

INSTRUCTING BARRISTERS IN THE HIGH COURT: LICENSED ACCESS

The following is based on an article in the December 1999 issue of Indirect TaxVoice written by Jeremy Woolf, barrister of Pump Court Tax Chambers, London, and Park Court Chambers, Leeds. The article considered the new rules that permitted members of the Faculty of Taxation, Chartered Institute of Taxation, Association of Taxation Technicians and the Institute of Indirect Taxation to instruct barristers in High Court litigation. The scheme originally called Direct Access, then BarDIRECT is now called Licensed Access.

In 1999 Licensed Access (formerly known as Direct Access and BarDIRECT) was granted to Members of the Institute of Indirect Taxation permitting them to instruct barristers to act on appeals to the Upper-tier Tax Tribunal and above when they have acted for the client before the First-tier Tribunal. Unless there are unforeseen problems, it is envisaged that the license will be for an indefinite period. It is important to note that:

- (i) Licensed Access currently only extends to Members who acted for the client before the First-tier Tribunal. If, for example because a Member retires or leaves the firm, it is desired that a different person should instruct the barrister, a specific license will have to be sought from the Bar Standards Board. This can be sought expeditiously by writing to the Secretary to the Access to the Bar Committee, the Bar Council, 298-293 High Holborn, London WC1V 7HZ
- (ii) The license currently also extends only to appeals. It therefore currently does not extend to other proceedings, in particular it does not extend to judicial review proceedings.

The basis upon which litigation is conducted

While the licence granted by the Licensed Access scheme means that barristers can now receive instructions from Members to conduct litigation in the Upper-tier of the Tax Tribunal, any litigation has to be conducted in accordance with the Civil Procedure Rules and the statutory provisions governing the conduct of litigation. The Civil Procedure Rules currently envisage litigation being conducted on two bases. The first is by a litigant in person. The second is by a solicitor. Unless they are also solicitors, Members are not entitled to institute proceedings on the basis that they are solicitors or agents of the client. This means that any litigation will have to be conducted on the basis that the litigant is a litigant in person.

A Member will be committing a criminal offence under section 20 Solicitors Act 1974 and section 70 of the Courts and Legal Services Act 1999 if he purports to be acting as a solicitor conducting litigation on behalf of the client. Section 22 of the Solicitors Act 1974 also makes it an offence for an unqualified person to directly or indirectly draw or prepare any instrument relating to legal proceedings if the act was done "for or in expectation of any fee, gain or reward". Barristers are excepted from this provision. While the Member cannot for reward settle such documentation, it is therefore open to the barrister instructed to do

so. In determining any charges, it is important for the Member to pay regard to these provisions.

The role of the Member

Because the litigation is being conducted on the basis that the client is a litigant in person, any communications by or to the Court or any formal communications with HMRC will be directly with the client. Since it is the client whose name is on the record, it is the client who must sign any documents that require a signature and whose name and address must be used on any documents (and not the Member's name). This means that the Appellant's Notice or Respondent's Notice must be completed on the basis that the client is a litigant in person and no details must be inserted in the boxes requesting details of the Appellant's solicitor. Nor can the Member sign the statement of truth as agent for the client.

Because any communications will be directed at the client, the client must be told to immediately inform the Member of any communications from the Court or other parties. It is then the Member's responsibility to inform counsel. Unless the Member does this, counsel will generally be unaware of any communication. This is because the Court or other parties to the litigation will in general just send correspondence to the client. While they can settle letters on behalf of their clients, barristers are not permitted to have general management and conduct of litigation, including undertaking direct communication and correspondence with the parties and their advisors.

Apart from instructing counsel, the Member's function is to assist the client in the conduct of the litigation as a litigant in person. Such assistance may be arranging for documents to be served on the Court and upon the Inland Revenue or Commissioners of Customs and Excise and preparing bundles. The Member is unlikely to want to personally serve the documents. He can engage a practice server to do this on his behalf. It is unusual for further evidence to be adduced on a tax appeal. If further evidence is required, the Member will be responsible for approaching potential witnesses. After the appeal is concluded he will be responsible for organising the taxation of any costs. The Member will probably want to delegate this function to a costs draftsman.

Instructing Counsel

If counsel has represented a client before the First-tier Tribunal, no problems are likely to arise, since the client will generally want to instruct the same counsel on any appeal. In cases where the Member has represented the client it will be necessary to choose a barrister. Details of individual barrister practising in revenue law can be found on the Revenue Bar Association web site at <http://www.revenue-bar.org>. Most of the individual chambers also have their own web sites. Having identified a barrister or set or sets of chambers, it is frequently worth discussing the position with the clerk, who, if you have not got a particular barrister in mind, may have views about the member or members who

would be most suitable for your purposes, and who will discuss the possible charging structure and charge-out rates of the relevant members and their availability.

If an appeal is to be made to the Upper-tier Tax Tribunal, counsel should be instructed as soon as possible. This is because the client will in general only have 56 days in which to appeal. In some penalty appeals, the appeal must be lodged within 28 days. There may be factual and technical issues that counsel will want to explore before settling any Appellant's Notice. The Civil Procedure Rules ideally require a Skeleton Argument to be produced at the same time as the Appellant's Notice. If this cannot be achieved, the Skeleton Argument must be lodged within 14 days. This is a document which it will frequently take counsel time to prepare. If the appeal is from a decision of the General Commissioners, counsel should at the latest be instructed as soon as the draft case is produced, so that he can advise about the amendments that should be sought. The case must be transmitted to the Upper-tier Tax Tribunal within 30 days of receipt.

Further information and concluding remarks

Licensed Access is the first time that any professional apart from solicitors has been permitted to instruct barristers in the Upper-tier Tax Tribunal. It was granted because of the success of the direct access rules in the tax field, and in particular the successful way in which Members have instructed barristers in litigation before the First-tier Tribunal. More detailed guidance notes have been prepared by the Bar Council. These Notes together with the Licensed Access rules and the general "Licensed Access Guidance Handbook for Clients" can be obtained from the Secretary to the Access to the Bar Committee, the Bar Council, 298-293 High Holborn, London WC1V 7HZ.