Neutral Citation: **[2025] UKUT 00254 (TCC)**

Case Number: UT/2024/000031

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London
EC4A 1NL

Procedure – appeal against Judge's decision not to recuse herself – substantive appeal subsequently heard and determined – jurisdiction of the Upper Tribunal to strike out the appeal on ground that it is an abuse of process or academic – application to substitute new parties – application for privacy and anonymity

Heard on: 13 May 2025
Judgment date: 30 July 2025

Before

MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN CANNAN

Between

CIRCLEPLANE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Adrian Eissa KC instructed by way of public access

For the Respondents: Emile Simpson of counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. In this appeal the appellant ("Circleplane") has appealed a decision of Tribunal Judge Fairpo ("the Judge") sitting in the First-tier Tribunal Tax Chamber ("the FTT"). The hearing before the FTT was listed before the Judge on 3 October 2023. Mr Joseph Howard of counsel was representing Circleplane ("Counsel"). At the start of the FTT hearing, Counsel applied for the Judge to recuse herself on the grounds of a perception of bias. The Judge refused the application but the hearing was vacated because the time spent dealing with the application meant that there was insufficient time to deal with the substantive appeal.

2. The Judge issued written reasons for refusing the recusal application on 20 November 2023 ("the Recusal Decision") which is the decision under appeal. The Judge set out the case law on recusal for perception of bias at [5] – [13] of the Recusal Decision. She set out the basis upon which it was alleged there was a perception of bias at [15] to [19]. In brief, and as described by the Judge, the perception of bias (and the Judge's response) was as follows:

(1) In 2018, the Judge and Counsel were members of the same specialist tax chambers known as Temple Tax Chambers ("Chambers").

(2) There was a dispute between Counsel and Chambers.

(3) Counsel considered that the Judge would be well aware of the details of the dispute. However, whilst the Judge was aware that Counsel had resigned from Chambers following a dispute with the management committee, she was not aware of details of the dispute. She was not a member of the management committee. The Judge was subsequently appointed as a salaried Tribunal Judge and left Chambers. Her recollection was that details of the dispute were confidential to the management committee and were not made available to all members of Chambers. She was not aware that the dispute extended beyond the management committee.

(4) In alleging perception of bias, Counsel also relied on the fact that the Judge had "inexplicably" been allocated to his three previous cases which he considered to be "statistically implausible".

3. Applying the test for perception of bias, the Judge found that a fair-minded observer in those circumstances would not conclude that there was a real possibility of bias against Circleplane. The application was therefore refused.

4. Circleplane applied for permission to appeal on 15 January 2024 on the following grounds:

(1) The FTT misdirected itself as to the law in relation to the "real possibility" test and its impact on the appearance of bias in the mind of an impartial observer.

(2) The FTT erred in law in failing to take into account or give sufficient weight to the Judge's own personal involvement in the dispute.

(3) The FTT erred in law in placing undue weight on the Judge's own personal investigations and present recollections.

(4) The FTT erred in law in failing to take into account the impact of conflicting information on the mind of the impartial fair-minded observer.

(5) The FTT erred in law in failing to take into account or place sufficient weight on the scale and scope of the dispute between Counsel and Chambers.

(6) The FTT erred in law in failing to take into account the real possibility of the appearance of unconscious bias.

5. In the application for permission to appeal, Counsel described the dispute in more detail. For present purposes we can simply record that the dispute is said to involve sensitive issues including allegations of discrimination by the management committee and by other members of Chambers not including the Judge. It is also said that emails between Counsel and the management committee were exchanged which were copied in to other members of Chambers, including the Judge. It is said that the Judge was therefore privy to details of the dispute and that the dispute could have directly affected the Judge's own commercial and financial position. As a member of Chambers at the material time she could be personally liable for any damages awarded against Chambers. It has subsequently been said by Counsel that the dispute is unresolved and could be reignited.

6. Prior to the application for permission to appeal, the FTT wrote to the parties on 19 December 2023 asking for dates to avoid to relist the substantive appeal. Counsel responded on 2 January 2024 saying that if the matter were to be relisted before the Judge then it could not be effective. If a different judge was allocated, the substantive hearing could be effective and Counsel encouraged the FTT to take that course. In the alternative, he said that the FTT appeal should be stayed pending Circleplane's appeal against the Recusal Decision.

7. The Judge granted permission to appeal on all grounds on 28 February 2024.

8. On 23 May 2024, the FTT sent a notice of hearing with a new hearing date of 18 September 2024. We understand that the hearing took place on that date before a different judge. A different representative appeared on behalf of Circleplane at that hearing because Counsel was not available. The underlying FTT appeal concerned an information notice issued to Circleplane. A decision was released on 19 September 2024 allowing the appeal in part and directing that the information notice should be varied. There is no right of appeal against that decision which is therefore final.

9. Given that the substantive FTT appeal has been determined, one might have expected that to be an end of the present appeal. However, on 13 January 2025 Circleplane made an application for privacy and anonymity ("the Privacy Application") in connection with this appeal. There was no indication in the Privacy Application that the FTT appeal had been determined, indeed it was referred to as still continuing. Circleplane sought directions as follows for the Upper Tribunal appeal:

(1) That all hearings be in private and any decision be fully anonymised.

(2) That certain sensitive emails relevant to the appeal and the Privacy Application should not be disclosed to HMRC.

(3) That the Privacy Application itself should be heard in private.

10. The Privacy Application alleges that, despite what the Judge had said about her lack of knowledge of the dispute between Counsel and Chambers, she would have been aware of full details of the dispute. In support of that allegation, contemporaneous emails referring to the dispute to which the Judge had been copied at the time were annexed to the Privacy Application. The Privacy Application alleges in the alternative that a reasonable observer, with full knowledge of the facts, would regard the Judge's denial of knowledge of the detail of the dispute as being inconsistent with the evidence, thus heightening the suspicion of bias.

11. The Privacy Application referred to the sensitive nature of the dispute in Chambers and to certain matters relating to Counsel. It is said that these matters also affect the privacy of third parties, including members of Chambers and former members of Chambers. The Privacy

Application included an application that if it was dismissed, the fact of the application should remain private and anonymised.

12. On 4 February 2025, HMRC applied for the Upper Tribunal to dispose of the appeal and the Privacy Application on the basis that the underlying proceedings had been determined by the FTT. As such, the appeal served no purpose and should be discontinued. Essentially, this was an application to strike out the appeal ("the Strike Out Application").

13. Circleplane served an objection to the Strike Out Application on 20 February 2025. It contended that there was no basis for HMRC to ask for the appeal to be discontinued and that there is no jurisdiction for the Upper Tribunal to strike out an appeal where permission to appeal has been granted. The notice of objection also included cross-applications by the Appellant as follows ("the Cross-Applications"):

(1) An application that Joseph Henry Howard Limited ("the Company") be substituted for Circleplane as the appellant.

(2) An application that the FTT be substituted for HMRC as the respondent to the appeal, alternatively that the appeal should proceed without a respondent.

14. The Upper Tribunal gave directions on 10 March 2025 for a hearing of the Privacy Application, the Strike Out Application and the Cross-Applications to take place on 13 May 2025. It also directed that the hearing should be in private. No direction was given in relation to the anonymisation of any decision following the hearing. The Tribunal also gave the FTT and Chambers an opportunity to make representations and to appear at the hearing. The then President of the FTT Tax Chamber informed the Tribunal that the FTT did not wish to attend the hearing or make representations. Chambers informed the Tribunal that it did not wish to appear at the hearing. It made clear its position that the allegations being made by Counsel were factually inaccurate and vigorously disputed.

15. At the outset of the hearing, we made clear to Mr Eissa KC, who appeared for the Appellant, that if the Privacy Application was not successful then we were not at that stage persuaded that our decision and the names of parties including Counsel should be anonymised. We would however be sensitive as to what was necessary to record in our decision. Having taken instructions, Circleplane maintained the Privacy Application and the Cross-Applications and objected to the Strike Out Application.

16. HMRC's position is that it maintains the Strike Out Application. In the event that the Strike Out Application is rejected, it does not oppose the Cross-Applications and is neutral on the Privacy Application.

17. There was some discussion as to the order in which we should deal with the various applications. The Strike Out Application and the Cross-Applications are inextricably linked. It was common ground that an appeal against the Recusal Decision would be academic as between the existing parties. Mr Eissa did not seek to persuade us that the appeal should go forward with the existing parties, although the point was not formally conceded. By replacing those parties pursuant to the Cross-Applications, Counsel and the Company seek to achieve what they say is an important objective, namely certainty in relation to future cases listed before the Judge in the FTT where Counsel is instructed. In the circumstances we decided to hear the Strike Out Application and the Cross-Applications together. We then heard the Privacy Application separately.

18. We adopt the same approach in this decision.

THE STRIKE OUT APPLICATION

19. Two issues arise on the Strike Out Application:

(1) What is the nature and extent of our jurisdiction to strike out an appeal.

(2) If we have jurisdiction, is that jurisdiction engaged in the circumstances of this case.

Jurisdiction to strike out

20. HMRC's case is that the Upper Tribunal's jurisdiction to strike out an appeal arises expressly by virtue of Rule 5(2) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), alternatively by reason of the Tribunal's implied powers.

21. Rules 5 and 8 of the Rules contain the relevant express powers of the Upper Tribunal. Rule 5 provides as follows:

> **Case management powers**
>
> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.
>
> (2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may …

22. Rule 5(3) then goes on to identify certain specific case management powers, for example in relation to extending time for compliance with a direction or rule, in relation to documents and in relation to hearings. There is no express reference in Rule 5(3) to a power to strike out.

23. Rule 8, in so far as relevant, provides as follows:

> **Striking out a party's case**
>
> 8(1) The proceedings, or the appropriate part of them, will automatically be struck out—
>
> (a) if the appellant or applicant has failed to comply with a direction that stated that failure by the appellant or applicant to comply with the direction would lead to the striking out of the proceedings or part of them; or
>
> (b) …
>
> (2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper 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 Upper Tribunal may strike out the whole or a part of the proceedings if —
>
> (a) the appellant or applicant has failed to comply with a direction which stated that failure by the appellant or applicant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant or applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding.
>
> …
>
> (7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that—

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or interested party from taking further part in the proceedings;…

24. It is also worth noting Rule 2 in relation to the overriding objective of dealing with cases fairly and justly:

> **Overriding objective and parties' obligation to co-operate with the Upper Tribunal**
>
> 2(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Upper Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.

25. HMRC submits that the Upper Tribunal has jurisdiction under Rule 5(2) to strike out or otherwise dispose of an appeal where that is consistent with the overriding objective. It contends that the circumstances in which that jurisdiction will arise include appeals which are an abuse of process and may include situations where an appeal is purely academic, even if it is not an abuse of process. Circleplane submits, on the other hand, that Rule 5 is concerned only with matters of procedure and thus cannot confer a jurisdiction to "strike out".

26. In construing Rule 5(2), we must give effect to the overriding objective. We bear in mind section 22(4) Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") which provides that the power to make Tribunal rules is to be exercised with a view to securing that proceedings are handled quickly and efficiently and that the rules are both simple and simply expressed.

27. We accept Mr Simpson's submission for HMRC that against that background, the following factors indicate that Rule 5(2) may be construed as including a power to strike out:

(1) Rule 5(2) is described in Rule 5(3) as comprising "general powers" and it makes provision for directions in relation to the "disposal of proceedings". It is not restricted by the particular powers described in Rule 5(3).

(2) The scope of Rule 5(2) is to be construed by reference to the overriding objective of dealing with cases fairly and justly.

(3) The absence of a power to strike out proceedings which are an abuse of process or which have become academic after permission to appeal has been granted would be contrary to the overriding objective.

28. In our view, Rule 5(2) should be construed as including a power to strike out in circumstances which, for whatever reason, do not fall within Rule 8. Indeed, that was the conclusion of Morgan J in *Foulser v HM Revenue & Customs* [2013] UKUT 038 (TCC).

29. *Foulser* is an important case in the context of both express and implied powers to strike out. It was concerned with the First-Tier Tribunal (Tax Chamber) Rules, but for present purposes those rules are identical to Rules 2, 5 and 8 of the Upper Tribunal Rules, save that

Rule 8 of the Upper Tribunal Rules does not include a power to strike out where there is no reasonable prospect of success in an appeal. That presumably reflects the fact that permission to appeal is required in the Upper Tribunal. The facts of *Foulser* were unusual. On the morning of the taxpayers' hearing before the FTT, HMRC arrested the taxpayers' adviser who was representing them in the appeal. The hearing was adjourned and the appeal stayed pending an application by the taxpayers for HMRC to be debarred from participating in the proceedings on the grounds of abuse of process. The FTT struck out that application on the grounds that it did not have jurisdiction to grant the relief sought. On appeal to the Upper Tribunal, it was argued that the FTT had been wrong to hold that the taxpayers' case of abuse of process was of a kind which was not within the jurisdiction of the FTT.

30. At [35], Morgan J discussed the distinction between two types of cases. Those in which a court concludes that a defendant cannot receive a fair trial and those where it concludes that it would be unfair for the defendant to be tried. In the first category, the alleged abuse directly affects the fairness of the hearing. In the second category, for some reason not affecting the fairness of the hearing, it would be unlawful in public law for a party to the proceedings to ask that they proceed. The FTT in *Foulser* had understood that the taxpayers' application to strike out made an allegation in the second category and had correctly held that it had no jurisdiction in that sort of case. However, the FTT had not considered whether it had jurisdiction under the first category.

31. The taxpayers argued that the FTT had an implied power to strike out under the first category. Morgan J considered the FTT Rules, in particular Rules 2, 5 and 8 and various authorities in relation to the implied powers of statutory tribunals. He concluded at [50]:

> 50. … If Mr and Mrs Foulser contend that the events of 29th September 2010 have made a fair hearing of the tax appeal impossible or that safeguards against possible unfairness must now be provided, then the FTT can deal with that contention and can exercise the express powers conferred by the 2009 Rules to deal with possible unfairness or to provide safeguards. It seems to me that the width of the express powers conferred by the 2009 Rules, to which I have referred, ought to be sufficient for these purposes. If it should turn out that the express powers conferred by the 2009 Rules are not sufficient, then the FTT can consider whether it has, and whether it ought to exercise, some implied power which might exist to enable it to achieve fairness in its procedures and/or to observe the rules of natural justice. Conversely, if the FTT considers that the events of 29th September 2010 do not make a fair hearing of the tax appeal impossible, with or without further safeguards, then any contention that HMRC acted unlawfully in public law must be put forward by way of an application for judicial review and such an application is not within the jurisdiction of the FTT.

32. It appears to us that in this paragraph Morgan J was at least contemplating that there was an express power for the FTT to deal with a situation where a fair hearing of the appeal was not possible. Alternatively, that there was an implied power. He remitted the appeal to the FTT to determine whether the taxpayer's complaint fell within the first category which the FTT had not considered. Morgan J went on to state at [55]:

> 55. As explained, at the hearing of the appeal, Ms Dewar for HMRC raised a point of law as to the express powers of the FTT to make an order debarring HMRC, if it found that such an order was justified to avoid unfairness to Mr and Mrs Foulser. In summary, HMRC submitted that the FTT did not have such a power, even in such a case. Although the principal case of Mr Jones for Mr and Mrs Foulser was that the powers he relied on were inherent or implied powers, he responded to Ms Dewar's submissions by arguing that the FTT did have such a power. The FTT had considered this point and was minded to hold that it did have such a power in such a case. For the reasons given earlier in this judgment, even though this point was not raised by a Respondent's Notice, I ought to deal with it.

33. In relation to this issue, Morgan J concluded at [64]:

> 64. The point which has been argued would only arise in a case where the FTT considered that a debarring order was justified and no lesser order would meet the justice of the case but yet, for whatever reason, the facts of the case did not come within Rules 7 and 8 . In my judgment, in that somewhat exceptional case, I am not persuaded that I should hold that the FTT could not produce the desired just result by using its power under Rule 5 to "regulate its procedure", particularly to deal with the case fairly and justly (as required by Rule 2(1) and (3)). Accordingly, I am not prepared to accept the submission of Ms Dewar for HMRC that the FTT could not make a debarring order against HMRC if, on the facts, the FTT considered that the only way to deal with the case fairly and justly was to make such an order.

34. It may be that what Morgan J said at [64] was not strictly necessary for his decision, although it seems to us that he was giving the FTT a direction in this regard were it to find that there was unfairness in the first category which could not be addressed by means of a lesser order. In any event, we respectfully agree with his conclusion that there is an express power in Rule 5, to debar HMRC from defending an appeal. Debarring HMRC from defending an appeal on the ground of abuse of process can be viewed as the equivalent of striking out an appeal on that ground (see Rule 8(7)).

35. In the present appeal, we were left unclear as to Mr Eissa's position on the existence and scope of any implied power. In his skeleton argument he stated that Morgan J had been correct to find that the FTT had an implied power to strike out, but that Morgan J was limiting the implied power to "extremely rare circumstances". In fact, Morgan J referred at [64] to "exceptional cases" where, for whatever reason, the facts did not come within Rule 8.

36. In oral submissions, Mr Eissa initially acknowledged the existence of an implied power to strike out for abuse of process, but then stated that he did not formally concede the existence of such a power. His oral submissions did not directly deal with the circumstances in which there is an implied power.

37. As to the existence of an express power, Mr Eissa submitted that Rule 5 is a purely administrative provision which simply permits the Tribunal to give effect to procedural decisions it has taken pursuant to other provisions in the Rules. He relied on what the Court of Appeal said in *Care First Partnership LLP v Roffey* [2001] ICR 87. That case concerned the scope to strike out a claim prior to evidence being heard under the Employment Tribunal Rules on the basis that the claim had no reasonable prospect of success. Rule 4 provided an express power to strike out, while rule 7 dealt expressly with what a tribunal may do if it considered a party's contention to have no real prospect of success. It could require the party to pay a deposit of up to £150 as a condition of being permitted to advance the contention. Rule 9 provided that the tribunal could conduct a hearing in such manner as it considered appropriate and Rule 13 provided that the tribunal could regulate its own procedure. Aldous LJ expressed the view at [23] that given the powers provided in Rule 7, "it would seem inconsistent with that rule if a tribunal could strike out a claim if it considered that it had no reasonable prospect of success before hearing the evidence. At [26] he explained that Rule 9 had to be read "in light of" Rules 7 and 13. He then said this:

> … the case management powers in rules 9 and 13 do not give the tribunal the power to grant summary relief. Those rules are concerned with procedure and do not provide a jurisdiction to strike out.

38. Morgan J considered *Care First Partnership* at [62] and [63] of *Foulser* but concluded that it was distinguishable. We agree. It was concerned with a different procedural code which contained no reference to the "disposal of proceedings". Aldous LJ's observations as to the scope of the case management powers in Rules 9 and 13 were plainly informed by his reading of the other rules (and particularly rule 7) to which he refers. He was not concerned with the question of strike out for abuse of process.

39. In any event, in making his submissions based on *Care First Partnership*, Mr Eissa acknowledged, at least in his skeleton, that an implied power could fill any perceived gap in Rule 8(3). We consider that he was right to do so. In our judgment it would be extremely surprising if the Upper Tribunal does not have power to strike out an appeal that is an abuse of process but, for whatever reason, does not fall within the express provisions of Rule 8. Such a power is, in our view, necessary to enable the Upper Tribunal to deal with cases fairly and justly, consistent with the overriding objective. In this regard, Mr Simpson referred us to the opening words of Lord Diplock in *Hunter v Chief Constable of West Midlands* [1982] AC 529 at p. 536 which support our view:

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied …

40. We were also referred to *Shiner v HM Revenue & Customs* [2015] UKUT 0596 (TCC) where Mann J records at [55] that the taxpayer did not dispute that the FTT had jurisdiction to strike out a case on the grounds of abuse of process (in this case a *Henderson v Henderson* type of abuse arising by reason of a previous Court of Appeal decision given in judicial review proceedings). Mann J expressed the view that the taxpayer was correct not to dispute the jurisdiction and (with reference to *Foulser*) he rejected the taxpayer's argument that the jurisdiction could be exercised under Rule 5 only in a "special case". Mann J observed that "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".

41. Notwithstanding his concession, the taxpayer attempted to run a new point at the hearing which appeared to cut across (at least to some degree) the scope of that concession. This is recorded in paragraphs [69] and [70] of the judgment and led to Mann J considering further the powers of the FTT to strike out on the ground of abuse of process, and specifically whether those powers extended beyond the scope of Rule 8. At [72], Mann J expressed the view that Rule 8(3) is not exhaustive of the potential abuses that might exist and he said this:

> 72. It is true therefore 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… 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 of imposing a sanction, of which striking out is likely to be a necessary one in some circumstances.

42. The parties did not refer us to the Court of Appeal judgment in *Shiner v HM Revenue & Customs* [2018] EWCA Civ 31 where Patten and Sales LJJ considered the jurisdiction to strike out for abuse of process at [19]–[21]:

> 19. The need to exercise caution in relation to any power to strike out proceedings prior to a full hearing is obvious. But it is a consideration which goes to the exercise of the power rather than to whether such a power exists. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in Rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed. A power to strike out could also be said to be part of the power of regulation by the First-tier Tribunal of its procedure under Rule 5(1) (which was the view of the Upper Tribunal), but Rule 8(3)(c) is enough. There is no need to imply a power. It is worth observing

that the equivalent provision in CPR 3.4(2) separates out a case where a statement of case discloses no reasonable grounds for bringing or defending the claim from a case where the statement of case is an abuse of the court's process. But for the First-tier Tribunal the Tribunal Procedure Committee has chosen a different but composite criterion of no reasonable prospect of success, which is wide enough to cover appeals which are legally hopeless as well as appeals which can be said to amount to an abuse of process. There is in my view express power to strike out on both grounds.

20. …

21. …There is nothing inimical to that process in the First-tier Tribunal being able to control the appeal procedure by excluding grounds of appeal with no reasonable prospect of success. The Rules are there to enable appeals to be handled quickly and efficiently in accordance with the objectives spelt out in TCEA 2007 s.22(4). I see no reason in principle why that cannot comprehend a bar being placed on the re-litigation of points already decided against the taxpayer in other relevant proceedings.

43. Following the hearing, we invited the parties to provide written submissions on the Court of Appeal judgment in *Shiner*. We accept Mr Simpson's submission that there is no reason why the conclusion that Rule 5(1) of the FTT rules encompasses a power to strike out for abuse of process should not equally apply to the Upper Tribunal rules. HMRC put its case at the hearing on the basis of Rule 5(2), but we accept that whether one puts the point by reference to Rule 5(1) or 5(2), the Rules plainly provide an express power to strike out for abuse. That arises, as Mr Simpson submits, either because the power under rule 5(1) for the Upper Tribunal to regulate its own procedure is given effect, *inter alia*, through rule 5(2), such that *Shiner* is (by analogy) authority for the proposition that there is an express power to strike out for abuse of process under rule 5(2); or because (again by analogy with *Shiner*), rule 5(1) itself provides that express power. We do not accept Mr Eissa's submission that the Court of Appeal judgment is of no relevance in the present appeal.

44. During the hearing, we also drew the parties' attention to section 25 TCEA 2007 which provides as follows:

Supplementary powers of Upper Tribunal

25(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—

(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and

(b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.

(2) The matters are —

(a) the attendance and examination of witnesses,

(b) the production and inspection of documents, and

(c) all other matters incidental to the Upper Tribunal's functions.

(3) Subsection (1) shall not be taken—

(a) to limit any power to make Tribunal Procedure Rules;

(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.

45. HMRC submitted that in the absence of an express or implied power to strike out, the Upper Tribunal could strike out pursuant to its powers under section 25(2)(c). Mr Eissa acknowledged that we would have all the powers of the High Court in relation to incidental

matters, but submitted that when permission to appeal has been granted we should be slow to utilise that power. That, of course, is a separate question to the existence of a power.

46. Whilst we did not have full submissions on this point, we consider that a power to strike out for abuse of process or because an appeal has become purely academic can be seen as incidental to the Upper Tribunal's function of dealing with cases fairly and justly. Whether the power should be exercised will depend on all the circumstances, including the fact that permission to appeal has been granted.

47. We also drew the parties' attention to *Universal Enterprises (EU) Limited v HM Revenue & Customs* [2015] UKUT 311 (TCC). In that case, a number of separate appellants in what are known as "MTIC appeals" were seeking to argue points of law which HMRC contended had already been determined by the Court of Appeal in *Mobilx Limited v HM Revenue & Customs* [2010] EWCA Civ 517 and subsequent cases. HMRC applied to set aside or vary permissions to appeal which had been granted on those grounds. HMRC argued that the Upper Tribunal had jurisdiction to make such a direction pursuant to Rule 5(3)(c) which provides that it can require a party to amend a document.

48. The Upper Tribunal (Judge Bishopp) held at [11] that the power under Rule 5(3)(c) could not be used to circumvent the limits on the power to strike out under Rule 8. In particular, there was no power to strike out any part of an appellant's case for which permission to appeal had been granted on the grounds that it had no prospect of success.

49. In *Universal Enterprises*, HMRC also relied on section 25 TCEA 2007. The Upper Tribunal at [13] considered that such reliance was misplaced because Rule 8(3)(c) was an express limitation on the power to strike out within section 25(3)(b):

> 13. In my judgement this argument falls at the first hurdle since, as it seems to me, rule 8(3)(c) does amount to an express limitation: as I have said, it is clear that the power to strike out part or the whole of an appellant's case on appeal from an inferior tribunal has not been conferred on the Upper Tribunal, and deliberately so. But even if I am wrong in that conclusion, I am satisfied that these are not cases in which the High Court would adopt the course Mr Puzey urged on me.

50. *Universal Enterprises* was not cited in *Shiner* and it does not specifically deal with the power to strike out for an abuse of process or where an appeal has become academic. In so far as it is inconsistent with *Foulser* and *Shiner*, we prefer the reasoning in those cases.

51. For these reasons we are satisfied that there is an express power to strike out for abuse of process pursuant to Rule 5. If that is wrong, we are satisfied that the Upper Tribunal would have an implied power to do so and we did not understand Mr Eissa seriously to contend otherwise. Further, there is no reason that the power to strike out should not extend to an appeal which is academic, if to strike out would be consistent with the overriding objective.

Is the jurisdiction engaged?

52. We must now consider whether we should strike out the appeal as an abuse of process or because the appeal has become academic as between the existing parties. In order for the appeal to serve any purpose, a new party would have to be substituted for Circleplane and a new respondent may also need to be substituted for HMRC. That is not a very encouraging foundation for Circleplane's submission that we should not strike out the appeal.

53. Mr Eissa submits that we should hear the appeal because it is in the interests of justice that the underlying question of recusal based on the relationship between Counsel and the Judge should be resolved. It is said that the Judge recognised that this was desirable, and that is why she did not seek to place any constraint on the permission to appeal. There is no reason why, in appropriate circumstances, an academic appeal should not be determined. In any event, if the Company is substituted for the Appellant and if, in so far as necessary, the FTT is

substituted for HMRC, then the appeal will no longer be academic. There is no sense in which the substance of this appeal has altered and there is nothing abusive about seeking a determination of the issue on that basis. Finally, Mr Eissa submits that it is striking that (if the Strike Out Application fails) HMRC does not object to the Cross-Application.

54. We accept that it may (in theory) be desirable for the question of whether the Judge should hear any cases in which Counsel is instructed to be resolved on this appeal. We understand that Counsel had been listed before the Judge on four occasions and invited her to recuse herself on the last two occasions. The Judge refused those applications and it is the last refusal which has led to this appeal.

55. HMRC submit that section 12 TCEA 2007 restricts the nature of the relief the Upper Tribunal can direct in the event of a successful appeal. It provides as follows:

> **12 Proceedings on appeal to Upper Tribunal**
>
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate.

56. Mr Simpson acknowledged that the Upper Tribunal could make a finding that the Judge erred in law in failing to recuse herself on the grounds of apparent bias. However, there would be no point in remitting the case to the FTT with directions for a reconsideration of the question. Nor could the Upper Tribunal give any declaration that there would be an appearance of bias in any future cases involving Counsel and the Judge. A finding by the Upper Tribunal that there was an appearance of bias in this case would not assist in relation to future cases.

57. It seems to us that if the Upper Tribunal were to hear this appeal and make a finding that there was an error of law, there would be no need to set aside the Recusal Decision. It is now academic as between Circleplane and HMRC. Nor could we give procedural directions because no purpose would be served by a reconsideration of the case by the FTT.

58. The question of apparent bias is highly fact sensitive and must be determined by reference to the circumstances that exist in a specific case at a specific time. However, in practical terms, a finding as to whether or not there was apparent bias in this case might assist the Judge and the FTT in determining whether future cases involving Counsel should be listed before the Judge. It would be unlikely to assist in other cases where Counsel is instructed which might be

listed before other Judges who were in Chambers at the time of the dispute. We understand that there are presently two fee-paid Judges of the Tax Chamber who were in Chambers at that time.

59. Mr Eissa makes the point that the issue is likely to come back in a subsequent appeal and that it would save time and costs for the issue to be determined in this appeal. That appears to be a fair point, although we do not know how likely it is in the ordinary course that an appeal where Counsel is instructed might be listed before the Judge.

60. However, the fact that it might be useful for the Upper Tribunal to determine the issue in this case does not necessarily mean that it should be resolved in this case, given the procedural machinations required, as evidenced by the Cross-Applications. We must also consider whether, as a matter of discretion, we should permit the Cross-Applications.

61. We do not agree with Mr Eissa that we can read anything into the permission granted by the Judge. He submitted that when the Judge granted permission to appeal she did not seek to limit the scope of that permission by reference to the underlying dispute in Circleplane's appeal. Mr Eissa seeks to infer from the fact that the Judge gave permission "with ease" that she was keen for the underlying matter to be resolved. We do not consider any such inference can be drawn from the permission to appeal. The Judge was being asked to consider the question of permission in the context of the case she was dealing with. She would have no jurisdiction to permit any appeal on grounds which went outside the confines of that dispute.

62. Mr Eissa submits that the Judge expressed a hope that the Recusal Decision would be appealed. However, that must be viewed in the context of an appeal which was proceeding before the FTT. We do not infer that the Judge was seeking to have the issue determined in isolation from the specific appeal of Circleplane.

63. In relation to the existing parties, the appeal is, in our view, properly described as academic. In appropriate circumstances there may be scope for the Upper Tribunal to determine an academic appeal. The Appellant relied on a decision of the Upper Tribunal (Administrative Appeals Chamber) in *LS and RS v HMRC* [2017] UKUT 0257 (AAC). In that case, HMRC made a decision in relation to tax credits which was appealed by the claimant. The appeal was dismissed by the FTT, however the claimant and the FTT were not aware that HMRC had by then made a further decision. The Upper Tribunal held that HMRC's original decision had lapsed when they made their further decision. The FTT ought to have struck out the appeal against the original decision pursuant to Rule 8(2)(a) because it had no jurisdiction in relation to a lapsed decision. However, the Upper Tribunal held that it was not under a duty to strike out the appeal:

> 33 …The Upper Tribunal is not under a duty to strike out an appeal just because the First-tier Tribunal had no jurisdiction to entertain the proceedings; its decision has not ceased to exist. And, as the Upper Tribunal has jurisdiction, it has power to deal with an issue that might be considered academic in view of the First-tier Tribunal's lack of jurisdiction. It is at this stage that there is scope within its jurisdiction for discretion in the exercise of the Upper Tribunal's power to hear and decide an academic issue.

64. Mr Eissa submitted that *LS and RS* is directly applicable to the present circumstances. The Recusal Decision still exists and even if it does not now affect Circleplane, it falls within the Upper Tribunal's jurisdiction.

65. We accept that the Upper Tribunal has jurisdiction to hear an appeal against a decision of the FTT which is academic. Whether it should do so is a matter of discretion.

66. HMRC's position is that the appeal should be struck out. It accepts that if the appeal is not struck out then the Upper Tribunal does have jurisdiction to determine the appeal even if it

is academic as regards the present parties. However, Mr Simpson referred us to *Zuckerman on Civil Procedure* 4th ed at 25.260 as to the circumstances in which an appeal which is academic between the parties may be allowed to proceed:

> There are three key requirements that must normally be satisfied before an appeal, which is academic between the parties, may be allowed to proceed:
>
> (1) the appeal would raise a point of some general importance;
>
> (2) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; and
>
> (3) the court is satisfied that both sides of the argument will be fully and properly aired.
>
> In sum, the hearing of appeals that are no longer determinative of the rights of the parties will primarily depend on whether the matter is of general public interest and whether entertaining an appeal is the most cost effective way of resolving the issue and promoting the overriding objective. The parties' agreement to participate notwithstanding that their interests are no longer engaged is of great importance because in the absence of argument from one of the parties the appeal court would be unable to come to a fully considered conclusion. However, the court may proceed even when party participation is not assured, provided it is satisfied that it is in possession of all the relevant considerations to the issue in question.

67. In *Hutcheson v Popdog Limited* [2011] EWCA Civ 1580 at [15] the Court of Appeal stated that these requirements had to be met save in exceptional circumstances.

68. Mr Eissa submitted that in substance all these conditions were satisfied. We do not agree.

69. On the Appellant's own case, the appeal does not raise a point of general importance. In relation to the Cross-Applications, Mr Eissa himself described the issue as "an entirely private matter" between Chambers, the Judge and the FTT. Mr Eissa did suggest a public interest in the Upper Tribunal hearing the appeal because its outcome would affect any taxpayer who might wish to instruct Counsel on an appeal before the FTT. We can see that there is potentially some public interest in taxpayers being in a position to instruct their counsel of choice, and that the possibility of their case coming before the Judge might dissuade them from instructing Counsel because it might involve an application to recuse. However, we do not consider that this is appropriately described as raising a point of general importance.

70. HMRC as respondent to the appeal does not agree to the appeal proceeding and has no interest in the outcome of the appeal. If the appeal does proceed and it remains as a respondent then it seeks an indemnity as to costs. Circleplane will not offer any indemnity as to HMRC's costs and it has not been suggested that the Company would offer an indemnity. Circleplane suggests that the appeal should proceed to determine the question of recusal with the FTT as respondent, alternatively without any respondent. As far as we are aware, no indemnity has been offered to the FTT in relation to its costs in the event it were to be substituted as a party and wished to participate in the proceedings.

71. In our view, if the appeal were to proceed, any respondent ought to have an indemnity as to costs.

72. Mr Eissa submitted that the appeal could proceed without a respondent. He relied on Rule 19 of the FTT Tax Chamber Rules which anticipates certain matters in that tribunal being determined without the involvement of a respondent. He submitted that, in such a case, any appeal to the Upper Tribunal would not have a respondent. However, he did not identify what sort of matters might proceed in the FTT without a respondent or whether they would be matters in respect of which there would be a right of appeal. We do not consider that the Upper Tribunal power in Rule 9(1) to remove a party as a respondent assists his submissions.

73. We make no observations as to whether it is always necessary for an appeal to the Upper Tribunal to have a respondent. However, we do acknowledge that a respondent in a recusal application or on appeal against a decision on a recusal application might legitimately take a neutral stance depending on the circumstances. In that case, there might only be submissions from the applicant or the appellant. Having said that, the presence of a respondent is often helpful to draw the attention of the court or tribunal to relevant matters of law or fact, consistent with counsel's duty and the overriding objective.

74. Mr Eissa submitted that the Upper Tribunal in this case would have the benefit of the Company's submissions and the Judge's reasons for the Recusal Decision. That is true. We do note however that a significant aspect of the grounds of appeal is that the Judge failed to take into account that she was privy to contemporaneous emails concerning the dispute. It is said that Counsel confirmed during oral submissions to the Judge that she had been copied in to the emails. We understand that the Judge was not provided with copies of the emails at the hearing or before she issued the Recusal Decision. We do not know why that was the case because clearly the emails may have refreshed the Judge's memory of events. Circleplane appears to have concluded that the Judge deleted the emails. That is not what the Judge said, and it is not something the Upper Tribunal would be prepared to assume. It is just the sort of issue where HMRC as a respondent might be expected to assist the Upper Tribunal as to what happened at the hearing before the Judge.

75. In our view it would be highly undesirable for the appeal to proceed without HMRC as a respondent.

76. The position of the FTT is that it did not wish to make representations on the application to join it as a respondent and it did not wish to attend the hearing before us. It considered that there was nothing it could or should say beyond what was said by the Judge in the Recusal Decision. We can quite understand why the FTT took that position. Further, it has not been offered any indemnity as to costs and we do not know what its position would be in relation to the substantive hearing if such an indemnity were to be offered.

77. An issue also arose at the hearing before us as to whether the Company is the appropriate party to substitute for Circleplane. That issue was not satisfactorily resolved. The Company trades under the name Chancery Court Tax Chambers of which Counsel is a member and Head of Chambers. Counsel holds at least 75% of the shares in the Company and he is the sole director. However, the recusal issue does not appear to go further than Counsel. It is not clear to us therefore why the Company should be substituted as the appellant. Mr Eissa told us that Counsel had incorporated his practice as a limited company and that his instructions in relation to the appeal were from Circleplane to the Company. He also said that the class of persons centrally affected by the alleged bias would be the Company's clients. However, there was no evidence before us as to the relationship between Counsel, the Company and Chancery Court Tax Chambers.

78. In summary, the Appellant seeks to have the issue of recusal determined either without any submissions from a respondent or, if there were to be submissions, without any indemnity as to costs. Even if the appeal cannot be described as an abuse of process, it is academic as between the parties. The conditions for determining an academic appeal are not satisfied. On any view, it would not be consistent with the overriding objective to allow the appeal to proceed with the present parties.

79. Having found that we do have jurisdiction to strike out the appeal, we are satisfied for the reasons given above that it is in the interests of justice for us to refuse the Cross-Applications and to strike out the appeal.

80. We are conscious that this leaves Counsel and possibly the FTT with something of a dilemma in relation to future cases that may be listed before the Judge and potentially before two other fee paid Judges in the Tax Chamber. However, we do not consider that the question of recusal in the present circumstances would resolve the question for future cases. It is the appearance of bias at the time of the hearing that is relevant. For example, in three years' time it will be apparent, if it is not already, whether Counsel still considers that he has a cause of action against the Chambers and its members in relation to the dispute in 2018. The dispute will be even more historic than it already is and that might be a relevant factor in determining whether recusal is necessary at that time.

81. An alternative might be for Counsel to seek to persuade the President of the Tax Chamber that no cases in which he has been instructed as counsel should be listed before the Judge and possibly before certain other fee paid Judges. If the FTT was unwilling to agree such a proposal, and we can think of various reasons why that might be the case, then Counsel could seek judicial review of the decision if he really thinks such a course is appropriate. We should emphasise that we are not advocating that approach.

82. It is most unfortunate that these issues have arisen. Counsel believes that there is an appearance of bias. We have no reason to think that his belief is not genuinely held. There is also what appears to be an implicit suggestion of actual bias in an allegation that several of Counsel's appeals have been listed before the Judge and that this is not simply a matter of coincidence. At the hearing before the Judge, Counsel described this as "inexplicable" and "statistically implausible". The matter was put as follows in the application for permission to appeal:

> 5. By whatever means or mechanisms, Joseph Howard and Judge Fairpo have been involved in a statistical anomaly whereby Judge Fairpo has been sequentially allocated to the last four hearings in which Joseph Howard was appointed counsel.
>
> …
>
> 15. …a statistical anomaly occurring in circumstances where a judge was a member of an organisation involved in a very serious dispute, inexplicably deleted all records of that dispute and also professes to have never had knowledge of it changes the character of even that. Such an anomaly together with other conflicting and concerning factors would mean there is a real possibility that a bystander would consider there to be conscious or unconscious bias in action.

83. It is difficult to see what relevance the "statistical anomaly" would have to a perception of bias said to arise out of the dispute in Chambers. If the suggestion is that someone has engineered the anomaly, the fair-minded and informed observer would regard that suggestion as fanciful. If Counsel is alleging that the fair-minded and informed observer would consider this to be anything more than a statistical anomaly, then no evidence whatsoever has been adduced to support the allegation at any stage of the appeal. Nor does it appear that Counsel has raised the matter with the President of the Tax Chamber.

THE PRIVACY APPLICATION

84. Given that we have struck out the appeal the question of whether the hearing of the appeal should be in private and whether any decision on the appeal should be anonymised does not arise. However, the Privacy Application included an application to anonymise this decision so as to remove reference to Circleplane, Counsel and the Company and any other detail which would allow Counsel to be identified. HMRC are neutral on the Privacy Application.

85. We have jurisdiction to make such a direction pursuant to Rule 14(1). However, we are not satisfied that we should do so.

86. The starting point is the principle of open justice which was recently considered by this Tribunal in *HM Revenue & Customs v Dettori* [2024] UKUT 00364 (TCC). The Upper Tribunal in that case (Miles J and Judge Thomas Scott) applied the principles set out by Nicklin J at [118]-[120] of *Farley v Paymaster Limited (1836) t/a Equiniti* [2024] EWHC 3883:

> 118. The default position, under the CPR, is therefore that the name and address of a party to civil litigation is required to be publicly available. These requirements are an important dimension of open justice and transparency. The Court has the power to permit derogation from this default position under CPR PD 16 §2.3 and CPR 39.2(4). As these are derogations from the principles of open justice, the following principles apply (drawn from Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003 ("the Practice Guidance") [9]-[13] and [16]):
>
> > (1) Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see Article 6.1 of the Convention, CPR 39.2 and *Scott -v- Scott* [1913] AC 417.
> >
> > (2) Derogations from this general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R -v- Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Donald -v- Ntuli* [2011] 1 WLR 294 [52]–[53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
> >
> > (3) The grant of derogations is not a question of discretion. It is a matter of obligation, and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M -v- W* [2010] EWHC 2457 (QB) [34].
> >
> > (4) There is no general exception to open justice where privacy or confidentiality is in issue.
> >
> > (5) The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott -v Scott* [1913] AC 417, 438–439, 463, 477; *Lord Browne of Madingley -v- Associated Newspapers Ltd* [2008] QB 103 [2]-[3]; *Secretary of State for the Home Department -v- AP (No.2)* [2010] 1 WLR 1652 [7]; *Gray -v-* W [2010] EWHC 2367 (QB) at [6]-[8]; and *JIH -v- News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645 [21].
> >
> > (6) When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in JIH [21].
> >
> > (7) Derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public.
>
> 119. Anonymity orders are usually justified on one of two bases: maintenance of the administration of justice and harm to other legitimate interests. The first category of case is where, without the relevant order being made, the administration of justice would be frustrated. Examples of this type of justification for derogations from open justice would include cases involving trade secrets or other confidential information. In such cases, if no derogations from open justice were granted, the proceedings themselves would destroy that which the claimant was seeking to protect, thereby frustrating the administration of justice: *Lupu -v- Rakoff* [2020] EMLR 6 [28]-[30]:

> "Restrictions on open justice to protect the legitimate interests of others raise more difficult issues. The starting point is the recognition that open justice (and probably of greater practical significance, the privilege that attaches to media reports of proceedings in open court) will frequently lead to some interference with the legitimate interests of parties and witnesses. Media reports of proceedings in open court can have an adverse impact on the rights and interests of others, but, ordinarily, the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public': *Khuja -v- Times Newspapers Ltd* [2019] AC 161 [34(2)] per Lord Sumption."

> 120. Consistent with the requirement to establish the necessity for any derogation from open justice with convincing evidence, the Court will scrutinise with care any application that the Court should withhold the name of a party or other details about the claim (including the party's address) from the public. Mere assertion that a party may suffer some harm is unlikely to discharge the burden to justify the order.

87. Circleplane, Counsel and the Company have not satisfied us that there should be a derogation from the general principle of open justice in this case. No evidence has been filed to explain the need for a derogation and no attempt has been made to identify any "exceptional circumstances" which might justify a derogation. Reliance has been placed solely on email communications in January 2018 in which Counsel raises complaints against members of Chambers. That does not begin to satisfy the evidential requirement.

88. The focus of the Privacy Application is on the alleged need for privacy owing to the fact that "evidencing the dispute" and the Judge's knowledge of the dispute would require reference to sensitive information. This judgment is not concerned with the substantive appeal and does not involve any "public airing" of the substance of the dispute.

89. In any event, we can see no reason why the fact of a dispute between members of a set of chambers, the identity of that chambers and the identity of the individuals in dispute are matters which should fall within the derogation. No evidence has been filed as to any harm that may be caused to Counsel or the members of Chambers by reason of their being identified. Indeed Chambers was given an opportunity to make representations in relation to the Privacy Application as set out above. It did not seek to support the Privacy Application.

90. It has not been suggested that reference to the existence of a dispute would in itself involve a reference to confidential or otherwise sensitive information. As Nicklin J said at [120] of *Farley*: "mere assertion that a party may suffer some harm is unlikely to discharge the burden to justify the order".

91. We also note that there is no suggestion that the application for recusal to the Judge was heard in private or that there was any application that the Recusal Decision should not be published or should be anonymised. We do not read anything in to the fact that the Recusal Decision was not in fact published.

92. *Dettori* was concerned with the well-known jockey Frankie Dettori. The application for anonymity in that case was on the basis that an application for privacy should not be what causes privacy to be lost where the taxpayer had withdrawn the underlying appeal. In holding that the general principles outlined above should apply, the Upper Tribunal referred at [18] to the principles applied in tax cases by Henderson J in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) and in its previous decision in *Dettori* at [2024] UKUT 12 (TCC).

93. Mr Eissa submitted that the decision in *Dettori* is distinguishable due to the emphasis in that case on the wider public interest in even the most mundane tax disputes. He contended that the present case was a private matter relating to Counsel, who was a non-party and so the same

considerations do not apply. His case appeared to be that there is "nothing to be gained from naming" Counsel and that "there is no disadvantage to the reader [of our decision] in not knowing his identity". This does not begin to satisfy the test for a derogation from the default position of open justice. The emails relied on by Mr Eissa do not justify the claim to privacy, although we accept that there are sensitive matters in the emails which we do not need to identify. We hereby order pursuant to Rule 14(1) that the emails shall not be disclosed to any non-party. In our view, that is sufficient to protect the rights of Counsel, the Company and Chambers.

94. Mr Eissa also relied on rights pursuant to Article 8 of the Human Rights Act 1998 which were considered by the Upper Tribunal in *Dettori* at [38]-[39]:

> 38. The position where an applicant for anonymity seeks to rely on their Article 8 rights is helpfully summarised in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [44]. At [44 (4)-(6)], Warby LJ stated as follows:
>
> > (4) The threshold question is whether the measure in question - here, allowing the disclosure of the claimant's name and consequent publicity - would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a "certain level of seriousness": *ZXC* (SC) [55], *Javadov* [39]. It was the very essence of the claimant's case - as to which the judge was in no doubt - that the reputational impact of disclosure would amount to a very serious interference with his Convention rights. In my view it is clear that the judge accepted throughout that the threshold test was satisfied. His reasoning cannot be understood in any other way.
> >
> > (5) The next stage is the balancing exercise. Both the judge's decisions expressly turned on whether it was "necessary and proportionate" to grant anonymity. That language clearly reflects a Convention analysis and the balancing process which the judge was required to undertake. The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice. It is clear enough, in my view, that he was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice.
> >
> > (6) It is in that context that the judge rightly addressed the question of whether the claimant had adduced "clear and cogent evidence". He was considering whether it had been shown that the balance fell in favour of anonymity. The cases all show that this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why "clear and cogent evidence" is needed. This requirement reflects both the older common law authorities and the more modern cases. In *Scott v Scott* [1913] AC 417 at p438 Viscount Haldane held that the court had no power to depart from open justice "unless it be strictly necessary"; the applicant "must make out his case strictly, and bring it up to the standard which the underlying principle requires". *Rai* (CA) is authority that the same is true of a case that relies on Article 8. The *Practice Guidance* is to the same effect and cites many modern authorities in support of that proposition. These include *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 WLR 1645 where, in an often-cited passage, Lord Neuberger of Abbotsbury MR said at [22]:
> >
> > > "Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule ..."

> 39. It is clear that the requirements summarised in *Marandi* have not been satisfied in relation to the Anonymity Application. Indeed, there has been no attempt at any stage by the Taxpayer to make clear why the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice, or to provide clear and cogent evidence, or to explain why the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule. It is through the provision by an applicant of that information and its evaluation by the court that the Article 8 rights are rendered effective and not illusory.

95. Mr Eissa submitted that the *Marandi* requirements are satisfied in the present case. We do not accept that submission. Mr Eissa has come nowhere near establishing a very serious interference with Counsel's right to respect for his private and family life or any reputational impact.

CONCLUSION

96. For the reasons given above we refuse the Cross-Applications and strike out the appeal. We refuse the Privacy Application in so far as it seeks anonymity in relation to the application itself. We do however direct that this decision shall not be published or disseminated beyond the parties and their legal representatives until the appeal rights of Circleplane, Counsel and the Company (in so far as the latter might have appeal rights) have been fully exhausted. That is subject to the proviso that we will make copies of the decision available to the Judge and the President of the FTT Tax Chamber on the basis that it is to be treated as confidential unless and until it is published.

MRS JUSTICE JOANNA SMITH
JUDGE JONATHAN CANNAN

Release date: 30 July 2025