2023 review

# View from the Tax Bar in 2023

**2023 has been a year of giant marshmallows, chocolate biscuits and major Supreme Court decisions. As those are covered elsewhere in these pages, I am going to focus on some practical aspects of tax litigation, deal with some developments in diversity at the Tax Bar, before looking at a selection of interesting cases that might not have caught your eye as easily as *NewsCorp*, *Target* or *Fisher*.**

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## Hearings

We are now all familiar with the full range of options for hearings – in-person, virtual or hybrid. However, over the last year I've seen logistical problems arising in all formats. So here are some tips for minimising last minute procedural issues:

- Hybrid hearings can be a great solution, particularly where there will be a large number of attendees. If you want a hybrid hearing, make that request to the tribunal well in advance; not all of the rooms have the necessary equipment.
- Where you are seeking to change the format of a hearing, explain your reasons; the tribunal will not simply accept a request, even if agreed between the parties.
- For anyone proposing to attend virtually with a speaking role (whether as advocate or witness), it is also sensible to explain to the Tribunal what checks have been made to ensure that the technology will work and, for witnesses, to ensure that they can give evidence undisturbed.
- The Upper Tribunal (UT) now has a default position for the format of hearings: video for hearings of half a day or less, in person for anything longer.
- Make sure witnesses are aware of the format of the hearing; some will assume that they can give evidence by video, which can then result in dealing with very late disputed applications shortly before the main hearing.
- If a witness plans to give evidence from abroad, follow the guidance issued by the FTT on 28 July 2022 to ensure that the local jurisdiction will permit the witness to give evidence (bit.ly/Oralevidencefromabroad). The process should be started as soon as possible, but in any event at least eight weeks before the hearing. The Foreign, Commonwealth & Development Office has now published a helpful list of the position for certain countries (see bit.ly/FCDOlist), including some (such as Luxembourg and Turkey) where the answer will always be no.
- The tribunals are now frequently giving directions for electronic bundles, even where the hearing is in person. When making a bundle, follow the guidance set out by the UT (bit.ly/ConductofproceedingsinUT) or First-tier Tribunal (bit.ly/ConductofproceedingsinFTT) as appropriate.
- Even if the directions do not require it, it is worth sharing the proposed index and electronic bundle itself with any other parties involved before the deadline for sending it to the tribunal. Adding or rearranging pages after the tribunal has started working with the bundle is almost impossible, and so correction of any errors often ends up generating supplementary bundles (with ever more confusing names).

The Upper Tribunal's guidance published in July (referred to above) now also sets out rules for skeleton arguments (similar to the Court of Appeal, but slightly different to keep us on our toes). The key point to note is that there are now page limits: 25 pages in a substantive tax appeal, 50 pages in judicial review hearings and cases which have been transferred from the FTT. If you think it is necessary to exceed these page limits, you will need to get permission in advance.

## Alternative dispute resolution

In February, HMRC released a new manual, *Alternative Dispute Resolution Guidance*. A key point to note is that HMRC consider that 'tax facts' are not confidential to the mediation, and can and will be relied upon. In HMRC's view, a 'tax fact' is a fact which has legal and technical implications for a taxpayer's liability, such as the receipt of a payment or the identity of a customer. This will, of course, make ADR unattractive for some clients, or make them particularly cautious in engaging with the mediation.

## Junior advocates

We are now used to clients asking our clerks to ensure that they provide a diverse list of available barristers when choosing who to instruct, and this a welcome development in putting together teams – hopefully resulting in a wider range of thinking and working styles, which can be a real benefit in developing legal arguments and preparing for a hearing.

In November, the Lady Chief Justice of England & Wales (supported by her fellow senior judiciary) went one step further and published guidance encouraging the participation of junior counsel in oral argument (see bit.ly/JuniorCounselinCourts). This guidance recognises that such opportunities support the continuing development of junior counsel, and that this is particularly important for women, who are under-represented as leading advocates. In accordance with that guidance, teams involving leading and junior counsel will need to discuss in advance of the hearing whether it is appropriate for junior counsel to have a speaking role. This is something that happens regularly already, but it is helpful to see it so strongly endorsed by the judiciary.

In addition to discussions between junior and leading counsel, the matter of allocating speaking roles will often be raised with the client, and the counsel team must, of course, keep the best interests of the client in mind. In my experience, there are significant advantages to asking a junior to take on a speaking role, allowing leading counsel to focus on other aspects of the case, and this is of course particularly helpful in hearings.

## Women and the Tax Bar

A 2023 personal highlight was the successful panel event encouraging recruitment of women to the Tax Bar, chaired

by Falk LJ, with a panel including Whipple LJ together with five excellent and enthusiastic tax barristers. With the help of Dilpreet Dhanoa (Field Court Tax Chambers), we organised this event on behalf of the Revenue Bar Association, kindly hosted and supported by Lincoln's Inn.

One of the difficulties of improving diversity within the Tax Bar is attracting a wide range of applicants, and women in particular are underrepresented in the pool of applicants for tax specialist sets – although happily the data shows this is improving. It was encouraging to see so many potential applicants attending this event, and those attending in person were surprisingly enthusiastic about staying for a drink and spending their evening talking to tax barristers.

If you are aware of any aspiring pupils who might be interested in tax, please do direct them to the recording of the event which is available on YouTube (see bit.ly/WomenAtTaxBar).

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## A selection of cases

In making this selection, I have focused on cases dealing with interesting procedural and case management issues, as these tend not to attract so much attention.

### Staleness

Starting with procedural matters, it seemed in 2021 that the Supreme Court had put to rest the issue of whether a discovery, for the purposes of a discovery assessment, could become 'stale' (*Tooth* [2021] UKSC 17). However, determined taxpayers continued to fight for the existence of a staleness concept, arguing that the Supreme Court's analysis on that point was obiter. In *Harrison* [2023] UKUT 38 (TCC), the UT firmly rejected that argument, noting that clear and comprehensive general guidance given by the Supreme Court should not be ignored.

### Publication of procedural decisions

In *Breen* [2023] UKUT 00252 (TCC), the UT dealt with the reinstatement of an appeal following a failure to comply with an unless order. In its 'concluding comments', the tribunal noted that the FTT had not published the unless order or the decision to reinstate the appeal, and noted that both merited publication because they contained detailed discussion of the approach to be taken in both. The UT therefore encouraged FTT judges to consider the publication of decisions in strike out and reinstatement applications, in order that other judges and the public can understand the decision-making process involved. While the tribunal did not mention other procedural decisions, the same argument might be made for any reasoned procedural decision (or indeed any reasoned costs decision).

### Confidentiality and litigation

Litigation involving several parties frequently gives rise to issues of confidentiality, and concerns about whether HMRC can and will share documents with other taxpayers. The Court of Appeal addressed this in *Mitchell* [2023] EWCA Civ 261, setting out a detailed and helpful discussion of the nature and scope of HMRC's powers under s 18 of the Commissioners for Revenue and Customs Act 2005, together with the FTT's jurisdiction in relation to that provision. The Court of Appeal considered that, in principle, disclosure by HMRC of one taxpayer's documents to another in the context of ongoing tax litigation can be permitted as made for the purposes of a function of HMRC or for the purposes of civil proceedings.

The court also held, however, that the FTT did not have jurisdiction to determine whether voluntary disclosure by HMRC would be permitted under these provisions, and so the only route for challenging a decision to disclose by HMRC is judicial review.

Finally, the court concluded that the FTT is a 'court' for the purposes of s 18(2)(e), and so HMRC can disclose documents if ordered by the FTT.

### Delay in decisions

*The How Development 1 Ltd* [2023] UKUT 84 (TCC) is interesting from the perspective of both procedure and substance. Sticking with procedure for now, the FTT decision was released nearly a year after the hearing, and contained no mention of the oral evidence of the taxpayer's witness. The decision contains a useful discussion of how a party should act in these circumstances (including requesting copies of the FTT's notes). Ultimately, the UT concluded that the decision was not 'safe' but that it was able to re-make it by taking into account the substantive points said to have been made by the witness in oral evidence.

Turning to the substance, *How* continues the line of SDLT cases on the concept of the 'grounds' of residential property. The UT summarised the approach as an 'evaluative exercise' which was 'inevitably impressionistic in nature'. It rejected the taxpayer's argument that there were certain types of land which were never capable of being grounds, and in particular the argument that there was some minimum level of accessibility from the dwelling required. While not part of the reasoning, the UT also noted that the provision of privacy and security for a dwelling was capable of amounting to 'enjoyment' of the dwelling, regardless of the accessibility of the land which provides it.

While the SDLT legislation is not the same as the principal private residence relief for CGT purposes, the approach taken to the ordinary meaning of 'grounds' will also be useful guidance for those advising on that relief.

## Upcoming appeals

As we leave 2023, we can look ahead to a selection of developments expected in 2024.

HMRC's appeal against the decision in *Lineker* [2023] UKFTT 340 (TC) will no doubt draw further media attention when it is heard in February 2024, and will be the latest in the many IR35 cases, including the recent success for Kaye Adams in *Atholl House Productions Ltd* (TC/2018/02263). We are also awaiting the decision of the Supreme Court in *Professional Games Match Officials Ltd* [2021] EWCA Civ 1370.

*The Prudential Assurance Company Limited* [2023] UKUT 54 (TCC) will be heard by the Court of Appeal in January 2024, dealing with the VAT grouping provisions and in particular the issue of fees invoiced after the supplier left the VAT group.

Finally, *Innovative Bites* [2022] UKFTT 352 (TC) was listed in the Upper Tribunal for late November, so we can look forward to learning more on whether a mega marshmallow is a snack or an ingredient in a s'more, and tell those interested in a career in tax that it is really all about food. ■