TC03038

Appeal number: TC/2012/00013

INCOME TAX – preliminary issues – assumption of revenue functions by SOCA – civil recovery proceedings under Proceeds of Crime Act 2002 – compromise agreement – whether compromise extended to tax liabilities – whether assessments otherwise invalid by reason of abuse of process

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIAN GERARD PEPPER **Appellant**

- and -

SERIOUS ORGANISED CRIME AGENCY **Respondent**

TRIBUNAL: JUDGE JONATHAN CANNAN
MR MOHAMMED FAROOQ

Sitting in public in Manchester on 1 and 2 July 2013

Mr Ian Smith and Miss Hui Ling McCarthy of counsel (instructed by MacGuill & Company Solicitors) for the Appellant

Mr David Yates of counsel (instructed by the Serious Organised Crime Agency) for the Respondents

DECISION

Introduction

1. The appellant, Mr Brian Pepper, appeals against various assessments to income tax and capital gains tax for tax years 1998-99 to 2005-06 ("the Assessments"). The total income and gains assessed are £7,860,400. The additional tax arising in relation to the assessments is £3,165,341.

2. The Assessments were made by the respondent ("SOCA") on 17 August 2011 pursuant to its powers under the Proceeds of Crime Act 2002 and the Taxes Management Act 1970. In his grounds of appeal dated 9 December 2011 Mr Pepper raises two broad grounds of appeal which can be summarised as follows:

(1) SOCA had no right to raise the Assessments which were consequently invalid, alternatively

(2) If SOCA was entitled to raise the Assessments then the amounts assessed are incorrect.

3. By consent the Tribunal gave directions for the determination of preliminary issues dealing with the first broad ground of appeal. During the course of the hearing before us the parties agreed that the formulation of the preliminary issues should be varied. The issues which we must determine are therefore as follows:

"*(1) Did the parties reach an agreement in 2009 as a consequence of which the assessments raised by the Respondent on 17 August 2011 and currently under appeal before the Tribunal are invalid?*

(2) Whether or not the Tribunal decides that no agreement was reached in 2009, are the assessments before the Tribunal invalid because of an abuse of process on the Respondents' part?"

4. The following background findings of fact are based on the evidence before us and are not controversial.

Background

5. On 5 October 2005 the Assets Recovery Agency ("ARA"), which was later to be merged with SOCA, raided a number of premises in the Manchester area. Those premises included the home and offices of Mr Pepper and his business partner Mr Paul Craven. The raids were conducted as part of an investigation into alleged criminal activity and money laundering said to involve the IRA. The raids attracted considerable publicity at the time and subsequently.

6. Mr Pepper instructed Olliers Solicitors to deal with the ARA. Mr Ambrose King was the ARA case lawyer with responsibility for Mr Pepper's case from the beginning. It was an extremely large investigation during which more than 300,000

documents were seized. By the middle of 2006 the focus of the investigation had shifted away from criminal activities connected with the IRA to other criminal activities including mortgage fraud.

7. On 1 December 2006 Mr Pepper executed a retirement deed whereby he retired from his partnership with Mr Craven. All partnership property accrued for the benefit of Mr Craven. At about the same time Mr Pepper also resigned as a director of various associated companies and transferred his shareholdings.

8. On 18 December 2006 the ARA obtained a property freezing order against Mr Pepper which prevented him dealing in any way with five named properties. The application was supported by a witness statement dated 13 December 2006 from Mr Edward Marshall who was a financial investigator with the ARA. He alleged criminal activity on the part of Mr Pepper involving money laundering, mortgage fraud, false accounting and tax evasion. He referred to a large number of bank accounts in the name of Mr Pepper which were the subject of the continuing investigation.

9. During the course of the investigation in tax year 2005-06 Mr Pepper had disposed of four of the five named properties ("the Four Properties"). It was the disposal of the Four Properties which would later support the capital gains tax assessment for 2005-06.

10. A second property freezing order was obtained on 15 January 2007 against Mr Pepper, Mr Craven and various associates. Whilst it was subsequently varied, this prevented Mr Pepper from dealing with a number of other specified properties.

11. ARA wrote to Olliers by way of an undated letter received on 30 May 2007. The letter stated that the ARA had assumed the taxation functions of HM Revenue & Customs in relation to Mr Pepper. The letter was signed by Mr King and stated "... *[the ARA] is currently in the process of preparing an assessment as to [Mr Pepper's] tax liabilities*". By this time Mr Pepper lived in Dubai and the letter asked for confirmation that Olliers would be in a position to accept service of documents relating to the tax assessment.

12. Olliers replied on 31 May 2007 to say that they did not act for Mr Pepper in relation to tax matters and could not accept service of documentation in relation to Mr Pepper's tax affairs.

13. The ARA commenced two claims against Mr Pepper in the High Court. In the first claim, issued on 24 July 2007, Mr Pepper was the sole defendant and the ARA sought a civil recovery order pursuant to sections 243 and 266 Proceeds of Crime Act 2002. The claim referred to various properties and the proceeds of sale of other properties including the Four Properties. It alleged that this was property derived from unlawful conduct namely false accounting, obtaining money transfers by deception, money laundering, tax evasion and stamp duty evasion. The second claim form was not in evidence but it is common ground that it related to Mr Pepper's interests in various properties jointly held by him with Mr Craven and/or with their associates.

14. In a witness statement in support dated 23 July 2007 Mr Marshall alleged unlawful conduct including mortgage fraud and false accounting with the profits being further laundered in property transactions. It was alleged that Mr Pepper had little by way of legitimate income to support his lifestyle which was said to include a high level of gambling. Mr Pepper had failed to submit any tax returns to HM Revenue & Customs since 1999. The assets he had accumulated were alleged to be the undeclared income and the proceeds of potential tax evasion.

15. On or about 5 March 2008 ARA lodged its particulars of claim in the first claim against Mr Pepper. There is no evidence that this was effectively served on Mr Pepper. The alleged unlawful conduct included money laundering, obtaining money transfers by deception, mortgage fraud, false accounting, income tax evasion and stamp duty evasion.

16. On 1 April 2008 ARA merged with SOCA. Mr King continued as the lawyer with responsibility for the civil recovery claims against Mr Pepper. There was no evidence of any contact between SOCA and Mr Pepper until a letter dated 23 February 2009 which we refer to below in our further findings of fact. By February 2009 Mr King was aware that there was going to be little or no recovery of any assets from Mr Pepper. His property portfolio had diminished in value and was subject to charges which would leave very little, if any equity.

17. One of the Assessments for tax year 2005-06 related to capital gains tax and charged estimated gains of £200,000 resulting in tax of £73,311. This was in respect of the Four Properties which had been owned by Mr Pepper. The Four Properties were all subject to the civil recovery claim.

18. *Legal Framework*

19. We can summarise the legal framework relatively briefly. Part 5 of the Proceeds of Crime Act 2002 ("POCA 2002") makes provision for an enforcement authority to recover property which is or represents property obtained through unlawful conduct. The heading of Part 5 is "*Civil Recovery of the Proceeds etc of Unlawful Conduct*". Proceedings under Part 5 are widely described as "civil recovery proceedings".

20. Until 1 April 2008 only the Director of the ARA could bring proceedings under Part 5 POCA 2002. Thereafter the powers of the ARA to bring such proceedings were transferred to SOCA amongst other bodies. Actions under Part 5 are directed against the property in the hands of the respondent to the proceedings. They are civil proceedings and it is not necessary for there to have been any criminal prosecution.

21. Proceedings under Part 5 are brought in the Administrative Court and subject to certain exceptions a recovery order must be made if the court is satisfied that the respondent holds recoverable property. Recoverable property is defined as property obtained through unlawful conduct.

22. Where ARA was considering bringing civil recovery proceedings, it could apply to the court for a property freezing order preventing any person from dealing with property which is subject to such an order. Before making such an order the court

must be satisfied that there is a good arguable case that the property is recoverable property.

23. Apart from Part 5, we are also concerned in this appeal with section 317 POCA 2002. This gives power to the Director of the ARA and from 1 April 2008 onwards of SOCA to serve notice on HMRC that he intends to carry out such of their general Revenue functions as are specified in the notice. The power only arises where the qualifying condition is satisfied, which includes where there are reasonable grounds to suspect that income or gains have accrued to a person as a result of his criminal conduct. The vesting of a function in the Director of the ARA does not divest HMRC of the function.

24. As appears from the preliminary issues, we are also concerned in this part of the appeal with issues of law relating to the following matters:

(1) construing the terms of the compromise agreement which the parties reached in 2009;

(2) the effect of that agreement for the purposes of the Assessments; and

(3) whether the Assessments are invalid as a result of an abuse of process on the part of the respondent.

25. We deal with the submissions of the parties on these issues as part of our decision below.

Findings of Fact

26. We heard oral evidence from Mr Pepper himself and on behalf of SOCA from Mr Ambrose King and Mr Richard La Roche. All the witnesses had produced witness statements with documentary evidence exhibited. We should say that Mr Pepper gave evidence by way of video-link from San Diego. He gave evidence in the early hours of the morning local time but neither party suggested and we did not consider that fact affected the quality of his evidence. Based on the evidence before us we make the following findings of fact, in all respects on the balance of probabilities.

27. At the end of 2006 Olliers had some discussions with the ARA about settling all their claims against Mr Pepper on a global basis.

28. Mr Pepper said that he understood from his advisers that by January 2007 tax was the only outstanding matter in the ARA investigation. Mr King disputed that was the case. If Mr Pepper did have that understanding in January 2007 we do not accept that he was correct. It is clear from Mr Marshall's witness statements later in 2007 that the ARA was alleging other criminal activity apart from tax evasion. We do not accept that those allegations would have been made in the detail that they were if they were not being seriously pursued. We have not seen any rebuttal by Mr Pepper of the allegations which were being made but plainly he does not accept the truth of those allegations. Whether or not they were well founded is irrelevant for the purposes of the preliminary issues, but we do not accept that tax evasion was the only matter the ARA was seriously investigating in 2007.

29. In January 2007 the ARA commenced civil recovery proceedings against Mr Pepper in relation to properties owned by the partnership between Mr Pepper and Mr Craven and their associates. In fact by that time Mr Pepper had already retired as a partner and as a director of the associates and therefore had little if any interest in those proceedings. Mr Pepper was reluctant to accept in his evidence that he had no interest in those proceedings but it must be the case. When this point was first raised in cross-examination Mr Pepper eventually accepted that "*at that point [December 2006] I had no interest*". Later when the same point was put to him he said "*I don't agree. I didn't agree the first time and I don't agree now*". In this respect we did not find Mr Pepper a reliable witness. We were left with the impression during his evidence that that he was prepared to change his account to suit his purpose.

30. On 5 February 2007 Olliers confirmed to MacGuill & Co, Mr Pepper's solicitors in Ireland, that there had been discussions with a QC representing the ARA who had indicated that a deal could be done in relation to the 5 properties covered by the first freezing order. Olliers hoped to do a deal whereby Mr Pepper "…*is able to walk away from the situation with no further involvement from the Asset Recovery Agency*". At that stage the ARA had not assumed the taxation functions of HM Revenue & Customs.

31. On 22 February 2007 MacGuill & Co wrote to Olliers stating that Mr Pepper was anxious to ensure that in any negotiations it was accepted by the UK authorities that all his obligations were dealt with. In particular that there would be no further claims in respect of taxation matters. At this time Mr Pepper thought that his potential tax liability could possibly be between £400,000 and £500,000. Later in his evidence he sought to reduce this estimate. However Mr Pepper was aware that he had not put in self-assessment returns and was certainly aware that he had a significant tax liability.

32. The letter from MacGuill & Co to Olliers enclosed an authority for Olliers and counsel to negotiate with the ARA. In fact the settlement discussions between Olliers and the ARA petered out.

33. The letter from ARA to Olliers received on 30 May 2007 which gave notice that the ARA had assumed the taxation functions of HM Revenue & Customs was signed by Mr King. The ARA at this time had a civil recovery section and a tax section, each including separate investigators and lawyers. In the tax section the investigators would be inspectors of taxes on secondment from HM Revenue & Customs. In the ordinary course a letter such as this would have been signed by the tax lawyer allocated to the case. We accept Mr King's evidence that the reason he signed it was probably because the tax lawyer was not available for some reason.

34. Olliers emailed Mr Pepper on 3 July 2007 by which stage it is clear that Mr Pepper was aware that the ARA had assumed the taxation functions of HM Revenue & Customs. Jeremy Pinson of Olliers said as follows:

"*It appears that they feel more able to get somewhere on the tax front, obviously there was never any intention for me to become involved in your tax affairs hence my latest response.*"

35. The reference to a response was to Olliers letter to the ARA dated 31 May 2007. We do not have any evidence from Mr Pinson of Olliers so we must draw whatever inferences we can from the oral evidence we do have and from the available documentary evidence. The language used by Mr Pinson does not appear to reflect an understanding that tax was the only outstanding matter under investigation. It does however at least suggest that from the perspective of Mr Pepper tax was becoming a more significant issue in the investigation.

36. It was not until a letter dated 26 September 2007 that the ARA sought to revive the negotiations initiated by Olliers at the end of 2006. There was no response to this aspect of the letter. Olliers did write to Mr King on 23 November 2007 to say that they were without funding or instructions from Mr Pepper. That response is not consistent with Olliers having ceased to act because tax was the only matter under investigation and because they were not dealing with Mr Pepper's tax affairs. The ARA again sought to revive the negotiations in a letter dated 28 November 2007. However there was no further correspondence or discussions about settlement until 2009.

37. In 2009 Mr Pepper was still living in Dubai. It was suggested in cross-examination that his involvement in a large property development in Dubai indicated that there had been a turnaround in his fortunes. We have not seen any evidence to justify such a turnaround and for present purposes we accept Mr Pepper's evidence that by that time his net worth was some £200,000, substantially less than what it had been in 2005.

38. On 23 February 2009 Mr King wrote to Mr Pepper referring to the proceedings against Mr Pepper and the fact that they had been listed for hearing by the High Court on 30 March 2009. Mr King referred to SOCA having been directed by the High Court to take certain steps to bring the hearing to the attention of Mr Pepper. He asked Mr Pepper or any solicitors he had instructed to contact SOCA as a matter of urgency. This letter was hand-delivered to an address in Dundalk where Mr Pepper's parent's lived.

39. On 27 March 2009 Mr King and Mr Pepper spoke by telephone. It is not clear why it took Mr King and Mr Pepper more than a month to make contact when the matter had been described as urgent. The content of their conversation was hotly disputed.

40. Mr Pepper's evidence was that Mr King said that he wanted to contact him to resolve his "*personal issues with SOCA*". They discussed the hearing which had been due to take place on 30 March 2009. Mr King also said that he would be writing again regarding the possibility of settling SOCA's case by consent and if they were able to do that it would save significant costs and time.

41. Thus far Mr King does not seriously dispute Mr Pepper's account of the conversation and we find that these matters were discussed in general terms. However Mr Pepper went on to say in evidence that they also had the following discussion. Mr King promised that a settlement would encompass all allegations that SOCA had against him and would include all liabilities to SOCA and the UK authorities. Once a settlement was reached all issues would be final and Mr Pepper would not hear from them again. Mr King would also seek to deal with the company issues due to the fact that Mr Pepper no longer had any shareholding in the companies.

42. Mr Pepper claimed to have a complete recollection of these details, if not the actual words used.

43. Not surprisingly Mr King had no real recollection of the detail of what was said. His only specific recollection was that when he referred to the ARA investigation Mr King had laughed and said words to the effect "*oh, the IRA thing*". That exchange was recorded by Mr King in a letter to Mr Pepper dated 8 April 2009. We accept Mr King's evidence, prompted as it no doubt was by re-reading the letter, that at the time he felt it was incongruous for someone to laugh in connection with the IRA.

44. Unfortunately Mr King did not make any attendance note of his conversation with Mr Pepper. He explained to us that his practice was not to make attendance notes but to confirm the contents of telephone conversations in correspondence. We accept that was Mr King's practice.

45. Immediately following the telephone call Mr King emailed Mr Pepper recording that they had spoken. He went on to confirm that the hearing listed for 31 March 2009 had been adjourned and would be relisted. In the meantime he would send the documents in support of the claim to Mr Pepper by post.

46. Mr King then went about dealing with the court listing office to obtain a copy of the order vacating the hearing and to obtain a listing appointment to re-fix the hearing.

47. On 8 April 2009 Mr King sent to Mr Pepper by email the letter dated 8 April 2009 which he used in place of an attendance note. We note that by this time it was not a contemporaneous note of the telephone conversation which had taken place. The following matters are recorded in the letter:

(1) Mr King refers to a "*brief telephone conversation*" on 27 March 2009 and that Mr Pepper had laughed as described above.

(2) He records the detail of administrative matters which had been discussed in relation to Mr Pepper obtaining papers in connection with the claim.

(3) He records the purpose of the letter as being to inform Mr Pepper that there was a listing appointment on 7 May 2009.

(4) Finally he says "*I will also be writing to you again regarding the possibility of settling the Agency's case by consent*".

48. We note that Mr King does not record in this letter what was said in relation to settlement, rather that he will write again in relation to settlement. That is consistent

with a general discussion about the possibility and benefits of a settlement. We gained the impression during his evidence that Mr King was a cautious man. We do not consider it credible that a cautious lawyer such as Mr King would have spoken to Mr Pepper in the terms Mr Pepper has described. It may be that Mr Pepper's account of the conversation records what he wanted to hear or what he thought he was being told. Whatever the explanation we are satisfied on the balance of probabilities that Mr King did not give Mr Pepper the indications and promises that Mr Pepper attributes to him. Nor do we accept that he would have given any indication as to claims by other UK authorities apart from SOCA.

49. There was another letter at this time from Mr King to Mr Pepper, marked "without prejudice". There were two versions of this letter in evidence. The version exhibited to Mr Pepper's witness statement was dated 8 April 2009. The version exhibited to Mr King's witness statement was dated 15 April 2009. The existence of two versions was not explored in evidence but in any event save for the date they were identical. One version was sent as an attachment to an email on 16 April 2009. It gave a summary of the first civil recovery claim against Mr Pepper and noted that there was only one property which may realise funds after settling the mortgage on that property. This was Flat A, 15 Ollerton Court and was in the course of being sold by the mortgagee in possession. In the light of the position described by Mr King he ended the letter as follows:

> "*Accordingly it might be sensible that the Agency's case against the remaining property is resolved by way of an agreement, thus saving time and costs.*"

50. Mr Pepper responded by email on 21 April 2009. He said as follows:

> "*I would like to have this sorted out also without the cost of solicitors. I have no problem signing over Flat 15 Ollerton Court to the agency as settlement for the civil recovery case against me by Soca. If you can clarify that this is the case and that all proceedings will be over we can get the process going immediately.*"

51. Mr Pepper's evidence was that his reference to "all proceedings" was intended to include any tax claim and that his email could not have been clearer. It may well be that Mr Pepper intended this reference to include any tax claim against him but he did not make that clear. The negotiations and discussion until this date had been directed towards settling the civil recovery claims.

52. Mr King assumed that Mr Pepper's email related only to settling the civil recovery proceedings. He did not think that it had anything to do with the investigation into Mr Pepper's tax affairs.

53. Mr Smith, who appears with Miss McCarthy on behalf of Mr Pepper, put it to Mr King that it was unreasonable of him to assume that Mr Pepper, when he used the words "*all proceedings*" was confining himself to the civil recovery proceedings. We do not accept that this was an unreasonable assumption. Even taking into account that Mr Pepper was a litigant in person at this stage, the clear reference in Mr King's email

had been to the first civil recovery proceedings with no mention of the tax investigation. Mr Pepper himself referred to the civil recovery case against him. A reasonable observer would have thought that the reference to all proceedings at this stage in the correspondence was to the two sets of civil recovery proceedings which had been commenced in the High Court.

54. Mr Pepper suggested that he had a good bargaining position and was able to insist that any tax liabilities were included in the settlement because SOCA were desperate to settle what had been their largest ever investigation costing them millions of pounds. Plainly this was an extremely large investigation, however we do not consider that Mr King was desperate to settle the proceedings on any terms.

55. On 30 April 2009 Mr King emailed for Mr Pepper's consideration a letter of the same date which was described as "*an offer of settlement*". The letter referred to Mr Pepper's email of 21 April 2009 and expressed gratitude "*for your indication that you are prepared to settle the case the Agency has against the remaining property owned by you and subject to its claim*". It continued: "*There are in fact two separate sets of proceedings which were instituted in relation to property held or controlled by you*" and went on to describe the two High Court claims. In relation to the second claim Mr King noted that Mr Pepper had terminated the partnership with Mr Craven and resigned as a director of the associated companies. It ended as follows:

> "*On that basis therefore the Agency's claims against you are restricted to only the potential net proceeds of sale of the two properties that are held personally by you; it will therefore proceed with preparing a settlement agreement which reflects this and will forward it to you for your consideration and consent.*"

56. Mr King accepted that there was nothing left for SOCA to recover from Mr Pepper's assets. However we are satisfied that at this stage Mr King was referring only to a settlement of the two civil recovery claims. He did not accept that "tax was on the table". We find that a reasonable observer would also consider that the offer made by Mr King was limited to the civil recovery claims in the High Court. We accept that Mr Pepper is not a lawyer and may not fully have appreciated the difference between the tax function of SOCA and its civil recovery function. Despite his evidence to the contrary Mr Pepper must have realised from this letter that Mr King was offering to settle only the civil recovery proceedings.

57. On 4 May 2009 Mr Pepper responded asking Mr King to forward to him the proposal for settlement. Mr King was away from the office and did not reply until 20 May 2009. He stated that he would draft a "*disposal order*" and noted that if there was no settlement the High Court claim had been listed for final hearing on 6, 7 or 8 July 2009. He then emailed again on 29 May 2009 as follows:

> "*Further to my email of last week, please find attached a draft order for settlement by consent of the civil recovery claim the Agency has against you alone.*"

58. The attached draft order was a consent order providing for a civil recovery order in respect of the two properties which might have had some value. The remaining part of the claim was to be dismissed and there was to be no order for costs. This was effectively a repeat of the offer made in the letter dated 30 April 2009.

59. Mr Pepper responded on 1 June 2009 as follows:

> "*I have received the offer of settlement and my solicitor has a couple of points that he wants adding to your offer. If you accept these points and amend the offer of settlement I will sign it by return.*
>
> *1. All cases against me by ARA and Soca will be dismissed and will not be able to be started again after the signing of this agreement.*
>
> *2. The Soca and ARA will not be proceeding with any criminal cases against me and or proceeding to prosecute me in court if I accept the offer of settlement. And that this offer of settlement is in full and final settlement of all cases taken against me by Soca and ARA.*"

60. This was a counter offer by Mr Pepper. In fact Mr Pepper said in evidence that he had not taken any solicitors advice. He had copied the draft order to his lawyer in Ireland, presumably MacGuill & Co, but he had been advised to go to his UK lawyer, presumably Olliers. Mr Pepper said and we accept that he did not take advice from any lawyer in connection with the settlement. The reference to a solicitor in this email was, in Mr Pepper's words "*to make it sound more legal*". It is a small point, but this does illustrate Mr Pepper being less than straightforward in his dealings with Mr King.

61. Mr King took the reference to "all cases" to mean the two civil recovery claims. It is clear that Mr King did so because he replied by email on 3 June 2009 clarifying the relationship between ARA and SOCA, in particular that the ARA was no longer a functioning body and that SOCA could investigate criminal matters but could not prosecute. He continued:

> "*With regard to the substantive matters raised in your email. I have spoken again with those who have responsibility for authorising settlements and following those discussions I have amended the draft order to reflect the fact that the civil recovery proceedings originally instituted by ARA will come to an end once this disposal order is signed.*
>
> *In addition SOCA confirms that it has not instigated any criminal proceedings, nor will it be instigating any criminal proceedings as a consequence of the ARA investigation of 2005 and subsequently.*
>
> *This is reflected in the draft signed disposal Order … and I trust you are now able to sign it and return to me for forwarding to the Court for sealing.*"

62. The reference to authorising settlements refers to a procedure whereby the lawyer with responsibility for a case must obtain authorisation before settling any

proceedings. In the present case the authorising person was a Mr Andy Lewis. Mr King gave evidence that tax settlements would also fall to be authorised by Mr Lewis. We have not seen any documentary evidence as to the content of discussions between Mr King and Mr Lewis in relation to the settlement. Mr King's evidence was that he did not discuss settling Mr Pepper's tax liabilities with Mr Lewis. We have no reason to consider that there was any discussion in relation to authorising a settlement of Mr Pepper's tax liabilities.

63. Mr King's email dated 3 June 2009 was his acceptance of the counter offer and at this stage there was a binding contract. On 14 June 2009 Mr Pepper indicated by email that he would be signing the draft consent order. Mr Pepper duly signed the consent order which was in the same form as the original draft but contained the following recitals:

> "*AND UPON the Claimant agreeing not to pursue any civil recovery claim (save in relation to the property set out in Schedule 1 to this order) against the Defendant arising out of the ARA investigation into the properties held or owned by the Defendant;*
>
> *AND UPON the Claimant confirming that it has not instigated criminal proceedings nor will it be instigating any criminal proceedings against the Defendant for any matters arising out of the ARA investigation into the properties held or owned by the Defendant;*"

64. It was put to Mr King that Mr Pepper's reference to "all cases" in his email dated 1 June 2009 should reasonably have been construed as including any cases arising out of the ARA's assumption of the Revenue's functions in relation to tax. Mr King did not accept that proposition and neither do we. Mr Pepper's email refers to all cases being dismissed and not being started again. Against the background of the previous dealings between Mr King and Mr Pepper a reasonable observer would have considered that Mr Pepper was referring to the existing High Court proceedings which were on foot and would be dismissed.

65. Mr Pepper may not have realised, but it was a fact that Mr King's responsibility extended only to civil recovery proceedings. We recognise that he had signed the letter assuming the Revenue's functions on behalf of ARA in 2007, but that was an isolated act on his part. All the dealings between Mr Pepper and Mr King, on the face of the correspondence referred to above, were concerned with civil recovery proceedings.

66. It was put to Mr King that he ought to have made clear to Mr Pepper that the settlement discussions did not cover the possibility of tax assessments being raised. At first sight we might have had some sympathy with that argument. Mr Pepper was a litigant in person dealing with an experienced lawyer. Further, one of the purposes of SOCA, as we understand it, was to co-ordinate the various types of investigations that may be conducted into criminal activity. It is regrettable therefore that Mr King had no contact with the persons responsible for the investigation into Mr Pepper's tax affairs at the time of the settlement. However when we take into account that Mr

Pepper wanted to give the impression to Mr King that he was being professionally advised we do not consider that it was unreasonable for Mr King not to raise the question of the tax position with Mr Pepper. In those circumstances Mr King's email sent on 3 June 2009 made it perfectly clear that the settlement referred only to the civil recovery proceedings in the High Court.

67. On 19 June 2009, following receipt of a scanned version of the order signed by Mr Pepper, Mr King emailed Mr Pepper to say that the order would be sent to the court for sealing and the hearing vacated. He then referred to "*a related matter*" being the second High Court claim. He said that "*in keeping with the agreement the Agency has reached with you, it is currently in the process of bringing your involvement in those other proceedings to an end …*". He went on to describe the process of settling with the other defendants in those proceedings and that a draft order would need to be signed by the other defendants and by Mr Pepper.

68. In the hearing before us both parties were agreed that by the time the first consent order was signed there was a binding contract which included a compromise of the second civil recovery claim.

69. In July 2009 there was further email correspondence between Mr King and Mr Pepper, including reference to the second High Court claim. On 16 July 2009 Mr King sent a draft consent order in relation to that claim signed by the other parties. It did not include the same substantive recitals that had been included in the consent order for the first civil recovery claim. There was no need for it to repeat those recitals which had no relevance to the other parties. The order recorded that Mr Pepper was being removed as a defendant to the claim because he had ceased to hold any interest in recoverable property.

70. On 3 August 2009 Mr Pepper emailed Mr King asking him to call him on or before 5 August 2009. They spoke by telephone on 4 August 2009 but each gave different accounts of the conversation. Again the content of this conversation was hotly disputed.

71. We accept Mr Pepper's evidence that this telephone conversation took place when he was on the way to the airport setting off on his honeymoon. Mr Pepper's evidence was that as a result he had a clear recollection of the conversation which he claimed was as follows. He asked Mr King for clarification that all the cases against him were now finished. Mr King made it clear that Mr Pepper would not be hearing from SOCA again regarding his affairs in Manchester. Mr King confirmed that every issue they had investigated including tax was finished. Mr Pepper recalled asking Mr King directly "*does this settlement include everything including tax*" to which Mr King replied "*yes*". Mr Pepper's evidence was that he knew SOCA needed Mr Pepper's signature on the consent order to end the largest investigation they had ever undertaken. Mr King had made it clear that all investigations were over and Mr Pepper confirmed he would sign the consent order. His evidence was that he was very relieved knowing that all the cases and the tax issues were concluded and he could happily go on honeymoon.

72. Mr King's evidence was that the conversation solely related to the second civil recovery claim and was simply about the mechanics of getting the draft order signed.

73. In accordance with his practice Mr King did not keep an attendance note of this conversation but he did refer to it in an email sent to Mr Pepper on 11 August 2009. Again we note that this was not contemporaneous. Mr King said that if there had been anything of great import in the conversation then it would have been reflected in the email. The extent of his reference to the conversation is as follows:

> "*Further to our telephone conversation of last Tuesday, I would be grateful if you could sign and return the final Disposal Order …*"

74. Whatever was said in the conversation on 4 August 2009 could not have changed the already concluded contract. It could however shed light on the terms of that contract and what the parties objectively intended to compromise.

75. Mr Pepper's evidence as to the conversation implies that he would not have signed the second consent order without the confirmations he was asking for. It is unlikely the conversation would have progressed on that basis because as Mr Pepper accepted the settlement had been concluded in June 2009 and he was already bound to sign the second consent order.

76. Mr Pepper said that the whole reason he wanted to speak to Mr King on 4 August 2009 was "*because he wanted clarification that everything including tax was finished*". He said that in his dealings with ARA and SOCA from the very beginning they had been underhand, had gone behind his back and were disorganised. We do not accept Mr Pepper's evidence as to why he wanted to speak to Mr King. If Mr Pepper genuinely believed that he could not trust SOCA or Mr King he would have sought the confirmation he claimed to be seeking in an email. An oral confirmation from Mr King would have been worthless. Mr Pepper's account of why he wanted to speak to Mr King is not credible.

77. We find that the conversation on 4 August 2009 was a straightforward conversation dealing with the mechanics of getting the consent order signed. There was no further discussion about the terms of the compromise agreement.

78. Mr Pepper's evidence was that he would not have settled the civil recovery claims if the settlement did not include all his tax liabilities. We do not accept that evidence. It was in the interests of both parties to settle the civil recovery claims and for Mr Pepper to ensure that there would be no criminal proceedings instigated and no liability for costs in the civil recovery proceedings.

79. No significant property, if anything, was ever recovered from Mr Pepper following the civil recovery proceedings. The benefit of the settlement to SOCA was that it brought matters to an end. By that we mean the civil recovery claims. Once the second proceedings were brought to an end Mr King handed matters to the recoveries team in SOCA and he had no further involvement.

80. Mr Smith cross examined Mr King with a view to establishing that the ARA as an organisation was seriously inefficient and suffered significant management failures. Those were essentially the findings of a report by the House of Commons Public Accounts Committee published in October 2007 and Mr King was not in a position to dispute those findings. Mr Yates on behalf of SOCA did not suggest that we should go behind the Committee's report and for the purposes of the preliminary issues we accept its findings. At the time of the report ARA was expected to merge with SOCA. We accept that ARA and subsequently SOCA were being encouraged to improve their performance in terms of asset recoveries through better use of negotiated settlements rather than pursuing cases to a conclusion through the courts.

81. Mr King was not involved in management, and he gave evidence that he was not aware of any real change in the way ARA operated following the Committee's report or in the way he was expected to progress his caseload. In particular he was not aware of pressure to settle more cases. He looked at each case on its own merits. We accept that Mr King and his department were aware of the Committee's report and had a heavy workload but we are not satisfied that this impacted on Mr King's dealings with Mr Pepper in any material respect.

82. It was also suggested in the skeleton argument served on behalf of Mr Pepper that Mr King had "carefully excluded" from his exhibits the emails from Mr Pepper dated 21 April 2009 and 1 June 2009 referring to "all proceedings" and "all cases". This allegation was not pursued in cross-examination.

83. Mr King was a straightforward and honest witness doing his best to recall matters going back to 2005. We accept that he was dealing with the civil recovery aspect of the investigation into Mr Pepper's affairs on its merits. He wanted to settle the civil recovery proceedings which had been commenced but not at any cost. In particular he would not have settled the tax side of the investigation without reference to the relevant tax lawyer and inspector of taxes.

The Tax Investigation

84. We turn now to consider the progress of the investigation into Mr Pepper's tax affairs, or more aptly the lack of progress. Originally this was the responsibility of a tax inspector in ARA called Ms Jane Richards. At some stage she passed responsibility to Mr John Freeman. In September 2010 responsibility was passed to Mr Richard La Roche who was a senior inspector of taxes on secondment to SOCA from HM Revenue & Customs.

85. On 17 April 2007 the ARA served notice on HM Revenue & Customs that it would be taking over their general Revenue functions in respect of Mr Pepper for the tax years 1998-99 to 2005-06. By 2 May 2007 Ms Richards had prepared potential assessments based on Mr Pepper's bank statements. Essentially this was a calculation of the total unexplained deposits into Mr Pepper's bank accounts without any deduction for allowable expenditure. The deposits which HMRC treated as unexplained amounted to more than £7½ million.

86. On 17 August 2011 Mr La Roche wrote to Mr Pepper enclosing the Assessments. In making the Assessments Mr La Roche used the same calculations that Ms Richards had prepared in 2007.

87. In his oral evidence Mr La Roche was asked to explain what was happening in relation to the tax investigation between June 2009 when the settlement agreement was reached and September 2010 when he was handed the file. He said that it appeared from the file that Mr Freeman was attempting to find an address for Mr Pepper through credit agencies and financial institutions. Similar attempts were said to have been made in the period from September 2010 to August 2011 when Mr La Roche had taken over the case.

88. We were not referred to any documentation in support of this explanation. As Mr Smith suggested, it is extremely surprising that Mr Freeman and Mr La Roche should have had difficulty contacting Mr Pepper because they had a forwarding address at a property in Dundalk owned by Mr Pepper and occupied by his parents. Mr Pepper had also maintained the email address which Mr King had used in his correspondence with Mr Pepper up to August 2009. Mr La Roche said that he did not consider emailing Mr Pepper.

89. The result is that between May 2007 and August 2011 Mr Pepper received no contact whatsoever regarding the investigation into his tax affairs. In the absence of any evidence from the tax file we are driven to conclude that any efforts to contact Mr Pepper between 2009 and 2011 were at best half-hearted. Indeed woeful would probably be a better description.

90. Having said that, we do not accept the inference Mr Smith invites us to draw that the reason no attempts were made to trace Mr Pepper was because SOCA considered that the tax position had been settled as part of Mr King's negotiations. It seems to us based on the evidence we have heard that this is a case of the civil recovery arm not knowing or even being interested in what the tax arm was doing and vice versa. That was either because of management failings within SOCA or because the absence of any significant recovery following a massive investigation left Mr Pepper's outstanding tax affairs as a fairly low priority.

91. We find that the tax investigation was also a low priority for ARA and SOCA in the period from May 2007 to 2009. Similarly, we are not satisfied that Mr Pepper had the tax issue specifically in his mind at the time of his negotiations with Mr King. If he did then Mr Pepper had every reason to expressly confirm in his correspondence with Mr King that the settlement included tax. He did not do so and in those circumstances the inference we would draw is that he deliberately omitted to make specific reference to it because he was hoping that it might simply be forgotten.

Our Decision

92. There was no dispute as to the approach we should take in construing the compromise agreement. The construction or meaning of a contract is what a reasonable person with all the relevant background knowledge of the parties at the

time the contract was made would have understood the parties to mean by the language of the contract – see *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38* and *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896*. The subjective intention of a party to the contract is not relevant to the construction of the contract.

93. The contract was made in, and evidenced by, the emails and correspondence referred to above. The making of the first consent order amounted to an act of performance of the contract. In the light of our findings of fact the terms of the contract were as follows:

(1) The two civil recovery claims commenced against Mr Pepper would be dismissed save in respect of the two properties identified in Schedule 1 of the order disposing of the first claim.

(2) SOCA would not pursue any further civil recovery proceedings pursuant to Part 5 of POCA 2002 against Mr Pepper arising out of the ARA investigation into the properties held or owned by him.

(3) SOCA would not pursue any criminal proceedings against Mr Pepper arising out of the ARA investigation into the properties held or owned by him.

(4) There would be no order in relation to the costs of the two civil recovery claims.

94. We find therefore that there was no agreement to compromise Mr Pepper's potential tax liabilities.

95. Miss McCarthy submitted that if the agreement did compromise any tax liabilities then the Assessments were invalid. Mr Yates made submissions to the effect that, as a matter of law, even if the agreement did extend to a compromise of any tax liability arising out of the investigation then:

(1) The agreement would have been ultra vires because by entering into such an agreement SOCA would have been acting wholly irrationally as a matter of public law, and

(2) Making the Assessments would amount to a breach of contract but the Assessments would not as a result be rendered invalid.

96. In the light of our decision as to the terms of the compromise agreement, and with respect to the detailed arguments we heard from Miss McCarthy and Mr Yates, we do not need to deal with these submissions. Our findings as to the terms of the agreement are essentially findings of fact and the issues of law referred to in the previous paragraph do not arise on the facts as found. In the circumstances it would be inappropriate for us to express any view as to what the position would have been if we had found different facts or a different agreement.

97. Irrespective of the true construction of the agreement, Mr Smith submitted that promises were made to Mr Pepper by Mr King as to the effect of the agreement. He submitted that those promises render SOCA's defence of the Assessments in this appeal an abuse of process. In making that submission Mr Smith relied on a summary

of the general principles as to res judicata and abuse of process set out by Auld LJ in *Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482* at 1490 and 1491. He also referred us to what Lord Phillips said in giving the judgment of the Court of Appeal in *R v Abu Hamza [2006] EWCA Crim 2918* at [54]:

> " *These authorities suggest that that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation.*"

98. In making his submissions on abuse of process Mr Smith acknowledged that if the agreement did not extend to tax liabilities then this was very much a secondary argument.

99. In the light of our findings of fact Mr Smith's submission is unsustainable. There was no promise or representation to Mr Pepper that the compromise would cover his tax liabilities. Nor was it unreasonable for Mr King not to raise the issue of tax liabilities during the course of the negotiations. In those circumstances there can be no question of an abuse of process.

100. In any event it is difficult to see that we would have jurisdiction to allow an appeal based on such an abuse of process. In *Foulser v HMRC [2013] UKUT 038 (TCC)* Morgan J sitting in the Upper Tribunal said as follows [35]:

> *… I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority.*

101. It is clear that Mr Smith's argument on abuse of process falls into the second category described by Morgan J. As such the FTT does not have jurisdiction.

102. For all the reasons given above our answers to the preliminary issues are as follows:

(1) The parties did not reach an agreement in 2009 as a consequence of which the assessments raised by the Respondent on 17 August 2011 and currently under appeal before the Tribunal are invalid.

(2) The assessments before the Tribunal are not invalid because of an abuse of process on the Respondents' part.

103. We invite the parties to agree directions for the further conduct of this appeal for consideration by the Tribunal. In default of agreement each party should notify the Tribunal in writing of the directions it seeks within 63 days of the release of this decision.

104. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 11 October 2013