

Neutral Citation Number: [2009] EWHC 2780 (Admin)

Case No: CO/12054/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2009

Before :

THE HONOURABLE MR JUSTICE SALES

Between :

**The Queen (on the application of the The Medical
Protection Society Limited)**

Claimant

- and -

**The Commissioners for Her Majesty's Revenue
and Customs**

Defendants

**Mr Andrew Hitchmough & Mr David Yates (instructed by Price Waterhouse Cooper Legal
LLP) for the Claimant**

Ms Nicola Shaw (instructed by HMRC Solicitors) for the Defendants

Hearing dates: 28/10/09

Mr Justice Sales:

1. This is an application for judicial review of a decision by the Defendants (whom, together with their predecessors, H.M. Commissioners for Customs & Excise, I will call “HMRC”) to require the Claimant, the Medical Protection Society Ltd (“MPS”), to account for value added tax (“VAT”) for the period of three years prior to 14 January 2008 under the so-called reverse charge provisions contained in s. 8 of the Value Added Tax Act 1994 (“VATA”) in respect of legal services provided in other jurisdictions and paid for by MPS (“the legal services”).
2. MPS maintains that it has the benefit of a specific ruling by HMRC contained in a letter from HMRC to MPS dated 3 March 1998 (“the ruling letter”) to the effect that reverse charge VAT was not payable by MPS in respect of the legal services; that that ruling in MPS’s favour was only withdrawn by a further letter from HMRC dated 14 January 2008; and that HMRC are not entitled to seek to recover such VAT for the period before the withdrawal of the ruling. HMRC accepts that the letter of 3 March 1998 contained a ruling in MPS’s favour on the point, but contend that they are not bound by that ruling because it was promulgated in circumstances where MPS had not provided full disclosure of material facts. Accordingly, they say that they are entitled to recover reverse charge VAT in relation to the legal services for the period of three years (i.e. up to the full extent of the limitation period in s. 77 of VATA). MPS responds that full and proper disclosure was given to HMRC in a letter dated 13 February 1998 written on its behalf by its accountants at the time, Robson Rhodes (“the disclosure letter”).
3. MPS also maintains an alternative case that HMRC are precluded from requiring it to pay reverse charge VAT in respect of the legal services because of what in argument was termed a “misdirection by omission” arising out of a site visit and review by one of HMRC’s officers (Mr Mumford) in 2001, during which he did not suggest that MPS’s failure to account for reverse charge VAT in respect of the legal services was incorrect.

The Legal Framework

4. Section 8 of VATA provides that where services are supplied to a person in the United Kingdom by a person in a relevant country other than the United Kingdom, no VAT is chargeable by the provider of the services but instead the recipient of the services is required to charge himself and account for VAT in respect of that supply of services to him. This means that HMRC collect VAT in respect of such services from the person who receives those services rather than from the person who provides the services (which would be the position if that person were in the United Kingdom). Before me this was referred to as the reverse charge arrangement.
5. MPS is a professional body which provides support to its members (principally doctors and dentists) who face legal, regulatory or disciplinary claims or proceedings in relation to their medical or dental practices. It is not an insurance company. The great majority of supplies of services by MPS are exempt supplies, falling within Group 9 of Schedule 9 to VATA (since the payments by its members are subscriptions to a professional body). That is significant, because it means that MPS has no scope to reclaim any VAT it has to pay in relation to services provided to it as input VAT in respect of its own supplies of services. That is why the decision of

HMRC to require it to account for VAT in respect of the legal services on a reverse charge basis has a substantial impact on MPS's financial position.

6. MPS's relationship with its members is governed by a constitution contained in its Memorandum and Articles of Association. The constitution provides that MPS has a discretion whether to grant indemnities to its members in respect of claims, costs, expenses and so on regarding claims and proceedings against them. At all material times the constitution provided that a member who has requested or is granted an indemnity should "comply absolutely with the directions of [MPS]", should "not (without the consent of [MPS]) take any steps in relation to" any relevant claim and should "(at [MPS's] request) co-operate fully with [MPS], its representatives and any appointed advisers in the handling of such claim ...".
7. HMRC has periodically issued guidance about the VAT treatment of legal and other expenses regarding claims against persons covered by insurance contracts in the form of VAT Notice 701/36. Although MPS does not provide insurance, it submits that the terms of this notice are relevant to interpreting the disclosure made in the disclosure letter. The version of Notice 701/36 in existence in February 1998 was the 1997 edition, which included the following:

"5.4 Treatment of claims expenses

It is important to ascertain which person has incurred the input tax relating to claims expenses. Legal services, repairs and replacement goods are normally supplies to the policyholder. Where an insurer pursues or defends a claim against a third party on behalf of the policyholder (subrogated claim), the supply of legal services is made to the policyholder. The insurer cannot treat VAT charged on these supplies as input tax.

Where an insurer obtains legal services in connection with, for example, policy drafting or interpretation, or in relation to a dispute with the policyholder, the supply is to the insurer and input tax is deductible subject to the insurer's partial exemption method. ..."

8. I should observe that I find this guidance somewhat obscure. Where an insurance company is subrogated to claims which the insured has, it becomes the owner of those claims and I would have thought that legal services which it requests and pays for in relation to exercising its subrogated rights are services provided to the insurance company for its own benefit, rather than services provided to the insured. Be that as it may, the basic thrust of the guidance in relation to legal expenses incurred to meet claims made against an insured is clear enough: they are regarded as legal services provided to the insured rather than to the insurer for the purposes of analysis of the VAT consequences.
9. Mr Hitchmough for MPS also drew my attention to the fact that policies of insurance usually contain a provision allowing for an insurer "to take over, in the name and on

behalf of the assured, the conduct and control of the defence of proceedings within the ambit of the policy brought against him. This power enables the insurers to settle the proceedings without consulting the assured ...” (see *Halsbury’s Laws*, vol. 25, Insurance, 4th ed., 2003 Re-issue, para. 675; and see also *MacGillivray on Insurance Law*, 11th ed., 2008, para. 28-038). He submitted that there was a close similarity between the ability of MPS to exercise control in relation to the defence of proceedings brought against its members and the position of an insurer under such a provision, which should have been appreciated by HMRC when they considered the disclosure letter and gave their ruling in favour of MPS in March 1998.

10. Where HMRC, in the exercise of their tax management powers, give a clear assurance as to the tax treatment of a transaction or series of transactions which is relied upon by a taxpayer, they may find themselves bound by that assurance even if it transpires that it is not strictly in accordance with the general law of taxation. This situation can arise both as a result of application of the general public law doctrine of legitimate expectations (see e.g. *R v Inland Revenue Commissioners, ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, in particular at 1569A-1570B per Bingham LJ) and as a result of application of HMRC’s own policy contained in Extra-Statutory Concession 3.5 (contained in Customs & Excise Notice 48). This provides:

“If a Customs and Excise officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing or, knowing the full facts, has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person’s attention.”

11. This policy was first stated in Parliament in 1978, and in consequence is sometimes referred to as the Sheldon statement after the minister who made the statement. HMRC give guidance in their internal manual regarding the operation of the policy in the Sheldon statement. They identify two types of misdirection to which the policy might be relevant: a positive misdirection and a “misdirection by omission”. MPS seek to rely upon the guidance on “misdirection by omission” in support of its alternative case in relation to the visit by Mr Mumford in 2001. The guidance includes the following statements:

“Misdirection by omission is the term used to cover circumstances where the Department has effectively misled a trader by failing to take action, or to give clear guidance on a matter where it could reasonably be expected we would take appropriate action. Misdirection by omission is a rarity. All claims must be considered but it can be difficult to establish, particularly many years after the event.

As a simple example, misdirection by omission would be accepted where an officer tells a trader that he thinks a supply is zero-rated but that he will check and confirm. He fails to do so and the trader starts or continues to zero-rate a standard-rated supply. Even in such relatively straightforward cases

there is often no hard evidence to back up the trader's contentions. Cases often have to be decided on the balance of probabilities.

Claims of misdirection by omission are often made following an assurance visit when it is claimed that the previous visiting officer, or a succession of officers, have failed to draw attention to an error in the trader's systems. In considering such cases there are several principles which should be borne in mind:

the registered person is responsible for the accuracy of their tax declarations and this responsibility cannot be transferred to the visiting officer;

a poor control/assurance visit does not on its own imply misdirection;

a failure to notice an error does not on its own imply misdirection;

if the trader was not misled by the officer, there is no misdirection; and

traders cannot reasonably assume they are accounting for tax correctly if an officer fails to find any errors on a visit.

Allegations made about previous visiting officers can be very subjective and misdirection by omission difficult to bottom. There can be no hard and fast rules laid down – each case must be judged on its own merits. All the “evidence” which will support or disprove the trader's claim to misdirection needs to be obtained and given due weight. Such evidence may include visit reports, copy letters, officer's notebooks and comments from the officers concerned as well as the often undocumented recollections of the trader.

If there is no evidence to support the fact that the disputed area was even examined or discussed, then it is likely the trader will not have a case and remission on misdirection grounds under the class concession should be refused.

The mere fact that an officer, or a succession of officers, failed to uncover an error, or that areas of the business expected to be covered were not covered, is not enough to bring the circumstances of the case within the terms of the class concession [i.e. the Sheldon statement]. However, it is the starting point for further investigations to begin. Under no circumstances should remission of tax be authorised under the terms of the class concession solely as a result of an inadequate assurance visit.

When considering remission of tax under the misdirection class concession, it should be remembered that remission can only be granted if the trader has, or will, suffer detriment if the arrears of tax are assessed and the business damaged financially. The fact that traders have had money in their possession to which they have no entitlement does not mean they would not suffer detriment. Detriment may be suffered if the trader has to find a sum of money for which no funding provision has been made. As a result of misdirection, the trader has been denied the opportunity to budget for the tax over a longer period, either by adjusting charges or level of service and so would suffer detriment if an assessment was enforced. Detriment may not be accepted if tax not charged can now be charged to and paid by customers. The raising of supplementary invoices for VAT may, however, cause detriment to the trader's reputation or credibility with customers as well as company finances."

12. As the Sheldon statement makes clear, the extra-statutory concession only applies where a clear and unequivocal ruling has been given by an HMRC officer who has "the full facts before him". The doctrine of legitimate expectation is limited in the same way. As Bingham LJ emphasised in *ex p. MFK Underwriting Agents Ltd* at 1569D-E:

"If it is to be successfully said that as a result of [an approach to the revenue] the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled ... First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given."

13. The parties were agreed that there is no difference regarding the requirement that the taxpayer should have given full details about the transaction in respect of which it sought HMRC's ruling as stated by Bingham LJ as a condition for operation of the doctrine of legitimate expectation and as set out in the Sheldon statement. The principal issue in this case is whether the disclosure letter gave sufficient details of the transactions whereby MPS paid for the legal services, such that HMRC are now to be bound by their ruling in the ruling letter that MPS did not have to account for VAT on a reverse charge basis in respect of such services (until HMRC changed that ruling by their letter of 14 January 2008).

The Facts

14. In the 1990s, MPS found itself using the services of foreign lawyers for two distinct purposes. First, it sought corporate advice from foreign lawyers (and occasionally accountants) related to the formation and operation of MPS support schemes in other countries; secondly, it paid foreign lawyers and other consultants established outside the United Kingdom for the legal services in relation to defending civil claims and regulatory and disciplinary proceedings against its members.
15. Originally, MPS did not account for VAT on a reverse charge basis either in respect of the corporate advice or in respect of the legal services. But it came to recognise that in relation to the corporate advice (which it clearly obtained for its own direct benefit) this was in error, and that it was under a liability to account for reverse charge VAT in respect of that advice. Accordingly, on 13 February 1998 the disclosure letter was written to draw the attention of HMRC to that error and to correct it.
16. At the same time, MPS sought HMRC's confirmation that no reverse charge VAT was payable in relation to the legal services. Under the heading "Members' Advice", the disclosure letter set out the following:

“Whilst writing, the Society seeks confirmation of its view that payments made by the Society to legal advisers and other consultants established outside the UK engaged to represent members in negligence actions, at disciplinary proceedings and to assist with complaints procedures and criminal matters arising from professional practice, etc do not fall within the scope of the reverse charge mechanism for the following reasons:

Though the Society pays the lawyers' fees, it is the member who directly benefits from the legal advice funded by the Society – the member being the person whose professional reputation and livelihood is at stake;

Under the terms of membership, the Society is not obliged to indemnify the member, but is obliged to consider whether to do so. If the discretion is exercised to indemnify the member, the position of the member becomes very like that of an insured party under a contract of insurance;

In the first instance, generally it is the member who contacts local lawyers approved by the Society to act in the territory, after having satisfied the Society, or its local representative, that he is a fully paid up member;

In many countries in which the Society is represented, members have a choice of legal firms approved by the Society which may be consulted. While it is only in exceptional cases that a member may consult a firm not approved by the Society, principally this is because the Society prefers that cases be

handled by medico-legal specialists, so that members receive the best available advice;

The Society considers that it is financially prudent (particularly as it is a mutual body reliant on its accumulated reserves to defend members' interests and to provide representation) that lawyers consulted by a member should not be permitted to act on the instructions of a member until the Society, or its representative has reviewed the case. For the same reason, in return for the Society's support members are generally asked to sign a letter of undertaking not to take any steps in a matter without the written consent of the Society, or of its lawyers;

Once the Society has authorised the legal adviser to act, we consider that in substance the relationship between the member and the adviser becomes one of client/adviser, with the lawyer owing a duty of care to the member and the Society. The legal adviser is under a continuing obligation to keep the Society informed of developments in the matter, this being essential to protect the financial interests of all members;

Should a matter proceed to Court or a Tribunal hearing, the Notice of Appearance will be entered in the name of the member, not the Society;

The Society views payments made to legal advisers as made under its "contract of indemnity" with members, not payment for supplies made to it. In substance, it is acting as an insurer (though as mentioned previously it is not technically an insurer), and in line with the arrangements applying to insurance companies, legal services relating to claims are to be treated as supplied to the insured person i.e. the member."

17. In relation to the VAT treatment regarding the legal services, the disclosure letter was plainly seeking a considered ruling from HMRC and purported to set out the full factual basis on which that ruling was to be given.
18. It is common ground that a clear ruling was given by HMRC in the ruling letter of 3 March 1998, which included the following:

"Further to your letter of 13 February, and our subsequent telephone conversation of the 27 February, I write to confirm the issues raised. ...

Members Advice

Under the VAT Act 1994 chapter 23, section 24 “input tax” is defined in respect of a taxable person as:-

VAT on the supply to him of any goods or services;

VAT on the acquisition by him from another member State of any goods; and the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him;

In order for an input tax claim to be valid, the claim must be made by the person to whom the supply was made. This is a fundamental principle and overrides the question of who may have paid for the supply in question or who may have possession of the relevant invoice or other evidence.

I can therefore confirm that the society is not the beneficiary of the supplies received from the society’s legal advisers, it is the members of the society themselves, thus the society should not be accounting for these supplies under the reverse charge.”

19. The primary issue between the parties is whether the details given in the disclosure letter were sufficiently full and accurate as to satisfy the disclosure requirement set out in the Sheldon statement and in *ex p. MFK Underwriting Agents Ltd.*
20. It is clear from the ruling letter that a conversation had taken place on 27 February 1998 between the relevant HMRC officer and a representative of Robson Rhodes for MPS. Mr Hitchmough sought to suggest that I should infer that, if (contrary to his submissions) I found that there was any want of full disclosure in the disclosure letter, any necessary additional information must have been provided in that conversation. I cannot accept that submission. There is no evidence about what was said in that conversation. It could have related to the corporate advice issue rather than the legal services issue. There is no indication that any additional information about the legal services, going beyond what was said in the disclosure letter, was provided in that conversation.
21. In light of the ruling letter, so far as concerned the legal services, MPS continued as it had done previously, and did not account for VAT on a reverse charge basis in respect of them.
22. On 22 March 2001 Mr Mumford for HMRC conducted his site visit and inspection of MPS’s books. His notes of that visit record that he examined all reverse charges in detail as part of his routine examination of VAT records. This referred to the reverse charge VAT which MPS had accounted for in relation to corporate advice, not to MPS’s treatment of legal services (in relation to which, in line with the ruling in the ruling letter, it did not account for any reverse charge VAT). Mr Mumford’s notes record that there was no reason to doubt that the reverse charges were being treated correctly, but it is clear in context that this referred to his checks of the reverse

charges in respect of corporate advice. His evidence was that he did not discuss with MPS the tax treatment of the legal services, and his notes support that evidence. I find that there was no reason for him to revisit, and he did not revisit, the topic of the ruling in respect of the legal services which was contained in the ruling letter.

23. On the occasion of another site visit by another HMRC officer in about early 2007, and in subsequent correspondence, the question of the proper VAT treatment in relation to the legal services was re-opened and re-examined by HMRC. Further information was sought and provided. In particular, MPS provided its manual for legal advisers acting in relation to civil claims against its members, entitled “Guidelines to MPS Legal Panel for claims work”, which MPS had produced in 2006 (“the Guidelines”).
24. Although the Guidelines were only produced in 2006, it is common ground that they stated MPS’s philosophy and practice of handling civil claims against its members at all material times, from sending of the disclosure letter onwards. Also, the Guidelines only deal with the handling of civil claims (and, according to MPS, only about 20% of the legal services deal with such claims), whereas the services MPS provides to assist its members to defend themselves from complaints and charges against them (including regulatory, disciplinary and criminal charges etc) cover a much wider area of work. However, again, it was common ground that the ruling in the ruling letter could only be treated as binding upon HMRC if full and proper disclosure of the facts regarding MPS’s handling of civil claims had been provided by MPS in the disclosure letter. Therefore, the main issue which I have to decide is whether the disclosure letter revealed a full factual picture which corresponds with that set out in the Guidelines.
25. The material parts of the Guidelines are as follows:

“A. Claims Management Principles

Our philosophy towards panel

We seek to build effective working relationships with our panel firms based on trust and dialogue. By directing our cases to a select panel with which we work regularly we aim to deliver better legal services to our members, and to achieve more effective and efficient management of both claims and non-claims matters.

These guidelines are intended to prevent misunderstanding by setting out clearly what we expect from our panel firms. Whilst they may appear prescriptive, some prescription is needed to ensure consistency and enable MPS to manage effectively the significant volume of claims with which it has to deal.

We encourage our file handlers to be proactive in managing claims. Panel should therefore expect discussion, challenge and, at times, disagreement. This is intended to be a constructive process, based on mutual respect, resulting in delivery of an excellent claims handling service to our members.

Our claims handling philosophy

We aim to provide an expert, supportive and efficient claims handling service to members who are faced with claims. We want to identify the issues early, respond to them, and move matters to appropriate resolution, be that settlement or successful repudiation. Where there is a good defence to a claim, we should try to effect settlement on fair terms as early as possible. This approach not only reduces the personal impact on members against whom claims are made, by taking an ethical, fair and straightforward approach to claims handling we will also reduce the financial and reputational impact of claims on the MPS membership in general.

To ensure that we remain in a position to keep our promises to members, it is critical that we assess the potential impact of claims and potential claims early, keep that assessment up to date and manage claims proactively and in a cost-effective manner. Hence the emphasis in these guidelines on strategic case management and on reserving. We are looking for an analytical, energetic, issue focussed approach to claims resolution. No firm on our panel should treat claims handling as a process only, or act merely as a 'post box'.

Research suggests that clinical negligence claims are often the result of poor communication between clinician and patient. In managing claims we have a bias towards good communication with claimants and their representatives. It is no triumph to win at trial a case which could have been disposed of long before, at lower cost and lower impact on the member, had we only explained earlier to a claimant the flaws in their case, or ensured they fully understood our defence. In communicating with claimants who have suffered injury and loss, regardless of its cause, we should be prepared to acknowledge what they have gone through and respect their perspective. We should always be prepared to give a reasoned response to claims. Where appropriate and helpful, we encourage members to offer apologies.

Good communication with members is critical too. We aim to keep members informed and engaged throughout the claims handling process.

Where discussion or negotiation does not resolve a claim, we are favourably disposed to alternative methods of dispute resolution, such as mediation or arbitration. These can have significant advantages over allowing litigation to run its course, including confidentiality, speed, the ability to air and resolve

emotional issues, reduced overall cost and higher member satisfaction.

Whilst recognising that different jurisdictions have different approaches, we prefer to avoid offering 'door of the court' settlements, because of the high legal costs generally involved. We aim to assess and test the merits of our case and the strength of our evidence well before trial, so as to reduce the scope for last minute weakness.

B. The Medical Protection Society

Medical Protection and Dental Protection

MPS is a not-for-profit mutual organisation offering a wide range of benefits on a discretionary basis, including indemnity to members in respect of negligence claims. MPS is not an insurer and must not be referred to as an insurer.

MPS has some 225,000 medical and dental members worldwide in over 40 countries. As such, it is the largest mutual medical protection organisation in the world. ...

Most members are individual medical and dental practitioners, but MPS also has some corporate members, which include hospitals, health departments, laboratories and clinics.

MPS is governed by a Council, a majority of whose members are medical and dental practitioners. Council delegates executive tasks, including claims management, to the staff of MPS. Staff managing claims operate under individual authority levels and therefore, depending on the value of the claim, or the issues involved in a non-claims matter, may need to report upwards before providing panel with instructions on key issues.

On lower value cases, claims will be managed by medico-legal or dento-legal advisers, who have clinical backgrounds but have trained in medico-legal issues. They also manage all non-claims matters. High value claims are managed by high claims managers, who are either solicitors or insurance professionals with extensive experience of clinical negligence claims.

Committees assist the claims management process. The Claims Audit Group is composed of medical and legal staff, the Dental Claims Audit Group of dental and legal staff. They consider liability and apportionment of issues on lower value cases. Claims Advisory Committees, for medical and dental claims respectively, are composed of expert external clinicians, and consider higher value cases.

Appendix 1 contains a flow chart setting out the claims handling process at MPS. [Appendix 1 showed that all new claims would go first for assessment by MPS representatives and only then would an “internal/external lawyer” be instructed to advise and expert clinical opinions be sought] ...

C. Specific Claims Handling Issues

...

Acknowledgment of instructions

Please acknowledge new instructions within 2 working days of receipt, by reply to the instructing handler. ...

Unless otherwise instructed, please also contact the member promptly:

introducing the person with conduct of the matter and (where applicable) any other people who will be working on it

providing your reference and contact details

if outside the U.K. and Republic of Ireland, and unless otherwise instructed, informing them that your assistance is provided subject to confirmation of membership and instructions from MPS to continue to assist (this is to deal with what may be a timelag between the request for assistance and confirmation of entitlement).

Reporting requirements: general

All reports should be sent direct to MPS and only to MPS, unless you have our written agreement to send the report through, or provide a copy to, someone else.

Reports should be in the format, and provide the information, set out in Section D.

Unless we instruct you otherwise, your first report should be sent to us as soon as possible and no later than 30 working days after initial instruction. That should be a substantive report under all headings unless your instructions say otherwise. If there is any reason why you are unable to report substantively within that timescale, or why it would be more cost effective to delay slightly, you should discuss this with the MPS file handler.

Copies of pleadings, proofs of evidence and witness statements, significant court orders, expert reports, opinions of counsel and medical records pertinent to issues in the case should be provided to MPS as and when available.

You are asked to follow the same standard format in subsequent reports. This makes it much easier for us to see how cases are progressing and ensure that all aspects are being covered, in particular case estimates. Unless we request otherwise, subsequent reports should update/amend previous reports and do not need to repeat unchanged information previously provided. Refer back to the previous report as necessary and comment only on any changes.

By way of guidance, MPS will, unless otherwise agreed, require a further report:

if due to changed circumstances or additional information the case estimate is no longer appropriate

if due to changed circumstances or additional information the case strategy is no longer appropriate

after receipt of expert evidence and/or any meeting of experts

immediately upon any offer to settle made by the claimant, unless this is in the course of negotiations covered by existing instructions

sufficiently in advance of mediation or trial to enable MPS to give final instructions on both liability and quantum issues, and (where available) obtain costs protection against trial costs in cases which MPS is willing to settle on terms (the timing of this will vary from jurisdiction to jurisdiction)

when settlement has been agreed or immediately after final judgment.

It is acceptable to send updates by letter or e-mail without using the report format, provided the update is brief, and no amendment to estimates or strategy is required. Our file reference number and the name of our member should however be provided on all written communications with us, even brief e-mails, so that they can easily be logged to the correct file.

If a file becomes inactive in the sense that there is no indication from the claimant that the claim is being pursued, this should be drawn to the attention of the MPS file handler for instructions. In some cases further investigation and a report may nevertheless be required, in others it may be agreed that the panel firm will simply confirm at agreed intervals that there have been no further developments.

If you are in any doubt as to whether a report is necessary, please feel free to contact the instructing handler to discuss this.

We also encourage you to call the instructing handler if you need to discuss developing or complex issues.

Proofing and liaison with the member

Members must be kept informed of the progress of the claim. See above under 'acknowledgement of instructions' for initial contact with members. It is important to maintain contact throughout, even if this is only to inform the member that the case is inactive.

It is important that the member is taken through the allegations made and asked to give a detailed account of events and a response at an early stage, as soon as sufficient information is available. This is best done face to face, but a telephone conference may be acceptable, depending on the size and complexity of the claim, and how far the member has to travel. A member must however be seen in person before a decision to proceed to trial is made, so that their likely performance as a witness can be assessed. In England and Wales, meetings will normally take place at your offices. You should liaise with the instructing handler as to their own attendance and/or attendance by an MLA or DLA.

The purpose of the meeting is to discuss the case in detail and "test" the member on relevant issues. It is important that both you and the member have the opportunity to consider relevant records and documents before the meeting. Where appropriate please also use the opportunity to explain the claims process to the member in some detail and to encourage the member to raise questions regarding the case or the process. If the member is facing related non-claims procedures, the interaction with the claim should be discussed (for example the timing of claims resolution, and whether or not formal admissions will be made on the claim).

The member should also be asked about any preferences in the choice of experts, although the final choice will be between the file handler and the panel solicitor.

After the meeting, the member should be provided with a draft statement for review and asked to comment. You should aim to ensure that you have a signed proof of evidence on file as soon as possible.

As the case progresses, members should be provided with copies of expert reports that are to be relied upon and asked for comments, and should be invited to conferences on liability, being provided with up-to-date documentation beforehand. The agreement of the member should be obtained to the settlement or defence of a claim, once instructions have been

given by MPS. (To avoid embarrassment panel are asked not to disclose to the member their recommendations to MPS until MPS has given instructions).

It is essential that members are informed of hearing dates as soon as they are known, and are told if a case which had been closed, or appeared to be inactive, revives. Members must of course also be informed of the outcome of cases.

Any concerns expressed by a member should be promptly reported to a file handler. Equally the file handler should be made aware of any failure to cooperate on the part of the member, or if a member requests service beyond the scope of your instructions from MPS.

In some cases the file handler will have a strong relationship with the member and may take on some of the responsibility for updating the member on claim progress. Panel and the file handler should establish from the outset who is to do that and then liaise to ensure that communication is clear and takes place as required, but that duplication is avoided.

Conflicts of interest

Panel should advise the file handler immediately if conflict prevents them accepting instructions or continuing to act.

Conflict, or potential conflict, between the interests of members should be discussed with the file handler at the earliest opportunity.

Instruction of experts

The requirement for and choice of expert witnesses, both as to speciality and specialist, and the clinical issues to be addressed, should be discussed with the file handler in advance. The same applies to any requirement for further reports. Panel should consider how much light will be thrown on the issues by further reports, and the relationship between the cost of obtaining them and the potential impact on the outcome of the case. The member should also be asked to comment on choice of expert.

...

Experts should be very carefully briefed. ... At the time of sending instructions, please provide the MPS file handler with a copy of the letter of instruction sent. Please note that for high value claims in England and Wales, and in some other jurisdictions by arrangement, the file handler may obtain expert reports and provide copy instructions and reports to the external lawyers. ...

Instruction of Counsel

Counsel should be briefed in appropriate matters, but the requirement for and choice of counsel should be discussed in advance with the file handler. We do, however, expect that our own panel, as clinical negligence specialists, will be able to advise on routine matters of liability, quantum and civil procedure. Where counsel is asked to advise (as opposed to, say, settle pleadings) MPS should be provided with a copy of the instructions to Counsel. ...

Generally speaking, experienced junior counsel who enjoy the confidence and respect of MPS are to be preferred to senior counsel for most cases.

Senior counsel should not be briefed without the prior agreement of the MPS file handler. They should only be briefed in complex matters...

Attendance at conferences and mediations

Where it is necessary for you to meet with counsel or other parties to discuss liability, quantum or settlement, please provide the file handler with the opportunity to participate in such meetings. In some jurisdictions opportunity for participation will be very limited, but consideration should be given to telephone or video conferencing.

Trial dates

Trial dates must be notified to the file handler immediately they are known, similarly any alterations in those dates.

Reviews, audit, feedback

MPS will hold periodic review meetings with individual panel firms to discuss performance issues and opportunities for improvement of the arrangements between MPS and panel. You should not hesitate to raise, either at such meetings or in the meantime, any problems you are experiencing in the timing or clarity of information or instruction received from MPS, in the operation of these guidelines or otherwise.”

26. After reviewing the Guidelines, HMRC objected that the disclosure letter had not presented the full factual picture, and withdrew the ruling in the ruling letter with retrospective effect. Their final decision to that effect was set out in a letter dated 24 September 2008, which identified the following facts as relevant facts not clearly or adequately identified in the disclosure letter:

“MPS can veto expert witnesses and can appoint different ones if they choose;

MPS decide whether to settle and how to settle;

MPS approve the way the case is progressed;

The lawyer has to agree its recommendations with MPS before informing the member;

MPS monitor the lawyer’s performance and can dismiss them;

MPS can override the lawyer;

The lawyer reports confidentially and direct to MPS on all aspects of the case;

MPS conduct post case audits on all aspects of the lawyer’s performance and how they conducted the case;

Lawyers have to contact MPS if a member requests services beyond the scope of their instructions from MPS.

The ruling our policy section arrived at is that the supply is by MPS to the member and that the services of the lawyers are made to MPS to facilitate the more comprehensive overall supply that MPS are making to the member. Our policy section felt that an important feature in arriving at this decision was the control that MPS exercise over the whole process and the facts I have listed above were a relevant and important part of how they arrived at that decision.”

27. This summary was set out after a further meeting between officers of HMRC and MPS at which the factual position was discussed. The letter invited MPS to indicate if it disagreed with the summary of the factual position set out in the letter. MPS has not sought to do so.
28. According to HMRC, on the footing that they were entitled to withdraw their earlier ruling because of insufficient disclosure in the disclosure letter, MPS is now obliged to account on a reverse charge basis for VAT in respect of the legal services for a period going back three years before the withdrawal of the ruling on 14 January 2008. The amount of VAT which HMRC claims is due in relation to that period is £5,821,817.13.

Analysis

29. Mr Hitchmough submitted that the disclosure letter set before HMRC, fairly and squarely, all the material facts which indicated the high level of control which MPS has in relation to dealing with claims against its members. He referred to the whole terms of the disclosure given in the letter, and particularly emphasised:

- i) the analogy explicitly drawn with the position of an insurer under a contract of insurance (paragraphs 2 and 8 of the disclosure letter), which he said indicated a level of control for MPS equivalent to that which insurers may have over claims under the terms usually included in insurance policies (see para. [9] above);
 - ii) the statements in paragraph 5 of the disclosure letter, indicating that a lawyer would not be permitted to act on the instructions of a member until MPS had reviewed the case (and, implicitly, had approved the instruction of the lawyer, as was also indicated by the opening words of paragraph 6) and that members had to undertake not to take any steps in relation to the claim without the consent of MPS (it seems this obligation was also imposed on members under the contract with them contained in MPS's constitution). These features indicated to HMRC, so Mr Hitchmough submitted, that MPS had full powers of control over claims where its members sought its assistance;
 - iii) the indication in paragraph 6 of the disclosure letter that it was for MPS to authorise a legal adviser to act for a member, and the express references to the duty of care owed by the lawyer to MPS as well as the member and to the legal adviser's continuing obligation to keep MPS informed of developments (so enabling MPS in practice to exercise its power of control).
30. Mr Hitchmough submitted that the information in the Guidelines merely provided evidence illustrating the full degree of control which MPS enjoyed in relation to the handling of claims against its members which had already been explained in the disclosure letter.
31. Against this, Miss Shaw, for HMRC, submitted that the whole tenor of the Guidelines, and the degree of practical control which they showed MPS enjoys and exercises in relation to the handling of claims (as further summarised, without objection by MPS, in HMRC's letter of 24 September 2008), went well beyond the picture presented in the disclosure letter and showed that there was a level of practical control by MPS well beyond that set out in the disclosure letter.
32. I have reached the conclusion, having compared the disclosure letter, the Guidelines and the factual summary in HMRC's letter of 24 September 2008, that Miss Shaw's submission is correct. In my view, the basic picture presented in the disclosure letter was one in which MPS's members appeared to be in the driving seat so far as concerned instructing lawyers to deal with claims against them and the handling of any proceedings, with an additional obligation upon them (and their lawyers) to report to MPS and keep it informed and to allow MPS to review and (if it so chose) control steps which might be taken by them. By contrast, the picture which emerges from the Guidelines is one in which it is MPS which is firmly in the driving seat so far as instructing lawyers and the handling of proceedings is concerned, with a limited obligation upon it and the lawyers to keep the affected member informed about what is going on and giving him very limited power to control what happens (his consent is required to settle a claim, but for little else). In the light of this contrast, I do not think that the disclosure letter presented the full relevant facts to HMRC.
33. In particular, I was struck by the following matters:

- i) In the disclosure letter, MPS sought to emphasise that the legal services were, as a matter of substance, for the benefit of the member (see e.g. paragraph 1). But in the Guidelines, MPS presents itself as providing a claims handling service to its members, of which the provision of the legal services is a part. MPS is, of course, paid for that service by the subscriptions which its members pay to it. Viewed in this way, there is at least an arguable case for saying that the overall substance and effect of the arrangements is that MPS is a direct and prime beneficiary of the provision of the legal services. That is, in my view, a matter which ought fairly to have been put before HMRC before inviting its ruling in 1998;
- ii) In paragraphs 3 and 4 of the disclosure letter the impression is given that it is the member who contacts local lawyers to act in relation to a matter; but in the Guidelines (and, in particular, in the description of the claims handling process in Appendix 1), the instruction of lawyers is shown as a stage reached after investigation and review of the claim by MPS representatives, and the whole tenor of the Guidelines is that it is MPS which instructs the lawyers after its member approaches it. I do not think that paragraph 5 of the disclosure letter clarified the position in this regard; indeed, it tends to strengthen the misleading impression given by paragraphs 3 and 4, because it appears to suggest that lawyers are first “consulted” by the member, and then there is a stage at which MPS decides whether to allow them to act (whereas, reading the Guidelines, the order of events appears to be different, in that a member approaches MPS and then it decides to instruct lawyers);
- iii) To my mind, the second sentence of paragraph 5 of the disclosure letter gives the impression that it is the member who is responsible for taking relevant decisions and steps in the handling of a claim, with an obligation to seek the consent of MPS for those decisions and steps. But the impression given by the Guidelines is that it is MPS which takes all relevant decisions and steps in the handling of a claim as part of its pro-active claims handling philosophy, with a (somewhat limited) obligation to keep the member informed about those decisions and steps and a (limited) obligation to seek the member’s consent (e.g. if the claim is to be settled or, presumably, if some step is required which in practice requires the member’s active participation, such as the filing of a witness statement signed by the member). In my view, although (as emphasised by Mr Hitchmough) paragraph 5 of the disclosure letter makes it clear that MPS has a formal right of control in relation to the handling of claims (in that it could refuse to give its consent for the taking of any step in the handling of the claim), it does not convey the true practical substance and effect of the arrangements according to the Guidelines, which go well beyond setting out a simple formal power of veto for MPS and emphasise instead the pro-active handling of claims by MPS itself which is to occur (as indicated, for example, by MPS’s power to decide which expert witness to instruct, even if the member does not agree);
- iv) In my view, paragraph 6 of the disclosure letter also adds to the misleading impression that, in practice, it is the member who gives instructions to the lawyer and has primary responsibility for taking decisions in relation to the handling of a claim against him. It refers to the substance of the relationship

between the member and the legal adviser being one of “client/adviser”, with an additional duty of care owed by the lawyer to the member and MPS. This suggests that the lawyer advises the member, who then takes relevant decisions (as a client ordinarily would) about how to proceed in the light of that advice. The second sentence of paragraph 6 reinforces that impression, since it indicates that the legal adviser’s obligation is simply to keep MPS informed of developments (rather than treat it as his client and as the primary decision-maker). By contrast, the Guidelines indicate that the practical reality is that the lawyer advises MPS as his primary client (indeed, the lawyer’s recommendation – i.e. advice – about how a claim should be handled may not even be shared with the member, if MPS decides it should not be), and is required to be guided by MPS rather than the member in all practical decision-making in relation to the handling of the claim;

- v) The analogy with a contract of insurance put forward in the disclosure letter (in particular, in paragraphs 2 and 8) does not correct the impression given by the other paragraphs. I do not think that, as a matter of full disclosure in this context, it is sufficient to leave HMRC officers to draw inferences as to how an arrangement operates in practice which are not made clear and obvious on the face of the information provided by the taxpayer. In any event, in the circumstances here, I do not think that reference to materials about what happens in an insurance context takes MPS any further than what was said in express terms in the second sentence of paragraph 5 of the disclosure letter. Even if (which I do not accept) I am to assume an officer of HMRC who is particularly well-informed about the workings of the insurance industry, so that he is aware of the usual policy term giving an insurer a right of control over claims against his insured (see para. [9] above), it does not follow that he would be on notice that such a formal right of control (equivalent to the formal right of control for MPS explained in paragraph 5) would be used as a matter of practical substance to promote the sort of pro-active claims handling service which is set out in the Guidelines. I do not know whether insurers invariably exercise their rights in that way in practice or not, and I do not think an officer of HMRC would know that, or should be taken to know that, either;
- vi) I think the second sentence of paragraph 8 of the disclosure letter does refer sufficiently clearly to the extant guidance about treatment of insurance companies (para. [7] above), but it does so in the context of a plea to HMRC to regard MPS’s arrangements as being equivalent to those set out in the insurance guidance. Particularly in the context of a letter in which it was made clear that MPS was not in fact in an insurance relationship with its members (paragraph 2, and note the use of inverted commas in the first sentence of paragraph 8), it was not equivalent to a statement of fact that the arrangements were the same. Moreover, the same point as in (v) above applies here;
- vii) In my view, the points listed in HMRC’s letter of 24 September 2008 (para. [26] above) correctly identify matters which were material facts and which were not fairly and fully presented to HMRC in the disclosure letter.

34. For these reasons, I dismiss MPS’s primary claim.

MPS's alternative case: misdirection by omission

35. In my judgment, there are two reasons why MPS's alternative case also falls to be dismissed.
36. First, a misdirection by omission may occur where there is some clear, reasonable expectation that an HMRC officer would take action (or, what amounts to the same thing, there is a public law duty upon him to act), and by not taking action when it would be expected that acting properly he should have done he has conveyed the false impression to the taxpayer that approval has in fact been given for the particular tax treatment of a specific transaction (whatever the true tax position according to the general law), and the taxpayer has relied upon that impression to his detriment. In my view, there is an appropriate legal analogy for analysing such cases (which again brings the approach under the Sheldon statement into line with that in *ex p. MFK Underwriting Agencies Ltd*), which consists in the category of case where a representation is treated as having been made to the effect that a particular state of affairs exists where a person has a duty to speak to explain if that state of affairs does not exist, and remains silent: cf Spencer Bower and Turner, *Estoppel by Representation*, 3rd ed., pp. 48-50. As is correctly made clear in the HMRC manual (para. [11] above), a misdirection by omission will occur only in exceptional circumstances. It is relevant that VAT is a tax based upon self-assessment by the taxpayer; usually, a simple omission by an officer to spot an error by the taxpayer will not qualify as amounting to an implicit misdirection by the officer. Moreover, since a misdirection by omission is relied upon as a sub-set of the cases covered by the Sheldon statement, in circumstances where there is no positive misdirection, it would be necessary to establish that the omission to act involved an implicit ruling by misdirection of the same clarity as is required where a positive statement is made. Again, it will only be in an exceptional case that such a clear ruling can be spelled out by implication from an omission to act or speak.
37. Turning from these principles to the facts of the case, the circumstances surrounding Mr Mumford's site visit in 2001 are very far indeed from supporting a case based on misdirection by omission. Mr Mumford did not say anything to lead MPS to suppose that he was re-checking the ruling in the ruling letter, nor that he was re-affirming that ruling on his own authority. He simply checked that MPS were applying the reverse charge properly in relation to corporate advice, and found that they were. Mr Mumford was not under any duty to check the tax position in relation to the legal services, and MPS had no reasonable expectation that he would do so. There is no basis in any of this for spelling out a case of misdirection by omission in relation to the tax treatment regarding the legal services.
38. Secondly, and in any event, since misdirection by omission is a sub-set of the cases covered by the Sheldon statement (and by the doctrine of legitimate expectation as set out in *ex p. MFK Underwriting Agents Ltd*), the same requirements in terms of full disclosure of relevant facts by the taxpayer apply as in relation to a case of positive misdirection. In this case, the only disclosure in relation to the legal services was that given in the disclosure letter, which I have found to have been insufficient. There is no evidence that Mr Mumford was told anything at all about the legal services, let alone that he was given notice of all those facts and matters referred to above which were not set out in the disclosure letter. Therefore, the site visit in 2001 cannot

improve MPS's submission that HMRC should be treated as precluded from requiring it now to account properly for VAT in respect of the legal services.

Conclusion

39. MPS's claim for judicial review of the decision in HMRC's letter of 24 September 2008 is dismissed.