



Taxing Matters

Navigating the complexities of the tax world

RPC

Season 4

Episode 2 – Top tips for tax litigation Jonathan Davey KC, Wilberforce Chambers

Alexis: Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alexis Armitage and I'm a Senior Associate in RPC's Tax Disputes team. I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some extra bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpclegal.com/taxingmatters.

I am delighted to be joined today by Jonathan Davey KC of Wilberforce Chambers. Jonathan is an experienced and sought after KC, having taken silk in 2016 at just 13 years' call. Jonathan's practice encompasses the full spectrum of commercial chancery work with a particular focus on tax, trusts and property. Today, Jonathan is going to share with us his top tips for tax litigation. Welcome, Jonathan, and thank you so much for joining me today.

Jonathan: Good afternoon, Alexis. It's lovely to be on the podcast. I'm a listener to the podcast. I enjoy it and it's nice to be here today.

Alexis: Brilliant, that's nice to hear, thank you. So, without further ado then, what is your first top tip, Jonathan?

Jonathan: My first top tip is keep your case simple. What I mean by that is this. Tax litigation, perhaps more than most forms of litigation, has the potential to generate numerous points. The legislation in question is often complex. The concepts are often undefined or disputed. There may be more than one particular tax in point. There may be more than one statutory regime, which potentially maps on to the situation. And that's, of course, before one gets to the facts, which are themselves often complex, whether it's involving unpacking and analysing a multi-element financial transaction or otherwise. So, against that backdrop, and despite that backdrop, I say resist the temptation to take every single possible point because it's a rare case in my experience where the winning submission begins, my Lord or my Lady, I'm now going to turn to my 17th point. And yet it never fails to surprise me just how often the party's approach to a piece of tax litigation has that feel.

There's usually, I would suggest, a key point or a small number of points, perhaps a big picture point, on which a case will often turn. And if one wants to put one's client in the best position to be successful, then it's crucial to take a clear view on what that point is and then focus on it and put your energies into getting the judge to do the same. Alexis, I was making some notes ahead of talking to you today, and I was reminded of the famous fictional or perhaps semi-fictional case of Jarndyce and Jarndyce referred to in Dickens' wonderful novel Bleak House. Jarndyce and Jarndyce, listeners may recall, is a long-running case about a contested will and if you think listeners could bear it, Alexis, I was going to read a very short passage from Bleak House.

Alexis: Please do.

Jonathan: "Jarndyce and Jarndyce drones on. This scarecrow of a suit has in the course of time become so complicated that no man alive knows what it means. Innumerable children have been born into the cause. Innumerable young people have been married into it. Innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why." So classic Dickens and in short, I say avoid inadvertently building the tax litigation equivalent of Jarndyce and Jarndyce. Keep your case simple. That's my first top tip.

Alexis: Brilliant. I really like that. Keep your case simple. And actually, you're absolutely right with cases that go on for a number of years, it's actually very difficult to do that. So, it's a very good top tip. So, what is number two?

Jonathan: My second top tip can be seen as a corollary to the first. It's this: the narrative matters. The narrative, the story really matters. If one talks to people about tax litigation, one is quite often met with the response, wow, that must be extremely technical. Of course, sometimes it is, but it does seem to me, Alexis, that that's not really the point. What you need to keep in mind, I would suggest, is that neither legislation nor the acts of individuals going about their business sit in a vacuum; context is everything.

For the purposes of assisting in producing a publication for the Chancery Bar Association some time ago, I had the great pleasure of heading over to Parliament Square and interviewing one of the Supreme Court Justices, Baroness Hale. I asked Lady Hale what she valued most in an advocate, and her answer has always stayed with me. What she said, I'm paraphrasing, but I hope faithfully so, is this: "Ultimately, in litigation, certainly in the upper courts it tends to be the clarifiers and the simplifiers who have success. Overcomplication in the end does not win the day." And I would humbly suggest that that is sage advice which should absolutely be kept in mind in relation to tax litigation. You need to have a story, a narrative, whether it's about how the legislation fits together or about why particular elements within a fact pattern are as they are, which is coherent and commonsensical. It's worth noting that I asked Lord Sumption the same question in a separate interview. What does he value most in an advocate? His answer was "breadth of legal vision". And it seems to me at least that while that might be a different mode of expression, it at least in part is the same point. It's the idea that seen through a broad lens, the law is or at least should be coherent. And if that is right, then it's not a bad working premise that the case theory which a judge listening to a case is likely to be most attracted to is the one which invites a determination of the dispute, which sits at ease within the widest possible palette of provisions, principles, and factual elements in the case which make up the quilt of evidence before the court. So, technicality alone, overcomplication certainly, rarely wins the day. The narrative matters, that is my second top tip.

Alexis: Brilliant, the narrative matters. I like that one too. So what's number three?

Jonathan: My third top tip again connects with what I've already said. It is this: spend more time analysing the documentary evidence, including the practical presentation of the documentary evidence in court, than your opponents. The reason I say that is because a single document, indeed a single sentence within a single document, or for that matter, a single utterance from the witness box, can and not infrequently does fundamentally alter the course of a case. It can torpedo the most elegant, abstract legal analysis. Therefore, the contents of hearing bundles and the contents of witness statements and exhibits to witness statements and their practical in-court presentation really does matter. And that means you need to make sure the right people are involved in putting together the hearing bundle. Alexis, this is not necessarily the stuff of peak time Saturday night Hollywood blockbuster legal drama, but it's crucially important. I agree with and would gratefully adopt what was said by the late Edmund King QC, in a wonderful, wise and wry article that he wrote entitled 'How to Lose a Case', which I would commend to anyone. King's focus was principally on commercial litigation, but what he says, in my view, applies equally in a tax litigation context. He said this. "Do not be too grand to worry about bundles. Bundles are not glamorous. They are prepared by junior people who have a very difficult job to work out what documents will turn out to be relevant at trial. Typically, the person doing it has never even seen a trial before. Typically, the silks and the judge can see only after weeks of evidence what the few critical documents are. So, if you don't keep an eye on it, it's pretty much luck what goes in and how it is ordered. Format matters. If it's not electronic, you can often merge or double-side or shrink your papers. You'll be quicker at finding stuff in court as a result. For electronic trials, it's the same principles. Make sure you have the right number of screens, the right processes for finding documents, and so on. Invest time in thinking ahead as to how you can be nimble in the courtroom." So, I say spend time as much time as you can analysing the facts and the evidence and their practical presentation in court, make the judge's life easy. It will pay dividends. That is tip number three.

Alexis: Yep, I wholeheartedly agree with that one. The devil is 100 % in the detail, so you need to be across it. So, moving on to top tip number four, Jonathan, when you're ready

Jonathan: Thank you, Alexis. My fourth top tip is this. If you only read a single judgment from a single case before you go into battle, make it Lord Wilberforce's magisterial judgment in the case of *WT Ramsey Limited* against the Inland Revenue Commissioners. *Ramsey* was a case that was heard by the House of Lords nearly 45 years ago in the spring of 1981. It concerned a capital gains tax avoidance scheme in relation to a farming business. So one might think that sounds pretty niche, of course in a sense the facts were, but what it said in the decision on general principle and approach is key and its impact has been profound. A year or two ago I had the honour of working with the great David Milne KC of Pump Court Tax Chambers shortly before his retirement. David acted in *Ramsay* as junior counsel. I asked him about the case. In typically modest and humorous fashion he said that his main contribution to the case was to carry the bags to court. I don't expect for a moment that that's true, but in any event, he also indicated that it was clear that the House of Lords wanted to say something significant on certain matters and they certainly did that.

Lord Wilberforce's judgment repays rereading whether on how to interpret tax legislation or the proper way to analyse complex, closely integrated fact patterns or the legal relevance of intention and likelihood in relation to actions in a tax transaction context, or more broadly, guidance on the approach that the judiciary should take when hearing tax cases. There is a deep well of wisdom as well as authority in what is said. Distilled to a sentence, the *Ramsey* approach is often described as consisting in the proposition that "the ultimate question is whether the relevant statutory provision, construed purposefully, is intended to apply to the transaction viewed realistically." That's how it's put in a Hong Kong case called *Arrowtown* subsequently approved in a number of cases by the House of Lords and the Supreme Court here. If that proposition sounds unremarkable, it's because what was perceived by some at least as revolutionary in a tax context has become orthodoxy. The ripple effects of the case are still being felt strongly well over 40 years later. So as I say, if you read just one case before you go into battle, then make it *Ramsey*. It is always time well spent to read it, whichever side of the argument you might find yourself on. That's top tip number four.

Alexis: Perfect, thank you. And I believe this is your final tip. Your next one, tip number five.

Jonathan: Well, it is tip number five, but Alexis, there's actually a bonus tip that I'm going to come on to after that if you'll forgive me. I'll go for tip number five now, though, anyway. So my fifth top tip concerns another thing to do before you go into battle, and that is to step back and ask the question, is this particular piece of tax litigation necessary at all? I'm not intending to be flippant in saying that; tax litigation is, of course, a serious business. But the point is this: in relation to most legal disputes, and that certainly includes tax disputes, there is usually more than one potential route to a resolution. And different routes may involve a party having more control or less control over what happens. The act of pulling the trigger on the tax litigation process, and certainly the act of crossing the threshold of the tribunal or court door for the substantive hearing itself, involves the party giving up a good amount of control because, ultimately, it will be the judge or the panel of judges rather than the parties who determines the outcome. Now it may be that a judicial decision is exactly what is needed or desired, but that won't invariably be the case. So, and perhaps this is another way of putting the same top tip, take settlement opportunities seriously. In the specific context of tax litigation, the parties involved will of course be, on the one hand, the taxpayer and, on the other hand, the tax collecting authority. So in this country, that's His Majesty's Revenue and Customs. So when it comes to settlement, it is important to be clear in understanding what the Revenue can and can't do. And with that in mind, I would, if I may suggest for the listeners a bit of bedtime reading in this area. Two items. Number one, the Revenue's litigation and settlement strategy, sometimes referred to as the LSS and related commentary. It's readily available online. It's clear and it's digestible. And item two. The Revenue's guidance headed *Collection and Management Legal Background*. It's short, it's to the point, and again, it's available online. The nub of the point is that the Revenue does not have a blank canvas when it comes to settlement, but there is some or can be some wiggle room. So, knowing where the goal posts are should assist in working out where there is somewhere between those goal posts that might be a satisfactory landing point for the parties involved. So that's my fifth top tip.

Always ask the question whether the tax litigation is actually necessary in the particular circumstances in question. Take settlement opportunities seriously.

Alexis: Brilliant, thank you. So I'm eagerly awaiting for this bonus tip. What is it?

Jonathan: Absolutely, bonus top tip. Always wanting to add value, I thought, is there anything else? And I think it's probably this. So this is my sixth top tip. Keep a sense of humour. If you can't avoid tax litigation, then once you're in it, keep in as light and positive a frame of mind as you possibly can. Alexis, this connects very much with a theme I've enjoyed emerging out of some of the excellent previous podcasts that you've done regarding the human side of tax litigation.

The serious point, I think, is this. You make better decisions if you are relaxed rather than overly stressed. You express yourself better if you are in a good frame of mind rather than a bad frame of mind. And therefore, people are more receptive to what you say if you are in that frame of mind when you speak. So yes, litigation can be stressful. But I'm yet to see a situation where allowing that stress to play a disproportionate role has a positive effect. So when you are in litigation, build into your daily pattern whatever it is that will keep you in a good place mentally, whether it's exercise or

listening to a comedy podcast on the way home or whatever it might be. So that is my sixth top tip, and so having jotted them down, I can recap on what they are in case listeners have only got 30 seconds rather than 15 minutes to listen to this. Number one, keep your case simple. Number two, the narrative matters. Number three, invest significant time in the detail of the evidence and don't be too grand to think about bundles. Number four, if you only read one case, make it Ramsey. Number five, if you can avoid tax litigation, then seriously consider that. Take settlement opportunities seriously. Number six, keep a sense of humour.

Alexis: Brilliant, thank you so much Jonathan, there's some seriously useful tips there, much appreciated.

Jonathan: Thanks Alexis.

Alexis: I'm afraid that's all we have time for today folks. Many thanks again to Jonathan for joining me and see you all again next time.

Alexis:

As ever, a big thank you goes to RPC's in-house team for the production, music and sound editing of this episode.

A full transcript of this episode together with our references can be found on our website at www.rpclegal.com/taxingmatters. And if you have any questions for me or any topics you'd us to cover in a future episode, please do email us on taxingmatters@rpclegal.com. I would love to hear from you. If you like Taxing Matters, why not try RPC's other podcast offerings, Insurance Covered, which looks at the inner workings of the insurance industry hosted by the brilliant Peter Mansfield and available on Apple podcasts, Spotify and our website. Or the Work Couch, the podcast series, which is where we explore how your business can navigate today's tricky people challenges and respond to key developments in the ever-evolving world of employment law. Hosted by the fantastic Ellie Gelder and also available on Apple podcasts, Spotify and our website rpclegal.com. If you like this episode, please take a moment to rate, review and subscribe and remember to tell a colleague about us.

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