



[2022] UKFTT 00082 (TC)

**TC 08413/V**

*PROCEDURE – Sch 36 Notices – dispute as to whether certain documents subject to legal privilege – applications for Tribunal to decide dispute under Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 – whether Applicants failed to comply with time limits in those Regulations – if so, whether Tribunal had jurisdiction to decide as a separate hearing - held, no compliance with the statutory time limits; no jurisdiction to decide in a separate hearing; instead directions issued for dispute to be decided as part of substantive appeals*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal numbers: TC/2021/01360  
TC/2021/01354; TC/2021/01355  
TC/2021/01361; TC/2021/01362  
TC/2021/01374; TC/2021/01375  
TC/2021/01376; TC/2021/01377  
TC/2021/01378; TC/2021/01380  
TC/2021/01381**

**BETWEEN**

**GEORGE H DRAFFAN  
SARAH JANE TURCAN  
DAVID TURCAN  
CHLOE TURCAN  
OLIVIA CAMPBELL-SLIGHT  
KATHERINE CROFTON-ATKINS,  
RALPH CLARK (AS EXECUTOR FOR ELIZABETH  
THOMSON)  
JOHN W TURCAN  
JAMES H TURCAN  
EDWARD INGLEFIELD  
FREDERICK INGLEFIELD  
HENRY JA TURCAN**

**Applicants**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON**

**The hearing took place on by video. A face to face hearing was not held because it had been listed during the coronavirus pandemic.**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.**

**Ms Aparna Nathan QC, instructed by Mazars LLP, for the Applicants.**

**Mr Harry Dixon, Litigator of HM Revenue and Customs, for the Respondents.**

## DECISION

### Summary

1. In 2002, the Applicants entered into certain tax planning arrangements known as the Mark II Flip Flop (“the Arrangements”). On 21 November 2019, HM Revenue & Customs (“HMRC”) issued the Applicants with Information Notices (“Notices”) under Finance Act 2008, Sch 36 (“Sch 36”). Each Notices contained a list of items which referred to one or more documents (respectively, the “Items” and the “Required Documents”).
2. In the view of the Applicants, some of the Required Documents are privileged and thus fall within Sch 36, para 23 (“the LPP Documents”). They provided an outline description to HMRC, and on the basis of that description, HMRC did not agree that the LPP Documents were privileged.
3. A procedure for resolving disputes about whether documents required under a Notice are privileged is set out in Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009, SI 2009/1916 (“the LPP Regs” or “the Regulations”).
4. On 3 December 2020, the Applicants applied to the Tribunal for the dispute as to the status of the LPP Documents to be determined under the procedures set out in the LPP Regs (“the Applications”). HMRC made a strike-out application on the grounds that the Applicants were out of time for the Tribunal to determine the dispute under the LPP Regs.
5. Having heard the submissions of both parties, I agreed with Mr Dixon that the Applicants were out of time, and that the Tribunal has no jurisdiction to hold the hearing for which the Applicants had applied. The LPP Applications are thus struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”).
6. As explained at §XX, that outcome does not mean that all the LPP Documents have automatically to be given to HMRC. Instead, the Tribunal will decide, as part of the substantive hearing of the Sch 36 Notice appeals, whether or not the LPP Documents attract legal privilege, and if not, whether any of the other grounds of appeal succeed.

### Schedule 36

7. Sch 36, para 23 is headed “Privileged communications between professional legal advisers and clients” and reads:

- “(1) An information notice does not require a person—
  - (a) to provide privileged information, or
  - (b) to produce any part of a document that is privileged.
- (2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.
- (3) The Commissioners may by regulations make provision for the resolution by the [tribunal] of disputes as to whether any information or document is privileged.
- (4) The regulations may, in particular, make provision as to—

- (a) the custody of a document while its status is being decided...

### **The LPP Regs**

8. The LPP Regs were made under the *vires* given by Sch 36, para 23(3). Reg 2 of those Regulations defines the terms used, including that “document” means “information, a document or part of a document” and a “document in dispute” means “a document over which there is a dispute between HMRC and a person who has been given an information notice as to whether the document is privileged”.

9. Reg 3 is headed “Application of these Regulations” and reads:

“These Regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either

- (a) during the course of correspondence, or
- (b) during the course of an inspection of premises under Schedule 36 as to whether a document is privileged.”

10. Reg 5 is headed “Procedure where information notice given in correspondence is in dispute” and reads:

(1) The following procedure applies where there is a dispute falling within regulation 3(a).

(2) On receipt of the information notice, the taxpayer, third party or person acting on their behalf shall—

(a) by the date given in the notice for providing information or producing documents, specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document;

(b) serve that list on HMRC.

(3) But no description of a document or type of document is required where such description would itself give rise to a dispute over privilege.

(4) Within twenty working days of receiving the list referred to in subparagraph (2), HMRC must notify the person who served the list of any documents on the list that it requires to be produced and which it considers are not privileged.

(5) On receipt of notification under paragraph (4), the taxpayer, third party or person acting on their behalf must make an application to the First-tier Tribunal to consider and resolve the dispute and must include copies of the documents which remain in dispute with that application.

(6) The taxpayer, third party or person acting on their behalf shall provide HMRC with proof of service under paragraph (2)(b).

(7) Service for the purposes of paragraph (2)(b) must take place within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf and HMRC but in any event no later than twenty working days after the date given in the notice for providing information or producing documents.

(8) An application under paragraph (5) must be made within a reasonable time to be agreed between the taxpayer, third party or person acting on their behalf

and HMRC but in any event no later than twenty working days of the date of the notification required under paragraph(4).”

11. In *Behague v HMRC* [2013] UKFTT 596 (TC) (“*Behague*”), Judge Mosedale considered this Regulation and then held at [10] (her emphasis):

“Combining the rather odd provisions of Regulation 5(2)(a) and (b), 5(6) and (7) it appears that the taxpayer is required to submit to HMRC his list of documents on which he claims LPP no later than twenty working days after the date that the information is required to be produced by the Information Notice.”

12. Reg 8 is headed “Finding of the First-tier Tribunal” and reads:

“When an application is made under regulation 5(5) or 6(5), the First-tier Tribunal shall—

(1) resolve the dispute by confirming whether and to what extent the document, is or is not privileged;

(2) direct which part or parts of a document (if any) shall be disclosed.”

13. Reg 10 is headed “Resolution of disputes by agreement”, and reads:

“A dispute falling within regulation 3 may be resolved at any time by HMRC and the person to whom an information notice has been given reaching an agreement, whether in writing or otherwise.”

### **The evidence**

14. I was provided with a Bundle of Documents which included:

(1) the Notice issued to Dr Draffan; I was told that the Notices issued to the other Applicants were in similar terms, and I have taken this to be the case; and

(2) various of the parties’ correspondence with each other, and with the Tribunal.

15. I was also provided at the beginning of the hearing with the LPP Applications for each Applicant, which had been accidentally omitted from the Bundle. There were no witness statements or oral evidence.

16. On the basis of the evidence summarised above, I make the findings of fact in the next part of this decision.

### **Findings of fact**

17. In or around 2002, each of the Applicants entered into the Arrangements. Both parties accepted that the Arrangements were similar to those considered in *Bowring v HMRC* [2015] UKUT 550 TCC. In HMRC’s view, that judgment was “a fact based decision” and each of the Applicants’ involvement in the Arrangements must be considered individually in order to see whether, and if so to what extent, the analysis in *Bowring* applied.

18. After the opening of enquiries into the Applicants’ self-assessment returns, HMRC asked informally for information about the Arrangements; HMRC then issued Sch 36 Notices, which were later withdrawn. On 4 October 2019, Mr Carl Whitehead of HMRC wrote to Mr Mackenzie of Mazars, the Applicants’ agent, and said that HMRC were about to issue new Sch

36 Notices, and that “if we are able to agree to the items which are LPP I would happily exclude them from the Notices. He then said:

“If we are unable to agree which items are LPP before the notices are issued your clients will have a further 20 days after the date for producing the documents to provide a list of all the LPP items. This does not extend the time for your clients to produce the non LPP items nor does this extend the statutory appeal dates. Once I have your lists of LPP items I will consider these and let you know whether I agree within 20 days. If I disagree I will let you know which items I still need and your clients will have 20 days to either provide these or refer the matter to the tribunal. At the end of this process we will have a decision on what is legally required and your clients will need to provide these items.”

19. On 21 November 2019, Mr Whitehead issued the Applicants with the Notices, to which a list of Items was attached. The Notices said that the Required Documents were to be provided by 2 January 2020. Under the heading “Legal Professional Privilege”, the Notice included this passage (my emphasis):

“If you decide to withhold information or documents because legal professional privilege applies, you need to let me have a list of each piece of information or each document being withheld. You must make sure that I receive the list no later than **30 January 2020**. The list should say why you are not providing the items and it should describe each piece of information or document being withheld. For example, "I am not providing the following items because I think that legal professional privilege applies to these: (1) letter dated dd/mm/yyyy from [name of client] to [name of lawyer] asking for advice on the law; (2) letter dated dd/mm/yyyy from [name of lawyer] to [name of client] giving advice on the law". You do not have to describe a document if describing it would mean revealing private information covered by the privilege.”

20. On 26 November 2019, a “Teams” meeting took place between HMRC (Mr Whitehead and Mr Bentley) and Mazars (Mr Mackenzie, Ms Riddoch and Mr Lewis). Most of the meeting related to a discussion of *Bowring* and to various Items in the Notices. At the end of the meeting, Mr Whitehead asked how Mazars proposed to take things forward, and then said he had already excluded from the Notices documents that appeared to be covered by LPP, but if there were any others they needed to be identified within the time which had already been specified in the Notices. Mr Whitehead added that he could not readily see that any of the Required Documents would be subject to LPP. Mr Mackenzie said he would check with his clients.

21. On 23 December 2019, the Applicants had appealed to HMRC against the Notices issued to them, on the grounds that some of the information was not “reasonably required”; some was not in their “possession or power” and some was legally privileged.

22. On 17 January 2020, Mr Whitehead wrote to Mr Mackenzie, saying he disagreed that any of the Items were not reasonably required, and was “surprised” that Mazars was saying that some were not in the Applicants’ possession or power, given the length of time the enquiry had been running. Under the heading “legal privilege”, he said:

“The matter of legal professional privilege is covered in the notice. The time limit for letting me have your list of privileged information and documents expires on 30 January 2020.”

23. That deadline was not met, and the Applicants asked for a statutory review. On 27 July 2020 the Review Officer, Ms Watson, issued her decision. Under the heading “legal privilege”, she said “In the appeal your agent claimed that some of the information requested is legally privileged, however they have not explained which items they consider these to be”. She referred to the LPP Regs; set out Reg 5 in full, and then said:

“Considering the above this is not a ground of appeal I am able to consider and would be for the First-tier Tribunal to decide. Following my review conclusion if you decide not to appeal to [the] tribunal but to provide the information and documents provided then the list of information/documents you believe to be legally privileged should be provided to HMRC no later than 30 days after the date of my conclusion letter.”

24. Mazars were also acting for another participant in the Arrangements, Mr Colin Wiseman. On 6 August 2020, a hearing took place before the FTT (Judge Bailey) of an application under the LPP Regs made by Mr Wiseman, on the basis that twelve documents required by the Notice issued to him were privileged. Judge Bailey issued her decision on 24 August 2020; she found that ten of the twelve documents were privileged and thus were not required to be disclosed by the Notice, and the remaining two were not subject to LPP. On 19 October 2020, Mr Wiseman applied for permission to appeal to the Upper Tribunal (“UT”) in relation to the two documents, and on 30 November 2020, Judge Bailey gave permission. However on 27 August 2021, Mr Wiseman notified the UT that he wished to withdraw his appeal, and the UT gave permission for him to withdraw.

25. It was common ground that the Applicants only provided their lists of LPP Documents (“the LPP Lists”) to HMRC on 9 November 2020. On 12 November 2020, Mr Whitehead emailed Mr Lewis at Mazars, saying (*italics in original*):

“I have looked at the lists of documents for the various participators. During our teleconference call we explained that the lists of LPP documents had to be provided within the time limits set out in the Reviewers’ decision letters. You did not provide the lists within these time limits to enable HMRC to take a view of the matter.

In the call you pointed out that the documents for each participator were mostly identical to those already supplied to the tribunal in the case of Mr Wiseman. You suggested that as the appeals were taken forward it might be possible for HMRC and yourselves to agree in the statements of fact for the tribunal that identical documents had already been accepted as LPP at an earlier tribunal for another participator [Mr Wiseman].

There are two points I would like to make. Firstly, since our teleconference Mr Wiseman has disputed the tribunal’s decision in relation to the LPP documents. Secondly you say: “*You will note that the documents are equivalent in timing and description to those for Mr Wiseman, since the solicitor is communicating with the participants in the same context.*” I would point out however that the lists differ considerably from Mr Wiseman’s and indeed from each other. The suggestion that we are dealing with identical documents is incorrect. We agreed to see if there was any merit in your proposals. Having considered the matter in the light of the above it is

clear there is not. HMRC’s position remains that each appeal must be decided on its own merits. I note that you have not provided lists for four participators but nor have you indicated that they propose to produce the documents. No doubt the position will become clear as the appeals progress. If you wish to explain this now, please feel free to do so.”

26. On 3 December 2020, the Applicants applied to the Tribunal for the dispute as to the status of the LPP Documents to be determined under the LPP Regs. The Applications read “under the terms of the statutory process given by SI 2009/1916, we are hereby applying to the Tribunal to resolve the dispute about whether LPP applies to the documents”.

27. On 4 June 2021, HMRC applied for the Applications to be struck out under Rule 8(2)(a) of the Tribunal Rules, which reads:

“The Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them.”

### **Mr Dixon’s submissions**

28. Mr Dixon made the following submissions, with which I agree.

(1) The Tribunal only had the jurisdiction given by Reg 8 of the LPP Regs if an applicant complied with the procedure set out in Reg 5. That regulation set out a series of steps, each with specified time limits. The first of these was that the Applicant was to “specify in a list each document, required under the information notice, which is in dispute, with a description of the nature and contents of that document” and serve that list on HMRC “by the date given in the notice for providing information or producing documents”. In the case of the Applicants, the date by which the list was required was 20 working days after the date for compliance with the Notice, in accordance with Reg 5.

(2) The time limits set by the Regulations were mandatory. Reg 5(7) said that the Applicants “must” provide the list of documents no later than twenty working days after the date given in the notice for providing information or producing documents. This was also Judge Mosedale’s view in *Behague*; she said at [14]:

“I note in passing that the LPP Regulations give this Tribunal no power to extend time for service of the list of documents to HMRC. While Rule 5(3)(a) of this Tribunal's rules may give this Tribunal power to extend time limits in other regulations, that can only be in relation to the conduct of proceedings before the Tribunal. So while it might give the Tribunal power to extend time for compliance with Regulation 5(5) and 5(8) which deal with the time for notification of the dispute to the Tribunal, although I express no view on this, it does not give power to extend time in relation to something which happened before notification. The Regulations give HMRC no power to extend time either.”

(3) Mr Dixon accepted that this passage was *obiter*, as Mr Behague had met the relevant time limits; Mr Dixon also acknowledged that as an FTT judgment *Behague* did not create a precedent. However, he invited the Tribunal to follow it because it was correct.

(4) Mr Dixon also invited the Tribunal to endorse this passage from *Behague* at [9]:



“The LPP Regulations lay down strict time limits. No doubt the reason for this is to ensure a claim for LPP does not slow down any more than absolutely necessary compliance with a well-founded Information Notice.”

(5) Mr Dixon confirmed that the LPP Documents would not automatically be disclosable to HMRC if the Applications were struck out. It is clear from Sch 36, para 23 that privileged documents are outside the scope of a Notice, and that this exclusion is consistent with wider case law. However, he submitted that it would be for the Applicants, at the hearing of their appeals, to make their case as to the existence of privilege, rather than there being a separate hearing.

### **Ms Nathan’s submissions, Mr Dixon’s response and the Tribunal’s view**

29. In this section of the decision, I have set out each of Ms Nathan submissions, followed by Mr Dixon’s reply and my view. Her first submission is that the time limits in the LPP Regs had been met. However, if the Tribunal were to find against her on this point, she made a number of other submissions in the alternative.

#### *The date by which the list had to be served*

30. Ms Nathan said that it followed from Reg 3 that the time for serving the list of LPP documents on HMRC only began to run from the date on which “there is a dispute” between HMRC and the recipient of a Notice, as to whether a document is privileged. She submitted that the dispute only came into existence when Mazars received Mr Whitehead’s letter of 12 November 2020, which ended by saying:

“We agreed to see if there was any merit in your proposals. Having considered the matter in the light of the above it is clear there is not.”

31. Mr Dixon responded by saying this was clearly incorrect. He pointed out that Reg 3 starts from the premise that the dispute arises “during the course of correspondence” and that, once there is such a dispute, the strict timetable set out in the LPP Regs runs from the date on which the Notice is given. The draftsman therefore envisaged that the dispute had arisen *before* the Notice was issued, as had been the position in the Applicants’ case.

32. I agree with Mr Dixon. It is clear from Mr Whitehead’s letter of 4 October 2019 that the parties were already in dispute about LPP before the Notices were issued: his letter said that “if we are able to agree to the items which are LPP I would happily exclude them from the Notices” but if they could not come to an agreement, he would include them. There was no such agreement and Mr Whitehead included the LPP Documents in the Notices, together with details of the compliance dates set by the LPP Regs. As a result, the Applicants had to serve the LPP Lists by 30 January 2020. They were instead provided over nine months later, on 9 November 2020. The Applicants did not comply with the time limits set out by the LPP Regs.

#### *HMRC’s power to agree*

33. Ms Nathan referred to Reg 10 of the LPP Regs, which provided that HMRC and the recipient of a Notice “may be resolved at any time”. She submitted that this “underlines the fact that the production of a list of documents pursuant to Regulation 5(2) is not the only basis upon which the issue of whether documents are privileged can be determined” by HMRC.

34. Mr Dixon responded by saying that it was unsurprising that HMRC had the power to agree a dispute with a recipient of a notice, but this does not change the machinery in the

Regulations which applies where there has been no settlement and the dispute is ongoing. Again, I agree with Mr Dixon. Reg 10 simply allows the parties to settle the dispute outside the terms of the Regulations.

#### *Care and management*

35. Ms Nathan submitted that HMRC had a wide-ranging power of care and management. She referred to *IRC v National Federation of Self-Employment and Small Business Ltd* [1982] AC 617, where Lord Diplock said at p 636 that HMRC had:

“a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection.”

36. That passage was cited by Lord Hoffman in *R (oao Wilkinson) v HMRC* [2005] 1 WLR 1718, and he then said at [21]:

“This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time.”

37. Ms Nathan also referred to s 9 of the Commissioners for Revenue and Customs Act 2005, which grants HMRC ancillary powers to do anything they think “necessary or expedient in connection with the exercise of their functions” or which is “incidental or conducive to the exercise of their functions”.

38. In Ms Nathan’s submission, HMRC could therefore use these powers to accept the LPP Lists after the deadline set by the Regulations, and they were wrong not to do so. She said that the Applicants had a good reason for their delay, because Mazars believed the LPP issue would be resolved by *Wiseman*, and she said HMRC knew the delay had been caused by that belief.

39. Mr Dixon disagreed. He said this was not a case involving “the interstices of the tax legislation”, but instead one where the Applicants had failed to follow the time limits provided by very prescriptive regulations. Even if he was wrong in that, any such challenge had to be brought by judicial review, and the Tribunal did not have the jurisdiction to decide public law disputes, unless that jurisdiction was explicitly or implicitly given by the relevant statutory provisions, which was not the case here.

40. Mr Dixon also disagreed with Ms Nathan’s submissions about there being a good reason for the delay. He submitted that the Applicants had been clearly on notice as to the time limit for serving the list: it was set out:

- (1) in Mr Whitehead’s letter of from 4 October 2019;
- (2) in the Notice itself, issued on 21 November 2019;
- (3) during the Teams meeting on 26 November 2019; and
- (4) in Mr Whitehead’s letter of 17 January 2020.

41. I agree with Ms Nathan that HMRC have a wide managerial discretion, but I also agree with Mr Dixon that the Tribunal has no inherent jurisdiction to rule on whether HMRC should have exercised that discretion. Ms Nathan did not seek to argue that any statutory provision gave the Tribunal the necessary jurisdiction, and in my view she was correct not to do so.

42. I merely note that Mr Dixon is clearly correct to say that the Applicants were given plenty of warning as to the deadline for serving the LPP Lists, and it is thus difficult to see why HMRC should have relaxed the time limit, were such a relaxation to fall within their care and management discretion.

*The purpose of the LPP Regs*

43. Ms Nathan said that the purpose of the LPP Regs was set out in the Explanatory Note, which included these passages:

“7.2 During consultation on Schedule 36 it became apparent that disputes about whether or not information requested by HMRC was covered by legal professional privilege had no satisfactory way of being resolved. The recipient of a notice would have to appeal the notice, or where it was issued by a tribunal, they would have to seek judicial review. Alternatively, they could just refuse to provide the information and risk incurring penalties ...

7.3 It seemed sensible that there should be some way to resolve disputes about whether information requested in a Schedule 36 notice was covered by professional privilege. External respondents to consultation strongly supported such a mechanism to reduce costs for their clients. The stalemate created by disputes could also adversely affect relationships between HMRC on the one hand and taxpayers and their advisors on the other. An independent procedure was seen as one way of preventing deterioration in relationships.”

44. Ms Nathan submitted that it was therefore clear that the aim of the LPP Regs was “to permit disputes about whether documents sought by the Respondents are privileged to be resolved in a sensible and cost-effective way”, and that the Applications were consistent with that purpose as they would enable the LPP Regs “to be applied to the documents in relation to which legal professional privilege is asserted”.

45. Mr Dixon responded by referring to Judge Mosedale’s *dictum* (set out at §XX) that the reason the Regulations include strict time limits is “to ensure a claim for LPP does not slow down any more than absolutely necessary compliance with a well-founded Information Notice”, and that it was not possible to rely on the purpose of a set of regulations but ignore their actual provisions.

46. I agree with Judge Mosedale that the purpose of the tight timetable in the Regulations is to minimise delays in compliance. That this is right is consistent with judicial *dicta* as to the purpose of Sch 36 itself. In *Derrin Brothers Properties Ltd and others v HMRC and others* [2016] EWCA Civ 15 (“*Derrin*”) the Chancellor, Sir Terence Etherton, gave the only judgment with which Davis and Vos LJ both agreed. He said at [66] that “in considering the proper interpretation of Sch 36, it is important to have in mind its background and its purpose”, and continued:

“[67] Sch 36, like its predecessor scheme in s 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community. So far as concerns the interests of the wider community, the

statutory scheme is intended to assist HMRC in its investigation of tax avoidance and tax evasion. Complex and sophisticated corporate and international arrangements are often the hallmark of schemes to avoid or evade tax and are often intended to throw a veil of obscurity over the reality of underlying transactions...

[68] The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise..."

47. Sir Terence Etherton then applied those principles to the particular case before the Court, which concerned "without notice" applications to the Tribunal.

48. That the passages cited above relate to Schedule 36 as a whole was recently confirmed by the UT (Judges Richards and Scott) in *X v HMRC* [2020] UKUT 29 (TCC) they said at [66] that "the statements in *Derrin* as to the overall scheme of the legislation and the purpose behind it clearly command respect and in our opinion are of considerable relevance to the correct construction of Schedule 36".

49. Sch 36 itself is therefore designed to reduce the risk that taxpayers can "delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise". It is entirely consistent with that purpose that the LPP Regs set out a series of steps which begin with the issuance of the Notice and ends a maximum of 60 working days later.

#### *Other appellants*

50. Ms Nathan said that Mazars were aware that HMRC had not applied the time limits in the LPP Regs to a case involving a different taxpayer. However, the Applicants put forward no evidence was provided and the taxpayer was not named.

51. Mr Dixon said he and those instructing him were unaware of any such case, and pointed out that Ms Nathan had not led any evidence to support her submission. He added that it was in any event entirely irrelevant to the issue before the Tribunal, which was whether or not to strike out the Applications of these particular Applicants.

52. I agree with Mr Dixon. Not only is there no evidential basis for this submission, but it is irrelevant to the issue I have to decide, which is whether to strike out *these Applications*. Even if a HMRC officer were to have failed to apply the LPP Regs in another case, that makes no difference to the facts and the law on which this decision must be founded.

53. To the extent that Ms Nathan's submission is based on HMRC taking a different approach in another case, the only possible route of legal challenge would be by judicial review. However, given that HMRC are here following the wording of the LPP Regs, it would be surprising if such a challenge were to be successful.

#### *The time limit in Behague*

54. Ms Nathan submitted in her skeleton argument that the time limit was not met in *Behague*, but Judge Mosedale nevertheless proceeded to determine the application. Mr Dixon pointed to [13] of that judgment, which reads:

“In this case the due date for submission of the information under the Information Notice was 28 May 2012. The appellant provided to HMRC its list of documents on which it claimed privilege on 20 June 2012, which I find was within 20 working days of 28 May. This was therefore done in time. Its submission to the Tribunal, on 22 June, was early rather than late.”

55. Ms Nathan did not repeat this submission in her oral pleadings, so as to explain why she disagreed with Judge Mosedale’s calculation of the number of working days. By my own calculation, noting that there were bank holidays on both 4 and 5 June that year, the list was provided on the fifteenth working day. In any event, Judge Mosedale understood that the time limit had been met, and proceeded on that basis.

#### *The Tribunal’s jurisdiction*

56. Ms Nathan submitted that in a case such as this, where the Applicants had appealed the Notices to the Tribunal, the Tribunal plainly has the jurisdiction to hear and decide matters which relate to those appeals, and that must include a dispute about LPP.

57. Mr Dixon pointed out that the Applications were specifically made “under the terms of the statutory process given by SI 2009/1916”.

58. I agree. Whether or not the Tribunal would have had jurisdiction under its normal case management powers was not the issue I had to decide. The Applicants had not applied, in the alternative, for the Tribunal to exercise its case management powers to call a hearing to decide the issue of whether the LPP Documents were covered by legal privilege. Nevertheless, the question of the Tribunal’s case management jurisdiction is relevant to the onward progress of these appeals and I return to it below.

#### **Decision on the strike out application**

59. For the reasons set out above, I find that the Tribunal has no jurisdiction to decide the Applications. As set out above, Rule 8(2)(a) provides:

“The Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them.”

60. As a result, I allow HMRC’s application and strike out the Applications under Rule 8(2)(a) of the Tribunal Rules.

#### **Case management powers**

61. I gave my decision to strike out the Applications at the hearing, but reserved the reasons. The last part of the hearing concerned how to move forward with the appeals against the Notices.

62. It is clear from Sch 36, para 23 that privileged documents are outside the scope of a Notice and thus that the issue of whether the LPP documents are legally privileged needed to be decided by the Tribunal.

63. Ms Nathan submitted that the Tribunal should direct a separate hearing to decide that issue, followed at a later date by the hearing of the substantive appeals; Mr Dixon submitted that the LPP dispute should be decided by the Tribunal as part of the substantive hearing.

64. Rule 5 of the Tribunal Rules is headed “Case management powers” and so far as relevant reads:

- “(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) ...
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction:
  - (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
  - (c)-(e) ...
  - (f) hold a hearing to consider any matter, including a case management hearing;...”

65. I considered whether Rule 5(3)(f) gave the Tribunal the jurisdiction to hold a hearing to decide whether or not the LPP Documents were legally privileged. I noted that:

- (1) Rule 5 begins by saying that it is “subject to the provisions of the 2007 Act and any other enactment”; and
- (2) Rule 5(3)(a) provides that the Tribunal’s power to extend the time for complying with any rule does not apply where that extension would conflict with a provision of another enactment setting down a time limit.

66. The LLP Regs apply “where there is a dispute between HMRC and a person to whom an information notice has been given...as to whether a document is privileged”, see Reg 3. Where that dispute has arisen in the course of correspondence rather than during an inspection of premises, Reg 5 states that “the following procedure applies”, namely that:

- (1) the recipient of the Notice “shall” serve on HMRC a list of documents which are said to be covered by LPP, no later than twenty working days after the date that the information is required to be produced by the Information Notice;
- (2) HMRC “must” notify the recipient within twenty working days of their view of the documents on the list; and
- (3) on receipt of that notification, the recipient “must make an application to the First-tier Tribunal to consider and resolve the dispute”.

67. When such an application is made, Reg 8 of the LPP Regs provides that the Tribunal “shall resolve the dispute”.

68. The LPP Regs thus set out a statutory procedure for resolving disputes about LPP by way of a separate hearing. In my judgment, the Tribunal cannot exercise its case management powers to direct a hearing to determine the LPP dispute without reference to the LPP Regs because that is precluded by the opening words of Rule 5.

69. If the Tribunal were to direct a hearing in a case such as this, where the Applicants had failed to meet the statutory time limits, the Tribunal would in terms be extending the time for compliance, and undermining the very prescriptive LPP Regs. Instead, the Tribunal only has

the jurisdiction to hold a separate hearing if the procedure in the LPP Regs is followed. The Rules cannot be used to by-pass the strict time limits there set out.

70. Even if I were to be wrong in this, so that the Tribunal retains jurisdiction despite the LPP Regs, I would have found that it was not in the interests of justice to direct a separate hearing of this LPP dispute, because it would further delay the substantive appeals against the Notices.

71. As a result, the issue as to whether the LPP Documents are privileged must be decided as part of the hearing of the appeals against the Notices. I have issued separate directions in relation to that hearing at the same time as issuing this decision.

**Appeal rights**

72. This document contains full findings of fact and reasons for the decision to strike out the Applications. 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.

**ANNE REDSTON**  
**TRIBUNAL JUDGE**  
**Release date: 28 FEBRUARY 2022**