Neutral Citation: [2023] UKFTT 00315 (TC)

Case Number: TC08775

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: MAN/2001/0343
MAN/2003/0022
MAN/2004/0017
MAN/2004/0242

PROCEDURE - VALUE ADDED TAX - Application to strike-out appeals - Whether appeals enjoy any reasonable prospect of success? - No - Appeals struck-out - Whether, if not struck-out on that basis, appeals should nonetheless be struck out as an abuse of process? - Yes

Heard on: 24 October 2022 and 24 November 2022
Judgment date: 28 March 2023

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL

Between

MEDIABILITY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Ripley, of Counsel, instructed by Nigel Gibbon and Co Ltd

For the Respondents: Isabel McArdle, of Counsel, instructed by HM Revenue and Customs' Solicitor's Office and Legal Services

DECISION

SUMMARY

1. This is my case-management decision in relation to an application by HMRC, dated 23 March 2022, to strike-out the whole of these four consolidated appeals.

2. For the reasons set out more fully below, I have decided, as a matter of my discretion, to strike-out the whole of these appeals, on the footing that there is no reasonable prospect of the Appellant's case, or part of it, succeeding: Rule 8(3)(c).

3. Had I not done so, I would nonetheless still have struck out these appeals, under the same part of the same Rule, and again as an exercise of my discretion, but as an abuse of process.

4. Consequently, there is no need for any further procedural directions in these appeals.

BACKGROUND

5. Mediability Ltd carried out business as an advertising agency.

6. The underlying appeals concern its VAT liability in respect of the supply of advertising services.

7. There are a number of assessments in dispute, issued between March 2001 and May 2004, for the periods 03/98 to 03/02 (ie, from 1 January 1998 to 31 March 2002), and as set out in the Appellant's Amended Grounds of Appeal dated 29 August 2021. The first batch of assessments were issued on 30 March 2001, and were for the period 03/98 to 03/00.

8. At the time relevant to the assessments in dispute, Mediability's services to clients established in the UK would have been standard-rated, and its services to clients established outside the UK would have been outside the scope of UK VAT.

9. For many years, the appeals were stayed behind a series of cases: *Halifax PLC* (ECJ, C-255/02), *WHA Limited* [2013] UKSC 24, and *Newey (t/a Ocean Finance)* (ECJ, C-653/11) [2013] STC 2432.

10. Insofar as still in dispute by the time of the hearing, I permit the Appellant to rely on its Amended Grounds of Appeal. This is to allow the appeals to be dealt with fairly and justly. In my view, some formally stated case was needed after the release, in June 2020, of the Tribunal's lengthy and detailed decision in *Wilmslow Financial Services PLC (in administration) v HMRC* [2020] UKFTT 0516 (TCC) (Judge Jennifer Dean).

11. That appeal concerned the affairs of Wilmslow Financial Services PLC, which was established in the UK. It was a credit-broker, carrying on the business of credit broking. For the purposes of VAT, credit-broking was an exempt activity.

12. I shall refer to Wilmslow Financial Services as 'Wilmslow PLC' (to include reference to Wilmslow's previous corporate identities, including Wilmslow Financial Services Ltd), and to the reported decision as the 'Wilmslow Decision'.

13. Although the Amended Grounds were said to stand in complete substitution for the earlier filed (and much shorter) Grounds, this does not exclude, still considering, where appropriate, the original grounds.

14. I am grateful to both counsel for their written and oral submissions.

Mediability's original case

15. Rule 8(3)(c) is about parties' "cases". Those cases are to be found in parties' Statements of Case. For Appellants, that is the Grounds of Appeal. For HMRC, that is its responsive Statement of Case under Rule 25 of the Tribunal's Rules.

16. The gist of the Appellant's original case (as advanced in the several original Grounds of Appeal filed between 2001 and 2004) was that Mediability supplied advertising services to a company called Karacus Ltd, which was established in Gibraltar. As such, it was said, Mediability's services were therefore outside the scope of UK VAT under the then-provisions of Article 16 of the *VAT (Place of Supply of Services) Order 1992* (SI 1992/3121) and Paragraph 2 of Schedule 5 of the *VAT Act 1994*.

17. Karacus Ltd described itself as in the business of providing financial intermediary services.

18. Wilmslow PLC had a contract with Karacus.

19. In its Grounds, Mediability positively asserted that its advertising services were supplied to Karacus, and not to Wilmslow PLC. It was said that Mediability's services were supplied for the purposes of the business of Karacus, and that the economic and commercial reality was that Mediability supplied its services to Karacus, in Gilbraltar, and not to Wilmslow PLC, in the UK.

20. Otherwise, Mediability said that its arrangements with Karacus could not be an abuse of rights because Mediability's purpose in entering the arrangements with Karacus was not to secure a tax advantage for itself by artificial means.

Mediability's later case

21. In the course of submissions, Mr Ripley helpfully confirmed:

(1) That he was not seeking to deny that Wilmslow PLC was provided with advertising services;

(2) That he did not deny that the transactions were designed to save Wilmslow PLC VAT;

(3) That the scheme (the details of which I shall set out below) was a VAT scheme;

(4) That Wilmslow PLC was supplying loan broking services;

(5) That Karacus was not supplying loan broking services.

22. Paragraph 12 of the Amended Grounds of Appeal says:

> "The analysis of the Tribunal in [the Wilmslow Decision] failed to take into account that, even if the economic and commercial reality is that it was Wilmslow PLC and not Karacus which made the supplies of loan broking, nevertheless, analysed on their own account, Mediability's supplies were properly made to Karacus. The finding made in relation to Wilmslow/Karacus is consistent with a finding that the advertising services received by Karacus from Mediability must therefore have been resupplied by Karacus to Wilmslow (which would have resulted in Wilmslow having to apply a reverse charge ..."

23. That is to say, Mediability was involved in a *resupply* of Karacus' services to Wilmslow ('the Re-Supply Argument').

24. Mr Ripley submitted that I should focus, in this appeal, on the economic reality of Mediability's supplies, and what that means for VAT purposes, whether recharacterised or not (ie, regardless of characterisation).

25. What Mr Ripley described as his 'ultimate submission' was that the Re-Supply Argument could not be dealt with in a preliminary or interlocutory hearing of this kind, but, in order to establish the exact character of the activity, the Tribunal "would need to look at everything". He contends that there is enough in the point to furnish Mediability with sufficient armour to resist being struck out under Rule 8(3)(c).

The Wilmslow Decision

26. Wilmslow PLC was a UK established company which supplied loan-broking services to its lender customers. It was a client of Mediability. As I apprehend it, there is no real dispute that advertising is essential to loan-broking, because advertising is the means whereby potential borrowers are attracted, so that their details can then be supplied by the loan-broker to lenders.

27. In the Wilmslow Decision, the Tribunal found that the commercial and economic reality of the Wilmslow - Karacus - Mediability *troika* was:

> (1) Wilmslow PLC (and not Karacus) provided supplies of exempt loan broking services to lenders; and
>
> (2) Wilmslow PLC (and not Karakus) was the recipient of the advertising services provided by Mediability; and
>
> (3) That the arrangements between Wilmslow PLC, Karacus and Mediability were abusive, with the essential aim of avoiding irrecoverable VAT by way of artificiality and the use of an abusive structure, including the commercially unnecessary insertion of Karacus.

28. More particularly, the FTT held:

> (1) The day-to-day contact between Wilmslow PLC and Mediability allowed the inference that the commercial reality was that Wilmslow PLC made the decisions in relation to advertising. Although Karakus may have placed orders and been invoiced by Mediability, and there was reference to direct contact between Mediability and Karakus, there was no detail as to the level of Karakus' involvement or whether it had any commercial input of any substance beyond following advice and directions given by Wilmslow PLC. Overall, the commercial relationship was between Wilmslow PLC and Mediability rather than Mediability and Karakus: Para [115];
>
> (2) A deed of guarantee dated 5 November 2002 made by Wilmslow PLC agreed to fully indemnify Mediability against a VAT liability arising from its provision of advertising services to Karakus (clause 2.1.2). The Tribunal accepted HMRC's submission that this evidence was indicative of Wilmslow PLC as the real beneficiary of advertising services: Para [131]
>
> (3) Wilmslow PLC sourced and determined the content of advertising, on the face of it without payment, and that it was Wilmslow PLC which had the business relationship with Mediability. The Tribunal found that Wilmslow PLC procured advertising services on its own behalf and was therefore the recipient of those supplies of advertising services: Para [188];
>
> (4) The arrangements which formed the subject of Wilmslow PLC's appeal were highly uncommercial, did not reflect the economic or commercial reality and were contrived to result in a tax advantage. The essential aim was to avoid irrecoverable

VAT and that the structure of the arrangements was contrary to the purpose of VAT by its artificiality: Para [209]

29. In this appeal, the Appellant ventured a detailed critique of the Tribunal's findings of fact in the Wilmslow Decision, but took the over-arching point that the Tribunal's analysis was on the footing that the Tribunal was considering Wilmslow's loan-broking services, and not Mediability's advertising services, and that, even if Wilmslow PLC *was* involved in an abusive scheme, that did not mean that Mediability was as well. Mr Ripley argued that the Tribunal there did not have the benefit of witness evidence from Mediability, which was crucial to the Tribunal's rejection of Wilmslow PLC's submission that Karacus had a real role.

30. HMRC submitted that the Wilmslow Decision provides complete analysis in answer to the Appellant's appeals: the Appellant supplied advertising services to Wilmslow PLC as a matter of economic and commercial reality, and not to Karacus.

31. But, even it did not, HMRC argue that the characterisation of supplies is one which must follow economic reality in preference to contractual terms, where the economic reality and the contractual terms can be shown to differ. Where a scheme operates through "a construct of contractual relationships", "it is necessary to look at the matter as a whole in order to determine the economic reality": *WHA v HMRC* [2013] UKSC 24 at [26].

THE TEST FOR PROSPECTS

32. In this regard, I am guided by the detailed statement of principles set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which was endorsed by the Tax and Chancery Chamber of the Upper Tribunal (Henry Carr J and Upper Tribunal Judge Sinfield) in *The First De Sales Ltd Partnership and others v Revenue and Customs Commissioners* [2018] UKUT 396 (TCC) at Para [33]:

> "(i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict

of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

33. In essence, HMRC argues that these appeals cannot survive the strike-out application because the totality of the presently available evidence, looked at as a whole, shows that the Appellant does not enjoy any realistic prospect of successfully advancing these appeals.

34. It is therefore necessary for me to break-down, into discrete pieces, the evidence. Here, there are three categories: the Wilmslow Decision's findings (with the attendant issue of whether these bind me); the available documentary evidence; and what is known about any other evidence.

The Wilmslow Decision's findings

35. The Wilmslow Decision was a reserved decision following a contested hearing. The facts as found are, by dint of the application of the usual principles applicable to judicial fact-finding, things which actually happened or a state of affairs which actually existed - not which might have happened, or which might have existed. As Lord Hoffmann said in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 at [2]:

> "If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

36. But Mediability was not a party to Wilmslow PLC's appeal and the findings as against Wilmslow PLC do not formally bind Mediability or this Tribunal: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 at 595, where the Court of Criminal Appeal, *per* Lord Goddard CJ, adopted the following passage from the *The Duchess of Kingston's Case* per Sir William Grey CJCP (1776) 2 Smiths Leading Cases (13th edn) 644 at pp 644-645:

> "[a]s a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but, not being applicable to the present subject, it is unnecessary to state them."

37. Lord Goddard CJ went on to say:

> "This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party."

38. Hence, the findings in the Wilmslow Decision, even though they deal with the self-same transactions, are not conclusive as against Mediability. If they were, then Mediability's appeals would, without doubt, thereby be at an end.

39. However, the findings nonetheless have some relevance in my overall assessment of the strength of the present evidence, and the prospects of Mediability being able to succeed at a full hearing, if allowed to go forward. They are strongly relevant, not least because the Wilmslow Decision considered the same scheme and the same participants.

The documentary evidence

40. Without conducting a mini-trial, I am entitled to assess the evidence before me to seek to determine whether Mediability's case, whether as put in its Amended Grounds of Appeal, or as susbequently developed in argument before me, enjoys any reasonable prospect of success.

41. Regardless of any concessions, it is abundantly clear from the contemporary, unchallenged, documentation that Mediability was looking to offer its advertising services to Wilmslow PLC free of VAT, if it could, because that is what Wilmslow PLC (which was Mediability's biggest client) wanted. Wilmslow PLC had a rational commercial reason for the advertising to be VAT free, because its business, as a loan broker, was an exempt activity, meaning that Wilmslow PLC's input tax could not then be offset against output tax - an example of so-called 'sticking' VAT / 'sticking' input tax.

42. On 3 March 1997, Martin J Ruffles, a VAT Manager from Arthur Andersen, wrote a letter (at page 98 of the bundle), to Mr Alan Grundy (then, the sole director of Mediability), prominently headed "VAT FREE ADVERTISING". This is a very important letter.

43. It said that it was contemplated that "events" (sic) were to be "arranged" so that Mediability *"will be able to supply advertising services to a company which is incorporated in Guernsey on a VAT free basis ... I have been progressing the issue with Rupert Webb at Wilmslow Financial Services Ltd and we are considerably closer to implementing the necessary arrangements which are required to effect the desired end result".* Rupert Webb was the Managing Director of Wilmslow PLC. The "we" was Mr Ruffles and Mr Webb. Wilmslow PLC and Mediability were, through Mr Ruffles, engaged in a common project, which was to procure VAT free advertising.

44. The sole purpose of the contemplated, to be arranged, "events" referred to in that letter was a tax purpose, namely Mediability's ability to offer VAT free advertising to Wilmslow PLC (which, in turn, would *pro tanto* escape 'sticking' VAT). There can be no viable

suggestion that there was any other purpose. The arrangements had everything to do with the tax on Mediability's services (which was why advice was to be obtained from a prominent Revenue QC) and was nothing to do with the actual content or provision of Mediability's services themselves.

45. The arrangements expressly contemplated the interposition of a non-UK company simply as the mechanism or instrument whereby the tax advantage to Mediability and Wilmslow PLC was to be obtained. No such company even existed at the time - it was still to be incorporated. That was because it simply did not matter - either for Mediability's purposes in retaining Wilmslow PLC as a client, or for Wilmslow PLC's purposes in escaping 'sticking' VAT - where that company was, or who controlled it, or its antecedents or business experience, or its trustworthiness as a prospective commercial counterparty (indeed, none at all were needed), just so long as it was somewhere which was not subject to UK VAT.

46. There follows a contract dated 30 June 1997 (at page 99 of the bundle), ostensibly with effect from 1 May 1997, between Karacus and Mediability, described as a 'Contract for the Provision of Advertising Services':

(1) There is no explanation, then or now, as to why the contract post-dates the apparent commencement of the contractual relationship between Mediability and Karacus;

(2) There is nothing in evidence as to the introduction of Karacus to Mediability, or the negotiations (if indeed any) between Karacus and Mediability.

47. Clause 1 recited that "Mediability have agreed to provide certain advertising services including, but not limited to the placing of advertisements in newspapers, magazines, on radio and television as may be agreed from time to time upon the terms set out in this Agreement".

48. This document must be looked at in the context of the March 1997 letter. The contract is obviously part of the "events" which Arthur Andersen contemplated arranging, and is obviously the effectuation of the purpose in the letter. But, instead of a company in Guernsey, there was Karacus in Gibraltar. But the principle and the intended effect, was exactly the same - this was all about removing the incidence of VAT on Mediability's services. It was not to do with the content of Mediability's services themselves.

49. The contract is otherwise extremely sketchily written. For example, there is nothing about the sums of money payable, or targets. On the face of it, it does not seem to have been a contract which could genuinely have regulated a genuine arms'-length commercial relationship, nor even a contract which actually had a substantive content. It was a contract simply for the sake of it, in order to fit-in with the arrangements which Arthur Andersen - working with Mediability and Wilmslow PLC - had contemplated.

50. Alongside this is an undated 1997 (latterly, said to have been 1 May 1997) agreement between Wilmslow PLC and Karacus, which recites that Karacus wished to engage Wilmslow PLC to act on its behalf to provide credit broking services and data processing services relating to loan applications, and that Karacus 'intends to enter into an agreement with a UK advertising agent to procure advertising services which will induce applications for loans'.

51. On 27 October 1999, Karacus and Wilmslow PLC entered into a so-called 'Supplementary Agreement' which sought to amend Clause 5 of the 1997 agreement so as to make express provision for Wilmslow's role in "procuring advertising services" on behalf of Karacus. Given that Mediability was not a party to these documents, and that Mediability do not intend to call anyone from Karacus or Wilmslow PLC to give evidence, then it is self-

evident that there is no evidence of any kind which anyone at Mediability can give about these documents (even if such evidence were admissible, and were not rendered inadmissible by the usual operation of the 'parol evidence' rule).

52. Again, the March 1997 letter is relevant, because Mr Ruffles discusses what he and Wilmslow's Mr Webb intended to do, "to effect the desired end result". The 1997 and 1999 Karacus - Wilmslow PLC agreements are themselves simply part of the scheme whereby Wilmslow PLC was to be relieved of the burden 'sticking' VAT arising from the advertising services provided to it by Mediability.

53. Taken together, the documentary evidence set out above tends inevitably to the conclusion that the Wilmslow/Karacus/Mediability scheme was simply a "construct of contracts", and that the contracts did not in fact reflect the true economic reality.

54. I have heard full argument on these documents, and, insofar as this is a case which turns on documents, there is, in my view, no realistic prospect of that assessment changing at a full hearing.

55. Hence, I need to move on to consider whether there is any other evidence which might nonetheless change the position so as to justify allowing these appeals to go forward to a full hearing.

Other evidence

56. The Appellant's Skeleton Argument, as an outline of its key submission, said that Mediability *"has highly relevant evidence to lead which was not before the FtT in [the Wilmslow Decision] including witness evidence of the interaction between Mediability and its customer"*. In its Objection to the strike-out application, Mediability said that the Tribunal would have to *'analyse the economic reality of the relationship between the Appellant and Karacus'*, and would not be able to do so without considering *'the explanations given by Alan Grundy and Darren Grundy in ... interviews'*, *'and will include further witness evidence to be given by both of them'*. Mr Ripley confirmed that the Appellant still intended to call Alan and Darren Grundy, if the appeals were not struck out.

57. However, no witness evidence (in the form of witness statements) from either of the Misters Grundy had been filed at all (the reference to 'further' is therefore otiose) and it did not seem to me as if there was any good reason why that could not have been done (i) in anticipation of the hearing, or (ii) responsively to HMRC's application, or even (iii) in the window afforded by the adjournment between Days 1 and 2 of this hearing, especially if (as asserted) the Tribunal would not be able to properly analyse the economic reality, or what had been said in interviews, without hearing, at a substantive hearing, the explanations given by the Grundys.

58. It is also important to note that it is being said that the Tribunal would only hear evidence from Messrs Grundy. It would not hear evidence from anyone else, including anyone involved with Wilmslow PLC (for example, its director Rupert Webb), Karacus Limited (for example, either of its directors, Messrs Tim J Revill and Alan R Kentish, or Jonathan Skinner (said to have been its 'Finance Manager') who was the author of a letter to HMCE, as it then was, dated 5 September 2000) headed "Re: Wilmslow Finance Ltd."

59. Wilmslow's Mr Webb was interviewed by HMRC on 5 October 1999. Mr Webb was asked about Karacus:

(1) He said that Karacus had given him the power to place adverts as he felt necessary;

(2) Wilmslow decided on the advertising policy.

(3) That was the same position was before Karacus was used;

(4) Karacus was set up to save VAT on advertising costs.

60. Those things being so: (i) the purpose of the arrangements; (ii) the manifest absence of genuine commerciality; and (iii) the role of Karacus as simply a mechanism or an instrument, all become absolutely clear.

61. The Grundy 'interviews' referred to, in relation to which it was said that further explanations would be provided, took place on various dates between 15 September 2000 and 15 January 2008. Those interviews were summarised (albeit quite discursively) in the Appellant's Amended Grounds of Appeal. Unfortunately, the original notes of those interviews had not been included in the hearing bundle. That occasioned an adjournment because, given their potential importance, I was not content to rely on summaries. The interview notes were provided in an Additional Bundle.

62. Having now read the meeting notes, and not just the summaries given of them, it is quite clear to me that neither Alan Grundy nor Darren Grundy would enjoy any realistic prospect either (i) of now credibly contradicting or explaining away what they had told HMRC in their interviews, or (ii) of credibly going behind what Mr Webb of Wilmslow PLC told HMRC in October 1999; or (iii) of persuading a Tribunal that the Grundys' evidence of fact now, in 2023, was to be preferred to their answers (or those of Mr Webb) then.

63. Messrs Grundys' and Mr Webb's answers in interview, being much closer in time to the actual events, were inherently likely to represent the true position as it actually was.

64. Mr Webb's answers were given openly and co-operatively, in the presence of his in-house accountant, and an external accountant.

65. As to the Grundys, their answers were given openly and in the presence of their professional representatives. Their professional representatives' answers were given in the presence of the Grundys, and there is no record that those answers were challenged or gainsaid by the Grundys at the time. All is ostensibly accurate and reliable.

66. When the interviews took place, the appropriate VAT treatment was still - before *Halifax PLC* and the other cases - up for discussion, so the answers were given candidly and not in trying to secure some tactical advantage.

67. The significant passage of time since then - between 15 and 23 years - was most unlikely to have improved the quality of the evidence. The Grundys said what they said: there was no challenge to the accuracy of the notes (even at the time), and reasonable inferences could also be drawn by what was not said. Evidence now seeking to impeach what they had said 20 or so years ago would be self-serving, and its probative value diminished significantly, if not completely extinguished.

68. The note of the first interview is near contemporaneous (it seems to have been finalised in November 2000). At that point, no assessments had yet been issued. It records the attendance of Alan Grundy, who was then the managing and sole director of the Appellant, and Mr Ruffles ('MR').

69. Mr Ruffles gave a lengthy description of the scheme. The 'driver' for what had happened in 1997 was Mediability's wish to keep Wilmslow PLC (which was its biggest client, accounting for about 30-35% of its business) as a client.

70. At the conclusion of the meeting, the following exchange is recorded between Steven Trigg ('ST'), described as an 'Anti-avoidance consultant for Customs and Excise' and Mr Ruffles and Mr Grundy:

ST put it to MR that the driver had been to provide VAT free advertising
AG/MR said no, it was to retain a client
ST - purpose of the structure was to mitigate VAT to retain client
MR - avoidance of VAT was a consequence of the arrangement. Sceme (sic) was brought to M[ediability] to keep WFS [Wilmslow] as a client
ST - sole purpose was to reduce VAT with the consequence being M[ediability] retained WFS as a client.
MR disagreed, driver was retention of client
ST - recap, purpose to mitigate VAT, consequence of doing so was to keep client
MR - said there were two drivers but prime being to keep client
MR and ST at this point agreed to disagree re this matter"

71. The commercial reality which emerges from this note is entirely clear:

(1) Wilmslow PLC was Mediability's real client, both before and after the scheme; and

(2) The scheme was entered into for tax avoidance purposes.

72. As to (2), on Day 2 of the hearing before me, Mr Ripley conceded that the scheme was a VAT scheme. That concession was, in my view, a (belated) recognition of the inevitable.

73. Nothing at all was said in the 2000 meeting as to some other characterisation of the scheme.

74. I agree with Ms McArdle that the answers given in the 3 hour pre-arranged interview which took place in September 2000 are - in her terms - 'checkmate' in relation to the Appellant enjoying any prospect of success in this appeal. There is no realistic prospect of arguing otherwise, and no likelihood of any credible evidence now being given which gainsays this. Mediability, its officers, and its advisers, gave the answers which it, and they, gave in 2000.

75. That conclusion can be tested and cross-checked against the other documents which are in evidence before me. It is only fortified by them.

76. In October 2001, Mr Webb wrote to Alan Grundy discussing "the Karacus situation" and describing it as a "VAT scheme". This is entirely consistent with what Mr Webb had told HMRC in October 2009. There is simply no way for Mr Grundy to now credibly contradict what Mr Webb wrote.

77. There is also an important email from Mr Ruffles at Arthur Andersen to Mediability and Wilmslow PLC dated 2 November 2001. By this time, HMRC (then the Commissioners of Customs and Excise) had already issued some assessments (30 March 2001), and a Notice of Appeal to the then-VAT and Duties Tribunal had been filed (2 May 2001), settled by Counsel, but signed by Mr Ruffles as Mediability's representative.

78. That email was not sent to anyone at Karacus, although, on the face of it, it affected Karacus profoundly. This is further support for the view that Karacus was, at that time, no more than a mechanism or instrument to achieve the desired tax outcome.

79. On the footing that Mr Ruffles was the architect of the scheme, there is no realistic prospect of any evidence being given by the Grundys, as to what Mr Ruffles intended to achieve, and their participation in it.

80. Mr Ruffles' high-level opening is extremely telling:

"Even where an issue could be regarded as having an impact upon just one of the companies" (ie, Mediability, or Wilmslow PLC) "it is important in my view that we

cease looking at these problems in isolation to the totality of the structure as a whole" (underlined emphasis added by me).

81. He then describes the "purpose" and "consequential effects" of "The Karacus Arrangements":

(1) Mediability intended to get, and got, a benefit in retaining Wilmslow PLC as a client;

(2) Wilmslow PLC intended to get, and got, a benefit (the "elimination of VAT from advertising expenditure" was said to have "generated additional income of £3m+ to date");

(3) Wilmslow PLC was "the principal beneficiary" of the arrangements;

(4) Wilmslow PLC's fees against Karacus were depressed by the increased commission that Karacus paid to Mediability, being a commission greater than the equivalent commission that would be paid to other media providers;

(5) Mediability's only benefit from the arrangement was the retained income from Karacus.

82. A proposed restructuring was discussed, but there is no suggestion that Karacus could object to this, or have any meaningful participation in the discussion, but would simply be manipulated to suit the ends of Wilmslow PLC and Mediability.

83. I agree with HMRC that this unvarnished (and, on the face of it, accurate) account of the scheme, written by its architect, written in private to both the true participants - Wilmslow PLC and Mediability - undermines any attempt by Mediability, here and now, to argue that the scheme was anything other than an artificial contrivance to escape sticking input VAT, without any genuine commercial involvement by Karacus.

84. I agree with HMRC that Karacus was "injected" into the scheme, and, as is clear from Mr Ruffles' November 2001 email, could simply be ignored, even when it came to the making of decisions which would affect Karacus' own ostensible commercial interests.

85. I simply do not see any realistic route whereby Mr Ripley's characterisation as a re-supply can gainsay these documents. His explanation comes decades after the events, is contrary to the explanations given at the time, and (in any event) does not really make commercial sense.

86. Mr Ripley invites me to consider the guidance of the Supreme Court in *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15 at Para [68], that decisions about the application of the VAT system are highly dependent on the factual situations involved, and "a small modification of the facts can render the legal solution in one case inapplicable to another". In effect, this is an invitation to be cautious when exercising my power to strike-out lest this is in fact one of those cases, as described in *Easyair* (vi), which may not turn out at trial to be really complicated, but which should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment.

87. I do not think that the guidance in *Aimia Coalition* - which binds me, and which I accept - assists him here. Mediability's factual case - at its very highest - is exceptionally weak. He does not identify any fact or facts which would, contrary to those already emerged, would tilt the balance in favour of Mediability. This cannot be oral evidence, because there is no evidence from the Grundys (and, if there is, it will be subject to the observations set out above), and there will not be any evidence from anyone else.

88. I do not accept that (to adopt the guidance in *Easyair)* "the evidence that can reasonably be expected to be available at trial" - namely, that of Mr Alan Grundy and Mr Darren Grundy - is even remotely likely to have any real weight set against the contemporary documents, including the record of the interviews. Submissions to the contrary are completely unpersuasive.

89. Although recognising the caution to be exercised in deciding whether to strike-out, and the obligation to do so only when in accordance with the overriding objective in Rule 2 of the Tribunal's Rules, I do not accept (again, adopting the guidance in *Easyair*) that "reasonable grounds" do genuinely exist for believing that "a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

90. There is no evidence which will now emerge about re-supply so as to support a case on re-supply. Wilmslow PLC itself never said that was what was happening; nor did the Grundys, nor did their advisers, at the time. All had ample opportunity to do so. In fact, what they said was inconsistent with a re-supply. The one and only client of the advertising services is and always was Wilmslow PLC. Wilmslow never suggested that Karacus was supplying it with anything.

91. I simply do not consider that Mediability's re-supply argument, now put at the forefront of its resistance to this part of HMRC's application, materially changes its position. The Re-Supply Argument, in my view, is a ingenious but ultimately unproductive attempt to artificially segregate the advertising services from the loan-broking services, in a way capable of generating a different outcome in relation to the advertising services from that already reached by the Tribunal in relation to the loan-broking services.

THE ABUSE OF RIGHTS ARGUMENT

92. Mediability advances a second argument as to why it should not be struck-out, based on the EU concept of abuse of law.

93. In the Wilmslow Decision, at [199]-[209], Judge Dean remarked as follows:

> "199. In the alternative, HMRC submit that the scheme was contrary to the doctrine of abuse of law. The sole purpose was to obtain a tax advantage. Furthermore, it was contrary to the purpose of the relevant provisions in that the structure was artificial, not in accordance with commercial reality and therefore contrary to the purpose of the VAT regime. It was also contrary to the place of supply provisions which impose VAT on consumption; the advertising supplies were received in the UK and therefore VAT should be incurred in the UK on those supplies.
>
> 200. The advertising was in the UK media and not Gibraltar therefore only designed for UK customers and therefore consumed in UK. It was commissioned by Karakus but based on content which was directed and approved by the Appellant. HMRC submit it would be contrary to the purpose of legislative provisions to avoid non-taxation if this loan broking business which was substantially conducted in the UK was able to compete with other loan broking businesses in the UK but without incurring irrecoverable VAT on the related advertising costs.
>
> 201. HMRC contend that the essential aim of the structure was an artificial means by which to avoid irrecoverable VAT arising on the advertising services procured and to allow recovery of VAT on the Appellant's overheads; there is no credible evidence of any commercial purpose of rationale in splitting the business between the UK and

Gibraltar and the arrangements were conceived and implemented by the Appellant as a VAT saving mechanism.

202. Mr Gibbon submitted, relying on Pendragon, that the clear inference to be drawn from the Court's comments is that it is difficult to set a blanket, standard or general "normality" to measure transactions against, given that parties are free to contract as they wish and according to their own commercial aims and objectives; where the law leaves options open to a taxpayer, it is not abusive to take one of those options.

203. I accepted Mr Gibbon's submissions regarding the authorities. The Supreme Court confirmed that business arrangements are not, of themselves, abusive where a taxpayer chooses one of a number of normal commercial options, none of which run counter to the purpose of the legislation. The CJEU in Newey T/A Ocean Finance held that the effect of the principle of abuse of rights was to bar artificial arrangements which did not reflect economic reality and were set up with the sole aim of obtaining a tax advantage.

204. However, having considered all of the evidence available, I preferred the submissions on behalf of HMRC that the scheme was manifestly contrary to the purpose of VAT by virtue of its artificiality and abusive structure. The use of the special purpose vehicle in Gibraltar added expense to the business which was commercially unnecessary other than to obtain a tax advantage. The scheme required profits from the business to be used to cover the expenses of Karakus which performed none of the necessary elements of the loan broking business from a commercial perspective.

205. I found that the commercial reality was that all marketing, processing and provision of vetted applications for loans was performed by the Appellant. As distinct from Newey T/A Ocean Finance, the Appellant sent the completed applications directly to the lenders giving Karakus no opportunity to object. There was no evidence that the directors of Karakus had any experience in loan broking nor that they had any meaningful involvement in it.

206. Although there were changes to the ownership and apparent control of Karakus I found that it did not operate independently of the Appellant at any point throughout the relevant period. I agreed with HMRC's submission, applying the authorities, that it is not necessary for a finding of artificiality for it to be established that the Appellant or Mr Webb retained a connection with Karakus after the transfer of Mr Webb's shares to the Ark Trust. However, in the absence of any credible explanation for the transfer, I was satisfied that it was reasonable to draw such an inference on the basis of the evidence and my findings thereon. The gifting of the shares for no consideration was manifestly uncommercial and the debenture entered into by Karakus reinforced my finding on the basis of the substantial leverage it provided to the Appellant which I concluded evidenced the Appellant's continued control.

207. I found that the Agreements lacked key details which would be expected in genuine commercial arrangements between arm's length parties. By way of example the 1997 contract provides no terms dealing with the negotiation and provision of content for advertising yet this was carried out by the Appellant without payment.

> 208. I accepted HMRC's submission that the 2004 Agreement contained rights given to the Appellant which no genuine principal would agree to whilst also limiting Karakus' remedies, for instance Karakus was granted royalty free and without time limit, a licence to the Appellant to use customer data which it could in turn sub-licence "without prejudice to any other provision of this Agreement"; such data would be both valuable and sensitive and it is wholly lacking commerciality for a loan broking principal to grant its processor the right to sub-licence such data without strict controls in place.
>
> CONCLUSION ON ISSUE (2) ABUSE
>
> 209. Having considered all of the evidence I found that the arrangements which form the subject of this appeal were highly uncommercial, did not reflect the economic or commercial reality and were contrived to result in a tax advantage. I was satisfied that the essential aim was to avoid irrecoverable VAT and that the structure of the arrangements was contrary to the purpose of VAT by its artificiality."

94. This analysis was challenged by Mr Ripley. The thrust of his submissions is that, regardless of whether the economic reality married up with the contractual reality, there is still a realistic argument that the transactions entered into by Mediabilty did not violate the abuse of rights principle.

95. The leading UK decision on the EU concept of abuse of law, is that of the Supreme Court in *HMRC v Pendragon plc and others* [2015] UKSC 37. Lord Sumption JSC (with whom Lords Neuberger, Reed, Carnwath and Hodge agreed) described the concept of abuse of law at Paragraph [5], making extensive reference to the decision of the Grand Chamber of the European Court of Justice in *Halifax plc* [2006] STC 919.

96. *Halifax* established two tests: the first is whether the scheme was contrary to the purpose of the legislation. The second is whether the transactions were undertaken with the essential aim of obtaining a tax advantage.

97. It is abundantly clear that the purpose of the scheme was tax avoidance, and it is abundantly clear that Karacus was inserted into the scheme to effectuate this purpose.

98. Even if this is treated as a case of concurrent purpose, and it could be shown (accepting, for the sake of argument, that it probably can be) that Mediability's choices were "*at least to some extent,* accounted for by ordinary business aims" (see *HMRC v Pendragon plc* [2015] UKSC 37 at [12] *per* Lord Sumption) - namely, in this case, Mediability's wish to retain Wilmslow PLC's business - "the commercial objective" is not enough "to explain the particular features of the contractual arrangements which produce the tax advantage".

99. In my view, the relevant "aim" was that of the scheme as a whole, and not of its component parts: ibid at [13]. That aim was tax avoidance.

100. But, even if the relevant aim is that of the component parts, thereby calling for an analysis of the individual steps, the answer is inevitably the same.

101. At Para [13] of *Pendragon,* Lord Sumption approves what was said by Lord Neuberger MR in *WHA Ltd v Customs and Excise Commissioners* [2007] EWCA Civ 728 at Para [22], rejecting the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination.

102. Lord Neuberger MR put it more trenchantly:

> "It was also contended by [the taxpayer] that it would be wrong to characterise the Scheme as an abuse because it involves inappropriately considering the Scheme as a whole, whereas questions relating to VAT are to be determined by reference to individual transactions – i.e. by treating each step in the Scheme separately. Thus, he argued in his written submissions that the "abuse test is not satisfied by WHA viewed alone". While I accept the soundness of the approach in classic VAT cases (indeed, we adopted it when considering whether the Scheme worked when considered at face value), I do not consider that it can possibly be appropriate when considering whether a scheme infringes the purpose of the Sixth Directive. Otherwise, a scheme would never be liable to attack on the basis of the principle established in Halifax. Effectively by definition, each step of such a scheme would be unassailable (as it would otherwise be unnecessary to invoke the abuse principle). Accordingly, on this argument, the scheme itself would be unassailable. Indeed, if this argument were correct, the European Court would have decided Halifax differently. The whole point of the principle is that, although each step of the scheme in question works, the overall effect of the scheme is unacceptable."

103. I agree.

104. I am not persuaded that the circumstances can now be redefined in a manner which avoids being caught by the *Halifax* test.

105. Even if Karacus was the abusive element, extraction of Karacus from the scheme cannot realistically be accomplished to achieve a non-abusive outcome.

CONCLUSION ON PROSPECTS

106. In my view, there is no reasonable prospect of Wilmslow succeeding in any part of its appeals, and they must therefore be struck-out pursuant to Rule 8(3)(c).

107. The contractual documents, such as they are, are so manifestly flimsy, and so self-evidently put together as a "construct", that I am bound to express doubt that the contractual position, even in its own right, was ever such that the documents could have been relied on to support a claim by Mediability that its supplies were outside the scope of UK VAT.

108. But, in any event, the appeals nonetheless founder helplessly on the rocks of economic reality. Karacus was in the picture simply as an instrument to achieve a tax advantage.

109. Moreover to my mind, and as a factor of great potency, the economic reality of the position was, in large measure, candidly, comprehensively, and accurately explained to HMRC by Wilmslow's Mr Webb, Mr Ruffles, the Appellant, its representatives, and its director, 20 or so years ago.

110. Mediability's contract with Karacus, and the contract between Karacus and Wilmslow, were artificial arrangements arising from an abuse of rights in the sphere of VAT, drawn up with the sole aim of obtaining a VAT advantage. Even if there were a commercial objective - namely, Mediabilty's retention of Wilmslow' business, that is not enough "to explain the particular features of the contractual arrangements which produce the tax advantage".

111. In my view, both limbs of Halifax are satisfied, for the reasons already discussed above. Even if Mediability had a concurrent purpose, the scheme as a whole falls foul of abuse of rights: *Halifax,* as explained by the Supreme Court in *Pendragon.*

112. There is no more than a false, fanciful or imaginary chance of Mediability now achieving an outcome whereby the assessments are discharged by the Tribunal.

THESE APPEALS AS AN ABUSE OF THE TRIBUNAL'S PROCESS

113. Given my conclusions above, I do not need to decide whether I would have struck out these appeals as an abuse of process.

114. However, and lest my conclusions above should fall for reconsideration, I shall summarily set out my reasoning and conclusions.

115. It is well-established that Rule 8(3)(c) can be used, in appropriate circumstances, and only when in accordance with the over-riding objective, to strike-out an appeal on the basis that it is an abuse of process: see the decision of the Court of Appeal (Patten and Sales LJJ) in *Shiner and Sheinman v Commissioners for HMRC* [2018] EWCA Civ 31 where Patten LJ remarked at Para [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."

116. Given the existence of the power, the question is whether it should be exercised in this case, especially given that Mediability was not a party in *Wilmslow*, and the natural persons involved with Mediability were not called as witnesses.

117. In *Michael Wilson and Partners Ltd v Sinclair* [2017] 1 WLR 2646, Simon LJ (with whom Patten LJ and the Senior President of Tribunals agreed) remarked (at Para [48](3)) that, in order to determine whether proceedings are abusive, the Tribunal must engaged in "a close merits-based analysis of the facts", to focus on "the critical question: whether in all the circumstances a party is abusing or misusing the Tribunal's process". He also observed that it would be a "rare case" where the litigation of an issue which had not previously been decided between the same parties or their privies would amount to an abuse of process: see Para [48](5).

118. Where issues have already been decided in prior proceedings, the fact that (as here) the parties were not the same in the old proceedings as the new one is not dispositive (ie, adverse to a successful argument that the new proceedings are abusive) "since the circumstances may be such as to bring the case within the spirit of the rules": ibid Para [48](5).

119. "The spirit of the rules" comes from the speech of Lord Hoffman in *Arthur J S Hall and Co v Simons* [2002] 1 AC 615 at 701C:

> "The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bix vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. They are usually mentioned in tandem but it is important to notice that the policies they are state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same ... The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as bring the case within the spirit of the rules."

120. Thus, it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if the circumstances are such as to offend the second policy identified by Lord Hoffman. in that the same issue is being litigated again; or if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated.

121. At page 702E Lord Hoffman said that the power was to be used "only in cases in which justice and public policy demand it."

122. More recently, in *Tinkler v Ferguson* [2021] EWCA Civ 18, the Court of Appeal (Peter Jackson LJ, with whom Dingemans LJ and Sir Richard McCombe agreed) confirmed (at [62]) that there is a group of cases, admittedly rare, where litigation may be abusive and therefore vulnerable to being struck-out even though not formally between the same parties or their privies. Peter Jackson LJ identified several mischiefs and relevant factors:

(1) Collateral attack;

(2) Overlap;

(3) Risk of inconsistent verdicts;

(4) Manifest unfairness to a Defendant;

(5) The public interest in the propriety of duplicative litigation.

123. In my view, and applying the binding guidance outlined above, the present appeals are abusive and should be struck-out:

(1) The transactions are the same ones already considered and adjudicated on by the Tribunal in the Wilmslow Decision*;*

(2) These appeals do now seek, quite openly, to mount a collateral attack on those findings;

(3) The evidence would be the same as already considered by the Tribunal in the Wilmslow Decision;

(4) There is only the prospect of 'further' (sic) witness evidence from Messrs Grundy. This does not, in my view, constitute 'new' or 'fresh' evidence of a kind which could entirely change the aspect of the case, or which would justify allowing these appeals to go forward.

124. There are also justice and public policy elements.

125. As to justice: Recognising the caution in deploying my strike-out powers, I am nonetheless of the view that the interests of justice are justified in striking out these appeals.

They are relitigation, using valuable (and scarce) public resources, many years after the relevant events, and thereby concerning matters which are, on any view, extraordinarily stale.

126. The interests of public policy are broadly similar, and, in my view, mandate the same outcome. It is neither in the interests of justice as a whole, nor public policy, to permit this Appellant - whether on the basis of "further" evidence (not yet extant) from Messrs Grundy, or on the basis of an ingenious (but, in my view, unsustainable), ex post facto, "recharacterisation", of which there is no evidence - to continue to advance these appeals.

OUTCOME

127. The appeals are struck-out in their entirety.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 28th MARCH 2023