Appeal number: FTC/101/2014

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM:
FIRST TIER TRIBUNAL (TAX CHAMBER)

(1) Ian Shiner
(2) David Sheinman **Appellants**

- and -

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

TRIBUNAL: MR JUSTICE MANN

Sitting in public in London on 7th and 8th October 2015

Conrad McDonnell (instructed by **Howard Kennedy LLP**) for the **Appellant**

James Rivett (instructed by **General Counsel & Solicitor to HMRC**) for the **Respondent**

DECISION

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of the First Tier Tribunal dated 23rd April 2014 ("the Decision") in which the FTT struck out part of the appellants' respective cases. The FTT gave permission to appeal to the Upper Tribunal. The essence of the Decision was that the relevant part, which complains that the imposition of tax legislation is, in the circumstances, an improper restriction on the flow of capital for the purposes of EU legislation, ought to be struck out because it had already been the subject of a decision, adverse to the appellants, in a previous Court of Appeal decision given in judicial review proceedings (*Shiner and another v HMRC* [2011] EWCA Civ 892). Other grounds of appeal are unaffected.

2. There are two appellants – Mr Shiner and Mr Sheinman – each with their own cases. However, their respective cases are, for practical purposes, identical and there is no need to consider them separately. Identical facts, mutatis mutandis, apply to the other.

3. On this appeal, as below, the appellants were represented by Mr Conrad McDonnell and HMRC by Mr James Rivett.

The facts and the nature of the dispute

4. The central facts are, at least for the purposes of this appeal, not in dispute. The FTT identified them by a cross-reference to the earlier Court of Appeal decision. I use the same source and set them out here, and I add subsequent events relevant to this appeal, taking them from the Decision.

5. The appellants participated in what the Court of Appeal described as a marketed tax avoidance scheme set up in the Isle of Man, which makes use of the Double Taxation Arrangement ("DTA") made with the Isle of Man in 1955. Taking Mr Sheinman's case, on 20th April 2005 he made the David Sheinman 2005 settlement, established under the laws of the Isle of Man. Parleybrook Ltd of Douglas, IoM, is the trustee. Under the terms of the trust deed the income is payable to Mr Sheinman as the "Principal Beneficiary". He transferred the sum of £10 to the trust company by cheque; this was the "Initial Property" comprised in the trust fund, to be invested by the trustee at its discretion. It is this £10 that was the principal focus of what is said to be the "capital" whose movement is impeded by European legislation to which I will

come. The trust deed makes no reference to any existing or future proposed trading partnership of which the trustee was or was to be a member.

6. Mr Shiner entered into arrangements with a different trustee company which were, apart from a difference in the identity of the trustee, for present purposes identical. On 21st April 2005 the two trustee companies entered into a partnership agreement with each other, governed by the laws of the IoM, called the Redwood Partnership (later The Redwood Land Partnership). The profits and losses were to be borne equally by the partners and the agreement stated that the two trust companies entered into the agreement "as trustee" of each of their respective settlements. The partnership used debt finance to acquire UK developments from a company of which the two appellants were the sole directors, and the partnership employed another company (again, the appellants were sole directors) to develop the sites and sell them on its behalf. The profits of the partnership are distributed to the trustee companies as partners.

7. The taxpayers were entitled to the income of their respective trusts, but claim that the profits accruing to the partnership are not chargeable to UK tax because of the terms of paragraph 3(2) of the DTA, claiming that the income was the profits of a "Manx enterprise" within the meaning of that provision. I am not concerned with the precise terms of the provision, or the details of the DTA, so I do not set them out in this decision. The appellants claim to have the benefit of it to remove the claim from income tax. They claim that the DTA were "arrangements" within the meaning of section 788(6) of the Income and Corporation Taxes Act 1988 ("ICTA") and were entitled to the relief afforded by that section.

8. Section 858 of the Income Tax (Trading and other Income) Act 2005 ("the 2005 Act") had the effect of preventing partners in foreign partnerships from claiming relief from income tax under arrangements within the meaning of section 788(6) of ICTA, but it did not have the same effect in relation to UK partnerships. However, and crucially for the purposes of this appeal, section 58 of the Finance Act 2008 amended section 858 by preventing UK residents who were not partners, but who were entitled to the income of a foreign partnership, from claiming relief under section 788. The effect of this amendment was made retrospective by subsections (4) and (5).

9. This appeal relates to the tax returns of the taxpayers for the years 2005/06, 2006/07 and 2007/08. Those are all years preceding the amendment affected by section 58 but are caught by its retrospectivity. As a result of that HMRC claim that the appellants/taxpayers are not entitled to any relief that would otherwise be afforded to them by the DTA, because they are persons entitled to the income of a foreign partnership (the Redwood-named partnership). The taxpayers claim to be entitled to that relief.

10. In June 2012 HMRC issued closure notices to both appellants in respect of the tax years that I have identified, disallowing the exemption by virtue of the amended section 858. The appellants appealed those closure notices on a number of grounds, all except one of which are not germane to this appeal. The one which is germane is a claim that section 58 is incompatible with Article 56 of the European Community Treaty which prevents impeding movement of capital. The relevant paragraph reads:

> "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."

11. In the more recent Treaty on the Functioning of the European Union the Article has become Article 63, but I shall refer to the older numbering in this judgment in order to be consistent with the numbering in the preceding Court of Appeal decision.

12. HMRC applied to strike out that part of the appeal on the footing that it had been adjudicated on in previous proceedings (namely, the Court of Appeal decision referred to above), and it was an abuse of process to argue that point (for the same reason). The FTT acceded to that application and struck out the relevant part of the appeal. The taxpayers appeal that decision to this Tribunal.

13. Since the Court of Appeal decision, and the extent to which it should prevent an issue in it from being raised again in the appeal, is at the heart of this case I will deal with it first, before explaining the basis of the Decision appealed from. It is necessary to set out extensive passages from it because there was something of a dispute as to what it decided and what the basis of that decision was.

The Court of Appeal decision

14. The hearing in the Court of Appeal was unusual in that it was not an appeal. It was an original judicial review hearing. The taxpayers wished to mount a challenge to the application (or at least the retrospective application) of section 58 on the basis of its incompatibility with Article 56, but (I am told) declined the suggestions of the Revenue that that be done in the First Tier Tribunal by an appeal in the normal way and insisted on bringing a challenge by way of judicial review. They also brought a claim that that retrospective application infringed their right to peaceful enjoyment of their possessions. That latter claim was dealt with in a parallel appeal of a Mr Huitson (*R (Huitson) v HMRC* [2011] EWCA Civ 893) and was ultimately disallowed. The Court of Appeal decided that it would hear the taxpayers'

applications itself, as an original application for the judicial review, at the same time as it heard Mr Huitson's parallel appeal. The court delivered separate judgments in the two cases on 25th June 2011, having heard them over 3 days in the previous November.

15. The main judgment was delivered by Mummery LJ, with whom the other two members of the court agreed. The issues which he considered he was addressing, and his conclusions on them, are found in various parts of his judgment. In paragraph 3 he summarised the case of the claimants:

> "3. The claimants' case is that HMRC cannot lawfully deny their claim to relief from payment of UK income tax for past years of assessment on income received by them in the UK from trusts in the Isle of Man. The claim to relief is based on a Double Taxation Arrangement (DTA) made with the Isle of Man in 1955. It was subsequently amended. By virtue of their participation in the arrangements of a tax avoidance scheme located in the Isle of Man the income received by them in the UK was channelled through interest in possession trusts established by the claimants in the Isle of Man.

And elaborated it in ensuing paragraphs:

> "5. The application is for judicial review of the retrospective application of s.58 of the Finance Act 2008 (the 2008 Act). That made amendments to the legislation on UK tax affecting the income of foreign partnerships, UK residents and DTAs with the UK. The claimants' case is that the retrospective provisions of s.58 are contrary to and incompatible with the paramount provisions of Article 56 of the European Community Treaty (prohibition of restrictions on free movement of capital between Member States). That prohibition is now incorporated in the same terms in Article 63 of the Treaty on the Functioning of the European Union (TFEU). As Article 56 was the relevant provision in force at the material time, I will continue to refer to it rather than to its replacement.
>
> 6. The claim is for a declaration that the amendments in s.58 are incompatible with Article 56 and that, as such, they cannot be applied lawfully by HMRC. Orders are also sought quashing the policy decisions of HMRC to enforce the retrospective aspects of s.58, as set out in a letter of 18 August 2008 sent by HMRC to the claimants. The claim for judicial review focuses on the terms of that letter.

…

> 8. In a sentence, this court has to decide whether it would be contrary to EU law and incompatible with Convention rights for HMRC to apply to the claimants and, in the case of Convention rights, to apply to Mr Huitson, amendments to primary fiscal legislation aimed at retrospectively nullifying the benefits of the tax avoidance scheme used by them."

16. In paragraph 12 he set out the text of Article 56, so far as relevant and then went to summarise the points arising:

> "13. It is common ground that the Article has direct effect and that it is capable of conferring rights on individuals enforceable in the domestic legal order. The issues of interpretation and applicability of Article 56 to this case canvassed in the detailed written and oral submissions address almost every aspect of its very wide terms, save for the numbers and the full stops. What, on the facts of this case, is the relevant "capital"? If "capital" is involved, has there been any "movement" of it? If so, was that movement between a Member State (the UK) and "a third country"? (thereby raising an intriguing and possibly obscure question of the status of the Isle of Man under EU law). If so, is such movement of capital affected by any "restrictions" on it in s.58? If so, are such restrictions justified? Is this court able to give clear and confident answers to the questions of interpretation of Article 56? If not, is it necessary to refer questions to the Court of Justice for rulings in order to determine the judicial review application?

17. In the end Mummery LJ did not deal with any points other than those relating closely to "capital". He went on to set out the contentions of the parties:

> "17. In a tiny nutshell the main point forcefully advanced by Mr David Goldberg QC on the claimants' behalf is that the retrospective effect of s.58 is contrary to, and incompatible with, Article 56. The reason for incompatibility is that the amendments made by s.58 are capable of preventing, restricting or discouraging commercial investment of capital in foreign partnerships by means of unjustified discrimination between an investment of capital in a foreign partnership and an investment of capital in a UK partnership. It is argued that s.58 favours

> investment in a UK partnership by imposing an incremental domestic tax charge on income, which may already have borne tax in another jurisdiction. Its retrospectivity is an infringement of the EU principles of legal certainty and legitimate expectation. There is no justification for its retrospective and discriminatory effects. If this court has any doubt on this matter contrary to the claimants' contentions, then it ought to refer the questions of interpretation raised for rulings by the Court of Justice.
>
> 18. The substance of HMRC's comprehensive response, also shrunk to nutshell size, is that, on the particular facts as they appear in this case, the claimants' main argument has no possible foundation in EU law. The claimants' case on EU law is described as so hypothetical that the court should not entertain it. In so far as the claimants may be affected by EU law on the actual facts of their case, they have failed entirely to address their effects, or the particular steps needed to establish that s.58 falls within the scope of application of Article 56 and other provisions and principles of EC law; or that s.58 amounts to a restriction on the free movement of capital; or that its provisions are discriminatory, or are incapable of justification, or are disproportionate, or offend the principle of legal certainty."

18. Thus the arguments are described as including arguments as to the general possible reach into transactions other than that of the appellants. As will appear, the court did not decide issues at that level of abstraction and concentrated on the particular effects of section 58 and Article 56 on the transaction which the appellants entered into. This focus becomes apparent in paragraph 19:

> "19. The claimants may be entitled to declaratory relief on their application for judicial review, if they can establish a case of incompatibility of s.58 with Article 56 *which affects them*. The result aimed for by the claimants is that the retrospective provisions of s.58 should be disapplied in HMRC's tax treatment of the income received by the claimants in the UK from the Manx trust in past years."

19. The emphasis is that of Mummery LJ himself. It is important in understanding the later parts of the judgment. He then went on to refer to the limited facts that were before the court:

> "20. It is vital to be clear about the facts relied on by the claimants to found real, not just hypothetical, issues of incompatibility with EU law. There is no agreed statement of facts. Very few facts are set out in the "Statement of Facts relied upon" in Section 8 of the Claim Form. The claimants' skeleton argument refers to hardly any facts. A brief draft statement has been supplied to the court. I will summarise the facts, as they at present appear from the papers, to see whether they lay a possible foundation for the claimants' legal submissions on the application of Article 56 regarding the movement of capital."

20. He then went on to summarise the facts. They are, essentially, the facts which I have identified above. In relation to the trust deed he observed:

> "26 … [The £10] was to be invested by each trustee at its discretion. The £10 transfer is said by Mr Goldberg QC to be a "movement of capital from a Member State to a third country" within the meaning of Article 56. The Trust Deeds make no reference to an existing or proposed further trading partnership of which the trustees are or were members."

21. At paragraph 36 Mummery turned to identify the issues:

> "36. Within the overall context of the retrospective effect of s. 58 the following issues were canvassed on the appeal. The first two depend very much on the particular facts of this case. The remaining issues are more wide-ranging.
>
> (1) Was there a relevant "movement of capital" or a payment within the meaning of Article 56?
>
> (2) If so, was the transfer or payment made between a Member State and a third country? That would involve deciding whether, within the meaning of Article 56, the Isle of Man is a "third country" to which there has been a movement of capital from the UK.
>
> (3) If so, how wide can the inquiry then range beyond the particular facts of this case into the realm of hypothetical situations to which s. 58 and Article 56 might relate?
>
> (4) Does s.58 restrict transfers of capital to a foreign partnership, but not those to a UK partnership? If so, is that precluded by Article 56 (subject to the defence of justification)?
>
> (5) If s.58 is precluded by Article 56, can it be justified in whole or in part, so that the retrospective aspect of s.58 is valid, despite the breach of the Article?

(6) Is there a doubt whether s.58 is precluded by Article 56 or whether it can be justified?

(7) If so, should there be a reference of questions of interpretation of Article 56 to the Court of Justice?

(8) Are the claimants' proceedings an abuse of rights under EU law.

22. He then reflects on the difficulties of dealing with more abstract matters on a judicial review application and set limits on the court's function:

> "38. …. Judicial review procedure is not best suited for deciding disputed questions of fact, or for deciding the tax liabilities of taxpayers in a dispute that is fact-sensitive. Nor is judicial review available for rulings of the court on hypothetical or academic questions. The proper function of judicial review proceedings is to determine whether there has been an abuse or excess of power by a public authority, or whether its acts or omissions affecting the claimants are lawful."

23. He thereby foreshadowed his decision to limit what he was trying and to decide the case by reference to the effect of the legislation on the parties before him. That is emphasised by his paragraph 41 to 43:

> "41. … It has to adjudicate on the lawfulness of the actions of HMRC in their treatment of the claimants' tax affairs on the particular facts of this case …

> "42. In other words, a judicial review court has a job description: adjudication of challenges by citizens to the lawfulness of acts and omissions of public authorities *affecting them*. Its job description does not extend to chairing seminars on EU law, or income tax law, or giving general advice on those areas of law to taxpayers, tax planning bodies or fiscal authorities."

Again, the emphasis is Mummery LJ's. Then he turned to his attention to the issues again. His next heading is important:

> "THE ISSUES

> I. Scope of application issues; transfer of "capital"; transfer from one Member State to a third country"

24. He was thus apparently going to consider issues 1 and 2. Issue 1 was whether there was a *relevant* "movement of capital" (my emphasis this time). He then goes on to summarise each side's submissions on relevant points:

> "45. Mr David Goldberg QC contends that the payment of £10 by cheque by the claimants to the respective trustee of each Isle of Man trust was a "movement of capital" which engaged Article 56. "Capital" referred to any form of money or something having monetary value. All that Article 56 required was that the capital had moved from one country to another. Here there was a movement of cash from the UK to the Isle of Man. That was all that was required for the Article to be engaged.
>
> 46. The movement of £10 was, he says, part of the arrangement for setting up the Manx trading partnership the next day. The money put in the trust was an investment in the partnership. It was an essential part of the one arrangement that the trustee would be a partner in the partnership and that the income of the partnership would be channelled through the medium of the trust to the claimant settlor/beneficiary. In Mr Goldberg's words the transfer of £10 "opened the gate to Article 56" and the question whether it was infringed by s.58
>
> … 48. Against that, HMRC submit that s.58 does not even begin to fall within the scope of application of Article 56, which is not therefore engaged and the EU principles of free movement of capital and of legal certainty cannot be relied upon.
>
> …
>
> 50. More importantly for this case, HMRC make the more basic factual point that, even if the Isle of Man is a "third country" within the meaning of Article 56, there has been no relevant "movement of capital" to engage Article 56. The sum of £10, which is the only movement of capital relied on by the claimants, was not put into or transferred to a partnership. The £10 transferred had nothing to do with the Manx partnership structure: it was put into an interest in possession trust, which, as a matter of trust law and for tax purposes, is and must be genuine and separate and distinct from the partnership, not simply a conduit for making payment of funds to the partnership and which has been inserted artificially for the

> purposes of tax avoidance. Further, there is no evidence in the case that the purpose of either trust was to invest in or to enter into the Manx partnership.
>
> Section 58 says nothing about the movement or transfer of a capital sum into a trust. It refers to a person entitled to a share of the profits of a partnership. It is addressed to the recipient end of the transaction, to the case of a person being entitled to a share of the profits of a partnership and to being deemed to be a member of the firm."

25. His conclusions are expressed in the following paragraphs:

> "52. I am in complete agreement with the submissions of HMRC on the narrow "movement of capital" point arising on the facts of this case.
>
> 53. The payment of £10 had nothing to do with the funding of the Manx partnership structure: it was put into a trust for the claimant and not into the Manx partnership, which was a distinct and separate entity from the Manx trust established by each claimant. Putting £10 each into Manx trusts, which the claimants have created and under which they are also entitled to a life interest, is not in itself a "movement of capital" within the meaning of Article 56. It does not become so, because the Manx trustee of the Manx trust is a member of a Manx partnership that uses the services of the settlor/ beneficiary, or chooses to pay the profits of the partnership into the trust for onward transmission to the principal beneficiary.
>
> 54. If there is no "movement of capital" at all within the meaning of Article 56, then it is not necessary for the decision of the claimants' income tax case on their past assessments, or even appropriate, for this court to embark on the general and larger constitutional question whether the Isle of Man is "a third country" within the meaning of Article 56, or any of the other issues identified below."

And he expressed the "Result" in the following terms (which may be relevant to the debate before me).

> "69. I would dismiss the claimants' application for judicial review on the grounds that (a) it does not appear *from the facts before the court* that there has been any "movement of capital" falling within Article 56; and (b) for the reasons given in the judgments handed down in Huitson the retrospective provisions of s.58 are proportionate and compatible with Article 1 of the First Protocol to the Convention.
>
> 70. The remaining issues do not need to be decided for the disposition of the claimants' application for judicial review. They can be decided by a higher court, if and when it reaches the conclusion that the facts of the case disclose a "movement of capital" within Article 56. Otherwise, it is advisable for those issues to be left for decision by another court in another case which could not be determined without deciding them."

I have emphasised potentially relevant words.

26. For the sake of completeness I should add that an application was made to the Supreme Court for permission to appeal. That was refused on 7th February 2012 on the footing that the application did not raise a point of law of general public importance, "bearing in mind that the case had already been the subject of judicial decision and reviewed on appeal" (which betrayed a misunderstanding of the procedural history) and:

> "(2) in relation to the point of European Community law raised in the application, the application is also refused because the correct application of Community law is so obvious as to leave no scope for any reasonable doubt."

The Decision of the FTT

27. In arriving at its decision to strike out the appropriate parts of the appeal the FTT started by incorporating by reference the structure of the arrangements referred to above, the cross-references being to certain paragraphs of the Court of Appeal decision. It identified a number of relevant passages from the judgment of Mummery LJ and set them out before turning to set out the contentions of the parties. HMRC submitted that the EU law point arising out of Article 56 had been decided by the Court of Appeal and was thus res judicata. Further or alternatively it was submitted that the proceedings were an abuse of process because it was re-litigating something that the Court of Appeal had decided. Then it was submitted that the proceedings had no reasonable prospect of success because the doctrine of stare decisis would require the FTT to follow the decision of the Court of Appeal, which was adverse to the taxpayers on the point. The appellants were then recorded as saying that res judicata did not apply because the proceedings were different in nature. The abuse point was resisted on the footing that the point decided by the Court of Appeal was a narrow

point which, on analysis, was a point of fact, and the fact-finding process had been limited because of the nature of the proceedings (judicial review) and because not all relevant facts were before the court. The principles of stare decisis did not have a binding effect in this case because of the nature of the decision and in any event the Court of Appeal decision was said to be per incuriam.

28. In its decision the FTT did not find that the matter was res judicata. It said the causes of action were different, so "cause of action estoppel" did not apply. The different parties (the Crown being a party to judicial review proceedings) meant that the FTT was "reluctant to conclude" that "issue estoppel" applied. On stare decisis the FTT concluded that the Court of Appeal decision was on a point of law that was binding on it, and it rejected the submissions that an alleged non-consideration of certain ECJ case law and certain alleged factual inadequacies meant that the decision was per incuriam. Finally, it found that it would be an abuse of process to permit the arguments based on Article 56 to be run before the Tribunal because the Court of Appeal decision meant that the decision on it would be a foregone conclusion, and it would be an abuse to relitigate a point which had already been aired before, and decided by, the Court of Appeal.

29. Accordingly, it struck out "that part of the Appellants' case that argues that the provisions of s 58 of the Finance Act 2008 were incompatible with any rights enjoyed under Article 56…".

The arguments on this appeal

30. On this appeal Mr McDonnell challenged both bases of the FTT decision. He submitted that the decision of the Court of Appeal was not binding as matter of stare decisis, and that in the circumstances it was not an abuse to seek to run the Article 56 point again in the tax appeal. On stare decisis he submitted:

> (i) The decision of the Court of Appeal was a decision of fact, and not a proposition of law within stare decisis.
>
> (ii) The decision of the Court of Appeal is not binding in these circumstances, especially where a subsequent decision of the Court of Justice points away from it.
>
> (iii) Insofar as the Court of Appeal determined questions of law, such decisions can be taken again (he said "challenged", but that is an inappropriate word) in a lower court or tribunal because it can be shown to be inconsistent with subsequent decisions of the CJEU, it was reached *per incuriam* because existing CJEU cases were overlooked, and a lower court could, even when faced with a decision of the Court of Appeal which is

apparently binding, nonetheless take the view that the point requires a reference to the CJEU.

(iv) If any of those points are right then it cannot be abusive of the process to raise the Article 56 point in the appeal because there is a genuine possibility that the result in the FTT might be different. Furthermore, the different nature of judicial review proceedings (in particular the absence of a fact-finding function), the nature of the FTT jurisdiction, the fact that there are other similar cases in the pipeline which would raise the points anyway were other reasons for the FTT appeal on this point not to be an abuse.

31. Underpinning many of these submissions were three further propositions. First, that Mr McDonnell only had to establish that one or more of his bases were arguable – that was enough because this was a strike-out application which should only be acceded to if a case was unarguable. Second, that the Court of Appeal had (at least very arguably) got it wrong insofar as Mummery LJ's judgment seemed to be saying that there was no movement of capital in this case. He said there plainly was a movement of capital, and authority justified that position. Third, it was said that the Court of Appeal reached its conclusion on the basis of inadequate facts. Fuller facts would be deployed on an appeal, and they would falsify the conclusions of the Court of Appeal.

32. Mr Rivett said that the FTT was correct for the reasons given. The Court of Appeal had decided the point. What it had decided was these taxpayers had no claim that their Article 56 rights had been infringed, albeit the judgment sometimes expressed itself infelicitously, leaving out the word "relevant" on occasions where it ought to be read in. The FTT considered *Johnson v Gore Wood* [2002] 2 AC 1 and applied it correctly. There was no reasonable prospect of the success on the appeal on the issue in question because the Court of Appeal had decided the point on facts which were indistinguishable, and any attempt to introduce new facts ought not to be allowed. He disputed that the Court of Appeal decision was in any way per incuriam.

33. At this point I can get Mr McDonnell's "arguability" point out of the way. Although there will be some strike-out applications which will fail because a pleaded case is arguable, they will fail because the strike-out application is not the appropriate occasion to have that argument. The sort of arguments raised in the present appeal are arguments in relation to which it is possible (and indeed in the case of the abuse arguments, necessary) to determine arguments within the application. This suggested bar does not exist.

What the Court of Appeal decided

34. This point is a significant one for this appeal for at least 2 reasons. First, part of Mr McDonnell's submissions were based on doubt as to what it decided, or even that it decided something which was shown by other authority to be wrong. The point he relied on was whether or not there was a movement of capital in this case. Mr McDonnell said that the court seemed to be saying there was not, whereas it was plain

there must have been and authority supported that. Second, ascertaining what it decided is a central consideration in a determination as to whether the same point is being raised in the present appeal in a manner which should not be allowed because it is an abuse of process.

35. The Court of Appeal was apparently treated to a wide range of submissions on some "big picture" points as to how section 58 might operate in various situations so as to disincentivise movement of capital. This is apparent from various parts of the judgment, and in particular paragraph 36. It is clear that the court did not rule on any of those matters because it held that the applicants failed to overcome a particular point which made the rest of the debate academic. That point was whether they had made a *relevant* movement of capital. Various paragraphs of the judgment, taken by themselves, would suggest that the Court of Appeal determined that the applicants had made *no* movement of capital – see paragraphs 53, 54, 69 (all set out above) and 70, where it refers to a higher court concluding that the case discloses "a 'movement of capital' within Article 56". However, a proper reading of the judgment reveals that that was not what the court was saying. That is apparent from the issues as defined in paragraph 36, and the use of the word "relevant". The same word is used in paragraph 13 – "What, on the facts of this case, is the relevant 'capital'?"; and it appears from the acceptance of the Revenue's submissions recorded in paragraph 50 as being that there was "no relevant movement of capital to engage Article 56".

36. From those matters it is apparent that the Court of Appeal's inquiry was as to facts or matters which demonstrated that section 58 might have any effect at all on the applicants which would bring the matter within Article 56. It found that there was no way in which the applicants could demonstrate that they had been affected in some way which contravened Article 56. That this was the analysis is apparent from a number of places in the judgment. For example, see the italicised words in paragraph 19, and the opening sentence of paragraph 20. The court was investigating the effect of section 58 and Article 56 on the two appellants. That is why it set out the facts of their arrangements, so far as known to the court. This is emphasised by paragraph 41 which refers to an adjudication of the lawfulness of the tax treatment of the applicants "on the particular facts of this case". It is quite apparent by the time one gets to paragraph 53 which sets out the basis of the decision. The crux of the reasoning was that the £10 of settled funds on the one hand and the creation of the partnerships and the subsequent flow of profits into the partnership and the trust on the other were sufficiently divorced that the £10 was not a movement of capital which should be treated as impeded by section 58. There is probably further reinforcement for this analysis in the apparent acceptance of the last sentence of paragraph 50. That sentence (reflecting on the absence of evidence that the purpose of the trust was to invest in or enter into the Manx partnership) is a comment on the lack of a link between the two elements which I have described as being divorced.

37. On that analysis the conclusion of the court was one to the effect that, on the facts, the interaction between section 58 and Article 56 was not one that affected the applicants

(the appellants). They did not have a case for saying that their movement of capital (the £10) was impeded by section 58. Nothing in the section directly impedes it; nothing in the section creates a restriction; and conducting an inquiry as to any wider ramifications of section 58 based on the steps after the provision of the £10 was irrelevant because that was not part of any relevant movement of capital for the purposes of Article 56. Therefore the applicants were not affected by any conflict between section 58 and Article 56 and their application for judicial review failed.

38. That analysis coincides with the submissions of HMRC in the appeal before me. It accepted that £10 was a movement of capital, or it could be, but it was not one touched by a combination of Article 56 and section 58 because one did not look beyond it to the separate structure which was built subsequently. In making those submissions HMRC did not accept that the Isle of Man was a "third country" within the meaning of the Article. The appeal before me was conducted on the footing that that was an open point.

The nature of that determination

39. It was part of Mr McDonnell's case that the determination of the Court of Appeal was a finding of fact, not a finding of law. That was one of his reasons for saying that the doctrine of stare decisis should not be applied to it. Like the FTT, I find that that argument is wrong. The finding was a conclusion of law on the facts before the court. On those facts it was not possible for the appellants to say that, as a matter of law, they could bring themselves within the legal (not factual) prohibition in Article 56. For that reason they could not say that they could complain about the activities of a public authority (HMRC) vis-à-vis them.

Stare decisis

40. It is perhaps surprising that the doctrine of stare decisis is invoked in a situation in which the parties would seem to be the same and where some form of issue estoppel would at first sight be the appropriate port of call. However, the FTT rejected the proposition that the taxpayers were bound by issue estoppel or related doctrines (apart from abuse of process), so I suppose that the logical next step is stare decisis. This doctrine treats the earlier case as binding authority which would require the case in the FTT to be decided in the same way. It would operate in the same way in relation to taxpayers other than Mr Shiner and Mr Sheinman.

41. The application of this doctrine requires one to identify the ratio decidendi of the earlier decision, and then determine the extent to which it is applicable to the facts of the present case. At that point one might then have to consider other points relied on by the taxpayers, such as whether it was decided per incuriam or whether there are other legally valid reasons why the ratio should not apply.

42. I have analysed the decision of the Court of Appeal above. The ratio of its decision seems to have been that where taxpayers pay moneys to establish trusts which are apparently independent (the trustees have a discretion as to what to do with trust assets), and the money is subsequently applied in a partnership with the financial consequences generally described in the judgment, then while there is a movement of capital, it is not a movement of capital which can be said to have been impeded by section 58 for the purposes of Article 56. They are therefore not affected by any contravention of Article 56. Therefore they could not sustain a case for judicial review. The FTT's analysis appears in paragraph 34 of its Decision:

> "On the contrary, the Court determined that without a movement of capital within the meaning of art 56 no relevant EU rights were in point and thus any argument of incompatibility of s 58 was futile. The Court then decided (unanimously and unambiguously) that art 56 was not engaged. We consider that is a decision on a point of law that is binding on this Tribunal."

43. Mr McDonnell agreed with the first sentence as a proposition of law, but disputed what he said was the assertion that in this case there was no transfer of capital. I have dealt with this point above. On a proper reading of his judgment, Mummery LJ said that there was a movement of capital, but it was not a relevant movement of capital because, on the facts, it was not impeded in any relevant way by Article 56. On that basis the appellants could not say that any operation of Article 56 affected them, so they were not entitled to judicial review. The FTT concluded that that meant that Article 56 was not engaged. I agree with that conclusion.

44. That means that as a matter of stare decisis, and unless an exception applied, the same conclusion ought to be reached in another case on the same facts. The present case is (for these purposes) another case, and if the facts are the same then the same result should be reached for the reason given by the Court of Appeal. However, what is important it to determine whether the material facts are, for these purposes, the same.

45. At this point the stare decisis point runs into difficulties. There are no case documents, within this appeal, which enable one to see clearly, and with an appropriate degree of formality, that the facts are the same. There is no document within the current appeal which currently defines the facts which will be relied on. Each appeal was commenced relatively informally by a letter dated 18th July 2012 which indicated an intention to appeal and went on:

> "Our client's appeal is made on the basis that the operation of s58 Finance Act 2008, on which you appear to rely in concluding that HMRC's amendment to the return is appropriate, is incompatible with Article 63 of the Treaty on the Functioning of the European Union, and that it cannot be justified at least so far as its operation is retrospective in effect for the tax years in question. For the avoidance of doubt, our client will contend that apart from s58 Finance Act 2008 no amendments to the return is required.
>
> You will be aware that our client sought Judicial Review in respect of such issues recently and the Court of Appeal decided against our client on the facts before the court. Nevertheless, we consider that our client's appeal to the First-tier Tribunal will be different proceedings and that it will be proper for the Tribunal to consider the issues of EU law for itself, in the light of the facts before the Tribunal."

46. There is no other document which indicates in a formal way the facts on which the taxpayers will rely. However, Mr McDonnell indicated two matters of fact which would be relied on by his clients which were not matters before the Court of Appeal. They appeared in his skeleton argument and he referred to them in his oral submissions. They were, taking the wording from his skeleton argument:

> "(a) evidence that the Appellants when transferring capital to the Isle of Man intended that it would become partnership capital; and
>
> (b) evidence that the Appellants, through the settlements, maintained their interest in the income of the Isle of Man partnership from year to year when they could have disposed of that interest as set out in [an earlier paragraph of the skeleton argument]."

47. Mr McDonnell's skeleton argument before the FTT raised the prospect of adducing evidence of this nature, albeit differently phrased and more extensively described.

48. The facts before the Court of Appeal were apparently very limited, a point on which the court itself commented. They are basically summarised above and were confined to the structure of the overall arrangement – the payment of money, the terms of the trusts (I am told that the deeds were before the court), the nature and existence of the partnerships and the potential, at least, for the profits to be paid out to the taxpayers.

The existence, extent and force of any intentions of the taxpayers that the trust funds should be applied to the partnership, and become an investment, were not in evidence. Paragraph 46 of the Court of Appeal judgment reflects the taxpayers' submissions on the point, and paragraph 50 records the submissions of the Revenue that there was no evidence that the purpose of either trust was to invest in or to enter into the Manx partnership. The Court of Appeal made no finding on the point, save that it probably implicitly accepted the Revenue's "no evidence" point.

49. I accept for present purposes that the points on which it is said that evidence will be adduced on the main tax appeal (if the appeal survives this appeal) would include material which was not before the Court of Appeal. Apart from the strike-out application, there is nothing procedurally which would preclude their introduction. Although it is odd to define a factual case in a skeleton argument, that ought to be allowed here because the strike-out application was launched at an early stage before factual points were more fully defined. If that evidence is indeed adduced, and if there are findings about it that the taxpayer seeks, then stare decisis will only apply if those facts were to be found to be immaterial. It is not possible to reach that conclusion on this hearing, and indeed embarking on that sort of hypothetical inquiry in an application such as this strike out application, on a case as potentially complex as this, would probably be inappropriate. Mr Rivett did not really seek to do so. He hinted a little darkly that evidence of the purpose of the taxpayers of the kind which they would apparently seek to introduce might introduce a different range of difficulties for them, but he did not go further than that.

50. Accordingly it is not apparent that the material factual findings on the appeal from the assessments will be the same as those on which the Court of Appeal made its decision, and in those circumstances it cannot be said, at present, that the point at issue in the appeal is stare decisis. I emphasise "at present". If it turns out that there is no material difference between the facts established or averred on the appeal and the facts on which the Court of Appeal based its decision, then the doctrine could come into play. But that is not apparent at the moment. Because of the procedural stage at which the application to strike out was launched it is not possible to say that the facts are not materially different.

51. That conclusion makes it unnecessary to go on to consider the merits of Mr McDonnell's submissions that the Court of Appeal decision was per incuriam, or his other reasons for saying that the doctrine is not applicable, and I shall not do so, at least in this context – I have to return to it below.

52. The conclusion that I have reached is on the assumption that the taxpayers are allowed to adduce evidence of additional facts on the tax appeal. Whether they should be allowed to do so is a question which is bound up with the next basis of striking out,

namely abuse of process on the footing that the taxpayers should not be allowed two bites at the cherry.

Abuse of process

53. The FTT found that the decision of the Court of Appeal was a decision binding on them and was not per incuriam, and in the light of that went on to consider whether it would be an abuse to take an Article 56 point on the tax appeal. It held that it would be an abuse because it was inevitable that the appeal would go against the taxpayer because of the stare decisis point, and further that it would an abuse to allow a point which had already been litigated to be litigated again in the light of *Johnson v Gore Wood*.

54. Part of the basis of that decision goes because I have held that it cannot be determined (at least at this stage) that the point in issue on the appeal is stare decisis. However, the second of those bases is separate, and does not depend on the application of binding precedent. The aspect of the abuse doctrine relied on by the FTT was that part set out by Lord Bingham in *Johnson* at page 23 (cited in the FTT decision at paragraph 14):

> "This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V C in *Henderson v Henderson* (1843) 3 Hare 100 at 114–115, [1843–60] All ER Rep 378 at 381–382, where he said:
>
> > 'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

> Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell LJ put it in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257) may cover—
>
> > 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'"

55. Although rule 8 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 (which deals with striking out) does not expressly provide for striking out a case on the grounds of abuse of process, Mr McDonnell (correctly, in my view) did not dispute that that could be a basis of striking out. He said that in a special case one could achieve the same result under Rule 5, which provides for case management powers. He referred me to *Foulser v HMRC* [2013] UKUT 038 (TCC). His appeal to me did not complain that the FTT was exercising a jurisdiction that it did not have. Nor did he really explain what "special" meant. Something is either an abuse or it is not, and if it is an abuse it is either a sufficient abuse to justify striking out, or it is not. A case does not have to be special. It has to be sufficient. That is the real question, and that is the question I shall address.

56. The basis on which stare decisis does not determine this case against the appellants is that the facts may not be the same. Mr McDonnell wishes to save his case by seeking to rely on facts that were not before the Court of Appeal. In *Johnson* terms it therefore becomes necessary to consider whether, having had one go at getting a determination that they are not liable for tax as a result of section 58, the appellants should be entitled to have another go via this appeal on the footing that they wish to adduce evidence of further facts. Mr Rivett says they should not, and to seek to do so is an abuse which falls squarely within what Lord Bingham was forbidding in *Johnson*. He referred me to page 31 of the report:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse)

> that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

57. This makes it clear that the test is not a mechanical one. The mere fact that the taxpayers took their Article 56 point in the Court of Appeal does not automatically mean that they cannot take it again in this appeal. The question is a broader one than that. A determination of it has to weigh all the circumstances and consider the justice of allowing or not allowing a second attempt to challenge the closure letters. It is clear from Lord Bingham's speech that the burden is on the person alleging an abuse. Mr Rivett presented this as a straightforward and obvious application of all the principles said to arise out of *Johnson* which prevented parties litigating the same point twice.

58. Absent the validity of any of the points taken by Mr McDonnell, which I consider next, I consider that Mr Rivett is correct. The taxpayers decided to take their point in judicial review proceedings. They advanced their case there, and they lost. A second attempt at the cherry would be an abuse, subject to the possibility that Mr McDonnell's points might indicate otherwise.

59. Mr McDonnell put forward four reasons why the appeal to the FTT was not an abuse in *Johnson* terms. They were:

> (a) The difference in the nature of judicial review and tax appeal proceedings.
> (b) The FTT is tasked with determining or dismissing a tax assessement. It is obliged to follow the law regardless of what the parties may say, and commencing appeal proceedings is not the same as starting civil

proceedings. He came close to saying, in effect, that *Johnson*-type abuse did not apply to these sort of proceedings.
(c) There are a large number of other pending cases in which the same point arises (presumably because this was a marketed scheme). If the points that he wishes to take were not taken in these proceedings because of a strike-out, but were successfully taken in other proceedings then that would be unfair to his clients.
(d) The FTT has the right to consider for itself whether European law was applied correctly and, if appropriate, refer a question to the European Court of Justice. If that is right then it cannot be an abuse to run the appeal so that the points can be considered.

The first point – the different nature of judicial review proceedings

60. In relation to this first point Mr McDonnell emphasised that judicial review proceedings were not a fact-finding exercise. He pointed to paragraph 38 of the decision in which Mummery LJ pointed out that:

> "Judicial review procedure is not best suited for deciding disputed question of fact, or for deciding the tax liabilities of taxpayers in a dispute that is fact sensitive."

61. In the same vein he would probably seek to rely on the words "on the facts before the court" in paragraph 69. Mr McDonnell's submissions were to the effect that bearing in mind the different nature of judicial review proceedings, his clients should not now be debarred from running an appeal in which full factual matters could (and should) be raised. His clients would not have had time to put in extensive evidence in the judicial review proceedings, and should have the opportunity to do so now.

62. I do not accept that submission, on the facts of this case. When the Court of Appeal was referring to limited factual inquiries it was indicating that disputes of fact would often not be appropriately dealt with on judicial review application. If there had been disputes of fact relevant to issues that it had to decide then it might well not have decided those issues. However, that is not the same thing as saying that the applicant should only put in limited evidence. The taxpayers had a choice of forums. They could have chosen to take the appeal route (a course which, as I have said, I was told was favoured and suggested by HMRC), but chose judicial review. Having done so, as in any proceedings, the applicants (the taxpayers) had a choice as to what evidence to put in. They decided to put in very little evidence, and in particular not to put in evidence in some areas which they now say are relevant to the point that they wished to have decided in the judicial review proceedings (and the appeal proceedings). That was the ground on which they elected to fight the point. There was nothing in the nature of judicial review proceedings which prevented them putting in the additional evidence if it was relevant. If they had done so it might have been the case that the court would have held that judicial review was inappropriate, if those facts were

contested (we will never know), but that would merely have made HMRC's point about that. The fact remains that the taxpayers deliberately chose the type of proceedings, and then deliberately chose to put in only very limited evidence to support them (HMRC had to flesh some of it out for the court).

63. There is therefore nothing in the initial choice of judicial review proceedings which meant that the taxpayers were somehow constrained in putting in additional evidence of the kind they now seek to adduce, and which would render it non-abusive to run what is the same threshold point (whether they are affected by Article 56 in a relevant way) on additional evidence. Having a second go at proceedings on the basis of evidence which was available first time round but not adduced is likely to be the sort of abuse at which *Johson v Gore Wood* is aimed.

64. Mr McDonnell is correct in pointing out that, to some degree, judicial review proceedings are different from tax appeals. The form or relief sought is likely to be different, and procedurally they are very different. However, they are each capable of deciding the same point, and if the same point is decided in one set there is no reason why, in appropriate circumstances, it should not be held to be a sufficient determination for abuse purposes in the other. As a matter of principle, an opportunity to take a point in the judicial review proceedings in the present matter could be taken to be sufficient to render a subsequent appeal an abuse on *Johnson* grounds. The difference in types of proceedings does not render this inapposite.

65. So the question becomes whether, in these particular sets of proceedings, there was something in the fact-finding, or fact-propounding, element in the judicial review proceedings, when compared with what can be done in the tax appeal, which makes it inappropriate to say that the appellants have had an opportunity to run their case on the relevant factual basis in an appropriate forum, and should not have another. In formulating the point in that way I have not lost sight of the fact that the burden of establishing an abuse is on the party alleging it; I am identifying the real point behind Mr McDonnell's answer to why the FTT proceedings are said to be an abuse. He says in essence that his clients did not run all relevant factual points in the judicial review proceedings, because of their nature, and should be allowed to do so now.

66. I do not consider Mr McDonnell's points to be good. There is nothing in the nature of judicial review proceedings which makes them sufficiently different from appeals to the FTT in such a way as would make bringing those proceedings and a determination in them an inappropriate basis for *Johnson*-type abuse of process. The taxpayers had a choice of what proceedings to bring. They chose judicial review. They then chose the evidence that they adduced on that application. If that was less than their full evidential case, then that was their choice. For the reasons appearing in *Johnson*, they should not be entitled to fight on a limited factual basis in one tribunal, and keep some facts back and then deploy them in another tribunal in due course, and indeed use

those facts as a reason for having a second bite at the cherry. There was nothing in the nature of the judicial review proceedings which forced that course on them. It was a litigation choice. The relevant facts were ones which, if they might have made a difference, were ones which, on the facts, they could and should have deployed in the judicial review proceedings.

67. I deal briefly with one point which Mr Rivett relied on as supporting the case for saying that the taxpayers should not be allowed to rely on additional evidence as justifying their second bite. He pointed out that there is a duty of candour in relation to evidence in judicial review proceedings – see the White Book at note 54.6.2. He suggested that the claimants were thereby obliged to bring forward the whole of their evidential case.

68. I do not rely on that point. The duty of full and frank disclosure referred to there is imposed mainly to ensure that applicants put adverse points in their evidence. If the applicants fail to put in points which they say favour them and are not adverse to them then that damages their case. It would not normally lead to a discharge of the judicial review relief. I therefore do not take that point into account in arriving at the conclusion which I have stated on this point.

The second point - the task of the FTT

69. Mr McDonnell's next point seems to turn on his analysis of the function of the FTT. He submitted that it had to follow the law in any event, regardless of what the parties said, because its statutory function was to confirm or set aside an assessment. In that context the scope of complaining that the proceedings were an abuse was much less. He was minded to say that a strike-out could only take place if one was brought within the grounds for strike-out in Rule 8 of the 2009 Rules, and while he accepted that the concept of abuse could exist in relation to the FTT, one could not strike out unless one of the specific strike-out grounds in rule 8 was made out. The abuse in question here was not such an abuse.

70. This was not a point which was taken before the FTT. It arose for the first time during argument before me. It was not even foreshadowed in Mr McDonnell's skeleton argument.

71. Rule 8 provides for the striking out of proceedings on mandatory grounds on certain jurisdictional bases which are not relevant here, and goes on:

> "(3) The Tribunal must strike out the whole or part of the proceedings if –

(a) the appellant has failed to comply with a direction which stated that failure by the appellants to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers that there is no reasonable prospect of the appellant's case, or part of it, succeeding."

72. It is true therefore true that Rule 8 provides for certain specific strike-out grounds, and they do not refer to the concept of striking out on the basis of an abuse. However, in my view, that does not necessarily exclude the possibility of striking out for abuse. The rules do not seem to refer to the concept of abuse at all, yet Mr McDonnell accepted (rightly in my view) that the concept of an abuse of proceedings was one which was potentially applicable to proceedings in the FTT. If that is right then, in relation to these matters, it cannot be said that the Rules are necessarily exhaustive in this particular area. Mr McDonnell accepted that abuses could be controlled under Rule 5, which gives general case management powers. If that is right, then one has to ask how it is that the court can control abuses. It can control abuses in the form of hopeless cases via Rule 8(3)(c). In my view Rule 8(3) is not exhaustive of the potential abuses which might exist. All the reasons which support the existence of the *Johnson v Gore Wood* type of abuse in which parties seek to litigate matters which have already been litigated are capable of applying to proceedings in the FTT which are, at least in part, judicial. Mr McDonnell submitted that in the context of issue estoppel it has been recognised that the proceedings are partly administrative (relying on *Littlewoods Retail and Others v HMRC* [2014] EWHC 868 (Ch)). I do not think that I have to decide the basis on which that label might be correctly applied. In my view the general case management powers of the FTT allow it to recognise the concept of an abuse of process, and those powers must be capable imposing a sanction, of which striking out is likely to be a necessary one in some circumstances. Accordingly, since the concept of abuse of the *Johnson v Gore Wood* type applies to the FTT, it would lie within the powers of the Tribunal, in an appropriate case, to strike out. The newly-taken jurisdictional point therefore fails.

73. In exercising a power to strike out for this kind of abuse, the FTT is not, as submitted by Mr McDonnell, failing to carry out its statutory function of deciding cases according to the law. I do not see why a failure to entertain cases which can be shown to be an abuse is a failure to decide cases according to the law. The application of the concept of abuse of process is as much an application of the law of the United Kingdom as is applying the substantive law.

74. Accordingly, I find that this point taken by Mr McDonnell has no weight.

The third point – the presence of other cases

75. Mr McDonnell's next point is that it would be unfair to strike out for abuse because it would distinguish unfairly between the appellants in the present appeals and other appellants who would come along later and who would not be barred from taking an Article 56 point on abuse grounds because none of them will have run the point through judicial review proceedings first.

76. I confess that I was originally a little troubled by this point, but on reflection I do not think it works in Mr McDonnell's favour. It may be true that subsequent appellants will be able to run arguments that Mr Shiner and Mr Sheinman cannot run, but that is because the latter gentlemen chose to run their case somewhere other than the FTT and did not advance evidential cases that later appellants may seek to run (it cannot be known whether or not they will). They will be in no different position from other litigants in more traditional litigation who litigate first, lose, and then see others with similar claims doing better than they did because those others run their cases differently. I do not think that this is a point which lessens or removes the abuse, or which ought to reduce the consequences to something less than a striking out.

The fourth point – the Tribunal can consider the European law point for itself and refer if necessary

77. On analysis this point has a general and a particular aspect. Its general aspect depends on a submission that any lower court has its own right of reference on a European point in relation to matters on which it would, as a matter of English precedent, be bound, and can consider in that context whether the higher court might have got its decision wrong. It is said that if that is right then it cannot be an abuse to start and maintain the proceedings. In its particular aspect, Mr McDonnell submitted that the Court of Appeal could be shown to have arguably got the case wrong, with the consequence that (if demonstrated) the FTT could and should reach a different decision.

78. So far as the general aspect is concerned, Mr McDonnell is able to start from the principle expanded in *Elchinov* Case C-173/09. In that case the European Court was asked to decide (inter alia):

> "Having regard to the principle of procedural autonomy: is the national court obliged to take account of binding directions given to it by a higher court when its decision is set aside and the case referred back for reconsideration if there is reason to assume that such directions are inconsistent with Community law?" (paragraph 19(3)).

79. In its judgment the Court said:

> "25. In that regard, it must be borne in mind, firstly, that the existence of a rule of national procedure such as that applicable in the case in the main proceedings cannot call into question the discretion of national courts not ruling at final instance to make a reference to the Court for a preliminary ruling whether they have doubts, as in the present case, as to the interpretation of European Union law.…
>
> 27. The Court has thus concluded that a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union Law concerned by such legal rulings. The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union Law, to refer to the Court questions which concern it…"

80. That authority gives Mr McDonnell quite a good starting point for his submissions. However, the right of a lower court to consider afresh a matter in which it is prima facie bound by a higher decision, does not seem to extend to a right simply to depart from that higher decision. It is a right, if it thinks fit, to refer a question to the European courts. In an English context, this is made clear by the view of the Court of Appeal as to the extent to which it should feel itself bound by its own previous decisions when those previous decisions are called into question by European considerations. In *Condé Naste Publications Ltd v Commissioners of HM Revenue and Customs* [2006] EWCA Civ 976 the Court of Appeal considered its own position in relation to re-hearing European points. Chadwick LJ said:

> "41. I am content to assume that there may be circumstances in which the obligation imposed on courts by section 3(1) of the European Communities Act 1972 would require this Court to refuse to follow its own earlier decision as to the meaning and effect of a Community instrument – including, in the present context, the effect of a judgment of the Court of Justice. Those circumstances would, I think, include a case in which the judgment of the Court of Justice under consideration by this Court in the earlier case had been the subject of further consideration – and consequent interpretation, explanation or qualification - by the Court of Justice in a later judgment. But, as it seems to me, one constitution in this Court should not substitute its own view as to the effect of a judgment of the Court of Justice for the view which has been reached by an

> another constitution in this Court in an earlier case on consideration of the same judgment in circumstances in which there has been no opportunity for the Court of Justice to review that judgment. In those circumstances, if persuaded that there are strong grounds for thinking that the earlier decision is wrong (as a matter of Community law) this Court may think it right to refer the point to the Court of Justice for a preliminary ruling. Or it may follow the earlier decision and give permission to appeal. But it should not refuse to follow the earlier decision merely because, on the same material and the same arguments, it is satisfied that a different conclusion should have been reached."

81. It is apparent from that that, in the absence of a Court of Justice decision on the very point, the Court of Appeal itself would not depart from a previous decision unless there were "strong grounds" for thinking that the earlier decision was wrong, and even then the court would not simply substitute its own view and would either refer the matter, or give permission to appeal to the Supreme Court. If the most that can be done by the Court of Appeal (in the absence of a clear European decision directly in point) is to refer or give permission to appeal, the same ought to apply to the FTT when faced with an apparently binding Court of Appeal decision. In particular, there ought to be "strong grounds" for thinking that there is something that needs, or might need, a reference. It is not enough for an appellant to put forward a case based on a desire to have a reference in relation to a matter raised in a Court of Appeal decision in some sort of speculative challenge to it.

82. In relation to a reference two things form an important part of the background to this debate. First, the Court of Appeal in the present matter had an extensive debate on the European points before it, and I am confident that they will have seen plenty of authority. It declined to refer any point to the Court of Justice (see paragraph 71). Second, in refusing permission to appeal the Supreme Court considered that there was no case for a reference because the point was clear enough – see above. That is compelling material which should be fully respected. In my view, unless something has changed since then, or there are "strong grounds" for supposing that something has gone wrong, then the theoretical jurisdiction to make a reference would not be a good reason for allowing the appeal to the FTT to go ahead if everything else pointed to its being halted. The need to bring litigation to an end applies even to cases involving a European dimension.

83. Accordingly, I consider the submissions of Mr McDonnell with a view to seeing if there is any ground for saying that the law has somehow moved on since those two superior decisions, or that there has been some possibility of an error which needs to be corrected by a reference. In the absence of something like that the FTT proceedings become speculative.

84. Analysing Mr McDonnell's submissions on this, his first point would seem to be that the Court of Appeal may have misunderstood the meaning of a movement of capital as a matter of EU law, or to have failed to appreciate what must be shown in order to engage the right to free movement of capital. He observes that the court was not taken to the Nomenclature set out in Annex I to Directive 88/361/EEC which gives guidance; it did not refer to authorities said to establish that a gift to person overseas (including a transfer to a settlement) is a movement of capital; it did not refer to authorities which establish that the proper question is whether movement of capital is discouraged; it did not refer to authorities to the effect that a measure which discourages retention of an interest in an overseas structure is prohibited; and indeed that it did not refer to any EU authorities at all.

85. I do not consider that any of these would justify what would be a bold finding that the Court of Appeal may have erred. The court did not find there was no movement of capital. It found there was no relevant movement of capital which was caught by Article 56. Paragraph 50 of the judgment of Mummery LJ records the Revenue's submission that the only movement of capital relied on was the sum of £10. It seems that the Revenue did not dispute that that was a movement of capital (as indeed it did not before me); it disputed that it was a relevant movement. Mummery LJ accepted those submissions and should be taken to be accepting the premise that there was a movement of capital. That deals with most of Mr McDonnell's points. The failure of the court to take account of the possibility that retention of an interest might be relevant to impeding free movement of capital is down to the way in which the taxpayers chose to run their case on judicial review. They cannot assume that they are entitled to try judicial review, and then have a further go on additional facts (see above).

86. Mr McDonnell's second point is a version of his *per incuriam* submissions which I did not consider above, but which I have to deal with now. He submitted that subsequent decisions of the CJEU have made it clear that, on the facts of this case, there was a movement of capital. The only one that he showed me was *European Commission v Austria* Case C-10/10, in which judgment was delivered on 16th June 2011 (after argument in the Court of Appeal but before it delivered judgment – no-one sought to draw it to the Court's attention). This case is said to support the submission that a gift can be a movement of capital. It does indeed seem to do so. However, that does not go to anything that was in issue because, as already pointed out, the Court of Appeal accepted that the gift to the trustees was a movement of capital anyway. So that case adds nothing.

87. Mr McDonnell also referred to (but did not take me to) *Schroder v Finanzamt Hameln* Case C-450/09, decided on 31st March 2011. As far as I can see, the only relevance of this case is a reference to the possibility of gifts being movements of capital. For the same reason as that just given, it does not take the matter further.

88. *Commission v Hellenic Republic* Case C-406/07 was relied on and cited by Mr McDonnell, not as a case decided after the Court of Appeal decision (or argument) but as a relevant case not cited. He said it was not cited because no translation was available. Be that as it may, I was taken to it. It concerns partnerships and freedom of establishment, not freedom of movement of capital. Mr McDonnell said that the two doctrines go hand in hand in a number of respects. Whether or not that is true, nothing in it seems to me to impact on the point decided by the Court of Appeal.

89. Four other CJEU cases were referred to in Mr McDonnell's skeleton argument as being recent cases which are said to make it clear that "on the facts of which will be established in this case, there was a movement of capital". I was not taken to them at the hearing. I have read the paragraphs identified as relevant for the two whose relevant paragraphs were identified, but I have not engaged in unguided dissection of the other two to see what their relevance might be. Of the two that I read, neither of them address the point on which the Court of Appeal reached its decision. If Mr McDonnell's reliance is intended to establish that there was a movement of capital, then he does not need to hit that target. As laboured previously, the Court of Appeal seems to have found there was one; it also found it was not a relevant one – Mr Shiner and Mr Sheinman were not affected in that movement of capital for the purposes of Article 56.

90. Accordingly, I find that there is no ground for supposing that an appeal, so far as permitted, would reveal that there are or might be sufficient grounds for questioning the Court of Appeal judgment so as to justify a reference to the European courts. The taxpayers are not entitled to run what would otherwise be a hopeless or abusive appeal in the hope that something will turn up. In the light of the authorities and principles identified in this part of this judgment they must establish there is a realistic prospect of establishing grounds for referring, and in the light of the previous decisions of the Court of Appeal and Supreme Court I do not consider that there is. In those circumstances the prospect of there being such a reference does not save the appeal from what would otherwise be the conclusion that it is an abuse of process.

Conclusion

91. It follows, therefore, that this appeal falls to be dismissed.

TRIBUNAL JUDGE: Mr Justice Mann

RELEASE DATE: 3 November 2015