Neutral Citation Number: [2016] EWHC 1197 (Admin)

Case No: CO/1217/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2016

Before :

SIR KENNETH PARKER
(Sitting as a Judge of the High Court)

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Between :

THE QUEEN (ON THE APPLICATION OF WILLIAM GRAHAM AND OTHERS)	**Claimants**
- and -	
HER MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS	**Defendant**

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- -

David Southern QC and John Dagnall (instructed by **Slater & Gordon (UK) LLP**) for the **Claimant**
Akash Nawbatt and Sebastian Purnell (instructed by **The Solicitor for Her Majesty's Revenue and Customs**) for the **Defendant**

Hearing dates: 27 April 2016

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Approved Judgment

Sir Kenneth Parker :

Introduction

1. The Claimants are individuals who participated in either Liberty Partnerships or Liberty Syndicates schemes.

2. The Claimants seek to challenge the legality of Accelerated Payment Notices ("APNs") and Partner Payment Notices ("PPNs"), issued to them pursuant to the provisions of the Finance Act 2014 ("FA 2014"), which claimed payment of tax that it was said the Claimants had avoided by their use of tax avoidance schemes.

3. By the time the claim came for hearing in this Court, Mr David Southern QC, on behalf of the Claimants, properly acknowledged that, in the light of, in particular, *R (on the application of Rowe, Worrall and Others)* [2015] EWHC 2293 (Admin) ("*Rowe*") and *Walapu v Her Majesty's Revenue and Customs* [2016] EWHC 658 (Admin) ("*Walapu*"), none of the grounds, save one in respect of only the Liberty Partnerships Claims, could be actively pursued. Mr Southern's written skeleton argument and his oral submissions, therefore, focussed on that single ground.

The Applicable Legislation

4. HMRC may give an APN to a person if Conditions A to C of section 219(1) FA 2014 are met. The equivalent conditions for PPNs are contained in Schedule 32 FA 2014. Condition A is that a tax enquiry is in progress into a return or claim made by a person in relation to a relevant tax.

5. Condition B is that the return or claim is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements"): section 219(3) FA 2014. The Claimants' returns were made on the basis that a tax advantage resulted from their participation in their Liberty Partnership (i.e. the chosen arrangements). Section 201(4) FA 2014 provides that "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions: see also section 229. Condition C is satisfied if one or more specified requirements are met. One of the specified requirements is that the chosen arrangements are "DOTAS arrangements": section 219(4)(b).

6. Section 219(5) provides:

> "(5) "DOTAS arrangements" means—
>
> (a) *notifiable arrangements* to which HMRC has allocated a reference number under section 311 of the Finance Act 2004 ("FA 2004"),
>
> (b) *notifiable arrangements* implementing *a notifiable proposal* where HMRC has allocated a reference number under that section to the *proposed notifiable arrangements*, or
>
> (c) arrangements in respect of which the promoter must provide prescribed information under section 312(2) of that Act by reason of the

> arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b).” (Emphasis added)

7. “Notifiable arrangements” and “notifiable proposal” are defined in section 306 FA 2004 and “proposed notifiable arrangements” is used in section 311 FA 2004.

FA 2004

8. Section 306(1) FA 2004 provides that “notifiable arrangements” means any arrangements which:

> “(a) fall within any description prescribed by the Treasury by regulations,
>
> (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and
>
> (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.”

9. Section 306(2) FA 2004 provides that:

> “a “notifiable proposal” means a *proposal for arrangements* which, if entered into would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).” (Emphasis added)

10. Section 308 FA 2004 prescribes the duties of a promoter to disclose to HMRC a “notifiable proposal” and “notifiable arrangements”. Section 308(1) imposes a duty on a promoter in relation to a notifiable proposal to provide HMRC with prescribed information relating to the notifiable proposal within a prescribed period after the earlier of (i) the date on which the promoter first makes the notifiable proposal available for implementation by any other person; or (ii) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

11. Section 308(3) imposes a duty on the promoter of notifiable arrangements to provide HMRC with prescribed information relating to those arrangements within a prescribed period after the date on which it first becomes aware of any transaction forming part of the notifiable arrangements unless those arrangements implement a proposal in respect of which notice has been given under subsection (1).

12. Section 308(5) provides that where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties) he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements.

13. Section 311 FA 2004 provides that where a person complies with, *inter alia*, section 308(1) or (3) HMRC may allocate a reference number to the notifiable arrangements or "in the case of a notifiable proposal, to the proposed notifiable arrangements".

14. Section 312 FA 2004 provides that where a promoter provides services to any client in connection with notifiable arrangements it must within 30 days of the relevant date provide the client with, *inter alia*, the SRN number that has been notified by HMRC in relation to (a) the notifiable arrangements; or (b) any arrangements substantially the same as the notifiable arrangements (whether involving the same or different parties). The duty to provide the SRN number to the client was originally set out in section 312(1) FA 2004. Section 312 was subsequently amended by the Finance Act 2008 and the duty is now contained in section 312(2) FA 2004. The "relevant date" for these purposes is the later of the date on which the promoter becomes aware of any transaction which forms part of the notifiable arrangements and the date on which the SRN number is notified to the promoter.

15. Section 319 FA 2004 contains transitional provisions which exempt promoters from their section 308 duties in respect of notifiable proposals and any notifiable arrangements, *inter alia*, where the notifiable proposal was first made available for implementation prior to 18 March 2004.

2006 DOTAS Regulations

16. The section 306(1)(a) FA 2004 Treasury regulations which prescribe the descriptions of arrangements were the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004 which came into force on 1 August 2004. The 2004 Regulations were replaced by the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 which came into force on 1 August 2006.

17. The sixth category of arrangements prescribed by the 2006 Regulations is Loss schemes: Regulation 12. Such schemes were not prescribed by the 2004 Regulations. Therefore, from 1 August 2006 (i) proposals and arrangements prescribed by the 2006 Regulations, such as loss schemes, were notifiable proposals and arrangements within the meaning of section 306 FA; and (ii) their promoters were under a section 308 duty to notify them to HMRC unless they fell within the transitional provisions of the 2006 Regulations (Regulation 1(2)).

18. Regulation 1(2) of the 2006 Regulations provides (so far as relevant):

> "(2) These Regulations do not have effect —
>
> (a) for the purposes of section 308(1) of FA 2004 (duties of promoter relating to any notifiable proposal), if the relevant date falls before 1st August 2006;
>
> (b) for the purposes of section 308(3) of FA 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before 1st August 2006."

19. The relevant date for the purposes of section 308(1) is the earlier of the date on which the promoter makes the notifiable proposal available for implementation by any other person or the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal (see paragraph 10 above).

The Background

20. The Liberty Schemes comprised the Liberty Partnerships and the Liberty Syndicates. Both the Liberty Partnerships' and Liberty Syndicates' proposals were formulated by its promoter, Mercury Tax Strategies Limited ("Mercury").

21. The relevant Information Memorandum, inviting subscriptions from individuals who were resident and ordinarily resident in the UK for tax purposes was issued in April 2006. It informed the public that the Liberty Partnerships were sponsored by Curzon (who issued the Information Memorandum). It gave general information about the Partnerships, in particular that they would be established for the purpose of making a profit other than by means of investment, principally through the acquisition of short-dated fixed income receivables, dividends and the rights to receive dividends.

22. Section 1 of the Information Memorandum, besides describing the intended business of the Partnerships, explained that they intended to fund their operations by raising up to £70 million per Partnership through capital contributions from individual partners. The minimum capital contribution for an individual partner was stated to be £100,000 with an initial capital contribution of £7,000 per £100,000. It was stated that the General Partner had made arrangements whereby partners (if they so desired) could provide up to 100 per cent of their capital contribution (less their initial capital contribution) by way of capital loans, defined as "full recourse loans to enable an individual partner to increase his or her capital contribution to a Partnership".

23. The Information Memorandum advised intending subscribers, under the heading "Short-Term Tax Relief" that:

> "under current UK tax legislation, the Partnership should be able to write off up to 100 per cent of their initial expenditure in the first year of operation. As a result, the Partnerships may expect to incur trading and/or tax losses in their first year."

Any such trading and/or tax losses would be allocated to partners in accordance with their individual Partnership participations and partners "should be able to offset their share of the losses in a variety of ways" as described in section 3 of the Memorandum.

24. Section 3 of the Memorandum, under the heading "Taxation", contained detailed guidance. However, it was introduced by a caveat stating that it was based on Mercury's understanding of relevant UK taxation law and practice "(which is subject to change)" as at the date of the Memorandum. There followed a general disclaimer of responsibility for the tax advice given on the part of Curzon, the Partnerships and their advisers. There followed a mention that the General Partner had sought advice from named tax counsel, who had given their opinion that tax relief should be

available to partners in the Partnerships, but that no guarantee could be given that tax relief would be available.

25. Section 3 of the Memorandum stated that the main ways of treating the expected losses for tax purposes would be by set-off against general income in the year of assessment in which the loss was incurred, or the preceding year or by carry-back for set-off against income of the preceding three years, or by carry-forward against future profits of the same trade. There was also guidance that interest on loans taken out by a partner to make a capital contribution to a Partnership should qualify for tax relief.

26. The Information Memorandum contained application forms including a pro forma subscription agreement, a power of attorney (in particular to sign, execute and deliver a loan agreement to provide a capital loan), a pro forma capital loan application letter, and a money laundering certificate.

27. In total there were eight individual Partnerships implemented pursuant to the Information Memorandum. Four of the individual Partnerships were implemented before August 2006 (and are not the subject of this claim), and four were implemented on dates between January 2007 and March 2007. A further two partnerships were implemented, prior to 1 August 2006, pursuant to a separate information memorandum (the Clavis Liberty Fund Partnerhips).

A Typical Partnership

28. In *Clavis Liberty 1 LP v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 0253 (TC) (First-tier Tribunal, Tax Chamber [Judge John Walters QC, Ms Elizabeth Bridge]: TC/2013/03364, Decision 18 April 2016), the Tribunal meticulously examined the structure and operations of one Partnership, the Clavis Liberty Fund 1 LP ("The Clavis Partnership"). That was formed under an earlier Information Memorandum (January 2006) which was in materially the same terms. I believe, therefore, that the Tribunal's description and analysis can fairly be relied upon as indicative of the nature of the Partnerships at issue in this claim.

29. The Clavis Partnership was registered as a Limited Partnership in Jersey, but apparently resident for tax purposes in the UK. Over 100 individuals were admitted to the Partnership as limited partners, subscribing in total over £62 million to the Partnership. Dickens Ventures Limited ("Dickens") was a company incorporated in the British Virgin Islands. Dickens had a subsidiary company, Helios Limited ("Helios"), incorporated in the Cayman Islands. Dickens made a capital contribution of about £60 million to Helios that was treated by Helios as a share premium available for distribution. Helios then declared an interim dividend of £60 million in favour of Dickens, and the Clavis Partnership purchased from Dickens for about £60 million the right to receive the interim dividend from Helios. It is unnecessary to describe in detail the somewhat intricate movement of monies to fund these transactions, and the involvement of the professional enterprises in the machinery of transfer, because a moment's reflection reveals the essential pre-ordained circularity of the funds in question and the absence of any commercial risk as ordinarily understood.

30. A naïve observer of this elaborate offshore arrangement might wonder how any tax advantage could be obtained, the Clavis Partnership having expended £60 million to obtain a dividend payment of the same amount, with no obvious loss or gain as

ordinarily understood. However, at the material time section 730 of the Income and Corporation Tax Act 1988 ("ICTA") provided that where the owner of shares sold or transferred the right to receive any distribution, the distribution was deemed to be the income of the owner of the shares. Thus, on one view, the dividend of £60 million was the income of Dickens, as owner of the shares in Helios, and not the income of the Partnership, which had in fact received payment of the £60 million dividend. I note that in *Paget v IRC* [1938] 2 KB 25, 21 TC 677, Miss Paget sold the coupons in certain Hungarian bonds to a coupon dealer, and in the event persuaded the court that the consideration received for the sale did not constitute any of her interest income for tax purposes. No doubt fearing that Miss Paget's stratagem had the potential for immunising all interest income from income tax, the legislature acted swiftly by enacting section 24 of the Finance Act 1938, the forerunner of section 730 ICTA. In any event, the Clavis Partnership believed that it was entitled to claim a trading loss of £60 million, being relieved, by section 730 ICTA, of having to account for any income resulting from receipt of the £60 million dividend from Helios. [The Tribunal has held that, so far as the dividend transaction was concerned, there was no relevant "trading" for tax purposes; and that section 730 was intended to prevent the seller of what in the ordinary course would have been her income from avoiding tax on the consideration received; and was not intended to allow the purchaser of income to reduce her tax liability by artificially manufacturing what would in the ordinary course not be regarded as a loss of any kind].

31. It is important to understand from the above that what came under the microscope in the Tribunal was the specific Partnership (*in casu*, the Clavis Partnership) and the transactions into which that specific Partnership had entered. That was inevitable because it was a specific Partnership which claimed a tax advantage (the relevant trading loss) by reason of, and only by reason of, the specific transactions into which it had entered. These were the arrangements which, for fiscal purposes, needed close scrutiny and analysis.

The Issue in this Claim

32. The issue that I have to decide is simply whether any of the Liberty Fund Partnerships was notifiable under the applicable DOTAS provisions, having regard to the transitional provisions in Regulation 1 of the Regulations 2006. In short, Mr Southern QC submits that none of the Partnerships was notifiable, and Condition C was not satisfied in respect of any PPN, because:

    i) For all the Partnerships the relevant first date for notifying any notifiable proposal (see section 308(1) and section 308(2)(a)) fell before 1 August 2006 (Regulation 1(2)(a) of the Regulations 2006);

    ii) For all the Partnerships the relevant first date for notifying any notifiable arrangements (see section 308(3) of FA 2004) also fell before 1 August 2006 (Regulation 1(2)(b) of the Regulations 2006).

33. i) above is not in contention. HMRC agrees that the relevant notifiable proposal for each of the partnerships was the Information Memorandum of April 2006, and that particular proposal was made available for implementation before 1 August 2006. No duty, therefore, arose to notify the proposal. However HMRC contends that, for the purposes of section 308(3), the relevant notifiable arrangements were the particular

arrangements for each specific Partnership. On that footing, the promoter had a duty to notify when he became aware of any transaction forming part of the particular arrangements for each specific Partnership. For each of Partnerships 5-8 that date inevitably fell after 1 August 2006, because no relevant transactions in respect of any of these Partnerships had been implemented before August 2006. The condition in section 308(3) was also satisfied, because *ex hypothesi* no notice had been given, or could have been required to be given, in respect of the relevant notifiable proposal.

34. Mr Southern QC resists that conclusion by submitting that "in reality" there was just one set of "arrangements" in this case, namely, the arrangements for the Liberty Partnerships. That single set of "arrangements" was constituted by the Information Memorandum, which set out how each of the proposed Partnerships would be constituted, how they would operate, and how they would achieve the tax advantage. Subscribers subscribed, and when one Partnership was fully subscribed, funds moved seamlessly into the next Partnership, and so on. Mr Southern QC, before Mr Justice Green in *Walapu*, deployed the metaphor of tramlines, with one Partnership running continuously into the next; and before me he suggested that the spill over might be likened to the icy water flowing over the "watertight" doors of the stricken "Titanic", a perhaps unfortunate comparison, bearing in mind the ultimate destiny of that ship and the fate of Mr Thomas Andrews, the intrepid designer of the liner's "watertight" compartments. Mr Southern invited me strenuously to look at what he called the "reality" of the situation, a somewhat novel approach emanating from those engaging in transactions whose sole purpose is the avoidance of tax.

35. I am unable to accept this submission. I have already stressed that, for fiscal purposes, the focus must be on the specific Partnership. Each individual Partnership had its own particular components, in terms of:

    i) the identity of the partners;

    ii) the amounts subscribed by each partner;

    iii) the identity of the corporate vendor of the relevant dividend rights;

    iv) the identity of the payer of the relevant dividend;

    v) the amount of the relevant dividend;

    vi) in particular, the alleged tax advantage;

    vii) the rights and obligations of each partner to the other partners in the individual partnership.

36. In my view, the relevant "arrangements" for the purposes of section 308 FA 2004 must in the circumstances of this case be the specific arrangements for each particular Partnership. There is simply no justification for sweeping all the individual Partnerships under a single "umbrella" arrangement (in effect constituted by the Information Memorandum), where the fiscal analysis cannot properly be applied to such a putative umbrella scheme, and where each Partnership had its own particular characteristics. The appeal to so called "reality" does not impress me, other than as a desperate *tabula in naufragio* (continuing Mr Southern QC's nautical predilection) for

the only relevant reality in the present context is the individual and separate Partnership.

37. The above interpretation is supported by, and coherent with, the applicable legislation, viewed as a whole. First, section 219(3) [condition B] refers to a particular tax advantage ("the asserted advantage") resulting from particular arrangements ("the chosen arrangements"), being DOTAS arrangements. What are "the chosen [DOTAS] arrangements" in this case? They can only be the particular arrangements for each Partnership, with the particular tax advantage being the alleged trading loss for each individual Partnership.

38. Secondly, under section 313(1)(b) of FA 2004 a person who is party to any notifiable arrangements must provide the Board with prescribed information relating to:

> "The time when he obtains or expects to obtain by virtue of the arrangements an advantage in relation to any relevant tax."

In the circumstances of this case that provision can sensibly apply only if the "arrangements" in question comprise the particular Partnership that the taxpayer has entered, or firmly intends to enter. It is clearly essential that HMRC should know when a taxpayer has entered, or intends to enter, into particular arrangements and the specific characteristics of these arrangements, in this case the individual Partnership.

39. The legislature also certainly contemplated a scenario in which there could, as here, be a series of similar "arrangements". Under section 308(5) FA 2004 there is a reference to two or more "sets of notifiable arrangements" which are substantially the same (whether they relate to the same parties or different parties). In such a case the promoter may rely upon a notification of the earlier "set of notifiable arrangements", and does not have to notify any subsequent similar set of arrangements. The corollary to that provision is section 312(2) FA 2004, whereby the promoter must notify a client of the reference number in relation to the notifiable arrangements, or:

> "(b) any arrangements substantially the same as the notifiable arrangements …"

(These provisions are echoed in section 219(5)(c) FA 2014 where "DOTAS arrangements" are specifically defined to include the case of client notification falling within section 312(2)(b) FA 2004)

40. It must be acknowledged that at the time of the FA 2004 and the Regulations 2004 the effect of the transitional provisions was different. Section 319(3)(b) excluded from notification:

> "any notifiable arrangements which implement such a proposal" [that is, any notifiable proposal falling within section 319(3)(c)]

41. Mr Akash Nawbatt, on behalf of HMRC, accepted that, before the 2006 Regulations were introduced, any arrangements implementing proposals that pre-dated 18 March 2004 were not notifiable. That constituted favourable treatment of some taxpayers, because other arrangements, being substantially the same and having the same alleged

tax advantages, were notifiable simply because they implemented "proposals" made on or after 18 March 2004. The position has now changed, in that "arrangements" (such as each of the Partnerships 5-8) are notifiable where they are implemented on or after 1 August 2006, even if the proposal (in this case the Information Memorandum) was made before that date but on or after 18 March 2004. That result is less favourable to certain taxpayers, but it is not difficult to see why it might be considered more effective in terms of legislative policy in this area, a greater number of individual tax avoidance arrangements being made notifiable; and as promoting greater equality of treatment of taxpayers seeking to exploit tax avoidance opportunities.

Conclusion

42. In respect of the relevant Liberty Fund Partnerships 5-8, there was a duty to notify prescribed information about the first Partnership under section 308(3), because:

    i) such a Partnership constituted "notifiable arrangements" under section 308(3); and

    ii) the promoter first became aware of a transaction forming part of such arrangements after 1 August 2006 when those arrangements began to be implemented; and

    iii) those arrangements did not implement a proposal in respect of which notice had been given under section 308(1) FA 2004.

43. As regards Liberty Fund Partnerships 6-8, each constituted notifiable arrangements under section 308(5), being substantially the same as the arrangements constituted by Liberty Fund Partnership 5, and there was no separate duty to notify provided that the arrangements of Liberty Fund Partnership 5 had been duly notified.

44. In any event, each of the Liberty Fund Partnerships 5-8 fell within section 219(5) of FA 2014 as "DOTAS arrangements". Condition C was, therefore, satisfied in each case.

45. I am, of course, fortified in this conclusion because it is in essence the conclusion reached, on different facts, by Mr Justice Green in *Walapu*, the learned judge there rejecting the same, or substantially the same, submissions as Mr Southern QC advanced before me.

46. For these reasons, the only active ground of claim being rejected, I dismiss this claim.