[2015] UKFTT 0663 (TC)

TC04782

Appeal numbers: TC/2015/00388
TC/2015/00389

PROCEDURE – application for a stay pending determination of concurrent judicial review proceedings – overlap of issues – risk of tribunal proceedings being moot or of academic interest – interests of fairness and justice

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) HT & CO (DRINKS) LIMITED
(2) MALCOLM COWEN (DRINKS) LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 3 December 2015

Conrad McDonnell, instructed by Neumans LLP, for the Appellants

Stephen Nathan QC and Ruth Hughes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. There are two applications before me. One is the application of the Respondents, HMRC, that the proceedings in this tribunal be stayed pending the disposal of the Appellants' application for judicial review in relation to the decisions of HMRC which are the subject of these appeals. The other is that of the Appellants for a direction that HMRC serve their statement of case within seven days, accompanied by a statement that failure to do so could lead to the barring of HMRC from taking further part in these proceedings.

Background

2. The Appellants, each of whom is part of the Everwine group of companies, are wholesalers of alcoholic beverages, along with soft drinks and other grocery products. HT & Co (Drinks) Limited ("HT") carried on a group-wide purchasing business, operated an authorised warehouse, supplied other group companies, and sold to off-licences and other independent retailers through its own cash and carry operation and to other wholesalers in the UK. Malcolm Cowen (Drinks) Limited ("MC") carried on two specific businesses: the first was acting as UK importer and distributor for 30 imported brands, and the second was supplying wholesale customers in the EU, who were wholesale customers in Northern France who purchased beers, wines and spirits intended for the cross-channel market.

3. Following certain investigations in 2014, which it is not necessary to describe (but which are summarised in the judgment of Cobb J in the Administrative Court in *R (on the application of HT & Co (Drinks) Ltd and another v Revenue and Customs Commissioners* [2015] EWHC 659 (Admin)), on 15 December 2014 HMRC revoked the authorisations of both HT and MC to hold and move goods under duty suspension in the UK. The following decisions were issued by HMRC on that date:

(1) A decision, expressed to take effect immediately from 15 December 2014, revoking HT's authorisation as a registered owner of duty suspended goods, pursuant to s 100G of the Customs and Excise Management Act 1979 ("CEMA").

(2) A decision, expressed to take effect immediately from 15 December 2014, revoking MC's authorisation as a registered owner of duty suspended goods, pursuant to s 100G CEMA.

(3) A revised approval, under s 92 CEMA, of HT's premises at Admiral House, London Road, West Thurrock ("the Thurrock warehouse") effective from 15 December 2014 to 16 March 2015 only, including the termination of the said approval on 16 March 2015 and conditions of approval including: "No goods whatsoever may be exported to the EU or third countries from this warehouse."

(4) A decision that HT would cease to be an Authorised Warehousekeeper under the Warehousekeepers and Owners of Warehoused Goods Regulations

1999 ("WOWGR"), regulations 3 and 4, and s 100G CEMA with effect from 16 March 2015.

4. In practice, HMRC permitted HT and MC to continue to hold existing goods in the Thurrock warehouse for a short time after 16 March 2015, withdrawing the goods in stages and paying VAT and excise duty on such withdrawals.

5. The decisions stated reasons, which in short concerned HMRC's lack of satisfaction with the due diligence conducted by HT and MC in relation to certain export customers.

6. The effect, according to the Appellants, is that the entire Everwine group is unable to purchase and hold alcoholic beverages from UK manufacturers and importers under duty suspension (which is the standard way of operating for large-scale wholesalers in the industry) with consequent serious damage to cashflow and operating cash and serious competitive disadvantage compared with other wholesalers operating in the UK domestic market.

7. In support of submissions as to the serious and damaging effect of HMRC's decisions, and of the urgency of moving forward with the proceedings in this tribunal, Mr McDonnell, for the Appellants, invited me to read two witness statements of Mr Sagar Thakrar, which were made in the context of the concurrent judicial review proceedings in the Administrative Court. Mr Nathan, for HMRC, objected to that course, pointing out, as was accepted by Mr McDonnell, that those statements had been made in February and March 2015, and could not therefore reliably reflect the current financial or commercial position of the group. In support of that submission, Mr Nathan also drew to my attention, and Mr McDonnell confirmed, that since that time a lease of the Thurrock warehouse had been granted to a third party authorised warehouse keeper.

8. I heard no oral evidence on this application. I do not consider it appropriate to make any findings of fact as to the financial or commercial position of the Everwine group based on witness statements produced in the judicial review proceedings some eight or nine months ago. I have no evidence as to the up to date position. Nor is it appropriate for me to take account of the lease of the Thurrock warehouse, in respect of which I had no evidence as to its nature or terms.

9. What cannot, however, be the subject of dispute is the fact that the various authorisations which the Appellants had went to the heart of their businesses, and that the removal of such authorisations would be likely to have a profound effect on those businesses. It is not necessary, in my view, for that broad proposition to be supported by detailed evidence as to the damage to the commercial or financial position of the group. But absent such evidence, it can be no more than a broad proposition.

The Appellants' appeals to this tribunal

10. Each Appellant made an appeal to the tribunal on 14 January 2015. Each appealed against the decision of HMRC to revoke authorisation as a registered owner. In addition, HT appealed against the further decisions affecting it, namely (a) against

the revocation of authorisation of the Thurrock warehouse as an authorised warehouse from 16 March 2015 and conditions imposed over the period 15 December 2014 to 16 March 2015, and (b) against the revocation of authorisation as an authorised warehousekeeper.

11. Although not expressed in this way in the respective grounds of appeal, it was accepted before me that, as all the matters under appeal are "ancillary matters" as defined by s 16(8) of the Finance Act 2004 ("FA 2004"), the jurisdiction of the tribunal is confined by s 16(4) to a determination whether the tribunal is satisfied that HMRC could not reasonably have arrived at the decision in question. If the tribunal is so satisfied, then its powers are:

> "(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
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> (c) in the case of a decision which has already been acted on or taken effect, and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future."

12. The appeals set out a number of individual grounds alongside that by reference to s 16(4) itself. It would not be helpful to set out in full those grounds of appeal, but I include here for present purposes my own brief summary of the Appellants' cases:

(1) the decisions to revoke the authorisations as a registered owner and, in the case of HT, as an authorised warehousekeeper were not "for reasonable cause" within the meaning of s 100G(5) CEMA;

(2) the decision to revoke the authorisation of the Thurrock warehouse and to impose conditions was not "for reasonable cause" under s 92(7) CEMA;

(3) the decisions, or the various conditions imposed, exceeded the powers of a Member State to control duty-suspended storage and movements of dutiable goods and to impose conditions under Council Directive 2008/118/EC;

(4) the decisions, or the various conditions, were contrary to EU law as being (i) disproportionate; (ii) contrary to the EU law principle of legal certainty; (iii) discriminatory as regards the supply of export markets and customers in the EU; and (iv) were a disproportionate and unjustifiable restriction on the free movement of goods;

(5) the statements by HMRC of alleged breaches of conditions are inaccurate or unreasonable, any alleged breaches are not serious and the decisions to revoke the Appellants' approvals as registered owners of duty suspended goods are not reasonable, proportionate or lawful sanctions for such alleged breaches;

(6) in particular, alleged breaches concerning due diligence in relation to third party companies which are export customers of HT, or relate to the trading by MC with customers where sales were made in another Member State, were not proper or reasonable (and in the case of MC, not lawful) concerns relating to the application of duty suspension to goods owned by HT in the UK or the operation of duty suspension by HT or MC in the UK. Grounds of unreasonableness, proportionality, discrimination and unlawful interference with the free movement of goods are repeated in these respects; and

(7) the revocation of authorisation of the Thurrock warehouse from 16 March 2015 and the revocation of HT's authorisation as an authorised warehousekeeper is in each case an interference with HT's right to property under A1P1 of the European Convention on Human Rights.

13. Due to a regrettable administrative delay in the tribunal, the Appellants' notices of appeal were not acknowledged by the tribunal until 23 March 2015, at which time the tribunal also directed that the appeals should be joined and HMRC should provided statements of case within 60 days of that date.

14. In the meantime, however, HT and MC had, by a claim form filed on 24 February 2015, applied to the Administrative Court for permission to proceed with a claim for judicial review of HMRC's decisions ("the JR proceedings").

15. In their detailed statement of grounds for judicial review, HT and MC accepted that there was a partial overlap between the issues raised by the application for judicial review and the appeals to this tribunal. Thus it was accepted that there was an overlap insofar as the application and the appeals concerned the reasonableness of the decisions "in the statutory sense", referring in that respect to s 100(5) CEMA and s 16(4) FA 1994, in the taking account of certain EU law issues, in particular those of proportionality and non-discrimination, and in respect of the human rights A1P1 issue in respect of the authorisation to operate a warehouse. But it was submitted for HT and MC in the JR proceedings that there were other issues which were outside the tribunal's jurisdiction and in respect of which there was therefore no overlap.

16. One of those issues was the application for interim relief, in the form of an injunction suspending the effect of the revocations, or their "most objectionable aspects". There is no power in the tribunal to grant such relief. HT and MC also sought the quashing of the revocations, or the variation of the conditions attaching to them, a declaration that revocations of the registrations as registered owners could have no practical effect and damages (again outside the powers of the tribunal) for the alleged wrongful damage to the businesses and serious interference with treaty rights to free movement of goods and non-discrimination.

17. The issues for which permission was sought to claim judicial review, as opposed to the remedies, were grouped under six main headings:

(1) *Improper purpose*. This argument is to the effect that HMRC's proper purpose in imposing conditions on tax warehouses and their operation is to control storage and movements of duty suspended goods within the UK and

between the UK and the EU. It is argued that the conditions were not imposed for those purposes but for a different (and thus "improper") purpose of seeking to combat "inbound alcohol diversion fraud", or, as HT and MC describe it, "smuggling".

(2) *Proportionality*. It is argued that both the imposition of the conditions on the registrations and the decision to impose the sanction of revocation were disproportionate to the object sought to be achieved, and that alternative, proportionate, sanctions could have been applied.

(3) *Wednesbury unreasonableness*. It is argued that, in revoking the authorisations, HMRC have failed to take into account relevant matters, and have taken into account irrelevant matters.

(4) *Want of due process*. The argument in this respect is that HMRC owed a duty of consultation to HT and MC, and that they failed to follow a proper consultation process. More specifically, it is said that HMRC did not, before making the revocations, provide any "show cause" or "minded to" letter to HT or MC, and did not at the time of serving the revocation notices put their intended decision and grounds to the Appellants for comment.

(5) *Consequences of revocations: compatibility with EU law.* It is argued that there was no justification for the interferences with the right of HT and MC to effect free movement of goods between Member States, and that the revocations are consequently in breach of their treaty rights.

(6) *Consequences of revocation*: *the WOWGR "registered owners" rules.* It is argued in this respect that the imposition of specific, personal, conditions on a person before that person may deposit goods in any tax warehouse, is not authorised by the Council Directive 2008/118 ("the Excise Directive").

18. The application for interim relief was considered on the papers by Haddon-Cave J on 27 February 2015, when he refused the application. That application, and the application for permission to apply for JR, were then the subject of an oral hearing on 6 March 2015 before Cobb J. His judgment, which is reported as I have described above, was given on 12 March 2015. The application for interim relief was dismissed, and permission was refused on all grounds.

19. By Appellant's Notice filed on 19 March 2015, HT and MC sought permission to appeal against the judgment of Cobb J. As well as seeking to appeal the refusal of interim relief, HT and MC put forward the following grounds for appealing the refusal of permission for judicial review:

> "1) The learned judge was wrong in law to hold that the Claimants would need to show 'something more than a realistic chance of success … in any prospective judicial review' in order to engage the power of the High Court [§47], later described by him as a 'high threshold' [§59] and 'that elevated and exceptional category which could be described as fundamentally unlawful' [§59].
>
> 2) Further or alternatively, the Claimants do have a realistic chance of success on the grounds advanced in the application for judicial review,

> which do amount to fundamental unlawfulness of the kind required by the lower Court, in any event.
>
> 3) The learned judge failed to consider at all the Claimant's challenge to the impugned decisions on the ground of improper purpose.
>
> 4) The learned judge was wrong as a matter of law and fact in his determination that there was not a real prospect of success in the Claimants' challenge to the impugned decisions on the ground of procedural unfairness."

20. By Order of Sullivan LJ on 8 May 2015, permission to appeal was granted on the threshold test issue (ground 1 above), but only in respect of grounds for challenging the lawfulness of HMRC's decision which were not, in substance, a complaint that the decision was "unreasonable" (which, it was remarked, was a matter for the tribunal). Permission was also granted on the "improper purpose" ground.

21. Permission was refused in respect of the application for interim relief (ground 3 above), and on the other grounds advanced. In refusing permission on ground 2, Sullivan LJ said:

> "When considering applications for permission to apply for judicial review of decisions against which there is a statutory appeal on a particular ground or grounds, the Court should be astute to ensure that the grounds for judicial review are not, in reality, the statutory ground or grounds of appeal dressed up in some ostensibly different legal clothes in order to sidestep some unwelcome feature of the statutory appellate scheme, such as a time limit or the lack of a power to grant interim relief.
>
> Both the Proportionality ground (insofar as it does not overlap with the Improper Purpose ground) and the Wednesbury Unreasonableness ground are, in substance, the complaint that the decision was 'unreasonable' dressed up in different legal formulations. There is no real prospect of persuading the Court of Appeal that permission should have been given to apply for judicial review on those grounds."

22. Sullivan LJ also found that the want of due process argument (ground 4 above) was not arguable on the facts of the case.

23. On 14 May 2014, HT and MC requested the Court of Appeal to reconsider, at an oral hearing, the want of due process challenge. The oral hearing of the appeal and the renewed application for permission in the Court of Appeal is floated to take place on 17 or 18 May 2016.

Discussion

24. Mr Nathan submitted that, having regard to what he argued was both a very considerable legal overlap and a considerable factual overlap between the JR proceedings and the proceedings in this tribunal, as a matter of principle, and in the interests of avoiding a waste of public resources, the tribunal should direct a stay in its proceedings so as to avoid unnecessary and unjust duplication of proceedings.

25. It cannot be doubted that, as a matter of principle, the same issues ought not to be canvassed in two separate sets of proceedings between the parties. In *Royal Bank of Scotland Ltd v Citrusdal Investments Ltd* [1971] 1 WLR 1469, on an application in the county court for a new business tenancy under the Landlord and Tenant Act 1954, the landlord opposed the grant on the ground that the tenancy was not a business tenancy. Shortly after the county court proceedings were initiated, the landlord applied by summons to the High Court for a declaration that the tenancy was not a business tenancy. It was held that it was vexatious for the landlord to have instituted the High Court proceedings in respect of the same subject matter and raising the same issues as in the proceedings in the county court. It would be wrong to allow two sets of proceedings to decide the issue between the parties to proceed in two different courts. Accordingly, in that case it was the High Court proceedings which were stayed.

26. In reaching that conclusion, Plowman J, at p 1472, derived support from a decision of Buckley J in *Thames Launches Ltd v Trinity House Corporation (Deptford Strond)* [1961] Ch 197, and in particular the exposition of principle at p 207:

> "As I understand it, the principle is that if two courts are faced substantially with the same question, it is desirable to ensure that that question is debated in only one of those two courts if by that means justice can be done."

27. Although also concerned with a business tenancy, a different issue arose in *Airport Restaurants Ltd v Southend Corporation* [1960] 1 WLR 880. There the case concerned an application by the tenant in the county court for a new tenancy following receipt of notice of termination of an existing tenancy. After instituting the county court proceedings, the tenant also brought proceedings in the High Court for a declaration that the notice terminating the tenancy was invalid, a challenge that was not available to it in the county court. At the hearing of the application in the county court, the tenant applied for an adjournment pending the outcome of the High Court proceedings, but was refused.

28. The Court of Appeal allowed the tenant's appeal and ordered the adjournment of the county court proceedings. It held, as appears from the judgment of Hodson LJ (with whom the other Lords Justices agreed) at p 882, that to allow the county court proceedings to continue before the High Court action came to an end involved a risk of injustice to the tenant. The potential injustice arose from the risk that, by continuing with the county court proceedings, the tenant might be estopped in the High Court from claiming that the notice was bad.

29. Agreeing with Hodson LJ, Harman LJ made the following additional observation:

> "It seems to me that to allow two sets of proceedings to go on about practically the same subject matter, in two different courts at one and the same time must prima facie be a course which the court should avoid. If he resumes the hearing while the High Court action is

> undecided the county court judge may well be deciding a matter which is purely of academic interest – in fact sitting to hear a moot and not a judicial case at all."

30. In a case concerning parallel proceedings in the industrial tribunal and the High Court, *Cahm v Wood and Goldstone Ltd* [1979] ICR 574, where there were common questions in both proceedings concerning whether certain documents copied and distributed by an employee were confidential and whether the employee could justify his conduct, the Employment Appeal Tribunal held that it was clearly in the interests of justice that the High Court action should be heard first, and the proceedings in the industrial tribunal should accordingly be adjourned, notwithstanding the inevitable delay that would result.

31. The cases indicate that as a matter of principle, first, proceedings in which the same issues or questions fall in substance to be determined should not be permitted to proceed in parallel. Secondly, in principle proceedings in one court should not be determined if there is a realistic prospect that the matter decided would be moot, because the issue would become immaterial as a consequence of a decision of another court. Finally, those principles are founded upon the interests of justice, which will therefore fall to be applied in any case where the question whether to adjourn or stay is not determined as a matter of principle.

32. I turn first to the question whether the same questions or issues fall to be determined in these two sets of proceedings. In this case, the JR proceedings already have a narrow compass. There are only two issues for which permission to appeal has presently been given in respect of the decision to refuse permission for the claim for judicial review to be made, those of application of the wrong threshold test and of improper purpose. The question whether the want of due process argument will be permitted to be raised on the appeal is not resolved, but remains an open question for the Court of Appeal.

33. That compass has been narrowed, in large part, by the recognition on the part of both Cobb J in the Administrative Court and Sullivan LJ in the Court of Appeal, that grounds should not be permitted to be raised in the JR proceedings if they are in substance a complaint that the decisions of HMRC were "unreasonable" in the sense covered by the tribunal's jurisdiction. That approach follows from *CC & C Limited v Revenue and Customs Commissioners* [2014] EWCA Civ 1653, in the Court of Appeal, where in giving the leading judgment Underhill LJ said, at [43]:

> "The correct principle seems to me to be this. If a 'relevant decision' is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 [FA 1994], and the Court should not intervene. However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the Court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim."

34. That essential demarcation is reflected both in the judgment of Cobb J and in the order of Sullivan LJ. I do not accept the argument of Mr Nathan that the grant of permission to appeal on the ground of application of the wrong threshold test has somehow opened up the essential question of reasonableness in the JR proceedings. It is clear from the order of Sullivan LJ that any challenge to HMRC's decisions in those proceedings cannot be a challenge to the reasonableness of those decisions, and cannot trespass on the tribunal's jurisdiction in that respect.

35. The Court of Appeal was concerned to make a clear distinction between issues of substance which, on the one hand, were within the jurisdiction of the tribunal, and on the other were appropriate for judicial review. That does not, however, produce a bright line between the matters which may be considered by the Administrative Court and those which should be confined to the tribunal. The improper purpose ground is a case in point. That is a ground which may represent a ground in its own right in the JR proceedings. But although not a discrete issue in the tribunal proceedings, it is also one element of the Appellants' case on unreasonableness in the tribunal. I accept, as Mr McDonnell argued, that in the JR proceedings it will be a question of principle, and in the tribunal proceedings it will be a ground in support of a case of unreasonableness, but that distinction does not, in my view, prevent those issues from overlapping.

36. There is also an element of overlap in the want of due process ground, but it is of a different nature. The factual background from the raising of concerns by HMRC to the issue of the relevant decisions, including the communications between HMRC and the Appellants, and the basis of HMRC's decision-making, are relevant to the tribunal proceedings. On the other hand, I accept Mr McDonnell's submission that in contrast to the proceedings in the tribunal, in the JR proceedings the history of the process will not address an argument that the decisions of HMRC were unreasonable, but that the ground will be advanced on the basis that the process itself was unfair. I also accept that the principal basis for this ground in the JR proceedings is that HMRC failed in their duty to consult by not providing any "show cause" or "minded to" letter to the Appellants before revoking the authorisations, and that this specific allegation is not made in the grounds of appeal to the tribunal.

37. I find therefore that there is some overlap between the JR proceedings and those in this tribunal. There is one overlapping issue, that of improper purpose, and one issue, that of want of due process, where the factual background will, or is likely to, overlap. There are, on the other hand, in the tribunal proceedings numerous issues going to the issue of reasonableness which will not feature in the JR proceedings. This is not, in my judgment, a case of the nature of *Royal Bank of Scotland* where the grounds in the county court and in the High Court essentially matched, nor *Cahm* where the issues were in essence the same in both the tribunal and the court. The degree of overlap in this case, when viewed in the context of the Appellants' respective cases as a whole, does not, in my view, mandate a stay of these proceedings as a matter of principle.

38. It is, however, possible to envisage a circumstance where the Appellants will have succeeded in their appeal to the Court of Appeal and as a consequence will have

been given permission to apply for judicial review, and where on the judicial review the Appellants will succeed on one or more grounds and the decision or decisions of HMRC will have been quashed. There is the prospect, therefore, that if all those events transpired the proceedings in this tribunal will be rendered nugatory.

39. Mr Nathan submitted, relying on what Harman LJ said in *Airport Restaurants Ltd*, that this would render the tribunal proceedings moot or of academic interest only. I agree, but that would depend on the Appellants traversing a number of significant hurdles. It seems to me that those hurdles must be taken into account in assessing the prospective nature of the proceedings in this tribunal. I do not accept the submission of Mr Nathan to the effect that, because it is the Appellants who have pursued the appeal in the JR proceedings, the question of a stay must be determined on the assumption of success for the Appellants. It is instead necessary, in my judgment, for the tribunal to take a realistic view of the circumstances.

40. In *Airport Restaurants Ltd*, proceedings had reached the stage of a hearing in the county court. The issue of whether a new lease should be granted was at the stage of being determined. That issue would, however, have been moot if the original notice of termination were to be found by the High Court to have been invalid, an argument which was not available to the tenant in the county court. It is understandable in those circumstances, even leaving aside the principal reason of potential injustice, why the hearing in the county court and the determination of the application for a new lease ought not to have proceeded.

41. The position in this case is different. First, the proceedings in the tribunal are at a very early stage. No statement of case has been served by HMRC. No issue would fall for determination at this stage which could be rendered moot by the quashing of the decisions on judicial review. Secondly, there is no clear route to the making of such a decision by the Administrative Court. There is considerable uncertainty whether it will be the proceedings in the court or in the tribunal which will in the end be determinative (subject, of course, to any further appeal).

42. In these circumstances, I have reached the conclusion in the circumstances of this case that the mere possibility of the tribunal proceedings becoming, at a later stage, moot does not require a stay of those proceedings as a matter of principle.

43. On the basis of my conclusions so far, the question whether I should direct a stay comes down to one of discretion. That discretion falls to be exercised judicially, and in line with the overriding objective to deal with cases fairly and justly (Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). All relevant circumstances should be taken into account, and I must conduct a balancing exercise to determine the relative prejudices consequent upon a decision to stay the proceedings or to allow the appeals to proceed in the normal way.

44. One of the aspects of the tribunal's overriding objective, in Rule 2(2)(e), is to avoid delay, so far as compatible with proper consideration of the issues. Against that, there is the limited overlap between the two sets of proceedings and the possibility that the JR proceedings will determine the case. Mr Nathan also argued

that this tribunal should seek to avoid the waste of public resources if the Appellants were permitted to run the appeals and the judicial review in parallel, but that argument is essentially predicated on a successful judicial review, and the consequent lack of necessity for the tribunal proceedings.

45. Although I take notice of the undoubted commercial implications for an appellant who has had authorisations of this nature withdrawn, and understand the natural desire of such a person to pursue a resolution of the dispute as quickly as possible, I did not, for the reasons I outlined earlier, have any evidence on which to base any conclusion on the commercial or financial circumstances of the Appellants. I have not therefore attached any weight to the particular commercial and financial circumstances of these individual Appellants or of the Everwine group.

46. Two particular factors weigh heavily in my view in favour of permitting these tribunal proceedings to proceed. The first is the uncertainty which surrounds the JR proceedings. Were those proceedings to have been at a more advanced stage, so that it could be said with some certainty that the questions on the judicial review were to be answered one way or another, that factor would have weighed in favour of a limited stay. But the absence of any certainty in that respect, and the prospect of further proceedings extending at least to May of next year, and beyond that, point in the opposite direction, especially when combined with the second factor. That factor is that the proceedings in this tribunal are at an early stage. To proceed with the process of the provision by HMRC of a statement of case, documents and witness evidence will not prejudice either party, except in terms of the work and expense involved. The tribunal proceedings are not at the stage of the determination of any issue.

47. It is possible, as I recognise, that the tribunal proceedings may, in the event, not be required. The time and expense of conducting those proceedings in parallel with the JR proceedings may, but only in the event that the dispute between the parties is resolved by the JR proceedings, be wasted. But in my view, in the circumstances of this case, that gives rise to a lesser prejudice than would be the case if the JR proceedings were, for example, to come to an end at some time between May and July 2016, or beyond that, without final resolution of the dispute between the parties, and the tribunal proceedings, on which such resolution would then rest, were to have gone no further forward at that time. That delay would, in my judgment, be prejudicial to the interests of justice, as it would defer the resolution of an issue of major importance to the affected parties.

48. I have therefore concluded that HMRC's application for a stay is to be refused.

49. That leads me to consider the application of the Appellants for a direction that HMRC serve their statement of case within 7 days, and for a direction that failure to do so could lead to the barring of HMRC from taking further part in these proceedings. I heard no argument on this application, but it is not necessary for me to do so to refuse it. It would not be fair and just to impose such a requirement on HMRC, within what must be regarded as an unreasonably short period, nor would it

be in any sense proportionate, at this stage in the proceedings, and in the light of the overall circumstances of this case, to include any form of warning of sanction.

50. I invite the parties, therefore, to either agree or put forward submissions as to appropriate directions for the case management of these appeals. I have in mind a straightforward direction that HMRC serve and file a statement of case within a reasonable period. It seems to me that, given that HMRC were notified of the appeals in March 2015, a period shorter than the usual 60 days would be appropriate. Taking account of the forthcoming holiday period, I would propose 42 days from the date of release of this decision. Provision may then be made for a reply by the Appellants to the statement of case, for exchanges of documents lists and copy documents and for the service of witness evidence. The parties are directed to notify the tribunal within 10 days of the date of release of this decision of their agreed directions or absent agreement their written submissions.

Application for permission to appeal

51. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2015