[2019] UKFTT 385 (TC)

TC07200

Appeal number: TC/2012/09177

PROCEDURE - VALUE ADDED TAX - Decision by FTT dismissing the Appellant's appeal upheld by UT but successfully appealed to Court of Appeal of Northern Ireland - Court of Appeal ordered remission to a differently constituted panel of the FTT for rehearing - Applications to strike out parts of HMRC's Further Amended Statement of Case and/or bar HMRC from advancing evidence of the facts and matters therein - Discussion of the effect of the Court of Appeal's order on the scope of the rehearing - Whether res judicata or issue estoppel? - No - Whether an abuse of process? - No - Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ULSTER METAL REFINERS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Tribunals House, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 29 March 2019

Mr David Bedenham, Counsel, instructed by CTM Tax Litigation Limited, for the Appellant

Mr Paul Taylor, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is my decision in relation to an application made by the Appellant Company ('**UM**').

2. This appeal has already acquired a long history.

3. The underlying dispute originates in HMRC's decision, made on 1 October 2012, to deny UM the right to deduct input tax amounting to £426,854 in relation to a series of transactions in the VAT periods 03/11 and 06/11: '**the Decision**'

4. That Decision was in due course appealed to this Tribunal, directions were released, and the substantive hearing took place over the course of five days in Belfast before Judge Cannan and Mr John Adrain FCA. The FTT's decision is reported at [2015] UKFTT 0255 (TC). Since then, UM advanced successive appeals of the FTT's decision to the Tax and Chancery Chamber of the Upper Tribunal ([2016] UKUT 342 (TCC): Arnold J and Judge Charles Hellier) and to the Court of Appeal of Northern Ireland: [2017] NICA 26 (Gillen and Weir LJJ, and McBride J). The Court of Appeal of Northern Ireland heard argument in February 2017 and handed down a substantive reserved judgment on 9 May 2017.

5. The matter which now falls to me to decide, in large measure, is identification and effectuation of the decision and order made by the Court of Appeal. The exercise is case-management of a somewhat unusual kind, insofar that, as a judge of first instance, I am being called upon to give directions flowing from an order of a superior court of record.

6. On 11 May 2018, HMRC filed a 'Further Amended Statement of Case' ('the 2018 SOC'). That SOC the subject matter of the present application. The 2018 SOC superseded an earlier 'Amended' Statement of Case, prepared in January 2018.

7. Although UM did not formally object to the filing of the 2018 SOC, it was done on the express understanding, that UM would, if so advised, seek to challenge any or all of the amendments.

8. On 13 June 2018, UM applied for orders:

   (1) That certain Paragraphs of the 2018 SOC be struck out and/or HMRC be barred from advancing evidence of the facts and matters contained therein;

   (2) That the appeal be allowed because HMRC has no reasonably prospect of defending it (together, 'the Application').

9. The first limb of the Application is founded on the doctrines of res judicata and/or issue estoppel, or, in the further alternative, on the basis that for HMRC to now advance its case in the way that it does in the 2018 SOC constitutes an abuse of the Tribunal's process.

10. The second limb of the Application is parasitic or consequential on the first. In summary, it is argued that if HMRC is debarred from relying on those facts and matters (irrespective of the route along which such a conclusion is arrived at) then HMRC enjoys no reasonable prospect of defending the appeal. In the context of this appeal, and in broad terms, it is contended that would be the outcome of HMRC being unable to discharge its legal and evidential burdens in relation to the denial.

11. Resolution of this dispute, as it stands before me, calls for analysis of the matters (i) which have already been put in issue and (ii) which have already been decided, whether at first instance or on appeal. Naturally, I remind myself that I must be careful to keep in mind that I am not sitting on appeal or quasi-appeal from any of the previous decisions which have been put before me for my consideration. Nor - to be clear - am I re-trying any part of the case.

The Decision, and the appeals

12. HMRC's original (i.e., unamended) Statement of Case, dated 5 February 2013, sets out HMRC's position in relation to the dispute, as it then stood ('the 2013 SOC'). The 2013 SOC was filed in accordance with the mandatory requirement of Rule 25(2)(b) that it should 'set out the respondent's position in relation to the case'. The approach conventionally encountered is that HMRC's 'Rule 25' Statements of Case (unlike Statements of Case in civil litigation in the civil courts) are a hybrid of pleading and narrative of the evidence. The 2013 SOC is an example of this approach.

13. In the 2013 SOC, the Commissioners stated that they were satisfied *"that the input tax was incurred in transactions connected with the fraudulent evasion of VAT and that the Appellant knew or should have known of this fact":* see §2. In support of this proposition, HMRC sought to rely on the decision of the European Court of Justice in *Axel Kittel v Belgium* and *Recolta Recycling Ltd* (see §26) as applied by the Court of Appeal in *Mobilx Ltd v HMRC* [2010] EWCA Civ 517: see §27 et seq.

14. The 2013 SOC described (at §32) the issues before the FTT thus:

> "(a) whether the assessed transactions that make up the denied input tax were "connected with the fraudulent evasion of VAT", and
>
> (b) whether the Appellant taxpayer "knew or should have known" of that fact."

15. As to Issue (a), HMRC's case (at §§34-38) was as follows:

> *"34. There were three distinct aspects to the Appellant's business:*
>
> *[...]*
>
> *(iii) Soft drinks trading where supplies were made to the Appellant by Irwin Enterprises ('Irwin'), Paul Magee Wholesale Beverages ('Paul Magee') and PCB Logistics ('PCB') - 'tax loss chains'*

35. The three aspects of the business have been kept separate from each other. Only the transaction chains falling under 34(iii) above have been traced to hijacked traders, and therefore to fraudulent tax losses.

36. In the deals in VAT periods 03/11 and 06/11, which are the subject of the decision, the Commissioners have traced all of the Appellant's purchases from Irwin, Paul Magee and PCB to tax losses with hijacked traders ...

37. All deal chains traced through Irwin led to one of three hijacked companies, namely Linkup Solutions, Landmark Wholesale and Eurolink Trading.

38. All deal chains traced through Paul Magee and PCB led to one defaulter or hijacked company, namely MJ Cartel."

16. The FTT heard oral evidence from three Higher Officers of HMRC, as well as from Mr Donaldson for the Appellant. It also received further written submissions from the parties.

17. As to Paragraph 38 of the 2013 SOC, the FTT recorded that there was no dispute as to the deal chains in relation to UM's supplies purchased from PCB and Magee. Both parties agreed (and the FTT was satisfied) that the supplier to PCB and Magee was in all cases Mark Cartel trading as M J Cartel: see [25] of the FTT's decision.

18. However, and as to Paragraph 37 of the 2013 SOC, and the 'Irwin' deal chains, there was a key dispute of fact, recorded by the FTT at [19]:

(1) HMRC's case was that the suppliers to Irwin were Landmark Wholesale Ltd ('Landmark'), Linkup Solutions Ltd ('Linkup'), and Eurolink Trading Ltd ('Eurolink');

(2) UM's case was that the suppliers to Irwin were not Landmark, Linkup, or Eurolink, but rather were William Kirk t/a Oriel Soft Drinks ('Oriel') and Swan Fruit Limited t/a Swan Wholesale ('Swan').

19. Following a lengthy and careful review of the evidence, the FTT found (at Para. [123]):

"In the light of all the evidence we think it more likely than not that the deals purportedly involving purchases by Irwin from the UK hijackers and sales by Irwin to Euromark did not actually take place. We accept Mr Jenkins' [then-Counsel for the Appellant] submissions that these were not genuine transactions, but simply a paper trail created by Irwin. ***The suppliers to Irwin in the Relevant Transactions were Oriel and Swan***." (emphasis added by me)

and at Para [137]:

"Annex 1 to this decision is a summary of our findings in relation to the deal chains for all Relevant Transactions, and in particular the identity of the supplier to Irwin and whether supplies could be traced back to Coca Cola. We are satisfied that ***all the Relevant Transactions where Irwin was the supplier trace back to Oriel or Swan*** and in 10 deals from Oriel to Coca Cola": (emphasis added by me).

20. At Para [146] the FTT recorded the concession, made by Mr Taylor (Counsel then-appearing, as now, for HMRC) that if the deal chains traced back to Coca Cola then there could not be any fraud in those deal chains.

21. As is clear from the foregoing, the FTT accepted the Appellant's case as to the identity of the suppliers to Irwin.

22. Nonetheless, it is especially important for me to set out, in full, the remainder of Paragraph 146 of the FTT's decision:

"However, the fraud we have found was not precisely the fraud Mr Taylor invited us to find. HMRC's case was that the tax loss arose with the hijacked traders. We have found that the tax loss was Irwin's failure to account for VAT on its supplies to the appellant. Fraud is, as Mr Jenkins put it, a web of deceit. ***It is not the detail of the fraud which is relevant. It is the existence of fraud, in this case the VAT fraud of Irwin himself***" (emphasis added by me).

23. Consistently with this, Annex 1 set out, in relation to the deals, what is described as the '*Likely* Supplier to Irwin' (emphasis added by me).

24. The FTT dismissed the Appellant's appeal against the denial of input tax.

25. UM appealed to the Upper Tribunal, which remarked (at Para [2]):

"... this is an unusual case because, although HMRC's case was that all the transactions in issue were connected with MTIC fraud, the Tribunal concluded that the majority of the transactions were connected with a different form of fraudulent evasion of VAT. It is this factor which lies at the heart of UM's first three grounds of appeal."

26. At Para [29] of its decision, the UT identified the crux of the appeal in this way:

"These three grounds all traverse the same issue. In essence, UM makes two complaints. The first complaint is that the Tribunal's finding that Irwin fraudulently defaulted on the payment of output tax in respect of the sales to UM, rather than Landmark et al, was procedurally unfair: no such case had been pleaded by HMRC, nor had HMRC led any evidence to support such a case or advanced such a case in argument, and accordingly UM had not led any evidence to meet that case. Thus UM was taken by surprise. For good measure, UM says that HMRC disavowed any such case in closing submissions. The

second complaint is that the Tribunal's finding was not open to it on the evidence."

27. The UT dismissed this aspect of UM's appeal in this way (at Para [33]):

"Accordingly, while it is correct that this was not a case which HMRC had pleaded, led evidence to support or advanced in argument, it was a case which flowed logically from UM's own case and it was a case which counsel for UM was given the opportunity make submissions in respect of during the course of argument. If counsel for UM considered that UM was being taken by surprise, he should have said so there and then. In that way the Tribunal could have considered whether the complaint was justified, and if so how to deal with it. For example, the Tribunal could have considered whether to give UM an adjournment and/or to permit UM to adduce further evidence. Since no complaint was made, the Tribunal did not have occasion to consider these options. In those circumstances, it is too late for UM to raise the complaint for the first time on appeal."

28. Undeterred, UM pursued a second appeal to the Court of Appeal of Northern Ireland. The matter was dealt with at a 'rolled-up' hearing, heard on 15 February 2017. The Court recorded the Grounds of Appeal to that Court as follows (at Para [16]):

"The appellant submits the case merits further consideration by the Court of Appeal on the basis the UT erred in the following respects:

"(i) In reconstructing the procedural context in which the FTT made its findings, the UT took into account various facts and matters that were simply incorrect or irrelevant and accordingly, the procedural context was not accurately reconstructed.

(ii) In concluding that the FTT's approach and conclusions was one that did not give rise to procedural unfairness and was properly open to it the Upper Tribunal reached a decision that was perverse."

29. Judgment was reserved and handed down on 9 May 2017.

30. In granting permission to appeal, the Court of Appeal remarked (at Para [29]):

"This application raises the question whether a tribunal can make a finding on the basis of a "third man theory" - that is, one which the judge suggests to the parties, but which has not been pleaded by the claimant..."

31. The 'third man theory' (sic) refers to those aspects of the FTT's decision summarised above, although this was not an expression apparently used by the FTT, but seems to have been coined as a shorthand to describe the FTT's approach and findings.

32. Having given permission to appeal, the Court of Appeal's discussion of the substantive matter was as follows (at Paras [33] et seq):

"[33] Rule 25 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 requires HMRC to deliver a statement of case. The statement of case must, in accordance with Rule 25(2)(b) "set out the respondent's position in relation to the case". HMRC set out its case on the basis that there was a missing trader because the supply chain had been traced to "hi-jacked traders and to fraudulent tax losses". In contrast UM in its witness statements made it clear that it did not accept any part of HMRC's case and specifically indicated that HMRC had incorrectly traced the supply chains.

[34] As noted by Lewison LJ in *The Prudential Assurance Co Ltd v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 376 at paragraph 20, pleadings play an important role in our adversarial system:

> "It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case."

And further at paragraph 24 he stated:

> "Parties to litigation are entitled to know where they stand and to tailor their expenditure and efforts in dealing with (and only with) what is known to be in dispute".

[35] Thus pleadings, by enabling a party to know the case he has to meet play a central role in ensuring a fair trial.

[36] It is well established that in ordinary civil litigation involving allegations of fraud, the obligations in respect of pleadings are heightened. The fraud must be "distinctly alleged" and it must be sufficiently particularised. As Lord Millet said in *Three Rivers District Council v Governor & Co of the Bank of England (No 3)* [2003] 2 AC 1 at paragraph 186:

> "This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so on a case of fraud. It is not open to the court to infer dishonesty from facts which have

not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved".

[37] As noted in *Blue Seer Global Ltd v HMRC* [2008] UKVAT 20694 at paragraph 30 these principles apply just as much in tax appeals heard in the FTT as they do in other litigation.

[38] The nature of a case can change prior to or during the course of a hearing. In such circumstances it has long been established that a party can apply to amend its pleadings to raise any new points.

[39] The appellant, relying on the authority of *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 submitted that the FTT could not find against UMR on a basis which HMRC had not made out in its original pleadings. Dyson LJ stated at paragraph 21:

> "In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision."

[40] As appears from the factual circumstances of Mars there was no hint of a "third man theory" in the witness statements or in the way in which the case was opened or in the evidence of the claimant's witnesses. In such circumstances we accept that it would not be open to a tribunal to pursue a "third man theory", as there would be no evidential basis for such a theory.

[41] We do not however, find that Mars lays down a general principle that a tribunal can never find for a claimant on the basis of a "third man theory". Rather we are satisfied that it is open to a tribunal or court to raise a "third man theory" when there is evidence or material before it to support such a theory.

[42] In this case we are satisfied there was evidence before the FTT which entitled it to raise a "third man theory". In particular there was evidence of fraudulent transactions on the basis of the supply chains as set out by UMR.

[43] As noted in Three Rivers a defendant is entitled to know the case he has to meet. In a fraud case this includes knowing the primary facts upon which fraud is alleged. When a tribunal wishes to find for a claimant on the basis of a

"third man theory" there are a number of steps that it must take to ensure that the defendant is afforded a fair trial. In particular it must inform the parties clearly of the "third man theory" and then afford to the parties sufficient opportunity to respond to the new case and if necessary permit an adjournment to allow the parties time to make decisions about what further investigations they should carry out, what further evidence or disclosure they should seek, what further witnesses they should call and what further submissions they should make. These steps are essential and central to meeting the requirement of a fair hearing as they ensure the party has an opportunity to know exactly the case he has to meet and an opportunity to meet it.

[44] We have considered the exchanges between Judge Cannan and UMR's counsel as set out in the transcript. We are not satisfied that Judge Cannan clearly indicated to UMR's counsel that the tribunal was considering finding for the claimant on a different factual basis to that advanced by HMRC. This view is corroborated by the fact that HMRC never at any stage indicated it wished to rely on an alternative factual basis to find fraud and it never applied to amend its pleadings. Further, even though all the parties were given the opportunity to make further written submissions to the FTT after the hearing, no party made submissions in respect of the new alternative factual basis for a finding of fraud.

[45] As a result we are satisfied UMR was taken by surprise. It was not afforded an opportunity to meet the new case which was now being made against it. If it had been properly alerted to this by the tribunal, UMR would have had the opportunity to consider whether to apply for an adjournment and to consider whether it now wished to seek further disclosure, whether to call further witnesses (which it seems it could have done), or whether to make further submissions. The failure of the tribunal to permit this meant UMR was denied a fair hearing.

[46] We therefore find there was procedural unfairness and we allow the appeal."

33. In its concluding section, headed 'Remedy', the Court of Appeal remarked as follows:

"[47] The appellant contends that the court should in accordance with its powers under section 14 of the Tribunal Courts and Enforcement Act 2007, remake the decision and order that the appellant had a right to deduct input tax. The appellant further contends that the matter should not be remitted to the FTT as this would, inter alia, give HMRC a 'second bite of the cherry', that is, a chance to amend the case it previously made so it can now rely on the 'third man' theory; be anathema to speedy justice and finality of litigation and would cause real prejudice to UMR as delay hampers the ability of UMR to gather evidence and because UMR has "no more money to fight the case". The respondent contends that this court is not in a position to remake the decision as it has not been called upon to and has not considered the evidence in the case, nor has it arrived at any findings of fact. In these circumstances it is submitted

that the matter should be remitted to the FTT. The respondent further submits that remittal to FTT is not giving HMRC a 'second bite of the cherry' as the 2007 Act provides for such a course of action.

[48] This court has not heard nor been asked to reconsider the evidence in this case and therefore we are satisfied we should not remake the decision. **Taking account of all the circumstances, we are satisfied that it is in the interests of justice that the case should be remitted to a differently constituted FTT for a re-hearing and we order accordingly**.

[49] We will hear counsel in respect of costs." (emphasis added by me).

34. The invitation at Paragraph [49] of the Court of Appeal's decision led to a further published judgment, released on 7 June 2017, neutral citation [2017] NICA 34, in which the Court observed:

"[9] The proceedings before this Court were necessary as the respondent failed to plead its case properly before the FTT and then resisted the appeal before the UT and Court of Appeal. In these circumstances we see no reason to depart from the general rule that costs follow the event and accordingly we condemn the respondent in costs above and below.

[10] **The difference between 'Irwin' and 'non-Irwin deals' played no part in the proceedings before the Court of Appeal** which dealt only with the issue of procedural unfairness and therefore we see no reasons to apportion costs in the manner sought by the respondent. Accordingly we condemn the respondent in the full costs of the Court of Appeal." (emphasis added by me).

35. The substantive order made by the Court of Appeal was not in the bundle, but was subsequently provided to me. It reads as follows:

"The Court

[...]

1. Grants leave to appeal

2. Allows the appeal

3. Remits the matter to a differently constituted First Tier Tribunal for a re hearing."

36. As far as I am aware, neither party sought permission to appeal to the Supreme Court of the United Kingdom.

37. On 18 January 2018, HMRC amended its 2013 SOC. This amended SOC does not make any reference to what had happened in the Court of Appeal. The amendments (underlined in the document) deal with Issue (a). HMRC continued to

advance its original case - that is to say, the case which had been dealt with (and dismissed) by the FTT in 2015.

38. But, HMRC added (and, obviously, responsively to the FTT's decision):

> "45. Further and in the alternative, the Respondent submits that the evidence is also consistent with a different and simpler fraud. The Respondent will submit that documents which purported to be sales invoices from Linkup Solutions, Landmark Wholesale and Eurolink Trading to Irwin Enterprises were not created in the course of real and legitimate business transactions but instead were created fraudulently by or on behalf of Irwin Enterprises in order to set off and thereby reduce the output tax which was due on its supplies to the Appellant, thus reducing its liability to pay Value Added Tax.
>
> 46. Further and in the alternative to paragraph 44a [sic] and the preceding paragraphs in the Statement of Case, the Respondent submits that the evidence is also consistent with contra trading by Irwin Enterprises. Further particulars of the deals with are relied upon to evidence the Respondents' submission as to contra trading will be provided within a time period either agreed by the parties or by a direction from the First Tier Tribunal"

39. Paragraphs 47 to 51 of the January 2018 SOC are a new section dealing with propositions of law said to derive from the decision of the Court of Appeal in *Fonecomp Ltd* [2015] STC 2254.

40. Those proposed amendments did not find favour from the Appellant's representatives, who on 29 January 2018 protested that HMRC could not simply 'have another go' at the case rejected by the FTT; and that the amended case 'is simply to repeat (albeit in different words) the 'hijacking' case that was rejected' (by the FTT).

41. HMRC's response, on 9 February 2018, was that 'there is no finality in this case for the reason that your client's appeal was successful and matter (sic) has now been returned to the First Tier Tribunal'.

42. On or about 22 March 2018, UM applied (pursuant to Rules 5 and/or 8) for an order to strike out certain parts of HMRC's January 2018 SOC or to bar HMRC from advancing in this appeal the facts and matters relied upon. That application was supported by a lengthy witness statement from Henry Donaldson, a director of UM, which includes a detailed and helpful chronology as well as a series of legal arguments.

43. However, the dispute - insofar as it engaged Paragraphs 45 and 46 of the January 2018 SOC, set out above - became an entirely academic one on 11 April 2018, when HMRC wrote that, *"following substantial further work by the officer in the case in tracing the deals in question, the Commissioners have come to the view that the evidence now best supports their position as put at the original FTT hearing, and so it is no longer necessary to plead the case in the alternative as per the Amended Statement of Case"*.

44. On 13 April 2018, the Appellant withdrew its application of 22 March 2018, but did so on the express basis that it was reserving the right to file a further abuse application once it had seen HMRC's proposed (Re) Amended Statement of Case.

45. The so-styled 'Further Amended Statement of Case' is dated 11 May 2018. Less helpfully than the January 2018 SOC, it is not annotated in the conventional way, with underlinings to show new material and crossings-out to show deleted material.

46. On 13 June 2018, the Appellant's representatives wrote that they did not object to the filing of the May 2018 SOC, but made clear that they remained of the view that HMRC's case was an abuse of process, and filed the present application. A letter dated 3 July 2018 seeks to amend the application so as to advance an argument that HMRC is barred by the doctrine of res judicata and/or issue estoppel. That is the footing on which it was argued before me. The Application is supported by witness statements of Henry Donaldson dated 12 June 2018, 13 June 2018 and 1 October 2018.

47. The first limb of the Application identifies two sets of Paragraphs of the Further Amended Statement of Case as subject to challenge:

(1) The first set is Paragraphs 37-47. Those Paragraphs are identical to the case earlier put by HMRC to the FTT in the 2013 SOC;

(2) The second set is Paragraphs 60-70. These Paragraphs are new. They refer to 'the constitution of the deal chains' and the supplies by Irwin. They refer to the review mentioned in HMRC's letter of 11 April 2018, undertaken by Officer Heather Arnold, and make reference in turn to a witness statement from her dated 20 April 2018 (with newly introduced material underlined). They assert that HMRC's position is that it is improbable that Irwin fraudulently created documents purporting to reflect purchase invoices from UK missing traders, but that the evidence instead points to MTIC fraud: see Paras 194-196 of Officer Arnold's witness statement. There is a further witness statement from Officer Arnold (her sixth) dated 26 February 2019 which responds to some criticisms made by Mr Donaldson of her witness statement dated 20 April 2018.

48. Paragraph 38 of the Application Notice reads as follows:

> "The case advanced by HMRC at paragraphs 37-47 and 60-70 of the Further Amended SOC is the self-same case that was rejected by Judge Cannan. Allowing HMRC to now re-run that case is an abuse of the FTT's process. To the extent that there is any material difference (which is denied) in the way that HMRC now puts its case it is still an abuse for HMRC to proceed in this manner because any such case could and should have been raised before Judge Cannan (see Henderson v Henderson (1842) 3 Hare 100). The abuse is made all the more egregious by the fact that the Appellant is, because of the passage of time, at a serious disadvantage in attempting to call relevant evidence in response to the case now advanced."

49. Before me, the thrust of the Appellant's argument was succinctly put by Mr Bedenham. He says that there has been "a square rejection of the Commissioners' chain", that is to say "a rejection of HMRC's case on connection to fraud", and "it ends right there". He also emphasises the need for finality in litigation, and the fact that this case is now several years old. He says that it is impermissible to carry on so as to see "what comes out in the wash."

50. Mr Taylor submits that the effect of the decision of the Court of Appeal is that the Appellant challenged the FTT's original adjudication on the basis that it was flawed, leading to the appeal being treated afresh. He argues that the Appellant "can't have it both ways": i.e., on the one hand, arguing (successfully) that the FTT's Decision was flawed and unsustainable for procedural reasons but, on the other, submitting that HMRC is nonetheless now bound by some of the FTT's findings of fact. Mr Taylor describes this approach as 'cherry picking'. He goes on to submit that the wider public interest requires that, on HMRC's case - then and now - UM was a participant in fraud and should "not to be rewarded for it" by knocking HMRC out of the appeal.

Discussion

51. Although the parties' respective submissions sought to engage intensively with the arguments put before the Court of Appeal, its reasons, and its *ratio decidendi*, and invited me to draw inferences and/or make findings as to what had and had not been in issue in the Court of Appeal, both parties are - in my respectful view - starting in the wrong place.

52. In my view, the correct staring point for analysis is the conventionally understood and long-established position that appeals are against orders, and are not against reasoned judgments: see (for example) CPR 52.0.6 comm (White Book 2019, p1767) and the authorities cited there, especially *Morina v Secretary of State for Work and Pensions* [2007] EWCA Civ 749.

53. In *Morina*, the Court of Appeal of England and Wales, per Maurice Kay LJ (with whom Sir Anthony Clarke MR (as he then was) and Arden LJ (as she then was) agreed) considered and approved the dicta of Sir Raymond Evershed MR in *Lake v Lake* [1955] P 336, at 343-44: "judgment or order" meant "the formal judgment or order which is drawn up and disposes of the proceedings" as opposed to "some finding or statement … which may be found in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding."

54. Accordingly, the appeals both to the Upper Tribunal and to the Court of Appeal were against the FTT's order. Although the FTT does not ordinarily draw an order in the conventional sense, its actual decision - the outcome, and the catalyst for the successive appeals - was that UM's appeal against HMRC's decision should be dismissed: see Para [209] of the FTT's decision. That was the FTT's order.

55. The Court of Appeal of Northern Ireland heard this appeal under the provisions of the *Rules of the Court of Judicature (Northern Ireland) 1980* (SR 1980/346) ('the

1980 Rules'). The Court of Appeal's order recites (incorrectly) that the appeal was from the Industrial Tribunal, and (perhaps incorrectly) that the appeal lay in accordance with Order 60b of those Rules: Rule 60b(1) provides that the notice of appeal "must state the questions of law on which the appeal is brought."

56. The general provisions as to appeals to the Court of Appeal of Northern Ireland are to be found in Order 59 of the 1980 Rules.

57. Insofar as material, O59 r3 ('General Provisions as to Appeals': Notice of appeal) provides:

> "(1) An appeal to the Court of Appeal shall be by way of rehearing and must be brought by motion, and the notice of the motion is referred to in this Order as "notice of appeal".
>
> (2) Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice must specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make.
>
> (3) Except with the leave of the Court of Appeal, the appellant shall not be entitled on the hearing of an appeal to rely on any grounds of appeal, or to apply for any relief, not specified in the notice of appeal."

58. On the face of it, O59 r 3(1) represents a different position from England and Wales where appeals are limited to a review of the decision of the lower court unless the appellate court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing: CPR 52.21(1)(b). A rehearing would therefore be an exception to the general rule (and, as Ward LJ observed in *Ealing LBC v Richardson* [2005] EWCA Civ 1798 at [20] *"..a simple failure to put one's case before the first court is not ordinarily to be cured by a rehearing"*).

59. O59 r 6 provides:

> "(1) A respondent who, having been served with a notice of appeal, desires-
>
> (a) to contend on the appeal that the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or
>
> (b) to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or
>
> (c) to contend by way of cross-appeal that the decision of the court below was wrong in whole or in part,

must give notice to that effect, specifying the grounds of his contention and, in a case to which paragraph (a) or (c) relates, the precise form of the order which he proposes to ask the Court to make.

(2) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of the appeal to apply for any relief not specified in a notice under paragraph (1) or to rely, in support of any contention, upon any ground which has not been specified in such a notice or relief upon by the court below."

60. The general powers of the Court of Appeal of Northern Ireland are set out in O59 r 10:

"(1) In relation to an appeal the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court including, without prejudice to the generality of the foregoing words, the powers of the Court under Order 36 to refer any question or issue of fact for trial before, or inquiry and report by, a master or referee.

(2) The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit or by deposition taken in accordance with Order 39 but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.

(3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

(4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

61. O59 r 11 gives the Court powers to order a new trial. In particular, O59 r 11(3) provides that:

"A new trial may be ordered on any question without interfering with the finding or decision on any other question, and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph (2) affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that part only, or as to that party or those parties only, and give final judgment as to the remainder."

62. I am bound by the Court of Appeal of Northern Ireland. I am bound not only by the order which it has made, but I am bound to implement the manner in which the Court of Appeal, by its order, has directed that this Tribunal should deal with the dispute. I have no power to vary or set aside the order of the Court of Appeal.

63. The Court of Appeal, by its order, has remitted 'the matter' to a differently constituted panel of the First Tier Tribunal "for a re hearing". The Order is entirely consistent with its reserved judgment.

64. Although, during the hearing, I invited the parties' views as to whether it might be appropriate to approach the Court of Appeal of Northern Ireland to ask for clarification of its order (on the assumption that it could do so, which may not be correct) there was no enthusiasm for this idea. On the contrary: neither party accepted any lack of clarity in the terms of the judgment, or the order, or any lack of clarity as to what was to happen next.

65. However, the parties' assessments of what had actually been remitted for rehearing varied strikingly:

(1) The Appellant considered that the effect of the judgment and order was that the rehearing was to be only of the matters comprised in the judgment of the Court of Appeal, and not more widely;

(2) HMRC's view before me was that the whole dispute was to be remitted for rehearing.

66. Although O59 r11(3) permitted the Court of Appeal to order "a new trial ... on any question without interfering with the finding or decision on any other question" it did not make reference to that power - whether expressly, or by inference.

67. I am particularly struck by the direction that whatever is to be reheard (irrespective of the ambit of that rehearing) is to be heard by a differently constituted panel of the FTT.

68. I must add that the Court of Appeal's decision as to what to do next - i.e., the effect of allowing the appeal to it - was made by the Court having received detailed written submissions from Mr Bedenham (7 March 2017) and Mr Taylor (20 March 2017):

(1) Mr Bedenham invited the Court of Appeal to remake the FTT's decision;

(2) Mr Taylor raised the possibility that, if the appeal were remitted to the FTT, the nature and extent of any further hearing 'could be confined to evidence and submissions relating to the role Irwin played in the VAT fraud': see Para 10 of his submissions.

69. However, the Court of Appeal did not adopt either of these suggestions, but chose a different path.

70. If the Appellant were right in its argument that the remitted matter were limited in scope to the subject matter of its successful appeal in the Court of Appeal, then practical and jurisprudential difficulties emerge which, in my respectful view, the Appellant simply cannot overcome.

71. By way of illustration: A panel ('Tribunal A') hears and determines a case, making findings as to issues (say) X and Y. For the sake of argument, Tribunal A's treatment and/or conclusion as to issue X is successfully appealed, but issue Y is not. If, following that appeal, 'the matter' were remitted to a differently constituted panel (Tribunal B) on the matter only of issue X, then how should Tribunal B treat the extant findings or conclusion of Tribunal A as to issue Y? There remain unappealed findings or conclusions from Tribunal A as to issue Y. Those are not interlocutory or provisional. Absent an appeal, they are final, and decisive. The findings made by Tribunal A are, jurisprudentially and factually, actually what happened. As explained by Lord Hoffmann in *Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35* at Para [2]:

> "[2] If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."
>
> [...]

72. If the Appellant is right as to the limited nature of the rehearing, then, to pursue my illustration, Tribunal A's findings as to Issue Y would stand as intact and unchallenged. Tribunal B would then have to be exceptionally careful to deal only with facts and evidence in relation to Issue X. But, even then, there is a real risk of inconsistent findings.

73. I am far from confident that the FTT's findings in this case in relation to the connection with fraud issue can, in all regards, be cleanly segregated from its findings in relation to the knowledge issue. But, even if (i) it could be shown that they could be, and (ii) Tribunal B were to proceed in that way, and (iii) no inconsistent findings were made, the eventual outcome (and the reasoning leading to it) would still have to be spliced together from two decisions of the FTT and not one. That is an undesirable outcome, and not one which is obviously consistent with the overriding objective contained in the Tribunal's Rules.

74. In my view, the direction for rehearing by a differently constituted Tribunal practically and jurisprudentially admits only of one outcome - namely, that the dispute was remitted to be reheard *in its entirety*, and was not remitted to another panel of the

FTT simply to deal with any narrower point which was immediately in issue in the appeal.

75. Despite Mr Bedenham's forceful submissions concerning the way in which the appeal was argued, and unfolded - principally (i) the focus on the 'third man' issue, and (ii) the absence of any cross-appeal or Respondent's notice from HMRC (whether in the UT or the Court of Appeal) seeking to uphold the FTT's decision - I am nonetheless of the view that my conclusion in the immediately preceding paragraph has to stand. What matters is the order which was made by the Court of Appeal. That order is clear, and is itself unappealed.

76. A number of factors reassure me in my conclusion that the whole matter, rather than simply a single issue, is to be reheard.

77. As the commentary in the 2019 White Book concerning the power of the Court of Appeal in England and Wales "to refer any claim or issue for determination by the lower court" (CPR 52.20(2)(b)) makes clear (p 1817), this power refers to a reference back to the lower court, in the sense of the judge or composition of the lower court which made the original decision. So, for example, in *Hicks v Russell Jones & Walker* [2007] EWCA Civ 844, the judge who had decided the dispute at first instance indicated that he was prepared to make further findings, subject to approval by the Court of Appeal.

78. Another example is *MVF3 APS v Bestnet Europe Ltd* [2011] EWHC 477. Arnold J had handed down a judgment which was considered by the Court of Appeal, which ordered:

> "There be remitted for determination by the Chancery Division before Arnold J the following questions of fact" [the questions of fact are then identified]

79. The heart of the question for Arnold J was what had the Court of Appeal really decided, and the effect of that order on the other (unappealed) parts of the judgment appealed from. But - as is evident, and unlike this case - the Court of Appeal had actually remitted the issues back to him, as the trial Judge, rather than expressly sending them elsewhere. I should add that Arnold J's decision in relation to the issue of remission was subject to an unsuccessful appeal, but on the basis of his findings of fact. His analysis and application of CPR 52.20(2)(b) was not challenged: see [2011] EWCA Civ 424.

Res Judicata / Issue Estoppel

80. Put shortly, given that the appeal against the decision of the FTT was allowed by the Court of Appeal, then the FTT decision is to be treated as set aside, and the Appellant's arguments as to res judicata / issue estoppel all fall away because there is no previous adjudication.

81. This is sufficient to address Mr Bedenham's reliance on the speech of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour*

Aerospace Ltd) [2014] AC 160, at Para [17], and the authorities therein cited, because the species of res judicata highlighted as relevant are ones which, on their own terms, are necessarily predicated on an extant, binding, earlier decision: for example, where "the cause of action is not the same in the later action as in the earlier one, [but] some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties" (see the *Duchess of Kingston's Case* (1776) 20 St T 355) and the principle, "which precluded a party from raising in subsequent proceedings matters which were not, but could and should been raised, in earlier ones": *Henderson v Henderson* (1843) 3 Hare 100. Although those are illustrations of the more general procedural rule against abusive proceedings, they are reflective of the underlying policy.

Abuse of Process

82. Given the discussion above, I can also express my views on this shortly. The first thing to be identified is the 'process' which is said to be abused. 'The process' here is that the parties went to the Court of Appeal of Northern Ireland, and are subject to an order of that Court which is itself unappealed, which binds me, and which I have no power to vary or set aside.

83. The Court of Appeal expressly declined an invitation to remake the decision itself, did not accept Mr Taylor's submission that a rehearing could be limited in scope, and (without wishing to unduly repeat the above) directed a rehearing before a differently constituted panel.

84. In short, the process now unfolding is simply that already ordered by the Court of Appeal - no more, and no less. Put another way, there cannot be any arguable abuse of process, because the process is that set down by the Court of Appeal.

85. Many of the reported decisions as to abuse of process are predicated on the existence of a previous, extant, decision: see, for example, *Johnson v Gore Wood & Co (A Firm)* [2002] 2 AC 1 at p 31; [2001] 1 AER 481 at Para [48] *per* Lord Bingham. But there is no such decision here.

86. Even if I were mistaken about that, I would nonetheless not have regarded a rehearing de novo, in its entirety, as constituting 'unjust harassment'. That is a high hurdle to cross. The absence of mala fides - although not conclusive - is a feature which I must take into account.

87. I am invited to consider the test articulated by Judge Berner in *Lindsay Hackett v HMRC* [2016] UKFTT 781 (TC). That was a case in which HMRC, and not the Appellant, had applied to strike-out certain parts of Mr Hackett's appeal, on the footing that he was seeking to re-litigate issues which HMRC say had been determined by the outcome of 3 earlier appeals (one dismissed, two withdrawn) between different parties. He approved *Johnson v Gore Wood* and remarked (at Para [38]) "What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the

circumstances a party's conduct is an abuse ... it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case."

88. I do not consider that to be the appropriate test in this case, bearing in mind my comments above as to the existence of an extant, unappealed, decision (as there was in *Hackett*).

89. But, even if it were, the magnetic circumstance of this case, being one which militates powerfully against abuse, is that the parties (as was their right) respectively pursued and resisted an appeal to the Court of Appeal. Although the Appellant wanted the matter of its right to deduct input tax to come to an end in the Court of Appeal, with the Court of Appeal remaking the decision, that is not what happened.

90. Whilst I acknowledge that the parties are now thrown back to square one in litigating in the FTT, for the second time, the entirety of the dispute, in my view that is the inevitable consequence of what has been ordered.

91. Insofar as the Appellants have sought a stay of these proceedings, whether as an abuse or otherwise, I refuse.

92. I can deal with the argument as to means first. Although I have had regard to the submissions made to the Court of Appeal by Mr Bedenham (Para 4(h)(ii) of his submissions dated 7 March 2017) as to the Appellant's means, and the likely financial effect on the Appellant (at least, as matters stood in early 2017) if the appeal (contrary to Mr Bedenham's submissions) were to be remitted, I do not consider that these afford any good reason to support a stay.

93. As to the passage of time, I acknowledge that this is a dispute which first emerged in 2012, and which was originally tried in 2015. But the period - almost two years - from release of the FTT's decision (June 2015) to the Court of Appeal's order (May 2017) was taken up by the appeals. A large part of the period since then was taken up with the 'detour' occasioned by HMRC's amendment of its SOC in January 2018, and then its resiling from those amendments. The effect of that has simply been to bring HMRC full-circle.

94. The passage of time from the first hearing - November 2014 - is not such as to render a fair trial impossible. I have had regard to what is said in the Application as to the "serious disadvantage" said to face the Appellant in attempting to call relevant evidence in response to the case now advanced. However, this is not something which is mentioned in either of Mr Donaldson's witness statements; and indeed he says that Paragraphs 60 to 70 of the Further Amended SOC (which is newly introduced material) "is a re-run of the very same case with nothing new to add".

95. In the original hearing, the only oral evidence from the Appellant was from Mr Henry Donaldson. There is no evidence that the quality of his recollection will have been affected by the passage of time. The contrary appears true: his witness statements (and especially the third, dated 12 June 2018, expressly responding to Officer Arnold's of 20 April 2018) make it clear that he remains intensely focussed on the substance of the appeal in a high degree of detail. No witnesses from Oriel, Swan,

or Irwin were called last time; and so there is no demonstrable (or demonstrated) connection between the passage of time and any witnesses the Appellant would wish to call this time.

96. This is largely a documentary case, and in this regard HMRC has 'retraced' the deals and produced amended deal sheets.

97. Ultimately, this Tribunal has adequate case management powers to control the procedure leading to the next hearing, and, when it takes place, to control the next hearing to ensure that the appeal is dealt with fairly and justly.

Conclusions

98. As such, I dismiss the application that certain paragraphs of the May 2018 SOC be struck out and/or HMRC be barred from advancing evidence of the facts and matters contained therein. Those passages stand.

99. The second limb of the application is also dismissed.

100. The parties should also now seek to agree case-management directions for the further management of this appeal.

101. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 13 JUNE 2019