



11 May 2016

## PRESS SUMMARY

**Eclipse Film Partners No 35 LLP (Appellant) v Commissioners for Her Majesty’s Revenue and Customs (Respondent) [2016] UKSC 24**  
*On appeal from [2014] EWCA Civ 184*

**JUSTICES:** Lord Neuberger (President), Lord Mance, Lord Sumption, Lord Toulson, Lord Hodge

### BACKGROUND TO THE APPEAL

Eclipse Film Partners No 35 LLP (“Eclipse”) filed a tax return in respect of the period which ended on 5 April 2007. HM Revenue & Customs (“the Revenue”) issued a closure notice determining that Eclipse did not carry on a trade or business. If correct, this would have severely adverse tax consequences for Eclipse.

Eclipse appealed to the First-tier Tribunal (Tax Chamber) (“FTT”) against the closure notice. The appeal was allocated as a Complex case under Rule 23 of the Tribunal Procedure (First Tier) (Tax Chamber) Rules 2009 and, within the 28-day period specified in Rule 23, Eclipse served a request under Rule 10(3), that “the proceedings be excluded from potential liability for costs or expenses under” Rule 10(1)(c).

Eclipse and the Revenue agreed, and the FTT duly made, directions for the procedure leading up to the hearing of that appeal. The directions included, at paragraph 13, a direction that provided that: (i) the parties should try and agree an appropriate bundle of documents, which should be prepared by Eclipse, who were to serve three copies on the Revenue and three copies on the FTT; and (ii) if the parties were unable to agree the Bundle, each party was to prepare its own bundle of documents and serve three copies on the other party and on the FTT.

As the parties were unable to agree a bundle, the FTT gave an oral direction that Eclipse prepare the bundle and that “the costs be shared” (“the Order”). Eclipse then prepared the bundle, which ran to over 700 lever-arch files, in part due to the requests by the Revenue for the inclusion of documents.

The FTT subsequently dismissed Eclipse’s appeal on the substantive tax issue. That decision was affirmed by the Upper Tribunal (“the UT”) on appeal, whose decision was in turn upheld by the Court of Appeal. Eclipse was refused permission to appeal to the Supreme Court on 13 April 2016.

Following the hearing before the FTT, Eclipse’s agents sent the Revenue invoices for £108,395.48 representing half the cost of preparing the bundle. The Revenue applied to the FTT to set aside the Order on the ground that the FTT had no jurisdiction to give such a direction. The FTT dismissed the Revenue’s application. The Revenue appealed and the UT held that the Order was made without jurisdiction and set it aside. Eclipse’s appeal to the Court of Appeal on this point was dismissed. Eclipse now appeals to the Supreme Court.

### JUDGMENT

The Supreme Court unanimously dismisses Eclipse’s appeal. Lord Neuberger gives the only judgment, with which the other Justices agree.

## REASONS FOR THE JUDGMENT

Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides that the costs of proceedings in the FTT shall be in the discretion of the FTT, and that the FTT has power to make orders for costs, subject to the Tribunal Procedure Rules [2]. The rules which governed the instant proceedings are the Tribunal Procedure (First Tier) (Tax Chamber) Rules 2009 (SI 2009/273) (L1) (“the Rules”) [3].

Rule 5 deals with the FTT’s case management powers. Rule 5(3)(i) provides that the FTT may, inter alia, by direction require a party to produce a bundle for a hearing.

Rule 10 is headed “Orders for costs”. With one exception, the FTT can only make two types of costs order under Rule 10(1): a wasted costs order under 10(1)(a), and an order for costs where a party has behaved unreasonably under 10(1)(b). The exception is under 10(1)(c), which provides that there will be no such limitation on the FTT’s jurisdiction to award costs if two conditions are satisfied: (i) that the proceedings are a “Complex case” under Rule 23, and (ii) that the taxpayer has not served a request, within the requisite 28-day period, that there should be no potential liability under Rule 10(1)(c) [6].

The reasoning of the Court of Appeal and the Upper Tribunal, which is reflected in the Revenue’s arguments before the Court, is that the FTT would have had a broad jurisdiction as to costs if no request under Rule 10(1)(c)(ii) had been served. However, because such a request was served by Eclipse, the FTT could only make an order for costs if Rules 10(1)(a) or Rule 10(1)(b) could be invoked. Neither of those provisions applied in the present case [14].

Eclipse raised two arguments in response. First, it submitted that the Order was not an order for payment of costs, but an order for the sharing of costs. The Court rejects that argument. The Order would undoubtedly involve the Revenue paying costs in the sense that they would be reimbursing Eclipse half the expenses it had incurred in preparing the bundles [15].

The second argument is that it is inherent in Rule 5(3) that the orders that the FTT makes under that provision can include terms as to costs [16]. The Court rejects that argument for a number of reasons [16]. First, Eclipse’s interpretation of Rule 5(3) robs Rule 10(1) of much of its force [17-18]. Secondly, Eclipse’s argument is inconsistent with Rules 10(3) to 10(7), which contain rules as to how any costs awarded by the FTT pursuant to Rule 10(1) are to be assessed and recovered. If there is a power to award costs under Rule 5, there would be a lacuna in the Rules because there are no such provisions governing the assessment and recovery of costs in respect of Rule 5 [19]. Thirdly, rejecting Eclipse’s case does not mean that the FTT cannot give permission to amend, or grant an adjournment, on terms as to costs [20]. Fourthly, there is Rule 16(2)(b), which requires the FTT to provide for the costs of a witness required to attend a hearing to be paid for one or other party. This shows that, where the Rules intend to enable or require the FTT to render a party liable for costs, they say so [21].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>