Neutral Citation Number: [2018] EWCA Civ 31

Case No: A3/2016/0188

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX & CHANCERY CHAMBER)
Mann J.
[2015] UKUT 596 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2018

Before :

LORD JUSTICE PATTEN
and
LORD JUSTICE SALES

- -

Between :

(1) IAN SHINER **(2) DAVID SHEINMAN**	**Appellants**
- and –	
THE COMMISSIONERS FOR HM REVENUE & CUSTOMS	**Respondents**

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- -

Mr Conrad McDonnell (instructed by **Howard Kennedy LLP)** for the Appellants
Mr James Rivett (instructed by **General Counsel and Solicitor to HM Revenue and Customs)** for the Respondents

Hearing dates : 6 and 7 December 2017

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Judgment Approved

Lord Justice Patten :

1. The appellants are the shareholders and directors of Mark Oliver Homes Yorkshire Limited ("MOH") which is a residential property developer specialising in the construction of affordable homes. The appellants have at all material times been resident in the UK for tax purposes and have been beneficially entitled to the income which they received from MOH. But, on the advice of PriceWaterhouse-Coopers LLP, they used a tax avoidance scheme which was designed to take advantage of the provisions of the 1955 UK - Isle of Man Double Taxation Treaty ("the DTT"). The charging provisions in Chapter 2 Part 2 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") take effect subject to any arrangements entered into by the UK to alleviate double taxation: see Taxation (International and Other Provisions) Act 2010 s.3 (formerly the Income and Corporation Taxes Act 1988 ("ICTA 1988") s.788(6)).

2. Paragraph 3(2) of the DTT exempts the industrial or commercial profits of an Isle of Man ("IOM") enterprise from UK tax unless it is engaged in trade or business in the UK through a permanent establishment here. An IOM enterprise is defined as including a commercial undertaking carried on by an IOM resident which can be any IOM tax resident including any body of persons whether corporate or non corporate. Person includes a partnership: see *Padmore v Inland Revenue Commissioners* [1989] STC 493.

3. In April 2005 Mr Shiner set up the Ian Shiner 2005 Settlement in the IOM by transferring to Armourdale Limited (an IOM resident company) as trustee the sum of £10 as the initial trust capital. Mr Shiner as well as being the settlor was also entitled to an interest in possession under the trust. At the same time Mr Sheinman established the David Sheinman 2005 Settlement using Parleybrook Limited as the IOM trustee with £10 as the initial trust capital. He too retained an interest in possession under the trust.

4. Following the establishment of the two IOM trusts, the trustees formed the Redwood Partnership ("Redwood") which then borrowed £1.28m in order to acquire a development site in the UK from another UK company (Merchant Property Developments Limited) of which the appellants were also directors. The site was developed using MOH as the contractor and the profits from the sale of the houses and other properties were distributed by Redwood to the trustees as partners and then paid to the appellants as trust income.

5. The appellants submitted tax returns for each of the years of assessment 2005/6, 2006/7 and 2007/8 claiming an exemption from income tax based on the combined effect of paragraph 3(2) of the DTT and ICTA 1988 s.788. The effect of the DTT had already been restricted by s.858 ITTOIA which prevented partners in foreign partnerships from claiming exemption from income tax on their share of the partnership income if they were UK residents. Although HMRC have always contended that s.858 in its unamended form was sufficient to remove the benefit of the DTT from the appellants in this case, the point was, they say, put beyond doubt by s.858(4) which was introduced by s.58 of the Finance Act 2008 ("FA 2008") and by s.58(4) was deemed always to have had effect. The amendment contained in the new s.858(4) treated as members of a foreign partnership under s.858 "any person entitled

to a share of the income of the firm". This would therefore include the appellants even though they were not partners as such in Redwood during the relevant years of assessment.

6. Relying in part on the retrospective effect of s.58, HMRC wrote to a number of taxpayers including the appellants in August 2008 and have subsequently on 28 June 2012 issued closure notices under s.28 TMA 1970 amending the appellants' self-assessment tax returns for the three years of assessment in question. The appellants have lodged appeals against the closure notices raising a number of challenges to the amended assessments. These include an argument that s.58 FA 2008 and, in particular, its retrospective effect contravened Article 56 of the EC Treaty (now Article 63 of the Treaty on the Functioning of the European Union ("TFEU")) which prohibits *"all restrictions on the movement of capital between Member States and between Member States and third countries*". It is common ground for the purposes of this appeal that the IOM is a third country: see *Routier v HMRC* [2017] EWCA Civ 1584.

7. Although the Article 56 point is now taken as part of the taxpayers' grounds of appeal against the closure notices, it formed the basis of what Mr Rivett for HMRC described as a pre-emptive strike which the taxpayers launched on 17 November 2008 soon after receiving HMRC's August 2008 letter. This took the form of an application seeking permission to apply for judicial review of HMRC's decision (as it was characterised) to apply the retrospective effect of s.58 to the three relevant years of assessment. They sought a declaration that to the extent that it applies to income received or earned before 12 March 2008, s.858 ITTOIA as amended was incompatible with Article 56. A point was also taken about the incompatibility of these provisions with the appellants' rights under Article 1 of the First Protocol to the Convention but that argument has been disposed of against the interests of the taxpayers by the subsequent decision of this court in *R (Huitson) v HMRC* [2011] EWCA Civ 893 and can be ignored for the purposes of this appeal.

8. Permission to bring the claim for judicial review was refused by Stanley Burnton LJ on 3 June 2009 but then granted by the Court of Appeal after an oral hearing on 25 May 2010. The claim for judicial review was retained in the Court of Appeal and eventually heard in November 2010 as a substantive application and not as an appeal. On 25 July 2011 ([2011] EWCA Civ 892) the Court of Appeal dismissed the claim. Mummery LJ (for reasons which I will return to in more detail later) held that there had been no movement of capital sufficient to engage Article 56 because the payment of the £10 (which was the only movement of capital relied upon in each case) had nothing to do with the funding of Redwood and was put into a trust for each appellant and not into the partnership which was a distinct and separate entity. It did not become a movement of capital under Article 56 merely because the IOM trustees became partners in Redwood.

9. On 7 February 2012 the Supreme Court refused permission to appeal.

10. On the basis of the Court of Appeal's decision, HMRC applied to the First-tier Tribunal for an order striking out the appeals against the closure notices so far as they relied on a breach of Article 56 EC. They contended that the point was *res judicata* as between the appellants and HMRC or alternatively an abuse of process because the

taxpayers were seeking to re-litigate a point that had already been decided against them. It was also said that the appeals on this issue had no reasonable prospect of success because the First-tier Tribunal was bound by the principle of *stare decisis* to follow the Court of Appeal's decision on the Article 56 point.

11. The First-tier Tribunal decided that the matter was not *res judicata* on the basis of issue estoppel because the Crown was a party to the claim for judicial review but it struck out the Article 56 case as an abuse of process and because it was bound to follow the Court of Appeal's decision on the point. The Upper Tribunal rejected *stare decisis* as a proper basis for the strike out order. It said that it was not possible to be sure at an interlocutory stage that the facts under consideration in the tax appeals would not be materially different. There is no cross-appeal by HMRC against this part of the decision. But the Upper Tribunal upheld the decision of the First-tier Tribunal that for the taxpayer to rely once again on the Article 56 arguments would amount to an abuse of process.

12. The Upper Tribunal rejected the argument that the differences between an application for judicial review and a statutory tax appeal prevented the reconsideration of the Article 56 point from amounting to an abuse of process. It decided that the First-tier Tribunal did have power to strike out an appeal on these grounds and it rejected Mr McDonnell's submission that the decision of the Court of Appeal was either one made *per incuriam* or at least could no longer stand in the light of subsequent decisions of the CJEU as to what type of restrictions would be prohibited by what is now Article 63. The taxpayers now appeal with the permission of the Upper Tribunal. Although Mr McDonnell has not in any sense abandoned his arguments about the application of the doctrine of abuse of process to tax appeals and the power of the First-tier Tribunal to strike out on that basis, at the forefront of his arguments he now relies on the recent decision of the CJEU in Case C-628/15 *The Trustees of the BT Pension Scheme v HMRC* as confirming that the decision of the Court of Appeal proceeded on a wrong and far too narrow basis and that this alone justifies the First-tier Tribunal in the application of what must be a broad, merits-based approach to allow the matter to be reconsidered as part of the tax appeals.

Jurisdiction to strike out

13. The first question raised by the appeal is whether the First-tier Tribunal has power under its rules to make an order striking out some of the grounds of appeal as an abuse of process even assuming that issue estoppel or abuse of process has any application in relation to a tax appeal. It is common ground that the First-tier Tribunal is a statutory tribunal with no inherent jurisdiction. It exists to perform the functions conferred on it by the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") and other statutes: see TCEA 2007 s.3(1). Its powers must be found in TCEA 2007 and the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") made under the power conferred by s.22.

14. Section 22 provides for the making of rules by the Tribunal Procedure Committee. Section 22(4) provides:

> "(4) Power to make Tribunal Procedure Rules is to be exercised
> with a view to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,

(b) that the tribunal system is accessible and fair,

(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,

(d) that the rules are both simple and simply expressed, and

(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently."

15. So far as material, the Rules now in force provide:

"2.-(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

…..

5-(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

…..

8-(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

…..

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings."

16. Mr McDonnell submits that although it may be possible to imply a power to strike out as part of the Rules, the circumstances in which that is possible are very limited. It is necessary to show that the implied power can be treated as part of the tribunal's function to regulate its own procedure in order to carry out its statutory objective: see *R (on the application of V) v Asylum and Immigration Tribunal* [2009] EWHC 1902 (Admin) at [27]. Tribunals do not have an open-ended power to regulate their own procedure.

17. Because Rule 8(3) gives the First-tier Tribunal an express power to strike out part of the proceedings on specified grounds, there is, Mr McDonnell says, no room for any further implied power to strike out on other more general grounds. This is reinforced by a consideration of the function of the First-tier Tribunal which is to determine statutory tax appeals and to reach a conclusion on the correct amount of tax payable. Once an appeal is made under s.31 TMA 1970 the First-tier Tribunal must determine it either by upholding the assessment or by reducing or increasing it: see TMA 1970 s.50. It has, he says, a duty to determine the tax payable which differentiates tax appeals from ordinary civil litigation between private parties.

18. To strike out part of an appeal is also, Mr McDonnell says, a drastic step because it deprives the taxpayer of the opportunity of raising his arguments against a background of all the relevant facts. Unless the circumstances are exceptional, it carries with it the risk of denying the taxpayer a fair hearing. It is therefore a power which (if it exists) should only be exercisable in very limited circumstances.

19. The need to exercise caution in relation to any power to strike out proceedings prior to a full hearing is obvious. But it is a consideration which goes to the exercise of the power rather than to whether such a power exists. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in Rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed. A power to strike out could also be said to be part of the power of regulation by the First-tier Tribunal of its procedure under Rule 5(1) (which was the view of the Upper Tribunal), but Rule 8(3)(c) is enough. There is no need to imply a power. It is worth observing that the equivalent provision in CPR 3.4(2) separates out a case where a statement of case discloses no reasonable grounds for bringing or defending the claim from a case where the statement of case is an abuse of the court's process. But for the First-tier Tribunal the Tribunal Procedure Committee has chosen a different but composite criterion of no reasonable prospect of success, which is wide enough to cover appeals which are legally hopeless as well as appeals which can be said to

amount to an abuse of process. There is in my view express power to strike out on both grounds.

20. Such a reading of the Rules is also consistent with the statutory function of the First-tier Tribunal to decide a tax appeal. The determination of an individual's tax liability is achieved through a process of assessment. The taxpayers in this case filed their tax returns containing their self-assessment of the tax due. In the August 2008 letter referred to earlier, they were asked by HMRC to submit revised self-assessments for the year 2006/7 but HMRC can (and in this case has) used the closure notice procedure under TMA 1970 s.28A to amend the taxpayers' self-assessment. If no amendment is made then that assessment determines the amount of tax payable. If the return is amended by HMRC the taxpayer can exercise his right of appeal under TMA s.31 and also request a review under s.49A. Once the First-tier Tribunal is notified of the appeal it must decide the matter in question: see s.49D(3) and, as mentioned earlier, it may reduce the amended assessment if it concludes that the taxpayer has been overcharged. But "*otherwise the assessment … shall stand good*": see s.50(6).

21. The result therefore of an appeal being struck out is that the assessment will govern the tax payable. I do not accept Mr McDonnell's submission that the First-tier Tribunal is obliged to determine whether or not any amendments to the original assessment should stand regardless of the circumstances. The taxpayers' ability to set aside the amendments made to their self-assessments in this case was entirely dependent on their being able to prosecute a successful appeal. There is nothing inimical to that process in the First-tier Tribunal being able to control the appeal procedure by excluding grounds of appeal with no reasonable prospect of success. The Rules are there to enable appeals to be handled quickly and efficiently in accordance with the objectives spelt out in TCEA 2007 s.22(4). I see no reason in principle why that cannot comprehend a bar being placed on the re-litigation of points already decided against the taxpayer in other relevant proceedings.

Caffoor

22. As part of his argument that the principles of *res judicata* and abuse of process have no application to a statutory tax appeal, Mr McDonnell relies on the opinion of the Privy Council delivered in *Caffoor v Commissioner of Income Tax, Colombo* [1961] 2 All ER 436. The question in that case was whether a decision by the Commissioner to exempt trustees from income tax on the ground that their activities were charitable in respect of a particular year of assessment was conclusive of that issue in relation to any other year of assessment. The opinion of the Board was that the earlier decision did not create an estoppel *per rem judicatam* because it related only to the particular year of assessment in respect of which the decision was made. Lord Radcliffe preferred the view that the Commissioner (along with any courts exercising an appellate jurisdiction in respect of his decision) was exercising a judicial function but he continued (at page 441):

> "While, therefore, it is unexceptionable to say that the board of review when exercising its powers under s 73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a lis inter partes and that the assessor who made the assessment or some other representative of the commissioner (s 73(3)) resembles a party hostile to the

> appellant, these considerations are not those that are critical to the issue of estoppel. The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see s 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning on the construction of the ordinance or of other statutes or on the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf *R v Hutchings)*."

23. There is a perceptive and useful analysis of the *Caffoor* decision by Henderson J (as he then was) in *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch) at [169]-[175] where the judge expresses the view that the *Caffoor* principle remains good law in relation to annually assessed taxes such as income and capital gains tax where the basic question for determination on the tax appeal is the amount of the tax payable in that year of assessment. I am prepared to accept (without deciding) that this is correct and that the transfer of tax appeals to the tribunal system has not effected any material change in that regard. HMRC do not contend otherwise for the purposes of this appeal. But the question for this court is whether the reasoning in *Caffoor* applies where the earlier decision is not that of a tax tribunal hearing a tax appeal but a decision made (as it happens by the Court of Appeal) on a substantive claim for judicial review of the decision of HMRC to rely on s.58 FA 2008 in respect of each of the relevant years of assessment to which it applies.

24. The taxpayers do not, I think, contend that the claim for judicial review can be regarded as identical in form and substance to the tax appeals on which they are now embarked. Indeed it is part of their submissions in relation to abuse of process that we should recognise the differences in procedure between them particularly in relation to the limited scope in judicial review for the investigation of the relevant facts. But Mr McDonnell relies on *Caffoor* for the proposition that no issue estoppel can arise even on relevant points of principle from one tax appeal to another and that, by analogy, the First-tier Tribunal in deciding the tax payable in the context of the present appeals should not be required to treat the earlier Court of Appeal decision as either resolving the Article 56 issue *inter parte*s or as making its re-litigation an abuse of process.

25. I am not persuaded that the outcome of this appeal depends on whether there is technically an issue estoppel arising from the earlier Court of Appeal decision on Article 56. The case was decided in the Upper Tribunal by reference to the broader considerations of abuse of process which I will come to shortly. I also accept Mr McDonnell's submission that the claim for judicial review was different from a tax appeal but, as I see it, that point operates against rather than in favour of the taxpayers in the instant case. Section 58 FA 2008 came into effect (including

retrospectively) after the taxpayers had filed their returns for the years in question but before the closure notices had been served. HMRC had opened an enquiry into the self-assessments on the basis that the income from the IOM trusts was taxable under s.858 in its unamended form. Once the August 2008 letter had been received the taxpayers decided, on advice, to launch a general attack on the decision of HMRC to apply s.58 to each of the years of assessment under review and in their claim form sought declarations that s.858 both before and after amendment by s.58 was incompatible with Article 56 EC and that the amendment made by s.58 was incompatible with Article 56 to the extent that it allowed the income tax treatment of income received "*at any time before 12 March 2008*".

26. I therefore accept Mr Rivett's submission that the claim for judicial review was made on a much broader basis and was not limited to the issue of what tax was payable in any single year of assessment. It was a challenge to the enforceability of s.58 in particular in relation to the period up to 12 March 2008 and was designed, if successful, to pre-empt amendments to the self-assessments in all the years to which s.58 would otherwise apply. Having chosen to dispute the enforceability of the legislation in that way, the taxpayers must accept the consequences of failure. The Court of Appeal has decided that Article 56 EC was not engaged by the payment of the £10 to the IOM trustees and the Supreme Court has refused permission to appeal. Although as in all proceedings for judicial review the claim was brought in the name of the Crown on the application of the taxpayers, this is not a bar to the court treating the re-litigation of the Article 56 issue in the subsequent tax appeals as an abuse of process. The Court of Appeal was exercising the powers of the High Court as a court of unlimited jurisdiction and under CPR Part 54 a person who brings the application for judicial review is treated as the claimant. Moreover in *Johnson v Gore Wood & Co* [2002] 2 AC 1 the first claim was brought not by Mr Johnson but by his company. The requirement that there should be finality in litigation exemplified by the decision of the Vice-Chancellor in *Henderson v Henderson* (1843) 3 Hare 100 has an equal application to the proceedings in this case. Such difference as exists in relation to the parties to the claim for judicial review also exposes the appellants to the argument that the Article 56 ground of appeal amounts in any event to a collateral attack on the decision of the Court of Appeal. In my view the only real issue on this appeal is whether there are any particular circumstances in this case (including the recent decision of the CJEU in the *BT Pension Trustees* reference) which make it permissible for the taxpayers to re-litigate the Article 56 issue in their tax appeals.

Abuse of Process

27. It is necessary to say a little at the outset about the type of consideration which may be relevant to the evaluation which Lord Bingham of Cornhill anticipated the court will carry out in deciding whether or not the new claim or argument amounts to an abuse of process on *Henderson v Henderson* principles. In *Henderson v Henderson* itself the Vice-Chancellor had said that the court would not permit the parties to open up the same subject of litigation except under special circumstances without indicating what those might be. In *Johnson v Gore Wood & Co* Lord Bingham said (at page 31):

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them.

> The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

28. In the Upper Tribunal the taxpayers raised various issues which they said militated against them being prevented from relying on an Article 56 challenge to s.58. It is said not to be uncommon for there to be claims for judicial review running in parallel with tax appeals to the tribunal. If the claim for judicial review succeeds the appeal will be unnecessary but, if it fails, the appeal will proceed. I am not sure how common that situation in fact is but it is not really what we are dealing with in this case. What the taxpayers are asking to do is to re-litigate an issue which is central to

their appeals and which was decided against them by the Court of Appeal in relation to all of the relevant assessments.

29. A point was also taken about the suitability of a claim for judicial review as a means of determining disputed questions of fact. This was acknowledged by Mummery LJ in his judgment (at [38]). Mr McDonnell says that his clients could have adduced more evidence about the IOM trusts and partnership which could have had a bearing on the outcome of the proceedings and therefore would be relevant and admissible in the pending tax appeals. They did not, for example, produce evidence which traced step by step the chain of transactions commencing with the establishment of the IOM trusts because they did not consider that such evidence would be appropriate in the context of a claim for judicial review as opposed to a tax appeal. As a consequence, they have been disadvantaged.

30. I have some difficulty with this. Like the Upper Tribunal, I accept that proceedings for judicial review are not the ideal forum for deciding disputes of facts and the existence of such disputes may even make a claim for judicial review inappropriate. But it is for the taxpayers as claimants to decide what evidence to put before the court and to choose the forum for litigating their dispute. There is nothing in the nature of a claim for judicial review which precluded them from putting in the additional evidence which they now say could have been adduced. Had they done so HMRC would have decided whether, or to what extent, they wished to challenge that evidence and the Court of Appeal would then have considered what impact it had on the proceedings. But none of those things happened and it is not possible for us to be satisfied that the evidence could not have been accommodated in the judicial review proceedings had it been adduced at the relevant time. The Upper Tribunal (at [66] of its decision) said:

> "66… The taxpayers had a choice of what proceedings to bring. They chose judicial review. They then chose the evidence that they adduced on that application. If that was less than their full evidential case, then that was their choice. For the reasons appearing in *Johnson*, they should not be entitled to fight on a limited basis in one tribunal, and keep some facts back and then deploy them in another tribunal in due course, and indeed use those facts as a reason for having a second bite at the cherry. There was nothing in the nature of the judicial review proceedings which forced that course on them. It was a litigation choice. The relevant facts were ones which, if they might have made a difference, were ones which, on the facts, they could and should have deployed in the judicial review proceedings."

I agree with this.

31. Next it is said that to strike out the Article 56 ground of appeal is unfair because it discriminates against the taxpayers in this case when compared with other taxpayers in a similar position who have not taken judicial review proceedings and are free to argue the Article 56 point in their tax appeals. But the premise answers the question. Those other taxpayers have chosen to litigate all relevant issues as part of their statutory appeals. The taxpayers in this case have taken a different course but one

which did enable them to argue their case on Article 56 in relation to the assessments under review. There is no material prejudice in their being bound by the outcome of those proceedings.

32. The more difficult point is whether the reconsideration of the Article 56 point (including if necessary with the benefit of a reference to the CJEU) can be justified in the light of the more recent decisions of the CJEU which were not available to the Court of Appeal when it delivered its judgment in 2011. Mr McDonnell makes the submission that the First-tier Tribunal will still be required to apply EU law to the facts found in order correctly to determine the tax due and could refer the Article 56 point to the CJEU if it considered that the Court of Appeal's decision would lead it to give a judgment contrary to EU law: see Case C-173/09 *Elchinov* [2010] ECR 1-889 at [27]-[28]. The CJEU was there considering the extent of the obligation of a lower court to apply an earlier decision of a higher court on a point which it considered was not *acte clair*. The particular issue of when a lower court should give primacy to the doctrine of precedent over its own misgivings on a question of EU law has been considered by the Court of Appeal in *Condé Nast Publications Limited v HMRC* [2006] EWCA Civ 976 where a distinction was drawn between an earlier decision of the higher court which had considered the point of EU law by reference to all the relevant CJEU authorities and one where the decision of the higher court had arguably been overtaken by a new intervening decision of the CJEU. In the former case the usual rules of precedent should apply.

33. The objection to the taxpayers being able to re-litigate the Article 56 point in relation to the pre-2008 years of assessment is not now based on *stare decisis* grounds. It relies on the fact that the issue has been litigated between the parties in respect of all the relevant years of assessment as giving rise to the application of a much stricter principle in respect of those years based on the public interest in securing finality in litigation. Absent an appeal in the instant case, a subsequent decision of a superior court which changes the law has never entitled the parties to domestic proceedings to seek to re-open what has previously been decided on the point in issue according to the law as it then stood and even where subsequent decisions have shown that the earlier decision was wrong when decided the public interest in maintaining finality in litigation remains powerful. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 the House of Lords held that the tenant under a lease was not estopped from challenging on a subsequent rent review an earlier decision of Walton J on the construction of the same rent review clause which had been held in later cases to have been wrongly decided. The House of Lords therefore recognised that an exception could be made in cases of issue estoppel based on special circumstances in the form of a change in the law. But there was no such exception made in relation to cause of action estoppel which remained absolute in relation to all points which were or had to be decided in order to establish the relevant cause of action: see Lord Keith at page 109 A-B; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [22].

34. The tenant in *Arnold* was allowed to re-argue the construction of the rent review clause free from the decision of Walton J for the purpose of future reviews: but remained bound by the outcome of the earlier decision as regards the rent review to which it related. I can see no reason for adopting a different approach simply because the issue between the parties is one of EU law. It is not suggested that the abuse of

process doctrine infringes or is incompatible with the EU principles of effectiveness or non-discrimination and it remains an important procedural safeguard within the competence of the domestic court. I am prepared to accept that for future years of assessment a change in the principles of EU law governing the application of what is now Article 63 could, if relevant, permit the issue decided by the Court of Appeal in this case to be re-considered. But that does not assist the taxpayers in this case.

BT Pension Scheme Trustees

35. I can now turn to whether the decision in the *BT Pension Scheme* case has in fact made any new law. The case concerned the taxation of dividend income received by the trustees from UK companies which had themselves invested in foreign subsidiaries. Under the corporation tax provisions then in force dividends received by UK taxpayers from UK companies gave rise to tax credits designed to avoid the double taxation of corporate profits both in the hands of the company and then when distributed as dividends to shareholders. The tax credits related to the advance corporation tax (ACT) paid by the company on its profits which was credited to the shareholder and used to reduce his own tax liability on the dividends. In the case of exempt pension schemes like the BT scheme where their own tax liabilities were minimal, the tax credits were paid by HMRC and amounted to an important source of revenue. But as an exception to this scheme, dividends paid by a UK resident company out of income from its foreign subsidiaries (referred to as foreign income dividends (FIDs)) did not entitle the UK shareholder to a tax credit. It was this inbalance under the FIDs regime that the CJEU considered on the recent reference.

36. The need for the reference was occasioned by the fact that the shareholder who received the dividends and the company which paid them were both resident in the UK so that on one view there was no relevant movement of capital to which what is now Article 63 could apply. The investment which the UK company made in its foreign subsidiary undoubtedly created a disparity in tax treatment in relation to the ultimate source of the profits distributed as dividends. But it was not a foreign investment which the UK shareholder had made. The question was whether Article 63 applied where both the UK taxpayer and the UK company were resident in the same member state.

37. In its judgment the CJEU referred to its earlier 2006 decision in C-446/04 *Test Claimants in the FII Group Litigation* ("FII"). It said:

> "30. It follows from the settled case-law of the Court that an acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking falls, in principle, within the scope of Article 63 TFEU, and not within that of Article 49 TFEU, that latter article applying only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraphs 91 and 92 and the case-law cited).

> …..
>
> 34. Thus, the Court has held, in particular, that, to the extent that the United Kingdom tax system — including the FID regime — deprives shareholders receiving dividends of their right to a tax credit where those dividends originated in the foreign-sourced profits of a resident company — contrary to what was provided for in the case of dividends which have their origin in the nationally-sourced profits of a resident company — that system established a restriction on the free movement of capital within the meaning of Article 63 TFEU.
>
> 35. In the present case, the Trustees received dividends treated as FIDs without having been entitled to a tax credit in respect of those dividends.
>
> 36. Such an absence of a tax credit for shareholders not subject to income tax in respect of dividends, such as the Trustees, has the effect of discouraging those shareholders from investing in the capital of companies resident in the United Kingdom which receive dividends from companies resident outside the United Kingdom, and favouring investments in companies resident in the United Kingdom receiving dividends from other companies resident in that same State (see, by analogy, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 166).
>
> 37. It follows that the Trustees' situation comes under the treatment referred to in paragraph 173 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), which is precluded by Article 63 TFEU. They may thus rely on that article for the purposes of disapplying a national provision, such as section 246C ICTA, which deprives them of a tax credit.
>
> ….
>
> 42. On the contrary, the unfavourable tax treatment of certain shareholders receiving dividends treated as FIDs, namely the absence of the tax credit provided for in section 246C ICTA, is precisely due to the fact that those dividends have their origin in the profits that the distributing company has received from a non-UK-resident company, whereas in the case of dividends which have their origin in the profits received from a UK-resident company, those recipient shareholders would have been entitled to such a tax credit, all other things being equal."

38. In *FII* in the paragraphs referred to, the CJEU had said:

> "166. It must be pointed out in that regard that the difference in treatment to which foreign-sourced dividends are subject when

> they are received by a resident company which has elected to be taxed under the FID regime (see paras 145-149 of this judgment) has the effect of discouraging such a company from investing its capital in a company established in another state and also has a restrictive effect on companies established in other states in that it constitutes an obstacle to their raising capital in the United Kingdom.
>
> …..
>
> 173. The answer to question 4 must therefore be that articles 43EC and 56EC preclude legislation of a member state which, while exempting from advance corporation tax resident companies paying dividends to their shareholders which have their origin in nationally-sourced dividends received by them, allows resident companies distributing dividends to their shareholders which have their origin in foreign-sourced dividends received by them to elect to be taxed under a regime which permits them to recover the advance corporation tax paid but, first, obliges those companies to pay that advance corporation tax and subsequently to claim repayment and, secondly, does not provide a tax credit for their shareholders, whereas those shareholders would have received such a tax credit in the case of a distribution made by a resident company which had its origin in nationally-sourced dividends."

39. The argument in the judicial review proceedings in the Court of Appeal centred on the payment of the £10 to the IOM trustees. Mr Goldberg QC who appeared with Mr McDonnell for the taxpayers identified this as the relevant movement of capital that was restricted for the purposes of Article 56. At [17] Mummery LJ said:

> "In a tiny nutshell the main point forcefully advanced by Mr David Goldberg QC on the Claimants' behalf is that the retrospective effect of s 58 is contrary to, and incompatible with, art 56. The reason for incompatibility is that the amendments made by s 58 are capable of preventing, restricting or discouraging commercial investment of capital in foreign partnerships by means of unjustified discrimination between an investment of capital in a foreign partnership and an investment of capital in a UK partnership. It is argued that s 58 favours investment in a UK partnership by imposing an incremental domestic tax charge on income, which may already have borne tax in another jurisdiction. Its retrospectivity is an infringement of the EU principles of legal certainty and legitimate expectation. There is no justification for its retrospective and discriminatory effects. If this court has any doubt on this matter contrary to the Claimants' contentions, then it ought to refer the questions of interpretation raised for rulings by the Court of Justice."

40. The argument for the taxpayer had to be put in that way because s.58 FA 2008 which is the statutory provision that is said to have this restrictive effect has no operation (through what is now s.858(4) ITTOIA) other than by taxing income from foreign partnerships in the hands of UK residents whether or not they were in fact partners in the foreign firm. This was said to have discriminated in terms of tax treatment between a UK resident who invested in a UK partnership and one who invested in a foreign partnership because in the latter case the profits in question might also be subject to local tax in that foreign country. It is also said that the retrospective introduction of the tax charge on UK residents to whom s.58 applies is discriminatory because, having made self-assessments of their tax liabilities on the basis of s.858 as it then stood, they were faced with the prospect of penalties and interest on those assessments by reason of inaccuracies which were attributable to subsequent changes in the legislation which had no application at the date when they filed their returns.

41. The taxpayers face a powerful argument that s.58 as such, at least looked at prospectively, does not introduce a measure of discrimination as alleged. It creates no difference in treatment between UK taxpayers who invest in UK partnerships and those who invest in foreign partnerships. Both are assessable to UK income tax on the profits concerned at the same rates regardless of the source of the income. Any foreign investment carries with it the possibility of local taxation which is not alleviated by some form of double taxation treaty. But it is difficult to see how that can amount to discrimination by the UK tax authorities in relation to the taxable income of UK residents. It is clear from the decision in *FII* as well as *BT* that the discrimination must be by the UK in its system of taxation of foreign dividends. The tax treatment of that income by the foreign country in question is irrelevant to that question. Similarly although the retrospective imposition of the tax on prior receipts from a foreign partnership may at least in theory expose the taxpayer to interest or penalties, that can hardly have operated to discourage foreign investment at the time when that investment was actually made and it has no application to the operation of s.58 in future years.

42. In his judgment Mummery LJ began by concentrating on whether the payment of the £10 which was the only movement of capital relied upon was a relevant movement of capital for the purposes of Article 56. The Court was referred to a very large number of CJEU authorities including its decision in *FII* and in its skeleton argument which we have seen HMRC specifically drew the Court's attention to what had been said in *FII* about the need for discrimination in the UK tax system. The taxpayers in their skeleton argument submitted that the effect of s.58 was to "**discourage**" foreign investment because of the tax consequences which I referred to earlier.

43. The Court of Appeal was therefore clearly alive to the arguments which prevailed in *BT Pension Scheme Trustees* and that case is not in my judgment a departure from but rather an application of settled principles. It merely provided confirmation that Article 63 applied even where the UK investment took the form of shares in a UK company. Mr McDonnell emphasises that the correct application of Article 63 (as exemplified in *BT*) requires one to look beyond the instant investment and through to the ultimate destination of the funds. But that was not in issue in the present case. On the basis that the IOM was a third country, the payment of the £10 represented a direct payment abroad. The question was whether it was one which engaged Article 63.

44. Mummery LJ said:

> “[45] Mr David Goldberg QC contends that the payment of £10 by cheque by the Claimants to the respective trustee of each Isle of Man trust was a “movement of capital” which engaged art 56. “Capital” referred to any form of money or something having monetary value. All that art 56 required was that the capital had moved from one country to another. Here there was a movement of cash from the UK to the Isle of Man. That was all that was required for the Article to be engaged.
>
> [46] The movement of £10 was, he says, part of the arrangement for setting up the Manx trading partnership the next day. The money put in the trust was an investment in the partnership. It was an essential part of the one arrangement that the trustee would be a partner in the partnership *and* that the income of the partnership would be channelled through the medium of the trust to the Claimant settlor/beneficiary. In Mr Goldberg's words the transfer of £10 “opened the gate to art 56” and the question whether it was infringed by s 58.
>
> …..
>
> [48] Against that, HMRC submit that s 58 does not even begin to fall within the scope of application of art 56, which is not therefore engaged and the EU principles of free movement of capital and of legal certainty cannot be relied upon.
>
> …..
>
> [50] More importantly for this case, HMRC make the more basic factual point that, even if the Isle of Man is a “third country” within the meaning of art 56, there has been no relevant “movement of capital” to engage art 56. The sum of £10, which is the only movement of capital relied on by the Claimants, was not put into or transferred to a partnership. The £10 transferred had nothing to do with the Manx partnership structure: it was put into an interest in possession trust, which, as a matter of trust law and for tax purposes, is and must be genuine and separate and distinct from the partnership, not simply a conduit for making payment of funds to the partnership and which has been inserted artificially for the purposes of tax avoidance. Further, there is no evidence in the case that the purpose of either trust was to invest in or to enter into the Manx partnership.
>
> [51] Section 58 says nothing about the movement or transfer of a capital sum into a trust. It refers to a person entitled to a share of the profits of a partnership. It is addressed to the recipient end of the transaction, to the case of a person being entitled to a

> share of the profits of a partnership and to being deemed to be a member of the firm."

45. He then stated his conclusions as follows:

> "[52] I am in complete agreement with the submissions of HMRC on the narrow "movement of capital" point arising on the facts of this case.
>
> [53] The payment of £10 had nothing to do with the funding of the Manx partnership structure: it was put into a trust for the Claimant and not into the Manx partnership, which was a distinct and separate entity from the Manx trust established by each Claimant. Putting £10 each into Manx trusts, which the Claimants have created and under which they are also entitled to a life interest, is not in itself a "movement of capital" within the meaning of art 56. It does not become so, because the Manx trustee of the Manx trust is a member of a Manx partnership that uses the services of the settlor/beneficiary, or chooses to pay the profits of the partnership into the trust for onward transmission to the principal beneficiary.
>
> …..
>
> [56] As HMRC point out, there is no challenge to the prospective operation of s 58. They submit that, even if art 56 is engaged, its provisions have not been infringed in this case, as there has been no restriction in s 58 on the free movement of capital. It is open to the Claimants to invest in the Isle of Man partnership, but there is no proof that they have done so, or that they have been retrospectively prevented from doing so.
>
> [57] It is also denied that, if there is any restriction, it operates on the facts of this case in a discriminatory manner based on nationality or residence as alleged by Mr Goldberg. UK citizens are treated in the same manner, regardless of whether the income is derived from a domestic partnership or a foreign partnership. There is no discriminatory treatment that favours a UK partnership at the expense of a non-UK partnership. No relevant comparator has been identified."

46. It seems to me that in relation to the first question whether the payment of the £10 was a relevant movement of capital the Court of Appeal has done no more than to hold that on the evidence it could not be said that the payment of the money to establish the trust was linked to the establishment of Redwood so as to bring into consideration the operation of s.58 as a factor relevant to the making of that payment. Unless the payment of the £10 can be treated as the first step in the making of a foreign investment in Redwood by the taxpayers then it is unaffected by s.58. The taxpayers are liable to pay income tax on the profits of the partnership because that is what the trustees have chosen to invest in. Investment decisions were for the trustees in this case using borrowed money. This is not a case like *BT* where the trustees of

the exempt pension scheme habitually invested funds under their control in UK companies many of whom invariably derived part of their income from foreign subsidiaries. All that the £10 did was to set up the trusts. As the Upper Tribunal put it, the taxpayers were unable to demonstrate that they had been affected in some way which contravened Article 56.

47. It is also clear from [56]-[57] of Mummery LJ's judgment that the Court of Appeal rejected the argument based on discriminatory tax treatment. If the relevant comparator is a UK taxpayer who invests in a UK partnership then s.58 does not create any disparity of treatment. They are both taxed the same. It was argued before the Court of Appeal that the possible imposition of interest and penalties was an infringement of the EU principles of legal certainty and legitimate expectation but they have nothing to do with Article 63. Nor does s.58 impose either interest or penalties. It merely operates to change the tax treatment of income received from foreign partnerships. Unless s.58 contravenes Article 63 in its operation both prospectively and retrospectively the taxpayers' challenge cannot succeed.

48. I have gone into the arguments in a little detail simply to explain why I do not accept either that the relevant decision in *BT* has made any departure in principle from the established authorities that were considered by the Court of Appeal or that the decision reached by the Court of Appeal can be said to be wrong (still less plainly wrong) or in need of reconsideration in the light of *BT*. The dismissal by the Supreme Court of the taxpayers' application for permission to appeal can only have occurred if the Supreme Court considered the point decided by the Court of Appeal to be *acte clair* and, in my view, *BT* has done nothing to change that. It follows that even if it were otherwise permissible there are in this case no special circumstances which justify the re-opening of the Article 56/Article 63 point as part of the forthcoming tax appeals and the First-tier Tribunal was therefore correct to strike out that ground of appeal for abuse of process.

49. I would, for these reasons, dismiss the appeal.

Lord Justice Sales :

50. I agree.