



**TC03495**

**Appeal numbers: TC/2010/05505, TC/2010/05506, TC/2010/05508 & TC/2010/05509**

*CASE MANAGEMENT – witness statements - application by Respondents to exclude or recast parts of statement of witness of fact on grounds they are expert evidence or irrelevant – application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE LEASING NO. 1 PARTNERSHIP  
THE LEASING NO. 2 PARTNERSHIP**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**Sitting in public in London on 4 April 2014**

**Mr Jolyon Maugham, counsel, instructed by Berwin Leighton Paisner LLP, for  
the Appellants**

**Ms Aparna Nathan, counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is a case management decision in relation to the appeals which are not yet listed for hearing.

5 2. The Respondents (“HMRC”) applied, on 4 February 2014, for a direction in relation to the witness statement of Gregory Stoloff, a witness for the Appellants, that:

(1) paragraphs 13-30, 52-62, 71 and 88-89 of the witness statement should be excluded on the basis that they are expert evidence rather than evidence of a witness of fact; and

10 (2) paragraphs 43, 44 and 72 should be recast in order to exclude expert evidence.

3. HMRC also applied, on 2 April 2014, for the Directions released on 9 July 2013 to be amended. The amendments proved not to be particularly contentious and, at the conclusion of the hearing, I left the parties to agree the precise terms of the amended directions which will be issued in due course. I say no more about those directions in this decision.

4. I had not been provided with a copy of Mr Stoloff’s witness statement before the hearing but I read it briefly at the hearing and have done so again more carefully, together with the parties’ statements of case, before writing this decision.

### 20 Background

5. The application in relation to the witness statement of Mr Stoloff was made in the context of an appeal by the Appellants against a decision by HMRC to amend the Appellants’ tax returns for the years 2005-06 and 2006-07. The Appellants were established as Jersey general partnerships to carry on, separately, a trade consisting of the acquisition and leasing, by way of both operating and finance leases, of equipment, plant, machinery and vehicles. HMRC took the view that the Appellants were established in order to implement a marketed tax avoidance scheme and were not carrying on any trade. HMRC also contended that certain ‘swap’ transactions were not part of any trade or, if they were, the payments under the swaps were not deductible because they were not incurred wholly or exclusively for the purposes of the trade and/or were of a capital nature.

6. Mr Stoloff is not one of the partners in the Appellants. He is an accountant by training. After a period with Arthur Andersen, he was employed by various investment banks, working primarily in capital markets, securitisation and structured finance for a period of some 20 years. Mr Stoloff states in his witness statement that, during his time in banking, he was involved in numerous lease transactions. After leaving banking, Mr Stoloff joined Matrix Group, the promoter of the alleged tax avoidance scheme, as a consultant.

### Submissions

40 7. At the hearing, Ms Aparna Nathan, who appeared on behalf of HMRC, submitted that Mr Stoloff was not an expert but a witness of fact in the appeal and it was not appropriate or permissible for such a witness to give evidence that went beyond his direct knowledge of the facts. HMRC’s position was that the paragraphs that they objected to contained matters of argument. Ms Nathan submitted that a

witness of fact should not be allowed to make general assertions on background information.

5 8. Ms Nathan referred me to the Civil Procedure Rules (“CPR”) on the subject of the content of witness statements. She relied on CPR 32.4 which describes a witness statement as “a written statement signed by a person which contains the evidence which that person would be allowed to give orally”. Ms Nathan acknowledged that the CPR did not apply to the Tribunal but submitted that they were a useful guide.

10 9. Ms Nathan also relied on passages from the judgment of Sir Terence Etherton C in *JD Wetherspoon Plc v Harris & Ors* [2013] EWHC 1088 (Ch). The judgment contained the reasons for the Chancellor’s decision to grant an application by the claimant that most of a witness statement by a witness for some of the defendants, Mr Goldberger, should be excluded from the evidence in the case. The relevant passages are at [33] and [39]-[40] which were as follows:

15 “33. The vast majority of Mr Goldberger's witness statement contains a recitation of facts based on the documents, commentary on those documents, argument, submissions and expressions of opinion, particularly on aspects of the commercial property market. In all those respects Mr Goldberger's witness statement is an abuse. The abusive parts should be struck out.

20 ...

25 39. Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the Chancery Guide (7th ed), which is as follows:

30 ‘A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they

35 may arise in the course of the trial.’

40 40. Nor would Mr Goldberger be permitted to give expert opinion evidence at the trial. A witness of fact may sometimes be able to give opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account. ... Mr Goldberger, however, has expressed his opinions on market practice by way of commentary on facts of which he has no direct knowledge and of which he cannot give direct evidence. In that respect he is purporting to act exactly like an expert witness giving opinion evidence. Permission for such expert evidence has, however,

45 been expressly refused.”

10. Mr Maugham submitted that HMRC’s application was unsustainable. He contended that Mr Stoloff’s evidence was not expert evidence but direct evidence of how the swaps and leasing markets worked based on his experience in banking at a senior level. There could be no objection to a witness of fact being an expert or

giving evidence as to how and why they exercised their professional judgment. The primary issue in the appeal is whether the Appellants were carrying on a trade which was a mixed question of fact and law.

5 11. In reply, Ms Nathan said that HMRC's case was not that Mr Stoloff could not speak about his expertise in relation to the implementation of the scheme but only that he should not make general unsubstantiated statements. HMRC's position was that the challenged parts of Mr Stoloff's witness statement were simply not relevant to the issue before the Tribunal and should be excluded

### **FTT Rules**

10 12. In considering the application, I seek to give effect to the overriding objective in Rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules") to deal with cases fairly and justly. I also have in mind Rule 15(2)(a) of the FTT Rules which provides that the Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. Rule  
15 15(2)(b)(iii) allows the Tribunal to exclude evidence, which would otherwise be admissible, where it would be unfair to admit it.

### **Discussion**

13. HMRC object to paragraphs 13-30 of Mr Stoloff's witness statement. In paragraph 12 his witness statement, Mr Stoloff states that he provides background to the leasing industry derived from his involvement over the years. In paragraphs 13-18  
20 of his witness statement, he sets out general background such as the distinction between finance leases and operating leases and the reasons why banks and others buy, hold and sell leasing portfolios. At paragraphs 19-26, Mr Stoloff describes Matrix's interest in the leasing industry. At paragraphs 27-28, Mr Stoloff comments  
25 on the leases acquired by the Appellants but his comments in paragraph 28 are reflected in paragraph 12 of HMRC's Further Amended Statement of Case and it seems strange to me that HMRC should now object to such evidence. Some of Mr Stoloff's evidence is clearly hearsay, eg when he discusses Investec's leasing business and motives for selling the lease portfolio in paragraphs 16, 25 and 29, but the  
30 Tribunal can and does accept hearsay evidence, although it will carry less weight than direct evidence. In other cases, eg when talking about Matrix for whom he was a consultant or why, in paragraph 30, Investec's lease portfolio was attractive to the Appellants, it is unclear whether Mr Stoloff is speaking from his own or from others' knowledge but that can be clarified in cross-examination and the Tribunal will give  
35 such weight to that evidence as they think appropriate. It seems to me that even where passages of Mr Stoloff's evidence stray into opinion they are part of Mr Stoloff's factual account and serve to provide a full and coherent explanation and account which Sir Terence Etherton C indicated was admissible.

14. In paragraphs 52-61 (I think that the reference to 62 in the application must be a  
40 typographical error), Mr Stoloff discusses swaps generally. He starts by setting out briefly his banking experience in relation to swaps. These paragraphs appear to me to contain a very general introduction to swaps which might be useful background for someone who had never come across a swap before. They do not contain any information that is specific to the Appellants' transactions which are described in  
45 paragraphs 62-75. As they may be a useful introduction to the more specific evidence about the swaps entered into by the Appellants, I decline to exclude the paragraphs for the reasons previously given, ie the passages give a fuller account. If HMRC consider

that paragraphs 52-61 materially misstate the nature of swaps generally and that any misrepresentations are not capable of being dealt with in cross-examination or submissions then they may apply to admit evidence on that point.

5 15. Paragraph 71 of Mr Stoloff's witness statement describes why a bank only has to carry capital against its mark to market position in a swap rather than against the full amount of the swap. This evidence is based on Mr Stoloff's understanding of the ISDA documentation. This occurs in the context of Mr Stoloff's evidence on why the Appellants chose to use swaps rather than other methods of managing cash flows under the leases and loans. In that context, Mr Stoloff is discussing the specific swaps entered into by the Appellants, with which he was involved. He is applying his knowledge, acquired during years working for investment banks. His evidence is not given as an expert but as a participant, albeit with relevant experience, in the events to explain why a particular structure was chosen rather than another. In my view, there is no reason to exclude such evidence.

15 16. Paragraphs 88-89 of Mr Stoloff's witness statement deal with the fees charged by Bank of Scotland under the scheme. In paragraph 87, Mr Stoloff states that the first year's payment to Bank of Scotland under the swap included fees. He then says in paragraphs 88 and 89 that, in his experience, it is normal for banks to build fees into other payments received and to do otherwise would add to the complexity without changing the accounting treatment. That is his evidence about the structure of the fees paid as part of the scheme, which he was involved in setting up, in response to HMRC's view, as perceived by him, that the inclusion of the fees was unusual. I see nothing improper about that evidence and part of it which is based on Mr Stoloff's previous experience can be challenged by HMRC in cross-examination and be the subject of submissions.

20 17. HMRC also objected to parts of paragraphs 43, 44 and 72 of Mr Stoloff's witness statement on the ground that they contained expert or opinion evidence. HMRC submitted that the paragraphs should be recast in order to exclude any expert evidence. I can deal with this point shortly. I have reviewed the paragraphs and my view is that it is not necessary, and would be disproportionate, to amend the paragraphs. Any parts that are evidence of opinion rather than fact can be the subject of submissions. I am confident that the Tribunal will have no difficulty in disregarding any parts of those paragraphs which are not relevant evidence of the facts.

35 **Conclusion**

18. For the reasons set out above, I refuse HMRC's application to exclude or recast parts of Mr Stoloff's witness statement.

40 **GREG SINFIELD**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 April 2014**

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