



TC04101

Appeal number: TC/2013/06299

PROCEDURE – application for issue of witness summons to former liquidator of appellant company – Rule 16 of the Tribunal Procedure Rules

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ABBHEY FORWARDING LTD
(in liquidation)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 14 October 2014

Oliver Powell, instructed by Banks Kelly Solicitors Limited, for the Appellant

The Respondents were not represented, but Ms Helen Barnard, of HMRC's Solicitor's Office, was in attendance to assist the Tribunal

Imran Afzal, instructed by Pinsent Masons, appeared for Ms Louise Brittain

DECISION

5 1. This was an application on behalf of the Appellant, Abbey Forwarding Limited (in liquidation) (“Abbey”), for a witness summons to be issued to Ms Louise Brittain, the former liquidator of Abbey.

10 2. That application was originally part of an application by Abbey made on 13 August 2014, which covered not only the application in respect of Ms Brittain, but also an application for disclosure by HMRC and witness summonses in respect of three further witnesses. By the time of the hearing, however, all those additional issues had been resolved, subject only to a possible application for costs by HMRC.

15 3. In the circumstances, HMRC were not represented by counsel at this hearing, although Ms Helen Barnard of their solicitor’s Office helpfully attended in order to assist the Tribunal. Abbey was represented by Oliver Powell of counsel, and Ms Brittain by Imran Afzal of counsel.

Background

20 4. Abbey’s appeal is against two notices of assessment under section 7 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 and section 12(1A)(b) of the Finance Act 1994 (“FA 1994”). The assessments concern alleged irregularities in certain movements of goods and consequent liability to excise duty and VAT.

25 5. The notices of assessment are dated 27 March 2009, and are addressed to Ms Brittain as the then liquidator of Abbey. Ms Brittain, who was at that time a partner in Baker Tilly, had been appointed liquidator on 4 February 2009. On 1 August 2009, Ms Brittain moved to Deloitte, remaining as the liquidator of Abbey until August 2012.

6. Abbey appealed the assessments on 5 September 2013. Following a hearing on 23 April 2014, I issued directions on 24 April 2014 directing a hearing to be listed to determine two matters as preliminary issues:

30 (a) an application by HMRC to strike out Abbey’s appeal in relation to excise duty on the ground that the Tribunal has no jurisdiction to determine such appeal; and

(b) applications by Abbey to appeal out of time the excise duty and VAT assessments.

35 7. Briefly, in respect of the jurisdiction issue, it is contended by HMRC, relying on sections 12 to 17 FA 1994, that in relation to the excise duty assessment no appeal can lie in the absence of a statutory review. As regards the VAT assessment, HMRC submit that the appeal is out of time, and that the Tribunal should not permit the appeal to be made. Abbey argues in relation to the excise duty assessment that a review was undertaken by HMRC and that an appeal was lodged in time. Its case in
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relation to the VAT assessment, and its alternative case in respect of the excise duty assessment, is that the Tribunal should give permission to appeal out of time.

8. It is in the context of the hearing of the preliminary matters that Abbey seeks the issue of a witness summons to Ms Brittain. Ms Brittain is no longer the liquidator of Abbey. Proceedings were instituted for her removal from the office of liquidator, and on 30 August 2012, prior to the hearing of that application, Ms Brittain consented to her removal and was replaced by the current liquidator, Mr Jeremy French.

The Tribunal's powers

9. Abbey's application is made under Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. That rule relevantly provides that, on the application of a party or on its own initiative, the Tribunal may by summons require any person to attend as a witness at a hearing at a time and place specified in the summons. Rule 16(4) provides that the recipient of such a summons may apply to the Tribunal for it to be varied or set aside if that person did not have an opportunity to object before it was made or issued. In this case that prior opportunity has been given to Ms Brittain, who has been represented on this application.

10. The power to issue a witness summons is one of a wide range of case management powers which may be exercised by the Tribunal. The Tribunal has a broad measure of discretion in such matters, but must exercise that discretion judicially, and with the overriding objective, as set out in Rule 2, of dealing with cases fairly and justly, in mind. The Tribunal should therefore consider all the relevant circumstances in determining an application of this nature.

11. In the case of an application for a witness summons, the guiding principle is that the Tribunal may issue such a summons where it considers that there is a real likelihood that the evidence of the person summonsed will materially assist the Tribunal in its determination of an issue or issues in the proceedings. The test is not whether the party making the application hopes that the evidence will assist its case. That would be in the nature of speculation or, as it is put, a "fishing expedition". The test is whether the Tribunal considers that there is a real likelihood that its determination will be assisted. That may be the case where the Tribunal considers that the evidence would be reasonably likely, one way or another, to resolve an area of uncertainty.

Abbey's application

12. Mr Powell put forward the following reasons why the Tribunal should issue a witness summons to Ms Brittain:

(1) Ms Brittain was the liquidator at the time when the assessments were purportedly raised and served on Abbey. As liquidator, Ms Brittain owed fiduciary duties to Abbey and was under a duty to retain documents. Although attempts had been made by Abbey to obtain further information from Ms Brittain, she had, it was submitted failed to provide sufficient answers. Ms

Brittain had repeatedly stated that she could not remember a number of aspects. It was said that she had given conflicting evidence in relation to her (and through her, Abbey's) knowledge of the assessments. It was only proper that Abbey be given the opportunity to scrutinise these conflicts.

5 (2) As regards the application to strike out the appeal on the basis that there had been no review by HMRC, it was argued that Ms Brittain had sworn a witness statement in related litigation confirming that she always asked for a review to be undertaken. This was a line of enquiry Abbey wished to pursue.

10 (3) As regards delay, and in particular the question why there was a delay in Abbey appealing the assessments, Ms Brittain's evidence, it is submitted, would be central to this. Although Ms Brittain might say that she cannot remember why she did not appeal the assessments, Abbey argues that it is nonetheless entitled to test this evidence. In this regard, it is submitted that Ms Brittain has previously shown herself to have been a mistaken witness.

15 (4) This Tribunal's determination of the preliminary matters will have far-reaching ramifications for Abbey. If the Tribunal rules against Abbey, then it will have no mechanism to challenge the assessments of excise duty and VAT. The assessments total £456,068. Given this sum, it is said that this is not a decision that the Tribunal will want to take lightly. Abbey submits that it is crucial that the Tribunal has the best possible evidence before it when making a decision. A refusal to issue the summons might hamper and frustrate the Tribunal's ability to make a decision on the preliminary matters.

20 (5) Referring to the overriding objective, Mr Powell draws attention to Rule 2(2)(a), and the need to deal with the case in ways that are proportionate to the importance of the case, and Rule 2(2)(c), to ensure, so far as practicable, that the parties are able to participate fully in the proceedings. He argues that it is crucial that Abbey is fully equipped to oppose the strike out application and that it is not hamstrung by Ms Brittain's reticence about giving evidence to the Tribunal.

25 (6) Mr Powell argues that, despite objection having been raised on behalf of Ms Brittain that Abbey is seeking to obtain evidence that can be used for a collateral purpose, that objection is misguided. Ms Brittain is legally represented, and it is said that all of Abbey's enquiries have been conducted in a proper and professional manner, and directed at the issues to be determined. No improper cross-examination would be undertaken by Abbey's legal team.

Ms Brittain's objections

13. Five heads of objection are put forward on behalf of Ms Brittain:

40 (1) Ms Brittain has, it is submitted, cooperated to a significant extent, both in interview and correspondence, with Abbey's requests and has provided a significant amount of documentation.

(2) The events of this case took place more than five years ago, and Ms Brittain cannot now recall every detailed aspect of a fast-moving and

complicated liquidation. Ms Brittain has indicated where no further information can be given by her and accordingly it would serve no purpose to have her repeat this before the Tribunal.

5 (3) Abbey, through its liquidator, can seek answers to its questions from Mr Paul Allen who, as an assistant director at Deloitte and a senior manager in the liquidation team at the relevant time, dealt with the Abbey's liquidation. Mr Allen is now a partner in the liquidator's firm of FRP Advisory LLP.

(4) It is submitted that the purpose of the application (at least in part) is to seek evidence to be used for a collateral purpose.

10 (5) Certain aspects of the application, such as those concerning costs, are entirely inappropriate.

(6) Many of the questions asked appear to have no relevance to the proceedings.

The history

15 14. There is a substantial history to the liquidation of Abbey and the role played by Ms Brittain. Ms Brittain was originally appointed as provisional liquidator prior to the order on 18 March 2009 to wind up Abbey on the petition of HMRC arising out of assessments to excise duty and VAT. Subsequently, Abbey, through Ms Brittain as liquidator, brought an action against its four former directors, alleging, amongst other things, that those directors had been negligent in allowing Abbey to be exposed to the liability to HMRC. Following a lengthy hearing in July 2010 before Lewison J (as he then was), the action was dismissed (see *Abbey Forwarding Limited (in liquidation) v Hone and others* [2010] EWHC 2029 (Ch)).

25 15. In support of those proceedings, Abbey had obtained a freezing order against the former directors and had given the standard cross-undertaking in damages. On dismissal of the action against the directors, the freezing injunction was lifted and an enquiry was ordered into Abbey's liability for compensation pursuant to the cross-undertakings. That liability is the subject of an indemnity given by HMRC. Those proceedings have so far progressed through the High Court ([2012] EWHC 3525 (Ch)) and the Court of Appeal ([2014] EWCA Civ 711). I was told that the substantive hearing of the enquiry for damages is due to take place in the High Court during the week commencing 10 November 2014.

35 16. Ms Brittain has given evidence, and has been subjected to cross-examination, in each of these proceedings. She has also been interviewed on 5 February 2014, by Mr French and Mr Russell Herbert, senior investigations manager for FRP Advisory, and subsequently responded, through her solicitors, to a number of requests made on behalf of Abbey for further information.

Interview of 5 February 2014

40 17. This interview was in the context of the enquiry for damages pursuant to Abbey's cross-undertakings, and HMRC's indemnity in that respect. It covered a broad range of matters, but included discussion of the assessments raised on 29 March

2009 (which are the subject of this appeal), between the date of Ms Brittain's appointment as provisional liquidator and the compulsory winding-up order.

18. Ms Brittain said that she had not been aware of the assessments until after the hearing of the misfeasance proceedings (July 2010). These assessments only became
5 relevant following the withdrawal by HMRC of earlier, and more substantial, assessments. Ms Brittain did not remember the sequence of events. But in response to a question concerning the absence of the March 2009 assessments in a draft statement of affairs dated 5 November 2010, she suggested that the omission might have been a mistake.

10 19. As regards requests for a review by HMRC and an appeal, Ms Brittain confirmed that a review had been sought in respect of assessments made in February 2009 (on which the appointment of a provisional liquidator had been based), but that no review had been requested in relation to the March 2009 assessments. Two reasons were given. First, the March 2009 assessments were not subject to the
15 misfeasance proceedings and so were not considered material at that time. Secondly, although Ms Brittain confirmed that she had been aware of the March 2009 assessments at the time of the creditors' meeting, she did not know exactly when they would have come to her attention.

20 20. The creditors' meeting under s 172 of the Insolvency Act 1986 (with respect to the proposal to remove Ms Brittain as liquidator) took place in December 2011. Ms Brittain was asked to explain how it was, had she been aware of the March 2009 assessments at that time, it would have been possible for the meeting to have been called. The point was that it appeared that, if the March 2009 assessments had been taken into account, the directors would not have had the requisite 25% in value of
25 creditors or contributories to have required such a meeting. Ms Brittain's reply was to the effect that she must have considered that, taking into account other creditors supporting the directors, the 25% threshold had been met. She reiterated that it was after the hearing of the misfeasance proceedings that she had become aware of the March 2009 assessments.

30 *Witness statements in removal proceedings*

21. Ms Brittain made a witness statement for the purpose of the proceedings in the High Court to remove her as liquidator. In that statement she alludes to the statement of affairs exhibited to previous witness statements of June and November 2010, and notes that the outstanding assessments (by which is meant the March 2009
35 assessments) had been overlooked, in error. In that connection, her evidence was that the absence of the assessments in the November 2010 statement of affairs did not go to show that those assessments were not served on Abbey. Indeed, Ms Brittain says that "[t]he Company was properly served by HMRC with the 'further' assessments in March 2009". She also says that the former directors were advised of the assessments
40 on 8 November 2011. Ms Brittain expresses the view that there is no benefit to Abbey in pursuing (appealing) the outstanding assessments, having regard to the presence of substantial creditors and no available assets. She states that, given the

insolvent position of the company, her decision not to appeal the assessments was a decision that was entirely proper.

22. I was also handed a copy of an earlier witness statement made by Ms Brittain in proceedings in the Companies Court. Although the parties are expressed to be three
5 of the former directors and Ms Brittain, and are not the same as the parties to the misfeasance proceedings, I apprehend (although it is not material) that this statement was made in the context of those proceedings, and concerned an application by the former directors to stay the High Court proceedings in favour of appeals being heard against the relevant assessments in this Tribunal. In that statement, dated 20 April
10 2010, Ms Brittain explains that for those assessments (the earlier assessments the circumstances of which lay at the heart of the misfeasance proceedings) she had requested a formal departmental review by HMRC. This, she said, was a course she adopted routinely, in part because it served to extend the time for appealing.

Further information sought from Ms Brittain

15 23. On 29 April 2014, Banks Kelly, solicitors for Abbey, wrote to Pinsent Masons, for Ms Brittain. In connection with this appeal, Banks Kelly sought responses to 14 questions. Following clarification of the directions given by me in April 2014 for the hearing of the preliminary matters, on 4 June 2014 Pinsent Masons sent replies to those questions. In respect of a number of questions, reference was simply made to
20 the transcript of the interview with Ms Brittain on 5 February 2014. These included questions related to when the assessments were brought to Ms Brittain's attention, and the surrounding circumstances. Others were treated as irrelevant to these proceedings; those questions included whether Ms Brittain accepted that she was responsible for the failure to request a review of the assessments.

25 24. In separate correspondence, not relating to this appeal, but to the enquiry as to damages, Banks Kelly and Pinsent Masons have been discussing requests from Banks Kelly for documents connected with the appointment of Ms Brittain as provisional liquidator and the misfeasance proceedings. On 18 June 2014 Banks Kelly wrote to Pinsent Masons proposing that they attend at Pinsent Masons' office to inspect the
30 documents and offered a contribution of £500 towards the costs of retrieval and copying. Pinsent Masons' reply of 20 June 2014 refers to the substantial number of documents already provided to Abbey, and to the substantial work and expense that would be required to review and redact others. The letter provides the results of certain searches carried out by Ms Brittain, but seeks a reasonable offer from Abbey for the costs of dealing properly with the request. The letter also seeks an explanation
35 from Banks Kelly of safeguards they consider could be put in place to ensure that documents provided to Abbey do not end up with the former directors, for whom Banks Kelly also act.

40 25. A further round of correspondence has taken place concerning the questions raised in connection with these proceedings. However, the only material further confirmation given by Ms Brittain in those respects, in a letter dated 14 August 2014 from Pinsent Masons to Banks Kelly, is that she cannot recall any further details.

Discussion

26. In determining whether there is a real likelihood that the evidence of a witness sought to be summonsed to appear will materially assist the Tribunal in its determination of an issue or issues before it, the necessary starting point is the cases
5 as put by the parties. In the case of the preliminary matters, those respective cases are set out in HMRC's application to strike out the appeal made on 17 December 2013 and Abbey's statement of case on the preliminary matters which was filed on 21 May 2014 in accordance with the April 2014 directions.

27. Somewhat curiously, neither of those documents was in the bundle for the
10 hearing of this application. As the need for witness evidence must always be founded on the parties' stated cases, a party making such an application should always take care to ensure that this essential material is properly placed before the Tribunal.

28. The documents are, however, on the Tribunal file. From these I can conclude that, as regards the strike out application, the Tribunal will not be materially assisted
15 by evidence from Ms Brittain. HMRC's case, put shortly, is that in the absence of a review, the Tribunal has no jurisdiction in relation to Abbey's purported appeal against the assessment to excise duty. This argument rests on a combination of the provisions governing the Tribunal's jurisdiction, as set out in s 16 FA 1994, and transitional provisions in the Transfer of Tribunal Functions and Revenue and
20 Customs Order 2009 applicable to relevant decisions of HMRC notified before 1 April 2009. Abbey's case in that respect is confined to an argument that on 25 June 2013 Abbey requested a review out of time of the assessment issued on 27 March 2009, and that the response of the HMRC officer, Officer Bailey, on 7 August 2013 amounted to a review. No case has been put by Abbey that the assessments were not
25 issued, or not notified, in March 2009.

29. In this respect, therefore, there is no obvious dispute of fact between the parties. The question is simply whether Officer Bailey's response to the request for an out of time review amounts, as a matter of law, to a review. Furthermore, in the absence of
30 any case made by Abbey as to the date of notification of the assessments, all relevant events in this connection took place after Ms Brittain had ceased to be the liquidator. She could not, therefore, in my judgment, give material evidence in relation to those events.

30. Abbey's application to appeal out of time arises differently in relation to the excise duty assessment on the one hand, and the VAT assessment on the other. As
35 regards excise duty, the application is applicable to the extent that the Tribunal finds, on the strike out application, that it has jurisdiction, but that the appeal was made out of time. In relation to VAT, there is (the late appeal apart) no prior jurisdictional question; the application is simply that the Tribunal permit an appeal to be made out of time.

40 31. Abbey's statement of case on this issue might perhaps be expressed a little more clearly. At paragraph 24, Abbey appears to accept that in respect of both the excise duty and VAT assessments (on the assumption that the Tribunal finds it has jurisdiction in relation to the excise duty assessment) the appeals are out of time.

That, of course, so far as the excise duty appeal is concerned, is not strictly correct, and certainly not in accordance with the submissions made to me. If Abbey were to succeed on its argument that Officer Bailey's letter of 7 August 2013 was a decision on a review following an out of time request, then its case would be that its appeal notified on 5 September 2013 was indeed in time, according to s 16 FA 1994.

32. The apparent difficulty is however, I think, resolved by paragraph 23 of the statement of case. Although that draws no distinction between the VAT appeal (for which there is no prior jurisdictional question) and the excise duty appeal, it does express the delay issue as arising in the latter respect only if the Tribunal has found that there is jurisdiction to hear such an appeal, and that the appeal is nonetheless out of time. In those circumstances, the concession in paragraph 24 can be more readily understood.

33. It is clear from the respective cases put by the parties that the question of delay will be a key issue as regards the applications to appeal out of time, both in respect of excise duty (to the extent such an application is required) and VAT. HMRC's case is, in essence, that there was a delay of some 4 years and 4 months between the date of the notices of assessment (27 March 2009) and the date of notification of the appeals (5 September 2009), and that, first, Abbey has no reasonable explanation for the delay, and secondly that, to the extent there is a reasonable explanation for the delay, there is no reasonable explanation for delay after that explanation ceased to apply.

34. In making this case, HMRC say that it is "highly relevant" to the Tribunal's decision that Abbey, the company, is the appellant, and not its liquidator. The liquidator in office from time to time is the person entitled (in place of the board of directors) to manage the affairs of the company in liquidation. Thus, it is said, decisions made by the liquidator are decisions of the company, not of an external person. On this basis, HMRC's case is that an assertion by the current liquidator that a previous liquidator made a decision not to appeal with which he disagrees cannot constitute a reasonable explanation. A further case is made concerning delays during the tenure of the present liquidator.

35. Abbey's statement of case addresses these matters quite briefly, and can be relevantly set out in full:

"a. Notwithstanding clarification as to whether the assessments were properly served on the Appellant, it is unclear as to the reason for the delay by Ms Brittain and the Appellant continues to seek clarification on this matter.

b. In respect of the delay since Mr French was appointed, this was due to:

i The failure by Ms Brittain and/or Deloitte to transfer the relevant documents to Mr French ..."

36. Not surprisingly, therefore, the respective cases focus, although not exclusively, on the reasons for the delay in making the appeal. That involves a factual enquiry of the actions of Abbey, as the appellant, which necessarily is an enquiry into the actions

of the liquidator for the time being. Ordinarily, therefore, where such a factual enquiry is necessary, the interests of justice are likely to be served by a witness summons being issued to a liquidator who would not otherwise attend to give evidence.

5 37. I turn therefore to consider whether, on the basis of the submissions made on behalf of Ms Brittain, I should in the circumstances of this case, refuse the application.

38. In his submissions to me, Mr Afzal distilled the grounds of Ms Brittain's objection to three. The first, which he argued was in itself sufficient, was that Ms
10 Brittain has already answered, in correspondence and interview, all the relevant questions in this regard. Time has passed, and she is unable to recall matters in detail. She has made it plain that she can provide no further information. There would be no assistance to be derived by the Tribunal in Ms Brittain simply repeating what she has already said.

15 39. In this respect, Mr Afzal referred me to the most recent correspondence passing between Banks Kelly and Pinsent Masons. On 6 October 2014, Banks Kelly wrote to Pinsent Masons to ask whether Ms Brittain could "confirm" the signature on the notice of assessment (that in relation to excise duty) "purportedly" received by Baker
20 Tilly. The response was said to be relevant to whether the application for a witness summons would be proceeded with. Pinsent Masons replied on 7 October 2014 providing confirmation that one signature (on an undated Copy to LMB stamp) was hers, and that the other (on a Received 30 March 2009 stamp) was that of Mr Allen.

40. It is not clear to what extent, if any, the letter sent the following day by Banks Kelly to Pinsent Mason is in reply to the letter of 7 October 2014. It is expressed as a
25 response to the earlier letter of 25 September 2014 from Pinsent Masons to the Tribunal setting out Ms Brittain's objections to the issue of a witness summons. It does, however, indicate that, as well as the issue concerning the provision of a copy of the assessment to Ms Brittain, the summons is sought to establish facts as to the reasons for delay in making the appeals.

30 41. A reply to the letter of 7 October 2014 was, however, sent by Banks Kelly to Pinsent Masons on 13 October 2014. In that letter Ms Brittain was asked to clarify on what date she signed the stamp on the notice of assessment. The reply from Pinsent Masons, on the day of the hearing before me, was:

35 "We are instructed that Ms Brittain cannot recall when she signed a stamp on the notice of assessment. Indeed, it is not clear from the copy document you have provided us whether the stamps are on the original notice of assessment or a copy of the original notice. In any event, Ms Brittain has advised that she cannot recollect the date on which she signed the stamp."

40 42. Mr Afzal argued that, having regard to the totality of the information already provided by Ms Brittain (which I have summarised earlier), the evidence of which was before the Tribunal, the lapse of time and her confirmations that there was

nothing further she could provide, no useful purpose could be found in Ms Brittain giving evidence before the Tribunal.

43. Although this is not a straightforward case, I have concluded that this ground of objection does not dissuade me of the material assistance to be derived by the
5 Tribunal from the evidence of a liquidator as to events that took place during the tenure of that liquidator. The fact that information has been provided by Ms Brittain in a number of different ways does not diminish the value of the direct evidence of the relevant matters she would be able to provide to the Tribunal. The issue of delay, and the reasons for the delay, in the relevant period by Abbey, whose actions are those of
10 its liquidator, is at the core of the respective cases put by the parties. The existence of other information provided by Ms Brittain is no substitute for direct evidence given by her.

44. There is, in my view, a clear danger that the parties will seek to place reliance on certain statements made by Ms Brittain on a number of previous occasions. Such
15 reliance may turn on interpretation or context, and the arguments may become nuanced. It would be wholly unsatisfactory for the Tribunal to find itself in the position of having to reach conclusions based on such submissions without the benefit of Ms Brittain having the opportunity to provide direct evidence to the Tribunal on those matters. Especially where the factual enquiry relates not only to hard facts, but
20 to factual questions of the reasons for action, or inaction, there is a clear advantage in the Tribunal being able to hear from the individual whose actions at the relevant time are the most material.

45. In reaching this conclusion, I have taken account of the lapse of time, and the inevitable difficulties in a witness recalling detail. However, there are matters as to
25 which Ms Brittain has provided information, as well as those where she has said she is unable to recall the details. For the reasons I have given, Ms Brittain's direct evidence of those matters on which she is able to assist will be of material assistance to the Tribunal. But it will equally be of assistance to understand from direct evidence the limits of Ms Brittain's detailed recollection of events.

30 46. Mr Afzal's second ground of objection was that the purpose of the application is to some extent to seek evidence to be used for a collateral purpose, namely in respect of other proceedings that might be contemplated in relation to the conduct of the liquidation, and in respect of Ms Brittain and others.

35 47. Although Mr Powell disavowed any such intention, pointing out that the application was made by the company (through its present liquidator) and not by the former directors, I am bound to say that Ms Brittain's concerns in this regard are not without foundation. On the material before me, which I need not summarise, it is clear that there is a prospect of the former directors seeking to instigate proceedings, against Ms Brittain and other parties. In addition, the correspondence from Banks
40 Kelly to various parties can only be read to suggest that evidence is being sought, not only in relation to this appeal, but also for other purposes. Again, because those statements relate to other parties and to other possible proceedings, I shall not set them out.

48. The question for me is whether the possible existence of a collateral purpose should weigh to such an extent that I should refuse this application. I have concluded that it should not. I do not regard the application as an abuse of process. I agree with the submission made by Pinsent Masons in their letter of 25 September 2014 that this
5 Tribunal should not be used improperly as a forum for Abbey's former directors, but that is something, as Mr Powell, submitted, that the Tribunal itself can ensure in the conduct of the hearing. Where, as is this case, there is a legitimate purpose to the obtaining of witness evidence in relation to the Tribunal proceedings themselves, the fact that, as might be the case in particular circumstances, that evidence might
10 additionally be of relevance to other proceedings is not a reason for the Tribunal not to require the evidence to be given to it.

49. The third ground of objection concerns the possible evidence that might be given by Mr Allen. I accept that Mr Allen's position, and involvement in the liquidation process, might make him a suitable witness, although on the information
15 before me I cannot judge to what extent. That is not, however, in my judgment, a reason to refuse the application for a witness summons in respect of Ms Brittain. Ms Brittain was the liquidator at the relevant time. Mr Allen may be able to provide evidence in his own right, if he is produced as a witness. But in considering the facts surrounding the delay in lodging an appeal, and the reasons for that delay, the
20 evidence of Mr Allen, even if it were to be made available to the Tribunal, could not supplant that of the liquidator.

50. For these reasons, I allow in principle Abbey's application for a witness summons. I say in principle for two reasons. The first is that there is, as yet, no date fixed for the hearing of the preliminary matters. Rule 16(2) provides that at least 14
25 days' notice of the hearing is to be given to the person required to attend. The second is that, again under Rule 16(2), the summons must, where the person required to attend is not a party, make provision for that person's necessary expenses of attendance, and state who is to pay those expenses.

51. As regards the latter, in the circumstances of an appellant, such as Abbey, in
30 liquidation as a result of a creditors' winding up, it is necessary, before the summons can be issued, for the Tribunal to be satisfied that the necessary expenses will be paid. It is a matter for Abbey how this is to be achieved. One possibility, which is straightforward for the Tribunal to administer, is that Banks Kelly, as solicitors for Abbey, provide an undertaking to the Tribunal to pay Ms Brittain's necessary
35 expenses of attendance. I have noted that, in its application, Abbey submitted that Ms Brittain should bear her own costs. It is not clear if this is a reference to the expenses of attending as a witness, but if it is, then I reject the submission. Ms Brittain's expenses must be paid by Abbey, to be secured in such way as the Tribunal may approve.

40 52. In light of my findings as to the nature of the evidence that will materially assist the Tribunal, having regard to the respective cases put by the parties, the summons, when issued, will not be open-ended as to the matters Ms Brittain's evidence will be required to address. It will relate solely to the matter of the application for permission to appeal the assessments out of time (and not to the jurisdictional question

concerning the excise duty assessments) and in that respect is to be limited to the following issues:

- (1) the receipt by Ms Brittain as liquidator of Abbey, or those acting for her in that capacity, of the notices of assessment;
- 5 (2) the reason or reasons why no appeal was made against the assessments up to the date Ms Brittain ceased to be the liquidator of Abbey (30 August 2012); and
- (3) the transfer of documents to Mr French, as the new liquidator of Abbey, following Ms Brittain's removal as liquidator.

10 53. It will be a matter for Ms Brittain whether she sees fit to produce in advance of the hearing a witness statement covering these issues. It is not, I consider, something that the Tribunal may direct of a witness who attends by way of a summons. But it would be helpful.

15 54. Finally, in case there is any doubt as to the position, I record that Abbey's application was limited to obtaining a direction for the issue of a witness summons to Ms Brittain. There was no application for the production by her of any documents. My direction is therefore only in respect of a witness summons. There is no order for production of documents.

Determination

20 55. The application of Abbey for a witness summons to be issued to Ms Louise Brittain is allowed in principle, on the terms set out in this decision.

Directions

56. I shall separately issue directions consequent upon my decision.

Application for permission to appeal

25 57. Although Ms Brittain is not a party to this appeal, she was a party to the application made by Abbey. As such she has the usual right to apply for permission to appeal this decision, as set out in the following paragraph.

30 58. 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.

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**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 30 October 2014