Neutral Citation Number: [2021] EWHC 2654 (Ch)

Case No: CH-2020-000246

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the Order of Chief Master Marsh dated 15 July 2020

Royal Courts of Justice
Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: Monday 4 October 2021

Before:

LORD JUSTICE SNOWDEN

- -

PANORAMA CASH & CARRY T/A BOOZE DIRECT

Claimant / Appellant

-and-

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Defendants / Respondents

- -

Andrew Young (instructed by **Neil Davies & Partners**) for the **Appellant**
Joshua Carey (instructed by **HMRC Solicitors Office**) for **the Respondents**

Hearing date: 25 June 2021

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APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:30 a.m. on Monday 4 October 2021.

LORD JUSTICE SNOWDEN:

Introduction

1. This was an oral hearing of the Appellant's application for permission to appeal, with the appeal to follow immediately thereafter if permission was granted. The "rolled-up" hearing was ordered by Mann J on 7 December 2020.

2. The Appellant sought permission to appeal against the Order of Chief Master Marsh dated 15 July 2020. In that Order, the Chief Master struck out the Appellant's claim against the Respondents for the tort of misfeasance in public office, and refused the Appellant's application to amend its particulars of claim.

3. There were, in short, two principal grounds of appeal. First, that the Chief Master erred by confining himself to considering only the Appellant's formal pleadings, and failed to give adequate consideration to other materials said to have been incorporated by reference. It is said that had the Chief Master given those materials adequate consideration, he would have concluded that the claim had a real prospect of success and would therefore have allowed the Appellant's application for permission to amend its pleaded case to cure any defects in the pleading. Second, it is contended that the Chief Master erred in his analysis of the law of limitation and wrongly concluded that the Appellant's claim was time-barred.

Background

4. The judgment of Chief Master Marsh described the background in considerable detail at paragraphs [3] – [18]: see Panorama Cash & Carry Limited T/A Booze Direct v The Commissioners for HMRC [2020] EWHC 1808 (Ch). For the purposes of this judgment, I set out below only the essential background relevant to the issues on appeal.

5. The Appellant is a trader in wholesale alcohol products. It was registered with HMRC from 2004 as an owner of warehoused excise goods pursuant to the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (1999 No. 1728). Those regulations empower HMRC to maintain a register of approved persons to enable them to trade in duty suspended alcohol products. They also empower HMRC, for reasonable cause, to revoke such approval.

6. In July 2010, the Appellant entered into transactions under which it purchased and then sold ten consignments of duty suspended beer. The purchaser was a Latvian company named Legata SIA. The consignments of beer were held by Edwards Beers and Mineral Bond Ltd ("Edwards"), and the beer was to be transported by an entity called Revolution International 2000 to a bonded warehouse in Belgium, operated by an entity called Simply Vodka BVBA.

7. Prior to the delivery of the consignments, it was necessary for Edwards to undertake a 'SEED' check as to Simply Vodka's standing. SEED is an acronym for 'System for Exchange of Excise Data'. Article 22 of Council Regulation (EC) No 2073/2004 of 16 November 2004 was in force at the material time and provided for each EU member state to maintain an electronic database of authorised warehousekeepers or registered traders, together with details of premises authorised as tax warehouses.

8. On 10 June 2010, HMRC confirmed to Edwards that Simply Vodka was authorised to receive the consignments of beer. Unbeknownst to both the Appellant and to HMRC, Simply Vodka had in fact ceased to trade on 4 February 2010 and should no longer have been on the Belgian database.

9. On 5 July 2010, HMRC commenced an investigation into Edwards and its customers. On 29 July 2010, HMRC discovered that the information it held about Simply Vodka on the SEED database was incorrect. By 12 August 2010, HMRC had also established that the consignments of beer sold by the Appellant had been fraudulently diverted by third parties for onward sale without the payment of duties and taxes. There is no suggestion that the Appellant was in any way implicated in the fraud.

10. On 20 August 2010, Officer McWilliam, a senior officer with HMRC, took the decision to revoke the registration of all traders involved in the transaction, including the Appellant. The Appellant sought a formal review of that decision by HMRC.

11. On 9 November 2010, the HMRC reviewing officer, Officer Donnachie, wrote to the Appellant upholding the decision of Officer McWilliam. The reasons given by Officer Donnachie for upholding the decision did not refer to the fact that Edwards had undertaken a SEED check and had been informed by HMRC that Simply Vodka was accredited by the Belgian authorities to receive the consignments of beer.

12. On 8 December 2010, the Appellant made an application to the First-tier Tribunal (Tax Chamber) (the "Tribunal") seeking to overturn the review decision of Officer Donnachie. The Tribunal heard the appeal on, variously, 5-6 November 2012, 17 March 2013 and 16-17 September 2013, with subsequent written submissions on 24 September 2013 and 1 October 2013.

13. The Tribunal determined the appeal on 8 January 2014. It concluded that the review decision was unreasonable on the basis that Officer Donnachie took into account matters he was not entitled to take into account, and failed to take into account matters he should have taken into account. As I explain below, the Tribunal does not have the power to retake the decision under appeal for itself, so the decision was remitted to HMRC for reconsideration.

14. For reasons which are unclear to me, HMRC appears not to have commenced the process for reconsideration until 31 May 2017, more than three years after the Tribunal's decision was handed down. However, upon the completion of the reconsideration process, on 10 August 2017, HMRC reinstated the Appellant's registration.

15. The net result, however, was that between August 2010 and August 2017, the Appellant was unable lawfully to operate its business trading in duty suspended alcohol products.

The decision of Chief Master Marsh

16. The Appellant's claim was issued on 20 December 2019. There were two bases upon which the claim was brought: (i) a common law claim in the tort of misfeasance in public office; and (ii) a breach of European Community law. I am concerned only with the first of those bases.

17. The Defendants applied to strike out the claim under CPR 3.4(2) on the ground that the particulars of claim did not disclose any reasonable grounds for bringing the claim or, in the alternative, under CPR 24.2 that the court should enter summary judgment for the Defendants on the basis that the claim had no real prospect of success, and there was no other compelling reason why the claim should be disposed of at trial.

18. The strike out application was heard by Chief Master Marsh on 16 June 2020. He found, and Mr Young on behalf of the Appellant accepted, both before the Chief Master and before me, that the particulars of claim were defective in so far as they related to the tort claim.

19. The Chief Master ordered that the claim and the particulars of claim be struck out and refused the Appellant permission to produce a new draft amended claim form and draft amended particulars of claim in respect of the allegations of misfeasance in public office. After summarising the Appellant's case at [28]-[29] of the judgment, the Chief Master set out his reasoning at [30]-[33] as follows:

> "30. Misfeasance in public office is a serious allegation to make. It involves an allegation that an officer or officers of a public authority has abused public power in bad faith and it must be properly pleaded and particularised. The particulars of claim do not:
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> > (1) Identify the officer or officers who are said to have committed the wrong. Although conventionally the officer in question need not be a party to the claim because the public authority will be vicariously liable, it is necessary to make clear who is said to have been the wrongdoer. The wrongdoers on the facts of this case cannot be the Commissioners because they had no involvement at all. On the basis of the pleaded case, there are at least three possible wrongdoers, Mr McWilliam, Mr Donnachie and whomever is said to have chosen not to comply with the Tribunal's Decision within a reasonable time. Mrs Kang's witness statement suggests that the complaint lies against Mr Donnachie but that will not assist the claimant in respect of paragraphs 34a (i) and (ii) of the particulars of claim.
> >
> > (2) Particularise the misfeasance. It does not suffice to assert that the original decision and the review were "unlawful", without more, or that some unnamed person or persons at HMRC chose to delay implementing the Tribunal's Decision.
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> > (3) Explain whether the claimant's case is based on targeted or untargeted malice and plead the respective elements of the tort.
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> > (4) Provide any, or least any adequate, plea of dishonesty or bad faith. Paragraphs 35 and 36 of the particulars of claim are unspecific and come nowhere to particularising the necessary mental element of the officer or officers against who the claimant wishes to claim.

> (5) Explain the basis for alleging that the delay in implementing the decision of the Tribunal was an abuse of the Tribunal's process. The notion is a curious one bearing in mind the claimant took no steps to refer the case back to the Tribunal and, in any event, it is not promising basis for a misfeasance claim.
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> 31. There is then the question of limitation about which there is no pleaded case. Under section 2 of the *Limitation Act 1980*, the claimant had 6 years in which to bring its claim. Time started to run from the point at which there is first material damage: *Iqbal v Legal Services Commission* [2005] EWCA Civ 623. Time would have started to run from the date of the original decision or the review (it matters not which for these purposes) but even if the date upon which HMRC served its evidence in the Tribunal is taken as a possible date to extend the period under section of the 1980 Act, time expired long before the claim was issued.
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> 32. Mr Young made submissions about limitation in relation to the claim under Community law to which I will return. However, Mr Young was not able to provide any basis upon which a claim under domestic law for misfeasance in public office might not be time barred.
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> 33. Mr Young submitted that the claim requires development through disclosure. The issue, however, is whether the claim pleads sufficient facts which, if proved, have some prospect of success and whether the claimant should be given an opportunity to amend this part of its case. If there were signs that the claimant might be able to plead a viable case that is not barred by limitation this might be an appropriate case in which to exercise that power because the claimant has clearly suffered substantial losses as a consequence of the decisions made in 2010. However, the claimant had 3½ months in which to consider the application despite that opportunity it has not provided a draft amendment. In those circumstances it is right to conclude that the claim for misfeasance in public office is bound to fail. If the CPR 24.2 test were to be applied, which provides a lower threshold for HMRC to establish, the claim has no real prospect of success and there is no other compelling reason for the claim to be disposed of at a trial."

<u>The permission application before me</u>

20. As I have said, there are two bases upon which the Appellant seeks permission to appeal against the decision of Chief Master Marsh. First, that the Chief Master failed to consider materials outside the Appellant's formal pleadings, and second that the Chief Master was wrong to conclude that the claim was time-barred.

21. In respect of the first issue, Mr Young for the Appellant accepted that the particulars of claim were defective in the ways identified by Chief Master Marsh at paragraph [30] of his judgment, and were therefore liable to be struck out under CPR 3.4(2). The real issue was therefore whether Chief Master Marsh was wrong to have refused permission for the Appellant to amend its particulars of claim. According to Mr Young, the

Appellant should have been afforded the opportunity to produce amended particulars of claim so as to plead its case properly.

22. I had before me at the hearing draft amended particulars of claim ("DAPOC") which Mr Young submitted corrected the deficiencies in the original pleading. As is apparent from the judgment of the Chief Master, no such document was produced to him at the time of the strike-out application.

23. The key parts of the DAPOC do not seek directly to impugne Officer McWilliam's conduct when taking his original decision to revoke the Appellant's licence on 20 August 2010. Mr. Young explained that the Appellant accepted that Officer McWilliam had acted honestly and with integrity in reaching that decision.

24. The Appellant's primary case set out in the DAPOC was that the relevant misfeasance amounting to a tort was committed by Officer Donnachie in the manner in which he undertook his review decision on 9 November 2010. The DAPOC stated as follows:

> "65. Officer Donnachie having an ulterior motive failed to honestly conduct his review. He used a template decision which was intended either by him and/or others to uphold revocation decisions targeting a large number of registered persons without any regard to the individual facts of the Claimant's circumstances.
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> 66. In so doing, Officer Donnachie was acting deliberately and knew that his action was unlawful and that it would cause economic harm to the Claimant."

The DAPOC proceeded to set out certain particulars of the alleged tort committed by Officer Donnachie.

25. The DAPOC also described the alleged role of an unidentified Commissioner who is said to have committed a separate tort of misfeasance in public office, in effect by approving and instituting a policy to restrict information within HMRC. It is alleged that this was designed to prevent officers (such as Officer McWilliam) from taking informed decisions. The DAPOC did not state when the Appellant believes the tort of the unidentified Commissioner to have been committed, but it can be assumed to have been some time before Officer McWilliam's decision in August 2010.

26. I will return below to make certain observations about the DAPOC. However, it appears to me that the logically prior question is the second issue, namely, whether the Chief Master was correct to conclude that the Appellant's claim in the tort of misfeasance in public office was statute-barred. If the Chief Master was correct in that view, then whether or not the Appellant's new DAPOC cured the defects in the original pleading, the claim would be bound to fail and granting permission to amend would be pointless. I therefore turn to the question of limitation.

Limitation

27. Section 2 of the Limitation Act 1980 (the "1980 Act") provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

28. The 1980 Act provides for various circumstances in which the time at which the limitation period commences will be delayed: for example, section 32 provides that where the action is based upon the fraud of the defendant, or a relevant fact was deliberately concealed from the claimant by the defendant, the period of limitation will run from the date on which the claimant discovered it, or ought with reasonable diligence to have discovered it.

29. The leading case on limitation periods in respect of claims for the tort of misfeasance in public office is Iqbal v Legal Services Commission [2005] EWCA Civ 623. The principles were set out in the judgment of May LJ at [13]-[15]:

> "13. For many causes of action in tort, including breach of statutory duty (at least of the kind alleged here) and misfeasance in public office, since damage is an essential ingredient of the tort, the cause of action does not accrue until there is material damage. The claimant alleges that the withholding of money which ought to have been paid caused the firm damage. The damage was the closure of the firm. This, he says, occurred after 23rd October 1997, not earlier than the Office for the Supervision of Solicitors intervened in November 1997. But there was, as I think Mr Berkley QC for the claimant appellant accepts, plainly material damage earlier than that; as, for instance, when in May 1997, as is pleaded, 11 members of staff had to leave because the firm could not pay them. Damage was in essence alleged in the judicial review proceedings begun in August 1997.
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> 14. The judge in his judgment referred at some length to the perceptive judgment of Lord Justice Chadwick in the case of Khan v Falvey [2002] EWCA Civ 400, and reported at [2002] Lloyd's Rep PN 369. There are a number of helpful passages in the judgments in that decision. The first to which I shall refer is from paragraph 23 in the judgment of Sir Murray Stuart−Smith. Sir Murray Stuart−Smith referred to the judgment of Hobhouse LJ (as he was then) in Hopkins v Mackenzie and said of it:
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> > "I share Hobhouse LJ's difficulties. A claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage from the same wrongful acts outside that period."
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> 15. Then at paragraph 37 in the judgment of Lord Justice Chadwick, we have this:
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> > "It is trite law that, where a tort is actionable only on proof of damage, the cause of action is not complete and time does not begin to run for the purposes of statutory limitation until actual damage occurs. What is meant by 'actual damage' in the context of a claim for purely financial (or economic) loss appears from a passage in the submissions of Mr Murray Stuart−Smith QC (as my Lord then was) to the Court of Appeal in Forster v Outred & Co [1982] 1 WLR 86. The passage was adopted by that Court, at

> [1982] 1 WLR 86, 94, 98; and has recently been approved by the House of Lords in Nyecredit Plc v Edward Erdman Ltd (No 2) [1997] 1 WLR 1627, 1630D−F. Actual damage means:
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> > '... any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage.' Lord Nicholls of Birkenhead added the 'cautionary reminder', at [1997] 1 WLR 1627, 1630F, that the loss must be relevant loss that is to say, it must be 'loss falling within the measure of damage applicable to the wrong in question'.'"

30. Thus, in cases involving the tort of misfeasance in public office, the cause of action accrues on the date on which the claimant suffers actual (material) damage within the meaning approved by the House of Lords in Nyecredit Plc, cited in the passage above. *Prima facie*, that date is the date from which the limitation period in section 2 of the 1980 Act starts to run, such that any claim must be brought within six years of that date unless there are special circumstances which justify delaying the start of the period.

31. Applying that principle to the instant case, according to the Appellant, the alleged damage must have occurred either on 20 August 2010 when the alleged misfeasance of the unnamed Commissioner resulted in Officer McWilliams wrongly revoking the Appellant's licence; alternatively it occurred on 9 November 2010 when Officer Donnachie published his review decision and upheld the original decision to revoke the Appellant's licence.

32. It will immediately be apparent, however, that if the cause of action accrued on either of these dates in 2010, subject to any circumstances which can be said to have delayed the commencement of the limitation period, the Appellant's claim commenced on 20 December 2019 was significantly outside the six-year limitation period prescribed by section 2 of the 1980 Act.

33. As I have set out above, in his judgment at [31]-[32], the Chief Master found that: (i) there was no pleaded case as to limitation; (ii) applying Iqbal, the limitation period commenced either on the date of the original decision of Officer McWilliam or on the date of the review decision of Officer Donnachie; and (iii) the limitation period expired long before the claim was issued.

34. In his judgment, the Chief Master suggested, at [34], that Mr Young had not been able to advance any basis upon which the tortious claim might not be time-barred. I was not provided with a transcript of the hearing, but with respect to the Chief Master, his comment at [34] appears to me incorrect. It is apparent from Mr Young's skeleton argument for the strike-out application that he did advance (at least in writing) various arguments in respect of limitation. Mr Young made substantially the same arguments to me both orally and in writing.

35. Mr Young did not seek to rely on any provision of the 1980 Act to argue that the Appellant's claim was not time-barred. He did not, for example, seek to suggest that the Defendants had concealed facts so as to delay the time from which limitation would run under section 32 of the 1980 Act. Indeed, it was accepted by Mr Young that all of the facts and matters on which the claim was premised had occurred, and were known by the Appellant to have occurred, before 19 December 2013.

36. Instead, Mr Young's argument in respect of limitation made two related points, which were founded upon the propositions: first, that by section 100G(5) of the Customs and Excise Management Act 1979 ("section 100G(5)"), Parliament had conferred upon the Defendants the sole power to revoke or vary the terms of the Appellant's licence; and, second, that by section 16 of the Finance Act 1994 ("section 16") Parliament had conferred exclusive jurisdiction upon the Tribunal to adjudicate upon disputes over the approval and revocation of licences for trading duty suspended alcohol.

37. Mr Young's first point was that until the decision of Officer Clydesdale on 31 May 2017 setting aside the original revocation decision of Officer McWilliam, the effect of section 100G(5) was that the revocation of the Appellant's licence was valid and effective, and this continued to be the case throughout the entire review and reconsideration proceedings. Accordingly, so Mr Young contended, if the Appellant had sought to bring a claim for misfeasance in public office at an earlier date, it would have been met with the argument that the revocation decision remained lawful and that the Appellant could not therefore have suffered any actionable loss.

38. Mr Young's second point was that until the proceedings before the Tribunal had concluded by the decision of the Tribunal on 8 January 2014, the provisions of section 16 ousted the jurisdiction of the High Court to entertain any other form of proceedings in relation to the revocation decision or HMRC's review of that decision. Specifically, he argued that until the statutory process before the Tribunal had concluded, the High Court could not make any determination or declaration as to the legality of a decision that was the subject of review by the Tribunal.

39. Accordingly, Mr Young submitted, had the Appellant sought to bring a claim before the High Court for the tort of misfeasance in public office at any date prior to 31 May 2017 (or possibly 8 January 2014), it would have been struck out. Mr Young submitted that it was widely understood among practitioners in the tax field that taxpayers could not bring proceedings before a Court in revenue matters prior to the conclusion of proceedings before the Tribunal.

40. In relation to the first of these points, Mr Young did not rely upon any specific authority in which similar arguments had been advanced. However, at the hearing I drew the attention of the parties to Escott v Tunbridge Wells BC [2016] EWHC 2793 (QB). I invited the parties to consider the relevance (if any) of the case and to make submissions on it should they wish to do so. At the conclusion of the hearing, I invited further short written submissions on the relevance of the decision.

41. Escott arose in different factual circumstances to the instant case. The claimants, Mr and Mrs Escott, issued a claim against the defendant borough council for misfeasance in public office. The basis for the claim in misfeasance was that the defendant had wrongly and maliciously issued (and then refused to withdraw) an enforcement notice under section 172 of the Town and County Planning Act 1990, requiring the claimants

not to operate their woodworking business so as to exceed a specified noise level. The claim was brought on 17 April 2015, but most of the loss allegedly suffered by the claimants occurred more than six years before that date.

42. The claimants argued that no cause of action accrued, or that there was no right to bring a claim, until the defendants had withdrawn the enforcement notice. The claimants argued that until the defendant withdrew the notice, it remained legally valid and binding, and hence was not open to challenge. They relied in support of their argument on section 285(1) of the Town and Country Planning Act 1990, which provides that,

> "(1) The validity of an enforcement notice shall not, except by way of an appeal under Part VII [of the 1990 Act], be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."

43. Holgate J rejected the claimants' arguments, holding that on the true construction of section 285(1) of the 1990 Act, an action for damages for misfeasance in public office was not ousted by the statutory regime for appeals. That was, he held, because the 1990 Act only made provision for appeals under Part VII to be pursued on specified grounds under the Act. He observed,

> "Even where a legal claim or defence involves challenging directly or indirectly the validity of an enforcement notice, the effect of the ouster clause is limited to grounds which could have been pursued in an appeal under Part VII. That would not exclude the bringing of an action for damages for misfeasance in public office."

44. Holgate J went on to say,

> "34. As a matter of principle the Claimants' argument is inconsistent with the very nature of the tort of misfeasance in a public office. For example, where a public official has acted in bad faith by deliberately taking action which he knows to be ultra vires, there is no need to have that action quashed in proceedings for judicial review, or for the authority concerned to withdraw or revoke that action, before the claim in tort can be brought. In the present case we are dealing with the first type of tort, where the power to act does exist, but where it is exercised for an improper motive in order to inflict damage on the claimant. No doubt such action could be the subject of a challenge by judicial review. But there is no legal requirement that that action be quashed, or revoked by the authority, before the claimant may bring a claim for damages based upon misfeasance. No authority was referenced to the court to suggest the contrary.
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> 35. That is hardly surprising. I accept the submission of Mr. Wayne Beglan, who appeared on behalf of the Defendant, that the Claimants' argument would, if accepted, stand the tort of misfeasance on its head. In a case where a public authority has in fact acted maliciously it could prevent or inhibit the bringing of a claim in damages for misfeasance by refusing to withdraw or revoke the conduct or action complained of. The only way of avoiding that absurd outcome would be for a claimant

> to obtain a quashing order in proceedings for judicial review. But there is simply no justification for requiring any such additional set of proceedings to be issued and pursued to a successful conclusion before the tortious claim may be brought."

45. It seems to me that this approach provides the answer to Mr Young's first point based on section 100G(5). Section 100G and the regulations made under it creates a framework under which HMRC may create and administer a regime for registered excise dealers and shippers. Section 100G(5) provides that,

> "The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section."

46. Of itself, that provision does not contain anything to suggest that the Commissioners, when exercising their powers, are immune from proceedings in the tort of misfeasance in public office. The improper revocation or variation of terms of a licence would be the action necessary in order to attract liability in tort, but the very fact that such action has been taken cannot prevent a claim being brought. Nor does section 100G require a claimant to have to take separate proceedings to quash the decision (whether by judicial review or otherwise before the Tribunal) before bringing a claim in tort.

47. As I see it, the real issue is whether the provisions of section 16, which establish the jurisdiction of the Tribunal, are effective to oust the jurisdiction of the High Court to entertain a tort claim in relation a decision which falls within the scope of the Tribunal's jurisdiction.

48. In relation to that point, Mr Young referred me to certain general statements of principle to the effect that, particularly in the field of tax law, specialist tribunals appointed by Parliament have exclusive jurisdiction over the matters reserved to them.

49. Thus, in Autologic Holdings plc and ors v Her Majesty's Commissioners of Inland Revenue [2006] 1 AC ("Autologic"), the House of Lords held that it was not open to taxpayers to seek a declaration from this Court as to the amount of tax owed (nor for the repayment tax) because Parliament had conferred exclusive jurisdiction to the Special and General Commissioners to hear appeals against assessments to tax. The House of Lords held that the effect of seeking a declaration in the High Court would be to circumvent that exclusive jurisdiction and would therefore amount to an abuse of process. The reasoning of the House of Lords was set out in the judgment of Lord Nicholls of Birkenhead at [12]-[15]:

> "12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court

> proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal …
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> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners …
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> 14. In Vandervell's case [1971] AC 912, 939-940 … Lord Wilberforce sought to clarify the limits of this 'exclusivity' principle. This principle, he said, is not to be taken to exclude the jurisdiction of the courts to decide a question of fact or law which is a basis for an income tax assessment where the taxpayer and the revenue so agree, provided the assessment to which the question relates has not become final, and provided also the question, 'in form suitable for decision by the court', is not 'so close to the question of the assessment itself' that the court should decline to entertain it …
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> 15. Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area in which the court has a discretion. In Glaxo Group Ltd v Inland Revenue Comrs [1995] STC 1075, 1083-1084, Robert Walker J put the matter this way:
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> > "It is not easy to discern any clear dividing line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction."
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> I respectfully agree with this approach, subject to noting that, at least as a general principle, the taxpayer and the revenue are each entitled to insist that the statutory procedure for dealing with disputed assessments should be followed."

50. It is clear from this decision (i) that there is an absolute bar to the jurisdiction of the High Court where the proceedings seek relief which is co-extensive with that available before the designated tribunal, and (ii) that there is a discretion to decline jurisdiction where the High Court proceedings seek relief that closely approximates to that available before the tribunal.

51. The statutory framework under which HMRC is required to review decisions made in relation to the revocation of licences is contained in sections 14-15 of the Finance Act

1994, and the procedure and jurisdiction of the Tribunal in respect of appeals against a decision on such a review is set out in section 16(4) of the 1994 Act in the following terms:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other persons making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
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> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
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> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future."

52. The jurisdiction of the Tribunal is thus limited to, in effect, reaching a decision as to the reasonableness of the review decision under appeal. The basis for such appeal would appear to be similar to "Wednesbury" unreasonableness. However, and significantly, the Tribunal has no power to remake a review decision for itself, but can only remit it to HMRC for a further review. Nor does the Tribunal have any power to award damages or compensation for loss suffered by a taxpayer in consequence of a decision or review decision which is found to have been taken unreasonably. Mr Young suggested that in the ordinary course, taxpayers who had suffered loss in such circumstances would simply have to bear that loss.

53. Having regard to the principles outlined in Autologic, the limits of the Tribunal's jurisdiction and powers that I have just described make it impossible to conclude that the provisions of sections 14-16 of the 1994 Act amount to an absolute bar to the Appellant bringing the claim for misfeasance in public office. The monetary relief by way of damages and compensation sought by the Appellant in the High Court claim simply could not be sought in proceedings before the Tribunal. In this respect, the instant case is very different to the type of situation envisaged in Autologic, where a taxpayer who is dissatisfied with a tax assessment seeks to have the High Court grant a declaration as to the amount of tax that he owes and make orders for repayment accordingly. Such relief would, in substance, be precisely the relief that would be sought before a tax tribunal.

54. Nor do I consider that the Appellant's claim for misfeasance in public office seeks relief which closely approximates to that sought before the Tribunal, such that if the claim had been brought at the same time as the Tribunal proceedings were pending, the High Court would have exercised its discretion to decline jurisdiction and strike out the

claim. As indicated above, the relief sought in the tort claim would have been different from that sought before the Tribunal.

55. In addition, the factual and legal issues in the two sets of proceedings would also not have been co-extensive. It is true that both the Tribunal and the High Court would have be tasked with conducting an evidential inquiry into the basis for Officer Donnachie's decision, but the parameters of the test that the Tribunal would be applying would be different to the (higher) test that the Appellant would have to satisfy to support a claim for misfeasance in public office. The mere fact that the Tribunal would be engaging in such an exercise might require some case management of the High Court proceedings to minimise the risk of inconsistent findings of fact, but that is an exercise that is often undertaken in cases in which the same set of events gives rise to two parallel sets of proceedings (e.g. statutory claims in the Employment Tribunal for unfair dismissal and unfair prejudice petitions in the High Court under the Companies Act).

56. For these reasons, I do not consider that the Appellant was unable to start its tort claim whilst the Tribunal proceedings were on foot, or that to do so would have been regarded as an obvious abuse of process or would have led to the claim being struck out in the exercise of the Court's discretion.

57. The other case to which I was referred by Mr Young was Chagos Islanders v Attorney General [2004] EWCA Civ 997. The facts of that case are highly unusual: during the 1960s, the UK government sought to accommodate a request from the U.S. government that the island of Diego Garcia, an island in the Chagos Islands archipelago in the Indian Ocean, be used as a strategic military base. To accomplish that end, the UK government forcibly removed, or otherwise prevented from returning, the entire population of the island. Many years later, certain of the Chagos Islanders and their descendants brought claims against, in effect, the British state on various grounds, including that of misfeasance in public office.

58. Given the passage of time since the relevant events had occurred, the case raised obvious limitation issues for the claimants. The proceedings were commenced in 2002 whilst the matters complained of took place in the 1960s and the 1970s: see [43] of the judgment of the Court of Appeal. The claimants relied on three arguments to seek to defeat the limitation defence, which on its face provided a complete answer to the claims: (i) unconscionability; (ii) disability; and (iii) concealment. Only the first of the arguments is relevant to the instant case, about which the Court of Appeal said as follows:

> "45. The claimants' first argument is that it would be unconscionable for the defendants to be allowed to rely on limitation. *We consider that the judge was very probably right in rejecting this argument as a matter of principle, on the grounds that the Limitation Act 1980 is intended to provide a complete code, including the circumstances in which it is unconscionable for a defendant to seek to invoke limitation, and that it is simply not open to the courts to seek to circumvent the effect of the 1980 Act by adding fresh grounds.*
>
> 46. However, it is plainly possible for a defendant validly to contract not to take a limitation point, or to estop himself from taking a limitation point. Particularly bearing in mind the basis of estoppel, *it is, we think,*

> *conceivable that a court may be prepared to hold that, by his conduct, a defendant had rendered it so inequitable for him to take limitation point that the court will effectively not permit him to do so*. In the present case, the claimants would seek to argue that, by the very actions complained of in these proceedings, namely removing them to Mauritius, and leaving them in a position where they were poor, ignorant, and without recourse to the courts, the UK government and its representatives cannot now be heard to say that the claimants have lost their right to seek relief promptly where the delay is due to these very circumstances."
>
> (my emphasis)

59. Mr Young invited me to conclude that the instant case is one in which the Court would arguably be prepared to hold that it is inequitable for the Defendants to take a limitation point and that they should be estopped from doing so. However, Mr Young could not direct me to any authority in which the *obiter* comments of the Court of Appeal in the Chagos Islanders case had been followed. He was also not able to identify the species of estoppel which was said to apply, and none was identified in the DAPOC.

60. I have considerable sympathy for the position in which the Appellant found itself, through no fault of its own, as a result of HMRC's unjustified decision to revoke its licence. I also well understand that those difficulties were compounded by the extraordinary length of time it took for HMRC to commence its reconsideration of that decision following the Tribunal's ruling. Nevertheless I cannot see how those facts or that delay, even though lengthy, could of itself give rise to an estoppel operating against the Defendants or otherwise make it inequitable for them to take the limitation point that is available under the 1980 Act.

61. As such I cannot accept that the Appellant has any prospect of resisting Defendants' limitation defence on the basis of the Chagos Islanders case.

The re-pleaded claim

62. Given that I have found that the Appellant's claim for misfeasance in public office is time-barred, it is not strictly necessary to consider the other ground on which the Appellant seeks to appeal against the decision of the Chief Master. As I have said, Mr Young accepted, rightly, that the original pleading was deficient and liable to be struck out. This ground of appeal was therefore premised on the argument that the Chief Master ought to have afforded the Appellant an opportunity to amend its case in order to plead it properly.

63. The Appellant put the DAPOC before me on this appeal. It did not explain why it had not produced such a draft pleading before the Chief Master for the purposes of the strike-out application. As the Chief Master indicated, an allegation of misfeasance in public office is a very serious allegation to make and one that must be properly particularised. It is not an allegation that should be made speculatively or without proper particularity. Bearing that in mind, and in circumstances in which the Appellant had had a significant amount of time to consider whether its pleading was defective, the Chief Master's decision not to permit the Appellant further time to produce an amended pleading was a case management decision which, in my view, fell within the reasonable ambit of his discretion.

64. That said, had I not concluded that the Appellant's claim was statute barred, I would have been minded to consider, in effect by way of an application for relief against sanctions, whether the DAPOC was adequate or (as the Defendants contended) it still failed to remedy the defects identified in the earlier pleading. As it is, however, in light of my conclusion on limitation, it is not necessary for me to address those arguments.

Disposal

65. In my view, the Appellant had a real prospect of success on appeal in this case. The arguments made by the Appellant as to the interaction between the jurisdiction of the Tribunal and the High Court in the context of the provisions of the Limitation Act were of some substance, and realistically and properly arguable.

66. Permission to appeal is therefore granted, but the appeal is dismissed for the reasons I have given.