[2018] UKFTT 0594 (TC)

TC06756

Appeal numbers: TC/2016/01473
TC/2016/02200
TC/2016/02521

PROCEDURE – recusal application – whether a fair-minded and informed observed would conclude that there was "a real risk" that my decision in this appeal might have a bearing on a case heard but not decided by the High Court – application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BENTON **STEPHEN JACKSON** **PAUL HUDSON**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 17 July 2018

Ms Ximena Montez-Manzano of Counsel, instructed by New Dawn Tax Partnership for the Appellants

Ms Aparna Nathan of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. I am a part-time judge in the First-tier Tribunal. I also practise as a barrister. On 14 November 2017, I was allocated as the judge to hear the appeals of Mr Benton, Mr Jackson and Mr Hudson ("the Appellants"). Their appeal was originally listed for hearing on 2 and 3 May 2018, but it was adjourned because the Appellants' Counsel, Ms Montez-Manzano, was ill. It was relisted for 17 and 18 July 2018.

2. The day before that relisted hearing, HMRC invited me to recuse myself from the case ("the Application") on the grounds of "apparent bias". The Appellants objected to the Application. On the first day of the relisted hearing, I heard the submissions of both parties on the Application and refused it. I gave my decision orally, and HMRC asked me to set out my reasons in a full decision. This is that full decision. HMRC did not ask for an adjournment of the substantive appeal, and the hearing of the Appellants' appeals followed.

3. My decision in the substantive appeal has been issued to the parties at the same time as this decision; in this judgment I refer to it simply as *Benton*, although an earlier decision involving the same parties before Judge Richards has already been published under reference *Benton v HMRC* [2017] UKFTT 396 (TC).

The legal principles

4. The law governing apparent bias is well known. The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", see Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. In *Lawal v Northern Spirit* [2003] UKHL 35 Lord Steyn at [14] said that the fair-minded and informed observer "will adopt a balanced approach" and be "neither complacent nor unduly sensitive or suspicious".

5. In *Locabail v Bayfield* [2000] QB 451 Lord Bingham CJ, giving the judgment of the court, approved observations of the Constitutional Court of South Africa in *President of the Republic v South African RFU* 1999 (7) BCLR (CC) 725 at 753

> "… The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer the justice without fear or favour; and the ability to carry out that oath by their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

6. HMRC relied in particular on the case of *Watts v Watts* [2015] EWCA Civ 1297. This concerned a part-time judge, Ms Catharine Newman QC, who was also a

practising barrister. She was listed to hear a case between a brother and a sister. The sister was represented by Mr Holland, who was in the same chambers as Ms Newman. Mr Holland was also junior counsel in long-running litigation in which Ms Newman was the lead counsel.

7. On the first day of the trial, the brother's representative made an application for Ms Newman to recuse herself by reason of apparent bias. His submission was that:

> "there were objective grounds for legitimate concern that the judge might be too generous to Mr Holland (and hence too generous to the respondent, his client) in the trial, to protect Mr Holland from disappointment associated with losing the case - which could be expected to be particularly great because of the personal financial implications of that for Mr Holland by reason of the [Conditional Fee] arrangement under which he was acting for the respondent - and so avoid damaging their future working relationship in the other litigation in which they were instructed to act together."

8. The judge refused the application, and the case proceeded to the Court of Appeal. Sales LJ dismissed the appeal. At [22] he said:

> "The notional fair-minded and informed observer, knowing the professional standards applied by part time judges drawn from the legal profession, would understand that any deputy judge who found that she was being asked to try a case in relation to subject matter where there was a real risk that her ruling in the case (which would of course acquire a degree of authority as the ruling of a court) might have a bearing on the arguments to be advanced in other ongoing litigation in which she was involved as counsel, would immediately for that reason recuse herself. In such a case it would be clear that her interest as a barrister would conflict with her duty as a judge and, since that would be clear, it would be obvious that she could be expected to identify such a conflict and then act ethically and in accordance with her professional obligations by recusing herself."

Benton **and** ***Broomfield***

9. In order to understand the Application, it is necessary first to summarise two cases. The first is *Benton,* the subject of the Application. The second is a judicial review case which had been heard but not decided at the time of the Application, and which was issued as *R(oao Broomfield) v HMRC* [2018] UKHC 1966 (Admin) ("*Broomfield*") on 27 July 2018.

Benton[1]

10. The Appellants in *Benton* had participated in a tax planning arrangement known as "Working Wheels" ("the Scheme"). Participants in the Scheme became partners in a partnership which purported to be trading in used cars[2]; losses generated by the

[1] The following paragraphs are simply a brief summary and do not give not a complete picture. They should not in any way be taken as replacing the findings in *Benton.*

[2] There were other variants, including watches and cash receivables, see *Flanagan* at [2].

partnership were offset against participants' other income. Some of the losses were used in the same year, some were carried back. The Scheme was litigated as *Flanagan v HMRC* [2014] UKFTT 175 (TC) ("*Flanagan*"). The appeal failed: Judge Bishopp held at [86] that:

> "none of the appellants was trading in the proper sense of that word, but…were instead engaged in an arrangement designed only to give the illusion of trading, and…the appeals must be dismissed on that ground alone."

11. His judgment was issued on 20 February 2014, and on 17 September 2014 the Upper Tribunal ("UT") refused permission to appeal. *Flanagan* was therefore a "final ruling", as defined by Finance Act 2014, s 205(4).

12. In reliance on *Flanagan*, HMRC issued each Appellant with a Follower Notice ("FN") requiring them to take corrective action to remove all the *Flanagan* losses. To the extent that losses had been carried back, the Appellants failed to take corrective action. HMRC levied penalties on the Appellants, who appealed the penalties to the FTT. Their grounds of appeal, as finally distilled by the time of the hearing, were[3] that:

(1) the FNs were invalid because they contained the following defects[4]:

(a) they stated that "the FTT's decision has not been appealed and is therefore final" instead of "the UT refused permission to appeal the FTT's decision and it is therefore final". The FNs therefore failed to explain the basis on which *Flanagan* had become a final ruling;

(b) they did not include the date on which *Flanagan* became a final ruling; and

(c) they said that, if the FNs were issued after 16 July 2015, the Appellants would have a right to make representations to HMRC about the validity of the FNs; the correct date was 16 September 2015.

(2) It was reasonable in all the circumstances for the Appellants not to have taken corrective action in relation to the *Flanagan* losses carried back to earlier years, because they had relied on professional advice from New Dawn Tax Partnership ("NDTP"). It was NDTP's view that, where the *Flanagan* losses had been carried back, and although the FTT had ruled that the Scheme had not generated trading losses, those losses were nevertheless immune from challenge. This was because HMRC had not opened timeous enquiries into the carry-back claims using TMA Sch 1A; instead they had opened claims into the year in which the losses were said to arise, under TMA s 9A. NDTP's view was based on its understanding of the Supreme Court's decision in *R (oao Cotter) v HMRC* [2013] UKSC 69 ("*Cotter*").

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[3] See *Benton* at §§124-5

[4] See *Benton* at §§142ff

(3) If penalties were due, HMRC should have given a larger deduction for co-operation.

13. HMRC's response to the Appellants' first ground of appeal was that the FTT had no jurisdiction to consider whether an FN was invalid, but if the FTT did have jurisdiction, and if there were defects, they could be cured by reliance on Taxes Management Act 1970 ("TMA") s 114.

Broomfield

14. The judicial review case of *Broomfield* also concerned FNs. The relevant "final ruling" was *Huitson v HMRC* [2015] UKFTT 448 (TC) ("*Huitson*"). Mr Huitson had argued that the UK-Isle of Man double tax treaty applied to protect much of his income from UK tax; the FTT (Judge Cannan and Mr Holden) decided the case in favour of HMRC. The decision was issued in September 2015.

15. In my capacity as a barrister, I have been instructed to represent a group of appellants in litigation before the FTT. The grounds of appeal were filed in July 2015 and were amended in November 2015. The appellants all entered into arrangements which were the same as, or similar to, those entered into by Mr Huitson.

16. There are two grounds of appeal before the FTT. The first is that the appellants were within the agency rules (now set out at Income Tax (Earnings and Pensions) Act 2003, s 44), so were entitled under TMA s 59B and Reg 185 of the PAYE Regulations to a credit for the PAYE which should have been deducted by their agencies, and that as a result the assessments made by HMRC for further tax were incorrect ("the s 44 ground"). The second ground of appeal is that *Huitson* was wrongly decided ("the *Huitson* ground"). The two grounds are made in the alternative.

17. HMRC issued some of the appellants with FNs on the basis that *Huitson* was a "final ruling", and the other conditions for the issuance of FNs were met. HMRC required the recipients to take corrective action by abandoning their FTT appeals entirely – ie both the s 44 ground and the *Huitson* ground.

18. Some of the FN recipients took judicial review ("JR") action against HMRC, with Ms Broomfield as the lead claimant. I was not instructed in relation to the JR and took no part in giving advice to the claimants in relation to their JR application.

19. One of the grounds of challenge at the High Court was that the FN legislation did not apply where there were two alternative arguments before the FTT, only one of which had been the subject of a final ruling. The claimants' JR application was listed to be heard on 28 and 29 June 2018 before Lewis J.

20. Shortly before that High Court hearing, HMRC changed their position. They accepted they had been incorrect to require the claimants to give up both the s 44 ground and the *Huitson* ground. At the hearing, they informed Lewis J that they would write to each claimant and say that if they abandoned the *Huitson* ground, HMRC would cancel the FNs and the related Accelerated Payment Notices and no

penalties would be issued. The text of that letter, and the background, is set out at [49] of *Broomfield*.

21. Another ground of challenge in the JR proceedings was that the FNs were invalid because they stated that[5]:

> "the claimants had one day more to take corrective action than was permitted as they said the 30 day period began after the day on which the defendants gave notice of its determination on any representations whereas it began on the day on which the notice was given."

22. HMRC's Counsel, Sir James Eadie QC, argued that the notices were not invalid for that reason, but that if they were, any defect could be cured by reliance on TMA s 114[6].

23. Following HMRC's change of position in relation to the grounds of appeal at the FTT, I attended the JR hearing, sitting in the public benches, to see whether it was likely that the grounds filed at the FTT would need to be changed to remove the *Huitson* ground. In other words, I attended because I was instructed on the FTT appeal, not because I was advising the claimants in *Broomfield* on their JR action.

The Application and HMRC's reasons

24. The Application was made on 17 July 2018. This was:

(1) after the hearing of *Broomfield* on 28 and 29 June 2018;

(2) after HMRC had provided the draft letter and explained their change of position in relation to the claimants in that case; but

(3) before judgment was handed down in *Broomfield* on 27 July 2018.

25. Ms Nathan submitted that the *dictum* of Sales LJ applied, because the "notional fair-minded and informed observer" would conclude that there was:

> "a real risk that [my] ruling in *Benton* (which would of course acquire a degree of authority as the ruling of a court) might have a bearing on the arguments to be advanced in *Broomfield* in which [I] was involved as counsel."

26. Ms Nathan accepted that I was not "involved as counsel" in *Broomfield*, but said that as the claimants in *Broomfield* were also appellants in the FTT appeals in which I was instructed, the same principle applied.

27. I asked Ms Nathan how my decision in *Benton* would affect the outcome in *Broomfield*, given that the case had already been heard, so there were no "arguments to be advanced". She said that HMRC consider it their duty to notify the High Court judge of any relevant FTT decisions published between the hearing date and the issuance of the High Court judgment, where there is "significant overlap" between the

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[5] see *Broomfield* at [84]

[6] see *Broomfield* at [87]

two cases, and that the judge may take that FTT decision into account when coming to his judgment. She said that if the hearing of *Benton* had taken place after the issuance of the *Broomfield* judgment, HMRC would not have made the Application.

28. She identified the "significant overlap" between the two cases as follows:

(1) the claimants' case in *Broomfield* was that their FNs were invalid because they contained mistakes;

(2) one of the grounds of appeal in *Benton* was that there were mistakes in the FNs, so that they were invalid; and

(3) HMRC's argument in both *Broomfield* and *Benton* was that, if there were mistakes, these could be remedied by reliance on TMA s 114.

29. She submitted that it was irrelevant that the alleged errors in the FNs issued to the claimants in *Broomfield* were different errors from those which were alleged to exist in *Benton.*

30. Ms Nathan made a further submission, to the effect that:

(1) in *Broomfield* the claimants had a second argument at the FTT, namely the s 44 ground; and

(2) in *Benton* the Appellants' position was that argued that they did not have to take corrective action because they were relying on *Cotter*, and this was also, in some sense, a second line of argument.

31. Although by the end of the hearing I was unclear whether this submission was maintained, I have considered and responded to it below.

Submissions by Ms Montez-Manzano

32. Ms Montez-Manzano said that the Appellants opposed the Application, because the fair-minded and informed observer would know that that judges are trained to have an open mind, to take into account all submissions made and to be impartial.

33. In relation to the alleged similarities between *Broomfield* and *Benton*, Ms Montez-Manzano said that the errors in the FNs were "altogether different". It was also clear in *Broomfield* that the High Court had the jurisdiction to declare an FN invalid, whereas the extent of the FTT's jurisdiction was an issue in *Benton.*

34. Moreover, a significant part of the Appellants' case in *Benton* was whether it had been "reasonable in all the circumstances" for them not to take corrective action" and in the alternative, whether the penalties should be reduced. Neither of these issues were relevant in *Broomfield.*

35. She also said that it was "very unlikely" that Lewis J would change his decision in *Broomfield* because of what I might decide in *Benton*, both because of the relative positions of the High Court and the FTT, and also because "the facts and arguments are so different".

Conclusions

36. I begin by setting out some of the facts which the fair-minded and informed observer would know:

(1) At the time of the Application, the hearing of *Broomfield* had taken place, and both parties had presented their cases. All the issues had been fully argued before Lewis J.

(2) The claimants in *Broomfield* and the Appellants in *Benton* were both seeking to argue that there were errors in their FNs. But the errors were entirely different.

(3) TMA s 114 is a provision which can be used to prevent assessments and similar from being void because of a "mistake, defect or omission". But whether or not s 114 can be used depends on the nature of that "mistake, defect or omission", as well as on other factors.

(4) There is extensive existing authority on the application of TMA s 114, including *Pipe v HMRC* [2008] STC 1911, a decision of Henderson J (as he then was); *HMRC v Donaldson* [2016] STC 2511 and *R (oao Archer) v HMRC* [2018] STC 38, both decisions of the Court of Appeal.

37. Were I to have decided that the FTT had the jurisdiction to declare that an FN was invalid on the basis that one or more of the alleged errors relied on by the Appellants[7], the fair minded and informed observer would not have thought that Lewis J would have been influenced by my decision[8].

38. That is because he was considering entirely different alleged errors, and because there is already extensive guidance from the High Court and the Court of Appeal on the application of TMA s 114.

39. The fair-minded and informed observer would instead have decided that there was no "real risk" that my decision in *Benton* might have a bearing Lewis J's decision about the validity of the FNs in *Broomfield*, so there was no "real possibility of bias".

40. As I noted above, it was unclear whether HMRC were also submitting that there was a further overlap, on the basis that in *Broomfield* the claimants had a second ground of appeal at the FTT, and the reliance on *Cotter* in *Benton* could also be seen as a second line of argument. However, the fair-minded and informed observer would know there was no overlap, because:

(1) in *Broomfield* the claimants were putting forward the s 44 ground as their primary case; if that succeeded, *Huitson* had no application on the facts. In contrast, the Appellants in *Benton* had accepted that the ruling in *Flanagan* applied to their arrangements; their *Cotter* argument turned on another matter entirely; and

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[7] In fact, as explained in *Benton* at §130, I decided that the FTT did not have the jurisdiction to declare that an FN was invalid, and so TMA s 114 was not in issue either.

[8] Lewis J published his judgment on 27 July 2018, only 3 days after the final day of the *Benton* hearing.

(2) in *Broomfield* HMRC had agreed that the claimants did not need to take corrective action as long as they gave up the *Huitson* ground, so the claimants were able to put forward their s 44 argument without the risk of FN penalties. In contrast, HMRC had imposed penalties on the Appellants in *Benton*, because they did not accept that reliance on *Cotter* provided a good reason for not taking corrective action.

41. The fair minded and informed observer would know that there was no parallel between the s 44 argument in *Broomfield* and the Appellants' reliance on *Cotter*, and would also know that nothing I could decide in *Benton* about *Cotter* would in any event make any difference to Lewis J's judgment in *Broomfield*, because HMRC had already changed their position on the s 44 argument.

42. For the reasons set out above, I refused the Application.

43. This document contains full findings of fact and reasons for the decision. If HMRC are dissatisfied with this decision, they have 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 HMRC. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 27 SEPTEMBER 2018