# TC02021

**Appeal numbers: TC/2010/7617, TC/2010/7615 and TC/2010/7613**

***PROCEDURE – (1) Disclosure – whether documents relevant – finding documents only relevant to extent contents of documents known to appellants at relevant time – application allowed in part – (2) Privilege – waiver – undisclosed privileged document post dating "issue" in respect of which disclosed privileged document relied upon – application refused.***

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

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| **PETER A D FISHER** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |
| **STEPHEN D FISHER** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |
| **ANNE P FISHER** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Bedford Square, London on 24 April 2012**

**Mr R Mullen, Counsel, and Ms H Brown, Counsel, for the Appellant**

**Mr D Ewart, Counsel, and Mr Oliver Connelly, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. The appellants in the three appeals each appeal against assessments to tax against them under the provisions of s 739 of the Income and Corporation Taxes Act 1988 ("ICTA") relating to transfer of assets abroad.

2. The assessments were made pursuant to the purchase by Stan James (Gibralter) Limited ("SJG") of the telebetting business of Stan James (Abingdon) Limited ("SJA") on 29 February 2000. The appellants were and are the sharesholders of SJG and SJA. In brief, s 739 gives income tax liability to certain persons on certain transfer of assets abroad and HMRC assessed the appellants on the basis s 739 applied to them because of the sale of part of SJA's business to SJG.

3. Originally the directions hearing was to determine a large number of applications but all but two of them were resolved by the parties in advance. There were just two issues left for me to resolve. Firstly, the appellants' application for disclosure of 13 January 2012. Secondly, the respondents' application for a direction that the appellants disclose item 71 on their list of documents. Item 71 was the instructions to and note of a conference with Mr Kevin Prosser QC on 19 December 2001. I deal with each matter separately.

**Appellants' application for disclosure**

4. Both parties were agreed that they would make disclosure on the standard basis that applies in the High Court under Paragraph 31.6 CPR and I have issued a separate direction to that effect.

5. They disagreed over whether certain documents which the appellants wanted disclosed fell within standard disclosure under the CPR. In any event whether the documents did or did not fall within standard disclosure, the appellants maintained their application that I should order disclosure of these documents.

6. The documents which the appellants wished to be disclosed, in so far as in HMRC's possession or control or HMRC had the right to take copies, were:

"Any Documents created in the period from 1 December 1998 to 6 October 2001 which relates to or concern or were prepared for or in relation to:

- the approach of HM Customs & Excise (**"HMCE"**) in enforcing section 9 BGDA.
- any requirement that an offshore betting operation must be a separate legal entity to any related UK betting operation.
- HMCE's view of the requirements for an offshore bookmaker to be able to offer bets to persons resident in the UK without breaching the terms of the Betting and Gaming Duties Act 1981.
- any threat to the UK tele-betting industry which was to perceived to result from the decision by Irish Government in December 1998 that Irish betting duty was to be reduced.
- any threat to the UK telebetting industry which was to perceived to result from the decision of Victor Chandler to relocate to Gibraltar and to offer a telebetting service to UK customers in March 1998.
- any threat to the UK tele-betting industry which was to perceived to result from the decision of the High Court in *Victor Chandler International v Customs and Excise Commissioners* [1999] EWHC Ch 214 (16th July, 1999).
- the policy reasons for the decision to abolish the betting duty on stakes and to replace it with a betting duty on betting profits from 6 October 2001.
- any reports, research or other evidence as to the effect of the betting duty on stakes on the UK betting industry.
- the Meetings.
- the decision to exclude SJA and/or the Appellants from the Meetings.
- entering into the BGDA Agreement.

Notes prepared for the Meetings by any officer or any employee of a government department.

Minutes of the Meetings.

The BGDA Agreement"

7. The appellants' application for disclosure defined "Documents" as internal HMCE guidance, internal HMCE memorandums, notes of meetings between HMCE personnel, notes of meetings between HMCE personnel and employees or officers of any other government department, e-mails or other correspondence between HMCE personnel, e-mails or other correspondence between HMCE personnel and employees

or officers of any other government department, correspondence with a Specified Party, and notes of meetings which included a Specified Party.

8. The application defined "a Specified Party" as the Appellants, SJA, the Betting Office Licensees Association, Ladbrokes; William Hill, Coral, Victor Chandler, the Tote, Blue Square, Sunderlands, Stanley, Maudleys, Demy, and Paddy Power.

9. The application defined "the meetings" as "meetings which took place between HMCE and/or officials of the Treasury Department and Ladbrokes, William Hill and Coral (or any of them) at which any of the following was discussed:

- the reduction in the rate of betting duty; or
- the replacement of the betting duty (as it applied on 29 February 2000) with any different form of charge, including but not restricted to that charge which was introduced by section 6 Finance Act 2001; or
- the relocation of telebetting operations which were based outside the UK to within the UK."

10. The application defined "the BGDA Agreement" as "the agreement or understanding (whether or not binding or enforceable) between representatives of the UK Government and Ladbrokes, William Hill and Coral (or any of them) as a result of which those companies (or any of them) agreed to operate a telebetting business for UK resident customers from within the UK."

11. It can be seen that the disclosure requested was extremely wide-ranging. Nevertheless, it could be divided into two very broad categories. The first category was documents which concerned the views of HMRC or opinions of which HMRC were aware in relation to telebetting in the UK and the operation of s 9 BGDA. The second category was anything concerning "the BGDA Agreement".

12. Which documents should I order to be disclosed?

**Relevant documents to be disclosed**

13. Reference was made to the apparent divergence on disclosure between standard disclosure under CPR which normally governs disclosure in the courts and the Rules governing disclosure in Tribunals. Rule 27(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that a party must disclose documents in its possession or control which he "intends to rely on or produce in the proceedings." CPR rules, at 31.6, in addition require a party to disclose documents which adversely affect his own case, adversely affect another party's case or support another party's case.

14. The Upper Tribunal (Administrative Appeals Chamber) in the case of *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (ACC) ruled, in respect of virtually identical tribunal procedure rules on disclosure as apply in the Tax Chamber, that:

> "[20] The starting point is that full disclosure of all relevant material should generally be given…."

The next few paragraphs deal with when it might be right to withhold disclosure of relevant material such as where disclosure might be adverse to the health of the patient (irrelevant here) or relate to matters confidential to a third party. The general rule given by the Upper Tribunal was:

> "[25] Given the general rule in favour of full disclosure the burden will be on the responsible authority to demonstrate that it is appropriate to withhold disclosure of any particular documents."

15. In conclusion, whatever the Tribunal Procedure Rules actually say, a party will be expected to disclose all relevant documents unless they can show withholding them is appropriate. I did not understand the parties to dispute this as a general principle: both parties were happy to agree to disclosure in accordance with standard disclosure under the CPR Rules. It was the application of the disclosure obligation to the facts of this case where the parties diverged.

16. Although CPR 31.6 does not use the word "relevant", in requiring all material which positively or negatively affects any party's case to be disclosed, it seems to me that it does require all relevant material to be disclosed. At least in so far as there is a potential difference between these two concepts, nothing turns on it as far as this application is concerned. I consider that both parties should disclose (subject to the normal exceptions such as for privileged material) relevant documents within their possession or control.

*Issues in the appeal*

17. Determining what is relevant material requires me to consider what issues will arise in the substantive appeal. Part of the appellants' case is that they rely on the exemption from liability under sections 739 and 740 ICTA contained in section 714. This provides:

> "**741 Exemption from sections 739 and 740**
>
> Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either –
>
> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were affected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.
>
> The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

18. It is the appellants' case both that avoidance of tax liability was not a motive of the transfer of the business by SJA to SJG and that that transfer was a bona fide

commercial transaction. It is their case that the imposition of 9% gaming duty on bets placed in the UK made SJA's telebetting business in the UK untenable once the High Court had ruled in the case of *Victor Chandler International v C&E Commrs* [2000] 2 All ER 315 that it was not unlawful for Victor Chandler (a competitor to SJA) to use teletext to promote telebetting outside the jurisdiction and free of the 9% gaming duty.

*Objective or subjective test*

19. The appellants' case is that there is a dispute between HMRC and the appellant whether the s741 ICTA test is objective or subjective: the appellants maintain the test is subjective but refer to statements by HMRC which the appellants' interpret as claiming the test to be objective. In particular, in their application HMRC stated that section 741

> "…..includes an objective consideration of all the facts…."

Therefore, runs the appellants' argument, they should have disclosure of all documents which would be relevant in the substantive hearing if the test were objective as well as if the test were subjective, as the Tribunal might rule in favour of HMRC that the test is objective.

20. I cannot agree. Firstly, s 741 is clearly a subjective test. It refers to the "purpose" of tax avoidance and being "designed for the purpose". A "purpose" or a "design" is by its very nature subjective. This point was considered by the Special Commissioners in the case of *Carvill v Inland Revenue Commissioners* [2000] STC (SCD) 143. In that case apparent dictum of Lord Nolan in *IRC v Willoughby* [1997] STC 995 at 1003-1004 were drawn to the attention of the Tribunal. That "dictum" was to the effect that the test was objective. Special Commissioner Avery Jones considered at paragraph 11, for reasons with which I agree, that that was not a dictum but merely a recital of HMRC's position in that case. In particular, (1) it was inconsistent with what Lord Nolan said elsewhere in the decision which amounted to saying that the motive test was subjective; (2) the paragraph with the objective test was prefaced by a reference to submissions by HMRC's counsel; (3) it was inconsistent with all other authorities; and (4) it makes no sense that motive could be objective. His conclusion was:

> "I propose therefore to approach this case by determining what was the purpose in the taxpayer's and his fellow directors' minds in carrying out a particular transaction. Any other approach seems impossible to apply in the circumstances of this case."

I agree that the test is subjective.

21. Secondly, my understanding of HMRC's position was that they agreed with the subjective nature of the test. Whatever HMRC's position was in *Willoughby*, Mr Ewart's position in front of me was that the test of motive was subjective. His point is that subjective motive may be ascertained from objective factors. It is not just a question of what the appellants *say* was their motive. It is appropriate to look at what a person did and when they did it and what they would have known at the time they did it in order to understand why they did it.

22. Mr Mullan referred me to a letter written to the appellants on 23 April 2012 by HMRC. I read this as a clear statement that HMRC considers the test to be subjective and a disavowal of any intention to argue that the test is objective.

23. So I will approach the question of disclosure on the basis that the test of motive is subjective (albeit objective factors may be relevant to discern that subjective motive). So what will interest the Tribunal will be the motive of the appellants and what will be relevant to that will include what was known to the appellants at the time of the transfer.

24. This distinction may not be material in any event. HMRC disavow any intention to argue that the test is objective (a concession well made) but even if a Tribunal took the view the test was objective, the test would be the motive of a hypothetical person in the position of the appellants. Therefore, so far as disclosure is concerned, the question is still what was known to the Fishers at the time?

25. I also reject Mr Mullan's suggestion that an 'objective consideration of all the facts', as proposed by HMRC (see paragraph 19 above) necessarily means that the tribunal will consider facts unknown to the appellant: it is clear that a Tribunal should only consider *relevant* facts. And as it is the appellants' motive at issue, only what was known to the appellants at the time could be relevant.

**Will disclosure corroborate appellants' testimony?**

26. It is the appellants' case that they expect that the material they seek to be disclosed to them if I make the disclosure order applied for will corroborate the witness evidence to be given by the appellants.

27. In particular, it is the appellants' case that their view at the time of the transfer was that SJA was at a very serious competitive disadvantage if it continued to conduct its telebetting business in the UK and that s 9 BGDA prevented it operating it abroad. Their view of the decision of the Irish Government (announced December 1998) to reduce betting duty followed by the ruling in the High Court in March 1999 in *Victor Chandler* was that the survival of SJA was put at risk as customers would (and some did) move their custom to non-UK based bookmakers offering telebetting via teletext. It is their case that SJA and its competitors made it clear to HMRC in discussions around this time that to remain competitive they would be forced to relocate abroad unless HMRC were persuaded to reduce the betting duty.

28. It is also the appellants' case that the three main participants had secret meetings with HMRC as a result of which an agreement was reached in which HMRC agreed to reduce the level of betting duty in return for those 3 business (Ladbrokes, William Hill and Coral) relocating back to the UK. The change to betting duty was announced on 6 October 2001.

29. Their case is that the Tribunal will not necessarily accept the appellants' evidence about what they believed at the time without corroborating evidence. Mr

Mullen refered me to the *Burns* case (see paragraph 34 below) where there was a reluctance by the Tribunal to accept the word of the appellant.

30. In summary their case will be that at the time HMRC did accept that a UK-based telebetting business was not viable, as demonstrated by the change in the law following the BGDA Agreement, and that therefore the appellants' view of what HMRC thought at the time was correct. So could the documents sought corroborate the appellants' evidence?

*HMRC's and SJA's competitors beliefs about the rate of betting duty and s9 BGDA*

31. The disclosure order applied for requires disclosure of all correspondence and notes of meetings with the appellants and/or SJA. HMRC do not dispute this: it is their case that they have already conducted a search to identify such items and already disclosed what they found. Such documents are clearly relevant to demonstrate what was known to the appellants at the time.

32. The disclosure order applied for also requires disclosure of all correspondence and notes of meetings with the Betting Office Licensees Association ("BOLA"). It became apparent at the hearing in front of me, although it was HMRC's position that they had previously been unaware of this, that Mr Fisher senior was Vice President of BOLA around the time of the matters in issue in this appeal. It is the appellants' case that Mr Fisher would have known anything known by BOLA at the time and indeed would often have attended any meeting with HMRC on behalf of BOLA.

33. At the hearing HMRC indicated that they therefore accepted that they must disclose any contemporaneous correspondence with BOLA or notes of meetings with BOLA, and I so direct. It was also agreed they would disclose internal notes prepared for the meetings on the basis that they would be indicative of what was discussed.

34. What was in issue before me was the disclosure of the rest of the material requested in this first category (I deal with the BGDA Agreement below) relating to what HMRC and SJA's competitors said to each other about the viability of UK-based telebetting businesses. It was the appellants' case that they expected documents produced as a result of such a disclosure order would corroborate their evidence that they believed at the time that HMRC and SJA's competitors thought a UK-based telebetting business was not viable in 2000.

*Information must have been known to appellants at time*

35. I am unable to agree that what HMRC or SJA's competitors thought about the viability of UK-based telebetting business in 2000 has any relevance to the appellants' case unless it was known to the appellants at the time. If it was not known to them at the time it cannot have influenced their decision to transfer part of SJA's business out of the jurisdiction.

36. The appellants' logic seems to be that if they can show other persons in the business and HMRC itself thought that a UK-based telebetting business was not

viable, then the Tribunal will be more likely to accept that that is what the appellants thought. While I agree that the Tribunal will address the question of whether the appellant's belief was rational, because that may indicate whether it was genuinely held, the Tribunal will address this question by looking at whether it was rational in the context of what was known to the appellant at the time. Whether or not the belief was shared with others is irrelevant save to the extent that the appellant knew at the time that others had such concerns.

37. The appellants also say that documents not known to the appellants at the time in so far as they record what HMRC and SJA's competitors' beliefs were at the time are relevant because they will show HMRC's and SJA's competitors' beliefs at the time were what the appellants say that they believed at the time that HMRC and SJA's competitors believed. This could be relevant (say the appellants) because it could tend to show that the appellants' evidence about their beliefs about what others believed is reliable because it is shown to be right.

38. Mr Mullan cited the case of *Burns and another v Revenue and Customs Commissioners* [2009] STC (SCD) 165 which was another case involving s 741 ICTA. At paragraph 36 the Judge said that he could look beyond the evidence of the only witness to "all the surrounding facts".

39. I find evidence of the motives and actions and statements of the appellants' competitors, save as they were known to the appellants at the time, is irrelevant. I do not read the *Burns* case as suggesting anything other than all relevant evidence should be considered. The question is what was known to the appellants at the time. The Tribunal can judge for itself whether, on what was known to the appellants at the time, their beliefs were genuinely held, and in so far as relevant to that question, whether their beliefs were rationally held. That other people had, unknown to the appellant, come to the same (or indeed a different) view, is of no real relevance.

40. Even if I were to view the documents for which disclosure is sought as having some very marginal relevance, such very marginal relevance could not justify what I consider to be a very onerous and oppressive search and disclosure exercise. It would require HMRC, and any officer involved in the particular department at the time, to check virtually every archive of information relating to that period. It is a fishing exercise to catch fish that are most unlikely to be of any interest to the Tribunal hearing the substantive appeal.

*Evidence of HMRC's policy*

41. It is also the appellants' case that the disclosure sought will corroborate the appellants' testimony because the appellants claim that HMRC's internal views on the matter were known to them at the time because HMRC officers would have communicated their views to the appellants at various meetings with the appellants. They complain that HMRC now appear to refuse to accept that they gave the advice that the appellants recollect that they were given.

42. HMRC's response is that the notes of the meetings with the appellant have been disclosed. If it is the appellants' case that something was said which was *not* recorded in these meeting notes, then that is a question of fact for the Tribunal to resolve.

43. I agree. Either the meeting notes record what the appellants say was said or they do not: in the former case HMRC's internal notes recording HMRC's views on the viability of UK-based telebetting businesses are irrelevant. In the latter case, the question is whether the appellants' recollection of the meetings is more accurate than the meeting notes. Whatever HMRC's views at the time can be proved to be does not actually answer this question. There is clearly more directly relevant evidence that could be called, such as evidence from the officers who attended the meeting and took the notes.

44. Mr Mullan referred me to the High court decision in the case of *R v Inland Revenue Commissioners ex p J Rothschild Holdings plc* [1986] STC 410. This decision was upheld in the Court of Appeal. In that case Simon Brown J ordered the disclosure of internal Inland Revenue documents of general character concerning the Revenue's views on the correct application of a particular statutory provision. This was in the context of claim by the appellants that a specific offer was made to the appellants in a phone conversation with an Inland Revenue officer.

45. Mr Mullan's point is that the appellants here are in a similar position. They say that HMRC had expressed to them the view that for a UK business to advertise n the UK a telebetting business based abroad UK would be unlawful, although the appellants cannot now be precise as to what was exactly said or when as they did not keep notes.

46. I find that this case is not the same as *Rothschild.* In that case it does not appear that a note of the phone conversation had been produced. Here notes of meetings have been produced. The appellants' claim amounts to saying that the notes are incomplete: the evidence sought disclosed by the appellants does nothing to answer the question of whether the notes are incomplete. Rather it would be the case of the appellants saying that, firstly, the notes are incomplete and more was said than is recorded *and,* secondly, that unrecorded extra would have been in line with whatever policy HMRC's internal documents disclose. This seems somewhat stretched speculation to me.

47. In any event there is a second consideration. HMRC accepted at the hearing, and indeed stated that it is part of their case, that one of the appellants' motives for relocating business outside the UK was consideration of s 9 BGDA as it is part of HMRC's case that betting duty was a tax which the appellants sought to avoid by relocating the business to Gibralter.

48. Therefore, in so far as the appellants want HMRC's internal documents in order to show that at the time HMRC considered that UK based companies could not lawfully run their UK-customer based telebetting businesses from abroad because of s 9 BGDA, there is no dispute. HMRC accept (and indeed rely on the fact) that s9

BGDA would have been a motive for the appellants in causing SJA to transfer its telebetting business to SJG. Disclosure is not necessary as the point is not in dispute.

49. This is quite unlike the *Rothschild* case where it was critical to the appellant's judicial review proceedings that HMRC could be proved to have made an offer on which they resiled: it was crucial to the appellant to prove that the phone call had taken place on the terms it alleged. In this case, it is very far from crucial that the appellants prove that HMRC had advised the appellants in meetings that s 9 prevented UK based telebetting businesses setting up abroad to target UK customers: HMRC accept that this would have been a motive of the appellants in relocating the business to Gibralter.

50. Mr Mullan points out that HMRC have refused to agree a statement of facts which included this point. However, I accept Mr Ewart's point that the appellants' draft statement of facts were considered by HMRC to be "loaded" although that does not explain why HMRC did not propose an alternative, blander statement. It does not matter: HMRC have conceded at this hearing that they accept that at the relevant time bookmakers in foreign jurisdictions with lower rates of betting duty who offered telebetting to UK based customers had a competitive advantage over UK based bookmakers who were subject to 9% duty and unable to operate from abroad due to s 9 BGDA.

51. HMRC's case is that the appellants would have had additional motives for causing the transfer to take place. It is not suggested by the appellants that HMRC's internal documents would have had any bearing on these alleged additional motives.

52. In conclusion, even just in regards HMRC's internal policy documents, I am not persuaded that they will be relevant to this appeal. And bearing in mind the very onerous nature of the disclosure application, I do not grant it.

53. In conclusion, save in respect of meetings or correspondence with the appellants themselves or BOLA I refuse the appellants' application for disclosure of documents in this first category.

*The BGDA meetings*

54. Turning to the second category of disclosure, this relates to meetings between HMRC and Ladbrokes, William Hill and Coral. SJA was not a party and none of the appellants attended. As I understand it, it is the appellants' case (in part) that information about what was actually agreed at these meetings will corroborate their evidence that their view at the time of the transfer of part of SJA's business to SJG was that without a reduction in betting duty SJA's business was untenable in the UK.

55. I agree with HMRC that this is not logical. The question is the appellants' motive at the time of the transfer. That may have been influenced by many things but it could not have been influenced by something about which the appellants did not know. All they knew about these meetings was what was in the public domain. What

was not in the public domain was not known to them and could not have influenced them.

56. Again, the appellants suggest that it corroborates their evidence that they were concerned about betting duty if they can show that their competitors were similarly concerned. But I reject this for the same reasons as given in paragraphs 35-40.

57. At the hearing in front of me the appellants' counsel suggested that although not currently in their witness statement, one of the appellants would give evidence at the hearing that it was his understanding that the agreement with the three main bookmakers in 2001 involved more than just HMRC's agreement to reduce betting duty but included other, undisclosed, sweeteners.

58. Two points arise on this. Currently this is no part of the appellants' pleaded case. If they wish to make an allegation of malfeasance against HMRC then it should be properly pleaded and a witness statement served in respect of it. Only then could a disclosure application in respect of relevant material be considered.

59. Secondly, such an allegation would need to be relevant to the appeal and it is not apparent to me why such an allegation, even if made out, would be relevant. I can speculate that it could be the appellants' case that a belief that other bookmakers were being offered a deal not offered to SJA might have been relevant to its decision to transfer its telebetting business to SJG and/or not repatriate it 18 months later when the betting duty was reduced. But apart from the need to plead this, whether or not such a belief was justified is not the question: the question would be whether it was genuinely held by the appellants. Internal confidential documents of HMRC not available to the appellants at the time could not have informed their belief if they had such a one.

60. A second reason for asking for disclosure seemed to be that the appellants wanted to know why their competitors chose to relocate to the UK as they thought this relevant to rebut a suggestion by HMRC that the appellants must have had more than betting duty as the reason for the expatriation as they did not repatriate when betting duty was reduced. But again what SJA's competitors did, for reasons unknown to them at the time, could not have relevance to their choice not to repatriate.

61. So again my conclusion is that the appellants have failed to establish that anything other than information in the pubic domain about the BGDA Agreement would be relevant to their appeal. They have failed to establish that the information about the BGDA Agreement which they seek from HMRC would be relevant so I refuse to order disclosure of it.

62. In brief, the appellants' case on disclosure is that at the substantive hearing in order to make out their case that their motive was not tax avoidance they may need evidence to corroborate their oral testimony. I refuse the disclosure order save to the extent the information was known to the appellant at the time, as it may be that the Tribunal will want to see corroborating evidence, but evidence of information that

was not known to the appellants at the time cannot corroborate their oral testimony as to their motives at the time.

**Respondents' application for disclosure**

63. HMRC apply to the Tribunal to order the appellant to disclose the instructions to and note of a conference with Mr Kevin Prosser QC on 19 December 2001. These are privileged documents but it is HMRC's case that the appellant has waived privilege in respect of them.

*The facts*

64. The appellants disclosed to HMRC (and thereby waived privilege in respect of the documents) instructions to Mr David Oliver QC dated 12 August 1999, the opinion of Mr Oliver QC dated 27 August 1999 (together "the 1999 Oliver advice"), instructions to Mr Kevin Prosser QC dated 17 January 2000 and the note of the conference with Mr Kevin Prosser QC dated 20 January 2000 and an attendance note of the same conference (together "the 2000 Prosser advice"). The appellants listed but did not disclose the instructions to and note of a conference with Mr Kevin Prosser QC on 19 December 2001 (together "the 2001 Prosser advice").

65. The 1999 Oliver advice principally concerned s 9 Bettting and Gaming Duties Act 1981 ("BGDA"). As mentioned above, this section imposed criminal liability for non-UK based bookmakers (or their agents) advertising their betting services within the UK. And it is the appellants' case that this advice was relevant to their decision to sell part of the business of SJA to SJG and they will rely on it at the substantive hearing.

66. The 2000 Prosser advice concerned tax advice surrounding the transactions at issue in this appeal and in particular the part sale of the business of SJA to SJG in February 2000. The appellants have disclosed this but do not intend to rely on it at the hearing.

67. What the 2001 Prosser advice concerned I was not told; all HMRC know is that it was on the appellants' list of documents as a relevant document.

68. The issue is not whether these documents privileged. They clearly are. The question is whether privilege has been waived in respect of them.

*Waiver of privilege cannot be partial*

69. Mr Ewart referred me to the case of *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529. In this case Templeman LJ at page 538 approved the explanation of when privilege is impliedly waived on documents other than those on which it is expressly waived, given by Mustill J in *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation* (1978) unrep where he said:

> "I believe that the principle underlying the rule of practice exemplified by *Burnell v British Transport Commission* is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. In my view, the same principle can be seen at work in *Geoge Doland Ltd v Blackburn, Robson Coates & Co.* in a rather different context."

70. The case in front of Templeman LJ concerned the waiver of privilege over only part of a single document. His ruling was that the effect of such partial waiver was to waive privilege over the entire document.

71. Nevertheless, it is clear from *George Doland Ltd* (mentioned in the above extract) that the rule extends beyond the partial disclosure of privileged documents to encompass disclosure of separate privileged documents in some cases. But it is clear from the above extract and from what Templeman LJ had said earlier in the same paragraph in reference to the case of *George Doland Ltd,* that the waiver of privilege in respect of one document will only encompass other documents which are relevant to the *same issue* in the appeal. Privilege is not waived merely because the other documents are relevant to the appeal as a whole or some other issue in it.

72. The appellants referred me to the High Court decision in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 158 (Ch). Mr Justice Mann dealt with this same point The facts of the case have some similarity with this case. In that case, the appellant had waived privilege in respect of some advice from counsel and solicitors. They had received more advice later from the same advisers and in respect of which they did not waive privilege. The judge decided that they were only to disclose the later advice to the extent that it was an "alteration, amplification or extension of the advice already disclosed." Otherwise privilege was not waived in respect of it.

73. Mr Justice Mann said:

> "[18]….The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege.
>
> [19] Once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger 'transaction') and fairness, and the need not to mislead, requires further disclosure. The application of this principle will be very fact sensitive…."

74. From the last line of his decision it appears that the further disclosure ordered by him included a redacted document.

75. So firstly the mere fact that the appellants listed the 2001 Prosser advice on their list of documents is not determinative of whether privilege has been waived in respect of it. That it is relevant to the appeal or at least one of the matters at issue in the appeal is not the question. The question is whether it relates to the same issue as other documents in respect of which privilege has been waived.

*Deploying in court*

76. To determine what the "issue" is, I have to determine the document(s) in respect of which privilege has been waived *and* which are being deployed in court. A party can waive privilege in respect of a document, but that will not bring in an implied waiver of privilege on other documents unless the party is relying on the first document in the proceedings. This is clear not only from Mustill J's statement cited above where he refers to "deploying in court" but has been considered in later cases.

77. It was discussed in *R v Secretary of State for Transport ex parte Factortame* [1997] EWHC 445 (not cited to me) where Auld LJ said:

> "[19] Much will depend, of course, on the indication given by the party waiving privilege before trial whether he intends to rely upon the privileged material at the trial and, if so, for what purpose…"

78. This brings in a second point. That even if a party does intend to rely on the document, the purpose for which he relies on it may dictate the "issue" in respect of which privilege is waived, and that therefore may determine if and to the extent privilege is waived on other documents. This is clear from the quotation above from Auld LJ and was also referred to in the *Fulham case* at paragraph 18 where Mann J said:

> "…..one is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go….[it was] submitted that the purpose of the disclosure played no part in a determination of how far the waiver went. I do not agree with that; in some cases it may provide a realistic, objectively determinable definition of the 'transaction' in question. Once the transaction has been identified, then those cases show that the whole of the material relevant to that transaction must be disclosed.…"

79. Auld LJ in *Factortame* (in the same paragraph as cited above) also indicated if the waiving party did not indicate in advance of the hearing the purpose for which it would rely on the privileged document, or then used it for a purpose other than one that was disclosed, might result in the other party being able to call for further disclosure at the hearing. He suggested that there might be costs sanctions against a party who chose not to make matters clear before the hearing.

*The 'issue' in this case*

80. The appellants in this case say that they will place no reliance on the 2000 Prosser advice. They will rely on the 1999 Oliver advice. In my view, as it is only the 1999 Oliver advice that is to be relied on, I have to determine the "issue" or

"transaction" for which only the 1999 Oliver advice is relied on in order to determine if privilege has been impliedly waived in respect of the Prosser 2001 advice. The Prosser 2000 advice is irrelevant in this context as the appellants do not rely on it.

81. The instructions to Mr Oliver QC in 1999 related to the High Court decision in *Victor Chandler International Ltd* which held that the use by a Gibraltar company of teletext to promote its business of taking bets was not an advertisement unlawful under s9 of the BGDA. The question was whether this decision would apply to SJA (a UK company) if it used teletext to promote betting via its branch in Gibraltar or whether the decision only applied to a separate, non-UK legal entity. Mr Oliver's advice was that to comply with the law the company promoting betting outside the UK had to be a non-UK entity, and preferably one in practice as divorced from SJA as possible.

82. My understanding is that the appellants intend to rely on this advice at the hearing to demonstrate the reason why SJG was established and the transfer of business from SJA to SJG took place.

83. Although the appellants have indicated they do not intend to rely on the 2000 Prosser advice at the hearing, they do not suggest they wish to withdraw the waiver of privilege in respect of this. I do not see how they could do so even if they wished: both the 1999 Oliver advice and 2000 Prosser advice relates to tax advice on the proposed relocation of the business from SJA to SJG. Both relate to the question of why the 2000 transfer took place. To disclose one and not the other would be partial disclosure and a failure to present the full picture.

84. But that does not alter the position that the "issue" is what arises from the 1999 Oliver advice as it is only that advice which is being relied on. If the appellants change their mind at or before the hearing, and seek to rely on the 2000 Prosser advice, then that may widen the "issue" for which waiver was made and bring in more privileged documents into an implied waiver. That will depend on the purpose for which they rely on the 2000 Prosser advice. But unless and until they do that, I will look only at the 1999 Oliver advice to determine the issue in respect of which privilege was waived.

85. The "issue" in respect of which the privilege document is relied upon I find is therefore *why* the 2000 transfer took place.

86. At first glance, as the issue is the legal advice the appellants received which led to the decision to transfer a part of the business of SJA to SJG, the 2001 Prosser advice is irrelevant. It was given 18 months after the transfer took place and cannot have influenced it.

87. HMRC do not see it in quite such simple terms. They point out that the reasons why the appellants chose not to repatriate their business in 2001 may bear on the reasons they chose to expatriate it in 2000. The Prosser 2001 advice might well refer to the reasons why the expatriation took place in considering whether repatriation should then take place.

88. I agree with this in principle, but the question is what is the *issue* (or *'transaction'* to use Mann J's terminology in *Fulham)* in respect of which the appellants rely on the 1999 Oliver advice. I see the position being similar to that in *Factortame* as summarised in the *Fulham* case*:*

> "[20] I think that the point can be illustrated by how the principles worked in the *Factortame* case itself. One of the issues in that case was whether or not the United Kingdom's infringement of community law was intentional or reckless. The government hd received advice form time to time on the legality of the legislation, and that went to the issue I have just referred to. The Secretary of State waived legal professional privilege in respect of legal advice up to a date in October 1987, but did not waive it for advice given after that date. That limitation was challenged, and it was said that in the light of the way that it took place, there should 'in fairness' also be disclosure for a later period. The Court of Appeal held that the limitation of disclosure was not inconsistent with principle. The Secretary of State expressly stated that he would not suggest at the trial that his conduct after the October date was government by the disclosed legal advice received before that date. Auld LJ held that in the light of that:
>
> > 'It is not a case of partial disclosure in relation to his conduct throughout the period in issue, but one of clear severability over two periods within it and of the disclosed and undisclosed documents relating respectively to each period. If the Secretary of State keeps to [counsel's] word, I can see no unfairness to the applicants….If the Secretary of State does seek to take an unfair advantage of his partial discovery at the trial, whether as a matter of evidence or argument, the applicants would be entitled to invite the trial judge to reopen the matter and determine whether there should be further disclosure.'"

89. My view is that as long as the appellants rely on the 1999 Oliver advice only to show their reasons for the transfer which took place in 2000 and not in relation to their reasons for not repatriating it in 2001, then they have not yet impliedly waived privilege in respect of the 2001 Prosser advice. It does not have to be disclosed.

90. As I have said this position could change, and could even change at the hearing, if it becomes apparent that the appellants rely on the 1999 Oliver advice for a wider purpose than merely showing the motive for the 2000 transfer. But while they restrict their reliance on the 1999 Oliver advice to their motive for the 2000 transfer, the 2001 Prosser advice does not have to be disclosed and HMRC's application for disclosure of it is refused.

*Tribunal to ascertain relevance*

91. I mention in passing that both parties were agreeable to the Tribunal inspecting the 2001 Prosser advice in camera and deciding whether it should be disclosed. Because of my decision in the above paragraphs, I do not need to do this nor take a view on whether it would be appropriate for me to do it, and I make no determination on this.

92. 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.

**BARBARA MOSEDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 May 2012**