UPPER TRIBUNAL **Case number: FTC/15/2013**
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

-and-

(1) MURRAY GROUP HOLDINGS LTD
(2) MURRAY GROUP MANAGEMENT LTD
(3) THE PREMIER PROPERTY GROUP LTD
(4) G M MINING LTD
(5) RFC 2012 PLC (in liquidation)
(formerly The Rangers Football Club plc) **Respondents**

FIRST-TIER TRIBUNAL **Case numbers: SC3113-3117/2009**
TAX CHAMBER

(1) MURRAY GROUP HOLDINGS LTD
(2) MURRAY GROUP MANAGEMENT LTD
(3) THE PREMIER PROPERTY GROUP LTD
(4) G M MINING LTD
(5) RFC 2012 PLC (in liquidation)
(formerly The Rangers Football Club plc) **Appellants**

-and-

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

Tribunal: Judge Colin Bishopp

Sitting in Edinburgh on 19 July 2013

After hearing Mr Andrew Thornhill QC, Mr Jonathan Bremner and Mr Thomas Chacko, counsel, for the respondents in the Upper Tribunal and appellants in the First-tier Tribunal, and Mr Roderick Thomson QC for the appellants in the Upper Tribunal and respondents in the First-tier Tribunal

It is directed that:

1. The appeal to the Upper Tribunal of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") shall proceed in accordance with the following directions;

2. All further hearings in these appeals, whether before the Upper Tribunal or the First-tier Tribunal, shall be in public, and no decisions shall be anonymised or redacted, save that

   (a) the names of the HMRC officers who gave evidence to the First-tier Tribunal shall not be made public;

   (b) the names of those other witnesses who were not compellable and who gave evidence to the First-tier Tribunal after having been assured of anonymity shall not be made public;

   (c) the parties have permission to apply for variation of this part of this direction.

3. The parties shall, by 13 September 2013, send to the Upper Tribunal and each other their estimates of the time required for the hearing of the appeal together with particulars of the dates inconvenient to them in the period from 6 January to 31 March 2014 inclusive.

4. HMRC shall send their skeleton argument and list of authorities to be relied on to the tribunal and the Murray Group by not less than two months before the date fixed for the start of the hearing.

5. The Murray Group shall send its skeleton argument and list of authorities to be relied on to the tribunal and HMRC by not less than one month before the date fixed for the start of the hearing.

6. The parties have permission to apply.

Colin Bishopp
Upper Tribunal Judge
President, First-tier Tribunal (Tax Chamber)

Release date: 9 August 2013

REASONS FOR DIRECTION

1. On 29 October 2012 the First-tier Tribunal released its decision in the appeal of Murray Group Holdings Ltd and others—for simplicity I shall refer to the appellants (as they then were) collectively as the Murray Group—against a decision of the then respondents, to whom I shall refer as HMRC, relating to a series of assessments made in respect of an employees' benefit trust ("EBT") which had been established by the Murray Group. The decision, which was not unanimous, was substantially in favour of the Murray Group; but HMRC have since secured permission to appeal to the Upper Tribunal. I emphasise that I am not concerned in these reasons with the merits of that appeal, but only with the manner in which the litigation between the parties is to be continued, and nothing which follows should be taken as an expression of opinion on the merits.

2. The questions which need to be considered at this stage, shortly stated, are as follows:

(1) Should various matters which the majority of the First-tier Tribunal left undecided ("the undecided issues") be determined by that tribunal before the appeal to the Upper Tribunal proceeds?

(2) If so, should a tribunal composed of the same judge and members make the necessary determinations, or should a differently-constituted panel do so?

(3) Alternatively, should the matter proceed now to the Upper Tribunal?

(4) If the answer to question (3) is yes, should the Upper Tribunal determine all the issues in the appeal, making its own findings about the undecided issues, or confine itself to the issues which the majority decided?

(5) To what extent, if at all, should any further hearing, whether before the Upper Tribunal or the First-tier Tribunal, be held in private; and to what extent, if at all, should any part of the resulting decision or decisions be anonymised or redacted?

3. Before embarking on an analysis of those questions it is necessary to explain something of the background. I begin by mentioning that, as the issues relate to the conduct of the litigation in the Upper Tribunal and the First-tier Tribunal, I sat as a judge of both tribunals in order that all of the issues could be determined at once.

4. One of the Murray Group companies was Rangers Football Club plc ("RFC"), whose financial stability was known to be threatened by (among other things) tax debts, or at least claimed tax debts. As is well known, RFC collapsed into administration in March 2012, followed by liquidation in October 2012. It has been re-named RFC 2012 plc. The greater part of its business, and with it most of its assets, were purchased from the administrators in June 2012 by Sevco Scotland Ltd, which has since been re-named The Rangers Football Club Ltd. Although the professional football team known as Rangers had played in the Scottish Premier League until 2012, the collapse led to the ejection of the team from that league, and a team known as Rangers now plays in the Scottish Third Division.

5. It is no secret that professional football generates strong feelings among large numbers of its followers, and that those strong feelings manifest themselves in different ways. Rightly or wrongly—and I should not be taken as expressing any opinion one way or the other on the matter—those managing RFC have been blamed by some for its collapse and for what is, or is seen as, the relegation of the team. There has been particular focus on RFC's tax affairs, and principally the assessments which are the subject of the present appeal. It is undisputed that various threats of a serious nature have been made, and that the Strathclyde Police have been compelled to offer advice and protection to several individuals involved in RFC's affairs. Some of the threats have come from disappointed Rangers supporters; others from supporters of rival teams who have formed the opinion that RFC's use of the EBT gave it an unfair financial advantage.

6. Largely because of those threats the hearing before the First-tier Tribunal was held in private. Some of the witnesses who gave oral evidence were resident outside the jurisdiction of the United Kingdom courts and tribunals, and therefore could not be compelled to give evidence; they did so only on condition that their names were not revealed. The two HMRC officers who had dealt with the matter, too, were believed to be under threat and their identities were concealed. In consequence the decision was released in a heavily redacted and anonymised form. There was also a long interval between the conclusion of the hearing and the release of the decision, occasioned in part by the complicated nature of the issues and in part by the fact that the tribunal was not unanimous—the panel members spent some time in discussions in the hope of achieving agreement and when it became clear that would not be possible the dissenting member wrote a lengthy decision of her own, necessarily taking time to do so. Those factors led to a suspicion in some quarters that material which could and should have been in the public domain was being concealed for inappropriate reasons. I do not accept that there is any substance in the suspicion, but I am conscious that there is disquiet and I am of the firm view that nothing should be done which might aggravate it without compelling reason.

7. Because a direction had been made by the First-tier Tribunal that its hearings should be held in private, and that direction had not been revoked or amended before I sat to hear the present applications, I heard them in private. But there is nothing sensitive about the directions I have decided to make, nor in my reasons for doing so. Accordingly, and irrespective of my conclusions in respect of the fifth of the questions I have identified above, I have decided that my direction and these reasons for it should be publicly available.

8. Before continuing I should make some observations about the fact that the First-tier Tribunal's decision was reached by a majority. Article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) provides that "If the decision of the tribunal is not unanimous, the decision of the majority is the decision of the tribunal". In this case, the judge and one of the members (whom I shall call, in what follows, "the majority") were in agreement that the appeal should be substantially allowed. The other member took the view that it should be dismissed. By virtue of article 8, her dissenting opinion, as I shall call it, does not rank as a decision—the only decision which does is that of the majority—and has no formal standing of any kind. However, as the dissenting member decided to write an opinion, with reasons, and publish them, those reasons are available to be deployed before the Upper Tribunal to the extent that HMRC (or, for that matter, the Murray Group) wish to deploy them as arguments.

9. The first four of the issues I have identified above can be considered together, before I make detailed directions, since ultimately they all require a judgment to be made about the most efficient and cost-effective means of resolving the litigation. The Murray Group's position, in summary, is that the proper course is for the appeal to the Upper Tribunal to be stayed while the outstanding issues are determined by the same panel of the First-tier Tribunal; HMRC's position is that the Upper Tribunal should determine the appeal to it first since all else is dependent on the outcome of that appeal. The outstanding issues, I should add, were the determination, in the light of the majority's conclusions, of the tax treatment of the contributions to the EBT made by the Murray Group in respect of five individuals, and of the loans made by the trusts to those individuals. The majority expressed the hope, if not the expectation, that the parties would be able to resolve those matters for themselves, but unfortunately they have not been able to do so.

10. For the Murray Group Mr Andrew Thornhill QC, leading Mr Jonathan Bremner and Mr Thomas Chacko, argued that the manner in which the majority had expressed the hope to which I have referred indicated a readiness to resume the hearing if agreement could not be reached. That opportunity should be taken first in order that a single, composite appeal could be heard by the Upper Tribunal. Until then that appeal should be stayed. The majority had expressly refrained from giving a concluded view and, in the absence of such a view, it was difficult to see how the Upper Tribunal could properly determine the entirety of the matter.

11. An appellant has the right to have his appeal determined, and, as Megaw LJ said in the context of an application to stay civil proceedings until parallel criminal proceedings had been determined, in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 at 905, "the burden is on the defendant in the civil action [for which read respondent in an appeal such as this] to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with." There is no reason for such interference in this case. The First-tier Tribunal is seised of the appeal, has not concluded it, and should now do so. The Upper Tribunal can deal (in the present context) only with appeals against decisions; it cannot deal with an appeal when there is no decision. The Upper Tribunal cannot find any further facts which might be necessary for its decision on the outstanding issues; it is permitted by the Tribunals, Courts and Enforcement Act 2007 s 12(2)(b)(ii) and (4) to make findings of fact only when it is re-making a decision of the First-tier Tribunal. The evidence relevant to the outstanding issues has already been heard by the First-tier Tribunal and it is that tribunal which should make findings in the light of the evidence it has heard.

12. The breadth of HMRC's attack on the majority's decision is considerable, and it is likely to take a long time for the appeal to be heard—Mr Roderick Thomson QC, appearing before me for HMRC, suggested as much as four weeks. Whatever the outcome, there is the prospect of a further appeal, in view of the importance of the issues and the amount of tax at stake. If the outstanding issues have then to be resolved by the First-tier Tribunal, in perhaps three or four years' time, the evidence will be stale and recollections will have faded. There may thereafter be another appeal, prolonging the final resolution of the matter even further.

13. The course advocated by the Murray Group, by contrast, avoided most of those difficulties. The outstanding issues could be resolved quite quickly, particularly if the

same panel were to determine them. A hearing of no more than two days should be sufficient and the appeal to the Upper Tribunal could then proceed, with minimal delay, and encompass all of the challenges HMRC wished to make against the resulting decision. That was in essence the course adopted by the Special Commissioners in *J D Wetherspoon plc v Revenue and Customs Commissioners* (sitting in 2007: see [2008] STC (SCD) 460) and, following transfer of the Special Commissioners' jurisdiction to it, the First-tier Tribunal (sitting in 2009: see [2009] UKFTT 734 (TC)), and endorsed by Briggs J and Judge Nowlan in the Upper Tribunal at [2012] STC 1450. The case related to the tax treatment of various items of expenditure. The Special Commissioners were invited to deal with two of the taxpayer's public houses as samples, but in fact did something slightly different. The Upper Tribunal put the matter in this way:

> "4. In delivering the first decision, the Special Commissioners sensibly confined their review still further, so as to focus their reasoning upon a much smaller number of specific items, in the expectation (which proved to be unfounded) that the parties would be able to resolve the remainder by the application of the principles applied by the Special Commissioners in relation to those few.
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> 5. That approach did lead to a substantial narrowing of issues (subject of course to appeal) as to the effect of the principles applied in the first decision upon the other items in dispute. Nonetheless, there remained a substantial body of what were described in the second decision as 'unclear items', which the First-tier Tribunal ('FTT') then dealt with, but only in relation to the Prince of Wales pub, in the second decision. For this purpose they relied upon the evidence (including cross-examination) deployed at the hearing in 2007, together with further submissions of counsel on the unclear items.
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> 6. Neither party was content with the decisions. There has therefore been an appeal by JDW and a cross-appeal by HMRC."

14. A similar approach should be adopted here. The delay will be minimal, and the prospect of two appeals to the Upper Tribunal, and of two possible sets of onward appeals, eliminated. There was no discernable prejudice to HMRC in proceeding in that manner.

15. HMRC's complaint that the majority refused to make various findings (a contention with which I deal in more detail below) and their consequent argument that any direction that the remainder of the appeal should be heard by a differently constituted tribunal is misconceived. The majority had not refused to make findings at all, but only to make the findings for which HMRC had argued. The complaint is based upon a misunderstanding of para 232 of the majority's decision:

> "We are unable to make further Findings in Fact in support of there being an orchestrated scheme extending to the payment in effect of wages or salary absolutely and unreservedly to the employees involved, as Mr Thomson urged us to do. We considered this with some care in view of his trenchant criticism of certain witnesses' evidence."

16. That was simply a statement that there was insufficient evidence before the tribunal on which it could make the finding HMRC wanted. But even if there were any merit in HMRC's complaint, it would be most unusual to change the composition of a tribunal part-way through a case. It would lead to delay, since the relevant evidence would have to be heard again, and consequent expense; and there would be a considerable risk of

inconsistency between the findings of the original panel and those of any new panel which might be appointed.

17. HMRC argued, through Mr Thomson, that the least difficult means of resolving the outstanding issues was for the matter to proceed now to the Upper Tribunal, and for it to make any findings of fact which were necessary for its eventual decision, of which there might well be none. Once complete findings of law were made by the Upper Tribunal, the resolution of the outstanding issues would largely if not wholly follow, without the need to make further findings of fact. Even if the Upper Tribunal felt it needed to make such findings, it would not need to hear evidence in order to do so—it could make findings from the recitation of the evidence set out in the majority's decision.

18. The majority plainly considered that the First-tier Tribunal was no longer seised of the matter, as it had made all the findings it intended to make and in some respects (as Mr Thomson put it) had abdicated its responsibility for making findings both of fact and of law. The dissenting member had been able to make such findings, but if the appeal were returned to the First-tier Tribunal for continuation of the hearing there could be no confidence in the ability of the majority to make such findings in the light of their failure to do so in their decision. It was not the case that the majority had merely failed to make the findings HMRC wanted; they had failed to make findings at all in several critical respects. At para 7 of the decision the majority said

> "Evidence was led at length over 17 days. The account of each witness is summarised in turn and at the conclusion of this section we set out our preliminary Findings-in-Fact on the less controversial aspects. Later, in the concluding section of the Decision, we comment on the more contentious factual issues."

19. Although the second sentence of that paragraph proved to be correct, the third did not. The findings of fact set out at para 103 of the majority's decision were drawn almost entirely from a statement of agreed facts prepared by the parties or were otherwise undisputed; there was very little analysis of (or comment on) the disputed evidence, and no findings based upon it. The majority simply failed in its duty to make findings from disputed evidence. One was left with the impression that, since HMRC did not rely on an allegation of sham, the majority took every document at face value and did not ask itself what was the true purpose of the arrangements. HMRC's submissions on that point were recited but not addressed.

20. This is not a case in which the majority reserved various issues for agreement between the parties or, in default of such agreement, resolution by the tribunal at a further hearing. It is apparent from the wording of para 233 of the majority's decision ("… we expect that it is sufficient that we allow the Appeal in principle. Parties can no doubt settle the sums due for the limited number of cases mentioned without further reference to the Tribunal") that the majority did not contemplate a further hearing at which residual matters might be decided, but considered that it had discharged its function. The position here is quite different from that in *Wetherspoon*, where the Special Commissioners said at [2008] STC (SCD) 460 at [117]

> "We have only been able to give a decision in principle on the main issues. We adjourn the appeal for the parties to consider whether the outstanding matters can be disposed of by agreement."

21. They then went on to make directions for the further conduct of the appeal should that be necessary. There are no similar directions in this case.

22. The parallel with *Jefferson v Bhetcha* which Mr Thornhill had tried to draw was false, since the issue there was quite different, namely whether an application for summary judgment in civil proceedings should be stayed pending the outcome of criminal proceedings against the defendant because the defendant would be obliged, in order to answer the application for summary judgment, to disclose her defence in the criminal proceedings. That is quite a different consideration from the question which arises in this case.

23. I have little doubt that there is substance in both sides' arguments, and I do not find this a case in which the way forward is clear-cut. I can see merit in directing that the hearing before the First-tier Tribunal be continued in order that such further findings of fact as are relevant but which have not yet been made can be made. Although the Upper Tribunal does have the power to make findings of fact in the context of an appeal from the First-tier Tribunal, it is clear to me from the wording of the legislation that the power is to be exercised only when the findings to be made are clear, and as a means of enabling the Upper Tribunal to re-make a decision; I agree with Mr Thornhill that it is not a mechanism by which deficiencies in the execution by a First-tier Tribunal of its fact-finding task can be cured. On the other hand, although I think the assertion that the First-tier Tribunal abdicated its responsibility overstates the position, I see the force of Mr Thomson's argument that findings of fact which could have been made were not, and that the wording of para 233 of the majority decision suggests that the majority did not expect the parties to apply for a continuation of the hearing.

24. In order to reach a conclusion on the first four of the issues it is, in my judgment, necessary to consider what it is which divides the parties. The essential question before the First-tier Tribunal was whether, as HMRC say, payments made into the EBT were emoluments subject to PAYE and NICs deductions or, as the Murray Group argues, they were not so subject. That is also the fundamental issue before the Upper Tribunal. With limited exceptions which are of no present importance, the majority came to a conclusion on that question in the Murray Group's favour. What it did not decide (instead leaving the parties to agree) was whether that conclusion held good, needed modification or should not apply at all in the cases of five individuals in which, as it put it (see para 211 of the majority decision) "exceptional circumstances may arise".

25. In my view the determining factor should be the means by which the matter may be resolved most efficiently, and in weighing that factor against the background and the parties' arguments as I have described I have come to the conclusion that the more effective course is for the Upper Tribunal to determine the fundamental issue first. If it upholds the majority but does not feel able to determine the outcome in respect of the five individuals it is true that it will have to remit the matter to the First-tier Tribunal for that determination to be made, and in that case two hearings will be necessary. However, if it upholds the majority but finds it possible to deal with those five individuals' circumstances itself, or alternatively reverses the majority in a manner which is determinative of those five cases, only one hearing will be necessary. Even if it reverses the majority but does not feel able to resolve the five cases, it will be able to remit the matter to be determined in accordance with its view of the law rather than the (on this hypothesis) incorrect view of the majority. Thus on this basis two hearings are possible

but not inevitable. By contrast, as it seems to me, the Murray Group's proposal guarantees two hearings and risks three: one to determine the outcome in respect of the five individuals; a second before the Upper Tribunal; and a third before the First-tier Tribunal, re-visiting its findings of fact in the light of the Upper Tribunal's conclusion. The risk may be slight, but it cannot be discounted and in my judgment makes it clear that the balance of convenience dictates that the appeal to the Upper Tribunal should proceed.

26. I do not need to consider the remaining detail of issues (1) to (4) set out above, save to observe that if the appeal or any part of it is to be remitted to the First-tier Tribunal it will be for the Upper Tribunal judge making the remission to decide whether the same or a different panel should deal with the matter. I now turn to the questions of privacy and anonymisation.

27. Before coming to the detail of the case it is worth making a preliminary observation. I have referred above to the strong feelings of many football supporters. Perhaps because of such feelings, professional football clubs are often regarded as having a special status. In some respects that may be the correct view; but it should nevertheless not be overlooked that a modern professional football club is not a "club", in the sense of an unincorporated association of members who join together in pursuit of a common purpose, but a commercial enterprise whose function is to generate profits for its shareholders. From that perspective it has no special status, and there is no reason why its tax affairs should not be as open to scrutiny as those of any other profit-making organisation. The players, too, have no greater right to conceal their tax affairs from public scrutiny than any other taxpayer. The fact that they are in the public eye is irrelevant. Any application for privacy, anonymity or redaction of detail must therefore be supported by the same type and quality of evidence as would be required of another taxpayer, and will be granted only for the same reasons.

28. It was common ground before me that the presumption is that tax appeals are heard in public, and with no concealment of identity or detail. I accept that, in the past, there was good reason to fear that the personal safety of certain individuals was threatened; but the information now before me indicates that the threats have abated and have probably disappeared. Even if the identities of some individuals were concealed in the First-tier Tribunal's decision, the nature of the issues was not. Most of the individuals who were involved in, or were beneficiaries of, the EBT have been identified, without any concealment, in the published report prepared for the Scottish Premier League Ltd by the Rt Hon Lord Nimmo Smith, Mr Nicholas Stewart QC and Mr Charles Flint QC. The First-tier Tribunal's decision was mentioned in the report and was taken into account by its authors and, although there is no direct link between the report and the decision, it does not require a great deal of ingenuity to work out, with reasonable accuracy, to whom the code names used by the First-tier Tribunal refer.

29. Against that background there seems to me to be little, if any, legitimate purpose to be served by holding hearings in private, by anonymising the decision, or by redaction, and I therefore direct that future hearings, whether in the Upper Tribunal or the First-tier Tribunal, shall be in public, and that no anonymisation or redaction shall take place. I impose, however, three provisos. First, as I have said, the two HMRC officers involved in the case had their identities concealed. Although there is no current evidence of possible threats against them I see no justification for exposing public servants carrying

out their duty to a potential risk without good cause; none was identified and Mr Thornhill did not oppose their being afforded continuing anonymity. Second, certain other witnesses gave evidence only after having been assured of anonymity. Mr Thomson made the point that they might nevertheless have been willing to give evidence without anonymity, or might be prepared to waive it now; and he suggested that the matter might be revisited. Leaving aside the impracticability of asking the witnesses and evaluating their replies, it seems to me to be wrong in principle to offer anonymity to a witness as an inducement to his testifying, only to remove his anonymity later. I direct therefore that the identities of those witnesses which were concealed for this reason shall continue to be concealed. It may be, that by marrying the SFA report with the First-tier Tribunal's decision the concealment can be defeated, but that fact does not seem to me to affect the principle. Third, it is possible that renewed threats may be made, or there is other reason to fear for the safety of some individuals. Should that be the case, the parties have permission to apply to the Upper Tribunal or, as the case may require, the First-tier Tribunal, for an appropriate variation of my direction.

30. The further directions I have made were uncontroversial, and I need not explain them.

Colin Bishopp
Upper Tribunal Judge
President, First-tier Tribunal (Tax Chamber)

Release date: 9 August 2013