

James Kessler; 1st; Applicant; 8 June 2010

Cases Nos. C1/2008/2488 and C1/2008/2690

IN THE COURT OF APPEAL (CIVIL DIVISION)
on appeal from
THE ADMINISTRATIVE COURT, QUEEN'S BENCH DIVISION

BETWEEN

THE QUEEN

on the Applications of

(1) ROBERT JOHN DAVIES and MICHAEL JOHN JAMES

(2) ROBERT GAINES-COOPER

Claimants/Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

IN THE MATTER OF AN APPLICATION BY

JAMES KESSLER QC

Applicant

WITNESS STATEMENT

1. I am James Kessler QC, a barrister practising at 15 Old Square, Lincoln's Inn, London WC2A 3UE in the field of taxation.
2. I make this statement in support of my application for permission to inspect and take copies of the skeleton arguments of the Respondents in this case (the Commissioners for Her Majesty's Revenue and Customs). I explain in this statement why I am making this application and the grounds on which I am making it. I refer to some correspondence and authorities which I have compiled in a file. Tab numbers refer to this file.

Background

3. I am the author of the book "*Taxation of Foreign Domiciliaries*" (now in its 8th edition) and a number of other books in the fields of taxation and trusts.
4. I also operate a website at www.kessler.co.uk which provides resources for readers of these books and others interested in these fields. In particular, this website provides a substantial archive of materials relevant to the taxation of foreign domiciliaries, which would otherwise be difficult to obtain. This can be freely accessed by anyone.
5. Throughout my career, I have sought to make the law, practice and documentation in my area as accessible and understandable as possible. I strongly believe that this benefits practitioners and the general public, and is in the best interests of the state.

Why I am making this application

6. As the Court observed in paragraph 11 of its Judgment, the present case concerns "*matters of great importance not just to the taxpayer but to the Revenue itself*". I understand the Court to mean that the case is of great public importance; it is not just of concern to the individual Appellants. In particular, the case concerns the meaning and effect of the Revenue's longstanding guidance on the meaning of residence of individuals. Residence is fundamental in determining an individual's liability to UK taxation.
7. Having read the Judgment of the Court, it seemed to me that my and other people's understanding of this case and its implications would be deepened by reading the skeleton arguments submitted on both sides. I think that:
 - (a) This would assist me to give better advice to my clients in relation to:
 - (i) the criteria of residence and ordinary residence, especially for the years prior to 2009, when IR20 was in force, but also for the current tax year;
 - (ii) the effects of the guidance and practice of the Revenue in this and other matters; and
 - (iii) how the Courts determine issues of this kind.
 - (b) This would enable me to discuss the issues raised by the case more fully in the next edition of my book "*Taxation of Foreign Domiciliaries*" and its online equivalent (which is available free to purchasers of the book).

- (c) If (as I anticipate) the skeleton arguments assist in understanding the case and how the Court reached its decision, I intend to add the skeleton arguments of both sides to the collection of materials available free on my website in order to make them readily accessible to the public and to promote better informed discussion and analysis of the Court's decision and of this area of the law.

My attempts to obtain a copy of the Respondents' skeleton argument

- 8. I initially requested copies of the Respondents' skeleton arguments from the Respondents by completing an online form on their website on 8 April 2010. A copy of the automatic acknowledgment of the request is at page 1 of tab 1. I have not kept a copy of the wording of my request, but I can confirm that I simply asked for a copy of the Respondents' skeleton argument in the Court of Appeal without further elaboration.
- 9. The Respondents replied on 7 May 2010 (tab 1, pages 2-3), treating it as a request under the Freedom of Information Act 2000. They rejected the request on two grounds:
 - (a) under section 21 of the Act, on the ground that the information was reasonably accessible from the Judgment and a transcript of the argument;
 - (b) under section 32, on the ground that the information was held by virtue of being contained in a document served by a public authority for the purpose of legal proceedings.
- 10. I consider that the rejection under section 21 was erroneous: the Judgment does not reproduce the Respondents' skeleton argument; and a transcript could only be obtained at great expense and would also not be expected to reproduce the skeleton argument. However, the rejection under section 32 of the Act appears to me to be correct, on the basis that the information is held by virtue of being contained in a document filed with or otherwise placed in the custody of a court for the purposes of proceedings.
- 11. I then asked Junior Counsel for the Appellants (the taxpayers), Ms Nicola Shaw, if she was willing to provide a copy of the Respondents' skeleton argument. Copies of our email correspondence are at pages 4 to 20 of tab 1. I considered that, in the light of CPR 31.22, if Ms Shaw was willing to provide it, she would not be in breach of any duty to the Respondents or the Court, (for completeness, unless the Court had made an Order to the contrary under CPR 31.22(2), in which case she would no doubt so inform me.)

12. As can be seen from these emails, Ms Shaw chose not to provide me with a copy of the Respondents' skeleton argument without the consent of their Counsel, notwithstanding the terms of CPR 31.22 and the observations in paragraph 8-092 of "*Media Law*" (5th edition) by Geoffrey Robertson QC and Andrew Nicol QC (tab 2). She asked the Respondents' Counsel, who declined to consent. However, she did provide copies of the taxpayers' skeleton arguments to me.
13. In these circumstances I wrote to the Court of Appeal registry on 17 May 2010 (tab 1, page 21) asking whether the Court had retained copies of the Respondents' skeleton arguments. I received a reply by email on 26 May 2010 confirming that the Court had retained copies of the Respondents' skeleton arguments (tab 1 page 22). Lastly, I wrote again to HMRC, enclosing a draft of this witness statement so they could see the full grounds of the application, but they decline to let me see their skeleton (tab 1 pages 23, 24) and do not give any reasons.

Grounds of this application

14. CPR 5.4C(2) provides that "*a non-party may, if the court gives permission, obtain from the records of the court a copy of any other document [i.e. a document other than a statement of case, judgment or order] filed by a party...*".
15. In *The Law Debenture Trust Corporation v Lexington Insurance* [2003] EWHC 2297 (tab 3) Colman J considered that written opening submissions did not form part of the "records of the court" since they were mere tools of advocacy provided directly to the judge to facilitate presentation of the case, without any requirement that they be filed or kept in the registry: see §17.
16. Whatever may have been the position regarded written opening submissions in the Commercial Court in 2003, I respectfully submit that skeleton arguments do form part of the records of the Court of Appeal in 2010. Appellants and Respondents are now required to file skeleton arguments with the Court within strict time limits (CPD52 §§5.9, 7.7 and 7.10). They must contain a numbered list of the points which the party wishes to make and they should define and confine the areas of controversy (CPD52 §§5.10 and 7.8). Although the primary argument remains oral, I think that it is right to say that written skeleton arguments frequently play an important role in the Court of Appeal's decision-making process. Furthermore, it appears that in this case copies of the skeleton arguments are in fact held by the Court's registry.
17. However, this point is academic, since even if the skeleton arguments do not form part of the "records of the court", within the meaning of CPR 5.4C(2), the *Law Debenture Trust* case confirms that the Court has an inherent jurisdiction to make such documents available to non-parties, and it appears that the discretion should

be exercised in a similar way.

18. I respectfully submit that the Court's discretion should be exercised on the basis of the following principles, which are identified in

(1) *GIO Services v Liverpool and London* [1999] 1 WLR 984 at 994C-997C (tab 4)

(2) *Chan U Seek v Alvis Vehicles* [2005] 1 WLR 2965 at §§20-21, 23-24, 27, 39-41 (tab 5)

(3) *The Law Debenture Trust Corporation v Lexington Insurance* [2003] EWHC 2297 at §§ 22 and 30 (tab 3)

- (a) Open justice is a fundamental principle of English law. There is a presumption that cases should be heard in public and that there should be as few impediments as possible to the reporting of cases.
- (b) The exercise of the Court's jurisdiction to expose skeleton arguments to public inspection is the general requirement of open justice, the underlying purpose of which is to ensure that justice should be seen to be done by exposing to public scrutiny not only oral argument upon which judges were invited to arrive at their judgments but documents which provided a substitute mode of submission or which facilitated the conduct of the hearing.
- (c) That purpose requires that the public observer should have access to the same written submissions which had been furnished to the judge to enable him to understand what the case was about.
- (d) The increasing use of written submissions designed to improve the efficiency of litigation should not deprive the public of access to the material considered by the court in the course of reaching its decision.
- (e) In exceptional circumstances, public access to such material may be denied, for example to protect confidential trade secrets. However very good and specific reasons are required to depart from the normal rule that the public should have access.
- (f) The court should not accede to general arguments that it would be possible to understand the proceedings without access to a particular document.
- (g) In particular, skeleton arguments in any complicated case should normally be made available to any member of the public who seeks them for

legitimate reasons.

19. The importance of the arguments as an aid in understanding a Judgment is recognised in the longstanding practice of The Incorporated Council of Law Reporting for England & Wales who provide a précis of the arguments as well as the Judgment. The text of the skeleton arguments is an even better aid than a précis of the arguments in the Law Reports, which is necessarily curtailed by considerations of cost and space.
20. I also submit that the courts' power to permit access to documents in their custody under CPR 5.4C or the inherent jurisdiction is not affected by the fact that they are exempted from compulsory disclosure under section 32 of the Freedom of Information Act 2000. On the contrary, I submit that the purpose of section 32 is to reserve to the courts the determination of whether access to such documents should be given, in accordance with the principles developed by the courts and which I have sought to summarise above.
21. I submit that my reasons for seeking the Respondents' skeleton arguments are legitimate. I am not aware of any possible reason for denying public access to them. I note in this regard that the hearing was in public, that the Respondents have not sought an Order preventing disclosure under CPR 31.22(2), and that the Appellants disclosed their own skeleton arguments on my request without hesitation.

Procedure

22. In accordance with CPR 5.4D, I am making this application by Application Notice under CPR Part 23 without formal notice to the Respondents. However, as a matter of courtesy I have informed the Respondents that I am making it and they will no doubt inform the Court promptly if they desire to be heard. As can be seen from the correspondence at tab 1 page 13, I have also informed Junior Counsel for the Appellants of my intention to make this application and have further informed them that it has been made. Under CPR 5.4D(2) the Court may direct that notice be given to any person who would be affected by its decision on the application. I am not aware of any other person who should be notified.
23. While the provisions of CPR 5.4D are not strictly applicable if this application has to be made under the inherent jurisdiction rather than CPR 5.4C (see paragraph 14 above), I would submit that the procedure set out in CPR 5.4D is equally appropriate for the Court's exercise of its inherent jurisdiction.
24. I recognise that this application is made after the Court has determined the appeal. However, I submit that this should not be a bar to the application, particularly as

the Court has retained the skeleton arguments in the “live” filing section and the case continues to be a matter of current importance and controversy. On this point, I respectfully draw the Court’s attention to the observations in *Chan U Seek v Alvis Vehicles* at §§28-29 and 43-44 (tab 5) and *GIO Services v Liverpool and London* at 997E-G (tab 4).

25. I have not included a draft Order in the Application Notice because the appropriate form of Order (if the Court should grant the application) seemed to be so straightforward that it would not be worthwhile add to the paperwork. However, I will be happy to submit a draft Order if the Court would find it helpful.
26. I have indicated in the Application Notice that the Application can be determined on the papers, but I would of course attend an oral hearing if the Court considers this necessary. If there is an oral hearing, I would wish to be represented by Counsel, Mr Jonathan D.C. Turner of 13 Old Square Chambers.

Statement of truth

27. I believe that the contents of this statement are true.

James Kessler QC