Queen's Bench Division

Regina (Sword Services Ltd and others) *v* Revenue and Customs Comrs

[2016] EWHC 1473 (Admin)

June 8, 9, 23 Cranston J

Revenue — Income tax — Tax avoidance — Limited liability partnership entering into tax avoidance scheme — Whether revenue empowered to issue partner payment notice on limited liability partnership — Finance Act 2014 (c 26), Sch 32

The claimants, who were members of general partnerships or limited liability partnerships, had entered into a tax avoidance scheme. Following inquiries, the revenue issued partner payment notices, a tax anti-avoidance measure, under Schedule 32 to the Finance Act 2014[1], requiring the claimants to pay the sum identified in the notices within 90 days. The claimants sought judicial review of the revenue's decision to issue the notices, claiming, inter alia, that Schedule 32 did not empower the revenue to issue partner payment notices to members of the limited liability partnerships, since a limited liability partnership was a separate legal entity to which the ordinary law of partnership did not apply and for which specific provision had to be made. Other grounds of claim were adjourned for separate hearing.

On that part of the claim concerning the scope of Schedule 32 to the 2014 Act—

Held, dismissing that part of the claim, that having regard to the language of Schedule 32 to the Finance Act 2014 coupled with its context and the purpose of the accelerated payments regime in the 2014 Act, as well as the wider statutory context, the reference in Schedule 32 to "partnership" and "partner" referred to both ordinary and limited liability partnerships and their members; and that, accordingly, limited liability partnerships fell within the schedule (post, paras 59–62, 64, 76).

CLAIM for judicial review

By a claim form dated 16 June 2015 the claimants brought a claim for judicial review challenging the issue of partner payment notices by the Revenue and Customs Commissioners ("the revenue"), between March and June 2015, under Schedule 32 to the Finance Act 2014, on the ground, inter alia, that Schedule 32 did not apply to limited liability partnerships. A further part of the claim relating to the Human Rights Act 1998 was adjourned pending the Court of Appeal's determination in separate proceedings.

The facts are stated in the judgment, post, paras 1–36, 53–54.

James Rivett (instructed by *GRM Law*) for the claimants.

Sam Grodzinski QC and *David Yates* (instructed by *Treasury Solicitor*) for the revenue.

The court took time for consideration.

23 June 2016. **CRANSTON J** handed down the following judgment.

Introduction

1 These proceedings challenge the issue of partner payment notices under Schedule 32 to the Finance Act 2014. Partner payment notices are a tax anti-avoidance measure. The effect of each partner payment notice is to require the recipient to pay the sum identified in them to Her Majesty's Revenue and Customs ("HMRC") within 90 days of the notice. There is no statutory mechanism by which to appeal to the First-tier Tribunal against the issue of a partner payment notice and so a challenge must proceed by way of judicial review.

2 The claimants are each members of partnerships set up by Future Capital Partners Ltd ("FCP"). Each partnership was either a general partnership ("GP") or a limited liability

[1] Finance Act 2014, Sch 32, so far as material: see post, paras 40, 41.

partnership ("LLP"). As a result of the permission decision of Picken J, explained later, this judgment affects only a limited number of the members of GPs, GPs 6–7, but all members of LLPs. There are witness statements from a number of claimants which refer to the partner payment notice causing permanent financial consequences for them, in some instances also having devastating effects for their employees.

3 There are two challenges to the partnership payment notices in these proceedings. First, the claimants contend that while the partnership payment notice provisions of Schedule 32 apply to the GPs, as a matter of statutory construction they do not apply to the LLPs. The second challenge is that the particular partnership payment notices sent for GPs 6–7 and LLPs 4–7 were invalid. If that is the case it is too late now under the legislation for HMRC to send valid notices. This second ground concerns whether, under the relevant provisions of the Taxes Management Act 1970, HMRC had issued notices of inquiry in relation to the partnership tax returns for GPs 6–7 and LLPs 4–7. That is one of the preconditions set out in Schedule 32 to the issue of partnership payment notices.

The tax avoidance scheme

4 In his first witness statement, Mr Timothy Levy explains that he is the chief executive officer, and one of the founders, of FCP, and is a director of various other companies within the FCP group. These include Future Films (Management Services) Ltd ("FFMS") and Future Films (Partnership Services) Ltd ("FFPS") and Future Capital Partners (Partnership Services) Ltd ("FCPPS"). From 2008 FCP established and promoted various GPs and LLPs as part of what was described in promotion material as "a plan to be involved in a diverse range of film activities", the FCP group having "arranged in excess of £5bn of structured media financing transactions without successful challenge from HMRC". Since then the GPs and LLPs have been managed or operated by a company connected with FCP.

5 Under the arrangements each GP or LLP provides film production services, and in return receives the right to share in the income received from films, contingent on their performance. In turn each claimant shares in the profits and losses of the relevant GP or LLP of which it is a member. The contractual arrangements entered into by each GP or LLP purport during their first period of account to have the effect that they are obliged under Generally Accepted Accounting Principles ("GAAP") to recognise the expenditure to which they are committed as having been expended in that first period. The claimants' position is that the losses arising to each GP or LLP during that initial period can then be set against a member's income for the purposes of computing their individual tax liability.

6 In February 2008 FCP as promoter made a disclosure to HMRC about these arrangements under section 308 of the Finance Act 2004 (the disclosure of tax-avoidance schemes provision). The disclosure was updated in September 2008. Dean Street Productions was the name given to the scheme and ultimately it included GPs 6–7 and the LLPs, which are involved in the present litigation. HMRC describes the scheme as a "UK GAAP sideways loss scheme."

The partnership documents

7 Under the scheme there were partnership deeds for each of GPs 6–7 and LLPs 4–7. By way of example the amended and restated partnership deed for LLP 4 is dated 21 December 2010. Future Capital Partners (FS) Ltd ("FCPFS") is identified as the promoter of the scheme. The founding members of the partnership are named as FFMS and FFPS, which are also defined as the designated members for the time being. FCP is defined as the consultant to the partnership for the time being, further to the partnership consultancy agreement. The future corporate member of the partnership is named as Future Screen Ventures (30) Ltd ("FSV30"). Under the partnership deed the registered office of the partnership is 10 Old Burlington Street, London.

8 Under clause 4.2 of the partnership deed, the consultant is responsible for ensuring that all partnership activities which amount to the operation of an unregulated collective investment scheme for the purposes of the Financial Services and Markets Act 2000 are carried out by an authorised person. The partnership deed states that FCPFS is appointed as the operator, pursuant to the operator agreement, although it enables the designated members to replace the operator. Under clause 4.4 the operator can delegate its functions to the consultant or any other suitable person. The remainder of clause 4 gives the designated members wide powers of management. Clause 7.1 imposes on the operator a duty to use reasonable endeavours to ensure that the consultant prepares the UK tax computation for the partnership and submits and agrees it with HMRC.

9 Under the film consultancy agreement dated 2 August 2010, LLP 4 engages FCP to provide film consultancy services. By clauses 5.1.4–5.1.5 FCP undertakes in dealings with third parties

to describe itself as the consultant to the partnership, not its agent, and not to hold itself out as agent or allow itself to be held out as such. Film consultancy services are defined as the services set out in the schedules. Schedule 2 contains a number of matters delegated by the operator, FCPFS, to the consultant, FCP. One of these is as follows:

> "Administering the general taxation matters of the partnership with the HMRC, and providing to partners such information derived from the tax and financial affairs of the partnership as they may reasonably require in relation to the computation of their own tax positions."

10 On 14 February 2011, LLP 4 appointed Taylorcocks, chartered accountants and chartered tax advisers, as its auditors. Under the letter of engagement Taylorcocks undertook to provide taxation services as follows:

> "We shall prepare, in respect of each accounting period, a computation of profits adjusted in accordance with the taxes acts. Once they have been approved by you we shall complete the appropriate self assessment schedule. We shall prepare on your behalf the necessary self assessment returns … We shall forward your return (together with copies of all supporting material we propose to submit to HM Revenue & Customs with your return) to you for approval and signature. You are legally responsible for making a correct return in respect of your annual tax liability, and it is essential that we as your agent are supplied with all relevant information."

11 The partnership documents for LLPs 5–7 and for GPs 6–7 followed essentially the same pattern as for LLP 4. With GPs 6–7 there was no designated partner but a managing partner; that was FCPPS. The accountant appointed for GPs 6–7 were Hillier Hopkins LLP.

12 There is an operator agreement dated 22 March 2010 for LLP 1. (I can assume that it is typical of such agreements given the absence of any objection from the claimants when HMRC produced it.) It is between LLP 1, FCP ("the Consultant"), FCPFS ("the Operator"), FFPS, and FFMS. The Preamble records that the Operator is authorised under the Financial Services and Markets Act 2000 and that the Consultant has identified it as competent to provide services to the partnership as an unregulated collective investment scheme. Under the agreement the designated members of LLP 1 appoint the operator as the exclusive operator of the partnership. Among the services to be provided to the partnership by the operator listed in Schedule 1 is to "administer the general taxation matters of the partnership with HM Revenue & Customs…" Under clause 2.6 of the agreement "it is understood that the operator may delegate to the consultant the performance of various tasks (as set out in Schedule 2 …)…" and this includes "administering the general taxation matters of the partnership with the Inland Revenue". The operator agreement is signed by Mr Levy as the designated member of LLP 1 and as director of each of FCP, FCPFS, FFPS, and FFMS.

The tax returns

13 Each of the partnerships in the scheme engaged with HMRC. The steps by LLP 4 can be taken as illustrative. On 1 February 2011 Mr Levy, for LLP 4, submitted a HMRC form 64–8, "Authorising your agent", naming FCP as the agent with whom HMRC could deal. A box was ticked "UTR [unique tax payer reference] not yet issued." The standard wording of form 64–8 states that the person who should sign the form is the partner responsible for the partnership's tax affairs.

14 On 17 February 2011 Mr Levy submitted to HMRC another form 64–8, "Authorising your agent". He was described as "director of designated member" of LLP 4. The box was ticked naming Taylorcocks as LLP 4's agent for dealing with the partnership's tax affairs.

15 Mr Grodzinski QC for HMRC submitted that the form dated 1 February 2011 was a general authorisation for FCP to act as LLP 4's agent with HMRC. Although the box indicating the scope of the agency was not ticked, he highlighted that, in completing the online form, "partnership" had been selected from the drop-down menu. It is difficult to sustain that submission when a few weeks later, on 17 February 2011, Mr Levy submitted the second form 64–8 authorising Taylercocks to act as LLP 4's agent to deal with HMRC. It seems to me that the form 64–8 of 1 February 2011 was, as Mr Levy says in his witness statement, to enable HMRC to inform FCP once a UTR had been allocated to the partnership. Nothing more was intended by choosing "partnership" from the drop-down menu.

16 On 23 March 2011 Mr Levy resubmitted form 64–8 for LLP 4, along with form SA400 for registering a partnership for self assessment and form SA402 for registering an individual partner for self assessment. On the form SA400, FFMS was named as the nominated partner and its address given as 10 Old Burlington Street. Mr Levy signed the form on behalf of FFMS. Form SA402 was for FFMS itself and LLP 4 was named as the partnership joined. Mr Levy signed that form as a director of FFMS. The forms were enclosed under cover of a letter from LLP 4 explaining that HMRC had written that the form 64–8 could not be accepted without the forms SA400 and SA402. The form 64–8 was being resubmitted, the letter said, since that form had been returned due to a missing UTR.

17 Separate forms SA400 were submitted on 23 March for LLP 5 and on 7 April for LLPs 6–7, all identifying FFMS as the nominated partner. No forms SA400 were completed for GPs 6–7.

18 Form SA400 is required by HMRC guidance for partnerships which intend to register for self-assessment purposes. The guidance provides that the form is to be signed by the so-called nominated partner, that is, the one responsible for receiving and filing tax returns for the partnership. The guidance *PM20200—Self assessment for partnerships: the nominated/representative partner* states that "nominated partner" and "representative partner" are the interchangeable departmental terms used to describe that person and recalls that members of a partnership are required by section 12AA(2) of the Taxes Management Act 1970 to nominate such a partner, who will act for the partnership in relation to a return, claim or other matter. In the absence of a notification the guidance adds that HMRC has the power to decide who will act as the nominated partner, which is usually done on a purely alphabetical basis.

19 The 2010 tax returns for the GPs 6–7 were filed on 14 December 2010 and 31 January 2011 respectively. The 2011 tax returns for LLPs 4–7 were filed over the period 24–26 January 2012. Internal e-mail correspondence shows that Taylorcocks sent the draft tax returns to the FCP group to ensure that all sources of income and all allowances had been included. The FCP group sent comments and on 23 January 2012 approved the returns for filing, subject to their providing UTRs for LLPs 6–7.

20 The tax return for LLP 4 for the year ending 5 April 2011 is illustrative. It gives as the address "C/O Future Capital Partners, 10 Old Burlington Street, London". Details of the individual partners are given and the losses they claim. One of the partners named is FSV30. The adviser's name and address is given as Taylorcocks. Box 11.3 of the tax return was blank. It reads as follows: "The information I have given in this partnership tax return, as the nominated partner, is correct and complete to the best of my knowledge and belief. Signature: Date: Print name in full here:" Following submission of the return, the automated reply from HMRC acknowledging receipt was sent to Taylorcocks.

21 FFMS was not listed as a partner in the return for LLP 4. Nor was it mentioned in the returns for LLPs 5–7. Similarly, FCPPS was not identified as a partner in the returns for GPs 6–7. In his witness statement, Mr Levy states that under the partnership deed for LLPs 4–7 the designated members were not allocated profits or losses and therefore were not included in the tax returns. So, too, with FCPPS, the managing partner for GPs 6–7. I note in passing that with, for example, LLP 3's tax return for 2011, FFPS was named as a partner with the loss being stated as £0·00.

HMRC's inquiry

22 Meanwhile, HMRC had initiated action regarding the general partnerships in the Dean Street Productions tax avoidance scheme. Notices of inquiry under the Taxes Management Act 1970 were sent for GPs 1–2 in December 2010 and marked for the attention of Mr Richard Philson at FCP, with whom HMRC had apparently already had contact. Box 11.3 on the tax returns for GPs 1–2 was blank so the so-called primary letter of inquiry was sent to Future Screen Ventures (16) Ltd ("FSV16"). In a witness statement Mr Len Jacobs from HMRC explains that the reason this company was selected was that it was thought to be connected to FCP, the promoter of the scheme. As well so-called courtesy letters were sent to all of the named partners in the tax returns for GPs 1–2.

23 Mr Philson responded, "for and on behalf of" GPs 1–2, enclosing documentation and stating that when HMRC had the opportunity to review it they should contact him to arrange a meeting. HMRC sent primary and courtesy notices of inquiry in the same way for GPs 3–5.

24 The partnership returns for GPs 6 and 7 were submitted in January 2011. On 16 May 2011 HMRC sent so-called primary letters of inquiry regarding them addressed to Future Screen Ventures (24) Ltd ("FSV24") and Future Screen Ventures (23) Ltd ("FSV23") respectively. Both FSV24 and FSV23 were listed as partners in the respective partnership tax return. As with GPs 1–2, Mr Jacobs explains that the reason these companies were selected was that box 11.3 on the

tax returns was blank and these listed partners were thought to be connected with FCP, the promoter of the scheme. On 16 May 2011 courtesy letters were sent to all of the members of GP 6 and 7 named in the tax returns, but not to FCPPS which, as I have explained, was not listed as a member.

25 On 11 July 2011 Mr Philson wrote to HMRC, with GPs 6–7 in the subject title, again for and on behalf of those partnerships, stating:

> "We acknowledge receipt of the opening inquiry notices regarding the above named partnerships. As agreed, we will postpone sending in the documentation you have requested until we have discussed Dean Street Productions No 1 GP and Dean Street Productions No 2 GP."

26 On 14 September 2011 there was a meeting between HMRC and FCP. Mr Philson was one of the FCP representatives. The notes of the meeting record that FCP representatives gave a brief overview of the scheme. They also explained that the GPs and LLPs followed the same pattern, but that there were two categories of investor in the LLPs to give more return for higher risk. HMRC said that it would prepare a more detailed request for information and FCP asked that it adopt a sample approach to keep the work manageable.

27 After the meeting HMRC sent a letter of 11 October 2011 to FSV16, marked for the attention of Mr Philson. It identified GPs 1–7 and LLPs 1–14 in the subject matter. The letter referred to the meeting of 14 September 2011 and expressed thanks for the explanation of the scheme. It went on to request information in relation to each of these GPs and LLPs. Mr Philson responded on 8 November 2011, referring as well to a telephone conversation earlier that day, stating that FSV24 was only a member of GP 1 and was not a FCP entity. Mr Philson's letter continued:

> "In order for us to respond to your questions it would be helpful if the letter was addressed to entities which are Future Capital Partners Ltd entities and which are founding Members across the GP and LLP Partnerships. Therefore could you please re-address your letter to the following entities (which are at different times Founding Partners of the GP and LLP partnerships). Future Capital Partners (Management Services) Ltd ['FCPMS'], Future Capital Partners (Partnership Services) Ltd, Future Films (Management Services) Ltd, Future Films (Partnership Services) Ltd."

28 As a result, HMRC resent the letter in November (still dated 11 October 2011) but addressed to FCPMS, FCPPS, FFMS and FFPS at 10 Old Burlington Street, London.

29 With reference to HMRC's letter of 11 October 2011, Mr Philson responded on 30 November 2011 providing information about GPs 1–7. As regards the LLPs, Mr Philson wrote:

> "We note that no tax returns have yet been filed for [LLP 2] onwards nor have inquiries been opened. We understand that the first year tax returns for [LLPs 2–7] will be filed on or before 31 January 2012. Can we suggest any information you require for these partnerships is requested after this date."

30 On 7 March 2012 Mr Philson wrote again to HMRC providing further information. Explaining the LLP structure, the letter stated: "In the LLP structure there are two designated members of the partnership, these are Future Films (Management Services) Ltd and Future Films (Partnership Services) Ltd."

31 HMRC wrote on 28 March 2012 to FCPMS, FCPPS, FFMS and FFPS at 10 Old Burlington Street, for the attention of Mr Philson, with reference to his letters of 30 November 2011 and 7 March 2012. Again the letter included GPs 1–7 and LLPs 1–14 in the subject matter. It was a short letter, to the effect that there was a large amount of data to review but HMRC hoped to be in a position to make a full response in May. The letter concluded: "In the meantime, if there are any aspects of my inquiry you wish to discuss then please do not hesitate to call me on the direct line above." There was further correspondence in April between Mr Philson and HMRC about GP 1.

32 On 1 June 2012 HMRC sent so-called primary inquiry letters in respect of LLPs 4–7. They were addressed to Future Screen Ventures (30) Ltd ("FSV30"), Future Screen Ventures (31) Ltd ("FSV31"), Future Screen Ventures (32) Ltd ("FSV32") and Future Screen Ventures (33) Ltd ("FSV33") respectively. The address of each of these companies was 10 Old Burlington Street, London. In his witness statement Mr Jacobs says that he believes that these were identified as the addressees of the letters for the same reasons as before, in other words box 11.3 in the tax

returns were blank and it was believed that these were entities associated with the promoter of the scheme.

33 The same day, 1 June 2012, HMRC also sent courtesy letters to all of the members of LLPs 4–7 listed in the relevant LLP's partnership return, informing them that HMRC intended to inquire into the partnership return of the relevant LLP. (There was one named partner where HMRC cannot produce evidence that a courtesy letter was sent; there is no need to say anything more about this.) FFMS and FFPS were not identified as members of the LLP in the tax returns, as explained earlier, so courtesy letters were not sent to them.

34 Mr Philson e-mailed HMRC on 21 June 2012, "in relation to your letters dated 1 June 2012 opening inquiries into the tax returns for the year ended 5 April 2011 for Dean Street Productions No 3–8 LLP." In the e-mail, Mr Philson also referred to a discussion with HMRC that day. He promised to send sample information for one partnership. Following this FCP engaged with HMRC about LLPs 4–7. (In June 2013 HMRC was notified of another agent of LLPs 4–7, Atcha & Associates Ltd, which subsequently also dealt with HMRC.)

35 In early February 2013 HMRC wrote four letters to FFMS at 10 Old Burlington Street, "as the nominated partner of" LLPs 4–7, making a without prejudice settlement offer of the ongoing inquireis into the partnerships.

36 Following enactment of Schedule 32 to the Finance Act 2014, HMRC issued partner payment notices to members of the Dean Street Productions GPs and LLPs at various times between mid March and early June 2015.

Statutory framework

Finance Act 2014

37 In outline, Part 4, Chapter 3, sections 219–229 of the Finance Act 2014, introduced a new regime of accelerated payment notices, requiring the taxpayer to pay the amount stated in the notice within 90 days. The effect of a notice is to disturb the ordinary position that no tax is payable until an inquiry into a given taxpayer is complete and any appeal against an amendment or assessment arising is determined. Parliament's aim is to reduce the incentive to enter tax avoidance schemes by enabling HMRC, at a relatively early stage, to require the payment of an amount calculated to be equivalent to what it regards as the understated tax. The result is that if tax is ultimately found to be payable, the taxpayer does not have the advantage of withholding payment to HMRC until after what might be a lengthy period of investigation and appeal: see *R (Rowe) v Revenue and Customs Comrs* [2015] EWHC 2293 (Admin), at [20] per Simler J; *Walapu v Revenue and Customs Comrs* [2016] EWHC 658 (Admin), at [6], per Green J.

38 Pursuant to section 228 of the Finance Act 2014, there is separate provision for accelerated payments in Schedule 32 to the Act "in relation to partnerships." Schedule 32 is headed "Accelerated Payments and Partnerships", and the effect of its paragraph 2(a) is that Chapter 3 of Part 4 of the Finance Act 2014 does not apply where "a tax inquiry is in progress in relation to a partnership return". Paragraph 2(2) states that no accelerated payment notice may be given to the representative partner of the partnership, or a successor of that partner, by reason of that inquiry or appeal. Instead, Schedule 32 "makes provision for partner payment notices" and accelerated partner payments in such cases: paragraph 2(3).

39 Various terms are used in paragraph 2—"tax inquiry", "partnership return" and "representative partner"—and it is convenient to consider their definition before proceeding further. Tax inquiry is defined in section 202(2) to include: (a) an inquiry under section 9A or 12AC of the TMA 1970 (inquiries into self assessment returns for income tax and capital gains tax), including an inquiry by virtue of notice being deemed to be given under section 9A of that Act by virtue of section 12AC(6) of that Act … "Partnership return" is defined in paragraph 1(2) to mean "a return in pursuance of a notice under section 12AA(2) or (3) of the TMA 1970" [the Taxes Management Act 1970]. Finally, paragraph 1(2) defines the "representative partner" in relation to a partnership return as the person who was required by a notice served under or for the purposes of section 12AA(2) or (3) of the TMA 1970 to deliver the return.

40 The key provision for partner payment notices is then set out in paragraph 3 of Schedule 32. In so far as relevant it provides:

> "(1) Where a partnership return has been made in respect of a partnership, HMRC may give a notice (a 'partner payment notice') to each relevant partner of the partnership if Conditions A to C are met.
>
> "(2) Condition A is that— (a) a tax inquiry is in progress in relation to the partnership return, or (b) an appeal has been made in relation to an amendment of the

return or against a conclusion stated by a closure notice in relation to a tax inquiry into the return."

"Relevant partner" is defined in paragraph 1(4) of Schedule 3 in relation to a partnership return, as "a person who was a partner in the partnership to which the return relates at any time during the period in respect of which the return was required".

41 The following paragraphs of Schedule 32 flesh out the scheme for partner payment notices. Paragraph 4 details the content of a partner payment notice, and paragraph 5 enables a relevant partner to object to a notice. The effect of a partner payment notice under paragraph 6 is that the relevant partner must make a payment of the amount stated in the notice. Paragraph 6A was inserted by the Finance Act 2015 to deal with notices specifying amounts where group relief is involved. Penalties for non-compliance are dealt with in paragraph 7. Under paragraph 8 a partner payment notice may be withdrawn, suspended or modified.

Taxes Management Act 1970

42 Schedule 32 to the Finance Act 2014 refers to section 12AA(2) and (3) of the Taxes Management Act 1970 and it is necessary to refer to these provisions. Section 12AA falls within Part II of that legislation, "Returns of income and gains", the sub-part containing section 12AA being headed "Partnerships". Section 12AA itself has the side note "partnership return". It empowers HMRC to require a return to be completed on behalf of a partnership, separate to that of its members. It is necessary to quote some relevant parts of section 12AA:

> "(1) Where a trade, profession or business is carried on by two or more persons in partnership, for the purpose of facilitating the establishment of the following amounts, namely— (a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner, and (b) the amount in which each partner chargeable to corporation tax for any period is so chargeable, an officer of the board may act under subsection (2) or (3) below (or both).
>
> "(2) An officer of the board may by a notice given to the partners require such person as is identified in accordance with rules given with the notice or a successor of his— (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> "(3) An officer of the board may by notice given to any partner require the partner or a successor of his— (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and (b) to deliver with the return such accounts and statements as may reasonably be so required; and a notice may be given to any one partner or separate notices may be given to each partner or to such partners as the officer thinks fit."
>
> "(5E) The commissioners— (a) shall prescribe what constitutes an electronic return for the purposes of this section, and (b) may make different provision for different cases or circumstances.
>
> "(6) Every return under this section shall include— (a) a declaration of the name, residence and tax reference of each of the persons who have been partners— (i) for the whole of the relevant period, or (ii) for any part of that period, and, in the case of a person falling within sub-paragraph (ii) above, of the part concerned; and (b) a declaration by the person making the return to the effect that it is to the best of his knowledge correct and complete."

A "partnership return" is defined in section 12AA(10A) to mean a return in pursuance of a notice under subsection (2) or (3). Section 12AA(13) defines "relevant partner" as the person who was a partner at any time during the period for which the return was made or is required, or the personal representatives of such a person. There is a definition of "successor" in section 12AA(11), addressing the position when a person required to make a partnership return is no longer available.

43 Notices of inquiry are dealt with in section 12AC(1) of the Taxes Management Act 1970. That section confers on HMRC the power to issue a notice of inquiry generally within twelve

months after the filing of a partnership tax return: "(a) to the partner who made and delivered the return, or his successor".

44 In *Flaxmode Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 666, Special Commissioner Charles Hellier held that the effect of this is that if a notice is given only to a person other than the person who "made and delivered the return, or his successor", for example to another partner, that notice is not a "notice of inquiry" under the section: para 8. The Special Commissioner added, at para 27:

> "It does not seem to me that section 12AC requires particular formality about the giving of notice. Chambers English Dictionary 7 Edition defines 'notice' as intimation, announcement, information, warning. It seems to me that that purpose of the notice to be given is to warn the taxpayer that an inquiry is underway so that he knows questions may be asked and that time limits may be affected, and to provide a mechanical activation of the inquiry procedure. This does not require something formal: all that is needed is something in writing which informs the taxpayer that an inquiry is underway. It seems to me therefore that a letter which announces that "I intend inquiring into" a tax return is sufficient to be a notice for the purposes of section 12AC."

45 At this point it only remains to mention section 113 of the Taxes Management Act 1970, which contains the power of HMRC to prescribe the form for tax returns.

Taxation of partners

46 By section 1257 of the Corporation Tax Act 2009 persons carrying on a trade in partnership are referred to collectively as a "firm". Unless otherwise indicated a firm is not to be regarded for tax purposes as an entity separate and distinct from the partners: see section 1258. Where a member of a partnership is a UK resident company, the profits of the company from the partnership activities are computed as if the partnership were a company: see section 1259. The partner's share of those profits for a period are to be determined according to the partnership's profit and loss sharing arrangements during that period: see section 1262.

47 With a limited liability partnership carrying on a trade or business with a view to a profit, its activities are deemed by section 1273 to be carried on by the members in partnership and not by the limited partnership as such. Section 1273(1) reads in part as follows:

> "(1) For corporation tax purposes, if a limited liability partnership carries on a trade or business with a view to profit— (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such), (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and (c) the property of the limited liability partnership is treated as held by the members as partnership property. References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade or business with a view to profit.
>
> "(2) For all purposes, except as otherwise provided, in the Corporation Tax Acts — (a) references to a firm include a limited liability partnership in relation to which subsection (1) applies, (b) references to members of a firm include members of such a limited liability partnership, (c) references to a company do not include such a limited liability partnership, and (d) references to members of a company do not include members of such a limited liability partnership."

48 At the time of the enactment of the Corporation Tax Act 2009 the Explanatory Memorandum for this section stated that it "contains the rules that treat limited liability partnerships ('LLPs') in the same way for tax purposes as ordinary partnerships ('firms' in this Act)". It added that the section is based on section 118ZA of ICTA [the Income and Corporation Taxes Act 1988], and that the corresponding rule for income tax is section 863 of ITTOIA [the Income Tax (Trading and Other Income) Act 2005].

Online filing

49 Schedule 3A to the Taxes Management Act 1970 deals with the electronic lodgement of tax returns. As a result of the Electronic Lodgement of Tax Returns Order 1997 (SI 1997/57), it applies to section 12AA of that Act. Paragraph 1 of Schedule 3A provides in part:

> "(4) Any requirement— (a) under any provision of Part II of this Act or Schedule 18 to the Finance Act 1998 that the return include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete, or (b) under or by virtue of any other provision of the Taxes Acts that the return be signed or include any description of declaration or certificate, shall not apply. "

For paragraph 1(4) of Schedule 3A to apply each of the conditions set out in Part III must be met: paragraph 1(2)(b).

50 During the course of the hearing, Mr Yates for HMRC contended that the returns for GPs 6–7 and LLPs 4–7 could not have been filed under the Schedule 3A provisions since the conditions set out in Part III could not be met. In particular HMRC had withdrawn the electronic lodgement service for self-assessment from April 2006. Following the hearing, these submissions were reduced to writing and further expounded. As a result, the claimants now accept that for the purposes of these proceedings, the tax returns for GPs 6–7 and LLPs 4–7 were electronically filed under the separate provisions, those of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) ("the 2003 Regulations").

51 Made under section 132 of the Finance Act 1999, the 2003 Regulations apply, inter alia, to tax returns. Under Regulation 3(2) persons other than HMRC may only use electronic communications if the conditions in Regulation 3 are satisfied. Regulations 3(3)–(7) state:

> "(3) The first condition is that the person is for the time being permitted to use electronic communications for the purpose in question by an authorisation given by means of a direction of the Board.
>
> "(4) The second condition is that the person uses— (a) an approved method for authenticating the identity of the sender of the communication; (b) an approved method of electronic communications; and (c) an approved method for authenticating any information delivered by means of electronic communications.
>
> "(5) The third condition is that any information or payment sent by means of electronic communications is in a form approved for the purpose of these Regulations, and extensible business reporting language (XBRL), inline XBRL and other electronic data handling techniques are among the forms that may be so approved. Here 'form' includes the manner in which the information is presented.
>
> "(6) The fourth condition is that the person maintains such records in written or electronic form as may be specified in a general or specific direction of the Board.
>
> "(7) In this Regulation 'approved' means approved, for the purposes of these Regulations and for the time being, by means of a general or specific direction of the Board."

52 HMRC issued a direction under Regulation 3(3) on 4 April 2008. It was a general direction under Regulation 3(7). It authorised agents acting for persons required to provide information in response to a notice under sections 8, 8A and 12AA of the Taxes Management Act 1970 to do so over the internet using the self assessment online service. The direction identified how the second and third conditions would be satisfied, namely that the methods and the form would be those set out on the HMRC website from time to time. The direction stated:

> "The Commissioners further direct that the method approved by them for authenticating the relevant information is completion of the declaration contained in the electronic return to confirm that the information is correct and complete to the best of the knowledge and belief of the person delivering the information."

The direction also contained this passage:

> "*Electronic returns*
>
> "The Commissioners further direct that the electronic return prescribed for the purposes of each of sections 8, 8A and 12AA of the Taxes Management Act 1970 is an electronic return delivered using the self assessment online service."

The judicial review

53 On 16 June 2015 various members of the Dean Street Productions GPs and LLPs lodged this judicial review of HMRC's decision to issue partner payment notices under Schedule 32 to

the Finance Act 2014. The claim form sought a remedy under the Human Rights Act 1998 and an order that the notices be quashed. In *R (Sword Services Ltd) v Revenue and Customs Comrs* [2015] EWHC 3544 (Admin), Picken J adjourned that part of the claim relating to the Human Rights Act 1998 until the Court of Appeal considers the judgment of Simler J in *R (Rowe) v Revenue and Customs Comrs* [2015] EWHC 2293 (Admin), where in separate proceedings she dismissed human rights objections to Schedule 32.

54 As regards the other part of the claim, Picken J gave permission to the claimants to proceed with the first challenge they raise in these proceedings, the statutory construction point that Schedule 32 does not apply to LLPs. As regards the second challenge considered here—that there were no valid inquiries into the tax returns of certain of the Dean Street Productions GPs and LLPs, which are a precondition to the issue of partner payment notices—Picken J held (correctly, in my view) that where courtesy letters about a tax inquiry had been sent to the members of a GP or LLP they gave the requisite notice to the recipients that HMRC intended to inquire into the partnership tax returns submitted in respect of the relevant partnerships. Consequently, it made no difference that the relevant filing partner received a letter in its capacity as one of several partners rather than because HMRC realised that it was the relevant filing partner: at para 17. With GPs 6–7 and LLPs 4–7, however, the filing partner was not listed in the tax returns, as explained earlier, and so received neither the primary nor a courtesy letter. Arguably, Picken J said, there was no valid notice of inquiry into the tax returns of those partnerships.

First challenge: Finance Act 2014 and LLPs

55 For the claimants, Mr Rivett contends that when properly construed Schedule 32 to the Finance Act 2014 does not empower HMRC to issue partner payment notices to members of limited liability partnerships. That schedule refers to "partnerships", but the Limited Liability Partnerships Act 2000 makes clear that a limited liability partnership is a separate legal entity and unless otherwise provided the ordinary law of partnership does not apply: see sections 1(2) and (5). Because of this, Mr Rivett submits, if a limited liability partnership and its members are to be treated in the same way for tax purposes as an ordinary partnership and its members, specific provision has to be made.

56 An example of a specific provision, Mr Rivett submits, is section 1273(1) of the Corporation Tax Act 2009. That section treats the activities of a limited liability partnership, carrying on a trade or business with a view to a profit, as being carried on by the members in partnership, and not by the limited partnership as such. In as much, however, as section 1273(2) provides that references to a firm include a limited liability partnership in relation to which subsection (1) applies, and references to a firm's members include the members of a limited liability partnership, that in Mr Rivett's submission is for the purposes of that Act alone. The same position obtains with income tax, where a specific provision treats a limited liability partnership as a general partnership: see section 863(2) ITTOIA and *Ingenious Games LLP v Revenue and Customs Comrs* [2015] UKUT 105 (TCC) at [11], per Henderson J.

57 Mr Rivett contrasts Schedule 32 to the Finance Act 2014, which does not contain anything equating limited liability partnerships to general partnerships, indeed in paragraph 3(1) refers to a partnership return "in respect of a partnership". That Schedule 32 does not apply to limited liability partnerships may seem a surprising result, he acknowledges, but it is the effect of closely articulated tax legislation where, he suggests, there can always be deficiencies. In support of his argument, Mr Rivett points to the need to insert paragraph 6A in the Schedule, shortly after its enactment, once a gap in coverage was exposed.

58 Mr Rivett adds another point. A fundamental ingredient of HMRC's argument as to the application of Schedule 32 to limited liability partnerships is the argument that each LLP is carrying on a trade or business with a view to a profit within the meaning of section 1273(1) of the Corporation Tax Act 2009. In the event that they were not carrying on a trade or business with a view to a profit the statutory fiction upon which HMRC's case in these proceedings rests could not apply to deem each to be a partnership for the purposes of Schedule. Mr Rivett submits that it would be entirely unconscionable were HMRC to argue in later proceedings (as it did in *Ingenious Games LLP v Revenue and Customs Comrs*) concerning the LLPs that they were not carrying on a trade or business with a view to a profit, since the aim was to generate not profits but losses for tax relief purposes, in other words that section 1273(1) did not apply.

59 The idea of a separate approach to interpreting tax statutes is rightly dead and buried. The words in tax legislation must be interpreted in light of the context and scheme of the Act as a whole. Regard must be had to the purpose of the provisions, a literal and formalistic approach being eschewed: see for example *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC

684, paras 28–29, per Lord Nicholls of Birkenhead, referring to *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991 and *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300.

60 In ordinary parlance the terms "partnership" and "partners" cover both general and limited liability partnerships and their members. There is no reason that this should not be the case with Schedule 32 to the Finance Act 2014, not least with the introductory words of paragraph 3. Certainly limited liability partnerships take corporate form. However, the default terms for their internal affairs are taken from the Partnership Act 1890 (regulation 7 of the Limited Liability Partnerships Regulations 2001 (SI 2001/1090)) and they are probably best regarded as having a hybrid legal character. Crucially, whatever the legal character of limited liability partnerships, this cannot be determinative when considering the meaning that the words of Schedule 32 convey. That would be a return to the formalism deprecated in the *Barclays Mercantile Business Finance Ltd*, *McGuckian* and *Ramsay* cases.

61 As for the immediate statutory context of Schedule 32, that is the adoption of the accelerated payments regime to partnerships. Its scheme and purpose is to make tax avoidance less advantageous in the manner referred to earlier in the judgment. Against that background, there is no reason to think that Parliament would have intended to adapt the accelerated payments regime to ordinary partnerships but not to do so for limited liability partnerships, when they too can be used to generate losses for tax avoidance schemes. So the language of Schedule 32, coupled with its context and the purpose of the accelerated payments regime in the Finance Act 2014, led me to conclude that it covers limited liability partnerships as well as general partnerships.

62 That limited liability partnerships fall within Schedule 32 is supported as well by the wider statutory context. Schedule 32 is meshed with sections 12AA–12AC of the Taxes Management Act 1970. Thus HMRC's power to make an inquiry into a partnership return, Condition A in Schedule 32, is contained in section 12AC of that Act. Further, the partnership return on which Schedule 32 is predicated is defined in its paragraph 1(2) as a return in pursuance of a notice under section 12AA(2) or (3) of that Act. In my view, Schedule 32 and sections 12AA–12AC are in pari materia and thus the same meaning attaches to the same terms in both. There is no distinction between an ordinary partnership and a limited liability partnership in sections 12AA–12AC. Indeed there is high authority that those sections apply to both: *Tower MCashback LLP v Revenue and Customs Comrs* [2011] 2 AC 457, para 8, per Lord Walker of Gestingthorpe JSC. Thus when Schedule 32 refers to partnership and partners, it is referring to both ordinary and limited liability partnerships and their members.

63 In my view the treatment of limited liability partnerships in the Corporation Tax Act 2009 is not relevant to the meaning of partnership in Schedule 32 to the Finance Act 2014. Quite apart from anything else section 1273 of the 2009 Act applies to a particular type of limited liability partnership, those carrying on a trade or business with a view to profit whose activities are to be treated (I put it broadly) as if its members were in a general partnership. Mr Rivett's forensic point about HMRC taking one view of the application of section 1273 now and possibly a different view later has no bearing whatsoever on the construction of Schedule 32.

64 I should note that section 863(2) of Income Tax (Trading and Other Income) Act 2005 is not expressed in the same way as section 1273. Section 863(2) states that for all purposes in the Income Tax Acts, except as otherwise provided, references to a firm or partnership include a limited liability partnership as regards one which carries on a trade, profession or business with a view to profit. As a result a limited liability partnership of this type, whose members are individuals, could fall within Schedule 32 for income tax purposes. Needless to say it would not make sense for a limited liability partnership with individual and corporate members to fall within Schedule 32 for the purposes of issuing notices to its individual members (for income tax purposes) but not to its corporate members (for corporation tax purposes). But there is no need for me to draw any conclusion from this. In my view, Schedule 32 on its face and in its statutory context draws no distinction between general partnerships and limited liability partnerships.

Second challenge: notices of inquiry invalid

65 The second ground of challenge Mr Rivett advanced is that in respect of GPs 6–7 and LLPs 4–7 there was no HMRC tax inquiry in progress, a precondition to the issue of partnership payment notices to their members. That was because HMRC had not issued valid notices of inquiry into the relevant partnership tax returns. Section 12AC(1) of the Taxes Management Act 1970 required a notice of inquiry into a given return to be given to the partner who made and delivered the return and that had not been done.

66 With GPs 6–7, Mr Rivett contended that there was no obligation to file a tax return since HMRC's notice requiring it was addressed to "Dean Street Productions No. 6 GP" and

"Dean Street Productions No. 7 GP" respectively. That was contrary to section 12AA of the Taxes Management Act 1970, which states that such a notice should be sent to a named partner. Admittedly FCPPS had not been notified to HMRC as the managing partner for either partnership in a form SA400. However, FCPPS was responsible for the tax returns for GPs 6–7 as their managing partner yet the purported notices of inquiry into them were issued to FSV24 and FSV23 respectively.

67 In the case of LLPs 4–7 the partner which made and delivered the tax returns was FFMS. FFMS had been identified as the nominated partner for LLPs 4–7 in the forms SA400, submitted to HMRC on 23 March 2013 and 7 April 2013. Indeed, Mr Rivett added, it was to FFMS as nominated partner for LLPs 4–7 that HMRC wrote on 4 February 2013 with information on the settlement opportunity. Yet HMRC ignored this. For example, with LLP 4 HMRC served the notice on FSV30, which was not the nominated partner and had not submitted the partnership return.

68 Mr Rivett added that any notice served on FCP was ineffective, since it was not a partner of GPs 6–7 and LLPs 4–7. Neither had it been appointed as agent to deal with HMRC. The agents appointed were the accountants Hillier Hopkins in the case of GPs 6–7, and Taylorcocks in the case of LLPs 4–7. The overall consequence was that one of the conditions in Schedule 32 for the issue of a partner payment notice was not satisfied and the notices which were issued to GPs 6–7 and LLPs 4–7 were invalid.

69 The starting point in considering these submissions is the legislation. Two features are of note. First, there is the obligation in section 12AA(6) of the Taxes Management Act 1970 that a partnership tax return must contain the name and details of each of the partners and a declaration by the person making the return that it is to the best of his knowledge and belief correct and complete. As we have seen under the 2003 Regulations tax returns submitted online to HMRC must have that declaration. The reason is obvious, so that HMRC knows from the face of the return who is taking responsibility for it. Thus contrary to the mandatory requirement of section 12AA(6) and the direction under the 2003 Regulations, there was no mention of FFMS in the case of the partnership tax returns for GPs 6–7, or of FFPS in the case of those for LPs 4–7, as either partners in those partnerships, or as filing partners attesting in box 11.3 to the accuracy and completeness of the returns.

70 In my view it does not lie in the mouth of someone failing to comply with a legal obligation to identify its existence to a public authority, and to attest to the truth of what it is telling it, to complain when the public authority does not then send it a notice of inquiry into the information proffered. It is perhaps an example of the principle operating in other parts of the law, ex turpi causa non oritur actio or, in new money, an action does not arise from a base cause. I cannot see that it makes any difference that at an earlier point FFMS was identified as the nominated partner of LLPs 4–7, and both FFMS and FFPS were identified as partners, in the forms SA400 and SA402. Disclosure in these non-statutory forms does not excuse a later failure to make the disclosure as required by law.

71 Secondly, there is section 12AC(1)(a) and its requirement that a notice of inquiry into a tax return is to be given to the partner who made and delivered the return. To my mind, the parliamentary intention behind that provision is to ensure that the taxpayer knows in writing of the inquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of inquiry and so long as the taxpayer knows of HMRC's decision to conduct an inquiry that is sufficient. In this regard *Flaxmode Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 666 is, in my view, correct.

72 In this case the reality from early on with this tax avoidance scheme was that the FCP group knew that HMRC would be inquiring into the tax returns of the partnerships associated with it. Mr Philson accepted in his letter of 11 July 2011 that inquiries were on foot for GPs 6–7. HMRC's letter of 11 October 2011 (resent in November 2011), addressed to FCPPS, FFMS and FFPS, and to the attention of Mr Philson of FCP, specifically referred to inquiries into the partnership accounts, mentioning GPs 6–7 and LLPs 4–7 in the title. From this letter, the addressees received notice that HMRC intended to inquire into the returns filed by that date, including those of GPs 6–7. The letter of 28 March 2012, similarly addressed, which responded to FCP's letter of 30 November 2011, referred to the fact that HMRC was carrying out an inquiry in relation to GPs 1–7 and LLPs 1–14, by this time the returns of LLPs 4–7 had been filed.

73 The service of courtesy notices on all partners listed in return gave notice of HMRC's intention to inquire regarding LLPs 4–7 after their tax returns were submitted. After that, there was Mr Philson's e-mail to HMRC on 21 June 2012, referring to the opening of inquiries into the tax returns for LLPs 3–8, and FCP's subsequent engagement with HMRC about LLPs 4–7. As the result of these contacts and the correspondence over a number of years, it simply is not open to

the GPs and LLPs, to the claimants who were members of these partnerships, or to members of the FCP corporate group (including FCPPS, the filing partner of GPs 6–7 and FFMS, the filing partner of LLPs 4–7) to deny reality: they knew of HMRC's inquiries and of the section 12AC(1)(a) notices.

74 That is also the position as a matter of formal legal analysis. Under the partnership deeds, FCPPS as a member and managing partner of GPs 6–7, and FFMS and FFPS as designated members of LLPs 4–7, had wide authority as regards the partnerships' tax affairs. They engaged FCP on behalf of the partnerships under the consultancy agreements, and these and the operator agreements delegated to FCP the responsibility for administering the general tax affairs of the partnerships. In other words, FCP had actual authority to act in relation to the taxation affairs of GPs 6–7 and LLPs 4–7. FCP in turn appointed the accountants to prepare and file the returns but that did not affect its authority as regards the partnerships' tax affairs. A principal can have more than one agent acting for it. That under the partnership documents FCP could not make representations of authority to third parties did not cut down its actual authority.

75 There can be no doubt that FCP was aware of the notices of inquiry into the partnership returns of GPs 6–7 and LLPs 4–7 since on 11 July 2011 and 21 June 2012 it wrote to HMRC acknowledging them. Notice to FCP was notice to its principals, the partnerships, in particular to their managing partner in the case of the GPs and their designated members in the case of the LLPs. In other words those who, under section 12AC(1)(a), were the partners making and delivering the tax returns were on notice of the inquiries: see *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, para 703, per Hoffmann LJ. They did not receive formal notices of the inquiry, but since they knew of the inquiry that is sufficient for the purposes of the legislation.

Conclusion

76 For the reasons I have given I dismiss this judicial review.

Claim dismissed.

FRASER PEH, Barrister