users.)
>
> In return for the expectation of obtaining the tax (and NICs) advantages, Scheme Users permit UCL to retain up to 19% of the gross contract value in respect of the services provided to arm's length clients. We consider that no rational individual would agree to give up the right to receive such a high percentage of the economic value clients pay for their services were it not for the tax (and NICs) advantages.
>
> There is no evidence to suggest that the administrative benefits you offer to Scheme Users differ to any material extent to those using the standard umbrella option and therefore it is reasonable to conclude that Scheme Users are paying for something else - the tax advantage."

9. HMRC also explained that the arrangements fell within two of the "hallmarks" of tax avoidance schemes prescribed by the Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations 2006: that is, the payment of a premium fee, and the fact that this was a standardised tax product. It was further explained that "Objectively speaking securing a tax advantage appears to be the only discernible purpose for Scheme Users entering the arrangements".

10. GAL made representations to HMRC, but on 12 January 2023, GAL was notified that an SRN would be issued and was informed of the SRN. In addition, GAL was required to send a form produced by HMRC – known as the form AAG6 – to its workers. This contains the following wording:

> "**Understanding what this means for you**
>
> You may not have been aware that you are or were involved in a tax avoidance scheme. Being involved in a tax avoidance scheme means *you may: • have to pay more in tax, interest and penalties than the scheme claims to save you • find yourself in a legal dispute with the Defendant*
>
> **Getting out of tax avoidance**
>
> If you're currently using this, or another tax avoidance scheme, *the Defendant strongly advise you to withdraw from it and can*

> *support you to do so*. If you want to withdraw from a scheme, you need to contact the Defendant".

11. It has been alleged by the Claimant that the effect of the SRN is effectively to decimate the business carried out by the Claimant through its agent GAL. The Claimant points out that the DOTAS regime imposes penalties on the Claimant and/or the workers for non-compliance with the notification obligations. On the facts of the present case, Mr Kamal, acting for the Claimant, argues that as the Claimant has around 200 workers engaged through GAL, it would be exposed to a potential penalty of £1 million merely for failing to send the form AAG6.

12. In the judicial review proceedings, the Claimant seeks to quash the SRN. As a matter of interim relief, the Claimant seeks an injunction forbidding HMRC from issuing the SRN.

Grounds of Challenge

13. The Claimant contends that the decision to notify GAL of an SRN was unlawful for a number of reasons set out in a document entitled "Grounds for Reconsideration". This document amounts to a reformulation of the grounds of challenge. HMRC does not oppose this reformulation, and I give permission for the Claimant to rely on these amended grounds for judicial review.

14. The Claimant contends that the decision to notify it of the SRN:

(1) interferes with the Free Movement of Capital, a principle of European Union law which it is said applies by way of 'direct effect' in the United Kingdom and has survived the legal arrangements associated with Brexit; it is said that the SRN presents the Claimant with three unattractive choices: ignore the SRN; comply with it and provide information; or challenge the SRN.

(2) interferes with the Right to Establish (under Article 49 of the Treaty on the Functioning of the European Union), which is protected by Article 25 of the EU-UK Withdrawal Agreement ("the Withdrawal Agreement"). The right to establish includes the right to set up a company over which one exercises control. The director of the Claimant, Stuart Brooke, resides in Malta, and his rights are said to be interfered with by the issuance of the SRN.

(3) breaches the General Data Protection Regulation ("the GDPR").

(4) breaches Article 5 of the Withdrawal Agreement, as the DOTAS regime is said to breach international law.

(5) violates the right to silence, which is said to form an integral part of Article 6 of the European Convention on Human Rights ("the Convention"); and

(6) is *ultra vires* as the requirement to send the form AAG6, which is consequent on the decision to issue the SRN, has pejorative allusions, is not justified by section 316

of the Finance Act 2004, and goes beyond what is permitted by section 312ZA of the Finance Act 2004.

A further ground of challenge to the HMRC's letter of 10 February 2023 was not pursued.

15. The Claimant contends that not only is the claim arguable for the purposes of a grant of permission, but it also gives rise to a serious issue to be tried for the purposes of interim relief. It is also contended that the balance of convenience favours the grant of the relief sought. The Claimant submits that it is more than likely that the Claimant's business will be decimated by the time of the substantive decision. Workers will leave and not return to the Claimant. Further, the Claimant may have liability for very significant penalties if the notification requirements are not complied with and may also face claims from its workers for breaches of the GDPR.

Discussion

Application for judicial review

16. I refuse the Claimant's application for permission to seek judicial review on grounds 1 to 5.

17. First, with respect to grounds 1 and 2, there is an alternative remedy. GAL had a statutory right of appeal to the First Tier Tribunal (Tax Chamber). These grounds of challenge could have been pursued by GAL in that appeal. Indeed, the Claimant has appealed the decision to issue the SRN to the First Tier Tribunal (TC/2023/00542), and the Tribunal struck out the appeal in a judgment dated 27 March 2024. It is an abuse of process for the Claimant to seek to make the same arguments in this forum that have already been dismissed by the First Tier Tribunal.

18. Second, grounds 1 to 5 are unarguable.

19. As for **ground 1**: the application of the principle of Free Movement of Capital to the Finance Act 2004 has been overridden by section 5(1) of the European Union (Withdrawal) Act 2018 ("the 2018 Act"). That section provides that:

> "The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP [Implementation Period] completion day."

The aspects of the DOTAS regime which the Claimant asserts are incompatible with the Free Movement of Capital principle were made through legislative changes enacted in 2021, which was after IP completion day (31 December 2020). As a result of the 2018 Act, the legislative changes cannot be disapplied by European Union law.

20. In any event, even if the Free Movement of Capital principle applied to the DOTAS regime, it could not sensibly be argued that it was contravened here. Member States remain free to create and to require compliance with proportionate domestic tax rules and requirements, provided that those rules do not discriminate against persons moving capital across intra-EU borders. There is no discrimination alleged here, and there was no interference with the movement of capital: there is no link here between

the movement of capital across international boundaries and warning people about the possible tax consequences of involvement in a tax avoidance scheme.

21. Further, any interference would clearly be justified and proportionate as the aspects of the DOTAS regime that the Claimant complains about are measures for ensuring compliance with domestic tax law, detecting noncompliance, and for protecting the interests of individuals who might unwittingly find themselves facing unaffordable tax bills for past tax liabilities for which their employers have failed properly to account on their behalf.

22. As for **ground 2**, interference with the right to establish, this has no application here. The SRNs are applied to a United Kingdom company: GAL. Mr Brooke's choice as to where he wishes to live, and where he wishes to set up a company are a matter for him, and these are matters to be addressed under Maltese law.

23. As for **ground 3**, the alleged breach of the GDPR, I see no basis to suggest that the processing of data is unlawful. The processing is carried out for the legitimate purposes of tax collection, and in particular the detection of noncompliance with tax rules. For any tax collection system, tax authorities must be able to gather information from the taxpayer. This is what the DOTAS regime does. This process is not arguably disproportionate.

24. As for **ground 4**, the alleged breach of Article 5 of the Withdrawal Agreement, this does not have direct effect in UK law. In any event, as Mr Bates on behalf of the HMRC put it, this argument is 'parasitic' on the earlier grounds being arguable. They are not arguable for the reasons that I have given.

25. As for **ground 5**, the violation of the right to silence under Article 6 of the Convention, the information that is sought under the DOTAS regime is for basic factual information such as the names of counterparties to transactions, and those taxpayers' Unique Taxpayer Reference numbers, so that those individuals may be identified. This does not give rise to any obligation on a person to "self-incriminate" by admitting to having committed a crime or other "criminal charge". Further, the notification of an SRN does not determine a criminal charge or impose a criminal penalty. It is an administrative measure giving rise to obligations to provide and disseminate information. It is only if this is not complied with that a penalty can be imposed.

26. As for **ground 6**, that the sending the form AAG6 is *ultra vires*, I consider that this ground of challenge is arguable.

27. The argument of the Claimant is that HMRC does not have the power to require GAL to send out the information warning taxpayers about the impact of their involvement in a tax avoidance scheme: see paragraph 10 above. It is arguable that that information is not part of the "prescribed information" that the person making the arrangements should be required to send.

28. Section 312ZA of the Finance Act 2004 provides that:

> "(1) This section applies where a person is providing (or has provided) services to another person ("the client") in

> connection with arrangements or proposed arrangements.
>
> (2) The person must, before the end of the period of 30 days beginning with the relevant date, provide the client with **prescribed information** relating to any reference number allocated in a case within section 311(3) (or, if more than one, any one such reference number) that has been notified to the person (whether by HMRC or any other person) in relation to—
>
> (a) the arrangements or proposed arrangements, or
>
> (b) any arrangements substantially the same as the arrangements or proposed arrangements (whether involving the same or different parties).
>
> (3) In subsection (2), "the relevant date" means the date on which the person has been notified of the reference number.
>
> (4) HMRC may give notice that, in relation to arrangements or proposed arrangements specified in the notice, no person is under the duty imposed by subsection (2) after the date specified in the notice."

(Emphasis added).

29. The "prescribed information" referred to is set out at regulation 6 of the Tax Avoidance Schemes (Information) Regulations 2012 ("the 2012 Regulations"):

> "(a) the name and address of the promoter or the person under the duty in section 312ZA(2);
>
> (b) the name, or a brief description of the arrangements or proposed arrangements ;
>
> (c) the reference number (or if more than one, any one reference number) allocated by HMRC under section 311 (allocation of reference number to arrangements) to—
>
> (i) the arrangements or proposed arrangements; or
>
> (ii) any arrangements substantially the same as the arrangements or proposed arrangements;
>
> (d) the date that the reference number was—
>
> (i) sent to the client by the promoter or the person under the duty in section 312ZA(2) . . . ".

It is arguable that the information in the AGG6 form -- identified at paragraph 10 above -- falls outwith the various matters set out in regulation 6 of the 2012 Regulations, in that it is not one of the matters listed in that regulation.

30. Mr Bates, for HMRC, contends that the additional information that is set out in the AGG6 can be required as there is a general power for HMRC at section 316(1) of the Finance Act 2004 to "**specify the form and manner** in which information required to be provided by any of the information provisions must be provided if the provision is to be complied with" (emphasis added).

31. I consider that is arguable that the power to "specify the form and manner" in which the information required to be provided under section 312ZA of the Finance Act 2004 (as prescribed by the 2012 Regulations) does not extend to the material referred to in the AGG6. It is arguable that "the form and manner" relates to how the prescribed information is supplied but does not empower HMRC to require additional information – including HMRC's warnings about the scheme – to be sent to the scheme users.

32. The Claimant had not particularised the arguably offending wording in its Grounds of Appeal document, or in the Grounds for Reconsideration. Nevertheless, the wording complained about was described in the oral submissions of Mr Kamal. I grant permission on this ground on condition that the Claimant amends the Grounds for Reconsideration to particularise the wording that is being complained about.

33. I do not consider that the Claimant should be refused permission on ground 6 on the basis that it lacks standing to proceed by way of judicial review. The Claimant plainly has an interest in the matter as it is, at least, indirectly affected by the issuance of the SRN and the requirement to send the AAG6 form. Whilst there are parties (GAL, and Umbrella Contracts Limited) who were directly affected, and may be better placed to bring the claim, they have not brought the claim, and so it cannot be said that allowing the Claimant to bring the claim will increase the costs of the litigation: c.f. *Jones & Ors v The Commissioner of Police for the Metropolis* [2019] EWHC 2957 (Admin) at §62. Furthermore, I consider that the lawfulness of the AGG6 form is a matter of wider interest, and it is important for the rule of law that the arguments should be tested at a substantive hearing.

Application for interim relief

34. With respect to the renewed application for interim relief, for the reasons already explained, save for ground 6, there is no arguable case and so no serious issue to be tried. Accordingly for grounds 1 to 5, the first hurdle of the test for an interim injunction in *American Cyannamid Ltd v Ethicon Ltd.* [1975] AC 396 is not overcome.

35. Further, with respect to the issuance of the SRN there is no basis for contending that the balance of convenience favours the grant of the interim relief sought by the Claimant. The SRN has been issued already and has been in effect for over one year.

36. With respect to ground 6 -- the issuance of the AAG6 form – there is a serious issue to be tried. Nevertheless, the balance of convenience does not favour the grant of interim relief. At its highest, I consider that inconvenience of prejudice to the Claimant is equally balanced with the prejudice to the recipients of the AAG6 as the form contains important information. Accordingly, the status quo should not be disturbed.

37. I accept that the sending of that form may cause damage to the Claimant in that it may lead to some workers ceasing to provide their services via the arrangement with GAL. On the other hand, the AAG6 form provides wording that protects the workers. The AAG6 form advises workers as to HMRC's concerns about the tax avoidance scheme that is being promoted and warns the workers of the impact on them if the scheme does not work. The workers may well be disadvantaged if they were deprived of that notification. This disadvantage to the workers is at least equal to the disadvantage to the Claimant in GAL being required to send the AAG6 form.

Conclusion

38. For the foregoing reasons, therefore, I dismiss the application for interim relief. I grant permission to proceed with the challenge by way of judicial review on ground 6 only, but refuse permission on grounds 1 to 5.