TC04084

Appeal number: TC/2014/01551

PROCEDURE – Application for preliminary hearing – Appeal against determinations issued on basis that that appellant domiciled in England and Wales – Whether determination of appellant's domicile of origin should be heard as a preliminary issue – No – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE RIGHT HONOURABLE CLIFTON HUGH LANCELOT DE VERDON BARON WROTTESLEY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at 45 Bedford Square, London WC1 on 30 September 2014

Marika Lemos, counsel instructed by New Quadrant Partners LLP, for the Appellant

Akash Nawbatt and David Peter, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the appellant, Lord Wrottesley, for the issue of his domicile of origin to be determined at a preliminary hearing.

2. On 21 June 2001 HM Revenue and Customs ("HMRC") opened an enquiry into a claim by Lord Wrottesley that he had abandoned his UK domicile of choice. The enquiry continued until 18 April 2013 when HMRC rejected the claim. On 19 April 2013 HMRC issued determinations (in accordance with s 207 Income and Corporation Taxes Act 1988 and s 9 Taxation of Chargeable Gains Act 1992) that Lord Wrottesley was domiciled in England and Wales during the years 2000-01 to 2007-08. He appealed against these determinations in which the tax at stake is approximately £46,000. It is common ground that his domicile during the years in question is the single issue to be determined in the substantive appeal.

3. Ms Marika Lemos, who appears for Lord Wrottesley, contends that as it will be necessary for the Tribunal to first determine the issue of Lord Wrottesley's domicile of origin in order to decide his domicile during the years in question and, as all of the evidence has been disclosed in relation to this issue, a preliminary hearing would achieve savings in both cost and time and also allow the parties to re-evaluate their positions, possibly leading to settlement without the necessity of a lengthy final hearing.

4. However, Mr Akash Nawbatt and Mr David Peter, who appear for HMRC, submit that the application should be refused as a decision on Lord Wrottesley's domicile of origin is not determinative of the appeal and will not obviate the need for a final hearing as it is not "a succinct knockout point which is capable of being decided after only a relatively short hearing" and does not fall within the limited circumstances in which the courts have held it appropriate to consider the trial of preliminary issues.

5. There is no doubt that in appropriate cases the Tribunal has the power to direct a preliminary hearing. Rule 5 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides:

> **Case management powers**
>
> **5.**—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
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> (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.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (e) deal with an issue in the proceedings as a preliminary issue;

6. The question therefore arises as to whether it is appropriate to direct a preliminary hearing in the present case.

7. In *Tilling v Whiteman* [1979] 1 All ER 737, as Lord Wilberforce noted (at 738-739):

> "The judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, … So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional the County Court Judge, rather than making findings of fact, decided the case on a point of law which had been considered as a preliminary issue."

8. Lord Scarman, who agreed with Lord Wilberforce said (at 744):

> "The case presents two disturbing features. First, the decision in the county court was upon a preliminary point of law. Had an extra half-hour or so been used to hear the evidence, one of two consequences would have ensued. Either Mrs. Tilling would have been believed when she said she required the house as a residence, or she would not. If the latter, that would have been the end of the case. If the former, your Lordships' decision allowing the appeal would now be final. As it is, the case has to go back to the county court to be tried. Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense."

9. In *Steele v Steele* (2001), *The Times* 5 June, Neuberger J (as he then was) said that when considering whether to order the determination of a preliminary issue the court should ask itself the following questions:

(1) Could the determination of the preliminary issue dispose of the whole case or at least one aspect of the case?

(2) Could the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation and in connection with the trial itself?

(3) If the preliminary issue was an issue of law, how much effort, if any, was involved in identifying the relevant facts for the purposes of the preliminary issue? The greater the effort the more questionable the value of ordering a preliminary issue.

(4) If the preliminary issue was an issue of law, to what extent was it to be determined on agreed facts? The more facts that were in dispute the greater the

risk that the law could not safely be determined until the disputes of fact were resolved.

(5) Whether the determination of the preliminary issue could unreasonably fetter either or both of the parties or the court in achieving a just result at trial.

(6) To what extent was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? In that regard the court could take account of the possibility that the determination of a preliminary issue might result in settlement.

(7) The extent to which the determination of a preliminary issue was relevant. The more likely it was that the issue would have to be determined by the court, the more appropriate it was to have it as a preliminary issue.

(8) To what extent was there a risk that the determination of the preliminary issue, if apparently helpful in terms of saving costs and time, could lead to an application for the pleadings to be amended to avoid the consequences of the determination?

(9) Was it just and right to order a preliminary issue?

10. Further guidance was given by David Steel J (sitting in the Court of Appeal) in *Mcloughlin v Grovers* [2002] QB 1312, where he said, at [66]:

> "In my judgment, the right approach to preliminary issues should be as follows. (a) Only issues which are decisive or potentially decisive should be identified. (b) The questions should usually be questions of law. (c) They should be decided on the basis of a schedule of agreed or assumed facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a case management conference."

11. In *Boyle v SCA Packaging* [2009] 4 All ER 1181 the industrial tribunal in Northern Ireland had decided to treat the question of whether the claimant had a "disability" within the meaning of the Disability Discrimination Act 1995 as a preliminary issue in a case in which she had alleged that she had been discriminated against because she was disabled. The case was subsequently appealed to the House of Lords where Lord Hope, considering whether a preliminary hearing was appropriate, said:

> "9. It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in *Tilling v Whiteman* [1980] AC 1, 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law. That the power to hold a pre-hearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR

2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130, 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.

10. In *Chris Ryder v Northern Ireland Policing Board* [2007] NICA 43, [2008] 4 BNIL 34, para 16, Kerr LCJ said:

> "A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points - see, for instance, *Bombadier Aerospace v McConnell* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

I would respectfully endorse those observations. The problem in this case is not so obviously one of overlap or inappropriate compartmentalisation. Mrs Boyle's complaint that she was subjected to harassment and aggressive and hostile treatment is a distinct issue, although it seems likely that the effects that this may have had on her, if established, will not be capable of being determined without the leading of more medical evidence. It is rather the cost and delay that has been caused by separating out those aspects of the case from the question whether she was a disabled person within the meaning of the Act. The separation of these two fundamental issues, which are likely to be present in many disputed disability discrimination cases, will rarely be appropriate even if the parties are in favour of it. Furthermore the decision to hold a pre-hearing review must not be regarded as the end of the process of case management. If separation is resorted to, every effort must be made to ensure that pre-hearing reviews are dealt with the least possible delay, bearing in mind that the merits cannot be addressed until the preliminary issues have been resolved in the claimant's favour."

Lord Neuberger agreed with Lord Hope saying, at [82], that this "was an inappropriate case in which to have had a hearing to determine a preliminary point."

12. Also, in the same case Lord Brown of Eaton-under-Heywood said, at [79]:

> "… unless there is a probability (I use the word advisedly) that a preliminary issue as to whether the complainant is disabled or not will be determinative one way or the other of the entire dispute, it is highly unlikely to be justifiable: there will almost certainly be more to lose than to gain by such a process."

13. Ms Lemos submitted that I should adopt the approach taken by Neuberger J in *Steele v Steele* which had been applied in tax cases (eg *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC)). However, I was reminded by Mr Nawbatt that *Boyle v SCA Packaging* was a decision of the House of Lords which had also been applied in tax cases (eg *Hargreaves v HMRC* [2014] UKUT 396 (TCC)). As such, he submitted that *Boyle* should be the starting point especially as Lord Neuberger, the judge in *Steele v Steele*, had agreed with Lord Hope in *Boyle*.

14. It is accepted that irrespective of whether or not a preliminary hearing is directed, unless the matter is settled, a hearing would be a required to determine the substantive issue between the parties. Therefore, in this case, the probability is that a preliminary hearing would not be determinative one way or the other of the entire dispute. Also, I am not convinced that the proposed preliminary issue of Lord Wrottesley's domicile of origin, which will have to be determined in any event, can be entirely divorced from the substantive issue, his domicile between 2000-01 and 2007-08.

15. In such circumstances, and in the absence of a "succinct knockout blow", adopting the approach of Lord Hope in *Boyle* it would appear to be preferable that there should be only one hearing to determine all the matters in dispute.

16. Turning to the guidance in *Mcloughlin v Grover*, I accept the submission of Ms Lemos that it would be possible to determine the issue of Lord Wrottesley's domicile of origin as a preliminary issue and that while this should usually involve questions of law the determination of questions of fact, as would be required in this case, is not precluded. However, despite the restriction under s 11 of the Tribunals, Courts and Enforcement Act 2007 of any right of appeal from the First-tier Tribunal to "any point of law", I do not agree that because there does not appear to be any dispute as in relation to the law applicable to domicile at this stage it necessarily reduces the likelihood of an appeal given the cases on domicile which have come before the Court of Appeal in recent times (eg *Barlow Clowes International Limited v Henwood* [2008] EWCA 577 Civ).

17. In relation to the questions posed by Neuberger J in *Steele v Steele* that are applicable to the present case, although the determination of the preliminary issue is unlikely to dispose of the case as a whole, as Ms Lemos submits it could possibly dispose of at least one aspect of the case. Also the evidence in relation to the domicile of origin issue, which is already available, is separate and distinct from that which will be adduced in the substantive appeal and although Lord Wrottesley's mother would be required to give evidence in relation to both the potential preliminary and substantive issues, her evidence would be different in relation to each and there would be no need for any repetition. As such, Ms Lemos contends, it is inevitable that there would be a significant saving in both time and cost.

18. However, Mr Nawbatt argues that while a preliminary hearing may appear to be helpful in relation to reducing time and costs it would not in fact do so. Having made enquiries from the Tribunal's listing office he understood that although the substantive hearing could be listed for April 2015 there was little prospect of an earlier date being available for any preliminary hearing.

19. In considering whether it just and right to order a preliminary hearing I am especially mindful that not only was it in 2001 that Lord Wrottesley claimed that he had abandoned his UK domicile but also the time taken by HMRC to issue the determinations. Clearly Lord Wrottesley has suffered prejudice as a result, not least the loss of his grandmother who, although she had made a witness statement before she died, would have been an important witness in relation to the domicile issue.

20. Therefore, on balance, having carefully considered all the circumstances of the case, especially that a further hearing will be necessary in any event and that it appears unlikely that a preliminary hearing will be listed sooner than the substantive appeal, I have come to the conclusion that it is not appropriate to direct a preliminary hearing in the present case. Accordingly I dismiss the application.

21. I would hope, however, given that the dispute between the parties commenced over 13 years ago that the parties can agree suitable directions to expedite the substantive hearing.

22. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 21 October 2014