Neutral Citation Number: [2023] EWHC 1659 (Admin)

Case Numbers: CO/3580/2022
& CO/3710/2022

In the High Court of Justice
King's Bench Division
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd July 2023
Before:

MR JUSTICE RITCHIE

- -

BETWEEN

The King
On the applications of

VISION HR SOLUTIONS LIMITED

Claimant

- and -
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Defendant

VEQTA LIMITED

Claimant

- and –

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Defendant

Setu Kamal (instructed by direct access) for the **Claimants**
Alan Bates (instructed by **HMRC Solicitors**) for the **Defendant**

Hearing date: 28th June 2023

- -

APPROVED JUDGMENT

Mr Justice Ritchie:

The Parties

1. The Claimants are two companies who provide staff employers within the United Kingdom.

2. The Defendant collects taxes for His Majesty's Government.

Bundles

3. For the applications I was provided with a core bundle and an authorities bundle containing 6579 pages.

The Issues

4. The Claimants apply for permission for judicial review of a decision made on 9th February 2023 by the Defendant to list them under S.86 of the *Finance Act 2022*.

The Decision

5. The decision was worded as follows:

> "*My reasons*
> In deciding whether information relating to you should be published, I have considered the requirements under the legislation as well as the representations you made. I have considered whether the conditions in section 86 of the Finance Act 2022 have been satisfied. I have also considered whether it would be appropriate to publish the information. I have also considered what information is appropriate and proportionate to publish in order to achieve the purpose of the legislation as set out above.
> *The conditions in section 86*
> I suspect you are promoting relevant arrangements which enable, or might be expected to enable, any person to obtain a tax advantage. I also suspect that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage. The relevant arrangements see the individuals enter an employment in which the amount of money received for their services is said to be made as one payment of salary and another payment under a separate option agreement. No income tax or National Insurance Contributions (NIC) are deducted from the second payment. This conclusion has been drawn from analysing the contracts of employment, option agreements, timesheets, payslips and bank statements of scheme users as well as information and documents provided as part of the representations including the
> nominee agreement.

In my view, the arrangements involve an artificial separation of amounts of what is in substance remuneration paid by an employer to an employee. The separation is artificial as it does not reflect the true substance of the economic relationship between the payer and payee, and its sole or main purpose is to generate a purported reduction of income tax and NIC payable. The supposed benefit of the arrangements is that, unlike the position in relation to payments of salary, the employer purportedly does not have to deduct income tax and NIC from the option payment. In other words, the amounts of income tax and NIC that are accounted for to HMRC on the total contract value are reduced. Publication of the information would be for the purposes of: (a) informing taxpayers about risks associated with, or concerns the officer has about, the proposal or arrangements; and (b) protecting the public revenue.

Consideration of whether or not it is appropriate to publish the information

It is appropriate for information about you and the arrangements you are promoting to be published so that persons who might wish to participate in, or rely on, the arrangements are aware that HMRC has concerns about those arrangements. In HMRC's view, the arrangements you are promoting to taxpayers are unlikely to produce the intended result. Persons relying on the arrangements are therefore likely to be under-paying income tax and NIC. Accordingly, the arrangements are likely to lead to UK tax revenues not being paid. Further, persons who rely on the arrangements could find themselves liable for arrears of unpaid tax (and, potentially, penalties) which could in some cases be substantial. Further and in any event, the arrangements involve artificial separation of amounts of what are in substance all part of an employee's remuneration from their employer, leading to the employer not accounting for income

tax and NIC which would otherwise be deducted and accounted for by the employer by reference to the whole amount. This is unfair to UK personal taxpayers generally, who receive their salary payments from their employers after the full amounts of income tax and NIC have been deducted.

In addition, some employees who are using the arrangements appear not to be aware that income tax and NIC are not being deducted from all the amounts they receive from their employer. In that regard, HMRC have discovered instances where scheme users have apparently been unaware: (a) that part of the amounts they were receiving were said to be referrable to an option payment; and/or (b) that the employer was not deducting income tax and NIC on the full amount of the contract value. A contributing factor

to this misunderstanding may be that certain amounts are being deducted by you and/or other entities in the transaction chain, since the amount received by a scheme user into their bank account will not be the full contract value but will have been subject to deductions which the user may misunderstand as relating to tax liabilities.

As a result of the above points, it is in my view appropriate for HMRC to publish information about you and the arrangements you are promoting. This will serve to inform current and potential scheme users of the risk associated with, and concerns HMRC have, regarding the arrangements. It is important that this information be made publicly available so as to help current and potential scheme users make informed choices as to whether or not they participate in the arrangements. Identifying you by name will help current and potential scheme users locate the relevant information (e.g. when carrying out an online search using a search engine) and will promote clarity as to which arrangements the information published by HMRC is referring to.

Consideration of representations

In your representations and materials you filed with the Administrative Court, you have stated that publication of the information you were notified that we were intending to publish would have a negative impact on your business. I have taken this into account, and I accept that publication of the information may lead to a reduction in the numbers of people choosing to participate in the scheme. I note, however, that any such reduction would be as a result of the choices made by such persons after having considered the published information and having made an informed choice, rather than as a direct result of the publication. In my view, it is proportionate and appropriate for HMRC to publish the information. It is right that HMRC should alert taxpayers to its concerns regarding the scheme, so that taxpayers can make informed decisions. Conversely, it would not be appropriate to give priority to your commercial interests over those of existing or potential scheme participants, by allowing a situation to continue whereby taxpayers may be choosing to participate in the scheme in circumstances where they would not have done so had they not been kept in ignorance of HMRC's concerns. Publication of the information is also likely to reduce the numbers of taxpayers for whom income tax and NICs are underpaid, and will thus help protect the public revenue.

You have also made various legal arguments. I do not consider those arguments to have any merit, but I will address briefly what seem to be your main points. I note that the interpretation of the

law is ultimately a matter for the courts, and that your legal arguments are currently sub judice in the judicial review proceedings you have brought.

- You contend that section 86 of the Finance Act 2022 is incompatible with Article 63 of the Treaty on the Functioning of the European Union (TFEU) as well as with a principle of 'free movement of capital' which you say forms part of Retained EU Law following the United Kingdom's withdrawal from the EU. I disagree. Even assuming you were correct that there was still a retained right to 'free movement of capital' in UK law, section 86 was enacted in February 2022 and its validity cannot be challenged on the basis of alleged incompatibility with

What we are going to publish

We are going to publish the information shown below. We will publish it online. Go to www.gov.uk and search for 'Named tax avoidance schemes, promoters, enablers and suppliers'. This page gives more information about publishing and a link to where the information is published.' EU law (even if and insofar as those principles are part of Retained EU Law). In any event, even if section 86 had to be read subject to Article 63 TFEU and/or general principles of EU law, both section 86 itself and the decision I am now taking would be lawful as section 86 does not give rise to a restriction of the free movement of capital. Further and in any event, the publication of the information I have decided should be published is proportionate, even if and insofar as it would involve any impediment to the exercise of any retained right to 'free movement of capital' as you allege.

- You have also contended that publication of the information would constitute the determination of a 'criminal charge' (or the imposition of a 'criminal penalty') for the purposes of Article 6 of the European Convention on Human Rights (ECHR), which would have been imposed on you without a process including a right of appeal on the merits. I disagree. The publication of information to the effect that HMRC has concerns about the scheme you are promoting would not constitute a criminal charge or penalty.

- There would also be no breach of Article 1 of the First Protocol to the ECHR (the right to peaceful enjoyment of one's possessions). You do not have a property right in future business from taxpayers who might, having been informed of HMRC's concerns, choose not to participate in the scheme. In any event, even if the publication of information did constitute an interference with your property rights, the interference would be proportionate in pursuance of a legitimate aim.

With regard to data protection law, I note that this decision relates to the publication of information about a company. A separate decision letter will be issued in relation to any proposed publication of the names of individuals. In any event, I am satisfied that the information HMRC intend to publish is the minimum that is reasonably necessary to inform scheme users of the risks and to protect the public revenue. Insofar as there is any interference with any data privacy of individuals, this is lawful and proportionate.

Information we are going to publish

Name of Scheme Vision HR Solutions Remuneration Scheme

Details of persons suspected of promoting the scheme, or of being a connected person

1. Vision HR Solutions Ltd (Malta) – Offshore Promoter
2. Stuart John Brooke – Director of Vision HR Solutions Ltd (Malta)
3. Onshore Intermediary Addresses of promoters suspected of promoting the scheme

1. Vision HR Solutions Ltd (Malta): 1 Floor 2, Falzun Street, C/W Naxxa, Birkirkara, BKR1441, Malta
2. Onshore Intermediary Date of Publication To be determined Legislation under which the scheme/promoter has been Named Finance Act 2022

How the scheme is claimed to work – summary Scheme users provide services to end clients through Vision HR Solutions Ltd (a Maltese company) and its UK nominee and agent. The users enter into an agreement that grants Vision HR Solutions Ltd (Malta) an option on an annuity agreement. The remuneration for their services is artificially separated into salary and payments said to be in return for the option. The payments said to be in relation to the annuity option are made without the deduction of Income Tax and National Insurance contributions.

Any other information HMRC considers relevant to publish about these schemes HMRC has previously published information about

The Umbrella Agency Ltd, for which Stuart John Brooke is also a director. HMRC has also published a Spotlight on Disguised Remuneration Schemes involving annuity agreements (Spotlight 35) based on a predecessor arrangement. We may also include some or all of this information in letters and other communications we send to or share with your clients and others. If we receive additional information about you or the arrangements or proposed arrangements, we may publish or share that information. What happens next We will publish the information shown above on www.gov.uk. We aim to do this 14 days from the date of this letter."

The Claimants' scheme

6. The Claimants supply workers to UK based employers. I do not have any real understanding of the schemes which the Claimants have created because the Claimants' counsel had insufficient instructions to be able to explain them to the Court. That lack did not hold him back from asserting repeatedly that no tax liability would or could arise on the payments received by workers under the Scheme. In the core bundle were standard form agreements between Malta based companies, of which Stuart Brooke is a director, and the Claimants, English companies, which act as agents for the schemes. In addition, there were standard forms of Employer Contracts for work (which was to be evidenced by time sheets) which set out payments of a salary at the National Minimum Wage, plus expenses, plus a "discretionary profit share bonus". There was also an Employee standard form contract which included provision for a salary and "additional pay" by way of a discretionary profit sharing bonus.

7. At the start of submissions, the Claimants stated that the workers were paid in two parts: (1) a salary from which tax and NI are deducted and (2) in part by way of an "option" or "loan" or "benefits in kind", which terms were used interchangeably. No tax or NI was paid on these monthly or weekly payments because they were made under a scheme (the Scheme). When I asked how the Scheme worked the Claimants asserted that sums were advanced or loaned from the Malta company to the worker each week or month and the worker could then exercise an option to gain an annuity on those very sums. When I asked what percentage the annuity was set at, the figure of 5% was stated as an example. Counsel was unable to provide any other details. No written contract was provided to set out the details of the Scheme. The term (length) of the "loan" was unknown. The terms of the loan and the annuity were not in evidence and counsel had no instructions upon them. I struggled to understand how an employee could receive a loan for his work and then exercise an option to get an annuity as well. After the lunch adjournment the Claimants' counsel changed his submissions on the annuity terms and stated that the option was granted to the Malta company which, if exercised, would require the employee to pay back to the Malta company the annuity. This was all shrouded in mystery. I take into account that in judicial review claims the parties have a duty of candour. The Claimants came nowhere near fulfilling that duty in relation to the details of the Scheme.

The grounds for judicial review

8. The claim was started by a claim form dated 5.10.2022. The Claimants issued this some weeks after receiving notifications from the Defendant about the likelihood of publication of their names on the S.86 list.

9. The Claimants sought urgent injunctions but these were refused by Stacey J on 30.9.2022 because the Claimants had delayed making the applications, failed to send a letter before action, offered no cross undertakings and failed to provide a draft order.

The urgent injunctions were superseded by the Defendant agreeing not to publish until the Court had determined whether permission would be granted. This was refused by Sir Ross Cranston on 12.4.2023 on the papers for the reasons given. The Claimants renewed their applications before me. Their counsel appeared from abroad by video. HMRC's counsel was in Court in person.

10. **Ground 1: Free Movement of Capital rights breached by S.86**

This ground of application was based on the assertion that publishing would constitute an unjustified and disproportionate infringement of the Claimants' EU law right to the Free Movement of Capital ('FMOC'). The Claimants asserted that the FMOC right is still part of UK law post Brexit and that there is a low test of infringement, so that any national measure that is liable to dissuade from the exercise of a Fundamental Treaty Freedom constitutes an infringement. The Claimants asserted that in relation to justification, the criteria which S.86 applies are wider than the definition of tax avoidance in EU case law. The Claimants asserted that the Defendant is wrong to assert that FMOC has been "impliedly repealed" by S.86 (an assertion which the Defendant has never made and did not make in submissions). The Claimants submitted that the effect of S.86, when read with section 5(1) of the *Withdrawal Act 2018* ('WA 2018'), is that S.86 is subject to the right to FMOC. Eight points were made by the Claimants in support of these propositions. I set them out below:

8.1 S.5 of the WA 2018, provides that the principle of the supremacy of EU law does not apply to any enactment passed or made on or after Brexit day, but the Claimants submitted that S.5 "does not in itself bar that from being the case". The Claimants submitted that the Retained EU case law provisions had the effect that any principles laid down by, and any decisions of, the European Court are retained in UK law as they had effect in EU law immediately before Brexit day.

8.2 S.2 of the *European Communities Act 1972* which incorporated FMOC, and S.4 of the WA 2018, "which retained it" are constitutional provisions and cannot be repealed by implication (relying on the ruling of Laws LJ in *Thorburn v Sunderland City Council and other appeals* [2002] EWHC 195 (Admin) at para. 63. FMOC is a 'fundamental' EU freedom which is of constitutional importance and also of a macro-economic one. Continued reliance is placed on it by the City of London. Although it was not in the authorities bundle I set out S.2 of the *ECA 1972* here:

> "2. **General implementation of Treaties**
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and

> available in law, and be enforced, allowed and followed accordingly ; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

8.3 The Claimants submitted that Parliament did not intend to limit FMOC because the UK Government has undertaken that it would allow for the continuance post Brexit of FMOC, by entering into the *EU-UK Trade and Co-operation Agreement 2020* ('TCA') on the 30th December 2020 (ratified 30th April 2021). The Claimants asserted that their Scheme was within the following articles:

> *"Article 215* **Capital movements**
> 1. Each Party shall allow, with regard to transactions on the capital and financial account of the balance of payments, the free movement of capital for the purpose of liberalisation of investment and other transactions as provided for in Title II of this Heading."

It was submitted that the making of annuity payments by the Claimants constituted the making of investments by it. The Claimant also submitted that the provision of "benefits in kind" under the Scheme fall within Title II of Heading I of the TCA:

(a) Investment Liberalisation at Article 127 of the TCA.

(b) Cross-border trade in services under Article 134 of the TCA;(c) Financial services at Article 182 of the TCA;

So, the Claimant submitted that in the light of these new obligations arising under the TCA, S.86 ought to be read as subject to the right of FMOC and submitted that if S.86 were to be construed by this Court so as to override FMOC, then the section would be an infringement of the treaty.

8.4 The consequences of S.86 listing are punitive and constitute the bringing of a criminal charge for the purposes of Article 6 of the ECHR.

8.5 The proper interpretation of S.86 which is required by EU laws is strict, relying on Case C-182/08 *Glaxo Wellcome*, at para. 67.

8.6 S.86 does not limit itself to arrangements entered into after the withdrawal of the UK from the EU. In failing to do so, it catches and penalises exercises of FMOC made prior to the withdrawal, in reliance of the law at the time. The principle of non-retroactivity under Article 70 of the *Vienna Convention on the Law of Treaties* (1969) ('VCLT') means that the withdrawal of the UK does not affect its obligations under the Treaty on the Functioning of the European Union (TFEU) prior to that withdrawal:

> **"Article 70 Consequences of the termination of a treaty**

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) **does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination**." (My emboldening)

The WA 2018 does not address the question of historical obligations arising by reason of the Fundamental Treaty Freedoms such as FMOC - whether by denying them or accepting them. It was submitted that it follows that sub-paragraph (b) of Article 70 applies in relation to those obligations. Private law rights arising from international agreements have been protected since the decision of the House of Lords in *Playa Larga* [1981] 3 WLR 328 per Lord Bridge at page 351:

> "First, if a sovereign state voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character."

The failure to abide by the UK - insofar as the protection of any exercise of FMOC during the period of the UK's membership of the EU is concerned - would constitute a failure to comply with the VCLT. The UK is a signatory to the VCLT and has reaffirmed its commitment to it under Article 4 of the Trade and Co-operation Agreement, which I set out below.

> *"Article 4*
> **Public international law**
> 1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969."

A failure to comply with the VCLT would constitute a breach of the TCA or the law on which it is predicated. This lends support to the fact that section 86 was not intended to impliedly overrule FMOC.

8.7 S.86 strains the UK GDPR, the EU GDPR and Articles 5 and 25 of the WA 2018.

8.8 S.86 of the *Finance Act 2022* is a 'money bill' for the purposes of the *Parliament Act 1911*. This gives rise to the deduction that the bill is only concerned with taxation and other financial matters. This in turn means that a matter beyond such things, such as the repeal of FMOC, cannot have been an intended part of the bill.

Ground 2: Article 25 of the Withdrawal Agreement – the Right to Establish

11. The Claimants assert that the director of the Claimants, Stuart Brooke, moved his residence from the UK to Malta prior to Brexit day. Under Article 25 of the *Withdrawal Agreement*, he qualifies for the Right To Establish set out in Article 49 of the *Treaty on the Functioning of the EU* (TFEU). He is the sole shareholder of the Claimants. So it was submitted that any dissuasion from the conduct of this business constitutes an infringement of the right. Article 25 of the *Withdrawal Agreement* states:

> *"Article 25*
> **Rights of self-employed persons**
> 1. Subject to the limitations set out in Articles 51 and 52 TFEU, self-employed persons in the host State and self-employed frontier workers in the State or States of work **shall enjoy the rights guaranteed by Articles 49 and 55 TFEU**. These rights include:
> (a) the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down by the host State for its own nationals, as set out in Article 49 TFEU; …" (My emboldening)

Art 49 of the TFEU states:

> "*Article 49*
> (ex Article 43 TEC)
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is affected, subject to the provisions of the Chapter relating to capital."

The Claimants submitted that any dissuasion by the state of establishment is as objectionable as a dissuasion by the state of origin and S.86 publication is dissuasive. A dissuasion of this right must be justified and proportionate. The Claimants relied upon the following case law: Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 31; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 27; and judgment of 17 July 2008 in Case C-207/07 *Commission* v *Spain*, paragraph 60); and Case C-87/13 *X* [2014].

Stay and referral to the ECJ

12. In the grounds for judicial review the Claimants stated that they "would seek that the court stay proceedings and make a referral to the ECJ" under Article 25 of the *Withdrawal Agreement* in light of the novelty of the matters arising, which are of widespread consequence. In verbal submissions this was not mentioned. The written submissions were to the effect that the right of the director under Article 25 of the *Withdrawal Agreement* has 'direct effect' by virtue of Article 4(1) of the *Withdrawal Agreement.* Under Article 158 of the *Withdrawal Agreement,* if the court is of the view that a decision on direct effect is necessary to enable it to give judgment this Court may request the Court of Justice of the European Union to give a preliminary ruling on that question. The legislation of a Member State which exempts persons whose principal occupation is employment in that Member State from the obligation to pay contributions to the Scheme for self-employed persons but withholds such exemption from persons whose principal occupation is employment in another Member State has the effect of placing at a disadvantage the pursuit of occupational activities outside the territory of that Member State. Articles 48 and 52 of the Treaty therefore preclude such legislation.

13. No such application was made in writing by notice before the hearing and no application was made at the hearing for the permission hearing to be stayed pending referral to the ECJ.

Ground 3: Breach of EU GDPR and UK GDPR

14. This ground was withdrawn during submissions.

Ground 4: Article 5 of the Withdrawal Agreement

15. In written and verbal submissions the Claimants accepted that this ground was parasitic in grounds 1 and 2 and so will run or fall with them.

Ground 5: Human Rights breaches

16. The Claimants asked the Court to make a declaration of incompatibility of S.86 under S. 4 of *the Human Rights Act 1998*. Alternatively, it was submitted that S.86 ought to be construed so that it only applies insofar as a liability to tax has arisen and insofar as the person threatened with publishing has the right to appeal to an independent tribunal.

17. The Claimants submitted that S.86 constituted a violation of Article 1 of Protocol 1 of the *European Convention on Human Rights* (ECHR) because publishing constitutes an unjustified interference with the 'possessions' of the Claimants. In particular: (a) the legal ideas, advice and arrangements of the Scheme, which they had the right to apply under a license agreement, constituted their "possessions" because they gave rise to economic rights and had value; (b) the same applies to the goodwill which the Claimants had generated amongst their clients. The Claimants relied upon *Mullai and Others v. Albania*, no. 9074/07, § 97, 23 March 2010); *Iatridis v. Greece* (Application no. 31107/96) at paragraph 54.

18. *ECHR Article 6* The Claimants submitted that the Defendant did not consider whether the threat of publishing under S.86 constituted the bringing of a 'criminal charge' for the purposes of Article 6 of the ECHR. It was asserted that the test of whether there is a 'criminal charge' for the purposes of the Human Rights Act 1998 or ECHR is autonomous (see *Jussila v Finland*, Application no. 73053/01, paragraph 37). The Claimants submitted that they were "threatened with the decimation of" their business and the Claimants ought to have been given the right to seek a review by an independent tribunal which S.86 does not provide (relying upon *Ozturk v Germany (Application no. 8544/79* and the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no. 43, p. 23, first subparagraph).

Analysis and applying the law to the Grounds

19. This application is a wholesale attack on S.86 of the *Finance Act 2022* based on EU law through the prism of the WA 2018. S.86 grants a statutory power to the Defendant to publish information about suspected tax avoidance schemes. Parliament passed the section and granted the power in the terms set out 4 years after the Brexit date.

20. In my judgment the publication of such information helps protect the interests of taxpayers who may be considering whether to participate in tax avoidance schemes and also helps protect the Exchequer against loss of tax revenues. Absent the power in S.86 the Defendant might not be able to warn taxpayers that it has concerns regarding supposed tax saving schemes that are being marketed to taxpayers, even where HMRC believes those schemes involve tax avoidance. There is a public interest in taxpayers being warned of HMRC's concerns about such schemes, so that: (a) taxpayers can make an informed decision as to whether to enter into or remain in these schemes; and (b) any taxpayers who still choose to participate or decide to continue to participate in the schemes are put on notice of HMRC's concerns and can make financial provision for the fact that they may be assessed by HMRC for liabilities for unpaid taxes and penalties. Identifying the Claimants by name helps give effect to the public interest identified above. It assists current and potential scheme users to locate the relevant information and promotes clarity as to the specific arrangement that is the subject of HMRC's concern. If such taxpayers are not warned

of HMRC's concerns, they may find themselves unexpectedly unable to pay their overdue tax liabilities (and any associated penalties) if and when they are eventually assessed for amounts of unpaid tax. This may cause serious financial difficulties for those taxpayers and may also lead to HMRC ultimately being unable to recover amounts of tax which were properly due. S.86 sets out a statutory procedure by which the power to publish information about suspected tax avoidance schemes is to be exercised. The procedure includes a requirement for HMRC to serve a prior notice of intent on persons to be named in HMRC's proposed publication, and to afford those persons an opportunity to make representations. In this case the Defendant followed that procedure. S.86 (1) states that where an authorised officer suspects that a proposal or arrangements are a "*relevant proposal*" or "*relevant arrangements*", the officer may arrange for the publication of information (which may include documents) for certain purposes. Those purposes are: (a) informing taxpayers about risks associated with, or concerns the officer has about, the proposal or arrangements, or (b)protecting the public revenue. The terms "*relevant proposal*" and "*relevant arrangements*" are defined in S.234 of the *Finance Act 2014* and, by virtue of S. 86(13) have the same meaning in S.86 as follows:

> "a. Arrangements are "*relevant arrangements*" if – (a) they enable, or might be expected to enable, any person to obtain a tax advantage, and (b) the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.
> b. "*Relevant proposal*" means a proposal for arrangements which (if entered into) would be "relevant arrangements"."

21. S.86(2) provides that the information that may be published includes information "*identifying or about any person*" who is suspected to be, or to have been *inter alia* a promoter of the "*the proposal or arrangements*", "*a connected person*", "*a member of a promotion structure*", or to have "*any other role in relation to making the proposal or arrangements available for implementation*". S.86(5) provides that where HMRC is intending to publish any information under that section which identifies a person, that person must be notified and given a period of 30 days within which to make representations. Under S.86(6) HMRC must take those representations into account before any publication of information about that person takes place.

Relevant Facts

22. On 1 September 2022 (Veqta Limited) and 15 September 2022 (Vision HR Solutions Limited) HMRC wrote to each of the Claimants, in accordance with subsection S.86(5) notifying the relevant Claimant that the authorised officer was intending to publish certain information about that Claimant and inviting each Claimant to make representations within 30 days. At that stage, HMRC had not yet taken any final decision as to whether the information (or any of it) should be published. Each Claimant exercised its right to make representations, doing so by way of a letter dated

30 September 2022 (in the case of Veqta Limited) or (in the case of Vision HR Solutions Limited) by reference to its judicial review claim of 17 October 2022.

23. The Defendant considers that the Scheme creates an artificial separation of part of the contractual remuneration paid by an employer to an employee, one part being salary and the other part being described as an 'option payment'. The mechanism by which the separation supposedly produces a tax saving is that the amounts said to constitute 'option payments' are not treated in the same way as salary, in that the employer does not deduct Income Tax and NICs from the option payment. In other words, the employer does not account to HMRC, on behalf of itself and/or the employee, for amounts of Income Tax and NICs based on the total contract value for the employee's service to the employer. What the employee therefore receives into his or her bank account is made up partly of amounts from which tax has not been deducted at source. (The amounts may have been subject to other deductions at source, such as fees charged by the Claimants or other persons for facilitating the arrangement.) In HMRC's opinion, such an arrangement is unlikely to work in producing a genuine tax advantage. Persons relying on the arrangement are therefore likely to be under-paying UK tax. Accordingly, the arrangement is likely to lead to UK tax revenues that are properly due not being accounted for. Further, persons who participate in the arrangement could find themselves liable for accumulated arrears of unpaid tax (and, potentially, penalties) which could in some cases be substantial. A further reason for concern is that some employees who are using the arrangements may be unaware that their employer is not deducting Income Tax and NICs from all the amounts the employer is paying them. In that regard, HMRC assert that they have discovered instances where employee scheme users have apparently been unaware: (a) that part of the amounts they were receiving were said to be, or relate to, 'option payments'; and/or (b) that the employer was not deducting tax and NICs on such amounts.

Ground 1 - FMOC

24. Much of the Claimants' Skeleton Argument under this ground is focused on whether S.86 has, under the doctrine of implied repeal, operated impliedly to repeal the EU Treaty right to FMOC. The Claimants also contended that the right to FMOC continues to apply in UK law as a directly effective EU Treaty right despite Brexit. In my judgment the EU Treaties have ceased to be directly effective in UK law. Whilst the United Kingdom was a member of the European Union, individuals had rights to free movement, including FMOC, and this was part of in UK law because of the incorporation of EU Treaties into UK law by section 2(2) of the ECA 1972. Since Brexit day Parliament has, through S.s 1, 1A and 1B of the WA 2018, expressly repealed the ECA 1972. Some saving provisions were incorporated into the WA 2018 in S.s 2 to 6 but they do not assist the Claimants.

25. FMOC by Member States was set out in Article 63 of the TFEU thus:

> "Article 63:

> 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States **and between Member States and third countries shall be prohibited.**
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

FMOC to third party states (non EU Members) was set out in Article 64 thus:

> "1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.
> 2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets."

26. S.1 of the WA 2018 states:

> **"1 Repeal of the European Communities Act 1972**
> The European Communities Act 1972 is repealed on exit day."

27. The principle of FMOC was contained in the treaties which were incorporated into UK law by S.2 of the ECA 1972. Thus, they are no longer incorporated into UK Law after the Act came into effect. The Retained EU law was categorised in the WA 2018. S.2: retained UK legislation which put into effect EU regulations "EU-derived domestic legislation". That is not relevant to this application. S.3 dealt with "Direct EU legislation" which is again not relevant to this application. The Claimant relied on S.4 which did not preserve EU treaties after Brexit day, instead it preserved "rights and obligations" which existed immediately before Brexit day, so a claim can be made after Brexit for a breach of an EU obligation carried by the UK which arose before Brexit, for instance a *Francovich claim*. Nothing in that Act expressly retained

the FMOC which the Claimants assert. In any event S.5 specifically protects new legislation going forwards after Brexit day from the effect of the dominance of EU law which existed before Brexit day providing:

> "**5 Exceptions to savings and incorporation**
> (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
> (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day."

28. Thus, I do not consider that this ground is arguable on that basis. However, for the purposes of this renewal hearing, it is not necessary for the Court to decide whether any right to FMOC has arguably been preserved in UK law by S.s 2 to 6 of the WA 2018. However, assuming that the right to FMOC is still in force and preserved in UK law, Ground 1 is unarguable for the following reasons:-

(1) S.86 is primary legislation enacted by the UK Parliament in 2022, after Brexit Implementation Day. Therefore, it cannot be declared to be invalid, or disapplied, by any Court by reason of any supposed incompatibility with either discarded or retained EU Law. There is no basis or mechanism by which a provision of such an Act could properly be said to be invalid, or could be disapplied, by reason of alleged incompatibility with the TFEU and/or any discarded or retained EU Law.

(2) S.86 would not have involved any unlawful interference with FMOC even if the United Kingdom were still a member of the EU and even if the ECA 1972 had not been repealed because the EU right to FMOC did not grant any business engaged in, or promoting tax schemes involving, the movement of capital between EU Member States any right to exemption from reasonable and proportionate action by national authorities to protect individuals or businesses from being potentially misled, or to publish warnings for the benefit of such persons or to protect lawful taxation revenues. Rather, actions taken by national authorities in the public interest are lawful, even if they might impede or discourage certain exercises of free movement rights, provided those actions are proportionate and otherwise objectively justified. I consider that any argument by the Claimants that such action by HMRC is intrinsically disproportionate or otherwise unjustified is plainly hopeless firstly because the Claimants refuse to disclose the details of the Scheme and secondly because the Claimants success on judicial review would rest on showing that the Defendant's decision taken in relation to proportionality and justification was irrational and no such evidence has been provided.

Ground 2 - Art 25 of the Withdrawal Agreement

29. The assertion that a S.86 listing for the Scheme is a dissuasion from setting up in Malta is without merit. The fact that a director of the Claimant has chosen to move his residence to Malta is irrelevant to whether HMRC may lawfully publish information about the Claimant under S.86. The director's right to establish a business in Malta and to set up companies there, which he has done, is a matter for the Maltese authorities under Maltese law and if necessary for the EU courts. That director may have an EU law right of establishment in Malta if he holds citizenship of an EU Member State, but this is irrelevant to HMRC's powers under S.86.

30. The cases which the Claimants relied upon in submissions do not affect Parliament's power after Brexit to pass legislation concerning UK taxation of employees working in the UK and to empower the Defendant to give warning of suspected tax avoidance. The Claimants are operating through UK agents. The principal companies are in Malta, but all are being treated the same under S.86 as any UK company. The Director could have set up anywhere and the S.86 listing would have been to the same effect. It does not bite harder because he is in Malta, it is neutral as to the domicile of the owner of the suspect Scheme. This ground is unarguable.

Ground 3

31. This was withdrawn.

Ground 4

32. This was parasitic on grounds 1 and 2 and so is unarguable.

Ground 5 – Human Rights

33. It was agreed by the Defendant that contracts can be "possessions" within Article 1 of the First Protocol to the *European Convention on Human Rights* ("**A1P1**"). A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

34. Looking at the first paragraph, publication of information by HMRC would not deprive the Claimants of, or interfere with the peaceful enjoyment of, any of their "possessions", such as any valuable proprietary know-how regarding any tax avoidance arrangements they have conceived or developed. Publication of information does not prevent the Claimants from being able to market and utilise any intellectual property they own. Rather, publication simply provides potential users of a relevant scheme with an

indication of HMRC's concern regarding such scheme, so that such potential users can make their own decisions on an informed basis.

35. There is no realistic basis for alleging that the Claimants have an existing property right in future income from fees that may be charged to users of their Scheme which may be a tax avoidance scheme. The first point to be made is that the proper tax and NI to be paid by the Claimants and their workers is not their possession it is their liability which, if due, should be paid on time. The Claimants' level of future income is dependent on *inter alia* the choices freely made by potential customers and cannot now be said to constitute a 'possession' of the Claimants. If the publication of information under S.86 could constitute an interference with the Claimants' rights to peaceful enjoyment of their 'possessions' for the purposes of A1P1 (which I consider it could not), there is no arguable basis for finding that such interference is disproportionate. The proportionality of the interference would need to be judged by reference to the relevant facts, including the matters identified by HMRC in its decision to publish the information. Human rights law does not require that potential customers of a business be kept 'in the dark' about the risks of entering a potential tax avoidance scheme which a business is marketing to them, simply because some potential customers might, having been informed, choose not to take that risk.

36. Looking at the second paragraph, it was not suggested that the Defendant's decision on proportionality or justification was irrational of unjustified. A1P1 expressly permits the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. I consider this part of this ground to be unarguable.

37. With regard to the 'criminal charge' limb of Article 6 ECHR:- there is no realistic basis for alleging that publication of information under S.86 constitutes the determination of a 'criminal charge' or the imposition of a 'criminal penalty'. Such publication is not a punishment and does not have consequences comparable to a criminal conviction. Rather, publication is a mechanism by which HMRC may make potential users of tax avoidance schemes aware of HMRC's concerns, so that such persons are put on notice of HMRC's concerns and can make an informed choice as to whether to participate in the scheme.

Conclusions

38. CPR r. 54.4 requires applicants to gain permission for judicial review. Permission is granted where the applicant satisfies court that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence, see *R. Ex p. Hughes v Legal Aid Board* [1992] 5 Admin. L.R. 623. An arguable case is one which has a realistic prospect of success and where there is no discretionary bar to a remedy such as delay, an alternative remedy, the application being purely academic or hypothetical, or the applicant being unlikely to gain any benefit, see *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780 at [14(4)] and *Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) at [112].

39. I do not consider that any of the grounds put forwards has an arguable prospect of success for the reasons given above so permission is refused. I also consider that the Claimants have failed to comply with the duty of candour and so should not be permitted to pursue this claim.

END