[2016] UKFTT 0805 (TC)

TC05530

Appeal number: TC/2015/00014, 00016 and 00017

Income Tax – Procedure – adjournment – no – sist – no – Discovery - strike-out application – refused - Directions issued

FIRST-TIER TRIBUNAL
TAX CHAMBER

RONNIE DECKER, HELEN DECKER and ADMIRA CLEMENS — **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, 126 George Street, Edinburgh on Friday 18 November 2016 and Thursday 24 November 2016.

No appearance by or for the Appellants. Written submissions dated 22 November 2016 from Mr Decker

Graham McIver, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

The substantive appeals

1. These appeals relate to Section 29 Taxes Management Act 1970 ("TMA") discovery assessments and Section 7 TMA penalty assessments issued on 15 September 2014 and 23 February 2015 respectively. As far as Mr Decker is concerned, these cover the years 1999/00 to 2002/03, Mrs Decker the years 1999/00 to 2001/02 and Admira Clemens the years 2000/01 to 2002/03. Very large sums of money are involved.

Procedural history

2. Notices of Appeal were received by the Tribunal on 29 December 2014 with a request that they be joined since they all arose from the same set of circumstances. Directions were then issued on 29 January 2015 to the effect that the three cases should proceed together and be heard together by the same Tribunal. They were then assigned to proceed under the Complex category.

3. Shortly thereafter, the respondents ("HMRC") issued the Notices of Penalty Assessments. The appellants' representative wrote to the Tribunal on 16 March 2015, requesting that that letter be treated as a Notice of Appeal against the penalty assessments and an application to amend the Grounds of Appeal in the existing appeals to include those penalty assessments. HMRC consented. That application was granted on 6 July 2015.

4. On 9 September 2015, the Tribunal issued Case Management Directions and acknowledged receipt of the Statement of Case.

5. Both parties complied with the Directions in regard to Lists of Documents on 23 October 2015 and a Joint Application for variation of the Directions was endorsed by the Tribunal on 3 December 2015 to extend a deadline in relation to confirmation of the expected duration of the hearing.

6. On 30 December 2015, the Tribunal consented to a stay of proceedings until 29 January 2016.

7. On 12 February 2016, the appellants complied with the Directions in regard to duration of the Tribunal hearing but lodged an application for sist. That application, which was vigorously opposed by HMRC, was on the basis that there were litigation proceedings ongoing in the Court of Session.

8. As the appellants' representative subsequently confirmed, the Court of Session granted the prayer of the Scottish Ministers' Petition for a Recovery Order under the Proceeds of Crime Act 2002 against all three appellants in these appeals on the basis

that they had not lodged Answers to the Petition. Warrants for Inhibition and Arrestment against Mr Decker were granted. That was a final disposal of that litigation at first instance. In fact, there were also another two respondents in the matter of the Petition being Mr Decker's son and a family Trust for that son.

9. A Reclaiming Motion has been lodged and that will be heard in the Court of Session on 31 January 2017 (in other words that is an appeal whereby an attempt is made to have the Recovery Order set aside and the proceedings reinstated).

10. On 20 May 2016, I issued Directions in regard to the opposed application for sist seeking written submissions from both parties on the basis that the parties had agreed that a hearing was not necessary.

11. Judge Mosedale refused that application for sist on 5 July 2016. She also refused the appellants' alternative application for unspecified revisions to HMRC's Statement of Case.

12. On 17 August 2016, the parties were notified that the substantive hearing in these appeals was set down to take place on 11-18 November 2016.

13. On 25 September 2016, the appellants' representative resigned agency. None of the appellants made contact with either the Tribunal or HMRC, notwithstanding the fact that, in terms of the Tribunal Directions dated 9 September 2015, the appellants had been required to serve the witness statements on whose evidence they intended to rely on at the hearing and that no later than 14 October 2016.

14. No witness statements have been lodged by any of the appellants. Further, by no later than 28 October 2016 the parties were required to provide to the Tribunal and each other the skeleton arguments including the details of any legislation and case law authorities to which they intended to refer at the hearing. No skeleton argument has been lodged by, or for, the appellants.

15. On 21 October 2016, HMRC intimated an application dated 20 October 2016 for strike out of the appellants' appeals under Rule 8(3) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 "the Rules".

16. On 28 October 2016, Judge Mosedale issued Directions stating that the appeals would be struck out unless the appellants confirmed their wish to continue with the appeals. A letter was also sent to each of the parties indicating that unless objections were received the substantive hearing would not proceed but 18 November 2016 would be reserved to hear HMRC's strike out application at the same time and in the same venue as previously notified.

17. Only Mr Decker responded purporting to represent all three appellants although no mandate had been lodged in regard to Ms Clemens. He again sought a sist of the proceedings. HMRC vigorously objected on 4 November 2016.

18. Mr Decker subsequently requested a postponement of the hearing. That application was refused. Mr Decker stated two grounds neither of which was

accepted. The first ground was that there was short notice and that was not accepted in light of the procedural history. The second ground was that none of the appellants had legal representation (see paragraph 35 below).

19. The appellants were notified that they could renew their application for postponement of the hearing and/or a sist of the appeal at the hearing on 18 November 2016. It was pointed out that there was no mandate from Ms Clemens.

20. On 17 November 2016, Mr Decker advised the Tribunal that none of the appellants would be attending the hearing and indicated that they had asked for it to be postponed.

Preliminary issues

The documentation

21. On 4 November 2016, HMRC had emailed the Tribunal with written copies to Mrs Decker and Ms Clemens (as they were unable to contact Mr Decker) making "Observations" on Mr Decker's request for a sist. I had a long email from Mr Decker responding to that email and containing his "Observations". There were also copies of all correspondence with, and copied to, the Tribunal.

22. HMRC had lodged a Note of Argument but that had not been copied to Mr and Mrs Decker primarily because, notwithstanding the fact that Mr Decker had given the Tribunal his address and email address, he had contacted HMRC at 13:00 on 16 November 2016 stating that he did not consent to email exchanges and that all documents should be sent to his registered address in Dubai, UAE. Service by mail to that address had failed.

23. He was, or should have been, very well aware that it had not proved possible to send the documents to his registered address. Indeed Mrs Decker had met the Sheriff Officers when they had failed to attempt to effect delivery. She then gave them a further new address for herself albeit it is a c/o address in Glasgow.

24. I therefore issued Directions on 18 November 2016 serving the Note of Argument by email on Mr Decker together with copies of two pieces of documentation to which HMRC referred but with which it was possible that Mr Decker might not be conversant. A copy of those Directions, without the Note of Argument and copy documentation is annexed at Appendix A.

25. I had identified those Documents in the excised bundle prepared for the substantive appeal and lodged for this hearing. The majority of the documents contained therein were wholly uncontentious (in the sense that in regard to most of them the parties should have been aware of them for years) being, for example the Notices of Appeal, Notices of Assessment, Tribunal Directions, parties' previous submissions, correspondence between the parties and the Tribunal etc. The two documents attached to my Directions are the only documents to which HMRC referred and where there might be a slight doubt as to whether the appellants' representative had copied those to the appellants. The appellants must be aware of the

Interlocutor from the Court of Session dated 22 April 2016 (since Mr Decker states that has been appealed) and the Petition to which that relates.

26. All documents, including the complete bundle, had been served on Admira Clemens and, if Mr Decker is correct in saying that he represents her, then he should have had access to everything in any event. However, I considered it only fair to allow him the opportunity to make comment if he so wished.

27. The remaining Bundles were copies of the Tribunal Rules and copies of correspondence with the Tribunal and evidence of attempts to serve documentation on Mr Decker.

28. On 22 November 2016, in response to my Directions, Mr Decker emailed the Tribunal at length. He expanded upon the Grounds of Appeal and referred to abortive correspondence in relation to a potential settlement in 2014 before the discovery assessments which are the subject matter of these appeals were issued. He also referred to the Independent Police Complaints Commission's ("IPCC") Venison Report, advanced an argument on his need for legal representation, in particular, pointing out that he did not know the difference between a strike-out hearing or an appeal hearing and challenging the competency of the discovery assessments. He stated that he enclosed nine documents but, in fact, 11 were included. With the exception of details of his gambling history, and a self-assessment statement dated 15 September 2016, much of the remaining information had already been furnished by HMRC.

Absence of the appellants

29. The first issue for the Tribunal was whether or not the hearing on the various applications should proceed in the absence of any of the appellants. I had due regard to Rules 33 and 2 of the Rules.

30. I am entirely satisfied that all of the parties have been notified of the hearing and that has happened repeatedly. They should have been in no doubt whatsoever that the hearing would proceed. At all times the appellants ought to have been expecting to be present in the Tribunal on 18 November 2016.

31. The remaining question is whether or not it is in the interests of justice to proceed with the hearing on the applications. Clearly Mr Decker anticipated that the application for postponement would be considered since he emailed the venue in Edinburgh stating:

> "…we are unable to attend the hearing….We have already requested for the hearing to be postponed.
>
> Thank you for your understanding in this matter
>
> Ronnie Decker
> Helen Decker
> Admira Clemens".

32. In terms of Direction 1 of the Directions dated 18 November 2016, since Admira Clemens had not intimated that her son should not represent her, Mr Decker was now recognised as her representative.

33. I decided to proceed on the basis that it was right and proper to proceed to consider the various applications.

Postponement/Adjournment/Sist applications

34. An application for postponement becomes an application to adjourn if reiterated at a hearing.

35. When Judge Mosedale refused the November postponement request she made it explicit that her preliminary view was that "…this is a Tribunal where justice may be obtained without legal representation, and in any event it is only an interim hearing; moreover it is for the appellant to ensure that they have funds to instruct lawyers if they wish to do so; moreover, it is inappropriate to grant the sist applied for by the appellant by the back door so it is inappropriate to further delay the progress of this appeal". I agree. If I were minded to grant an adjournment it would in fact amount to a sist given the time frames involved as Mr Decker is arguing for a sist to February 2017. Accordingly, since the arguments overlap, I address both applications together.

36. Mr Decker argued that these appeals should not proceed "until my legal representation is sorted out".

37. Tribunals are designed to be used by unrepresented appellants. As I indicated in the summary decision, and reiterate here, unrepresented appellants frequently appear in tribunals and it is by no means unusual for them to be opposed by Counsel. The key fact is that these are the appellants' appeals. It is their choice as to whether or not they wish to proceed with them. That is a matter for each individual appellant. If they are unable to access funding then they must decide whether they wish to proceed themselves or with the assistance of a friend or other representative, whether professionally qualified or not. Alternatively, they can decide whether or not they wish to withdraw the appeals.

38. The appellants have had at least two months to attempt to arrange alternative representation. The usual timescale allowed by the Tribunal in such circumstances is four to six weeks. This is not an unusual situation. Indeed, I would draw Mr Decker's attention to the case which he cited at page 2 in his email dated 22 November 2016. On the first page of that case, if one accesses it through the link, as he requested me to do, it is recorded that one of the parties "Andreas Charalambous appeared with his litigation friend". I observe that that gentleman is identified as one of the *Dramatis Personae* in The Petition in the Court of Session (at 7.4) and that is presumably why that reported case is known to Mr Decker.

The law

39. The Tribunal's Case Management powers are to be found at Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and, in particular,

Rule 5(3)(h) which states that the Tribunal may, by direction, adjourn or postpone a hearing.

40. Rule 2 of the Rules provides the overriding objective which is to deal with cases fairly and justly:-

Rule 2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

41. It is made quite clear in *Transport for London v Greg O'Cathail*[1] that the overarching fairness factor must be taken into account in assessing the effect of the decision as to whether or not to adjourn on **both** sides. *Terluk v Berezovsky*[2] identifies the fact that a late adjournment involves a significant loss of time and money. If this hearing were to be adjourned there would undoubtedly be a waste of scarce Tribunal time, no possibility of recovery of costs from this hearing from the appellants and a further delay in access to justice for the parties since, at a minimum, there would be no case management directions and there would be an outstanding application for strike out. HMRC contend that an adjournment would result in prejudice to HMRC, the administration of justice and the public purse.

[1] 2013 EWCA Civ 21 at paragraph 42

[2] 2010 EWCA Civ 1345

42. Both parties are entitled to have cases dealt with fairly and justly. The appellants do not have the monopoly of the fairness factors. *Dhillon v Asiedu*[3] confirms that the decision as to whether or not to adjourn is a balancing exercise.

43. Of course, I am also aware of Article 6 of the European Convention on Human Rights and the relevant part provides:-

> "In their determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …".

44. In the case of *Teinaz v Wandsworth London Borough Council*[4] Gibson LJ commented on Article 6 and stated at paragraphs 21 and 22:

> "…but the tribunal or court is entitled to be satisfied that the inability of the litigant … is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment … all must depend on the particular circumstances of the case".

What then are the particular circumstances of this case?

45. Like Judge Mosedale before me, I do not accept that the appellants have had short notice of this hearing. The substantive hearing was notified on 17 August 2016. The appellants should have expected to be in the Tribunal on 18 November 2016. The proposed intention to substitute a one day interim hearing was notified on 28 October 2016.

46. At the latest, the appellants have known that they have not had representation since 25 September 2016. Had they been engaged in these appeals it would have reasonably been expected that at a bare minimum they would have contacted the Tribunal at, or before, that point to look for an extension of time to comply with Directions and/or to find new representation. They did not. The Tribunal had to ask them whether they intended to proceed.

47. Mr Decker has blandly stated that "We are unable to get legal representation until money is released to pay for it." and "We are waiting for the Judicial Factor who appointed ….on our behalf to make available funds which was held by our previous Lawyers to be released to our client accounts." He went on to explain in an email to HMRC and others dated 3 November 2016, that that funding issue would be resolved through Legal Aid or a variation of the restraint order.

48. Legal Aid would not be available for these Tribunal proceedings. I have no information on the funding, or not, for the Court of Session proceedings.

49. The Petition of The Scottish Ministers in the Court of Session narrates that the restraint orders granted by the Court (not the CRU as stated by Mr Decker) were recalled on 19 August 2011 (48.1 - 48.4 of The Petition). It may be that there are other

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[3] 2012 EWCA Civ 1020

[4] 2002 ICR 1471

restraint orders but I have been provided with no information in that regard and Mr McIver was unable to assist.

50. Mr Decker states that he has no assets that are not covered by the Recovery Order granted on 22 April 2016 (see paragraphs 8 and 9 above). By implication, the same holds good for all three appellants. At that Hearing Mr Decker (only) was represented. I note that the funds held by previous lawyers form part of the Recovery Order (4.2.3 of the Petition).

51. Like Judge Mosedale, I have been provided with absolutely no information as to the Reclaiming Motion or the possibility or probability of success. Unlike her, however, I have had the opportunity to read the Petition and the Decision of Lord Brailsford dated 22 April 2016.

52. That Decision certainly did grant the Recovery Order but that was on the basis that Lord Brailsford had refused Mr Decker's Motions to allow Answers to the Petition to be enrolled late. The implication of that is that:

(a) the Reclaiming Motion which is to be heard in the Inner House in January 2017 relates to the refusal to allow Answers,

(b) if that is successful it appears to relate only to Mr Decker, since he is the only Respondent (of the five) mentioned in the Decision, and

(c) if it is successful it would mean that the Petition would be remitted back to be dealt with "As Accords" and therefore proof of, and challenges to, the Crown's case would then be heard in the Outer House.

53. In summary, even if the Reclaiming Motion is successful (and presumably funding for representation for that may well be an even more expensive and competing issue) all that that would mean is that the appellant(s) would revert to the position that they were in in April 2016 and would then have the potential to litigate the Petition in the Court of Session. The outcome and timescale for that is impossible to predict, let alone the possibility, however remote, of further appeals.

54. In those circumstances, presumably, even if a sist were granted now a further application would be lodged in February.

55. If the Motion is unsuccessful, then there are no assets to fund anything and any delay would have been pointless.

56. The prospect of funding for these proceedings being made available in any reasonable time frame, if at all, seems remote.

57. Judge Mosedale's reasons for refusing the previous application to sist (which was to a date three months after the conclusion of the Court of Session proceedings) were issued on 5 July 2016 so the appellants have been on notice for a long period as why they had not been successful. In particular, her conclusion was that:

> "It is not enough to aver, as the appellants do, that both proceedings concern the origin of money in the appellants' bank accounts, and/or both concern the same or similar issues, or that (in the appellants' view) HMRC's and the views of the Scottish Ministers in the respective proceedings are not the same. The appellants have failed to identify, let alone make out, any real risk of unfair prejudice to them in the FTT proceedings if the FTT proceedings are not stayed behind the PCA proceedings."

58. Those are still the arguments being advanced. Mr Decker argues that "….the funds and assets in dispute in the Court of Session and …in this Tribunal are the same…" and that the crucial issue is the source of funds in the appellants' bank accounts so the two sets of proceedings are inextricably linked. He argues that the Court of Session will determine issues of fact that are relevant to these proceedings.

59. The only new arguments that he has advanced since the last refusal of an application to sist are that:

> (a) if the Court of Session finds that the funds in question are the proceeds of crime then they cannot be taxed, and
>
> (b) the various departments of HMRC are, and have been, engaged in a "witch hunt" whereby the appellants are pursued by HMRC who "…pound us with legal procedure until we go broke".

60. Quite apart from the issue as to whether there will be any litigation in the Court of Session, the averments in the Petition span a far greater period than the years of assessment in these appeals and deal with a very extensive range of property in the names of a number of individuals and legal entities not involved in these appeals. Accordingly, if that matter proceeds to litigation it involves a very different factual matrix to these appeals.

61. The only parties who are potentially the same are the three appellants. I say potentially because it would appear that neither Mrs Decker nor Ms Clemens (nor the other two respondents) have lodged Answers in the Court of Session. Mr Decker states that they are parties but whether they are, or not, is not material to this Decision. Findings in fact in the Court of Session would not bind the Tribunal. Each case depends on the evidence led before it.

62. Further, the two litigations are completely different and deal with different legislative provisions. In these appeals, HMRC bear the burden of proof in establishing that discovery assessments were competently and timeously raised and, if so, that the law in regard to penalties has been properly applied.

63. If they succeed in that, then the burden of proof changes and it is for the appellants themselves to produce evidence to show that the assessments in the years in question are excessive, whether because the source of some funds may or may not be taxable or for other reasons. To date, as I find in regard to HMRC's application for strike out below, extremely little indeed has even been argued for or by the appellants.

64. It is quite different in the Court of Session. Firstly, the appellant(s) have to be successful in the Reclaiming Motion which appears to be likely to be predicated

purely on matters of fact relating to the failure to lodge Answers timeously and the law relating to that. Secondly, in the absence of any information as to the substance of any such Answers, if admitted, it is impossible to even conjecture as to the evidence that might be led. The burden of proof lies with the Scottish Ministers if the Petition is litigated.

65. The allegations of a "witch hunt" or persecution are entirely irrelevant to the question of adjournment or sist but I confirm that I did consider the arguments advanced. Mr Decker referred me to a case in 2010 referring to matters many years previously and to the IPCC Venison reports. In regard to the latter, it has nothing whatsoever to do with these appeals.

66. For completeness, I should point out that although I read paragraph 16 of the case to which I was referred and the witness did refer to Mr Decker, albeit not in relation to these appeals, the Judge stated at paragraph 19 in regard to the evidence of that witness that "…I have come to the conclusion that his whole story…is incredible and untrue". It is not relevant to these appeals.

Decisions on adjournment and sist

67. As I indicated in the summary decision I refuse these applications. I have weighed all the relevant factors in the balance and find that there are very high sums of money potentially at stake, the facts at issue occurred between 13 and 17 years ago and it is in the interests of justice to progress these appeals as expeditiously as possible.

HMRC's Application to strike out the Appeals

68. HMRC relied on Rule 8(3) of the Rules and that reads:

> 8(3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

Rule 8(3)(a)

69. It is conceded that this is of potential application only to Admira Clemens. She certainly did not comply with the Directions dated 28 October 2016 and that Direction indicated that failure to comply could lead to strike out. Technically I could strike out her appeal on that basis. However, Mr Decker, in the absence of a mandate, purported to speak for her and intimated that she wished to continue with the appeal. I have remedied the lack of a mandate and therefore it would not be proportionate, fair or

just to strike out her appeal on the basis of noncompliance where her son and his wife had complied with those Directions.

Rule 8(3)(b)

70. Undoubtedly, there has been minimal engagement by the appellants with the Tribunal, HMRC and the appeal process particularly as evidenced by:

(a) Following the resignation of their representative on Sunday 25 September 2016, only six and a half weeks before the six day hearing, the appellants did not contact either HMRC or the Tribunal. The first contact of any note was Mr Decker's email of 3 November 2016 in response to the Directions intimating the possibility of strike out.

(b) None of the appellants have complied with Directions in regard to the production of witness statements or skeleton arguments and that is particularly significant in that the grounds of appeal stated in the Notices of Appeal are very brief and lacking in specification. HMRC are indeed currently in a position where they find themselves having to answer appeals which are largely unspecified, and insofar as specified are not founded on material which has been lodged in process.

(c) Whilst it has been possible for the Tribunal to contact Mr Decker by email and for service of all documentation to be made on Almira Clemens, Mrs Decker has never intimated her apparent change of address to the Tribunal. HMRC only found out about it on 15 November 2016 after repeated attempts by Sheriff Officers to effect service at the given address had failed. Mr Decker only confirmed his address (which is not identical to that on the Notice of Appeal perhaps because of a typing error) on 12 November 2016. HMRC had previously attempted service at that and a similar address (the only difference being the PO Box numbers) and had failed and one was returned "recipient moved". On 16 and 22 November 2016, Mr Decker confirmed that he refuses to accept service of documentation from HMRC by email.

(d) The repeated applications for postponement and sist, where the grounds for previous refusal were explicit, do not sit well with the requirement in terms of Rule 2 of the Rules to avoid delay.

71. I have considerable sympathy with HMRC's entirely understandable frustration at the lack of progress in these appeals. I find that all three appellants have failed to co-operate with the Tribunal but that is not the whole point. The question is whether that lack of co-operation means that the proceedings cannot be dealt with fairly and justly. This is a discretionary sanction. Strike out of proceedings has sometimes been referred to as a " Draconian remedy" and obviously should not be undertaken lightly.

72. Clearly, HMRC have been prejudiced and there has been delay. On the other hand, although the issues in the substantive appeals relate to some 13 to 17 years ago, these appeals only came to the Tribunal two years ago. They are complex cases. I find

that, viewed through the prism of the procedural history, the delay, which is to be deprecated, is not inordinate.

73. I have very carefully weighed all of the circumstances in the balance and given that the appellants had not been put on notice that failure to comply with the September 2015 Directions could lead to strike out, I find that the lack of co-operation can be remedied in order to achieve fair and just proceedings by issue of appropriate case management directions. I therefore do not strike out these proceedings in terms of Rule 8(3)(b).

Rule 8(3)(c)

74. Finally, I considered Rule 8(3)(c) and the prospects of success. Again this is a discretionary sanction so I had to weigh all relevant factors in the balance.

75. As I indicate above, I agree with HMRC that the grounds of appeal specified in the Notices of Appeal are very brief and lacking in specification. In the case of the two ladies it is simply argued that the monies allegedly received are being taxed in the hands of Mr Decker so there is double taxation. That fails to take into account his appeal.

76. The onus of proof in regard to the quantum of the assessments lies with the appellants. In plain English, it is for the ladies to prove, on the balance of probabilities, where and when any monies apparently passing through their bank accounts came from. They have produced no argument or evidence. If the Tribunal does not permit them to lodge witness statements out of time then, in relation to the tax allegedly due for the years in question, their prospects of success seem unlikely.

77. As far as Mr Decker is concerned, again the Notice of Appeal is minimalist, suggests double counting on the basis of monies allegedly moving between accounts, and in addition it is suggested that Mr Decker had assumed that some monies had been received net of PAYE. As with the ladies, since no evidence has been produced, in the absence of permission to lodge witness statements and/or other evidence out of time, the prospects of success seem unlikely because of the burden of proof.

78. As I indicate in the Directions issued after this hearing, there is a further complication in that Mr Decker's email of 22 November 2016 with enclosures raised what purported to be new and more extensive Grounds of Appeal than those intimated in the three Notices of Appeal.

79. I am treating that, together with his email of 12 November 2016, as an application to lodge amended Grounds of Appeal. On the face of it, it would appear that he is now advancing arguments as to the competency of taxing illegal income, his non-residence in the United Kingdom, the overlap between his appeal and the Court of Session action and the relevance of his gambling income, none of which appears in his own Notice of Appeal.

80. Furthermore, it would appear that in respect of all three appellants an argument is now being advanced as to the timing and competency of the assessments issued.

81. Even if that had not now been raised, the primary reason why I do not strike out these appeals on the basis of Rule 8(3)(c) is because, as HMRC acknowledge in their Note of Argument, the onus of proof in regard to the discovery assessments and utilisation of the extended time limit to do so in terms of sections 29 and 36 TMA lies with HMRC. That is the case whether or not the appellants raise a challenge. If HMRC do not discharge that burden then the appellants' appeals succeed. In these circumstances it is not appropriate to strike out these proceedings in terms of Rule 8(3)(c).

Application for Directions and other matters

82. Mr McIver orally amended his application for Directions in the event that the strike out applications were not successful. The terms of the Directions relating to case management and issued by me with the Summary Decision were agreed at the hearing.

83. In his email dated 22 November 2016, Mr Decker raised a number of other matters which I have not canvassed in this decision. In that email, Mr Decker now concedes that some tax is due and points to abortive settlement negotiations in 2014 where he had offered to settle all three appeals with HMRC in the sum of £750,000. He argues that that is the extent of the liability rather than figures in excess of £3 million.

84. He has effectively requested disclosure of correspondence in regard thereto on the basis that that would establish his actual liability. That correspondence ante-dated the assessments which are the subject matter of this appeal. HMRC have pointed to that correspondence in the bundle served on Almira Clemens and in the excised bundle lodged for the hearing. That correspondence makes it explicit that as long ago as 31 May 2013, HMRC were negotiating "…in order to reach agreement that is satisfactory to both parties…by taking a pragmatic approach" and that the verbal agreement fell through because in September 2014 Mr Decker was not prepared to sign the letter of offer as drafted.

85. Abortive settlement negotiations would not be of relevance to the quantum of these appeals. I therefore make no Directions for disclosure in that regard.

86. Lastly, Mr Decker also referred to, and by inference sought disclosure of, unspecified documents that had been allegedly requested by his former representative. There have been no previous applications for disclosure, HMRC's list of documents has not been challenged and Mr McIver was not aware of any formal requests for documentation. In the absence of further specification I make no Direction for disclosure in that regard.

Directions

87. I annex at Appendix B the Directions issued with my Summary Decision following this hearing. I draw the appellants' attention to the "warning" that if there is a failure in compliance then the appeals could be struck out. In the said email, Mr Decker alleges that he does not understand the meaning of strike out. In plain English, it means that the appeals will not be allowed to continue. HMRC have quite

properly asked that all Directions carry that "warning" and I have honoured that request given the procedural history.

88. 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.

TRIBUNAL JUDGE
RELEASE DATE:

APPENDIX A

Appeal number: TC/2015/00014, 16 & 17

FIRST-TIER TRIBUNAL
TAX CHAMBER

RONNIE DECKER, HELEN DECKER and ADMIRA CLEMENS — **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Edinburgh on Friday 18 November 2016

The appellants did not appear and were not represented

Graham McIver, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

WHEREAS a hearing was set down for today to consider the respondents' ("HMRC") application for strike out and the appellants' applications for postponement and sist and

(a) It transpired that HMRC's Note of Argument had not been copied to Mr and Mrs Decker;

(b) HMRC had been wholly unable to serve the bundle on Mr and Mrs Decker because Mr Decker had refused to receive service by email and service by other means on his given address had failed; and

(c) Notwithstanding Mr Decker's protestations no mandate has been received by the Tribunal in respect of his mother, Admira Clemens.

NOW THEREFORE IT IS DIRECTED that in the interests of justice

(1) Unless Admira Clemens formally intimates to the Tribunal by no later than 5:00pm on Wednesday 23 November 2016 that she does **not** wish her son to represent her, I waive the requirement for a mandate and accept that Mr Decker can and should represent his mother.

(2) The said Note of Argument is annexed hereto at Appendix 1 and is formally served on all of the parties.

(3) Admira Clemens has been served the HMRC bundle not all of which has been referred to by HMRC in argument today. The only items therein to which HMRC referred that would not necessarily be known to or in possession of the appellants are Notes of meeting dated 8 May 2013 (in the bundle at tab 61, page 433) and that is annexed at Appendix 2 and a letter from Mr Decker's former representative dated 13 May 2013 (in the bundle at tab 63 at page 437) and that is annexed at Appendix 3. Both are hereby formally served on all of the parties.

(4) The hearing today did not consider the postponement or sist applications since the strike out application has not been decided. I therefore adjourn the hearing to 2:00pm on Thursday 24 November 2016 at George House, 126 George Street, Edinburgh.

(5) If Mr Decker, both for himself and his family, wishes to make any representations to the Tribunal in regard to the three documents hereby served, then he should do so by emailing the Tribunal by no later than 5:00pm on Tuesday 22 November 2016. The email address should be that which he has used hitherto, namely taxappeals@hmcts.gsi.gov.uk. The strike out application will be determined at the adjourned hearing.

TRIBUNAL JUDGE
RELEASE DATE: 18 November 2016

APPENDIX B

Appeal number: TC/2015/00014, 00016 and 00017

FIRST-TIER TRIBUNAL
TAX CHAMBER

RONNIE DECKER, HELEN DECKER and ADMIRA CLEMENS — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, 126 George Street, Edinburgh on Thursday 24 November 2016

No appearance by or for the Appellants but written communications were received from Mr Decker

Having heard Graham McIver, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

WHEREAS at the Hearing on Friday 18 and Thursday 24 November 2016

89. I received a long email with enclosures from Mr Decker on behalf of all three appellants and that raised what purported to be new and more extensive Grounds of Appeal than those intimated in the Notices of Appeal. I am treating that, together with his email of 12 November 2016, as an application to lodge amended Grounds of

Appeal. On the face of it, it would appear that he is now advancing arguments as to the competency of taxing illegal income, his non-residence in the United Kingdom, the overlap between the appeal and the Court of Session action and the relevance of his gambling income, none of which appears in his own Notice of Appeal. Furthermore, it would appear that in respect of all three appellants an argument is now being advanced as to the timing and competency of the assessments issued.

90. HMRC made an application that, in the event that the strike-out application was not granted, and it has not been, then detailed Case Management Directions should be issued as promptly as possible.

NOW THEREFORE IT IS DIRECTED that

1. Mr Decker, as representative for the appellants is to lodge amended Grounds of Appeal with the Tribunal for **each** of the three appeals and that by no later than noon on 16 December 2016.

2. Those amended Grounds of Appeal must also be served on HMRC within the same timescale.

3. In the event that the said new Grounds of Appeal are lodged then HMRC shall lodge with the Tribunal an amended Statement of Case and that by no later than 16 January 2016.

4. HMRC are relieved of the obligation to intimate documents to Mr Decker by post since it has thus far proved impossible to serve documentation on Mr Decker and it appears Mrs Decker has changed address without notifying the Tribunal or HMRC. Sheriff Officers had provided HMRC with a new address for her but Mr Decker is her representative. Mr Decker has declined to accept service by email from HMRC. He communicates with the Tribunal by email and the Tribunal will therefore, by email, send Mr Decker copies of any documentation lodged by HMRC.

5. Mr Decker is directed to lodge with the Tribunal details of address(es) where service of documents for both himself and his wife will be **accepted** and that by no later than noon on 16 December 2016. I observe that Mr Decker acts for both Mrs Decker and Ms Clemens and both have furnished UK addresses. There is some doubt about Mrs Decker's address. In the absence of provision of a new address for Mr Decker himself, Ms Clemens' address will be taken to be the address for Mr Decker.

6. **Listing information:** Both parties are directed to lodge with the Tribunal by no later than noon on 16 December 2016 details of dates to avoid for a hearing during the months of May and June 2017. I draw the parties' attention to the fact that six days have been allocated for these appeals. The Tribunal will list the hearing on or shortly after this date **even if any party did not provide its dates to avoid or said that no dates are available.** The parties must cooperate with the Tribunal to make themselves available for this hearing. A request for postponement on the grounds the date of the hearing is inconvenience is unlikely to succeed if that party did not provide its dates to avoid.

7. **Appellants witness statements:** Not later than noon on 16 February 2017 each of the appellants shall send or deliver to the Tribunal and the respondents, statements from all witnesses on whose evidence it intends to rely at the hearing setting out what that evidence will be ("witness statements").

8. **Respondents' witness statements:** Not later than noon on 16 February 2017 the respondents shall send or deliver to the Tribunal for onward transmission to the appellants, statements from all witnesses on whose evidence it intends to rely at the hearing setting out what that evidence will be ("witness statements").

9. **Index for hearing bundle:** Not later than 42 days before the commencement of the hearing, the appellant shall serve on the respondents (and notify the Tribunal that it has done so) a draft index to the bundle of documents. The index shall include:

a. the notices of appeal, as amended, provided under Tribunal Procedure Rule 20;
b. the statements of case provided under Tribunal Procedure Rule 25;
c. all documents on the lists of documents provided; and
d. the witness statements provided as directed above.

10. **Additions to index:** Not later than 35 days before the commencement of the hearing the respondents shall lodge with the Tribunal for onward transmission to Mr Decker any additions to the draft index to the bundle of documents

11. **Hearing bundle:** Not later than 28 days before the hearing the appellant shall send or deliver to the respondents the indexed, paginated and bound bundle of documents in accordance with the draft index and the additions to it;

The appellants shall ensure that the copy in the documents bundle of the witnesses' statements shall, where there is a reference to an exhibit in the text, have added in its margin a cross-reference to the exhibit by its place in the documents bundle.

12. **Appellants' outline of case:** Not later than 21 days before the hearing the appellants shall send or deliver to the respondents an outline of the case that it will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which it intends to refer at the hearing.

At the same time the appellant will file with the Tribunal an electronic copy of its skeleton argument together with electronic copies of the witness statements (without exhibits) on which it relies.

13. **Respondents´ outline of case**: Not later than 14 days before the hearing the respondents shall send or deliver to the appellant an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which they intend to refer at the hearing.

At the same time the respondents will file with the Tribunal an electronic copy of their skeleton argument together with electronic copies of the witness statements (without exhibits) on which they rely.

14. **Authorities bundle:** Not later than 7 days before the hearing the appellant shall send or deliver to the respondents one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments).

15. **Delivery of bundles to Tribunal:** The appellant shall deposit with the Tribunal three copies of the document bundle not later than 3pm on the 7th day before the hearing.

16. **Witness attendance at hearing:** At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

17. **Right to request new directions:** Either party may apply at any time for these Directions to be amended, suspended or set aside, or for further directions.

18. The appellants are put on notice that failure to comply with any of these Directions will lead to the striking out of the proceedings or part of them, all in terms of Rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

19. Both parties are directed to lodge with the Tribunal their skeleton arguments.

Anne Scott

TRIBUNAL JUDGE
RELEASE DATE:

NOTE: Grounds of Appeal should outline the arguments that will be advanced in the substantive hearing. Therefore, the amended Grounds of Appeal for each appellant should simply state why HMRC's decision(s) are wrong and give the reasons. It should not be a history; that is a matter, if appropriate, for witness statements.