TC01484

Appeal number: SC/3048 & 3049/2003

Procedure – jurisdiction – abuse of process - appellants' application that the tribunal should hear no submissions or evidence from HMRC – whether tribunal has inherent power to prevent its processes being abused – whether the power asserted by the appellants was to be implied – no – application dismissed

FIRST-TIER TRIBUNAL

TAX

BRIAN FOULSER
and DOREEN FOULSER **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 22 September 2011

Alun Jones QC, instructed by Keystone Law, for the Appellant

Fiona Dewar, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These are applications in the appeals of Mr and Mrs Foulser ("the Appellants") which give rise to important issues concerning the jurisdiction and powers of the Tribunal in case of an alleged abuse of process.

2. The application of the Appellants is that, on the basis of the conduct of HMRC, the Tribunal should hear no submissions or evidence from HMRC for the purpose of obtaining further monies as claimed by HMRC in these appeal proceedings. Essentially, and as accepted by Mr Jones for the Appellants, this application amounts to one that the Tribunal debar HMRC from taking further part in the proceedings, with the result that the appeal would fall to be allowed.

3. The facts on which the Appellants rest their application are largely undisputed. What are, however, disputed are the inferences which the Appellants draw from those facts as to the motives or purposes to be ascribed to HMRC. Each of the parties prepared statements of witnesses to provide the Tribunal with the opportunity of making findings in this respect. But the parties agreed that I should first make a determination on an application by HMRC that the Appellants' application should either be struck out or summarily dismissed, without proceeding to hear live evidence on the merits, on the basis that:

(1) this Tribunal has no jurisdiction to make the order sought by the Appellants; and/or

(2) the application is in any event bound to fail as the evidence in support fails to raise a prima facie case and the allegations (even if true) would not justify the sanction sought.

Background

4. This case has a long history. As far back as November 1997 the Appellants, advised by their tax adviser, Mr Edward Gittins, made gifts of shares in a company, BG Foods Limited, on which they claimed holdover relief from capital gains tax. HMRC refused those claims, and the Appellants' appeals to the then special commissioners, and on appeal to both the High Court and Court of Appeal, were dismissed in principle. That left the amount of the CGT assessment to be determined, which depended on the open market value of the shares. That fell to be determined by this tribunal (as successor of the special commissioners), and a hearing before Judge Avery Jones commenced on 27 September 2010.

5. The first day of the hearing was a reading day. The Appellants' case commenced on 28 September 2010, during which certain evidence of fact was given. On the following day the events took place which have given rise to these applications. I set out the following brief description merely to provide context for the discussion of the issues raised on HMRC's application. In the absence of having heard the evidence, nothing in this description amounts to a finding of fact.

6. According to Mr Gittins' witness statement he left the house in Montpelier Street, London, where he had been staying since arriving on the previous Sunday, at around 7.30am. He was due to meet counsel for the Appellants in those proceedings at 8am. He was at that stage arrested on suspicion of cheating the Revenue and false accounting. He was told that HMRC had a warrant to search the premises.

7. Despite informing the HMRC officers that he was on his way to a conference and then to the tax tribunal for the hearing, Mr Gittins was escorted back into the house and when inside asked to hand over his briefcase. He was then taken to Notting Hill police station where he was processed, spent time in a cell, and was questioned before being released on bail that evening. The Montpelier Street premises and other premises at Cockspur Street were searched under the warrant.

8. In the meantime the tribunal, through the clerk assisting Judge Avery Jones on that day, had been informed of Mr Gittins' arrest. There is some dispute about the circumstances of the calls made, and the instructions given to the clerk with regard to information about the arrest being passed to the judge, but in any event, by agreement between counsel for the Appellants and counsel for HMRC, the judge was not informed of this. Instead, counsel met with the judge in chambers and a short adjournment was directed, without any of the detailed reasons having to be disclosed. The judge was subsequently given details of the arrest, and of the Appellants' consideration of making an application in respect of abuse of process, and he granted a further stay.

The Appellants' claim

9. In support of their application the Appellants claim that the warrants to enter, search and make seizures from the Montpelier Street and Cockspur Street premises occupied by their adviser, Mr Gittins, Montpelier Tax Consultants (Isle of Man) Limited and associated companies, and the arrest and detention of Mr Gittins, were arranged by officers and agents of HMRC to take place on 29 September 2010 with the purposes, among other purposes, of:

(1) obtaining sight of legally privileged and confidential material held by Mr Gittins or associated companies relevant to the hearing of their tax appeal held in the week of 27 September 2010;

(2) alerting the tribunal hearing their tax appeal on that day to the arrest and detention;

(3) causing the postponement of the hearing;

(4) causing publicity to the arrest of Mr Gittins and thus embarrassing the Appellants in the preparation and conduct of their appeal;

(5) placing pressure oppressively on the Appellants to settle the subject matter of the appeal.

10. Although correspondence, and references in Mr Foulser's witness statement refer to the Appellants' complaint being that they cannot have a fair hearing before the Tribunal, in argument Mr Jones did not rely upon any submission that the proceedings

could not be fairly conducted. Instead he submitted that HMRC had been guilty of such serious misbehaviour that they should not be allowed to benefit to the detriment of the Appellants, and accordingly should not be permitted to take further part in the proceedings.

11. The distinction between these two approaches can be seen from the case of *R (Ebrahim) v Feltham Magistrates Court; Mouat v DPP* [2001] 2 Cr App R 23 in the Divisional Court. There, in cases concerning applications to stay criminal proceedings against a defendant on the ground that videotape evidence had been obliterated, the court reviewed the principles underlying the jurisdiction to order a stay. It stated (at [18]) that the two categories of case in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair to the defendant to be tried. In relation to this second category, the court said:

> "[19] We are not at present concerned with the second of these categories (which we will call 'Category 2' cases), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of those cases it is this court, rather than any lower court, which possesses the requisite jurisdiction (see ex p Watts, *per* Buxton LJ at p 195B-D).
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> [20] In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors' conduct it would be unfair to him if the court were to permit them to proceed at all. The court's enquiry is directed more to the prosecutors' behaviour than to the fairness of the eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all."

12. The argument of the Appellants accordingly is that HMRC's conduct is such that it would be unfair to the Appellants if the tribunal were to permit HMRC to proceed with their case. Having regard to HMRC's behaviour, it is said that, although there is no argument that the Appellants cannot have a fair hearing of the share valuation issue, this tribunal should be satisfied that it is not fair that the appellants should be put to the trouble and inconvenience of these proceedings.

Jurisdiction

13. With that context, I turn to address the submissions on jurisdiction. The issue here is whether, as Mr Jones submits, this tribunal has an inherent jurisdiction to debar a party from proceedings on the basis of abuse of process of the second category referred to in *Ebrahim*, or whether, as argued by Ms Dewar, the tribunal does not have any such power, its procedural powers being limited to those expressly or impliedly set out in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

14. There was no dispute between the parties on the inherent power of the superior courts to step in to prevent their processes being abused for the purposes of injustice, or in order to maintain their character as a court of justice. That power is inherent in the courts' jurisdiction and allows them to enforce their rules of practice and to suppress any abuse of their process and to defeat any attempted thwarting of their process (see *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 at 409).

15. Ms Dewar submitted that these historical inherent powers are exercisable by superior courts of record as a result of their unique constitutional position as the successors of earlier courts and thereby endowed from their inception with the powers previously exercisable by the superior courts since the earliest days of the common law. She invited me to contrast that with the position of the First-tier Tribunal as purely a creature of statute, deriving its limited jurisdiction exclusively from the statutes creating it. The tribunal, argues Ms Dewar, can only have the powers given to it by the statutes and rules that govern its jurisdiction and procedure. No First-tier Tribunal enjoys the same kind of general inherent powers – such as the power to prevent abuse of process – as the superior courts.

16. In support of this submission Ms Dewar referred me to *R on the application of V v Asylum and Immigration Tribunal* [2009] EWHC 1902 (Admin) where (at [24]) Hickinbottom J refers to the AIT as purely a creature of statute which cannot have any inherent powers on the same basis as the High Court. After referring to certain cases that appeared to suggest a wider inherent general power for every court or tribunal to regulate its own procedure, the learned judge went on to say, in a passage that is worth setting out in full:

> 26. Later cases do not go so far. For example, in the face of a submission by Mr Robertson himself that a magistrates' court as the creature of statute had no inherent jurisdiction, in R v Malvern Justices ex p Evans [1988] 1 QB 540 at pages 550H-551A, Watkins LJ, whilst confirming that "justices have an inherent power to regulate the procedure in their own court", questioned whether that went so far as to warrant an assumption that that enabled justices to sit in camera "casting aside… the hallowed notion of open justice". Before me, Mr Robertson relied upon that passage as confirming the principle that inferior tribunals have inherent powers in relation to their own procedure: as he did the judgment of Scott Baker J (as he then was) in R (The Secretary of State for the Home Department) v Immigration Appeal Tribunal [2001] EWHC 261 (Admin), [2001] QB 1224 , where he said, of the AIT's predecessor (the Immigration Appeal Tribunal):
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> "The tribunal, in my judgment quite correctly, pointed out that it has only those powers that are given to it by the statutes and rules that govern its jurisdiction and procedure. It has no inherent powers *save those which enable it to prevent its processes being abused.* Without these it could not function properly as a tribunal. What it does not have is power to deal with appeals in a way which is not permitted by the governing statutes or rules". (emphasis added).
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> 27. However, those cases represent a retreat from the proposition that all courts and tribunals have an inherent power generally to regulate

> their own procedure. They display a far more restricted approach to the so-called "inherent powers" of tribunals, namely a restriction to powers that are necessary for the proper functioning of the tribunal. That approach is generally reflected in the more recent cases, which make clear that inferior courts and tribunals do not have an open-ended general power to regulate their own procedure (see, e.g., Akewushola v The Secretary of State for the Home Department [2000] 1 WLR 2295 at 2301E-H per Sedley LJ, and The Secretary of State for Defence v The President of the Pensions Appeal Tribunal [2004] EWCA 141 (Admin) at [25] and following per Newman J).
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> 28 The use of the term "inherent powers" as applying to inferior tribunals in these cases must mean something different from the term as used of the High Court: and it seems to me that the references are not to the historical powers of the superior courts inherent in the High Court, but to powers that can properly be implied into the statutory scheme on the usual principles of statutory interpretation. It is well-settled law that it is justifiable to imply words into legislative provisions where there is an ambiguity or an omission and the implied words are necessary to remedy such defect (see, e.g., Elloy De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] AC 69 at page 77H).

17. In reliance on the *V case* Ms Dewar submits that tribunals do not have the kind of open-ended inherent power to regulate their own processes enjoyed by superior courts of record. Unless it is possible to interpret the relevant rules to include a particular power, a tribunal will not have it, no matter how useful or desirable it might be. In particular, if specific provision is made in the relevant procedural rules for the use of a certain power, it will not usually be appropriate to imply that the power can in fact be used more widely. Nor will it be appropriate to use another broader provision to achieve the same effect. Such specific provisions will be presumed to be exhaustive of the circumstances in which that power may be used: if the draftsman had intended the specific power to be used more widely, he would have said so.

18. Ms Dewar also referred to *Khan v Heywood and Middleton Primary Care Trust* [2006] EWCA Civ 1087 where the Court of Appeal held that an employment tribunal had no inherent jurisdiction to reinstate proceedings that had been withdrawn, notwithstanding that it might have been desirable for statute to confer on it such a power. Similar conclusions were reached as regards powers to review or rescind decisions in *Akewushola v Secretary of State for the Home Department* [2000] All ER 148 (pensions tribunal) and *R (on the application of the Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2001] EWHC 261 Admin.

19. Ms Dewar drew my attention to a number of cases involving tribunals where it has been held that the tribunal has no inherent power to strike out. In *Kelly v Ingersoll-Rand Ltd* [1982] ICR 476, described by Brown-Wilkinson J in the employment appeal tribunal as "an unusual and unhappy case", an industrial tribunal had dismissed an employee's claim not on its merits but for want of prosecution by the employee. The question arose whether the industrial tribunal had the power to do so. The EAT held that the industrial tribunal had no inherent jurisdiction. It was a matter of interpretation of the rules governing the tribunal's procedure.

20. On the question of the interpretation of the rules applicable in *Kelly*, it was argued on behalf of the employee that the necessary power could be found in Rule 12(1). This provided: "Subject to the provisions of these rules, a tribunal may regulate its own procedure". Rule 12 then went on to provide a particular power for the tribunal to order an application to be struck out for want of prosecution, subject to certain safeguards. The EAT expressed the view that, but for the introductory words to Rule 12(1), the tribunal might have had power to strike out for want of prosecution. But the fact that striking out for want of prosecution was expressly dealt with by the rules made it impossible to hold that there was a right to make such an order otherwise than in accordance with the requirements and safeguards contained in those rules.

21. The same rules were in issue in *O'Keefe v Southampton City Council* [1988] ICR 419, where the EAT agreed that there was no inherent jurisdiction. In that case, which concerned a strike out where the claimant was guilty of abusive conduct during the hearing, the EAT reluctantly concluded that the strike out powers in the then applicable rules could not extend to the conduct of a party before the tribunal.

22. In *Care First Partnership Ltd v Roffey and Others* [2001] ICR 87, the Court of Appeal considered arguments that an employment tribunal had the power, either under its powers to regulate its own procedure or under powers to conduct a hearing, to dismiss the complaints as having no reasonable prospect of success. The Court of Appeal made clear that, as the tribunal was a creature of statute, the answer depended upon the terms of the rules governing the tribunal's jurisdiction. As in *Kelly* and *O'Keefe*, the court refused to infer any jurisdiction other than that expressed by the applicable rules.

23. The cases just referred to are all in the sphere of the industrial and employment tribunals. In the tax field, in a case, *Deborah Smith v HMRC* [2005] UKVAT (Excise) E00896, concerning the power of the VAT and Duties Tribunal to dismiss an appeal against seizure of goods for failure to pay excise duties for abuse of process without a hearing on the merits, the chairman (Mr Theodore Wallace) accepted (at para 31) that the "Tribunal unlike the High Court is a statutory body with no inherent powers".

24. Mr Jones accepted that the rules which govern this tribunal (the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) do not confer the power that he submitted it should exercise in this case. Instead he argued that the tribunal did indeed have an inherent power to do so. He submitted that it would be astonishing if the tribunal did not have the power to cure abuse.

25. Mr Jones took me again to *Connelly*, to which I have already referred. That case was concerned with the discretion of a court (outside the strict pleas of *autrefois acquit* or *autrefois convict*) to stay a subsequent indictment containing charges founded on the same facts as those on which a previous indictment is based or forming or being part of a series of offences based on one incident. Mr Jones first directed me to the speech of Lord Reid where, at p 406G he said "…I think that there must always be a residual discretion to prevent anything which savours of abuse of

process". He then referred to the speech of Lord Morris of Borth-y-Guest (at p 409H) where his lordship referred to the policy and tradition inherent in the criminal administration that, even in the case of wrongdoers, there must be an avoidance of anything that savours of oppression. Lord Devlin (at p 442H) also makes clear that the courts have the power to see that the process of law is not abused (rather than permit the executive to have that responsibility), and at p 443G, citing Lord Blackburn in *Metropolitan Bank Ltd v Pooley* [1881-85] All ER Rep 949 at p 954), that in criminal as well as civil proceedings the court has inherently in its power the right to see that its processes are not abused by a proceeding without reasonable grounds so as to be vexatious or harassing.

26. Mr Jones referred me to *Hunter v Chief Constable of the West Midlands Police and Others* [1982] AC 529, which concerned the question of abuse of process in the case of a civil action to initiate a collateral attack on a decision of a criminal court, and in particular to the beginning of the speech of Lord Diplock (at p 536):

> "… 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; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

He submitted that although this case concerned the powers of the High Court, Lord Diplock was referring to the inherent power of any court (and, he argued, therefore any tribunal), and that this power should not be defined by reference to fixed categories, such as the powers of this tribunal to strike out under rule 8 of the Rules.

27. Mr Jones argued that the fact that the tribunal is a creature of statute does not prevent it from having an inherent jurisdiction to prevent abuse. He referred me in this respect to cases in the magistrates' court, itself a creature of statute. In *Mills v Cooper* [1967] 2 QB 459, the divisional court held that every court had discretion to decline to hear proceedings on the ground that they were oppressive and an abuse of the process of the court.

28. In *Atkinson v United States of America Government* [1971] AC 197, Lord Reid referred back to what he had said in *Connelly* about the residual discretion to prevent abuses of process, but stated (at p 232) that whatever had been said in *Connelly* with regard to the extent of the power of a trial judge to stop a case, that could not be regarded as any authority for the proposition that magistrates had power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. The statutory powers in question in that case were those in the Extradition Act 1870 and Lord Reid considered that, absent the safeguards in that Act,

and the intention of Parliament as regards the use of those safeguards, it would have been necessary to infer that the magistrate had power to refuse to commit in order to prevent an infringement of natural justice.

29. Mr Jones urged me not to place significant weight on the cases concerning the powers of tribunals which, he submitted, were cases on their own narrow principles, and could have no wider application. He argued that cases concerning procedural issues such as the setting aside of a withdrawal of a claim (*Khan*), or review or rescission of a decision (*Akewushola*) were not relevant to questions of abuse of process. *Kelly* is a case on striking out for want of prosecution where the process was already covered by the rules. Mr Jones submitted that none of the cases could be regarded as establishing any wider principle concerning abuse of process.

30. In the *V case*, the submission of the claimant was that the Secretary of State was being abusive of the Asylum and Immigration Tribunal, and that the AIT had erred in failing to use its inherent powers to prevent such an abuse. Mr Jones argued in this respect that what was said was that the tribunal did not have an inherent power to regulate its own procedure. The question here was whether the tribunal had an inherent power to prevent an abuse of its own procedure.

Discussion

31. On the authorities it is clear to me that this tribunal does not have any inherent powers. In my judgment the position is clear from the judgment of Hickinbottom J in the *V case*: the tribunal does not have any inherent powers on the same basis as the High Court. The only powers that the tribunal has are those that are necessary for the proper functioning of the tribunal, and those are restricted to powers that are expressly conferred on the tribunal through the Rules or statutory framework, or which can properly be implied into the statutory scheme through construction of the Rules.

32. The authorities on which Mr Jones places reliance do not, in my view, show that this tribunal can have any inherent powers beyond those that may be inferred into the statutory scheme and the tribunal's Rules. The explanation given by Hickinbottom J in the *V case* could not have been given if Mr Jones was right that the power to prevent abuse was an inherent jurisdiction of the tribunals as well as the courts. As the cases which relate to tribunals specifically make clear, there is no such inherent power in the tribunals. The question, therefore, is whether the power which the Appellants ask the tribunal to exercise in their favour can be implied.

33. Mr Jones submitted that this tribunal has a power effectively to strike out a party's case on the ground that the conduct of that party is such that it would be unfair to the other party for the case to be heard on its merits. Mr Jones relied solely on the second category of cases for which a stay for abuse of process may be ordered, as described in *Ebrahim*. He did not argue that these appeals themselves could not fairly be determined (the first category).

34. Ms Dewar argued that by virtue of the terms of the Rules themselves this tribunal is empowered to deal with many of the kinds of abuse or unfairness that could

impinge on proceedings before it. Principally those powers are derived from rule 8, but the tribunal also has power, for example under rule 5(3)(d), to prevent a party relying on documents that had been illegally obtained or to prevent a party making submissions where doing so would amount to a collateral attack on a previous final judgment.

35. I turn therefore to the relevant Rules. I start with rule 2, which sets out the overriding objective of the Rules, namely to enable the tribunal to deal with cases fairly and justly. By rule 2(3) the tribunal must seek to give effect to the overriding objective both when it exercises any power under the Rules and when it interprets any rule.

36. The tribunal has wide case management powers, as described in rule 5(1), which provides:

> "Subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007] and any other enactment, the Tribunal may regulate its own procedure."

A number of powers to make directions are set out by rule 5(3), but these are described expressly as not restricting the general powers.

37. The powers to strike out a party's case or, in the case of a respondent, to bar the respondent from taking further part in proceedings, are set out in rule 8:

> "(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> > (a) does not have jurisdiction in relation to the proceedings or that part of them; and
> >
> > (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> > (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
> >
> > (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
> >
> > (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

38. Rule 15, which is described as not restricting the general powers in rule 5(1) and (2), empowers the Tribunal to give directions as to the nature of the evidence or submissions it requires.

39. Ms Dewar submitted that rule 8 provides a clear and exhaustive scheme for limiting a party's participation in proceedings. It includes in sub-paragraphs (4) to (6) a measure of protection for parties faced with exercise of this sanction in the form of a right to make representations to the tribunal before the order is made and a right to apply to have the sanction lifted. She submitted that there is no room in this statutory scheme for some free-standing or overarching power to limit a party's participation by reference to conduct outside the confines of rule 8, nor for the use of the broad powers in rule 5 or rule 15 to achieve the same effect.

40. Ms Dewar argued that to find an additional unfettered power to limit participation in addition to rule 8 or to use rules 5 or 15 to achieve the same effect would be wholly inconsistent with the express specific provisions of rule 8, render that rule entirely otiose and strip away the statutory protections in rule 8. She submitted that if the draftsman had intended this tribunal to have power to limit a party's participation by reference to broad concepts of abuse or fairness or by reference to the propriety of the way that it had conducted these or other proceedings, he would have included them as criteria for the tribunal's exercise in rule 8.

41. I do not consider that rule 8 can be said as a general matter to be exhaustive of all possible circumstances where the tribunal might have the power to strike out a case, or prevent a respondent from proceeding. Each case where a strike out power is asserted will fall to be determined, in the light of the authorities, on its own merits. Although in the case of the tribunal a power can exist only if it can properly be implied into the statutory scheme, it seems to me that the remarks of Lord Diplock in *Hunter* in relation to the court's inherent powers, and the undesirability of confining those powers to fixed categories, are equally apt to the construction of the Rules. Without therefore pre-judging any other circumstances that might arise, it is necessary for me to decide whether the particular power which the Appellants here seek to be exercised can be implied into the tribunal's jurisdiction under the Rules.

42. Were such a power to be implied, it could in my view only be so implied by a construction of the provision for the tribunal to regulate its own procedure as set out in rule 5, construed of course to give effect to the overriding objective to deal with cases fairly and justly. In this respect I should note that rule 5(1) does not contain the "subject to the provisions of these rules" language without which the EAT in *Kelly* thought it may well have been that the industrial tribunal might have had the power to strike out for want of prosecution in the course of the hearing, and without the safeguards provided in the express provision in that respect. In an appropriate case, therefore, it seems to me that, if fairness and justice demand, this tribunal may well have power under rule 5 to make directions in circumstances outwith express provision elsewhere in the Rules.

43. Having said that, I have concluded that no such power as the Appellants assert in their application can or should be implied. I have reached this conclusion, not on the basis of a construction of the Rules themselves, but on the basis of the nature of the power which the Appellants assert. As appears from *Ebrahim* (at para 19 of the judgment of the court), in some of the second category of cases, those where a prosecution should not be allowed to proceed because it is not being pursued in good faith, or where the prosecutors have been guilty of such serious misbehaviour that they ought not to be allowed to benefit to the defendant's detriment, it is the High Court or the Divisional Court (and not the lower court) which will possess the requisite jurisdiction, and not any lower court.

44. In making this observation the court in *Ebrahim* referred to the judgment of the Divisional Court delivered by Buxton LJ in *R v Belmarsh Magistrates' Court ex p Watts* [1999] 2 Cr App R 188. That case concerned the jurisdiction of the magistrates' court to entertain a complaint of abuse of process on the ground that summonses were intended to be and were a collateral attack on a person's criminal conviction. The court there cited *R v Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42, HL and the distinction to be drawn between unfairness within the proceedings on the one hand, and on the other misconduct or law-breaking by public authorities in bringing a defendant within the jurisdiction at all. Holding that the Divisional Court and the magistrates' court in principle have concurrent jurisdiction in cases of allegations of abuse in magistrates' court cases, the court went on to say (at p 195):

> "Within the general jurisdiction … there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have. So much is clear from Lord Griffiths's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself."

45. In my judgment this indicates that questions of a stay of proceedings, or an effective striking out of a party's case, which do not specifically involve issues of unfairness within the proceedings themselves, are appropriate for the jurisdiction of the Divisional Court, and not that of the lower courts. In argument Mr Jones posed the question as to where a remedy might be obtained if this tribunal did not have jurisdiction. It is not for me to answer that question, and the answer would not in any event affect my conclusion. If it were the case (which I doubt) that the Divisional Court did not have jurisdiction over cases of abuse such as that alleged by the Appellants, that could not constitute a reason for implying such a jurisdiction in the tribunal.

46. It follows that I dismiss the Appellants' application. Accordingly, as I have found that the tribunal does not have jurisdiction to make the order which the Appellants have applied for, I need not express a view on HMRC's alternative applications, and it would not be appropriate for me to do so, as I would potentially be trespassing on another court's jurisdiction.

Application for permission to appeal

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

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 4 October 2011