[2020] UKFTT 12 (TC)

TC07518

PROCEDURE – Strike-out application and barring application-both refused-costs reserved

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07912

BETWEEN

SPRING CAPITAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on 19 November 2019

Michael Upton, Advocate, for the Appellant

Sadiya Choudhury, Barrister, instructed by the General Counsel and Solicitor to HM Revenue and Customs, Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was a hearing in respect of the respondents' ("HMRC's") strike-out application dated 1 April 2019 and the appellant's barring application dated 24 April 2019.

The hearing and the evidence

2. I was provided with a substantial hearing Bundle and a Bundle of Authorities for each of the appellant and HMRC.

Background facts

3. The appellant filed its company tax return ("the Return") for the accounting period ending ("APE") 30 April 2015 on 29 April 2016. That filing was timeous. The Return included a claim for a capital loss, but not the capital loss which is the subject matter of this appeal.

4. In an email to HMRC on 29 April 2016, Mr Rod Thomas, a director of the appellant, referred to the decision of Judge Brannan in *Spring Capital Ltd v HMRC and Others*[1] ("the Key Decision"). He stated that the appellant wished to make a provisional claim under section 24 Taxation of Capital Gains Tax Act 1992 ("TCGA") for a

> "… CGT loss of £6.39 million arising on 30/4/2013 on the basis of the extinction of the asset, namely the goodwill in the seafood trade. In the alternative, the company wishes to claim a loss of £6.39 million on the basis that the asset (ie the goodwill) was of negligible value and for the asset to be treated as having been disposed of on 1/5/2013".

5. HMRC responded on 27 May 2016, pointing out that there is no basis for a "provisional" claim, referred to the dates quoted in the email and explicitly asked whether the appellant was seeking to amend its return for APE 30 April 2013 or APE 30 April 2014 (both of which were then under enquiry). The appellant was also asked to confirm the date on which the CGT loss was incurred.

6. There was no reply until, on 25 January 2017, Mr Thomas wrote to HMRC referring to "…our claim dated 29/4/16 for a CGT loss of £6,390,000" and asked that it be set off against gains arising in the APE 30 April 2015.

7. HMRC responded that day stating that, for a number of reasons, it was not accepted that there was any CGT loss of £6.39 million.

8. On or about 25 January 2017, the appellant amended the Return and in an email dated 26 January 2017 stated that "The amendment and the claim of 29/4/16 have been made protectively so as to preserve our right to utilise capital relief in relation to the good will in the SSS trade acquired by the company in 2004/05 …". That amendment was *inter alia* on the basis that there was a capital loss of £6,390,000.

9. On 27 January 2017, HMRC wrote to the appellant opening an enquiry into the Return and on 15 February 2017 wrote to the appellant advising that an enquiry would be opened into the amendment to the Return.

10. On 23 February 2017, HMRC wrote to the appellant, in accordance with paragraph 32(1) Schedule 18 Finance Act 1998, issuing a Closure Notice in respect of both the Return and the amendment to it.

[1] [2015] UKFTT 66 (TC)

11. On 7 March 2017, the appellant appealed against the amendments made by that Closure Notice.

12. In the interim, on 3 March 2017, the appellant had further amended the Return, again referring to a loss of £6.39 million, and HMRC opened an enquiry into that amendment on 9 March 2017.

13. The Closure Notice in respect of the 3 March 2017 amendment to the Return was issued on 29 June 2017.

14. That Closure Notice made it clear that the appellant had not responded to various enquiries raised by HMRC and in particular had not responded to HMRC's arguments that:

(a) On the basis of the accounts and tax computations for the six years to 30 April 2016 and correspondence over at least the previous three years, HMRC believed that the trade of the distribution of seafood ceased in APE 30 April 2012. Specifically, there had been no charges for the purchase of fish since APE 30 April 2011 and no fish distribution income had been received since APE 30 April 2012. The appellant had been explicitly asked if that was agreed and, if not, why not?

(b) As Judge Brannan had indicated in a decision on an application for leave to appeal, he had made no formal decision as to valuation of goodwill in the Key Decision. The appellant had been explicitly asked if that was agreed.

15. HMRC went on to make findings to that effect namely that:

(a) The trade of distribution of seafood ceased in APE 30 April 2012.

(b) There had been no charges for the purchase of fish since APE 30 April 2011.

(c) No fish distribution income had been received since APE 30 April 2012.

HMRC also concluded that:

(d) The "entire loss, destruction, dissipation or extinction of the asset" as referred to in section 24(1) TCGA would therefore be in APE 30 April 2012.

(e) The purported amendment dated 3 March 2017 had intimated a claim under section 24(1) TCGA for a capital loss of £6,390,000 arising in APE 2015, and although it was not accepted that there was any such loss, the time limit for giving notice of a loss under that section is four years and therefore the claim was out of time.

(f) The alternative claim under section 24(2) TCGA had a time limit of two years and therefore also was out of time because a claim is not valid after the date on which a business ceases to trade and that trade ceased in APE 30 April 2012.

(g) The cessation of trade by the appellant had not involved the disposal of goodwill at any price, let alone £6.39 million. That was evidence that the trade was of little, if any value, without employment contracts with the Messrs Thomas containing non-competition covenants and contracts with customers. There were none.

16. In the interim on 22 June 2017, Mr Thomas had written to HMRC referring to the earlier Closure Notice dated 23 February 2017, which was related to the Return and first amendment.

17. He intimated notification of a claim under section 24(1) TCGA for a capital loss of £20 million arising in APE 30 April 2015, which failing an alternative claim on the basis of negligible value of a loss of £20 million under section 24(1A) TCGA ("the June Claim").

18. He relied on the decision of Judge Brooks in *Spring Capital v HMRC*[2] ("the Strike Out Decision") to the effect that it was "…competent for the appellant to advance arguments in the alternative" and argued that there was a reasonable prospect of succeeding in an argument that the goodwill had been acquired for £20 million. In that email he also referred to, and relied on, an Undertaking given in the Court of Session in May 2010 stating that the arguments based on that also had a reasonable prospect of success.

19. HMRC responded on 29 June 2017, referring to the second amendment to the Return, setting out again all of the arguments in the Closure Notice in that regard. HMRC made it explicit that the June claim was out of time and invalid. Therefore there could be no enquiry.

20. HMRC comprehensively rejected the argument that Judge Brooks had found that the appellant had had a reasonable prospect of succeeding in any argument; the only relevant finding, for these purposes, was that there had been no abuse of process in advancing the arguments.

21. HMRC also rejected the argument that the Undertaking was of any application to the appellant *inter alia* citing Judge Brannan at paragraph 279 of the Key Decision where he stated "It is clear to me that the Undertaking confers no rights on the appellant".

22. After further correspondence between the parties, on 7 February 2018, HMRC issued a view of the matter letter setting out the amendments that they considered needed to be made to the Return. On 8 March 2018, the appellant notified a request for a review of those amendments.

23. On 29 October 2018, the review conclusion letter upheld HMRC's conclusions and rejected the June Claim.

24. The appellant appealed to the Tribunal on 28 November 2018. The stated grounds of appeal are:-

> "(1) By reference to the appellant's capital loss claim dated 22/6/17, the appellant does not have a liability in respect of capital gains for the relevant year;
>
> (2) The legal charges included as a deduction, the appellant's computations were incurred wholly and exclusively for the purpose of the trade; and
>
> (3) Contrary to the conclusion stated, the appellant did not fail to include additional income of £80,206 in its computations."

25. On 15 February 2019, HMRC filed their Statement of Case and on 1 April 2019 filed the application for the appeal to be struck out in its entirety in terms of Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). The appellant's response on 22 April 2019 was an application that HMRC be barred from the proceedings in terms of Rule 8(7) of the Rules in relation to the first ground of appeal, namely the claim for the loss.

The applicable law

26. There is no dispute between the parties that Rule 8 is in point. The parties referred to a number of authorities and both referred to the principles enunciated in *Fairford Group plc and Another v HMRC*[3]("Fairford") which were approved by the Upper Tribunal in *The First de*

[2] [2017] UKFTT 465 (TC)
[3] [2014] UKUT 329 (TCC)

Sales Ltd Partnership and Others v HMRC[4] ("De Sales") on which HMRC relied and *HMRC v Woodstream Europe Ltd*[5] ("Woodstream") on which the appellant relied.

27. *Woodstream* did endorse *Fairford,* as the appellant stated, but it is relevant to these proceedings for different reasons. I am bound by, and rely on, paragraphs 14-16 which read as follows:

> "14. The FTT was correct in observing that the Tribunal is a creature of statute law and its jurisdiction is circumscribed by that law. In relation to strike-out applications, that jurisdiction is found in Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"). That Rule, which was not set out in the Decision, provides, so far as relevant, as follows:
>
> **'8—Striking out a party's case**
> …
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (c) The Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.'
>
> 15. If the FTT lacks jurisdiction it *must* strike out the proceedings. That is a binary decision, which the Tribunal must address and determine at the hearing of the strike-out application. This is to be contrasted with an application to strike out a claim, or part of it, on the grounds that it has no reasonable prospect of success. In the latter case, the Tribunal will not exercise its discretion to strike out if there is a non-fanciful argument in support of the claim, or relevant part.
>
> 16. In this respect, we agree with the conclusion of this Tribunal in *Raftopoulou v Commissioners for Revenue & Customs* [2015] UKUT 579 (TCC). Although the Court of Appeal overturned the decision of the Upper Tribunal on the substantive issue in that case, it did not refer to or reconsider the Upper Tribunal's conclusion on this point. The Upper Tribunal in *Raftopoulou* firmly rejected the argument that in relation to an application to strike out for lack of jurisdiction the correct approach was the same as that on an application to strike out under Rule 8(3)(c), stating as follows:
>
> '25. We do not agree. There is in our judgment no basis, whether in statute or by reference to [*Revenue and Customs Commissioners v Fairford Group plc* [2014] UKUT 329 (TCC)], or the authorities referred to in that case, for the proposition advanced by [Counsel] in this respect. The test of whether there is a realistic as opposed to a fanciful prospect of succeeding referred to in *Fairford* is clearly directed at explaining how a tribunal should approach its discretion in cases where the ground of strike out is whether the proceedings stand a reasonable prospect of success. The strike out under consideration in this appeal was by contrast on the grounds of jurisdiction. It is clear that in relation to strike outs on the basis of lack of jurisdiction the test is a binary one; either the tribunal has jurisdiction or it does not …'".

28. HMRC relied on paragraph 33 of *De Sales* and, of course, I am bound by that paragraph which reads:

> "33. Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

[4] [2018] UKUT 396 (TCC)
[5] [2018] UKUT 398 (TCC)

'i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

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

29. I have applied those principles.

30. For the avoidance of doubt, I have disregarded the appellant's reliance on, and reference to, *Wightman and Others v The Advocate General*[6] (not the Secretary of State for Exiting the European Union, as stated) since that decision relates to the interpretation of the words "a real prospect of success" in Section 27B(2)(b) of the Court of Session Act 1988 in the context of judicial review.

31. The relevant words in this appeal are to be found in Rule 8(3)(c) of the Rules and are "no reasonable prospect of…succeeding" in the context of strike out. That is completely different.

32. In summary, in simple language, the starting point is whether the grounds of appeal have a realistic prospect of success.

The second and third Grounds of Appeal

33. Although both in their Skeleton Arguments and in oral submissions the parties addressed these Grounds of Appeal, which are inextricably linked, after addressing the question of the capital loss, for reasons that will become evident it is appropriate to deal with this first.

[6] [2018] CSIH 18

34. I have narrated the history of the amendments to the Return at some length, firstly in order to set the June Claim which is the subject matter of this appeal in context but also in order to narrate the facts disclosed, or rather not disclosed to HMRC by the appellant.

35. As can be seen from paragraph 14 above, the appellant has repeatedly failed to answer questions posed by HMRC. If, as the appellant now alleges, it can produce evidence that the trade continued until 2014, a great deal of time, trouble and expense including the necessity for this hearing might have been avoided. It was only when the appellant lodged its Skeleton Argument that reference has been made to an invoice in 2014. Mr Upton assured the Tribunal that that invoice would be produced together with evidence in relation to the other invoices which have not as yet been vouched.

36. If that is indeed the case then it is possible that the appellant might succeed in establishing that the trade continued beyond APE 30 April 2012 and that expenditure was incurred wholly and exclusively for the purpose of that trade.

37. Accordingly I do not strike out those two grounds of appeal at this juncture.

The First ground - the capital loss claim

38. I am not going to articulate all of the arguments advanced, not least since some fell away in the hearing. The starting, and substantive, point is the whole question of goodwill.

39. Both parties refer to and rely on the Key Decision which extends to 296 paragraphs. All of the following references to numbered paragraphs, unless otherwise referenced, are to the Key Decision where it is stated at paragraph 2 that "...the main dispute…relates to whether the appellant is entitled to a deduction…in respect of the purchase of goodwill.".

40. It is not in dispute that no further evidence on goodwill has been produced since that hearing. It is also the case that at the most recent hearing[7] Judge Brannan confirmed that he had not reached a final decision on the valuation of goodwill in the Key Decision although he did "…express the conclusion that I would have been minded to reach had it been necessary to do so…" and also that in the recent hearing the appellant had abandoned the argument on the existence of goodwill.

HMRC's arguments

41. HMRC's primary argument is that the loss can only be claimed, if, as a matter of fact, the goodwill had been transferred to the appellant from Spring Salmon and Seafood Limited ("SSS") but that Judge Brannan in the Key Decision had found that no such transfer took place. Furthermore Judge Brannan had found explicitly that the appellant's arguments thereanent had been comprehensively discredited. In particular HMRC relied on paragraphs 218 to 222 and 226 and 229. The conclusions articulated in those paragraphs have not been appealed.

42. The secondary argument is that the claims for a loss under section 24 TCGA were invalid because they were out of time. It had not been disputed that the trade ceased in APE 2012.

43. Thirdly, the June Claim was also out of time. However, and in any event, since no enquiry was opened and no decision made on it, the Tribunal has no jurisdiction in respect of the June Claim. HMRC rely on paragraph 73 in *HMRC v Raftopoulou*[8] which reads:

> "It follows that the F-tT was right to decide that it lacked jurisdiction to hear the taxpayer's appeal, which should therefore be struck out. There are two grounds for this conclusion. First, the claim was made out of time, and accordingly could not be the subject of an enquiry leading to a closure notice against which an

[7] [2019] UKFTT 699 (TC) at paragraph 17
[8] [2018] STC 988

appeal to the F-tT would lie. Second, there was in any event no enquiry into the claim and therefore no appealable closure notice."

44. Lastly, since the June Claim was invalid then there was no need to enquire into it and the appellant's arguments based on *R (on the application of Derry) v HMRC*[9] have no application precisely because the claim was invalid.

45. However, even if there had been a valid claim it does not follow that if relief is denied under one set of statutory provision (paragraph 92 Schedule 29 Finance Act 2002) then it ought to be granted under another (TCGA for capital losses).

The appellant's arguments

46. The appellant argues that:

(a) HMRC have an irrelevant reliance on how the relevant trade was acquired;

(b) HMRC have failed to competently enquire into the claim (being the June Claim);

(c) HMRC have breached the Undertaking given in respect of enquiries into the trade.

47. As far as the first issue is concerned, since the appellant certainly took over the trade from SSS the goodwill must have followed. It is irrelevant how the trade, and by inference the goodwill, was acquired. Furthermore, at paragraphs 18, 126, 217 and 221 Judge Brannan found that the trade was transferred to the appellant by SSS.

48. Judge Brooks, at paragraphs 16 and 17 of the Strike Out Decision, had arrived at the correct decision in relation to the closely related issue of annual amortisation of the same goodwill and the same result should follow in this instance.

49. In relation to the second issue it is not in dispute that the June Claim was a claim outwith a return under Section 24(1) TCGA and, by way of alternative, a claim under Section 24(1A) TCGA. In terms of paragraph 5 of Schedule 1A of the Taxes Management Act 1970 ("TMA") the deadline for HMRC to give notice in writing of any intention to enquire into claims was 31 July 2018 and they did not do so. Accordingly in terms of paragraph 4 of Schedule 1, HMRC are obliged to give effect to the claims and in that regard the appellant relied on *HMRC v Cotter*[10] and *Faulkner v HMRC*[11].

50. HMRC are not entitled to rely on *Raftopolou* because the claim was valid and in time as the trade ceased in APE 30 April 2015 with the last invoice issued in respect of the trade being dated August 2014.

51. The question of cessation of trade is a matter of fact and is therefore a matter for evidence at the full hearing of the appeal.

52. Lastly in that regard the appellants relied on *Derry* at paragraph 66.

53. In summary, there is a realistic possibility that Schedule 1A TMA applies.

54. Lastly, in regard to the Undertaking, the appellant advanced a lengthy argument as to the merits of the Undertaking and argued that the question as to whether the appellant has a realistic prospect of relying on the Undertaking is a matter which has previously been argued and decided between the parties in this Tribunal. It would be an abuse of process to attempt to re-argue that. Judge Brooks, at paragraphs 14 to 17 in the Strike Out Decision had held that there was a reasonable prospect of success in respect of the arguments about the effect of the Undertaking.

[9] [2019] UKSC 19
[10] [2013] UKSC 69
[11] [2018] UKFTT 270 (TC)

Discussion on the first ground

55. As can be seen, in very large measure, the decision on this issue turns on Judge Brannan's findings. In the Key Decision he set out in great detail the history of the transfer of the trade from SSS and the numerous issues that arose in connection with that including not only the question of goodwill but the amount thereof.

56. It is notable that the two values for goodwill seen in this appeal, being the £20 million and the £6.39 million also arose in that appeal until, as Judge Brannan records at paragraph 84, Mr Thomas "abandoned" the former and "adopted" the latter.

57. HMRC are correct to say that in paragraph 218 Judge Brannan found Mr Thomas' evidence lacking in credibility and that he therefore reached the conclusion, that in that appeal, the appellant was not entitled to deductions in respect of a purchase of goodwill.

58. However, that is not the whole story. In that appeal the appellant had argued that on 22 September 2004, SSS had transferred its seafood business to the Messrs Thomas and that then on the same day Messrs Thomas had transferred the seafood business to the appellant for a consideration equal to the market value. It was argued that there had been a tripartite transaction.

59. It was that that Judge Brannan found to be incredible in paragraph 218 and for numerous reasons he found that there had been no tripartite transaction.

60. At paragraph 226 Judge Brannan stated that he did

> "… not believe Mr Thomas' version of events in relation to the tripartite transaction. In my view the far more likely explanation for why the 2005 and 2006 accounts made no mention of the appellant having purchased goodwill was that it did not happen: it was simply an invention."

61. At paragraph 230 Judge Brannan found that the seafood trade of SSS was wound down during the autumn of 2004 and ceased on 31 January 2005 but that during that period the appellant began to carry on that trade. Judge Brannan stated at paragraph 126 that he was satisfied that the trade which the appellant began to carry on was the same trade as that previously carried on by SSS.

62. Judge Brannan heard expert evidence in relation to the market value of the seafood trade and, in particular, in relation to the market value of the goodwill attached to that trade.

63. At paragraph 252 Judge Brannan stated quite clearly: "Accordingly, had it been necessary to decide the point, I would have accepted Mr Taub's valuation of goodwill at £6,390,000 …".

64. Accordingly, I find that there is a realistic prospect that, in this appeal, it is possible that the Tribunal would find that there was a transfer of goodwill. The valuation of that goodwill would depend on the evidence adduced.

65. The other basis on which HMRC sought strike out was on the basis that the June Claim was invalid.

66. It is accepted by both parties that the appellant has appealed the June Claim, and not the amendments to the Return. As can be seen HMRC's case is that the June Claim was invalid because it was out of time. At paragraph 27 above I have referred to, and quoted from, *Woodstream* which makes it explicit that if a claim is invalid and there is no appealable decision then the Tribunal has no jurisdiction. In that event the appeal must be struck out.

67. The problem in this instance is that the appellant most certainly has not helped itself. HMRC have repeatedly stated that the trade ceased in APE 30 April 2012. Accordingly the last date for lodging a claim would have been 30 April 2016. The June Claim is after that. On the face of it is invalid.

68. As I indicate at paragraph 4 above, initially the appellant indicated that any claim related to APE 2013. It was argued for the appellant that that was a typing error. I do not accept that, on the basis that 2013 was mentioned twice in that email and for different reasons.

69. It was argued by Mr Upton that perhaps the trade was gradually wound down. Although no evidence has been produced it was conceded orally that there was "not much trade in the final year" and that there might have been only five transactions.

70. There has been no explanation as to why, even in the face of a strike out application, the appellant has still failed to produce any evidence as to when the trade ceased and what various invoices relate to.

71. It was only when the Skeleton Argument was lodged that there was any suggestion that the last invoice was produced in 2014. That invoice has not yet been lodged in evidence and HMRC have not had sight of it.

72. Notwithstanding the appellant's own repeated failure to produce evidence relating to the cessation of trade, nevertheless it cannot be said that there is no reasonable prospect of succeeding in establishing that the trade continued beyond 2012. Accordingly I do not strike out the appeal on that basis at this juncture.

The Undertaking

73. Whilst I accept that Judge Brannan found at paragraph 279 that the Undertaking conferred no rights on the appellant, that was in part predicated on the concession by the appellant at that stage that English law applied to the Undertaking. It is now argued that Scots law applies.

74. The Undertaking is not referred to in the Grounds of Appeal and, if it is to be relied upon, then it should be. The appellant has made it clear that it wishes to rely on the Undertaking. The issue of *jus quesitum tertio* is certainly litigable. A hearing has been set down for 7 to 10 September 2020 in another appeal by the appellant (TC/2016/01479) when the effect of the Undertaking is to be argued. In the event that the appellant is permitted to amend the Grounds of Appeal then this appeal should be listed for hearing on that issue, and that issue alone, at the same time.

The Strike Out Decision

75. For the avoidance of doubt, I do not accept the argument that this decision should follow exactly the same line as Judge Brook's decision. His decision has predicated on different facts at a different time. In particular, he made it explicit that the argument on the Undertaking rested in part on the fact that Judge Brannan could not have been aware of Lord Glennie's comments on the Undertaking.

Decision on Strike Out

76. For all of the reasons given I do not strike out this appeal, at this juncture, on any of the grounds currently advanced by HMRC.

Barring application

77. Rule 8(7) of the Rules provides that Rule 8

> '… applies to a respondent as it applies to an appellant except that –
>
> (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings …'

Accordingly the exposition of the applicable law at paragraphs 26 to 31 above applies to the question of barring HMRC.

78. The appellant argues that in terms of section 42(1) Taxes Management Act 1970 ("TMA") Schedule 1A applied to the June Claim. In terms of paragraph 5 of Schedule 1A the deadline for HMRC to give notice in writing of any intention to open an enquiry into the June Claim was 31 July 2018 and no such enquiry was opened. Accordingly in terms of paragraph 4 of Schedule 1A effect must be given to the claims.

79. At paragraph 6 of the barring application the appellant argues that HMRC's assertion that the June Claim was out of time "… itself depends upon when the claim arose. It arose in the period ending on 30 April 2015 and in terms of section 24 was accordingly not out of time".

80. As I have made clear at paragraph 14(a) above the appellant had not responded to HMRC's request for information as to the date of cessation of trade. At paragraph 35 above I reference that paragraph and point out that it was only when the Skeleton Argument for this hearing was produced that reference was made to an invoice in 2014. I have declined HMRC's strike out application on the basis that, contrary to their belief it is possible that the trade continued beyond APE 30 April 2012.

81. HMRC's position has always been, as is set out in paragraphs 41 to 44 above, that the June Claim was out of time and invalid so therefore there could be no enquiry. They argue that it was out of time on the basis that:

(a) There had been no purchases of fish since accounting period ending 30 April 2011;

(b) There had been no fish distribution income since APE 30 April 2012;

(c) The time limit for making a valid claim expired four years after the year of assessment to which it relates;

(d) Therefore, a statutory time limit applied and for the claim to be valid it had to be filed by 30 April 2016 and it was not.

82. As I indicate at paragraph 67 above, on the face of it the June Claim was invalid if the trade had ceased in APE 30 April 2012.

83. As the appellant states at paragraph 20 of their Skeleton Argument the issue as to when the trade ceased is one of fact and if there is doubt about that issue then it is a matter for evidence at the full hearing. I have already found at paragraph 72 above in relation to the strike out application that it cannot be said that there is no reasonable prospect that the appellant will be able to establish that the trade continued beyond APE 30 April 2012.

84. Since, as I indicate at paragraphs 69 and 71 above the only information about trading after that date is assertions at the hearing in submissions and in the Skeleton Argument, and that is not evidence[12], it cannot be said that there is no reasonable prospect that HMRC will not be able to establish that the June Claim was invalid because it was out of time and therefore there was no requirement for an enquiry.

[12] Paragraph 15 Qureshi v HMRC [2018] UKFTT 0115 (TC) approved at paragraph 51 Edwards v HMRC [2019] UKUT 131 (TCC)

Costs

85. I observe that at paragraph 44 of the appellant's Skeleton Argument, the appellant seeks its costs in respect of the appeal to date with sanction for the employment of counsel. I have heard no argument on that point and the position is therefore reserved, *quoad* both parties.

86. Lastly, parties are DIRECTED to lodge with the Tribunal by no later than noon on Monday 20 January 2020 draft Directions in agreed terms dealing with procedural matters going forward. In the event that agreement cannot be reached then each party shall lodge with the other, and with the Tribunal, in the same timescale their own draft Directions. Copies should also be lodged with the Tribunal in Edinburgh, in the usual way.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

87. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Previous release date: 7 January 2020

Amended pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) on 10 September 2020