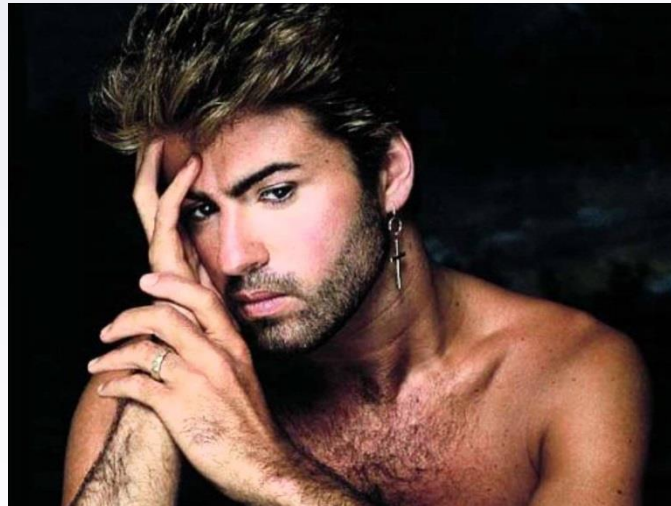
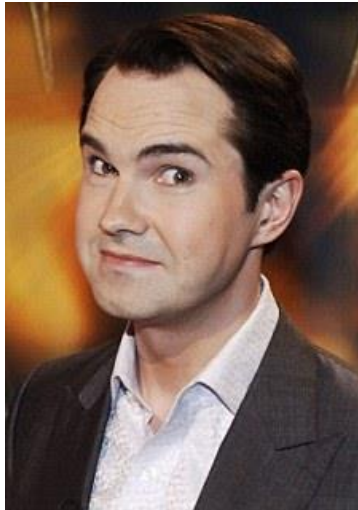


Tax Mitigation Schemes and FOS Jurisdiction

Jay Jagasia, Guildhall Chambers

Common Link?



Introduction

- Film finance schemes
- Political and public opposition
- HMRC intervention
- High net worth individuals
- Tax is primary driver
- Follower notice and accelerated payment regime
- The role of claims management companies
- *R (on the application of Chancery) v FOS* [2015]
- Facts
- Significance of *Chancery*
- Appeal status – hearing on 28/29.03.17



Sideways Loss Relief

“Tax incentives for the production of films were contained in the Finance Acts of 1992 and 1997. One feature of the relief enabled expenditure on production of a film to be written off upon its completion, which produced losses in the early years of its life. This characteristic of losses in the early years of trading enabled taxpayers to mitigate income tax, using those losses...in the year of the loss or in the three previous years...This could be used to generate large refunds of tax paid such that a significant loss in year 1 of a film scheme could be carried back to cover most of the general income for the previous three years. The avoided tax would be deferred and repaid in later years...The typical film scheme involved a limited liability partnership...This LLP would be financed by individual members making a capital contribution typically consisting of 20% cash and 80% loan finance...The tax repayment in the light of those percentages would provide a tax repayment, at 40% tax rate, double the cash contribution”

Key Issues

1. FOS or Part 7 claim? What are the perceived advantages and disadvantages, from the perspective of advisors and complainants?
2. What are the main jurisdictional arguments raised in FOS complaints of this nature? Which arguments have the best chance of succeeding?
3. How far can the FOS go in determining its own jurisdiction?
4. What are the main issues that need to be considered to quantify loss?

FOS or Part 7 Claim?

- Is FOS a consumer-friendly jurisdiction?
- Importance of formal evidence and cross-examination?
- Value of complaint/claim ?– *Clark v In Focus Asset Management* [2014] EWCA Civ 118
- Danger of publicity?
- Costs?
- Ouseley J shared Chancery’s concern “*about the large numbers of claims, pursued at no or very little cost risk to the complainants, leading to sizeable compensation awards on a rough and ready basis, with the facts not analysed properly, in decisions lacking the rigour which a High Court Judge should bring*”

Jurisdictional Arguments?

- Limitation
- Tax vs Investment Advice
- Not a CIS because scheme participants had day-to-day control
- Last ditch arguments (discretionary) – value of complaint exceeds mandatory compensation limits, complainant has means to litigate and need for formal evidence which can be tested on cross-examination

The Jurisdiction of the FOS to...Determine its Own Jurisdiction?

- Claimant – *Bluefin*
- FOS – *Bankhole*
- Judgment or precedent fact?
- Significance of competing approaches from the perspective of ease of challenge
- *Chancery* – milieu
- Ultimately for court to decide whether FOS has acted with or without jurisdiction, but FOS has important role to play in fact-finding and initial decision-making process
- Distinction between procedural/discretionary issues and issues where there is only one correct legal answer
- Fact finding (and procedural/discretionary issues) only challengeable on traditional JR bases

Loss?

- HMRC challenge to only part of the anticipated loss relief?
- Tax effect only ever envisaged mitigation, not avoidance
- Borrowing commitments?
- Loss of opportunity?
- Statutory interest?
- HMRC penalties?

Conclusions

- Difficult task ahead for those who have recommended clients to participate in failed tax mitigation schemes (and their insurers!)
- Complaints increasing in number
- *Chancery* further empowers FOS
- Where no clear-cut jurisdictional argument, FOS will likely seize jurisdiction and consider merits of complaint
- Some clarity on boundaries of FOS jurisdiction in this area (even if boundaries almost limitless)
- Left open possibility that certain schemes may breach the investment/tax advice melange
- Little scope to argue that a scheme is not a CIS
- Focal date for CIS assessment
- No generic fatal blow to jurisdiction